



ALAMEDA COUNTY
AUDITOR-CONTROLLER AGENCY
PATRICK O'CONNELL
AUDITOR-CONTROLLER/CLERK-RECORDER

M E M O R A N D U M

TO: Scott Haggerty, Board of Supervisors, Procurement and Contracting Policy Committee

Nate Miley, Board of Supervisors, Procurement and contracting Policy Committee

FROM: Patrick O'Connell, Auditor-Controller

DATE: March 1, 2010

SUBJECT: PROCUREMENT UPDATE

Attached is an updated progress report on County procurement. The data presented in the report is for the period July 1, 2007 through December 31, 2009. The report shows that under the committee's direction policies and procedures have been put in place that have resulted in increased participation, heightened awareness of staff to follow board requirements and an increase in percentage of contract dollars awarded to MBE/SLEB contractors. Listed below and included in the attachments are some accomplishments. The report in its entirety will be available on our website at <http://www.acgov.org/auditor/sleb/documents.htm>. If you have any questions please call me.

- MBE/SLEB % of TOTAL DOLLARS increased from 10.45% to 31.97%
- MBE/SLEB dollars increase from \$57.7M to \$208.1M
- MBE/SLEB CONSTRUCTION % of dollars increased from 14.37% to 38.99%
- MBE/SLEB A & E % of dollars increased from 10.15% to 39.03%
- MBE/SLEB SVS % of dollars increased from 13.82% to 33.30%
- MBE/SLEB GOODS & SERVICES % of dollars increased from 7.16% to 27.83%
- Local Contract dollars increased from 57.76% to 63.86%
- Contracts under \$25,000 targeted to MBE/SLEB
- Contracts over \$25,000 bid preference: 5% local, 5% SLEB

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Procurement and Contracting Community Advisory Group**

- NON-SLEB goods and services contracts: 20% SLEB
- Approximately 1,150 SLEBs certified – simplified process
- Elations used to monitor contract compliance
- Alcolink modified to track contract information
- Implement ECOP: Construction contracts over \$100,000 - 60% local, 20% small local, 15% MBE, 5% women owned
- Unbundled large contracts: review county-wide contracts prior to re-bidding
- Implemented Bond Assistance Program
- Contract Compliance moved to Auditor Agency
- Training for staff and contractors, over 20 presentations to various groups

PO:hc

REPORT ON COUNTY PROCUREMENT

March 1, 2010

Background

- July 2002 Availability Study contract awarded to MTA
- October 2004 Board receives Study
- Study referred to Procurement and Contracting Policy Committee (PCPC)
- January 2005 Executive Steering Group begins review
- December 2005 Executive Steering Group submits draft report to PCPC
- January 2006 PCPC submits draft report to Community Advisory Group (CAG)

Background

- September 2007 CAG submits recommendations to PCPC
- September 2007 PCPC refers CAG recommendations to Executive Steering Group
- December 2005 thru July 2009 enhancement of procurement processes
- July 2009 Executive Steering Group submits its response to CAG recommendations to PCPC

The Executive Steering Group

Chair: Susan Muranishi, County Administrator

Charles Plummer, Sheriff

Pat O'Connell, Auditor/Controller

Donald Blevins, Chief, Probation Department

Denise Eaton-May, Director, Human Resource Services

Chet Hewitt, Director, Social Services Agency

Dave Kears, Director, Health Care Services Agency

Don LaBelle, Director, Public Works Agency

Dave Macdonald, Director, Information Technology Department

Aki Nakao, Director, General Services Agency

Richard Winnie, County Counsel

Debbie Barnes, Contract and Employment Services Manager, City of Oakland

David Houts, Staff Analyst, Flood Control/Zone 7

Beverly Johnson, Contract Equity Administrator, East Bay Municipal Utility District

Christine Monsen, Executive Director, Alameda County Transportation Authority

Bernida Reagan, Director of Social Responsibility, Port of Oakland

Donna Linton, Assistant County Administrator

Sal Morales, Diversity Program Manager

Accomplishments

POLICIES

- Contracts under \$25K targeted to SLEB Contractors
 - If no SLEB Contractors, then to Local Businesses
- Direct contracting to award small contracts
 - Hazardous materials abatement, site preparation, trenching for utilities
- Contracts over \$25K include 5% Local and 5% SLEB bid preference
 - Non-SLEB contracts for goods and services require a minimum of 20% SLEB participation

Accomplishments

POLICIES

- Enhanced Construction Outreach Program (ECOP) implemented for GSA construction projects over \$100,000
 - 60% Local Participation
 - 20% Small Local Participation
 - 15% Minority Business Enterprise Subcontractor
 - 5% Women-Owned Business Subcontractor
- Unbundle large procurement contracts
 - Printing Services, Temporary Services, Training

Accomplishments

POLICIES

- All procurement centralized in GSA
- Sole Source Policy and website developed and implemented to ensure SLEB requirements are met

Accomplishments

PROCEDURES

- County-wide contracts reviewed prior to rebidding for unbundling opportunities
 - Office goods, paper products
- Bids and requests for proposals reviewed prior to issuing for compliance with SLEB and Construction Outreach Programs
- Procedure implemented for 5-day notice of invoice disputes
- ALCOLINK Contracts Module and the Vendor Database updated to include ethnicity, gender, award amounts and SLEB data to enhance reporting capabilities

Accomplishments

PROCEDURES

- Implementation of Elation System July 1, 2008
 - Monitor contractual labor and utilization requirements
 - Report Construction Outreach and SLEB Program compliance
 - Procurement guidelines and participation included in staff training
- Small Business Capacity Building
 - Bids solicited exclusively from certified County small and emerging businesses to foster growth of these firms

Accomplishments

OTHER

- Approximately 1,150 SLEBS certified by the County
- Contract Administration Guide developed to assist in contract management
- Uniform Procurement Manual (UPM) developed to create online (intranet) central repository for County's procurement policies, procedures, programs and related forms
- Implemented Bond Assistance Program

Accomplishments

OTHER

- Developed and conduct year-round training and outreach for small businesses
 - How to do Business with Alameda County
 - Construction Management Program
 - How to Become Certified

Accomplishments

OTHER

- Contract Compliance in the Auditor-Controller Agency
 - Oversight of SLEB Program
 - Oversight of data analysis and reporting
 - Community and Business Outreach – Decentralized
 - General Services Agency
 - Public Works Agency
 - Auditor-Controller Agency

Total Contracts Local & Non-Local

	7/1/00 - 6/30/03	7/1/07 - 12/31/09
Local	\$318.9M	\$415.5M
Non-Local	\$233.2M	\$235.2M
Total	\$552.1M	\$650.7M
% Local	57.76%	63.86%

Local Contracts Summary

	7/1/00 - 6/30/03	7/1/07 - 12/31/09
Total Local Contracts	\$318.9M	\$415.5M
Local Dollars	57.76%	63.86%
MBE/SLEB	\$57.7M	\$208.1M
MBE/SLEB % of Total Contracts	10.45%	31.97%

MBE/SLEB Contracts by Type

Type	7/1/00 - 6/30/03		7/1/07 - 12/31/09	
	\$	%	\$	%
Construction	\$20.2M	14.37%	\$40.2M	38.99%
Architecture & Engineering	\$5.5M	10.15%	\$3.2M	39.03%
Professional Services	\$13.3M	13.82%	\$88.3M	33.30%
Goods & Services	\$18.7M	7.16%	\$76.4M	27.83%
Total	\$57.7M	10.45%	\$208.1M	31.97%

MBE/SLEB Contract Amounts by Ethnicity

Type	7/1/00 - 6/30/03	7/1/07 - 12/31/09
	\$	\$
African American	\$8.8M	\$19.3M
Hispanic American	\$23.4M	\$55.3M
Multi-Ethnicity	-	\$14.2M
Asian American	\$16.2M	\$38.0M
Caucasian Female	\$3.2M	\$23.7M
Caucasian Male	\$5.7M	\$57.1M
Native American	\$0.4M	\$0.5M
Total	\$57.7M	\$208.1M

Contracts by Geographic Area

Geographic Area	7/1/00 - 6/30/03		7/1/07-12/31/09	
	\$	%	\$	%
Alameda	\$1.7M	.53%	\$11.9M	2.87%
Albany	\$.9M	0.28%	\$1.4M	0.34%
Berkeley	\$10.8M	3.39%	\$5.5M	1.33%
Castro Valley	\$.7M	0.22%	\$1.5M	0.37%
Dublin	\$6.1M	1.91%	\$84.1M	20.25%
Emeryville	\$9.2M	2.88%	\$7.3M	1.75%
Fremont	\$8.5M	2.67%	\$20.4M	4.92%
Hayward	\$34.4M	10.79%	\$19.7M	4.75%
Livermore	\$5.7M	1.79%	\$26.0M	6.26%
Newark	\$1.4M	0.44%	\$2.6M	0.62%
Oakland	\$201.9M	63.31%	\$142.7M	34.30%
Piedmont	-	0.00%	-	0.00%
Pleasanton	\$14.5M	4.55%	\$64.0M	15.41%
San Leandro	\$14.6M	4.58%	\$19.6M	4.71%
San Lorenzo	\$6.1M	1.91%	\$2.2M	0.53%
Sunol	-	0.00%	\$0.1M	0.02%
Union City	\$2.4M	.75%	\$6.5M	1.57%
TOTAL	\$318.9M	100.00%	\$415.5M	100.00%

MBE/SLEB Participation by Type

	7/1/00 - 6/30/03	7/1/07 - 12/31/09
Construction		
Total	\$141.1M	\$103.2M
MBE/SLEB	\$20.2M	\$40.2M
% MBE/SLEB	14.37%	38.99%
Architecture & Engineering		
Total	\$53.7M	\$8.1M
MBE/SLEB	\$5.5M	\$3.2M
% MBE/SLEB	10.15%	39.03%
Professional Services		
Total	\$96.1M	\$265.1M
MBE/SLEB	\$13.3M	\$88.3M
% MBE/SLEB	13.82%	33.30%
Goods & Services		
Total	\$261.2M	\$274.3M
MBE/SLEB	\$18.7M	\$76.4M
% MBE/SLEB	7.16%	27.83%
Total All Contracts		
Total	\$552.1M	\$650.7M
MBE/SLEB	\$57.7M	\$208.1M
% MBE/SLEB	10.45%	31.97%

Construction Contracts by Ethnicity

	7/1/00 - 6/30/03	7/1/07 - 12/31/09
African American Males	\$1.8M	\$2.6M
African American Females	\$.8M	\$.2M
Asian American Males	\$2.5M	\$.3M
Asian American Females	\$.2M	\$12.7M
Hispanic American Males	\$13.4M	\$19.3M
Hispanic American Females	\$1.2M	\$1.2M
Native American Males	\$.1M	-
Native American Females	\$.2M	-
Multi-Ethnic> 50% Males	-	-
Multi-Ethnic> 50% Females	-	-
Caucasian Males - SLEB	-	\$3.0M
Caucasian Females - SLEB	-	\$.2M
Multi-Ethnic 50/50	-	\$.8M
Total MBE/SLEB	\$20.2M	\$40.2M
Caucasian Males	\$116.3M	\$54.9M
Caucasian Females	\$4.6M	\$5.3M
Unknown/Decline	-	\$2.8M
Publicly Owned Entity	-	-
Total	\$141.1M	\$103.2M
% MBE/SLEB	14.37%	38.99%

Architect & Engineering Contracts by Ethnicity

	7/1/00 - 6/30/03	7/1/07 - 12/31/09
African American Males	\$1.4M	-
African American Females	-	-
Asian American Males	\$.8M	\$1.1M
Asian American Females	\$.5M	\$.6M
Hispanic American Males	\$1.1M	-
Hispanic American Females	\$.5M	-
Native American Males	-	-
Native American Females	-	-
Multi-Ethnic> 50% Males	-	-
Multi-Ethnic> 50% Females	-	-
Caucasian Males - SLEB	\$1.1M	\$.4M
Caucasian Females - SLEB	\$.1M	\$1.1M
Multi-Ethnic 50/50	-	-
Total MBE/SLEB	\$5.5M	\$3.2M
Caucasian Males	\$45.2M	\$2.5M
Caucasian Females	\$3.0M	\$.1M
Unknown/Decline	-	-
Publicly Owned Entity	-	\$2.4M
TOTAL	\$53.7M	\$8.1M
% MBE/SLEB	10.15%	39.03%

Professional Services Contracts by Ethnicity

	7/1/00 - 6/30/03	7/1/07 - 12/31/09
African American Males	\$1.5M	\$9.2M
African American Females	\$1.3M	\$3.7M
Asian American Males	\$5.2M	\$2.6M
Asian American Females	\$.4M	\$5.2M
Hispanic American Males	\$.6M	\$29.8M
Hispanic American Females	\$.4M	\$1.1M
Native American Males	-	\$.1M
Native American Females	-	-
Multi-Ethnic> 50% Males	-	\$1.6M
Multi-Ethnic> 50% Females	-	\$.2M
Caucasian Males - SLEB	\$1.8M	\$26.3M
Caucasian Females - SLEB	\$2.1M	\$3.5M
Multi-Ethnic 50/50	-	\$5.0M
Total MBE/SLEB	\$13.3M	\$88.3M
Caucasian Males	\$73.0M	\$66.4M
Caucasian Females	\$9.8M	\$8.1M
Unknown/Decline	-	\$.5M
Publicly Owned Entity	-	\$101.8M
Total	\$96.1M	\$265.1M
% MBE/SLEB	13.82%	33.30%

Goods & Services Contracts by Ethnicity

	7/1/00 - 6/30/03	7/1/07 - 12/31/09
African American Males	\$1.3M	\$3.3M
African American Females	\$.8M	\$.2M
Asian American Males	\$4.9M	\$9.5M
Asian American Females	\$1.6M	\$6.0M
Hispanic American Males	\$4.8M	\$2.6M
Hispanic American Females	\$1.4M	\$1.3M
Native American Males	-	\$.2M
Native American Females	-	\$.2M
Multi-Ethnic> 50% Males	-	\$3.8M
Multi-Ethnic> 50% Females	-	\$.7M
Caucasian Males - SLEB	\$2.8M	\$27.5M
Caucasian Females - SLEB	\$1.1M	\$18.9M
Multi-Ethnic 50/50	-	\$2.2M
Total MBE/SLEB	\$18.7M	\$76.4M
Caucasian Males	\$191.0M	\$116.3M
Caucasian Females	\$51.5M	\$4.3M
Unknown/Decline	-	\$.8M
Publicly Owned Entity	-	\$76.5M
Total	\$261.2M	\$274.3M
% MBE/SLEB	7.16%	27.83%

