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AGENDA ITEM # _____ July 23, 2024

July 2, 2024

Honorable Board of Supervisors
County of Alameda
1221 Oak Street, Suite 536
Oakland, CA 94612-4305

RE: REPEAL OF CONSTRUCTION COMPLIANCE PROGRAM AND ENHANCED
CONSTRUCTION OUTREACH PROGRAM

Dear Board Members:

Recommendation:

Repeal the Construction Compliance Program and the Enhanced Construction Outreach Program.

Discussion/Summary:

The County adopted the Public Works Agency (PWA) "Construction Compliance Program" (CCP) in 1971 to encourage minority-owned businesses (MBE) and disadvantaged business entities (DBE) to participate in public works projects. The CCP was amended in 1979 to add women-owned businesses (WBE) to the program. It was suspended in 1985 and reinstated in its current form in April 1987. The CCP requires contractors bidding on construction projects of \$100,000 or greater to demonstrate a substantial good faith effort to meet program goals for participation by minority or women-owned businesses as subcontractors, suppliers, and/or truckers. It establishes the participation goals for MBE at 15% and WBE at 5%.

The General Services Agency (GSA) "Enhanced Construction Outreach Program" (ECOP) was adopted in 2003, with amendments in 2006 and 2008 to increase the bidding threshold for application of the ECOP to contracts with a value of \$100,000 to \$125,000. The ECOP establishes incentives to encourage opportunity in public contracting and applies to Capital Construction Projects for sealed-bid construction projects over \$125,000. Prime contractor bidders must meet the program's goals for participation of small and local businesses, and diverse subcontracting, or provide evidence of good faith efforts to do so. It establishes participation goals for local business enterprises at 60%, small, local and emerging businesses at 20%, minority-owned business enterprise subcontractors at 15%, and women-owned business enterprise subcontractors at 5%.

In July of 2022 a taxpayer lawsuit was filed against the County, GSA and PWA in the Alameda County Superior Court challenging the legality of the CCP and ECOP. *See, Californians for Equal Rights Foundation, et al. v. County of Alameda, et al.*, Alameda Superior Court, Case No. 22cv014956 ("CERF"). The plaintiffs in CERF allege that the CCP and ECOP violate the Equal Protection Clause of the 14th Amendment to the United States Constitution and Article I, Section 31 of the California Constitution (Proposition 209). The County's defense of the CERF litigation

initially was successful with the trial court ruling in the County's favor on procedural grounds. But the Court of Appeal reversed the trial court order and remanded the case to the Superior Court to rule on the merits. *CERF*, Court of Appeal, First District, Division 3, 2024 WL 1189087 (March 20, 2024).

This litigation setback, and the overall state of jurisprudence in the field, warrant stepping away from the CCP and ECOP in favor of exploring whether there are options that may increase access and survive legal challenge. The holding and analysis in the recent decision of the United States Supreme Court in *Students for Fair Admissions, Inc. v. Pres. And Fellows of Harvard College*, 143 S. Ct. 2141 (2023) eliminating affirmative action programs for college admissions has been interpreted as extending to race- and gender-conscious programs like the CCP and ECOP. See, *Ultima Serv. Corp. v. U.S. Dept. of Agric.*, 683 F.Supp.3d 745 (E.D. Tenn. 2023)(SFAA's reasoning not limited to college admissions, striking down Section 8(a) program rebuttable presumption of social disadvantage for minority groups); *Landscape Consultants of Texas, Inc. v. City of Houston* (S.D. Tex. Sept. 19, 2023)(No. 4:23-cv-3616)(challenge to city's MBE subcontractor requirement for non-minority prime contractor).

Recognizing these legal impediments, staff recommend that the Construction Compliance Program and Enhanced Construction Outreach Program be repealed.

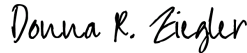
Financing:

Approval of this recommendation will have no impact on net County cost.

Vision 2026 Goal:

The repeal of these programs aligns with our core principles of fiscal stewardship by reducing litigation risks and associated costs, while advancing our shared vision for a prosperous and vibrant economy that serves businesses across diverse sectors.

Respectfully submitted,


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DANIEL WOLDESENBET, Director
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cc: Susan Muranishi, County Administrator
Melissa Wilk, Auditor-Controller