

A Report of the 2002-2003 Civil Grand Jury
For the City and County of San Francisco

**THE HUMAN RIGHTS COMMISSION AND THE
MINORITY BUSINESS ORDINANCE:
STATISTICS BUT NO SPECIFICS TO SUPPORT
CITY CLAIM THAT IT DISCRIMINATES**

Released June 26, 2003

Reports of the Civil Grand Jury do not identify the individuals interviewed, pursuant to California Penal Code sec. 929. The California Legislature intended this provision to encourage full candor and cooperation by City and County personnel.

Parties identified in the report must respond to the Presiding Judge of the Superior Court within the number of days specified, with a copy sent to the Board of Supervisors. As to each finding of the Grand Jury, the response must either (1) agree with the finding, or (2) disagree with it, wholly or partially, and explain why. Further, as to each recommendation made by the Grand Jury, the responding party must report either (1) that the recommendation has been implemented, with a summary explanation of how it was; (2) the recommendation has not been implemented, but will be implemented in the future, with a timeframe for implementation; (3) the recommendation requires further analysis, with an explanation of the scope of that analysis and a timeframe for the officer or agency head to be prepared to discuss it (less than six months from the release of this Report); or (4) the recommendation will not be implemented because it is not warranted or reasonable, with an explanation of why that is. (Cal. Penal Code, secs. 933, 933.05.)

**THE HUMAN RIGHTS COMMISSION AND THE
MINORITY BUSINESS ORDINANCE:
STATISTICS BUT NO SPECIFICS TO SUPPORT
CITY CLAIM THAT IT DISCRIMINATES**

Summary of Recommendations

1. The Human Rights Commission should comply with the Minority Business Ordinance by recording instances of discriminatory conduct by the City. If it cannot demonstrate instances of discrimination by the City, the Board of Supervisors should consider alternatives to renewing the MBE/WBE ordinance, such as instituting a local economically disadvantaged business enterprise program.
2. Post-award monitoring and enforcement of compliance with anti-discrimination ordinances should be transferred from the Human Rights Commission to the Office of Contract Administration which is better equipped for such monitoring.

OVERVIEW

The Human Rights Commission of the City and County of San Francisco (HRC) monitors and enforces City laws that prohibit discrimination in City contracting. The key ordinance, which the HRC oversees, is "The Minority/Women/Local Business Utilization Ordinance," last passed by the Board of Supervisors (Board) in October 1998, and expected to be reenacted in June or July of 2003 for another three years.

This Ordinance¹ was enacted with legislative findings that the City had engaged in discriminatory conduct in contracting. The validity of the current Ordinance and of any extension of the Ordinance depends on the City's ability to support the findings of discriminatory conduct, especially after the enactment of Article I, section 31 of the California Constitution (the former Proposition 209), which prohibits race- and gender-conscious policies. Likewise, federal law requires discrimination by the City for the Ordinance to be legal. Thus if the asserted discrimination does not exist, the Ordinance may be challenged.

In the legislative findings set forth in the Ordinance, the City explicitly accuses itself of both active and passive discrimination against minority-owned business enterprises ("MBEs") and woman-owned business enterprises ("WBEs"). When first adopted in 1984 and in each subsequent extension (1989, 1992 and 1998), the City has repeated this accusation.

Consequently, the 2002-2003 Civil Grand Jury investigated and sought to identify the discriminatory conduct upon which findings made by the Board of Supervisors rest. In the course of this investigation, the Grand Jury found no evidence of examples of discrimination. To the contrary, the Grand Jury found that the City has taken substantial steps to protect against discrimination and to remedy the effects of any past discrimination.

¹ Unless otherwise specified, "the Ordinance" refers to the MBE/WBE Ordinance in the San Francisco Administrative Code, section 12.D.A.