All Contracts by Ethnicity

	7/1/00 - 6/30/03	7/1/07 - 12/31/09
African American Males	\$6.0M	\$15.2M
African American Females	\$2.8M	\$4.1M
Asian American Males	\$13.5M	\$13.5M
Asian American Females	\$2.7M	\$24.5M
Hispanic American Males	\$20.0M	\$51.7M
Hispanic American Females	\$3.4M	\$3.6M
Native American Males	\$.1M	\$.3M
Native American Females	\$.3M	\$.2M
Multi-Ethnic> 50% Males	-	\$5.4M
Multi-Ethnic> 50% Females	-	\$.8M
Caucasian Males - SLEB	\$5.7M	\$57.1M
Caucasian Females - SLEB	\$3.2M	\$23.7M
Multi-Ethnic 50/50	-	\$8.0M
Total MBE/SLEB	\$57.7M	\$208.1M
Caucasian Males	\$425.5M	\$240.1M
Caucasian Females	\$68.9M	\$17.7M
Unknown/Decline	-	\$4.1M
Publicly Owned Entity	-	\$180.7M
Total	\$552.1M	\$650.7M
% MBE/SLEB	10.45%	31.97%

MBE/SLEB by Contract Amount

	7/1/00 - 6/30/03	7/1/07 - 6/30/09
CONTRACTS UNDER \$25,000		
Total	\$63.0M	\$69.5M
MBE/SLEB	\$9.7M	\$25.8M
% MBE/SLEB	15.38%	37.10%
CONTRACTS \$25,001 - \$100,000		
Total	\$106.3M	\$68.3M
MBE/SLEB	\$11.3M	\$27.8M
% MBE/SLEB	10.60%	40.65%
CONTRACTS \$100,001 - \$500,000		
Total	\$85.9M	\$98.0M
MBE/SLEB	\$16.4M	\$41.4M
% MBE/SLEB	19.13%	42.18%
CONTRACTS OVER \$500,000		
Total	\$296.9M	\$414.9M
MBE/SLEB	\$20.3M	\$113.2M
% MBE/SLEB	6.84%	27.27%
TOTAL ALL CONTRACTS		
Total	\$552.1M	\$650.7M
MBE/SLEB	\$57.7M	\$208.1M
% MBE/SLEB	10.45%	31.97%

Contract Amounts Under \$25,000 by Ethnicity

	7/1/00 - 6/30/03	7/1/07 - 12/31/09
African American Males	\$1.1M	\$1.3M
African American Females	\$.6M	\$.4M
Asian American Males	\$2.6M	\$3.5M
Asian American Females	\$1.0M	\$1.5M
Hispanic American Males	\$2.4M	\$1.6M
Hispanic American Females	\$.4M	\$.6M
Native American Males	\$.1M	\$.1M
Native American Females	-	\$.2M
Multi-Ethnic> 50% Males	-	\$1.3M
Multi-Ethnic> 50% Females	-	\$.1M
Caucasian Males - SLEB	\$1.2M	\$8.7M
Caucasian Females - SLEB	\$.3M	\$5.3M
Multi-Ethnic 50/50	-	\$1.2M
Total MBE/SLEB	\$9.7M	\$25.8M
Caucasian Males	\$46.2M	\$22.1M
Caucasian Females	\$7.1M	\$2.9M
Unknown/Decline	-	\$.3M
Publicly Owned Entity	-	\$18.4M
Total	\$63.0M	\$69.5M
% MBE/SLEB	15.38%	37.10%

Contract Amounts \$25,001-\$100,000 by Ethnicity

	7/1/00 - 6/30/03	7/1/07 - 12/31/09
African American Males	\$2.3M	\$1.3M
African American Females	\$1.4M	\$1.0M
Asian American Males	\$3.5M	\$2.4M
Asian American Females	\$1.2M	\$1.9M
Hispanic American Males	\$2.5M	\$1.6M
Hispanic American Females	\$.4M	\$.5M
Native American Males	-	\$.1M
Native American Females	-	\$.1M
Multi-Ethnic> 50% Males	-	\$0.9M
Multi-Ethnic> 50% Females	-	\$.2M
Caucasian Males - SLEB	-	\$9.9M
Caucasian Females - SLEB	-	\$6.8M
Multi-Ethnic 50/50	-	\$1.1M
Total MBE/SLEB	\$11.3M	\$27.8M
Caucasian Males	\$83.6M	\$19.5M
Caucasian Females	\$11.4M	\$2.5M
Unknown/Decline	-	\$.6M
Publicly Owned Entity	-	\$17.9M
Total	\$106.3M	\$68.3M
% MBE/SLEB	10.60%	40.65%

Contract Amounts \$100,001-\$500,000 by Ethnicity

	7/1/00 - 6/30/03	7/1/07 - 12/31/09
African American Males	\$1.2M	\$2.2M
African American Females	\$.1M	\$.8M
Asian American Males	\$3.5M	\$6.4M
Asian American Females	\$.5M	\$2.7M
Hispanic American Males	\$2.2M	\$4.7M
Hispanic American Females	\$1.2M	\$1.7M
Native American Males	-	-
Native American Females	\$.3M	-
Multi-Ethnic> 50% Males	-	\$.5M
Multi-Ethnic> 50% Females	-	\$.5M
Caucasian Males - SLEB	\$4.6M	\$15.6M
Caucasian Females - SLEB	\$2.8M	\$4.7M
Multi-Ethnic 50/50	-	\$1.6M
Total MBE/SLEB	\$16.4M	\$41.4M
Caucasian Males	\$64.7M	\$33.5M
Caucasian Females	\$4.8M	\$4.3M
Unknown/Decline	-	\$2.5M
Publicly Owned Entity	-	\$16.3M
Total	\$85.9M	\$98.0M
% MBE/SLEB	19.13%	42.18%

Contract Amounts Over \$500,000 by Ethnicity

	7/1/00 - 6/30/03	7/1/07 - 12/31/09
African American Males	\$1.4M	\$10.4M
African American Females	\$.7M	\$2.0M
Asian American Males	\$4.0M	\$1.3M
Asian American Females	-	\$18.4M
Hispanic American Males	\$12.9M	\$43.8M
Hispanic American Females	\$1.3M	\$.8M
Native American Males	-	-
Native American Females	-	-
Multi-Ethnic> 50% Males	-	\$2.7M
Multi-Ethnic> 50% Females	-	-
Caucasian Males - SLEB	-	\$22.9M
Caucasian Females - SLEB	-	\$6.9M
Multi-Ethnic 50/50	-	\$4.0M
Total MBE/SLEB	\$20.3M	\$113.2M
Caucasian Males	\$230.9M	\$165.1M
Caucasian Females	\$45.7M	\$7.9M
Unknown/Decline	-	\$.7M
Publicly Owned Entity	-	\$128.0M
Total	\$296.9M	\$414.9M
% MBE/SLEB	6.84%	27.27%

Total Contracts by Ethnicity

	7/1/00 - 6/30/03	7/1/07 - 12/31/09
African American Males	\$6.0M	\$15.2M
African American Females	\$2.8M	\$4.1M
Asian American Males	\$13.5M	\$13.5M
Asian American Females	\$2.7M	\$24.5M
Hispanic American Males	\$20.0M	\$51.7M
Hispanic American Females	\$3.4M	\$3.6M
Native American Males	\$.1M	\$.3M
Native American Females	\$.3M	\$.2M
Multi-Ethnic> 50% Males	-	\$5.4M
Multi-Ethnic> 50% Females	-	\$.8M
Caucasian Males - SLEB	\$5.7M	\$57.1M
Caucasian Females - SLEB	\$3.2M	\$23.7M
Multi-Ethnic 50/50	-	\$8.0M
Total MBE/SLEB	\$57.7M	\$208.1M
Caucasian Males	\$425.5M	\$240.1M
Caucasian Females	\$68.9M	\$17.7M
Unknown/Decline	-	\$4.1M
Publicly Owned Entity	-	\$180.7M
Total	\$552.1M	\$650.7M
% MBE/SLEB	10.45%	31.97%

CAG Recommendations

Recommendation (page 4 of ESC Response)

Create Very Small Local Business Enterprise (VSLBE)

- Fewer than 20 employees
- $\frac{1}{4}$ of the dollar amount of the SBA

ESG Response

- *Use data as collected to determine suitability for VLSBE*
- *Counsel advises such a program has no clear authorization in State law and increases legal risk to County*

CAG Recommendations

Recommendation (pages 5-6 of ESG Response)

Increase LBE Goals

- 70% Construction
- 40% Architecture & Engineering
- 50% Goods

ESG Response

- *Current analysis of data shows actual dollars exceed recommended goals*
- *Keep SLEB as is*
- *Contracts under \$25k; award all to MBE/SLEB/Local*

CAG Recommendations

Recommendation (page 6 of ESG Response)

Prime contractors responsibilities - Good Faith Efforts and Debarment

ESG Response

- *The ESG concurs with the recommendation upon the approval of County Counsel*
- *Any penalties collected will go into a revolving fund to advance the goals of the County's procurement program*

CAG Recommendations

Recommendation (page 7 of ESG Response)

County Responsibilities – Good Faith Efforts

ESG Response

The County will use the Elations system to notify sub-contractors that were selected by the Prime Contractor

Recommendation (page 7 of ESG Response)

Random audits of contracts over \$250,000; Charge contractor for Audit

ESG Response

Recommend random compliance reviews on contracts over \$250,000

CAG Recommendations

Recommendation (page 7 of ESG Response)

Preferences for LBEs

- Prime contractors who meet SLEB goals receive an additional 10 points and bid considered 4% lower for scoring

ESG Response

- *Since LBE participation is greater than CAG goals, continue SLEB program as is*
- *Continue to monitor stats to determine if enhancements are needed*

CAG Recommendations

Recommendation (page 8 of ESG Response)

Preferences for SLEBs

- Additional 5% for construction contracts under \$10M and A&E under \$3M

ESG Response

- *Public Contracting Code only allows for 5% preference for construction*
- *Counsel has advised preference cannot be considered when evaluating A&E*

CAG Recommendations

Recommendation (pages 8-9 of ESG Response)

Geographic equity program within Alameda County

- Consider geographic goals and geographic preferences

ESG Response

- *Geographic preferences are not permitted in most Federal and State programs*
- *The County is currently working to resolve audit disallowances due to these preferences*
- *Counsel has advised that contract awards and solicitations cannot be exclusionary or based on geographical areas within the County*

CAG Recommendations

Recommendation (pages 10-12 of ESG Response)

Race and gender conscious policy

- Set goals by category – ethnicity and gender
- Create an underutilized pool
- Award preference points

ESG Response

See County Counsel response dated June 19, 2008

CAG Recommendations

Recommendation (page 13 of ESG Response)

Unbundle large contracts and award contracts in phases

ESG Response

The ESG concurs and will continue these contracting practices

CAG Recommendations

Recommendation (page 13 of ESG Response)

Consider Geographical Diversity

ESG Response

- *The ESG advocates the continuance of local preference for goods and services and the application of GSA-ECOP goals for construction*
- *Geographic preferences are not permitted in most Federal and State programs*
- *The County is currently working to resolve audit disallowances due to these preferences*
- *Counsel has advised that there isn't any authorization in State law for programs based on geographical location*

CAG Recommendations

Recommendation (page 13 of ESG Response)

Rebid high volume contracts

ESG Response

The ESG concurs and will continue this practice

Recommendation (page 14 of ESG Response)

Create a pool of VSLEBs for various categories and amounts

ESG Response

The ESG advocates vendor pools that meet the SLEB program requirements and the GSA-ECOP goals

CAG Recommendations

Recommendation (page 14 of ESG Response)

Use direct contracting as a means to award small contracts

ESG Response

The ESG concurs and will continue to award construction support services as direct contracts under the terms of the SLEB and ECOP programs

CAG Recommendations

Recommendation (pages 14-15 of ESG Response)

- Analyze bonding on a case by case basis
- Assist firms to become bond ready
- Establish relationships for bonding and loan assistance
- Develop a bonding and finance program

ESG Response

- *The ESG concurs and will continue to review each project's bonding requirement*
- *The County has implemented a bonding assistance program through the Risk Management Dept which will help build capacity, assist in becoming bond ready, refer firms to appropriate parties to provide assistance and has developed a bonding and finance program*

CAG Recommendations

Recommendation (page 16 of ESG Response)

Phasing of bond requirement; reduction of the retention

ESG Response

- *The County will continue to phase projects to allow small businesses to bond*
- *After 50% of the work is complete bonds could be released on a project by project basis*

CAG Recommendations

Recommendation (page 17 of ESG Response)

- Primes list all subs when bidding
- Bid analysis conducted by Third Party
- Assess Prime's record of performance and compliance

ESG Response

- *The County is currently requiring the prime contractor to list all sub-contractors when a bid is submitted*
- *Routine contract monitoring should be conducted to assure compliance*

CAG Recommendations

Recommendation (pages 17-18 ESG Response)

Develop an expedited payment program

ESG Response

The ESG recommends using the Elations System to monitor payments received and acknowledged by primes and sub-contractors, and when necessary address payment issues

CAG Recommendations

Recommendation (page 18 of ESG Response)

Pay mobilization for SLEB firms

ESG Response

The ESG recommends the Board consider a revolving loan program with established criteria and repayment provisions for qualified contractors

Recommendation (page 19 of ESG Response)

Five day notice of invoice disputes

ESG Response

The ESG will continue process to give five day notice of invoice dispute and allow project managers line item approval for submitted invoices

CAG Recommendations

Recommendation (page 19 ESG Response)

Develop formal sub-contractor substitution standards

ESG Response

- *The ESG advocates continuing the practice of mirroring substitution requirements as outlined in the California Public Contract Code applicable to construction contracts*
- *Any reduction in the scope of work or contract value of a sub-contractor is considered a substitution*

CAG Recommendations

Recommendation (page 20 ESG Response)

Implement construction project management best practices

ESG Response

The ESG recommends implementing the construction project management best practices including:

- *Timely inspections*
- *Avoidance of Critical Path Method Schedules on smaller projects*
- *Answering requests for information promptly*
- *Provision of timely feedback and constructive criticism*

CAG Recommendations

Recommendation (page 20 of ESG Response)

Post Contract Awards on the Internet

ESG Response

A website to post awards was developed and is in place

Recommendation (page 21 of ESG Response)

Contractors comply with all Federal and State laws and County procedures

ESG Response

The ESG concurs that routine and rigorous contract monitoring should be conducted to assure compliance

CAG Recommendations

Recommendation (page 21 ESG Response)

Analysis of Purchase Card procurement

ESG Response

The County is currently working with departments that use credit cards to collect the required data

CAG Recommendations

Recommendation (page 22 ESG Response)

For contracts over \$15M, Prime must provide capacity building and training

ESG Response

- *County provides and promotes training through Small Business Development Center Alliance and the Federal Training Center*
- *If required by Prime, potential to increase cost of County contracts*

CAG Recommendations

Recommendation (page 22 ESG Response)

- Exclusion of pre-qualification screening by Primes
- Continued search for SLEB to meet County goals

ESG Response

- *Selection of sub-contractors by Prime is at the discretion of the Prime*
- *If goals are not met, the Prime and County must continue their outreach efforts*

CAG Recommendations

Recommendation (page 23 ESG Response)

Contract Compliance housed in the Auditor Controller's Office

ESG Response

Contract Compliance was moved to the Auditor-Controller's Office July 1, 2008

CAG Recommendations

Recommendation (page 23 ESG Response)

Status of Alcolink to track contracts & data collection

ESG Response

Contract module has been implemented to provide utilization and compliance data

CAG Recommendations

[Recommendation \(page 24 ESG Response\)](#)

Summary of recommendations being implemented

[ESG Response](#)

Reviewed at the beginning of this presentation and also attached to the report

[Recommendation \(page 24 ESG Response\)](#)

County publish utilization reports

[ESG Response](#)

Reports will be distributed quarterly to the Board of Supervisor's PCPC and posted on the County's website

In Progress

- All Acquisition Activity will be Managed by GSA
- Enhanced SLEB Website
- Posting Reports on SLEB Website
- Revolving Loan Program
- OCIP for Future Construction Projects
- Opportunities for Additional Outreach
- Continue to Unbundle Contracts

In Progress

- Maximize Use of Local Vendors Regardless of Funding Source

EXECUTIVE STEERING GROUP

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INTRODUCTION

PURPOSE

This report sets forth the results of the review and analysis, conducted by the CAO and members of the Executive Committee, of the recommendations of the Availability Study Community Advisory Group (CAG). It also includes an implementation schedule for the creation of a compliance component in the Office of the Auditor-Controller.

