

ARTICLE 7

NONDISCRIMINATORY EMPLOYMENT PRACTICES BY CITY CONTRACTORS

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ARTICLE 7

NONDISCRIMINATORY EMPLOYMENT PRACTICES BY CITY CONTRACTORS

SEC. 2-7.00 PURPOSE. A significant portion of the revenue to the City of Hayward derives from local taxpayers, residents, and consumers of City services who represent many racial, religious, and ethnic groups of both sexes, all ages, and disabilities. The City uses a substantial part of such revenues to provide goods and services to these taxpayers, residents, and service consumers by contracting with private firms. These firms, in turn, could or do provide employment for a meaningful proportion of the demographically diverse working force within the City.

Further, the constitutions, laws, and policies of the United States and the State of California prohibit discrimination against any employee or applicant for employment on the grounds of race, color, religion, national origin, ancestry, place of birth, sex, sexual orientation, age, or disability.

For these reasons the City Council, in enacting this article, reaffirms its long-standing policy favoring nondiscriminatory employment practices to ensure that the revenues derived from local taxpayers, residents, and consumers of City services and returned to them in goods and services are expended to contractors with nondiscriminatory employment practices consistent with the constitutions, laws, and policies of the United States and the State of California. This article may be referred to and cited as the Affirmative Action Contract Compliance Program of the City of Hayward.

SEC. 2-7.01 DEFINITIONS. The following words and phrases shall be construed as defined in this section unless it is apparent from their context that a different meaning is intended.

- a. "Affirmative action" means positive steps taken by a contractor or subcontractor to ensure that its employment practices promote and accomplish employment selection, retention, and advancement of a particular category of persons described by race, color, religion, national origin, ancestry, place of birth, sex, sexual orientation, age, or disability.
- b. "City Manager" means the City Manager of the City of Hayward or any City officer or employee authorized by the City Manager or the City Council to act on behalf of the City Manager in a pro tempore capacity.
- c. "Construction contract" is a written contract for the construction or improvement of any work consisting of public buildings, works, drains, sewers, utilities, parks, playgrounds, streets, and off-street parking lots.
- d. "Contractor" is any person, partnership, firm, or corporation, or any combination thereof that submits a direct bid and enters into a direct or prime contract with the City of Hayward.
- e. "Employment practices" are those practices and procedures involving the recruitment of applicants and the selection, evaluation, training, compensation, promotion,

demotion, transfer, suspension, lay-off, and termination of employees and any other practice or procedure relating to employees in their work-related activities.

- f. "Equal opportunity" is the opportunity that is extended to all persons so that they are employed in like proportion to their representation in the labor market in which they work.
- g. "Good faith effort" is the effort taken by a contractor or subcontractor to assure that its employment practices are nondiscriminatory and that its work force reflects equal opportunity employment.
- h. "Minority" is a person or persons who are black (Negro), Hispanic (including Mexican, Puerto Rican, Cuban, Central American, South American, or other Spanish origin or culture regardless of race), Asian (including Pacific Islanders), and American Indian (including Alaskan natives).
- i. "Nonconstruction contract" is any contract, purchase order, or agreement (including any agreement for architectural, engineering design, or any other professional or technical personal services) for work, service, or provision of materials, equipment, or supplies to or for the City of Hayward which is entered into with or on behalf of the City of Hayward.
- j. "Nondiscriminatory Employment Practices Provision" is the provision required by Section 2-7.02 of this article which is executed by the contractor and in which the contractor agrees that it will not discriminate against any applicant for employment or any employee in the performance of its contract with the City because of the race, color, religion, national origin, ancestry, place of birth, sex, sexual orientation, age, or disability of such applicant or employee.
- k. "Subcontractor" is any person, partnership, firm or corporation, or any combination thereof, that enters into a contract with a direct and prime contractor to perform or provide a portion or part of any contract with the City.

SEC. 2-7.02 NONDISCRIMINATORY EMPLOYMENT PRACTICES

PROVISION REQUIRED. Every contract entered into by the City of Hayward and every subcontract let by a contractor of the City shall contain a Nondiscriminatory Employment Practices Provision in substantially the following form:

In the performance of this contract the contractor or subcontractor agrees as follows:

- a. Affirmative action - general. The contractor or subcontractor shall not discriminate against any applicant for employment or employee on the grounds of race, color, religion, national origin, ancestry, place of birth, sex, sexual orientation, age, or disability. The contractor or subcontractor will take affirmative action to ensure that its recruitment, selection, and evaluation practices do not discriminate against any applicant for employment or employee.

