



**DIVERSITY, EQUITY AND INCLUSION COMMITTEE MEETING  
STAFF REPORT**

<b>Meeting Date: February 13, 2024</b>		<b>Subject: Equity and Inclusion in Public Contracting</b>	
		<b>Staff Member:</b> Stephanie Davidson, Assistant City Attorney	
		<b>Department:</b> Legal	
<b>Action Required</b>		<b>Advisory Board/Commission Recommendation</b>	
<input type="checkbox"/> Motion <input type="checkbox"/> Public Hearing Date: <input type="checkbox"/> Ordinance 1 <sup>st</sup> Reading Date: <input type="checkbox"/> Ordinance 2 <sup>nd</sup> Reading Date: <input type="checkbox"/> Resolution <input checked="" type="checkbox"/> Information or Direction <input type="checkbox"/> Information Only <input type="checkbox"/> Council Direction <input type="checkbox"/> Consent Agenda		<input type="checkbox"/> Approval <input type="checkbox"/> Denial <input type="checkbox"/> None Forwarded <input checked="" type="checkbox"/> Not Applicable	
		<b>Comments:</b> N/A	
<b>Staff Recommendation:</b> N/A			
<b>Recommended Language for Motion:</b> N/A			
<b>Project / Issue Relates To:</b>			
<input type="checkbox"/> Council Goals/Priorities:	<input type="checkbox"/> Adopted Master Plan(s):	<input checked="" type="checkbox"/> Not Applicable	

**ISSUE BEFORE THE DEI COMMITTEE:** An informational session to discuss adoption of measures to promote equity and inclusion in the City of Wilsonville’s public contracting program.

**EXECUTIVE SUMMARY:**

Public contracting (i.e., public procurement) refers to the City’s efforts to procure goods or services, and enter into contracts with vendors or contractors. These public contracting activities are governed by certain state statutes (Oregon Revised Statutes chapters 279A, 279B,

and 279C, and related Oregon Administrative Rules) and the City’s Public Contracting Code (WCC 2.310 through 2.319).

This conversation regarding equity and inclusion in the City’s public contracting program is part of a larger project. Since November of last year, the City’s Legal Department has been taking a holistic look at the City’s public contracting program. The Legal Department’s goal is to facilitate City Council’s adoption of an updated City public contracting code effective as of July 1, 2023. The Legal Department is also developing a manual to assist City staff who engage in public contracting activities.

ORS 279A.100 allows the City to “engag[e] in public contracting practices designed to promote affirmative action goals, policies or programs for disadvantaged or minority groups or to give a preference in awarding public contracts to disabled veterans.” This statute defines “affirmative action” to mean “a program designed to ensure equal opportunity in employment and business for persons otherwise disadvantaged by reason of race, color, religion, sex, national origin, age or physical or mental disability or a policy to give a preference in awarding public contracts to disabled veterans.”

The Legal Department seeks to improve the City’s approach to equity and inclusion in public contracting, while also minimizing the risk of legal challenges to such measures (i.e., lawsuits).

## **I. Background**

### **A. Applicable Constitutional Standard**

An equity and inclusion program could violate the equal protection clause of the federal constitution if it is not appropriately tailored. The equal protection clause prohibits a government body (i.e., the City) from denying a person equal protection under its laws; generally speaking, it requires that a government body (i.e., the City) treat all individuals in similar situations the same. If the City implements a program that treats businesses or individuals differently based on certain classifications – as outlined below – it will increase the chance that a member of the public will challenge the program in court, based on the argument that the City has violated its rights under the equal protection clause.

There are three levels of scrutiny under the equal protection clause:

1. **Strict Scrutiny – the Highest Level.** A government program that grants a preference based on race, ethnicity, religion, or national origin, or another suspect classification, must pass “strict scrutiny:” the program must be narrowly tailored to achieve a compelling government objective, and there must be no other means available to the government to achieve its objective. Challenged government programs that are subject to strict scrutiny rarely meet this legal standard.

2. **Intermediate Scrutiny.** A government program that grants a preference based on gender, or another quasi-suspect classification, must pass “intermediate scrutiny:” the program must be substantially related to an important government justification, and if challenged in court, the burden would be on the City to prove an important objective, and that the use of the distinction is substantially related to that objective.