BACKGROUND

In December 2001, the Board approved a study of the availability and utilization of local, small, women and minority-owned businesses in contracting for the goods and services required by Alameda County. The scope of the Study was to analyze contracts awarded in Fiscal Years 2000-2001 through 2002-2003 in the areas of: Construction, Architecture and Engineering, Professional Services and Goods and Other Services. In July 2002, the contract for the Study was awarded to Mason Tillman Associates, Ltd. The Study was performed between December 2002 and August, 2004. The Board received the Study's findings and recommendations in October of 2004, and referred the recommendations to its standing Procurement and Contracting Policy Committee (PCPC). In turn, in December 2004, the PCPC approved the County Administrator's recommendations and authorized the County Administrator's Office (CAO) to manage the review and implementation process.

DEFINITION AND PURPOSE OF CONTRIBUTING GROUPS

The Community Advisory Group (CAG), comprised of representatives from the County's diverse public and private-sector business communities, was convened by the PCPC with the specific role to:

- Lend expertise and render advice to the PCPC and the Executive Steering Group on the functionality and applicability of the Study recommendations.

The Executive Steering Group (ESG), comprised of key agency/department heads and other outside public agency procurement professionals, was convened by the County Administrator, with the specific charge to:

- Review and analyze the study recommendations
- Prepare a report of the proposed implementation actions
- Submit the report and recommendations to the Board's PCPC for consideration and action.

In January, 2005, the Executive Steering Group formed four working teams, each of which formed its own working group. These teams and groups involved many staff from the lead agencies, as well as other County staff and staff from outside entities. The Executive Steering Group convened monthly meetings to receive status reports from the working teams and their groups.

EXECUTIVE STEERING GROUP RESPONSE TO CAG RECOMMENDATIONS

To better understand the meaning and impacts of the proposed changes in County business operations, the Executive Steering Group also organized panel discussions and software presentations aimed at identifying best practices. In August, 2005, the Executive Steering Group completed its work and began developing its report, summarizing its activities and recommendations.

An earlier report of the Executive Steering Group on its review and analysis of the Alameda County Availability Study was presented to the Board in December, 2005. The Board referred the Mason Tillman Availability Study and the Executive Steering Group's review and analysis of it to the PCPC, which in turn, referred both reports to the Community Advisory Group (CAG). On September 17, 2007, the CAG presented its report and final recommendations to the PCPC, which in turn referred the CAG report to the Executive Steering Committee for response and formulation of an implementation plan.

The following information represents those responses and implementation schedules, prepared by the Executive Steering Committee as requested by the PCPC.

PART 1: RACE AND GENDER NEUTRAL

Reconsideration of the County's Small Business Definition

COMMUNITY ADVISORY GROUP RECOMMENDATION, Page 5:

- Keep current Small, Local Emerging Business (SLEB) program, and add enhanced preferences for emerging businesses.
- Create a Very Small Local Business Enterprise (VSLBE), like the Port, for businesses with fewer than 20 employees and ¼ of the dollar amount of the SBA definition.

ESG Response:

The Executive Steering Group (ESG) proposes that the evaluation of data collected from the Compliance System should be used to determine the suitability of adding enhanced preferences for emerging businesses. If the analysis indicates that these enhanced preferences are needed and feasible, 5% preference points could be added to the current 10% preference points now granted to local and small/emerging businesses.

The ESG notes that implementation of the CAG recommended VSLBE program would require additional County resources to identify, certify and maintain yet another category of business listings and may impact current County contracts with large local firms now partnering with small businesses. Also, County Counsel has stated that such a program has no clear authorization in State law, and would, therefore, increase legal risk to the County. We advocate the continuation of the current SLEB Program and continued evaluation of the utilization goals achieved from data collected in the Compliance System prior to implementation of further enhancements and/or adding new small business programs.

Proposed Local and Small Local Business Enterprise Program

COMMUNITY ADVISORY GROUP RECOMMENDATION, Pages 5 and 6:
Continue the existing SLEB program and provide enhanced preferences for emerging businesses. Adopt a Very Small Local Business Enterprise (VSLBE).

EXECUTIVE STEERING GROUP RESPONSE TO CAG RECOMMENDATIONS

ESG Response:

The ESG agrees that the SLEB program should be continued and proposes continuing evaluation of the utilization of emerging businesses before implementing further enhancements and new programs, as indicated in our previous response.

Program Participation Goals

COMMUNITY ADVISORY GROUP RECOMMENDATIONS, Pages 6 and 7

The Community Advisory Committee recommends the following goals for various areas of contracting.

Local Business and Small Business Goals for Non Public Works Agency Contracts (Non-PWA)

Contract Type	Contract Size	LBE Goal*	SLEB Goal	VSLB E
Construction	\$500k++	70%	30%	
	\$26k to \$499k	70%	30%	
	\$0 to \$25k **	N/A	N/A	100%
A&E Prof Services	\$500k++	40%	20%	
	\$76k to \$499k	40%	20%	
	\$0 to \$75k **	N/A	N/A	100%
Goods	\$500k++	50%	30%	
	\$26k to \$499k	50%	30%	
	\$0 to \$25k **	N/A	N/A	100%

Notes: * LBE is inclusive of SLEB Goals.

Local Business and Small Business Goals for Public Works Agency Contracts (PWA)

Contract Type	Contract Size	LBE Goal*	SLEB Goal	VSLBE
Construction	\$500k++	50%	30%	
	\$100k to \$499k	50%	30%	
	\$0 to \$99k **	N/A	N/A	100%
A&E Prof Services	\$500k++	40%	20%	
	\$76k to \$499k	40%	20%	
	\$0 to \$75k **	N/A	N/A	100%
Goods	\$500k++	50%	30%	
	\$26k to \$499k	50%	30%	
	\$0 to \$25k **	N/A	N/A	100%

Notes: * LBE is inclusive of SLEB Goals.

** This goal will jump-start an increase in Small Business participation.

EXECUTIVE STEERING GROUP RESPONSE TO CAG RECOMMENDATIONS

ESG Response:

The ESG analysis shows that local participation currently exceeds the above CAG recommended LBE goals:

- *All County contracts awarded 7/1/06 – 6/30/09 indicate an average of 66% awards to local firms and an average of 38% for MBE/SLEB firms as follows:*
 - *77% LBE up to \$25K*
 - *73% LBE more than \$25K-\$100K*
 - *65% LBE more than \$100K-\$500K*
 - *73% LBE more than \$500K*
 - *34% MBE/SLEB up to \$25K*
 - *38% MBE/SLEB more than \$25K-\$100K*
 - *38% MBE/SLEB more than \$100K-\$500K*
 - *39% MBE/SLEB more than \$500K*

The ESG believes that implementation of the Compliance System will allow the County to monitor business utilization, goal achievement and evaluate the need to revise goals on an on-going basis.

The ESG recommends continuing the SLEB Program, including the 100% SLEB/MBE local goal for contracts up to \$25K, and evaluating data from the Compliance System on an on-going basis to determine the need for revising Program goals and requirements.

Local and Small Local Business Enterprise Good Faith Efforts

COMMUNITY ADVISORY GROUP RECOMMENDATIONS:

Compliance/Enforcement

- Prime Contractor Responsibilities Pertaining to Good Faith Efforts, page 8:

The prime-contractor must sign, under penalty of perjury, that all of the information in the bid submission is true. If they have submitted a false document the contractor may be subject but not limited to: being banned from applying for a county contract for three years and/or being penalized 10% of the contract cost.

EXECUTIVE STEERING GROUP RESPONSE TO CAG RECOMMENDATIONS

ESG Response

The ESG concurs with this recommendation upon County Counsel approval and notes that: other public agency bid documents now include the recommended language and that the County should have debarment policies banning vendors from bidding for set amounts of time, for example see LA County at

http://lacounty.info/doing_business/cpy0004.PDF

Resources would be required to develop and maintain a database of vendors banned from bidding and posted online for public view. For example see SF County at

http://www.sfgov.org/site/controller_index.asp?id=28412

The ESG recommends that the County adopt a policy stating that contractor penalties collected go into a revolving fund to be used to advance the goals of the County procurement program.

- **County Responsibilities Pertaining to Good Faith Efforts, Page 8:**

The County will send a certified letter to the sub-contractors which the prime contractor has listed as sub-contractors in their bids, and follow-up to confirm the sub-contractors has agreed to work on the job. The County will acquire a copy of the final estimate given to the prime contractor by the listed sub contractor. The County Project Managers assigned to specific projects must sign a document "under penalty of perjury" verifying the review of all bid documents and the completion of all progress payments.

ESG Response:

The County will use the Elations System to notify sub-contractors that they were selected by the prime contractor.

Audits, page 8:

The County will conduct random audits for contracts over \$250K. The cost of the audit should be added to language of the contract and paid for by the successful bidder.

ESG Response:

The ESG recommends that random compliance reviews should be performed on contracts over \$250K.

- **Preferences/Incentives**

Preferences for LBEs, page 9:

Prime Contractors who meet the goals of sub-contracting with local businesses will be given an additional 10 point bid preference and their bid will be considered 4% lower than the actual dollar figure submitted (for the sake of scoring only.)

EXECUTIVE STEERING GROUP RESPONSE TO CAG RECOMMENDATIONS

ESG Response:

LBE participation is currently greater than the CAG recommended LBE goals above. The ESG advocates the continuance of the current SLEB Program and Local Preference unless reviews performed by the Compliance Office indicate enhancements are required to increase local subcontractor utilization.

Preferences for SLEBs, page 9:

For Construction contracts under \$10 Million, and Architectural and Engineering Contracts under \$3 Million, an additional 5% preference will be given to SLEB contractors.

ESG Response:

The Public Contracting Code indicates a 5% maximum preference for construction contractors meeting small business goals. County Counsel has previously advised that preferences cannot be considered when evaluating A&E proposals/awarding contracts.

The current 40% GSA-ECOP goal is greater than the 30% CAG recommendation. We recommend continuing the GSA-ECOP goal, for construction projects in excess of \$100K, where 5% small business preference is available when 40% SLBE/SLEB participation is achieved. The ESG recommends applying the SLEB Program requirements for A&E contracts with no preference, in accordance with County Counsel's advice.

Proposed Geographic Equity Program within Alameda County

COMMUNITY ADVISORY GROUP RECOMMENDATIONS, pages 9 and 10:

The Mason Tillman study identified disparities in the number and dollar amount for contracts awarded to businesses the various cities within Alameda County based on the populations in those cities. Based on this, the CAG made the following recommendations:

- The County should explore establishing a program to develop geographic diversity goals for underutilized businesses in each of the four county regions based on a Z score analysis.
- The County will outreach to businesses in regions that are underutilized to attract vendors and contractors and identify those ready, willing, and able to do business with Alameda County.

EXECUTIVE STEERING GROUP RESPONSE TO CAG RECOMMENDATIONS

- Statistical Analysis: The Office of Contract Compliance will review the contract awards and payments every year, calculate the actual dollar amounts awarded, and percentage of contract dollars awarded and received by firms in each of Alameda County's four regions. The regions of the county are: Tri-City, Tri-Valley, Mid County, and North County. (The delineation of these regions to be developed.)
- The County will outreach to businesses in underutilized regions to alert them to opportunities to bid under the SLEB and VSLBE programs.
- If after three years of monitoring the geographic data, identified inequities are not corrected, goals will be established with a 5% assigned evaluation bonus to be given to firms in the underutilized geographic areas (within Alameda County) or a 5% bid discount for contract bids from contractors in the same area. A maximum of 15% evaluation bonus (points) will be the highest amount achieved by all of the possible bonus elements. The firm's headquarters will be the basis for the evaluation. Firms having only a non-corporate small / field office (or only a post office box) in the underutilized regions will not qualify for the 5% bonus or bid discount.

ESG Response:

The ESG proposes continued application of the GSA-ECOP and SLEB Program and Countywide outreach along with evaluation of contracting data from the Compliance System to identify areas where/if business utilization enhancements and concentrated outreach efforts are needed. It is important to note that the Office of the County Counsel has previously advised that there is no authorization under state law for a program excluding certain bidders or providing preferences based on geographic location. As such, adding such a program poses a substantial legal risk. It should also be noted that the awarding of preference points by geographic area is not permitted in most Federal Programs. The County's Single Audit Report has questioned the use of preference points and disallowed costs associated with contractors who received preference points.