The findings of discrimination on which the Ordinance relies are based on disparity studies that indicate statistical underutilization of certified MBEs/WBEs in City contracting and on unsubstantiated anecdotal evidence presented in testimony at hearings held by the Board of Supervisors and the HRC.² There are no HRC records or documentation of specific instances of discrimination in City contracting notwithstanding the Ordinance's mandate that the HRC keep such records. Moreover, the City departments that do the contracting deny any discrimination either by City employees or the contracting parties. If problems are discovered on the part of private contractors doing business with the City, the contracting departments, working with the HRC, have acted to remedy the situation and punish wrongdoers. Apart from disparity studies and the unsubstantiated claims of discrimination made at Board of Supervisors and HRC hearings, there is neither evidence of discriminatory conduct on the part of the City nor any indication that private discrimination is tolerated by the City in the performance of its contracts.

Given the absence of records of specific instances of discrimination and the responses by the City departments and HRC, there is no way to identify the City's conduct and remedy the discriminatory conduct of which the City accuses itself. Also, without such documentation, it is impossible to determine if the perceived underutilization of MBE and WBE contractors that is shown in the disparity studies is, in fact, attributable to wrongful discrimination by the City rather than to independent forces such as lack of availability or capability of MBE/WBE contractors or lack of MBE/WBE contractor interest in winning city contracts.

The Grand Jury has concluded that without appropriate records, problems of discrimination, if they exist, will not be solved. It, therefore, recommends that the HRC keep the records required by the Ordinance identifying discriminatory activity by or on behalf of the City. If no specific instances of discrimination in City contracting can be established, the CGJ recommends that the Board reevaluate the basis for the Ordinance and consider alternatives such as an ordinance that fosters local economically disadvantaged business enterprises without regard to race or gender.³

The HRC's explanation for the lack of any records of instances of discrimination by the City – that it successfully resolves discrimination through conference and conciliation – is inconsistent with the assertion that the City continues to discriminate. If the HRC is able to prevent discriminatory conduct from adversely affecting MBEs/WBEs, then it is natural that there would be no records of discriminatory conduct by City officials. If, however, the HRC believes that discrimination persists, then its failure to record instances of discrimination is less understandable.

² A disparity study is a study undertaken to determine whether there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service (availability) and the number of such actually engaged (utilization) by a locality in a relevant market area. A significant statistical disparity between the availability and use of such contractors may give rise to an inference of discriminatory exclusion. (See, *City of Richmond v. J. A. Croson Company* (1989) 488 U.S. 469, 509.) The Grand Jury recognizes that courts have held disparity studies and anecdotal evidence sufficient to support an inference of discrimination. The focus of the Grand Jury is on uncovering evidence of *instances of actual* discrimination by the City so that it can be remedied or prevented.

³ Many City officials interviewed by the Grand Jury expressed support for an ordinance that would be race-neutral and gender-neutral to support local economically disadvantaged firms, as it would (a) assist the same group of businesses, and (b) do so in a more legally defensible manner.

The Grand Jury also concludes that the HRC lacks the personnel and resources to monitor adequately the post-award compliance with the Ordinance by contractors hired by the City. In addition, the Jury found an inherent conflict in the HRC acting as both enforcer and advocate. The Grand Jury, therefore, recommends that HRC functions related to post-award compliance be transferred to the Office of Contract Administration, which is better equipped for such monitoring.

BACKGROUND

The MBE/WBE Ordinance in General

The MBE/WBE program was initially created in April 1984. Its purpose was “to combat the City and County of San Francisco’s own active and passive participation in discrimination against minority- and women-owned business, both in its own contracting for goods and services and in the private market for such goods and services.” (Sec. 12D.A.2.)

“Active discrimination” against minorities or women is any *official* action that treats people differently because of their race or gender. “Passive discrimination” was found when a municipality “had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry.”⁴

The Ordinance is designed to increase the participation of MBE and WBE in City-awarded contracts by extending discounts in all bids and contracts and in the composition of rating scales for professional services contracts. The discounts are:

- 5% for a joint venture in which the MBE or WBE participation is less than 35%
- 7.5% for a joint venture in which the MBE or WBE participation is 40% or more
- 10% for a local MBE or local WBE or joint venture between or among WBEs and MBEs.

(12.D.A.9(A)(2).)