The contractor or subcontractor shall also ensure that its personnel policies, practices, and procedures, including, but not limited to, the transfer, promotion, demotion, suspension, layoff, or termination, rates of pay and other forms of compensation, and the selection for training programs, apprenticeship, and on-the-job training do not discriminate against any employee. The contractor or subcontractor shall post in

conspicuous places that are accessible to applicants for employment and employees notices setting forth this Nondiscriminatory Employment Practices Provision.

b. Recruitment.

- (1) Nonunion employees. Advertising placed with any media shall include the notation: 'An Equal Opportunity Employer'. Advertisements shall be placed with media having large circulation among minority groups or at school placement centers having large minority student enrollments. The contractor or subcontractor will send to each source of employee referrals, other than labor unions or workers' representatives, a notice, in such form and content as shall be furnished or approved by the City, advising said source of employee referrals of its commitments under Chapter 2, Article 7, of the Hayward Municipal Code, and shall post copies of the notices in conspicuous places available to employees and applicants for employment.

Recruitment of nonunion employees shall, to the maximum extent possible, utilize the services of minority organizations likely to be referral sources for minority group employees.

- (2) Union employees. Union employees shall be recruited in accordance with applicable labor agreements. The contractor or subcontractor shall send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, in such form and content as shall be furnished or approved by the City, advising said labor union or workers' representatives of its commitments under Chapter 2, Article 7, of the Hayward Municipal Code, and shall post copies of the notice in conspicuous places available to employees and applicants for employment. The contractor or subcontractor agrees to seek the inclusion in all union agreements to which it is a party, clauses prohibiting discrimination based upon race, color, religion, national origin, ancestry, place of birth, sex, sexual orientation, age, or disability. To the maximum extent consistent with applicable labor agreements, the contractor or subcontractor will attempt to recruit applicants without regard to race, color, religion, national origin, ancestry, place of birth, sex, sexual orientation, age, or disability.

- c. Equal Employment Opportunity Officer. The contractor or subcontractor shall designate one of its management employees as its Equal Employment Opportunity Officer and assign such officer the responsibility and authority to administer and promote an active program to put the contractor's or subcontractor's nondiscriminatory employment practices commitment into practice.

- d. Access to records. The contractor or subcontractor shall permit access during normal business hours to its records of employment, employment advertisements, completed application forms, and other pertinent data and records when requested to do so by the City Manager or any representative of the Fair Employment Practices Commission of the State of California.

e. Compliance review procedures.

- (1) The contractor or subcontractor shall upon request of the City Manager submit its official payroll records together with a monthly cumulative

summary of all employee hours worked in performance of its contract with or on behalf of the City identified as to minority status.

- (2) The contractor or subcontractor shall submit to a formal, thorough review of its records, books, reports, and accounts concerning its employment practices for the purpose of determining whether they are nondiscriminatory. This review will be performed at intervals during the performance of the contract as may be specified by the City Manager.

Each review shall be followed within 30 days by either a written notice to the contractor or subcontractor that it is in apparent compliance with the Nondiscriminatory Employment Practices Provision of its contract or by a citation of apparent deficiency, summary of findings, and a statement of remedial commitment for signature by the contractor. If the contractor or subcontractor fails to execute and submit the statement of remedial commitment within 14 days of its receipt, or, following such submission, if the contractor or subcontractor fails to meet the commitments it has made in executing such statement, the City Manager shall issue a notice of intent to initiate an action against the contractor or subcontractor with the Fair Employment Practices Commission for willful violation of the Nondiscriminatory Employment Practices Provision and the California Fair Employment Practices Act in not less than 30 days of such notice of intent.

- f. Violations. The City Manager shall deem a finding of willful violation of the Nondiscrimination Employment Practices Provision and the California Fair Employment Practices Act to have occurred upon receipt of written notice from the Fair Employment Practices Commission that it has investigated and determined that the contractor or subcontractor has violated the Fair Employment Practices Act and has issued an order under Labor Code Section 1426, which has become final, or obtained relief under Labor Code Sections 1429 and 1429.1; or an appropriate federal commission or agency, or a court of the State of California, or if the United States Government finds, in any action or proceeding to which the contractor or subcontractor is a party, that it discriminated against employees or applicants for employment in the performance of this contract. Upon receipt of such notice or final judgment, the City Manager shall notify the contractor or subcontractor that unless it demonstrates to the satisfaction of the City Council within a stated reasonable period that the violation has been corrected, said contractor or subcontractor shall be subject to the remedies hereinafter provided.
- g. Remedies for willful violation. The contractor or subcontractor agrees that a finding of willful violation of the California Fair Employment Practices Act or of this Nondiscriminatory Employment Practices Provision shall be regarded by the City Council as a basis for determining whether or not it is a responsible bidder as to future contracts for which such contractor or subcontractor may submit bids. The contractor or subcontractor further agrees that such disqualification by said City Council shall remain in effect for one year or until it demonstrates to the satisfaction of the City Manager that its employment practices are in conformity with the nondiscrimination provisions of this article.

