



# CITY OF CARSON

## Legislation Text

File #: 2018-203, Version: 1

### Report to Mayor and City Council

Tuesday, April 17, 2018

Discussion

#### **SUBJECT:**

**INTRODUCTION AND FIRST READING OF ORDINANCE NO. 18-1806 ESTABLISHING A "LOCAL PREFERENCE" WITHIN THE CITY'S PURCHASING ORDINANCE (CITY COUNCIL)**

#### **I. SUMMARY**

This matter was continued from the March 20, 2018 City Council meeting. At that time, the City Council instructed staff to research whether the local preference of 5% could be increased and if the amount of the contract, material supplies or equipment could be increased over \$100,000. Staff has done further research and the recommendation remains the same.

In 2013, the City adopted a local preference ordinance, which provided preferential treatment for resident businesses providing services, supplies, and equipment to the City ("2013 Ordinance"). In 2017, the City's purchasing ordinance was substantially re-written and modernized so that it would better address the City's purchasing needs ("New Purchasing Ordinance").

To complete the modernization of the New Purchasing Ordinance, the City Council has directed staff and the City Attorney to draft new and up-dated local preference provision(s) to be included in the New Purchasing Ordinance

Attached is an ordinance which, in the considered opinion of the Office of the City Attorney, up-dates the 2013 local preference provisions of the old purchasing ordinance, and is in a form ready for consideration and possible introduction and first reading at the pleasure of the City Council.

#### **II. RECOMMENDATION**

WAIVE further reading and INTRODUCE for first reading Ordinance No. 18-1806, "AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CARSON, CALIFORNIA, AMENDING THE CARSON MUNICIPAL CODE TO ESTABLISH A PREFERENCE FOR LOCAL BUSINESSES IN THE PROCUREMENT OF SUPPLIES AND EQUIPMENT AND SERVICES."

### III. ALTERNATIVES

1. DIRECT staff and the City Attorney to further revise the draft ordinance and bring the same back for further consideration.
2. TAKE NO ACTION on the draft ordinance
3. TAKE such action as the City Council deems appropriate consistent with the requirements of law.

### IV. BACKGROUND

Courts strictly construe statutory language requiring a contract to be awarded to the “lowest bidder” against allowing a local preference or any other preference that is not based on giving the bid to the person or entity submitting the lowest price. However, absent an express requirement by statute, charter or ordinance, a city does not have a requirement to use a competitive bid process and/or award to the lowest bidder.

In *Davis v. City of Santa Ana* (1952) 108 Cal.App.2d 669, the court considered whether a trash collection contract was a “public project,” under former Government Code § 37901-2-3 (now codified at Public Contract Code § 20161). That section required a public bidding process and an award to the lowest responsible bidder for contracts over \$1000. As a general matter, “[i]n the absence of some specific charter or statutory requirement, municipal contracts need not be let under competitive bidding.”

Similarly, in a 1989 opinion, the Attorney General (“AG”) opined that a general law county could not apply a 5% preference in purchasing supplies if the county does not employ a purchasing agent, but could apply the 5% preference if it does employ a purchasing agent. Citing to *City of Santa Ana*, the AG found that, unless limited by statute, charter or ordinance, a governmental agency may contract without competitive bidding. Additionally, the AG found that, “where preference is required to be given by law to the lowest responsible bidder, a preference in favor of local vendors is plainly invalid.”

Based upon the forgoing, and a review of relevant laws, the Office of the City Attorney is of the considered opinion that a general law city, like the City of Carson, may adopt a local preference ordinance for the purchase of supplies, but not for contracts for public works projects. The only applicable state laws requiring the use a public bidding process and award to the lowest responsible bidder is under Public Contract Code §§ 20160, *et seq.* These laws are expressly limited to public works

contracts.

As to public contracts for supplies or equipment, the only state law that would seem to apply would be Government Code § 54202. This section only requires a city to adopt an ordinance for its public contracting procedures, but it does not have any requirement that a city award its contracts to the lowest responsible bidder. Accordingly, the City of Carson may adopt a local preference ordinance into its public contracting procedures. However, even if a City local preference ordinance is not prohibited by state statute, it may still run afoul of the state or federal constitution.

The federal courts have regularly found local preference laws to pass constitutional muster when a city is exercising the local preference through the City's action as a market participant. A city is acting as a market participant when it is spending money in the market as a business or customer, rather than a regulator, the City may favor certain customers or suppliers.

In *Associated General Contractors of California, Inc. v. City and County of San Francisco* (9<sup>th</sup> Cir. 1987) 813 F.2d 922, the Ninth Circuit was asked to determine whether a local preference ordinance adopted by the City and County of San Francisco ("SF"), that gave a 5% bidding preference to local businesses on purchases under \$50,000 violated the Equal Protection Clause. The court upheld the local preference ordinance, which required SF to "allocate its own funds to ameliorate disadvantages suffered by local business," that were caused by the city.

The court found that two of the city's adopted findings for approving the local preference ordinance provided legitimate support for the local preference ordinance. The first finding was that local businesses which seek to enter into contracts with the SF were at a disadvantage compared to businesses outside the SF. The second finding was that, the public interest was served by encouraging businesses to locate and remain in the SF through a minimal "good faith" preference.

The Ninth Circuit further stated that the ordinance might not have passed constitutional muster if the preference had been greater or if the preference given to businesses did not involve SF purchases. The Court found that the means adopted to pursue the legitimate ends were measured and appropriate.

### **Elements of Draft Ordinance**

Under the proposed ordinance, "local business" is a business that can certify that it:

1. Has a headquarter, primary or branch office within the City, which was established prior to the City inviting bids for the respective procurement, and
2. Possesses a current City business license and City certificate of occupancy, and

3. Is certified by the State Department of General Services as a Small Business.

In terms of the local preference itself, an informal survey has found that the average local preference afforded by cities surveyed was 5%. For example, the cities of Costa Mesa, Concord, Fresno, Hayward, San Jose, Gardena, and Thousand Oaks provide a 5% local preference. On the other hand, Santa Ana provides a preferences of 7% for Santa Ana-based businesses and a 4% preference for Orange County-based businesses. The City of Long Beach has a 10% local preference.

A 5% local preference has been upheld in the *Associated General Contractors* case. Based upon our anecdotal survey, the attached ordinance affords a 5% “preference” for local businesses in awarding City contracts pursuant to the New Purchasing Ordinance.

In the *Associated General Contractors* case, the Ninth Circuit upheld a local preference ordinance that applied to contracts not exceeding \$50,000. However, our informal survey found that contract “caps” ranged from \$10,000 up to \$1,000,000.

Of these cities surveyed, the most common contract “cap” adopted was to apply a local preference to city contracts not exceeding \$100,000 (e.g., Santa Ana, Concord, Long Beach, and Thousand Oaks). Again, based upon our anecdotal survey, the attached local preference ordinance is limited to contracts not exceeding \$100,000. This means that, if a local business submits a bid of \$100,000, then the local preference of 5% would apply. If the bid is greater than \$100,000, then the local preference would not apply.

Additionally, the City’s Purchasing Manager is able to establish administrative rules and procedures to carry out the local preference ordinance per Section 2603 of Chapter 6 of Article II of the Municipal Code.

## **V. FISCAL IMPACT**

None

## **VI. EXHIBITS**

1) Ordinance No. 18-1806 (pgs. 5-11)

Prepared by: City Attorney's Office