If the contract is to be awarded to the lowest bidder, the discount (which does not affect payment, but only how bids are judged) is taken off the bid price. If, however, the contract is awarded on the basis of points scored, the "discount" takes the form of points added to the scores of the MBE/WBE bidders.

An MBE or WBE is an economically disadvantaged local business that is certified by the HRC.⁵ To be certified, it must establish that it is local and that its annual gross receipts in the

⁴ See *City of Richmond v. J. A. Croson Company* (1989) 488 U.S. 469, 492.

⁵ "Minority business enterprise (MBE)" shall mean an economically disadvantaged local business that is an independent and continuing business for profit, performs a commercially useful function, is owned and controlled by one or more minority persons residing in the United States or its territories and is certified as an MBE pursuant to Section 12D.A.6(B).

"Women business enterprise (WBE)" shall mean an economically disadvantaged local business that is an independent and continuing business for profit, performs a commercially useful function, is owned and controlled by one or more women residing in the United States or its territories and is certified as a WBE pursuant to Section 12D.A.6(B).

"Owned" for purposes of determining whether a business is a MBE or WBE shall mean that minorities or women, as the context requires:

three fiscal years immediately preceding its application have not exceeded:

- public works/construction - \$4,000,000; specialty construction contractors - \$5,000,000;
- goods/materials/ equipment and general service suppliers - \$5,000,000;
- professional services - \$2,000,000;
- trucking - \$3,500,000; and
- telecommunications - \$5,000,000. (Sec. 12.D.A.5.)

The Ordinance is designed to increase the participation of MBEs and WBEs in City-awarded contracts by extending discounts in all bids and contracts, and in the compensation of rating scales of professional service contracts.

The HRC maintains a roster of all certified MBEs and WBEs to determine the “participation goals” that it will establish with respect to the award of any contract governed by the Ordinance. The Ordinance defines “participation goals” as “the targeted levels of citywide participation in City prime contracts that reflect the relevant share of MBEs and WBEs in a given industry or profession, also referred to as ‘percent availability.’” (Sec. 12.D.A.5.)

The Ordinance’s participation goals apply to any contract or sub-contract, and cover construction, professional services, and purchasing in excess of specified dollar amounts. (Sec. 12D.A.15(D).)

The Ordinance imposes specific powers and duties upon the Director of HRC, the Controller, the Mayor, and the Contract Awarding Authorities in order to maximize MBE/WBE participation, with the HRC mandated to “Adopt rules and regulations establishing standards and procedures for effectively carrying out this ordinance.” (Sec. 12.D.A.6-8.)

INVESTIGATIVE PROCESS

In addition to reviewing the MBE/WBE Ordinance (the original 1984 version, and its extensions in 1988 and 1992), the Grand Jury reviewed relevant charter provisions, other city ordinances, rules and regulations, legislative history, reports, statistical studies, and analyses that addressed or dealt with the subject of eliminating or preventing discrimination in the award or enforcement of City contracts.⁶ The CGJ also interviewed the department heads or staff

(1) Possess an ownership interest of at least 51 percent of the business; (2) Possess incidents of ownership, such as an interest in profit and loss, equal to at least the required ownership interest percentage; and (3) Contribute capital, equipment and expertise to the business equal to at least the required ownership percentage. "Control" of a business shall refer to the possession of the legal authority and power to manage business assets, good will and daily operations of the business, and the active and continuous exercise of such authority and power in determining the policies and directing the operations of the business.

⁶ Among the relevant ordinances are: Section 4.107 of the City Charter which establishes the HRC and describes its duties and functions; various chapters of the San Francisco Administrative Code which, in addition to the Ordinance: (1) implement the Charter by establishing the organizational structure of the HRC and describing its processes and duties (Ch. 12A); (2) require all City contracts to include in them provisions that prohibit discriminating against any person on the basis of race, color, creed, religion, national origin, sex, and other specified grounds (Chs.12B, 12C); and (3) identify the policies and procedures which govern the award of City contracts for public works or improvements, including professional design, consulting and construction management services, and the acquisition of goods and services (Chs. 6, 21).

members of the following City departments which award or administer the vast majority of City contracts: the HRC, the Airport, the Department of Public Works, the Municipal Railway, the Department of Technology and Information Services, the Port of San Francisco, the San Francisco Public Utilities Commission, the Department of Human Resources, the Office of Contract Administration, the Controller, and the City Attorney. Finally, the Grand Jury also reviewed decisions of the United States Supreme Court, the Ninth Circuit Court of Appeals, the California Supreme Court, and other federal and state courts addressing legal challenges to affirmative action programs in federal, state, and local contracting programs.

