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MEMORANDUM

TO: Brisbane City Council
FROM: City Attorney
RE: Local Business Enterprise (LBE) Ordinance
DATE: March 16, 2009

At a recent meeting of the City Council, the Executive Director of the Chamber of Commerce suggested that the City explore the possibility of adopting a local business enterprise ordinance, citing as examples the cities of San Francisco, Oakland and East Palo Alto. I have looked at the LBE programs for these cities along with some other jurisdictions, such as San Jose, Richmond, Inglewood, Palm Springs and the County of Los Angeles. While details may differ, they all share some common characteristics which can be summarized as follows:

1. **Application to Public Contracts.** The ordinances apply to contracts entered into by the city or county for construction of public improvements by the agency, purchase by the agency of materials, equipment and supplies, or consultant contracts entered into by the agency for professional services. The ordinances do not attempt to regulate contracts between private parties.

2. **What is "Local".** The ordinance must identify the geographical area it seeks to benefit. That area is often defined as the jurisdictional limits of the city adopting the ordinance. However, some cities (San Jose, Napa, Los Angeles, Port of Oakland) have defined "local" to mean anywhere within the county. Palm Springs defines local as the entire Coachella Valley.

3. **What is a "Local Business Entity"?** All of the ordinances have requirements for the business to maintain an office or other form of physical presence in the city, although not necessarily the main office. Typically, that local presence must have been in existence for a minimum period of time prior to the bid, such as 1 year. Special rules are needed to cover certain business entities, such as joint ventures, which may have both local and non-local members. There is always a minimum required percentage of local ownership interest, which varies by jurisdiction and type of contract. For example, for the award of a larger construction contract, the "local" entity might be a company holding only a minority interest in a joint venture.

4. **Who Benefits? (Local Business vs. Small Business vs. Minority or Women-Owned Business, or any combination thereof).** The class of persons intended to be benefited by the ordinance needs to be defined. Some ordinances are limited only to "local" businesses, regardless of size. Other jurisdictions, such as San Francisco, have much more complicated provisions and distinguish between large and small local business and make further distinctions based upon minority or women-owned businesses.

5. **Preference Granted.** All of the ordinances will grant some form of preference to the local business, typically in the form of a percentage discount applied to a bid price or bonus points where the selection is based upon a point rating system. Discounts range from 2% to 10%, with 5% seeming more common. Different rules may be applied to different types of businesses. For example, San Jose gives a 2.5% discount for a local business and an additional 2.5% discount if that business is also a small business. San Francisco has established totally different rules for local businesses and "micro" businesses.

6. **Certification by Business.** Most ordinances provide for a certification process to qualify as a local business, or small business, or minority or woman-owned business, as the case may be. Where size matters (such as small business being measured by annual gross receipts), the business may be required to provide annual financial statements and even copies of federal tax returns (e.g. San Francisco). Alternatively, the business may need to be qualified as a small business by the state or federal government. The city staff would be responsible for conducting the investigation to determine qualification and would issue the certification to the business prior to any bid being submitted. The certification would be valid for a limited period of time and would have to be periodically renewed. Evidence of a current certification must then be submitted with the bid proposal.

7. **Monetary Limits on Contract.** The local preference is usually confined to contracts having a specified monetary limit which may be adjusted from time to time for inflation. For example, in San Francisco, the limit is \$10,000,000 but in Richmond the limit is \$100,000 for construction contracts, \$50,000 for service contracts, and \$25,000 for equipment, supplies or materials. Palm Springs has a limit on the amount of the discount of either 5% of the bid or \$15,000, whichever is less. The San Jose City Charter prohibits local preference for public works contracts in excess of \$100,000 and requires such contracts be awarded only to the lowest responsible bidder.

8. **Exceptions to Preference.** All of the ordinance contain exceptions to the requirement for granting a local preference. One exception that always appears is a contract financed with federal funds since local preferences are expressly prohibited by the federal government. Other exceptions include emergency work, contracts for which there is only a sole source or involving proprietary information, and contracts for which there is no qualified local business available. Most ordinances also contain a waiver provision giving the City Council the discretion to waive the local preference in certain circumstances.

If the City Council desires to consider the adoption of a local business enterprise ordinance, then staff would request that some guidance be provided by the Council with regard to the manner in which each of the foregoing issues should be addressed.