



Ordinance Fact Sheet

TO: City Council

DATE: June 3, 2002

FROM: City Attorney

SUBJECT: Introduction and First Reading of an Ordinance Amending Pasadena Municipal Code Chapter 4.08, Competitive Bidding and Purchasing, Repealing Pasadena Municipal Code Chapter 4.09, Affirmative Action in Contracting, and Amending Chapter 2.360, Affirmative Action in City Employment

TITLE OF PROPOSED ORDINANCE:

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF PASADENA AMENDING PASADENA MUNICIPAL CODE, TITLE 4, CHAPTER 4.08, COMPETITIVE BIDDING AND PURCHASING, REPEALING PASADENA MUNICIPAL CODE TITLE 4, CHAPTER 4.09, AFFIRMATIVE ACTION IN CONTRACTING, AND AMENDING PASADENA MUNICIPAL CODE TITLE 2, CHAPTER 2.360, AFFIRMATIVE ACTION IN CITY EMPLOYMENT, TO ENSURE COMPLIANCE WITH THE CONSTITUTION OF THE STATE OF CALIFORNIA

BACKGROUND:

A proposed ordinance was submitted to the City Council at its meeting of April 8, 2002. At that meeting, the City Council asked that the proposed ordinance be revised to the extent legally permissible, to include provisions regarding reporting with respect to contractors hiring Pasadena residents. Further, the desire was expressed to include reporting information regarding minorities and women, and mechanisms to ensure that contractors have broad based outreach. The attached ordinance establishes those provisions to the extent allowed by law and also modifies the Pasadena Municipal Code in the manner described to the Council previously, as described below.

PURPOSE OF ORDINANCE:

The attached Ordinance amends the Pasadena Municipal Code Chapters relating to City Employment and Contracting to eliminate provisions related to preferential treatment in City employment and contracting made unconstitutional by the enactment of Section 31 to Article 1 of the Constitution of the State of California (Proposition 209). The proposed revisions to the

Competitive Bidding and Purchasing Ordinance will preserve the City's commitment to equal opportunity and local contracting, as previously established in the Affirmative Action in Contracting Ordinance, and will require contractor compliance with these provisions. The ordinance revisions will also ensure that the City's employment practices conform to the requirements of the Constitution of the State of California.

The Affirmative Action in Contracting Ordinance that is being repealed provides that contracts in excess of \$25,000 that are not subject to competitive bidding are subject to a competitive selection process. Under the current Ordinance, exemptions to this requirement are subject to the approval of the City Council. The proposed revisions maintain the requirement to undertake a competitive selection process for contracts in excess of \$25,000 which are not subject to competitive bidding, by incorporating such requirement into the Competitive Bidding and Purchasing Ordinance. The City Manager would have authority to approve such contracts if they are less than \$75,000. This is consistent with Article X Section 1001 of the City Charter which exempts contracts less than \$75,000 from Council approval, and Section 4.08.030 of the Competitive Bidding and Purchasing Ordinance which authorizes the City Manager to establish procedures for procurements excluded from competitive bidding.

The proposed ordinance also clarifies that the contracting authority for the Pasadena Center Operating Company is the same as that of the Rose Bowl Operating Company.

Modifications following April 8, 2002 City Council Meeting:

As a result of various case authority and interpretations of the Privileges and Immunities Clause of the U.S. Constitution Privileges, among others, there are severe impediments to the City's ability to mandate local hiring by its contractors or provide a preference to bidders to induce such hiring. However, there appears to be no prohibition on the City's ability to ask bidders for that information. Accordingly, the Ordinance includes the requirement regarding contractors' reporting with respect to their hiring of Pasadena residents, as set forth in Section 4.08.035C. There are also other references throughout the ordinance which address contracting with local businesses (defined as those with a fixed place of business located in the City).

Proposition 209, interpreted by subsequent court decisions in 2000 and 2001, amended the California State Constitution to prohibit preferential treatment in public employment, contracting and education. Recent cases, however, have left open the option for public entities to pursue diversity in contracting and employment through broad-based outreach efforts. (*Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537). Further, the California Court of Appeal has recently held that gathering information based on race and gender in contracting is justified by a compelling government need. (*Connerly v. State Personnel Board, et. al.* (2001) 92 Cal. App.4th 16, 62). In that decision, the Court of Appeal found that "monitoring programs which collect and report data concerning the participation of women and minorities in governmental programs do not violate equal protection principles." The Court of Appeal went

on to note in that decision that a monitoring program designed to collect and report accurate and up to date information is justified by the compelling governmental need for such information. As long as such a program does not discriminate against or grant a preference to an individual or group, Proposition 209 is not implicated.

In addition, Proposition 209 itself provides an exemption from using gender and race classifications when federal law requires it. (California Constitution Article I, Section 31(e)). Section 4.08.181 sets forth special provisions for such contracts.

Accordingly, the attached Ordinance requires that contractors provide information regarding minority, women, and other businesses. The definition provided for minorities is based on federal definitions, and also includes Armenians, as that is a group which has historically been tracked in Pasadena.

The Ordinance amends the Municipal Code as required to ensure consistency with the State Constitution, and includes steps to track contractors' hiring of Pasadena residents and to ensure equal opportunity for all in public contracting and employment .