PART 2: Race and Gender Conscious

ESG Note: in this segment the Community Advisory Group is submitting one comprehensive recommendation, which follows:

COMMUNITY ADVISORY GROUP RECOMMENDATIONS, pages 12-14:

In other sections of this document the Community Advisory Group has responded to the recommendations and suggestions put forward by the Mason Tillman and/or the Executive Steering Committee. For this section, the Community Advisory Group is the putting forward a comprehensive race conscious proposal.

Preface: Why Implement A Race and Gender Conscious Policy

The Procurement and Contracting Committee understands that race and gender conscious recommendations must be able to pass legal scrutiny – especially meaning that a race conscious recommendation must be narrowly tailored to address past discrimination. In an effort to address current and prevent future statistically significant disparities the Procurement and Contracting Advisory Group is recommending the following policy.

Implementation of the proposed Race and Gender Conscious Policy:

Part I: Statistical Analysis. The Office of Contract Compliance will review the contract awards and payments every year, calculate the actual dollar amount awarded, and the percentage of contract dollars awarded and actual payments received by: African American Firms, Hispanic Owned Firms, Asian Owned Firms, Native American Owned Firms and Women Owned Firms.

To “Jump Start” this process, the Office of Contract and Compliance could use the statistical data used by the Mason Tillman Associates (MTA) report to determine or validate the “underutilized” categories. After the County/Office of Contract Compliance determines which groups are statistically significantly under utilized, as determined by the z score analysis specific Race and Gender Conscious strategies can be implemented. Utilization of the Mason Tillman data from the Mason Tillman Disparity Study could expedite implementation of this policy by 6-18 months. It is also recommended that an “Advisory Oversight Group be created to monitor the collection of the actual data collected and that they meet every six months. The Advisory Oversight should include members of the Advisory Group.

EXECUTIVE STEERING GROUP RESPONSE TO CAG RECOMMENDATIONS

If the County chooses not to use the Mason Tillman data, to determine the statistically underutilized groups, The Procurement and Contracting Advisory Group is suggesting the following sources to identify the pool of businesses that are "ready willing and able" to perform services with the County:

- Alameda County ALCOLINK Vendors
- All other Businesses that have performed business with the County or have submitted unsuccessful contract bids
- All Businesses in the SLEB Database
- The Business which responded to the Mason Tillman's outreach campaign for the Availability Study
- ACTIA's Local and Small Local Business listing
- BART's database of certified Disadvantaged Businesses
- CALTRANS Unified Certification Database
- East Bay MUD's Contract Equity Program Business Directory
- The Small and Local Business Directories from the 14 Cities in Alameda County
- The Port of Oakland's Certification Outreach Database
- U.S. Small Business Administration Procurement and Access Marketing Network
- Alameda County Public Works Business Outreach Bureau Meeting Attendee List
- American Institute of Architects: East Bay Chapter
- Associated Builders and Contractors
- Associated General Contractors
- Black Contractors Associations
- Builders' Exchange of Alameda County
- East Bay Asian Design Professional Listing
- National Association of Women Owned Business
- All Municipal Chambers of Commerce from the Cities within the County
- All of the Ethnic Chambers of Commerce in Alameda County

If the proposed office of Contract Compliance for Alameda County wishes to remove any of the businesses' from the above organizations list they must gain the approval of the Procurement and Contracting Committee.

After reviewing the contracts awards and developing a pool of businesses that are ready willing and able to work for the County; a z score analysis should be performed to determine if a businesses owned by certain ethnicities or genders are underutilized. If a business category is determined to be statistically underutilized, as determined by the "Z score", we recommend the following policies and procedures:

- Set Goals by Category: 15% for underutilized ethnic and women owned firms, 5% for underutilized gender firms.

EXECUTIVE STEERING GROUP RESPONSE TO CAG RECOMMENDATIONS

- Create (and regularly revise) an Underutilized Pool The County will go to the underutilized pool for all informal and direct contracting. Contractors must also go to the pool when implementing substitutions.
- Outreach via Bid Advertisements/RFP/RFQs The appropriate firms in the underutilized groups will be listed as available subs on outgoing Bid Advertisements, RFP's and RFQ's; bid submissions will be considered non responsive without showing a good faith effort as defined by this Advisory Group to sub-contract with firms in the underutilized pool.
- Award Preference Points. Utilization of these firms will result in 5% preference points.
- Pursue Post Award Subcontracting Opportunities to Overcome Non-compliance with Goals, including :
 - Materials Suppliers
 - Trucking
 - Reproduction/Deliveries
 - Security (job site)
 - Staffing
 - Permit Expeditors

ESG Response:

County Counsel has advised that there may be significant legal risk in the implementation of the proposals regarding race and gender conscious recommendations. Therefore, the ESG has referred all of the above CAG race and gender conscious recommendations to County Counsel for review and opinion.

Please see County Counsel response dated June 19, 2008.

PART 3: CONTRACTING AND PROCUREMENT

Pre-award Activities

Unbundle Large Procurements Into Smaller Contracts Where Feasible

COMMUNITY ADVISORY GROUP RECOMMENDATIONS, page 15:

- Decrease the size of contracts whenever possible to allow for M/WBEs, V/SLBEs, and SLEBs to participate more frequently.

ESG Response:

The ESG concurs and proposes to continue this practice for M/WBEs and SLBEs and SLEBs.

- Award contracts in phases where possible.

ESG Response:

The ESG concurs and recommends continuing this contracting practice.

- Consider geographical diversity as well

ESG Response:

The ESG advocates the continuance of the County Local Preference for goods and services, applying GSA-ECOP goals for construction contracts greater than \$100K and will perform ongoing monitoring of local business utilization through the Compliance System. The Office of the County Counsel has advised that there is no authorization in state law for programs based on geographic locations.

Assess the Use of County-wide Contracts Annually

COMMUNITY ADVISORY GROUP RECOMMENDATIONS, Page 16:

- Re-bid high volume contracts. This would allow new contractors/vendors to compete for more frequent contract opportunities, including LBEs, VSLBEs and SLEBs

EXECUTIVE STEERING GROUP RESPONSE TO CAG RECOMMENDATIONS

ESG Response:

The ESG concurs with this recommendation and will continue this practice.

- Create a pool of VSLBEs firms to go to for goods and services contracts less than \$25,000; A&E and professional services less than \$75,000; and for Public Works Agency (PWA) construction contracts under \$100,000 and under \$25,000 for non-PWA. Firms should be fairly rotated in and out of the pool (for example, every three years). The ALCOLINK software should make this more feasible. County will conduct outreach to build these pools with certified mail and follow-up telephone calls.

ESG Response:

The ESG advocates development of qualified vendor pools that meet SLEB Program requirements for goods and services and GSA-ECOP goals for construction projects and the ongoing monitoring of local business utilization through the Compliance System.

Use Direct Contracting As A Means to Award Small Contracts

COMMUNITY ADVISORY GROUP RECOMMENDATION, page 16:
We concur, as long as the County is bound to utilize the goals for VSLBEs and SLEBs

ESG Response:

The ESG concurs with the Mason-Tillman Associates (MTA) recommendation that construction support services should be awarded as direct contracts. The ESG will continue to award construction support services to small businesses under the current SLEB Program and ECOP.

Revise Bonding and Insurance Requirements

COMMUNITY ADVISORY GROUP RECOMMENDATIONS, Pages 16 and 17:

We concur with this recommendation, with the following modifications:

- Analyze bonding on a case by case basis to insure the appropriate level of bonding, if bonding is necessary at all not only for construction but for professional services contracts. Small firms are considered a liability in trying to get large bonds - the high cost of bonding is exclusionary; small companies must go at risk to take on high levels of bonding.

EXECUTIVE STEERING GROUP RESPONSE TO CAG RECOMMENDATIONS

ESG Response:

The ESG concurs with this recommendation and will continue to review each project's bonding requirements. A bonding/insurance assistance program was implemented by Risk Management through a contract with Merriwether and Williams Insurance Services, which has developed a contractor assistance program to build the capacity of qualified Small Local Emerging Business (SLEB) contractors to compete for County construction contracts.

- The Office of Contract Compliance/county should assist firms so they can become bond ready. Analysis of their situation to figure out how to assist them in applying for bonding should be a service provided.

ESG Response:

The Bond Assistance Program as implemented by Risk Management will help firms to become "Bond Ready" and assist them in applying for bonds.

- The County can establish relationships for bonding and loan assistance with insurance agents and banks and utilize appropriate financial development corporations to provide loan and bond guarantees. This can be partial or total bond assurance.

ESG Response:

The Risk Management Bond Assistance Program will work with firms and refer them to the appropriate parties that will be able to provide assistance.

- Develop a bonding and finance program for SLEBs and VSLBEs for contracts \$100,000 - \$5 Million.

EXECUTIVE STEERING GROUP RESPONSE TO CAG RECOMMENDATIONS

ESG Response:

The Risk Management Bond Assistance Program has developed a bonding and finance program.

- The County should require primes to participate in Owner Controlled Insurance Program (OCIP) for contracts over \$5 million and extend the coverage to sub tier subs.

ESG Response:

The ESG generally concurs with the original MTA recommendation. The GSA and Risk Management Departments are currently working on developing an OCIP program for the Alameda County Medical Center acute tower replacement project.

Phase Bonding and Retainage Requirements

COMMUNITY ADVISORY GROUP RECOMMENDATIONS, Pages 17 and 18:

- Phases of Bonding Requirements: Bonding requirements can be set at phases instead of bonding the entire project at one time. For example, a two million dollar project can be performed in four or five phases (bond at each phase and then roll the bond over to the next phase). Realistically, a firm can only do so much of the project at one time. Note that we can not concur with the Mason Tillman bonding recommendation because bonds will not be proportionally released. Historically, surety companies have not released bonds proportionately.

ESG Response:

The ESG concurs and will continue to phase projects to allow small businesses to bond.

- Reduction of the retention after 50% of the work is done: Sub-contractors are paid 60 days after the project is signed off as completed including the retention. We are recommending that after 50% of the work is complete the sub-contractor's retention should be reduced to 5%.

EXECUTIVE STEERING GROUP RESPONSE TO CAG RECOMMENDATIONS

ESG Response:

The ESG concurs that bonds could be released. The ESG also concurs with its original response to the MTA recommendation – that the current practice of giving County Project Managers discretion to do this on a project by project basis should be adopted as Board policy.

Review Bids and Proposals for Goal Attainment

COMMUNITY ADVISORY GROUP RECOMMENDATION, Page 18:

Listing and Utilization of Sub-Contractors:

- Listings: Prime Contractors should be required to list all sub-contractors when the bid is submitted.
- Analysis: Bid analysis shall be performed by an independent third party (not the office of compliance).
- Prior Performance: Assess whether primes have a satisfactory record of performance and compliance with applicable statutes and regulations, including health, safety, labor and employment to the extent allowable by the law.

ESG Response:

The County is currently requiring prime contractors to list all sub-contractors when a bid is submitted.

Post-award Activities

Develop an Expedited Payment Program

COMMUNITY ADVISORY GROUP RECOMMENDATION, Page 19:

This recommendation should apply to LBEs, VSLBEs SLEBs, and M/WBEs:

- Timely Payment: The sub-contractor invoices the prime contractor 25 days after the start of work; the prime bills the county by the 30th day. The County should cut the check within 1-5 days after receiving the prime contractors' invoice and send it to the prime; the prime should send the money to the sub-contractor within 5 days. This would result in the SLEB's being paid 15 days after they submit their invoice. If there is an

EXECUTIVE STEERING GROUP RESPONSE TO CAG RECOMMENDATIONS

unjustified delay in payment a reasonable interest rate (1.5% per month) will be to the prime and thus extended to the sub.

- Expedited Payment for VSLBES: VSLBES should be paid within 15 days of invoicing the County.
- Compliance/Enforcement: The County should track the payments on a secure web-based system. If sub-contractors are not paid, the County should withhold from the prime the amount they have not paid to the sub in the prime's next progress payment. The amount is released only with proof of payment.
- Monitoring: The County should continue to monitor the length of time for payment and report annually. County department heads should be held accountable for timely processing of paperwork through their department (e.g. 5 days).

ESG Response:

The ESG recommends utilizing the compliance system to monitor payments received and acknowledged by primes and subcontractors and, when necessary, addressing prompt payment issues.

Pay Mobilization for SLEB Firms

COMMUNITY ADVISORY GROUP RECOMMENDATION, page 19:

- Revolving Loan Fund: Develop a revolving loan fund for VSLBES, SLEBs M/WBEs to use if the contract specifications do not have mobilization funds (e.g. Architectural and Engineering contracts or consulting contracts).
- Mobilization Funds: Mobilization funds should be applied to sub-contractors just as mobilization funds are applied to the prime in the contract specifications.

ESG Response:

The ESG concurs with its original response that payment of such funds is not a prudent financial practice, and instead, the ESG recommends the Board consider the establishment of a revolving loan program with established criteria and repayment provisions for qualified contractors.

EXECUTIVE STEERING GROUP RESPONSE TO CAG RECOMMENDATIONS

Give five-day notice of invoice disputes and grant project managers line item approval for submitted invoices

COMMUNITY ADVISORY GROUP RECOMMENDATION, page 20:
The County should develop a policy that allows for the settlement of payment disputes between subs and primes over payment in 10 days or less.

ESG Response:

The ESG concurs with the MTA recommendation to give a five-day notice of invoice disputes and grant project managers line item approval for submitted invoices and will continue this procedure.

Develop formal subcontractor substitution standards

COMMUNITY ADVISORY GROUP RECOMMENDATIONS, pages 20 and 21:

- Changes to Scope of Work: Prime contractors should not be allowed to increase or decrease the sub-contractors' scope of work, unless a change order is submitted to the Office of Contract Compliance that increases or decreases the scope of work and contract amount.

NOTE: The reduction in the scope of work or contract value can not be considered as a substitution because there may be legitimate reductions in the scope by the prime contractor of the County. It is only a substitution when the scope of services for a sub-contractor is reduced and that same work is performed by another subcontractor or the prime contractor.

- Self-performance: Prime Contractors should not be allowed to self-perform in lieu of Sub-contractors; unless the prime is a small business and the impacted sub is not.
- Process: The prime contractor must send a letter to the sub-contractor about unresolved deficiencies by certified mail, if they are requesting to remove the sub from the contract. The sub-contractor has 5 days to respond by certified mail. Copies of both letters must be sent to the Project Manager within 5 days. Within 5 days the prime must send a letter requesting substitution to the County. The County must set a substitution hearing within 5 days of receiving the request for substitution from the prime contractor. The hearing must happen no later than 10 days after the County has set the date. The County's decision is final and must be made in writing within 10 days.
- Compliance: If there are three or more of these unresolved differences on a job it should trigger an investigation by the office of contract compliance.