The contractor or subcontractor further agrees that the contractor or subcontractor shall, as a penalty to the City of Hayward, forfeit for each calendar day or portion thereof an amount not to exceed \$250 or 1 percent of the total contract amount,

whichever is greater. Such penalty may be deducted from any sums due the contractor or subcontractor or recovered by the City through maintenance of an action in any court of competent jurisdiction.

Prior to making any determination with respect to reinstatement of a contractor or subcontractor as a responsible bidder, the City Council may refer the matter to the Human Relations Commission of the City of Hayward for a report and recommendation. The contractor or subcontractor agrees to cooperate to the fullest extent with said Human Relations Commission in its exercise of the authority here conferred, including, but not limited to, promptly furnishing reports requested for the commission's review of matters relating to such reinstatement.

SEC. 2-7.03 SPECIAL REQUIREMENTS IN CONSTRUCTION CONTRACTS OF \$15,000 OR MORE. For every construction contract that requires payment by the City to a contractor of a sum equal to or in excess of \$15,000 (or where the contract does not require payment of a fixed sum, but it is estimated by the City that payment under such contract will in the aggregate equal or exceed \$15,000), the following requirement must be met in addition to those set out in Section 2-7.02 herein:

- a. The contractor that submits the apparent low bid shall, on behalf of itself and those of its subcontractors, if any, where the dollar amount of such subcontract exceeds \$10,000, furnish the City Manager written documentation showing that its projected work force for execution of the contract or subcontract includes, on a craft-by-craft basis, minority and female employees in the percentages established by the U.S. Department of Labor in the Special Bid Conditions applicable to federally assisted construction contracts performed in Alameda County, set out at 41 Code of Federal Regulations, Part 60-4, and any subsequent amendments thereto. Three printed copies of said Special Bid Conditions for Alameda County are on file in the office of the City Clerk, to which reference is hereby made for further particulars, and one printed copy of said Special Bid Conditions for Alameda County shall be appended to and incorporated in any contract awarded pursuant to the provisions of this section. All amendments to or replacement of the Special Bid Conditions for Alameda County enacted subsequent to the effective date of this article shall automatically become a part of these regulations upon the filing of three copies thereof with the City Clerk of the City.
- b. The contractor that submits the apparent low bid and each of its subcontractors, if any, where the dollar amount of such subcontract is \$10,000 or more, shall attend a conference with the City Manager to determine whether the information submitted shows compliance with the conditions set forth in subsection (a) herein.
- c. Following such conference, the apparent low bidder shall enter into a memorandum of understanding with the City in a form agreed to by such contractor and the City Manager, which memorandum of understanding shall set forth the measures that the contractor and its subcontractors who have attended the conference shall take in achieving the work force composition described by the contractor in the documentation furnished to the City Manager pursuant to subsection (a) herein.
- d. In the event the apparent low bidder fails to submit the requested written information, appear at the conference, or enter into a memorandum of understanding that is acceptable to the City Manager, the City Manager shall, after giving notice and an opportunity to respond to the apparent low bidder, recommend to the City Council

rejection of such bid, and seek authorization from the City Council to contact the second lowest bidder for the purpose of conducting the procedure set out in subsections a. through c. herein.

- e. The performance of any contract awarded pursuant to the provisions of this section shall be governed by the rules and regulations promulgated by the U.S. Department of Labor applicable to federally assisted construction projects performed in the City of Hayward including, but not limited to, the requirement that minority employee hours be uniform throughout the life of the contract and that minority and female employees not be transferred between job sites solely to meet affirmative action hiring goals.