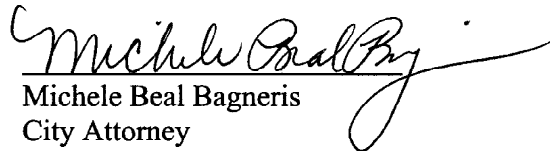
PROGRAM, DEPARTMENTS OR GROUPS AFFECTED:

The Human Resources Department will implement the proposed amendments to Chapter 2.360; the Finance Department will implement the proposed amendments to Chapter 4.08.

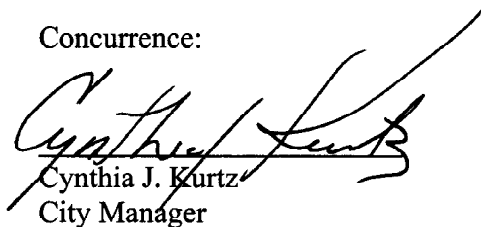
FISCAL IMPACT:

Minimal. Staff expects no change in administrative costs as a result of the proposed amendments to the Municipal Code; nor does staff anticipate any change in the participation, financial or otherwise, of members of any protected classes in either contracting or employment relationships with the City.

Respectfully Submitted,


Michele Beal Bagneris
City Attorney

Concurrence:


Cynthia J. Kurtz
City Manager

Introduced by Councilmember _____

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF PASADENA AMENDING PASADENA MUNICIPAL CODE, TITLE 4, CHAPTER 4.08, COMPETITIVE BIDDING AND PURCHASING, REPEALING PASADENA MUNICIPAL CODE TITLE 4, CHAPTER 4.09, AFFIRMATIVE ACTION IN CONTRACTING, AND AMENDING PASADENA MUNICIPAL CODE TITLE 2, CHAPTER 2.360, AFFIRMATIVE ACTION IN CITY EMPLOYMENT, TO ENSURE COMPLIANCE WITH APPLICABLE STATE LAW

WHEREAS, the voters of the State of California passed Proposition 209 in the statewide election of November 1996, adding Section 31 to Article I of the Constitution of the State of California, prohibiting discrimination or preferential treatment to any individual or group in public employment, public education, or public contracting on the basis of race, sex, color, ethnicity, or national origin; and,

WHEREAS, the California State Supreme Court found in *Hi-Voltage Wire Works Inc. v. City of San Jose* (December 1, 2000) 24 Cal.4th 537 that a contracting regulation that provided outreach only to minority and women-owned firms violated Article I, Section 31 of the California State Constitution; *Hi-Voltage*, however did not prohibit broad-based outreach efforts that targeted women and minorities and,

WHEREAS, the California Court of Appeal for the Third Appellate District ruled in *Connerly v. State Personnel Board* (September 4, 2001) 92 Cal.App. 4th 16 that gathering information based on race and gender in contracting is justified by a compelling government interest and therefore reporting requirements do not violate Article 1, Section 31 of the California State Constitution; and,

WHEREAS, Pasadena Municipal Code Title 4, Chapter 4.09, Affirmative Action in Contracting, includes provisions for advantages for minority or women-owned firms in purchasing

and contracting processes which appear to be inconsistent with the California State Constitution, and must therefore be repealed; and,

WHEREAS, those provisions of Pasadena Municipal Code Title 4, Chapter 4.09, Affirmative Action in Contracting which are in compliance with the California State Constitution are found to apply to the provisions of Pasadena Municipal Code Title 4, Chapter 4.08, Competitive Bidding and Purchasing, and should therefore be included therein; and,

WHEREAS, the efficiency of the procurement process will be enhanced by providing for approval by the City Manager of all contracts under \$75,000; and,

WHEREAS, Pasadena Municipal Code Title 2, Chapter 2.360, Affirmative Action in City Employment, which provides for the establishment of hiring goals and timetables by the City is inconsistent with the California State Constitution, and must therefore be amended;

NOW THEREFORE, the People of the City of Pasadena ordain as follows:

SECTION 1. Pasadena Municipal Code Title 4, Chapter 4.08, Competitive Bidding and Purchasing, shall be amended in its entirety to read as set forth in Exhibit A, attached hereto and incorporated herein by this reference.

SECTION 2. Pasadena Municipal Code Title 4, Chapter 4.09, Affirmative Action in Contracting, shall be repealed in its entirety.

SECTION 3. Pasadena Municipal Code Title 2, Chapter 2.360, Affirmative Action in City Employment, shall be amended in its entirety to read as set forth in Exhibit B attached hereto and incorporated herein by this reference.

SECTION 4. The City Clerk shall certify the adoption of this Ordinance and shall cause a summary of the Ordinance to be published.

SECTION 5. This Ordinance shall take effect upon publication.

I HEREBY CERTIFY that the foregoing Ordinance was introduced by the City Council at its regular meeting held March 25, 2002, by the following vote:

AYES:

NOES:

ABSTAIN:

ABSENT:

Published:

Jane Rodriguez, CMC, City Clerk

Approved as to Form:

Maribel S. Medina
Assistant City Attorney

Approved as to Form:

Hugh A. Halford,
Assistant City Attorney