EXECUTIVE STEERING GROUP RESPONSE TO CAG RECOMMENDATIONS

ESG Response:

The ESG concurs with the original MTA recommendation and advocates continuing the practice of mirroring substitution requirements as outlined in the California Public Contract Code applicable to construction contracts. Any reduction in the scope of work or contract value of a subcontract should be considered as a substitution.

Implement Construction Project Management Best Practices

COMMUNITY ADVISORY GROUP RECOMMENDATION, Page 21:

Prime contractors on large County projects will be encouraged to provide training to new subcontractors that they have taken on to help meet the small business goals and provide 1-5 sessions of "best practice" training.

ESG Response:

The ESG concurs with the original MTA recommendation to implement the Construction Project Management Best Practices, including: timely inspections, avoidance of Critical Path Method Schedules on smaller projects, answering requests for information promptly, and provision of timely feedback and constructive criticism.

Post Prime Contract and Sub-Contract Awards on the Internet

COMMUNITY ADVISORY GROUP RECOMMENDATION, page 21:

We concur with the MTA recommendation to post prime contract and subcontract awards on the County's website.

ESG Response:

The ESG concurs with this recommendation and notes that a Contract Award website to post prime and subcontract awards has been developed and is currently online on the County's GSA Department site and easily accessed by clicking on the Awards link.

Conduct Routine Post-Award Contract Compliance

EXECUTIVE STEERING GROUP RESPONSE TO CAG RECOMMENDATIONS

COMMUNITY ADVISORY GROUP RECOMMENDATION, page 22:

We concur that the Office of Contract Compliance is responsible for insuring that the contracting and procurement policies are implemented and are able to collect copies of checks, penalize prime and subcontractors for non-compliance, fine prime contractors for non-approved substitutions, and include provisions for liquidated damages if a contract is breached due to non-compliance with these provisions.

The Community Advisory Committee also recommends that the office of Contract Compliance monitor that the contractor also comply with all applicable federal and state laws, including health, safety, labor and employment, to the extent allow able by the law.

ESG Response:

The ESG concurs with the original MTA recommendation that routine and rigorous contract compliance monitoring should be conducted to ensure that LBE, SLEB, and M/WBE goals are met throughout the duration of a contract.

Assess the Use of Sole Source Contracts

COMMUNITY ADVISORY GROUP RECOMMENDATION, page 22:

We agree that all sole source contracts and purchase orders above \$10K should be reviewed, tracked, and posted to determine if LBE, SLEB, and M/WBE goals, as well as VSLBE goals, can be applied.

ESG Response:

The ESG concurs with the original MTA recommendation to review all sole source contracts and track them by industry. The Board of Supervisors has adopted a sole source policy that is administered by the General Services Agency.

Conduct a Utilization Analysis of Purchase Card Procurement

COMMUNITY ADVISORY GROUP RECOMMENDATION, page 22:

We agree that purchase order/card procurement should be analyzed and reviewed.

EXECUTIVE STEERING GROUP RESPONSE TO CAG RECOMMENDATIONS

ESG Response:

The ESG concurs with the original MTA recommendation and the Auditor-Controller's Office is conducting an ongoing analysis of purchase card procurements. Credit card purchases amount to approximately 3% of the total County purchases. Credit card companies currently cannot provide us with ethnicity and gender information. We are currently working with County departments that use credit cards to secure the required information.

Additional Contracting and Procurement Recommendations from the Advisory Committee, page 23

- Small Business/Contractor Training: For contracts over \$15 Million, the Prime Contractor must provide capacity building and training in conjunction with existing county programs.

ESG Response:

The ESG believes that this recommendation:

- may impact cost of County contracts, and notes that
- the County provides/promotes contractor training through the Small Business Development Center Alliance and the Federal Training Center

- Exclusion of the Pre-Qualification Screening by Prime Contractors: County (Board of Supervisors) must approve prequalification screening from primes that excludes county certified small local businesses.

ESG Response:

The selection of subs by a prime contractor during the bidding process is at the discretion of the prime contractor. However, if goals are not met, the contractor and the County must continue their outreach efforts.

- Continued Search for Small and Local Businesses to meet County Goals: If the Prime has not met the goal for small/local, etc. the Prime and County must continue to outreach to small local businesses for the duration of the job.

ESG Response:

The ESG concurs for those parts of the work for which a prime has not already sub-contracted.

PART 4: ADMINISTRATIVE

ORGANIZATIONAL STRUCTURE

D1:

COMMUNITY ADVISORY GROUP RECOMMENDATIONS, page 24:

We concur with the development of a fully funded and staffed Office of Contract Compliance as put forward by Mason Tillman with the following changes: The Office of Contract Compliance should be housed in the Auditor Controller's office, and we would add the category of VSLBE to the list of firms that receive special outreach.

Pre and Post Outreach should be defined as: Sending an e-mail and a letter by certified mail and follow-up telephone calls to firms that have not responded to the certified letter. A log needs to be kept of the follow-up calls.

ESG Response:

The ESG concurs with the CAG recommendation that the Compliance Office will be housed in the Auditor-Controller's Office. It was established there on July 1, 2008.

DATA MANAGEMENT

COMMUNITY ADVISORY GROUP RECOMMENDATIONS, page 24:

The Committee would like to acknowledge and commend the County Departments, because we understand that they have or are in the process of implementing numerous administrative recommendations put forward by Mason Tillman. Therefore we are only asking confirmation/status reports on the following:

- Status of the ALCO Link system being used to track contracts –

ESG Response:

The ALCOLINK Contracts Module has been implemented and enhanced to better interface with the new County Compliance System to provide business utilization and compliance data.

- Status on the collection of ALCO Link for data collection(page 25)

EXECUTIVE STEERING GROUP RESPONSE TO CAG RECOMMENDATIONS

ESG Response:

The ALCOLINK/Compliance System interface has been completed.

- Can the County provide a summary of the recommendations being implemented and their suggested implementing practices?

ESG Response:

See Attachment

- Recommend the County publish the utilization reports monthly or quarterly and formally submit them to the Board of Supervisors

ESG Response:

The ESG concurs with this recommendation and is planning to continue to distribute utilization reports quarterly to the Board of Supervisor's PCPC.

**ACCOMPLISHMENTS OF COUNTY STAFF IN RESPONSE TO THE
AVAILABILITY REPORT AND CAG AND ESG RECOMMENDATIONS**

In the area of changes and implementation of new policies, we are pleased to report the following accomplishments:

- Contracts under \$25K are now targeted to SLEB contractors, if none are available after our search and notification procedures, these are targeted to other Local Businesses.
- Direct Contracting to award small contracts has been implemented. Examples of this are hazardous materials abatement, site preparation, and trenching for utilities.
- Contracts over \$25K now include 5% Local and 5% SLEB bid preferences.
- Non-SLEB contracts for goods and services now require a minimum of 20% SLEB participation.
- The Enhanced Construction Outreach Program (ECOP) has been implemented for GSA construction projects over \$100,000. This includes 60% Local Participation; 20% Small Local Participation; 15% Minority Business Enterprise Subcontractor, and 5% Women-owned Business Subcontractor.
- Large procurement projects have been unbundled. Examples include: printing services, temporary services, and training.
- All procurement has been centralized in GSA to insure adherence to the policies.
- A web site has been developed and implemented for the Sole Source Policy to insure SLEB requirements are met.

In the area of changes and implementation of new procedures, we are pleased to report the following accomplishments:

County-wide contracts are now reviewed prior to rebidding for unbundling opportunities. Examples include: Contracts for office goods and paper products.

Bids and requests for proposals are now reviewed prior to their being issued for compliance with SLEB and Construction Outreach Programs.

EXECUTIVE STEERING GROUP RESPONSE TO CAG RECOMMENDATIONS

Changes and implementation of new procedures, continued:

A procedure has been implemented for a 5-day notice of invoice disputes. No invoice disputes have been submitted to date.

Updates have been made to the ALCOLINK Contracts Module and the Vendor Database so that they now include ethnicity, gender, award amounts and SLEB data. This has greatly enhanced our reporting capabilities.

The Elation System was implemented July 1, 2008. This system allows the County to monitor contractual labor and utilization requirements, report out Construction Outreach and SLEB Program compliance, and include procurement guidelines and participation in staff training.

The Small Business Capacity Building program has been implemented, which includes exclusive bid solicitation from certified County small and emerging businesses to foster growth of these firms.

Other Accomplishments of Note

- Approximately 1,000 SLEBS have been certified by the County
- A Contract Administration Guide has been developed and widely distributed to assist in contract management
- A Uniform Procurement Manual (UPM) has been developed to create an online (intranet) central repository for all of the County's procurement policies. It is centrally updated and always current, and a resource for all departments to insure consistency of application of all procurement procedures.
- A contract has been awarded by Risk Management to develop our new Bond Assistance Program
- Staff training, in the form of a Procurement Overview Workshop, Module I, has been developed. Over 300 staff from the departments and agencies has been trained. An online tutorial and Module II of the training program are now in development.
- An alliance has been formed with Cal State East Bay and the Small Business Development Center (SBDC) for contractor training and outreach
- Year-round training and outreach for small business has been developed and implemented. The training includes; How to do Business with Alameda County; The Construction Management Program, and How to Become Certified.

EXECUTIVE STEERING GROUP RESPONSE TO CAG RECOMMENDATIONS

- The Contract Compliance Office has been transferred to the Auditor-Controller Agency effective July 1, 2008.
- The County has received positive publicity for its efforts, having been featured on "Bay Area Business Today" with a highlighting of our contracting efforts and outreach to the Small Local Business Community.

**PROCUREMENT AND CONTRACTING
COMMUNITY ADVISORY GROUP**

Final Recommendations

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PART 4: ADMINISTRATIVE RECOMMENDATIONS

INTRODUCTION

In 2003 Alameda County commissioned Mason Tillman and Associates LTD to conduct an Availability Study. The purpose of the Study was to examine the County's use of local, small, women owned, and minority owned vendors. The Availability Study contains data and detailed analysis of the County's contracting practices and a number of recommendations to improve the County's contracting opportunities with local, women and minority owned firms. The Study was presented to the Board of Supervisors; and after receiving the Study, the Board of Supervisors directed Susan Muranishi, The County Administrative Officer to assemble an Executive Steering Group of County employees to respond to the recommendations put forward in the Mason Tillman Study.

The Mason Tillman Study and the County Response, Review and Analysis of the County Availability Study were presented to the Board of Supervisors and the Supervisors referred both documents to the Procurement and Contracting Committee, which is Co-Chaired by Supervisors Haggerty and Carson. The Committee Co-Chairs assembled a Community Advisory Group; each member of the Board appointed one member to the committee, with other members being selected as a result of their expertise in business and/or contracting. The committee members consisted of business owners, representatives of labor, members of the municipal and ethnic chambers of commerce and contracting consultants.

Members of the Community Advisory Group:

Cecelia Chang, Executive Director Justice for New Americans
Jeanne Chiang, Member, Mason Tillman Availability Study, Community Task Force
Geoffrey Pete, Vice-Chair, Oakland Black Caucus
Kaye Stevens, President/CEO AMG & MECCA, Inc.
Kim McCoy Wade, Representative, Alameda County Central Labor Council
Jesus Vargas, Hispanic Chamber of Commerce of Alameda County
Kelvin McCaskle, Oakland African American Chamber of Commerce
Arthur Washington, Senior Vice-President, NorCal, FDC
Gerrie Chui, Oakland Chinatown Chamber, Director
Billy Sandbrink, Fremont Chamber of Commerce
Tim Hunt, Alameda County Newspaper Group
Ed Dillard, President & CEO, Oakland Black Board and Trade
Shonda Scott, Chair, Alameda County Human Relations Commission

Community Advisory Group Staff:

Rodney Brooks, Chief of Staff, Supervisor Keith Carson
Chris Gray, Chief of Staff, Supervisor Scott Haggerty

The Advisory Group met for over a year reviewing and analyzing the Mason Tillman Availability Study and the County's response. This Document is the Advisory Committee's

recommendations and responses to the Mason Tillman Availability Study and the Review and responses put forward by the County Executive Steering Committee. In the Race Neutral; Procurement and Contracting; and Administration sections of this document, we have summarized the recommendations by Mason Tillman and the responses by the Executive Steering Committee and then added the Advisory Group's recommendations. In the Race Conscious section, the Advisory Group has put together one comprehensive recommendation.

The members of the Advisory Committee would like to extend their deepest gratitude to the Board of Supervisors for allowing us to serve Alameda County in this capacity and providing the venue to hold our meetings.

DEFINITIONS

Very Small Local Business Enterprise (VSLBE): $\frac{1}{4}$ the size of SBA definition for small and fewer than 20 employees at the time of contract award.

Small Local Emerging Business (SLEB): A County program which provides preferences to small local and emerging local businesses. "Small" is defined as the Small Business Administration (SBA) definition for small in each business category. "Emerging" is defined as $\frac{1}{2}$ the size of the SBA definition of Small in each category.

Small Business Administration (SBA): A State and Federal designation for a firm's size that is deemed as "small" based on revenue and/or personnel size. A certification letter is typically accomplished by this designation.

Local Business Enterprise (LBE): A business that has a business license that has been issued by a city in Alameda County or by the County itself. The business must be located in the County for at least 6 months to be considered local.

Minority Business Enterprise (MBE): A business where at least 51% is owned by a person of color.

Women Business Enterprise (WBE): A business where at least 51% is owned by a woman

Z score: A commonly used statistical equation to determine how far away a unit is from the average. In our recommendations, the formula will be used to determine if an ethnic, gender or geographic group is statistically underutilized.

Executive Steering Group (ESG): The County Executive Steering Committee is made up of staff from various public agencies in Alameda County and Chaired by Susan Muranishi; the membership has an understanding of small business outreach goals and policies promoting the involvement of small business.

Community Advisory Group (CAG): An advisory group made up of volunteers recommended by the County Staff and/or County Supervisors who have an interest in promoting small business participation.

Good Faith Effort: A Good Faith Effort is the documented action taken by a bidder or proposer that seeks to justify having a reduced small business (or minority/women business) goal set for a specific project or excused from achieving those goals.

SECTION 1: RACE AND GENDER NEUTRAL

Reconsideration of the County's Small Business Definition

MASON TILLMAN RECOMMENDATION: The County's definition of small business must serve to better differentiate between types of industry and size segments to ensure that County's firms are competing with firms of like size, a necessary condition to achieve the County's equity goals. The County should define small, local business size as a firm with 20 or fewer employees, reflecting the local business demographics.