FACTS, CONCLUSIONS AND RECOMMENDATIONS

I. THE HRC HAS FAILED TO DOCUMENT INSTANCES OF DISCRIMINATION AS REQUIRED BY THE ORDINANCE.

FACTS

A. The City has relied only on disparity studies and anecdotal evidence in perpetuating the Ordinance.

- The Board of Supervisors in passing the 1998 Ordinance relied on disparity studies and anecdotal evidence to support findings of active and passive discrimination by the City.
- None of the grounds cited by the City in the Ordinance in support of its finding of active and passive discrimination by the City contain specific data which identifies either directly or indirectly City department heads, project managers, assistant project managers, or other employees responsible for the City's discriminatory conduct. The findings, for example, mention an "old boy network" as a group, without attributing improper conduct to any specific individual.
- The disparity studies relied upon to extend the Ordinance (one prepared by the Mason-Tillman firm, some by the HRC) consist largely of statistical data, such as the number of MBEs/WBEs in a given industry and the percentage of contract dollars awarded or paid to these groups in comparison to non-minorities over one or more years. These statistical studies do not attempt to identify any specific discriminatory conduct by City contract awarding departments or their staff.
- These studies also contain anecdotal testimony in which an occasional speaker complains of discriminatory conduct by a City official, but such testimony is generally non-specific and made without the alleged offender present to respond.
- The HRC disparity study issued in April 2003 covers January 1998 to February 2003. It reports an underutilization of MBEs/WBEs in every major phase of City contracting. The study fails to identify any City official who has engaged in discriminatory conduct and does not describe any actual instance or allegation of discrimination.

- The HRC annual report issued in March 2003, states that the data in its Diversity Tracking System shows that MBE/WBEs “continue to be underutilized in City contracts.” (HRC, Ch. 12.D.A. Annual Report, March 2003, p. 8). The report identifies six industries – architecture and engineering, construction, general services, professional services, telecommunications, and purchasing; shows the Mayor’s goals for these industries for fiscal year 2001-2002, and the utilization rate for certified MBEs/WBEs toward meeting these goals. In three of the six industries, the goal achievement rate is less than 22%.
- The HRC’s report recommends that because of such underutilization the “City continue implementing Chapter 12.D.A.” This report, like reports for the years 1999 through 2003, fails to identify any City officials or discriminatory conduct by any City officials which contributed to the underutilization of MBEs/WBEs including those industries in which the utilization rate is less than 22%.

B. HRC has no record of specific acts of discrimination by or on behalf of the City.

- The HRC is required by law to submit a written report of its activities to the Mayor and the Board of Supervisors at least quarterly, and to include in the report “instances of discrimination by any agency, board or officer” of the City since the prior report. (Sec. 12.A.11.)
- The MBE/WBE Ordinance also requires that the Director issue quarterly reports to the Board of Supervisors that document each City’s department’s progress in meeting the MBE/WBE goals and the success of each department’s prime contractors in complying with their best effort obligations to meet MBE/WBE subcontracting goals. (Sec. 12D.A.18.)
- The Ordinance further provides that if the Director concludes that the failure of the department or prime contractors to meet such goals is due in whole or in part to the department management’s intentional or negligent performance of its obligations under the Ordinance, the Clerk of the Board of Supervisors shall schedule a hearing before an appropriate committee of the Board at which the department head must be prepared to respond to the Director’s findings and to explain what steps he or she intends to take to correct the problems identified by the Director.
- During the five years the present Ordinance has been in effect, the HRC has made no written record and has not issued any report of any active or passive discrimination by any City official arising from the award of any HRC reviewed contract.⁷
- As the agency charged with the duty of implementing the Ordinance, the HRC is present at every stage of the pre-award contract proceedings.