SEC. 2-7.04 SPECIAL REQUIREMENTS IN NONCONSTRUCTION

CONTRACTS OF \$10,000 OR MORE. For every nonconstruction contract estimated by the City to equal or exceed \$10,000 annually, where the contract has a potential for more than one delivery on City request and the Contractor employs more than (10) persons, and for every other nonconstruction contract equal to or in excess of \$25,000 (whether paid in one sum upon delivery or completion, or paid periodically and such periodical payments are estimated by the City to total \$25,000 or more in one year) the following requirements must be met in addition to those set out in Section 2-7.02 herein:

- a. The contractor that submits the apparent low bid shall, on behalf of itself and those of its subcontractors, if any, where the dollar amount of such subcontract exceeds \$10,000, furnish the City Manager such information concerning its employment practices and existing and projected work forces in the form and manner as may be requested by the City Manager.
- b. The contractor that submits the apparent low bid and each of its subcontractors, if any, where the dollar amount of such subcontract is \$10,000 or more, may be required to attend a conference with the City Manager at such time and place as may be fixed by the City Manager to determine whether the information earlier submitted shows compliance with the nondiscrimination requirements of this article.

In making such determination, the City Manager shall consider the following factors:

- (1) The size of the contractor's or subcontractor's existing work force;
- (2) The size of the anticipated work force necessary for the contractor or subcontractor to perform the contract or subcontract for or on behalf of the City;
- (3) The projected turnover, vacancies, or work force expansion that the contractor or subcontractor expects to occur during the term of the contract;
- (4) The specific plans of the contractor or subcontractor to recruit applicants for employment and to select, train, and promote employees hired to complete the contract with or on behalf of the City in like proportion to their numbers in the contractor's or subcontractor's typical, geographic labor market;
- (5) An analysis showing the projected work force that would be expected, after all necessary selection is completed, to perform the contract or subcontract with or on behalf of the City absent any discriminatory employment practices;

- (6) Any other qualitative or quantitative data which would assist the City Manager in determining the contractor's or subcontractor's commitment to meet the nondiscriminatory employment practices requirements of this article.
- c. Following such conference, the apparent low bidder shall enter into a memorandum of understanding with the City in a form agreed to by such contractor and the City Manager, which memorandum of understanding shall set forth the measures that the contractor and its subcontractors who have attended the conference shall take in furthering and meeting its nondiscrimination employment practices commitment during the performance of the contract.
- d. In the event the apparent low bidder fails to submit the requested written information, appear at the conference, or enter into a memorandum of understanding that is acceptable to the City Manager, the City Manager shall, after giving notice and an opportunity to respond to the apparent low bidder, contact the second lowest bidder for the purpose of conducting the procedure set out in subsections a. through c. herein.

SEC. 2-7.05 IMPLEMENTING RULES AND REGULATIONS, ENFORCEMENT PROCEDURES, AND DELEGATION OF RESPONSIBILITY. The City Manager shall promulgate all rules, regulations, and forms necessary to implement the provisions of this article. So far as is practical, such rules, regulations, and forms shall be similar to those adopted pursuant to federal Executive Order 11246 and the Fair Employment Practices Act of the State of California.

The City Manager shall monitor the performance of contractors or subcontractors in their achievement of the nondiscriminatory employment practices requirements provided herein, conduct on-site inspection of their work forces and employment records, and submit periodic reports on such performances to the City Council and the Human Relations Commission for advisory review to the City Council regarding modifications of this article so as to ensure its effectiveness.

The City Manager shall designate a Contract Compliance Officer and may, at his discretion, delegate responsibility and authority for administering the provisions of this article to the Contract Compliance Officer and to such other officers or employees of the City as necessary for proper administration of this program.

SEC. 2-7.06 EXEMPTIONS. The following contracts are exempt from the provisions of this article.

- a. Contracts with other governmental jurisdictions;
- b. Contracts with manufacturers whose principal place of business is located outside the United States;
- c. Contracts with the United States manufacturers whose principal place of business is located outside the State of California;
- d. Contracts with any single or sole-source supplier of any goods or service; and
- e. Contracts resulting from exigent emergency requisitions where any delay in completion or performance of the contract would jeopardize the public health, safety, or welfare of the citizens of the City of Hayward, or where in the judgment of the

City Manager the operational effectiveness of a significant City function would be significantly threatened if the contract were not entered into expeditiously.

SEC. 2-7.07 CONTRACTS SUBJECT TO EXECUTIVE ORDER 11246. No provision of this article shall be construed to apply to any federally assisted construction contract entered into by the City that is subject to Executive Order 11246 or any order amending or superseding Executive Order 11246, the rules and regulations promulgated pursuant to said order, or the federal Equal Employment Opportunity Bid Conditions for Alameda County.

SEC. 2-7.08 OTHER REMEDIES. The provisions of this article shall not be construed to prevent the City from pursuing and obtaining any remedy or relief as may be prescribed by law.