EXECUTIVE STEERING GROUP RESPONSE: The Executive Steering Group (ESG) recommends instead that the County continue to use the Small Business Administration's standard of company size based on dollars by industry code to be consistent with community standards used by similar entities, and that the County keep its current SLEB program in place with modifications recommended elsewhere in this report.

COMMUNITY ADVISORY GROUP RECOMMENDATION:

- Keep current Small, Local Emerging Business (SLEB) program, and add enhanced preferences for emerging businesses.
- Create a Very Small Local Business Enterprise (VSLBE), like the Port, for businesses with fewer than 20 employees and ¼ of the dollar amount of the SBA definition.

Proposed Local and Small Local Business Enterprise Program

MASON TILLMAN RECOMMENDATION: The County should consider revising its SLEB program by creating a Local (LBE) and Small Local Business Enterprise (SLBE) program that applies to all County contracts, including construction contracts. The LBE category is defined as a firm that has had a fixed office and street address within the County for at least six months and a verifiable business license issued by the County or a City within the County. The firms' officers must be domiciled in the County. The County should certify firms as LBEs. The SLEB category would be a firm that meets the above requirements and has 20 employees or fewer.

EXECUTIVE STEERING GROUP RESPONSE: It is recommended that the County keep its current SLEB program in place with modifications recommended elsewhere in their report. The County currently requires six months residency for local businesses. The proposal to require the officers of local businesses live within the County may have the effect of limiting the availability of local firms. County Counsel has also advised the ESG that requiring the principals to live in the County appears to be illegal. None of the other entities surveyed for best practices, such as EBMUD, ACTIA, Prot of Oakland, and City of Oakland have implemented or are considering such a requirement.

COMMUNITY ADVISORY GROUP RECOMMENDATION: Continue the existing SLEB program and provide enhanced preferences for emerging businesses. Adopt a Very Small Local Business Enterprise (VSLBE).

Program Participation Goals

MASON TILLMAN RECOMMENDATION: Goals should be established as a target for the participation of LBEs and SLEB's in the County's Contracts, as follows:

- Contracts over \$100,000 – 60% LBE and 20% SLEB
- Contracts under \$100,000 – 60% SLEB and 20% LBE
- Contracts under \$25,000 – All such contracts should be targeted to SLEBs that are in the emerging category.

EXECUTIVE STEERING GROUP RESPONSE: The ESG concurs that goals should be set.

For contracts under \$25,000, we recommend that the County adopt a policy that mirrors its existing practice to maximize the use of SLEBs.

For contracts over \$25,000, a 60% goal is recommended; 20% SLEB plus an additional 40% local requirement. This category will be reassessed and the goals adjusted as the available vendor pool is expanded.

There may be some constraints in the public contract code (PCC) that will inhibit our achieving the goals in the construction area. The ESG recommends that prime contractors be required to report their progress in achieving compliance on a monthly basis with payment invoice submissions and that all contracts include financial penalty clauses in the area of retention for not meeting agreed upon goals.

COMMUNITY ADVISORY GROUP RECOMMENDATIONS

The Community Advisory Committee recommends the following goals for various areas of contracting.

Local Business and Small Business Goals for Non Public Works Agency Contracts (Non-PWA)

Contract Type	Contract Size	LBE Goal*	SLEB Goal	VSLB E
Construction	\$500k++	70%	30%	
	\$26k to \$499k	70%	30%	
	\$0 to \$25k **	N/A	N/A	100%
A&E Prof Services	\$500k++	40%	20%	
	\$76k to \$499k	40%	20%	
	\$0 to \$75k **	N/A	N/A	100%
Goods	\$500k++	50%	30%	
	\$26k to \$499k	50%	30%	
	\$0 to \$25k **	N/A	N/A	100%

Notes: * LBE is inclusive of SLEB Goals.

** This goal will jump-start an increase in Small Business participation.

Local Business and Small Business Goals for Public Works Agency Contracts (PWA)

Contract Type	Contract Size	LBE Goal*	SLEB Goal	VSLBE
Construction	\$500k++	50%	30%	
	\$100k to \$499k	50%	30%	
	\$0 to \$99k **	N/A	N/A	100%
A&E Prof Services	\$500k++	40%	20%	
	\$76k to \$499k	40%	20%	
	\$0 to \$75k **	N/A	N/A	100%
Goods	\$500k++	50%	30%	
	\$26k to \$499k	50%	30%	
	\$0 to \$25k **	N/A	N/A	100%

Notes: * LBE is inclusive of SLEB Goals.

** This goal will jump-start an increase in Small Business participation.

The Public Works goals only apply to projects that receive no Federal Funding

Local and Small Local Business Enterprise Good Faith Efforts

MASON TILLMAN RECOMMENDATION: Bidders on County contracts should be required to meet the LBE and SLEB goals, or demonstrate a Good Faith Effort (GFE). A waiver provision must be available to address circumstances where LBE or SLEB goals cannot be met. Bidders failing to meet the LBE or SLEB goal or demonstrate a GFE would be deemed non-responsive.

EXECUTIVE STEERING GROUP RESPONSE: The ESG concurs with this recommendation as applied to construction contracts. The California Public Contract Code (PCC) does not contain a process for meeting goals for small or local subcontractor participation in construction projects, nor a Good Faith Effort in lieu of such participation. The ESG proposes review of the effectiveness of current GFE processes used for minority and women business enterprises for potential application to ensure small and local subcontractor participation in construction projects. A pilot project team will continue to analyze and make any needed modification to good faith effort policies.

It is agreed, and has already been implemented, that bidders and proposers on County contracts be required to meet the SLEB Goals or demonstrate a GFE, and that GFEs upon Board approval would be applicable to any County contract. The County has a waiver policy that is enforced to address circumstances where SLEB goals cannot be met.

COMMUNITY ADVISORY GROUP RECOMMENDATIONS:

Compliance/Enforcement

Prime Contractor Responsibilities Pertaining to Good Faith Efforts:

The prime-contractor must sign, under penalty of perjury, that all of the information in the bid submission is true. If they have submitted a false document the contractor may be subject but not limited to: being banned from applying for a county contract for three years and/or being penalized 10% of the contract cost.

County Responsibilities Pertaining to Good Faith Efforts:

The County will send a certified letter to the sub-contractors which the prime contractor has listed as sub-contractors in their bids, and follow-up to confirm the sub-contractors has agreed to work on the job. The County will acquire a copy of the final estimate given to the prime contractor by the listed sub contractor. The County Project Managers assigned to specific projects must sign a document "under penalty of perjury" verifying the review of all bid documents and the completion of all progress payments.

Audits:

The County will conduct random audits for contracts over \$250K. The cost of the audit should be added to language of the contract and paid for by the successful bidder.

Preferences/Incentives

Preferences for LBEs:

Prime Contractors who meet the goals of sub-contracting with local businesses will be given an additional 10 point bid preference and their bid will be considered 4% lower than the actual dollar figure submitted (for the sake of scoring only.)

Preferences for SLEBs:

For Construction contracts under \$10 Million, and Architectural and Engineering Contracts under \$3 Million, an additional 5% preference will be given to SLEB contractors.

Proposed Geographic Equity Program within Alameda County

MASON TILLMAN RECOMMENDATION: Not addressed

EXECUTIVE STEERING GROUP RESPONSE: N/A

COMMUNITY ADVISORY GROUP RECOMMENDATION: The Mason Tillman study identified disparities in the number and dollar amount for contracts awarded to businesses the various cities within Alameda County based on the populations in those cities.

The Advisory Group made the following recommendations:

- The County should explore establishing a program to develop geographic diversity goals for underutilized businesses in each of the four county regions based on a Z score analysis.
- The County will outreach to businesses in regions that are underutilized to attract vendors and contractors and identify those ready, willing, and able to do business with Alameda County.
- Statistical Analysis: The Office of Contract Compliance will review the contract awards and payments every year, calculate the actual dollar amounts awarded, and percentage of contract dollars awarded and received by firms in each of Alameda County's four regions. The regions of the county are: Tri-City, Tri-Valley, Mid County, and North County. (The delineation of these regions to be developed.)
- The County will outreach to businesses in underutilized regions to alert them to opportunities to bid under the SLEB and VSLBE programs.
- If after three years of monitoring the geographic data, identified inequities are not corrected, goals will be established with a 5% assigned evaluation bonus to be given to firms in the underutilized geographic areas (within Alameda County) or a 5% bid discount for contract bids from contractors in the same area. A maximum of 15% evaluation bonus (points) will be the highest amount achieved by all of the possible

bonus elements. The firm's headquarters will be the basis for the evaluation. Firms having only a non-corporate small / field office (or only a post office box) in the underutilized regions will not qualify for the 5% bonus or bid discount.

Section 2: Race and Gender Conscious Recommendations

Note: In this segment the Community Advisory Group is submitting one comprehensive recommendation. There are no responses by the Advisory Group to the recommendations by Mason Tillman or the Executive Steering Group in this section.

Formal Prime Contract Remedies

Evaluation Credits

MASON TILLMAN RECOMMENDATION: Evaluation credits should be given to statistically significant underutilized groups on Architecture and Engineering and Professional Services contracts. Targeted firms would receive 15% of the assigned evaluation points which would be applied to the rating for formally awarded contracts under \$500,000.

EXECUTIVE STEERING GROUP RESPONSE: The ESG can not recommend this approach at this time.

Informal Prime Contract Remedies

Sheltered Market

MASON TILLMAN RECOMMENDATION: A Sheltered Market program could be established for informal contracts.

EXECUTIVE STEERING GROUP RESPONSE: Other local agencies surveyed for best practices...have not adopted a Sheltered Market Program as their practice. However, establishment of a "Business Development Fund" is recommended.

If the County were to pursue the establishment of a specific race and gender conscious program to increase participation of underutilized groups the two options described below could be considered for implementation.

Option 1: Sheltered Market Program

Option 2: Minority, Women, and Other Business Enterprise Program

County Staff Good Faith Efforts

MASON TILLMAN RECOMMENDATION: County staff with informal contract purchasing authority should be required to document a GFE to solicit quotes from the statistically significant underutilized groups.

EXECUTIVE STEERING GROUP RESPONSE: If the County wished to limit initial outreach and quote solicitation to underutilized groups, it would have to establish the contractor qualification criteria and identify the groups and services to be documented.

Subcontractor Remedies

Overall M/WBE Subcontracting Goals

MASON TILLMAN RECOMMENDATION: An overall goal reflecting the availability of the statistically significant underutilized groups as calculated in the Study should be established as a target for the participation of the underutilized groups in the County's subcontracts. The overall goal should be reviewed every three to five years.

EXECUTIVE STEERING GROUP RESPONSE: The ESG concurs with the recommendation that contracting goals be adjusted regularly to reflect the availability of contractors for the specific work being bid. Other local agencies... have not adopted M/WBE goals as their practice... If the County decided to proceed with a more targeted program that focuses on underutilized groups, target goals and contractor criteria will have to be established.

Contract-Specific M/WBE Subcontracting Goals

MASON TILLMAN RECOMMENDATION: Contract specific M/WBE subcontracting goals should be set on all construction, architecture and engineering, and professional service contracts. These goals should reflect the actual availability for each contract that is advertised. The County will need to maintain a current database with available M/WBE and non-M/WBE firms willing and able to perform contracts.

EXECUTIVE STEERING GROUP RESPONSE: We recommend the County maintain its current practices, as amended in our response to program participation goals. If the County were to change these goals, resources would be required for ongoing development and maintenance of a database of statistically significant underutilized available firms by ethnicity.

Weighted Good Faith Efforts

MASON TILLMAN RECOMMENDATION: The development of detailed and quantifiable GFE criteria that establishes minimum behavior required to demonstrate an attempt to meet the subcontracting goals should be developed. It should measure a prime contractor's efforts to meet the M/WBEs subcontracting goals, and should include a

minimum score for the prime contractor to demonstrate a Good Faith Effort. A prime contractor not meeting the minimum score would be deemed non-responsive.

EXECUTIVE STEERING GROUP RESPONSE: Subcontracting goals are set for each construction project. A review of best practices did not demonstrate that using weighted GFE would result in an increase of minority and women subcontractor participation.

Disadvantaged Business Enterprise Programs

MASON TILLMAN RECOMMENDATION: Federal DBE subcontracting goals should be utilized whenever federal dollars are used to procure products or services.

EXECUTIVE STEERING GROUP RESPONSE: The County's current SLEB Program already requires that the Prime be certified as local or that the prime subcontract 20% of the business to a certified SLEB(s)

COMMUNITY ADVISORY GROUP RECOMMENDATIONS:

In other sections of this document the Community Advisory Group has responded to the recommendations and suggestions put forward by the Mason Tillman and/or the Executive Steering Committee. For this section, the Community Advisory Group is putting forward a comprehensive race conscious proposal.

Preface: Why Implement A Race and Gender Conscious Policy

The Procurement and Contracting Committee understands that race and gender conscious recommendations must be able to pass legal scrutiny – especially meaning that a race conscious recommendation must be narrowly tailored to address past discrimination. In an effort to address current and prevent future statistically significant disparities the Procurement and Contracting Advisory Group is recommending the following policy.

Implementation of the proposed Race and Gender Conscious Policy:

Part I: Statistical Analysis. The Office of Contract Compliance will review the contract awards and payments every year, calculate the actual dollar amount awarded, and the percentage of contract dollars awarded and actual payments received by: African American Firms, Hispanic Owned Firms, Asian Owned Firms, Native American Owned Firms and Women Owned Firms.

To "Jump Start" this process, the Office of Contract and Compliance could use the statistical data used by the Mason Tillman Associates (MTA) report to determine or validate the "underutilized" categories. After the County/Office of Contract Compliance determines which groups are statistically significantly under utilized, as determined by the z score analysis specific Race and Gender Conscious strategies can be implemented. Utilization of the Mason Tillman data from the Mason Tillman Disparity Study could expedite implementation of this policy by 6-18 months. It is also recommended that an

"Advisory Oversight Group be created to monitor the collection of the actual data collected and that they meet every six months. The Advisory Oversight should include members of the Advisory Group.