⁷ Ironically, in its general findings in support of the current Ordinance passed in 1998, the Board asserted that “Since 1989, the City has devoted substantial additional resources to the task of understanding *and documenting* discrimination against women and minorities in awarding City contracts and in the private market for such contracts.” (Sec. 12.D.A.2, emphasis added.)

- After a contract has been fully performed, no HRC exit report records active or passive discrimination by the City during the pre- or post-award period or any effect of such discriminatory conduct upon MBE/WBE goals or participation in the contract.
- Currently the HRC has no computerized program where such information could be stored and retrieved as a source for identifying on an individual or cumulative contract basis specific facts which demonstrate the City's active and passive discrimination in City contracting.
- The HRC explains the lack of any records or reports identifying discriminatory conduct by City department heads, project managers, assistant project managers or other staff personnel during the pre- or post-award period of any contract on the basis that, if such conduct occurs, HRC has successfully resolved the problem through conference and conciliation with the offender and in that manner has avoided such conduct from adversely affecting MBE/WBE participation in the contract involved.
- All of the contracting department heads interviewed during this investigation state that they cooperate with the HRC and believe that the process has almost eliminated any discriminatory practices by City employees or the parties with whom they contract. These department heads described steps they have taken when they found any behavior of private firms that might have violated the Ordinance.
- HRC does have records documenting actions by private parties that violate the Ordinance. These include records of administrative hearings held by the HRC in which sanctions are imposed if willful violations are found, audits by the Controller which identify contractors' failure to comply with the Ordinance, and litigation by the City Attorney's office against contractors who violate the Ordinance.

C. Procedures of the HRC have been effective in reducing discrimination and encouraging MBEs/WBEs.

- The HRC has created rules and forms to be used by the City's departments in awarding contracts under the Ordinance. To ensure that the awarding departments comply with its rules and procedures, the HRC has a staff of contract compliance officers (CCO) who are assigned to the departments.
- The CCO assigned to an awarding department works with the project manager or other department representative to ensure compliance with the Ordinance. In general, the contract awarding procedures for public works and improvements will include the following:
 - a) The department develops a Scope of Work concept and begins the process of developing plans and specifications for the proposed project.
 - b) At some early point in the process, the project manager or designee meets with the CCO to identify the trades, service suppliers, and vendors that may be involved in the project

(Sec. 12.D.A.17.3). Once the plans and specifications are developed, the CCO then determines the MBE/WBE participation goals based on the specific trades, service suppliers and vendors required under the plans. (See, S.F. Admin. Code, ch. 6, sec. 6.5(B).) The CCO does not set a specific goal for each trade or service for which an MBE/WBE is available, but arrives at an overall goal for the project based on the percentage of availability of all MBEs or WBEs that might be available to perform some part of the work within the needed trades or services.

- c) After the plans and specifications have been finalized, they are submitted for review and approval by the contract awarding authority within the department, the HRC, and the City Attorney's Office and are then advertised for bid or request for proposal. Each solicitation for bid or request for proposal document must include relevant HRC attachments that explain the procurement process. (HRC R & Reg. IV G.)
- d) Generally for bids over \$50,000, there is a pre-bid conference attended by an HRC representative who explains to prospective bidders their contractual obligations under the MBE/WBE ordinance, such as participation goals set for the project; "the good faith efforts" required to meet the goals; and the obligation to sign an affidavit under penalty of perjury of the contractor's intention to comply fully with the Ordinance. (Sec. 12.D.A(D)(1).)
- e) The Project Manager who receives the draft bid documents sends them to the HRC CCO for review. The CCO completes a standardized bid analysis for each of the three lowest bidders and reviews each bidder's MBE/WBE subcontracting goals and statement of good faith efforts to attain those goals. The HRC's bid analysis determines whether the bid is improper or non-responsive to the Ordinance. The non-responsive bids are eliminated and the contract is then awarded to the lowest responsible bidder.
- f) When the successful bidder is selected, an HRC form is prepared which lists the successful bidder's subcontractors, including their percentage of participation and MBE/WBE status, if any.
- g) If the project is a "large project" – defined by the Ordinance to be any project estimated to cost more than \$5,000,000 or any professional services contract estimated to cost more than \$50,000 – before soliciting bids, the contracting authority must submit the proposals to the Director of the HRC to determine whether the project could be divided into smaller projects to enhance the opportunity for MBE/WBE participation. If the HRC determines that the contract can be broken down into more accessible parts, the contract awarding authority must do so. (Sec. 12.D.A.9(A)(3).)