3. **Minimum Scrutiny – the Lowest Level.** A government program that grants a preference based on a non-suspect classification such as classifications based on economic characteristics, must pass only “minimum scrutiny:” the program must be rationally related to a legitimate government justification. A program that grants a preference to veterans or emerging small businesses, or using a classification based on age or mental disability, must meet this standard if challenged in court. Minimum scrutiny is easiest level of scrutiny for a government entity to survive if challenged in court.

Before the City implements a program that grants a preference based on race, ethnicity, or gender, it must have empirical evidence of discrimination in its public contracting program (i.e. proof of the discrimination), and any such program must be narrowly tailored to address that discrimination. We do not currently have such evidence and cannot obtain it in the next few months. Paying a consultant to study this issue would likely be costly. Further, City staff do not currently believe that its public contracting activities are resulting in discrimination.

If a City program is challenged in court, under the equal protection clause or on any other basis, the City must pay attorneys to defend its position in court. Attorney fees can amount to tens of thousands of dollars in even minor disputes.

## **B. The City’s Current Approach to Equity and Inclusion in Public Contracting**

The City currently does not have any equity and inclusion policies in its code, or in related administrative materials (e.g., manuals or administrative rules).

## **II. Staff Recommendations**

After studying this issue, the Legal Department recommends that the City implement the following measures to promote equity and inclusion in its public contracting activities. These recommendations would not be incorporated into the City’s updated Public Contracting Code, but would be included in the related manual, which City staff will use as they engage in public contracting activities.

- Allow, but do not require, City staff to consider eligible businesses from the online COBID directory or conduct outreach to COBID-certified businesses when:
  - o Distributing solicitation documents in competitive procurements (e.g., requests for proposals);

- Obtaining quotes for intermediate procurements (generally, procurements of goods and services with a value of between \$25,000 and \$250,000, and construction contracts with a value of between \$25,000 and \$100,000); and,
- Awarding contracts in small and direct procurements (procurements with a value of \$25,000 or less).
- Allow, but do not require, City staff to use reasonable efforts to:
  - Assist COBID-certified businesses to successfully respond to City solicitations; and,
  - Assist local businesses to obtain COBID certification.
- Create and maintain a list of businesses that are COBID-certified and located in Wilsonville, that provide work that the City may need.

“COBID” is an acronym for Certification Office for Business Inclusion and Diversity. It is a state-administered certification program that certifies that a particular business is (a) owned and operated by on or more people who qualify as being ethnic minorities, women, veterans, or (b) an emerging small business.

Other cities have more robust equity and inclusion programs that require staff to take certain actions when engaging in public contracting activities; further, some cities commit funding to equity and inclusion initiatives. The Legal Department discourages the City from adopting these more robust measures because they would expose the City to risk of litigation, for the reasons provided above.

**EXPECTED RESULTS:**

Any recommendation made by the DEI Committee regarding equity and inclusion in the City’s public contracting program will be relayed to City Council.

**TIMELINE:**

These are the deadlines applicable to this project:

- February 22, 2024: City Council will hold its first work session to guide the Legal Department’s work to update the City’s public contracting code.
- March 18, 2024: City Council will hold a second work session to review the Legal Department’s recommended updates to the City’s public contracting code.
- May 6, 2024: City Council will hold a public hearing and conduct a first reading of the Legal Department’s proposed revisions to the City’s Public Contracting Code.
- May 20, 2024: City Council will conduct a second reading of the Legal Department’s proposed revisions to the City’s Public Contracting Code.

The DEI Committee’s recommendations regarding this project must be received by the Legal Department no later than February 22, 2024.

**CURRENT YEAR BUDGET IMPACTS:**

N/A

**COMMUNITY INVOLVEMENT PROCESS:**

N/A

**POTENTIAL IMPACTS OR BENEFIT TO THE COMMUNITY:**

Adopting any equity and inclusion measures may result in more COBID-certified businesses securing contracting or procurement opportunities with the City.

**ALTERNATIVES:**

Retain the current approach to equity and inclusion in the City's public contracting program (i.e., do not implement any new measures to promote equity and inclusion in the City's public contracting activities).

**CITY MANAGER COMMENT:**

N/A

**ATTACHMENTS:**

None.