If the County chooses not to use the Mason Tillman data, to determine the statistically underutilized groups, The Procurement and Contracting Advisory Group is suggesting the following sources to identify the pool of businesses that are "ready willing and able" to perform services with the County:

- Alameda County ALCOLINK Vendors
- All other Businesses that have performed business with the County or have submitted unsuccessful contract bids
- All Businesses in the SLEB Database
- The Business which responded to the Mason Tillman's outreach campaign for the Availability Study
- ACTIA's Local and Small Local Business listing
- BART's database of certified Disadvantaged Businesses
- CALTRANS Unified Certification Database
- East Bay MUD's Contract Equity Program Business Directory
- The Small and Local Business Directories from the 14 Cities in Alameda County
- The Port of Oakland's Certification Outreach Database
- U.S. Small Business Administration Procurement and Access Marketing Network
- Alameda County Public Works Business Outreach Bureau Meeting Attendee List
- American Institute of Architects: East Bay Chapter
- Associated Builders and Contractors
- Associated General Contractors
- Black Contractors Associations
- Builders' Exchange of Alameda County
- East Bay Asian Design Professional Listing
- National Association of Women Owned Business
- All Municipal Chambers of Commerce from the Cities within the County
- All of the Ethnic Chambers of Commerce in Alameda County

If the proposed office of Contract Compliance for Alameda County wishes to remove any of the businesses' from the above organizations list they must gain the approval of the Procurement and Contracting Committee.

After reviewing the contracts awards and developing a pool of businesses that are ready willing and able to work for the County; a z score analysis should be performed to determine if a businesses owned by certain ethnicities or genders are underutilized. If a business category is determined to be statistically underutilized, as determined by the "Z score", we recommend the following policies and procedures:

- Set Goals by Category: 15% for underutilized ethnic and women owned firms, 5% for underutilized gender firms.

- Create (and regularly revise) an Underutilized Pool The County will go to the underutilized pool for all informal and direct contracting. Contractors must also go to the pool when implementing substitutions.
- Outreach via Bid Advertisements/RFP/RFQs The appropriate firms in the underutilized groups will be listed as available subs on outgoing Bid Advertisements, RFP's and RFQ's; bid submissions will be considered non responsive without showing a good faith effort as defined by this Advisory Group to sub-contract with firms in the underutilized pool.
- Award Preference Points. Utilization of these firms will result in 5% preference points.
- Pursue Post Award Subcontracting Opportunities to Overcome Non-compliance with Goals, including :
 - Materials Suppliers
 - Trucking
 - Reproduction/Deliveries
 - Security (job site)
 - Staffing
 - Permit Expeditors

SECTION 3: CONTRACTING AND PROCUREMENT

Pre-award Activities

Unbundle Large Procurements Into Smaller Contracts Where Feasible

MASON TILLMAN RECOMMENDATION: Large contracts should be unbundled to maximize small business participation, according to these criteria

- Project in more than one location
- Size and complexity of the procurement
- Similarity of the goods and services procured
- Sequencing and delivery of the work
- Public safety issues and convenience
- Procurement segmentation options

Look to the Federal guidelines for concepts that could be implemented by the County in this area.

EXECUTIVE STEERING GROUP RESPONSE: The Executive Steering Group wholeheartedly concurs with this recommendation.

COMMUNITY ADVISORY GROUP RECOMMENDATION:

- Decrease the size of contracts whenever possible to allow for M/WBEs, V/SLBEs, and SLEBs to participate more frequently.
- Award contracts in phases where possible.
- Consider geographical diversity as well

Assess the Use of County-wide Contracts Annually

MASON TILLMAN RECOMMENDATION: County-wide contracts should be assessed to determine if the size prohibits competition from small businesses, if the bulk is actually several small purchases bundled into one contract, and whether the procurement is for savings or primarily for convenience. A cost-benefit analysis should be conducted to determine significant costs savings, reduction in procurement cycle time, or contractual terms and conditions advantageous to the County. Increase in personnel or administrative cost alone should not be sufficient justification for using a County-wide contract. These contracts should require supervisory and contract compliance approval.

Criteria for such contracts should be inclusion of M/WBEs in the bid solicitation, limitations of amounts, purchasing from different vendors, inclusion of factors other than price (delivery schedules, proximity of office, or use of M/WBE subcontractors), simplified specifications, and annual contracting.

EXECUTIVE STEERING GROUP RESPONSE: ESG recommends continued use of the current policy, of contracting with local firms as the prime or requiring non-local primes to subcontract 20% of the work to a certified SLEB.

COMMUNITY ADVISORY GROUP RECOMMENDATION:

- Re-bid high volume contracts. This would allow new contractors/vendors to compete for more frequent contract opportunities, including LBEs, VSLBEs and SLEBs
- Create a pool of VSLBEs firms to go to for goods and services contracts less than \$25,000; A&E and professional services less than \$75,000; and for Public Works Agency (PWA) construction contracts under \$100,000 and under \$25,000 for non-PWA. Firms should be fairly rotated in and out of the pool (for example, every three years). The ALCOLINK software should make this more feasible. County will conduct outreach to build these pools with certified mail and follow-up telephone calls.

Use Direct Contracting As A Means to Award Small Contracts

MASON TILLMAN RECOMMENDATION: Construction support services should be awarded as direct contracts.

EXECUTIVE STEERING GROUP RESPONSE: The ESG concurs with the Mason Tillman recommendation.

COMMUNITY ADVISORY GROUP RECOMMENDATION: We concur, as long as the County is bound to utilize the goals for VSLBEs and SLEBs

Revise Bonding and Insurance Requirements

MASON TILLMAN RECOMMENDATION: Bonding and insurance requirements should be evaluated to ensure that smaller contracts do not carry a disproportionately high level of coverage. The risk manager should apply the standards consistently on all solicitations. Revised standards should address bid, performance and payment bonds, general and professional liability, and errors and omissions insurance. The revised standards should consider waiving bonds for construction contracts less than \$100,000.

EXECUTIVE STEERING GROUP RESPONSE: The ESG generally concurs with this recommendation.

COMMUNITY ADVISORY GROUP RECOMMENDATION: We concur with this recommendation, with the following modifications:

- Analyze bonding on a case by case basis to insure the appropriate level of bonding, if bonding is necessary at all not only for construction but for professional services contracts. Small firms are considered a liability in trying to get large bonds - the

high cost of bonding is exclusionary; small companies must go at risk to take on high levels of bonding.

- The Office of Contract Compliance/county should assist firms so they can become bond ready. Analysis of their situation to figure out how to assist them in applying for bonding should be a service provided.
- The County can establish relationships for bonding and loan assistance with insurance agents and banks and utilize appropriate financial development corporations to provide loan and bond guarantees. This can be partial or total bond assurance.
- Develop a bonding and finance program for SLEBs and VSLBEs for contracts \$100,000 - \$5 Million.
- The County should require primes to participate in OCIP for contracts over \$5 million and extend the coverage to sub tier subs.

Phase Bonding and Retainage Requirements

MASON TILLMAN RECOMMENDATIONS:

Bonding: Prime contractor's bonds should be rolled over into the next portion and proportionally released as goods and services are accepted. Subcontractor's bonds should be released upon completion and acceptance of their portion of work.

Retainage: Subcontractor's portion of the retainage should be released once work has been completed and accepted. Retainage should be eliminated for small subcontracts and reduced for all certified M/WBEs and SLEB contractors.

EXECUTIVE STEERING GROUP RESPONSE:

The ESG concurs that bonds could be released

The County Project Managers currently have discretion; we recommend that this practice be adopted as a Board policy.

COMMUNITY ADVISORY GROUP RECOMMENDATION:

- **Phases of Bonding Requirements:** Bonding requirements can be set at phases instead of bonding the entire project at one time. For example, a two million dollar project can be performed in four or five phases (bond at each phase and then roll the bond over to the next phase). Realistically, a firm can only do so much of the project at one time. Note that we can not concur with the Mason Tillman bonding recommendation because bonds will not be proportionally released. Historically, surety companies have not released bonds proportionately.

- **Reduction of the retention after 50% of the work is done:** Sub-contractors are paid 60 days after the project is signed off as completed including the retention. We are recommending that after 50% of the work is complete the sub-contractor's retention should be reduced to 5%.

Review Bids and Proposals for Goal Attainment

MASON TILLMAN RECOMMENDATION: Prime contractors in all contracts in all industries should be required to list the LBE, SLBE, and M/WBE firms in their submissions. If they do not or make a GFE to do so, the submission should be deemed non-responsive.

EXECUTIVE STEERING GROUP RESPONSE: The ESG recommends that this strategy be implemented as part of the SLEB program on a pilot basis, evaluated for its impact, and continued only if bids are not adversely impacted.

COMMUNITY ADVISORY GROUP RECOMMENDATION:

Listing and Utilization of Sub-Contractors:

- **Listings:** Prime Contractors should be required to list all sub-contractors when the bid is submitted.
- **Analysis:** Bid analysis shall be performed by an independent third party (not the office of compliance).
- **Prior Performance:** Assess whether primes have a satisfactory record of performance and compliance with applicable statutes and regulations, including health, safety, labor and employment to the extent allowable by the law.

Post-award Activities

Develop an Expedited Payment Program

MASON TILLMAN RECOMMENDATION: An expedited payment program for LBEs, SLBEs, and M/WBEs, should be developed. When a participating firm submits an invoice, they would include an identification number that marks it for a 15 day expedited payment. Prime contractors who elect not to participate in the program will be subject to the normal contractual prompt payment clauses and penalties for non-compliance. Firm's participation in the program could be permitted to submit invoices for progress payment at two-week intervals.

EXECUTIVE STEERING GROUP RESPONSE: The ESG concurs that all vendors should receive prompt payment and prompt notification of invoice disputes. The ESG acknowledges that there is a perception in the business community that receipt of County payments may not be as timely as with other agencies.

In an attempt to correct this perception, the Auditor-Controller Agency has been monitoring the length of time for payment over the last year. To ensure prompt payments to contractors, the Auditor's office is working with departments to expedite departmental approval and submission of invoices for payment.

COMMUNITY ADVISORY GROUP RECOMMENDATION: This recommendation should apply to LBES, VSLBES, SLEBs, and M/WBES:

- **Timely Payment:** The sub-contractor invoices the prime contractor 25 days after the start of work; the prime bills the county by the 30th day. The County should cut the check within 1-5 days after receiving the prime contractors' invoice and send it to the prime; the prime should send the money to the sub-contractor within 5 days. This would result in the SLEB's being paid 15 days after they submit their invoice. If there is an unjustified delay in payment a reasonable interest rate (1.5% per month) will be to the prime and thus extended to the sub.
- **Expedited Payment for VSLBES:** VSLBES should be paid within 15 days of invoicing the County.
- **Compliance/Enforcement:** The County should track the payments on a secure web-based system. If sub-contractors are not paid, the County should withhold from the prime the amount they have not paid to the sub in the prime's next progress payment. The amount is released only with proof of payment.
- **Monitoring:** The County should continue to monitor the length of time for payment and report annually. County department heads should be held accountable for timely processing of paperwork through their department (e.g. 5 days).

Pay Mobilization for SLEB Firms

MASON TILLMAN RECOMMENDATION: Mobilization funds should be paid to all SLEB and M/WBE prime contractors regardless of industry. The amount of the mobilization could be a nominal percentage of the contract.

EXECUTIVE STEERING GROUP RESPONSE: The ESG cannot recommend this proposal, as advanced payment is not a prudent financial practice. Instead, the ESG recommends the Board consider the establishment of a revolving loan program with established criteria and repayment provisions for qualified contractors.

COMMUNITY ADVISORY GROUP RECOMMENDATION:

- **Revolving Loan Fund:** Develop a revolving loan fund for VSLBES, SLEBs, M/WBES to use if the contract specifications do not have mobilization funds (e.g. Architectural and Engineering contracts or consulting contracts).
- **Mobilization Funds:** Mobilization funds should be applied to sub-contractors just as mobilization funds are applied to the prime in the contract specifications.

Give five-day notice of invoice disputes and grant project managers line item approval for submitted invoices

MASON TILLMAN RECOMMENDATION: Give five-day notice of invoice disputes and grant project managers line item approval for submitted invoices.

EXECUTIVE STEERING GROUP RESPONSE: The ESG concurs with this recommendation.

COMMUNITY ADVISORY GROUP RECOMMENDATION: The County should develop a policy that allows for the settlement of payment disputes between subs and primes over payment in 10 days or less.

Develop formal subcontractor substitution standards

MASON TILLMAN RECOMMENDATION: The subcontract substitution requirements for all contracts in all industries and should mirror those outlined in the California Public Contract Code that apply to construction contracts. A subcontractor should be notified in writing of the intended substitution and afforded the opportunity to respond. Substitutions should only be allowed after the subcontractor's response and only with the approval of the County. Any reduction in the scope of work or contract value of a subcontract should be considered as a substitution.

EXECUTIVE STEERING GROUP RESPONSE: We concur with this recommendation.

COMMUNITY ADVISORY GROUP RECOMMENDATION:

- **Changes to Scope of Work:** Prime contractors should not be allowed to increase or decrease the sub-contractors' scope of work, unless a change order is submitted to the Office of Contract Compliance that increases or decreases the scope of work and contract amount.

NOTE: The reduction in the scope of work or contract value can not be considered as a substitution because there may be legitimate reductions in the scope by the prime contractor of the County. It is only a substitution when the scope of services for a sub-contractor is reduced and that same work is performed by another subcontractor or the prime contractor.

- **Self-performance:** Prime Contractors should not be allowed to self-perform in lieu of Sub-contractors; unless the prime is a small business and the impacted sub is not.
- **Process:** The prime contractor must send a letter to the sub-contractor about unresolved deficiencies by certified mail, if they are requesting to remove the sub from the contract. The sub-contractor has 5 days to respond by certified mail.

Copies of both letters must be sent to the Project Manager within 5 days. Within 5 days the prime must send a letter requesting substitution to the County. The County must set a substitution hearing within 5 days of receiving the request for substitution from the prime contractor. The hearing must happen no later than 10 days after the County has set the date. The County's decision is final and must be made in writing within 10 days.

- **Compliance:** If there are three or more of these unresolved differences on a job it should trigger an investigation by the office of contract compliance.

Implement Construction Project Management Best Practices

MASON TILLMAN RECOMMENDATION: Implement Construction Project Management Best Practices, including:

- Timely inspections
- Avoidance of Critical Path Method Schedules on smaller projects
- Answering requests for information promptly
- Provision of timely feedback and constructive criticism

EXECUTIVE STEERING GROUP RESPONSE: The ESG concurs with this recommendation.

COMMUNITY ADVISORY GROUP RECOMMENDATION: Prime contractors on large County projects will be encouraged to provide training to new subcontractors that they have taken on to help meet the small business goals and provide 1-5 sessions of "best practice" training.

Post Prime Contract and Sub-Contract Awards on the Internet

MASON TILLMAN RECOMMENDATION: Prime contract and subcontract awards should be posted to the County's website.