The purpose of dividing "large projects" into smaller ones is to increase the opportunity for MBE/WBE participation on a project, but occasionally the procedure produces conflicts between the awarding department and the HRC. A department might find it more efficient for a single contractor to be responsible for all phases of the project. However, the HRC's primary goal is to increase MBE/WBE participation in the project and the HRC may conclude that that outweighs any potential loss of efficiency,

administrative convenience, or other benefits of having a single contractor.

- h) The HRC and the department are usually able to resolve their differences through negotiation and compromise. On rare occasions when necessary, an impasse between the HRC and the awarding authority can be resolved by consulting a neutral third party, such as the City Attorney.

Waivers of MBE/WBE Requirements

- MBE/WBE discounts and requirements for good faith efforts to obtain MBE/WBE participation may be waived under the Ordinance in two circumstances:
 - 1) when the needed goods or services are from a sole source that is not currently disqualified from doing business with the City, or
 - 2) when a contract is necessary in response to an emergency that endangers public health or safety and there is no time to apply bid discounts or there are no immediately available MBE and/or WBE contractors capable of performing the emergency work. (Sec. 12.D.A.15(A).)
- For emergency work, the HRC has tried to provide greater opportunities for MBE and WBE contractors by attempting to identify some areas of that work that MBEs and WBEs might perform. MBE/WBEs have been added to the lists of firms to be called in emergencies by DPW and other agencies with substantial emergency needs.

Reduction of MBE/WBE Requirements

- The Director may waive or reduce the MBE/WBE participation goals on a project if she determines that:
 - 1) The reasonable and necessary requirements of the project make subcontracting or the participation of businesses other than the bidder unfeasible;
 - 2) Qualified MBE/WBEs capable of providing the goods or services required by the contract are unavailable despite the prime contractor's or department's good faith effort to locate them; or
 - 3) Price quotes given by available MBE/WBEs exceed competitive levels beyond amounts attributable to costs inflated by the present effects of discrimination. (Sec. 12.D.A.(17)E-G.)

Enforcement Provisions

- If the Director has reason to believe that a contractor, acting in good faith, has failed to comply with "the race and/or gender-conscious requirements" of the Ordinance, she notifies the department that awarded the contract, and attempts to resolve non-compliance issues through conciliation. If the conciliation process fails, the department may impose sanctions against the contractor, which might include:

- a) refusal to grant the award of contract;
 - b) an order suspending the contract;
 - c) an order withholding funds;
 - d) an order revising the contract due to material breach, or
 - e) disqualification from eligibility from City contracts for a period not to exceed five years.
- (Secs. 12D.A.9(A)(7), 12D.A.16(B).)

- In cases in which the Director believes that the contractor has acted willfully and in bad faith in failing to comply with the Ordinance, she may, after an investigation and hearing, impose sanctions for violations that may include:

- a) declaring the contractor non-responsive and ineligible to receive the award;
- b) declaring the contractor ineligible to bid on City contracts for a five-year period;
- c) revoking the certification of the business if it is an MBE/WEB, or
- d) assessing liquidated damages, pursuant to a liquidated damages clause that is present in each contract awarded under the ordinance. (Secs. 12D.A.16(C), 12D.A.9(D)(3).)

