Meeting Date: 09 / 27 / 11

| ACTION | TYPE OF ITEM |
|---|---|
| ☐ Approved Recommendation | ☐ Info/Consent |
| ☐ Ord. No(s). _____ | ■ Report |
| ☐ Res. No(s). _____ | ☐ Public Hearing (Info/consent) |
| ☐ Other _____ | ☐ Other _____ |

Prepared By: Alan Holmberg, City Attorney Agenda Item No. O-3

Reviewed By: City Manager City Attorney Finance Other *(Specify)*

**DATE:** March 30, 2011

**TO:** City Council

**FROM:** Alan Holmberg, City Attorney
City Attorney

**SUBJECT:** **Preferences for Small Local Businesses in Public Works and Trade Services Agreements**

## RECOMMENDATION

That City Council consider a report and provide direction concerning possible implementation of preferences for local small businesses in public works and trade services agreements, and agreements for purchase of supplies and equipment.

## DISCUSSION

The City Council may, upon making appropriate findings, enact ordinances which provide for preferences of up to 5% of the low bid on public works projects to small, local contractors and contractors who use small, local subcontractors. Similar preferences can be provided on agreements for trade services and for the purchase of equipment and supplies. The preference could not be applied if inconsistent with federal or state legal or contract requirements.

Issues which the City Council needs to consider in connection with implementing such preferences are summarized as follows:

**What is a small local business?** A small, local business can be defined as a business having a license to do business in the City for a period of time (1 – 2 years?), having a principal office in the City, and yearly gross receipts of less than a certain amount over a period of time. (The City of Ventura uses $20,000,000 per year).

**What is the amount of the preference?** Under section 2002 of the Public Contract Code, the maximum permitted amount is 5%. The same percentage would probably be held appropriate for trade service contracts and contracts for supplies and equipment.

**Should there be a maximum contract amount to which the preference is applicable?** Application of the preference has financial consequences to the City. As an example: If the lowest bid on a project is $100,000, not from a local contractor, and the second lowest bid is $104,900, from a local contractor, the contract would be awarded to the local contractor at $104,900. The cost to the City is $4,900.

The larger the contract, the greater the cost to the City. Other local agencies have established contract limits of $50,000 to $300,000.

**Subcontractor Issues.** As noted, the Public Contract Code allows up to a 5% preference for use of local, small business subcontractors. If it wishes to grant such a preference, the City Council must determine what percentage of a contract amount must be performed by local small business subcontractors to warrant the preference.

**Findings.** Findings supporting the need for a preference should be made. Such findings could include reference to high unemployment rates in the City and a demonstrated need to retain or attract small businesses to the community.

## FINANCIAL IMPACT

There is no immediate fiscal impact associated with the recommended action. Fiscal impacts will be associated with any preference program actually implemented.

Attachment #1 - Detailed Discussion of Preference Issues

## DETAILED DISCUSSION

The City of Oxnard ("City") is a general law city. As such, the City is subject to the limitations contained in the Public Contract Code and the Government Code with respect to the award of contracts for (i) public projects, (ii) supplies and equipment, and (iii) specialized services.

In 2002, the Legislature adopted Public Works Code section 2002, which authorizes local agencies to establish modest preferences to "small businesses" in the award of contracts for (i) public projects, (ii) supplies and equipment, and (iii) services where responsibility and quality are equal.

Section 2002 (a) provides as follows:

> "Notwithstanding any other provision of law requiring a local agency to award contracts to the lowest responsible bidder, any local agency may do any of the following in facilitating contract awards to small businesses:
>
> > (1) Provide for a small business preference in construction, the procurement of goods, or the delivery of services where responsibility and quality are equal. The preference to a small business shall be up to 5 percent of the lowest responsible bidder meeting specifications.
> > (2) Establish a subcontracting participation goal for small businesses on contracts and grant a preference, up to a maximum of 5 percent, to those bidders who meet the goal.
> > (3) Require bidders to make good faith efforts to meet a subcontracting participation goal for small business contracts. Bidders that fail to meet the goal shall demonstrate that they make good faith efforts to utilize small business contractors."

Further, section 2002 (b) affords the local agency with discretion to define the term "small business." Although this section appears to provide local agencies with broad discretion regarding defining the term "small business," there are no judicial decisions that have defined the limits of such discretion. A number of local agencies have defined small business to be a small "local" business. In addition, the City may be able to rely upon other judicial decisions that have upheld local preferences in limited circumstances, which local preferences were adopted prior to the enactment of section 2002, to guide the City's determination regarding adopting a local small business preference.