EXECUTIVE STEERING GROUP RESPONSE: The ESG concurs with this recommendation.

COMMUNITY ADVISORY GROUP RECOMMENDATION: We concur with this recommendation.

Conduct Routine Post-Award Contract Compliance

MASON TILLMAN RECOMMENDATION: Routine and rigorous contract compliance monitoring should be conducted to ensure that LBE, SLEB, and M/WBE goals are met throughout the duration of a contract, using the following methods:

- Collection of copies of cancelled checks to subcontractors to verify payments

- Penalize prime and subcontractors for non-compliance with the program requirements
- Fine prime contractors for non-approved substitutions
- Inclusion of a provision for liquidated damages if a contract is breached due to non-compliance with its provisions.

EXECUTIVE STEERING GROUP RESPONSE: The ESG concurs with this recommendation and have incorporated this function into the duties of the centralized compliance unit.

COMMUNITY ADVISORY GROUP RECOMMENDATION: We concur that the Office of Contract Compliance is responsible for insuring that the contracting and procurement policies are implemented and are able to collect copies of checks, penalize prime and subcontractors for non-compliance, fine prime contractors for non-approved substitutions, and include provisions for liquidated damages if a contract is breached due to non-compliance with these provisions.

The Community Advisory Committee also recommends that the office of Contract Compliance monitor that the contractor also comply with all applicable federal and state laws, including health, safety, labor and employment, to the extent allow able by the law.

Assess the Use of Sole Source Contracts

MASON TILLMAN RECOMMENDATION: All sole source contracts should be reviewed to determine if LBE, SLBE, or M/WBE goals can be applied. Sole source contracts should be tracked by industry. Sole source contract awards should be posted to the County's website on the same day each week.

EXECUTIVE STEERING GROUP RESPONSE: The ESG concurs with this recommendation.

COMMUNITY ADVISORY GROUP RECOMMENDATION: We agree that all sole source contracts and purchase orders above \$10K should be reviewed, tracked, and posted to determine if LBE, SLEB, and M/WBE goals, as well as VSLBE goals, can be applied.

Conduct a Utilization Analysis of Purchase Card Procurement

MASON TILLMAN RECOMMENDATION: Purchase Card Procurement should be analyzed to determine SLEB utilization.

EXECUTIVE STEERING GROUP RESPONSE: The Auditor's Office is currently reviewing the utilization of credit card.

COMMUNITY ADVISORY GROUP RECOMMENDATION: We agree that purchase order/card procurement should be analyzed and reviewed.

Additional Contracting and Procurement Recommendations from the Advisory Committee

- **Small Business/Contractor Training:** For contracts over \$15 Million, the Prime Contractor must provide capacity building and training in conjunction with existing county programs.
- **Exclusion of the Pre-Qualification Screening by Prime Contractors:** County (Board of Supervisors) must approve prequalification screening from primes that excludes county certified small local businesses.
- **Continued Search for Small and Local Businesses to meet County Goals:** If the Prime has not met the goal for small local etc. the Prime and County must continue to outreach to small local businesses for the duration of the job.

SECTION 4: ADMINISTRATIVE

ORGANIZATIONAL STRUCTURE

- D1: MASON TILLMAN RECOMMENDATION 1-7:** Establish a Centralized or County-wide Contract Compliance Office under the jurisdiction of the County Administrator and separate from any agency with purchasing authority; staff the Contract Compliance Office adequately; Centralize all County procurement through GSA; Develop a County-wide purchasing manual; conduct outreach and implement market strategies; recognize buyers that utilize LBEs, SLBEs, and M/WBEs; and publish LBE, SLBE, and M/WBE utilization reports on a regular basis.

EXECUTIVE STEERING GROUP RESPONSE: Currently, GSA manages the SLEB program as mandated by the Board. We concur with the recommendation to establish a pilot compliance program in the County Administrator's Office in Fiscal Year 2006-07... We concur with this recommendations.

COMMUNITY ADVISORY GROUP RECOMMENDATIONS: We concur with the development of a fully funded and staffed Office of Contract Compliance as put forward by Mason Tillman with the following changes: The Office of Contract Compliance should be housed in the Auditor Controller's office, and we would add the category of VSLBE to the list of firms that receive special outreach.

Pre and Post Outreach should be defined as: Sending an e-mail and a letter by certified mail and follow-up telephone calls to firms that have not responded to the certified letter. A log needs to be kept of the follow-up calls.

DATA MANAGEMENT

MASON TILLMAN RECOMMENDATION 1-6: Enhance ALCOLINK to perform contract compliance functions: ALCOLINK Dormant Contract Module should be utilized to track the basic prime contract information which is now not being captured except in the memo text field; Code contracts by description and industry classification in ALCOLINK; include Contract Award Amount in ALCOLINK to establish a "not to exceed amount" for the purchase order; establish one procedure for purchase orders to replace the two procedures now in place (GSA and CAO); digitally record bidders with Bid Tracking Module in ALCOLINK; and design a utilization Tracking Database linked to ALCOLINK..

EXECUTIVE STEERING GROUP RECOMMENDATION: The ESG concurs with this recommendation and are implementing People Soft Contracts Module. The County is also using contract compliance software on a pilot basis

COMMUNITY ADVISORY GROUP RECOMMENDATIONS: The Committee would like to acknowledge and commend the County Departments, because we understand that they have or are in the process of implementing numerous administrative recommendations put forward by Mason Tillman. Therefore we are only asking confirmation/status reports on the following:

- Status of the ALCO Link system being used to track contracts
- Status on the collection of ALCO Link for data collection
- Can the County provide a summary of the recommendations being implemented and their suggested implementing practices.
- Recommend the County publish the utilization reports monthly or quarterly and formally submit them to the Board of Supervisors



Memorandum

OFFICE OF THE COUNTY COUNSEL

RICHARD E. WINNIE
COUNTY COUNSEL

DATE: June 19, 2008

TO: Supervisor Scott Haggerty
Supervisor Keith Carson

FROM: Richard E. Winnie, County Counsel
Brian E. Washington, Assistant County Counsel *BEW*

CC: Susan S. Muranishi, County Administrator
Pat O'Connell, Auditor-Controller
Aki Nakao, Director, General Services Agency
Daniel Woldesenbet, Director, Public Works Agency

SUBJECT: Legal Analysis of Report by Procurement and Contracting Community Advisory Group

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2008 JUN 20 AM 11:48
ALAMEDA COUNTY AUDITOR

Your committee asked that the Office of the County Counsel review the Report by the Procurement and Contracting Community Advisory Group and provide an analysis describing the Advisory Group's recommendations, focusing on the race conscious proposals.

Summary

The California Civil Rights Initiative (commonly referred to as "Proposition 209"), as interpreted by the California Supreme Court, essentially bars the County from using race or gender-based distinctions in contracting. Since the California Supreme Court's decision in *Hi-Voltage v. San Jose*, a few public entities, including Alameda County, have continued to use race in limited circumstances on the theory that federal law requires the County to remedy discrimination that it has identified with a "*Crosby*" Study. A case pending before the California Supreme Court will test this theory and could substantially impact the viability of pursuing the Advisory Group's race/gender conscious recommendations. The Board may wish to postpone implementing the Advisory Group's recommendations until the Supreme Court decides this case -- sometime in the next three to fifteen months.

With that important background, the Advisory Group's recommendations constitute a defensible approach to continuing the County's very legally aggressive policy of maintaining race conscious programs in light of Proposition 209. Since the recommendations call for ongoing analysis of underutilization of minority and woman-owned firms in the full range of County contracting, the Advisory Group's recommendations appear to comply with federal "*Crosby*" standards.

The Advisory Group's non-race/gender recommendations also raise other legal issues. Most importantly, the Advisory Group recommends continuing, and in some cases augmenting, the County's aggressive programs to benefit local contractors. These programs raise substantial questions under state law. Miscellaneous other proposals also raise legal issues.

Race-Conscious Remedies

The operative language from Proposition 209 provides that public entities "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." In *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal.4th 537 (2000), the California Supreme Court held that a San Jose MWBE construction program that is similar the County's program violated Proposition 209, concluding that drawing distinctions based on race or gender in public contracting, even if it led to no tangible advantage, violated Proposition 209.

San Francisco and a few public entities, including Alameda County, have maintained MWBE contracting programs despite *Hi-Voltage*, arguing that federal law requires efforts to remedy discrimination identified in *Crosby* studies.¹ In April 2007, the Court of Appeal issued a decision in *Coral Construction, Inc. v. City and County of San Francisco, et al*, A107803, a case challenging San Francisco's continued use of race remedies. The Court of Appeal concluded that despite federal anti-discrimination law, Proposition 209 barred San Francisco's race and gender based program, unless the City had a *Crosby* study demonstrating that it **intentionally** discriminated on the basis of race and/or gender in the past. Since the California Supreme Court accepted review of this case, the Court of Appeal opinion cannot be cited and therefore is not binding on Alameda County or anyone else.

If the Supreme Court comes to a conclusion similar to the Court of Appeal, because the County does not have a *Crosby* study that concludes that the County has intentionally discriminated in the past, the County would not be able to maintain a race/gender based program. The *Coral* case is now fully briefed before the California Supreme Court, but a hearing date has not yet been set. Thus, the final decision could be anywhere from approximately three to fifteen months away.

If the Advisory Group's recommendations are adopted, the County will need to re-evaluate the program when the Supreme Court issues its *Coral* decision. The County may want to consider waiting to adopt the Advisory Group's recommendations until after the Supreme Court rules in *Coral*, as the decision is likely to determine whether continued use of race and gender under Proposition 209 is at all viable.

If the larger state law issues of continuing to use race/gender are overcome, the Advisory Group's recommendations constitute a defensible approach to complying with federal law by ensuring that the program is "narrowly tailored." A number of important decisions would need to be made regarding implementation, such as how often the "z scores" (underutilization measurements) would be made and which remedial programs would be selected. The legal risk of the various remedial options varies significantly. For example, setting overall goals for

¹ San Francisco has some additional arguments supporting its continued use of race and gender in contracting decisions, but the argument that federal law requires continued use of the race/gender-based considerations is by far San Francisco's strongest argument and will be the focus here.

use of underutilized firms poses significantly less legal risk than creating a pool of underutilized contractors who get exclusive access to certain contracts.

Other Legal Issues From Advisory Group Report

Aside from legal issues relating to race/gender-based remedies, the other key legal issue that the Advisory Group's recommendations touch upon is the legality of programs to promote local businesses. The California Public Contract Code specifically authorizes the County to implement contracting programs to assist small businesses. Public Contract Code Section 2002.² Section 2002(b) provides that each local entity can define "small businesses" for its purposes, and the County has used this provision to define small businesses as enterprises of a certain size that are located in Alameda County. While no case has addressed the propriety of using a local component in the "small business" definition, the Attorney General's office has informally opined that it believes having a local requirement in the definition of small business violates Section 2002. Thus, the Advisory Group's recommendations to continue and expand upon the County's programs providing benefits to local contractors would maintain the County's current, aggressive position on Public Contract Code Section 2002.³

² Section **2002** provides, in full: (a) 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 made good faith efforts to utilize small business contractors.

(b) The term "small business," as used in this section, shall be defined by each local agency.

³ A more remote legal risk, but one that also bears mentioning, is the Constitution's Privileges and Immunities Clause. To comply with the Clause, the County must be able to demonstrate that its local preferences serve a legitimate purpose and use the least restrictive means possible. Associated Gen. Contractors of California, Inc. v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987) *overruled in other part by* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). While there is authority supporting the proposition that a 5% price preference can be justified (72 Ops. Cal. Atty. Gen. 86 (1989)), the County has adopted a 10% price preference for certain small and local contractors, and numerous subcontracting and outreach programs that push the limits of the Privileges and Immunities Clause. The risk from suit on the Privileges and Immunities Clause is, however, generally low because only individual citizens have standing to bring such actions.

Overall, the Advisory Group's many recommendations on small and local preference programs constitute a modest expansion of the County's current programs, and as such, would moderately increase risk that a program could be challenged as violating state or federal law.⁴ There are a few exceptions that appear to more aggressively expand the program. For example, the Advisory Group recommends that the County "[c]reate a pool of VSLBEs firms to go to for goods and services contracts less than \$25,000." As such a program has no clear authorization in state law, it would increase legal risk to the County.

Miscellaneous Legal Issues

The following is a quick summary of the remaining legal issues raised by the Advisory Group's proposal. It bears noting that a number of proposals are phrased in general terms and some additional issue may arise as the suggestions are fleshed out and implemented:

- **Subcontractor Scope Changes:** On the Advisory Group's recommendations on formal subcontractor substitution standards, as noted in Mason Tillman's recommendation, the Public Contract Code (Sections 4100 through 4114) comprehensively regulates subcontractor substitution, and as a result, for construction contracts, the County cannot further regulate the substitution process. In forming any regulations for other contracts, the County needs to ensure that it does not interfere in the contractual relationship between prime and sub contractors.
- **Revolving/Mobilization Funds:** In adopting any recommendation to advance mobilization funds, the County must weigh its increase risk of having to seek reimbursement from the contractor if the services are not performed adequately.
- **Independent Bid Analysis:** If adopted, the Advisory Group recommendation that bid analysis be performed by an independent third party would reduce the County contracting department's control over their procurement and could lead to disputes within the County about how to process and/or award contracts.
- **Bonding Requirements:** On the phased bonding release recommendation, note that Public Contract Code Section 20129 provides that "[t]he person to whom the contract is awarded shall execute a bond to be approved by the board for the faithful performance of the contract." Thus, for construction contracts, it appears that bonds could only be "phased" if the overall contract was only entered into in phases. In addition, the Advisory Groups recommends developing "a bonding and finance program for SLBEs (SLEBs) and V/SLBEs for contracts \$100,000 to \$5 Million." In any bonding program, the County cannot directly procure bonds for contractors it hires since the Public Contract Code and Civil Code require the contractors to do this. The County can, as it did with the Juvenile Justice project, hire someone to provide the service of assisting companies in receiving bonds that have difficulties meeting surety requirements.
- **Debarment:** If the County follows the Advisory Group's recommendation to implement a debarment procedure, it should do so through an ordinance rather than contractual

⁴ Although the Advisory Group's recommendations do not directly raise the issue, it is worth noting that it has recently come to this office's attention that many federal grant programs prohibit the uses of local preferences in contracts paid for with federal funds. The County is currently in the process of modifying its practices to meet these requirements.

Supervisors Scott Haggerty & Keith Carson
June 19, 2008
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language, as proposed. (GSA and the Office of the County Counsel are currently developing a proposed debarment procedure.)