D. The City Works Actively To Combat Discrimination and Remedy the Past Effects of Discrimination.

- In addition to the creation of the HRC itself, the City has established other programs to foster the participation of minorities and women in City contracting. Among these steps are:
 - A financial assistance program to enable small firms to obtain bonding
 - Community outreach on an ongoing basis
 - Pre-bid conferences at which MBEs/WBEs can meet prime contractors and learn about City procedures
 - Administrative proceedings when bad faith or non-compliance is suspected
 - Audits by the Controller to identify any contractor's failure to comply with the Ordinance
 - Adjusting bid bonding and insurance requirements where appropriate
 - Providing technical assistance to MBEs/WBEs to increase their ability to compete effectively for City contracts
 - HRC and Controller cooperation to create a system for prompt payment to MBEs/WBEs
 - Inviting joint ventures to promote MBE/WBE participation.

FINDINGS

1. In passing the Ordinance, the Board has relied only on disparity studies (or other statistics) and anecdotal evidence to establish that the City has actively or passively discriminated against MBE/WBEs, and not on evidence of actual incidents of discrimination by the City.
2. There exist no records or evidence of specific incidents of discrimination that identify wrongful conduct by the City. There exist no documents that describe discriminatory

conduct by the City. There exist no documents describing what the City has done to remedy any supposed discriminatory conduct.

3. It is difficult to rectify wrongful conduct without knowing what that conduct is. HRC has not done so although discrimination in City contracting purportedly has occurred over and over, year after year, for 19 consecutive years.
4. Without documentation it cannot be determined whether the underutilization of MBE/WBE contractors reflected in the disparity studies is attributable to discrimination by the City, or rather is attributable to non-discriminatory causes such as lack of availability, lack of capacity, lack of funding, lack of interest, waiver, lack of insurability, or other causes.
5. Although the courts accept disparity studies to support an inference of discrimination, without identifying and discovering the cause of the actual instances of discrimination purported to occur by the City, the problem will not be solved.
6. The HRC's explanation for the lack of any records of instances of discrimination by the City – that it successfully resolves discrimination through conference and conciliation – is inconsistent with the assertion that the City continues to discriminate. If the HRC is able to prevent discriminatory conduct from adversely affecting MBEs/WBEs, then it is natural that there would be no records of discriminatory conduct by City officials. If, however, the HRC believes that discrimination persists, then its failure to record instances of discrimination is less understandable.
7. If utilization of MBE and WBE contractors is so low (for example, 22% of the goals set by the HRC), a discriminatory cause should be easy to discern and substantiate if one exists.

RECOMMENDATIONS

- 1a. The HRC should comply with its duties and obligations under Sections 12.A.11 and 12.D.A.8 of the San Francisco Administrative Code to include in its quarterly reports actual instances of discrimination by City agencies, boards or officers, whether the discrimination is active or passive.
- 1b. If the HRC can produce no record or evidence of actual specific instances of discrimination by the City (that is, evidence other than statistical studies), the Board of Supervisors should reconsider the basis of the Ordinance and consider alternatives such as a local disadvantaged business enterprise program.
- 1c. At the end of every contract awarded under its oversight, the HRC should record data relevant to the MBE/WBE goals established for that contract. Such data should include at least the following:
 - 1) the MBE/WBE goals set for the contract;
 - 2) the goals actually achieved;
 - 3) if the goals were not fully achieved, the factors which were responsible for the lack of

achievement; and

- 4) if the failure to achieve the goals was at all due to the conduct of the department head, project manager, or any other City employee, or any contractor employed by the City, an identification of the person involved, a description of the conduct at issue, the remedial steps taken, and the impact of such conduct upon MBE/WBE participation, or the goals set for such participation.

1d. The City should establish a software program in which the data recorded under Recommendation 1c may be stored and retrieved for statistical and reporting purposes.