Prior to the enactment of section 2002, courts had upheld local business preferences under limited circumstances. Specifically, courts had allowed measured and appropriate local preferences that were intended (1) to ameliorate disadvantages suffered by local businesses, and (2) to encourage businesses to locate and remain within a city's boundaries. (Associated General Contractors of California, Inc. v. City and County of San Francisco (1986) 813 F 2nd 922, 943.)

Although section 2002 (b) appears to afford local agencies with broad discretion in defining the term small business, if the City desires to extend preferences to local small businesses then the City should adhere to the grounds similar to those described in judicial decisions where local business preferences have been upheld.

The City should evaluate and determine that the public interest would best be served by encouraging businesses to locate and remain in the City through the provision of a minimal good faith preference to local businesses in the award of City contracts.

The City could also determine that preferences to small businesses are necessary to reduce higher unemployment rates in the City.

By making such determinations and by relying upon the authority set out in Public Contract Code section 2002, the City's adoption of a local small business preference should be able to withstand a challenge to the constitutionality of such preference.

In addition to the requirements of State law, the City has also adopted a Purchasing and Contracting Ordinance, codified in Chapter 4 of the Oxnard City Code. This ordinance governs the City's award of contracts for (i) public works projects, (ii) supplies and equipment, and (iii) trade services and professional services. If the City Council directs staff to draft a local small business preference, it will be necessary to amend the City's Purchasing and Contracting Ordinance to incorporate such a preference.

**Public Projects**

The first type of procurement contract involves "public projects," which are governed by Public Contract Code sections 20160 et seq. Section 20162 requires that any "public project" that involves the expenditure of $5,000 or more, shall be awarded to the "lowest responsible bidder." (Since the City uses the Uniform Construction Cost Accounting System, its threshold is $30,000.) The term "public project" is defined in section 20161 as follows:

> "(a) A project for the erection, improvement, painting, or repair of public buildings and works.
>
> (b) Work in or about streams, bays, waterfronts, embankments, or other work for protection against overflow.
>
> (c) Street or sewer work except maintenance or repair.
>
> (d) Furnishing supplies or materials for any such project, including maintenance or repair of streets or sewers."

The competitive bidding requirements set out in State law offer little ability to deviate from the strict requirements of awarding such contract to the lowest responsible bidder. However, the authority set forth in section 2002 provides the City with an

opportunity to provide a modest preference to local small businesses in the City's award of contracts for public projects.

Specifically, and in accordance with section 2002 (a)(1), the City may encourage the award of contracts for public projects to local small businesses by establishing up to a 5 percent preference of the bid price of the lowest responsible bidder meeting.

In addition, pursuant to section 2002 (a)(2), the City may further encourage the use of local small businesses in public projects by establishing a subcontracting participation goal for local small businesses and provide a maximum preference of 5 percent to those bidders who meet the goal. This will result in the use more local small businesses on public projects as subcontractors.

Finally, the City could require bidders to make good faith efforts to meet a subcontracting participation goal for local small businesses contracts. Bidders that fail to meet the goal could be required to demonstrate that they made a good faith effort to utilize local small business contractors.

**Trade Services**

Chapter 4 of the City Code provides for a competitive bidding based trade service contract procurement system. The same preferences applied to public works contracts could be applied to this system.

**Supplies and Equipment**

Other procurement contracts involve the award of contracts for supplies and equipment and are governed by Government Code sections 54201 et seq. Section 54202 requires that every local agency adopt policies and procedures, including bidding regulations, governing purchases of supplies and equipment. The City's policies and procedures are set out in Chapter 4 of the Oxnard City Code.

Similar to the award of contracts for public projects described above, the City could establish local small business preferences in accordance with section 2002 for local small businesses that provide the City with supplies and equipment.

**Specialized Services**

The final type of procurement contract involves the award of contracts for specialized services, which are governed by Government Code sections 53060 and 4526.

Section 53060 provides that a city may contract with any persons for the furnishing to the city special services and advice in financial, economic, accounting, engineering, legal, or administrative matters if such persons are specially trained and experienced and competent to perform such services.

Section 4526 further provides that notwithstanding any other provision of law, a city's selection of professional services of private architectural, landscape architectural, engineering, environmental, land surveying or construction project management firms shall be on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required.

Sections 53060 and 4526 require that the City select specialized services on the basis of experience and competency without regarding to cost. Accordingly, the use of a local small business preference in the award of these types of contracts would appear to be of little consequence.

**Conclusion**

In the event that City desires to implement a small business preference in accordance with Public Contract Code section 2002, the City must determine that such local preference is necessary (i) to encourage businesses to locate and remain within the City's boundaries and (ii) to provide employment opportunities to local residents and reduce unemployment which is higher than an area average. If such a determination is made, and the modest preferences described in section 2002 are followed, then the City's local small business preference should withstand any challenge to its constitutionality.