REQUIRED RESPONSES

HRC – 60 days

City Attorney – 60 days

Board of Supervisors – 90 days

II. THE COMPLIANCE FUNCTION OF THE HRC SHOULD BE TRANSFERRED TO THE OFFICE OF CONTRACT ADMINISTRATION

FACTS

- The HRC has a duty to advocate for maximum participation by MBEs/WBEs in City contracts.
- The HRC is also responsible for the certification and compliance standards and procedures necessary to effectuate the Ordinance (Sec. 12.D.A.6.)
- The HRC’s responsibilities arise both before and after the contract award. Pre-award functions consist primarily in certifying MBEs/WBEs, working with City departments in setting MBE/WBE goals, evaluating the bid panels who will in turn evaluate incoming bids, analyzing bid submissions for discount eligibility, determining responsiveness of bids to MBE/WBE goals, and recommending the award of contracts to the “lowest responsible and responsive bidder.”
- Post-award responsibilities consist of insuring that the MBEs/WBEs identified in the bid documents actually work on the job and are paid in accordance with the contract. Moreover, the HRC reviews change-orders and amendments to the contract to insure that the MBEs/WBEs are not adversely affected. HRC staff told the CGJ that due to lack of manpower and resources, they cannot make many on-site visits to ensure that the contract is being performed in compliance with its MBE/WBE requirements.
- At the completion of the contract, the HRC requires the general contractor to submit a sworn affidavit stating that it employed and paid the MBE/WBE subcontractors, who also must sign a document saying they were employed and paid properly under the contract. The HRC also prepares an exit report to reconcile the proposed MBE/WBE utilization in the bid documents with the actual MBE/WBE utilization and payment during contract performance.

- In 1998, the Board of Supervisors found that improper post-award conduct such as the reduction or cancellation of MBE/WBE work, and the use of non-minority subcontractors to perform work designated for MBE/WBEs had not been curbed by effective enforcement of the Ordinance.
- In August 1999, Mayor Willie L. Brown appointed Roberta Achtenberg, Aileen C. Hernandez and Justice Harry W. Low to a blue ribbon panel to assess and evaluate the City's policies in contracting with businesses owned by women and minorities. This task force stated, "our most important recommendation is that the compliance and certification functions ... be relocated from the Human Rights Commission to a new division within the Office of the Controller."⁸ The City has not adopted the Task Force's recommendation.
- The Task Force concluded that the MBE/WBE Ordinance would be improved by transferring all post-award contract compliance functions from the HRC because the technical and resource demands of certification and compliance functions had impeded the HRC "from aggressively and creatively using their human rights aspects of the program." (Independent Task Force Report, Sec. 1, pp. 2-3.)
- The Controller already provides a compliance function under the Ordinance by conducting random audits of prime contractors to ensure their compliance and random audits of 10% of the joint ventures which are granted bid discounts in each fiscal year.
- The Office of Contract Administration, which was created after the publication of the Task Force Report, currently monitors City contracts with regard to labor benefits, living wage requirements and health care standards.

FINDINGS

1. The HRC lacks personnel and resources to monitor post-award compliance adequately. It primarily relies on the closing affidavit, which provides data on the contractor's employment and payment of MBEs/WBEs during the performance of the contract.
2. The HRC has an inherent conflict of interest between its role as advocate and its role as enforcer of post-award compliance.
3. The Office of the Controller would have a conflict of interest if all enforcement responsibilities were transferred to it because it would be required to review part of its own work in making these compliance audits.
4. The Office of Contract Administration already has personnel and procedures sufficient to expand its responsibilities to include monitoring and enforcement of contractor compliance with the Ordinance. Its agents already visit sites to inspect records and working conditions, so it would be relatively easy for them to ensure that any MBE/WBE subcontractors listed in the bid are the ones in fact doing the work on the site.

⁸ Independent Task Force Report, September 2000, Sec. 1, p. 2.

RECOMMENDATION

2. All HRC functions related to post-award contract compliance should be transferred to the Office of Contract Administration.

REQUIRED RESPONSES

HRC – 60 days

Office of Contract Administration – 60 days

Office of the Controller – 60 days

Board of Supervisors – 90 days

The Members of the 2002-2003 Civil Grand Jury
For the City and County of San Francisco

Jane R. Brady

William J. Bush

Jess Centeno

Henry Cohen

Clement D. DeAmicis

Rosemary DeGregorio

Patricia Glynn

Susan Hirsch

Ross W. Hoffman

Stephen T. Jacobs

George E. Kloves

Richard P. Matthews

Jack L. McNulty

Susan M. O'Connor

Mary A. Powell, Foreperson

Inez K. Scourkes

Arlene K. Singer

Pauline Walker

Joanna B. Warrens