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OVERVIEW OF ASSEMBLY BILL 1084

The purpose of this chapter is to advise the City College of San Francisco as to the scope and applicability of Assembly Bill 1084 and how the law affects its Small Local Business Enterprise programs used in the procurement of construction, construction related professional services and goods and other services.¹

Specifically, this memorandum addresses the following:

a. What guidance does AB 1084 provide in determining small business subcontracting goals;

b. What latitude do local agencies have in defining a small business;

c. What are the applicable prime and subcontractor bid preferences; and

d. What constitutes good faith efforts?

This memorandum first provides a general summary of what AB 1084 allows and does not allow, as well as the various sections of the Public Contracting Code and Government Code that it adds, amends or repeals.

¹ Pursuant to our research, we presume that City College of San Francisco is considered a state agency, and is therefore subject to the provisions of the Education and Public Contracting Codes. We did not find any documentation stating that the College is deemed a “home rule municipality” and therefore afforded more leeway under the California Constitution.

Mason Tillman Associates, Ltd. September 2002
Assembly Bill 1084
Overview and Implementation
I. Applicable Law

A. Assembly Bill 1084

Assembly Bill 1084, introduced by Assemblymember Herb Wesson, and enacted this past October, seeks to remedy barriers to procurement opportunities for small businesses in a race and gender neutral manner, consistent with Proposition 209. The Bill provides incentives to prime contractors to increase small business (including minority-owned and woman-owned) participation in state and local government contracting.

Assembly Bill 1084 amends Sections 14836, 14837, 14838.5, 14839, 14839.1, 14840, 14842, and 14842.5 of the Government Code, and repeals and adds Section 14838 of the Code. The Bill also amends Sections 2000 and 2001 of, and to add Sections 2002 and 10116 to, the Public Contracting Code, relating to public contracts.

The law as it stands requires state and local agencies to give small businesses, defined as “an independently owned and operated business, which is not dominant in its field of operation, the principal office of which is located in California, the officers of which are domiciled in California, and which, together with its affiliates, has 100 or fewer employees, and average annual gross receipts of ten million dollars or less over the previous three years, or is a manufacturer, as defined in subdivision (c), with 100 or fewer employees,” a 5% preference in contracts for construction, the procurement of goods, or the delivery of services. AB 1084 also includes microbusinesses, defined as a “small business that, together with its affiliates, has average annual gross receipts of two million five hundred thousand dollars or less over the previous three years, or is a manufacturer, as defined in subsection (c), with 25 or fewer employees,” and revises annual goals for the program.

Further, the Bill authorizes a state or local agency to provide the small and micro business prime preference in construction, the procurement of goods, or the delivery of services, and to establish a subcontracting participation goal for small businesses on contracts with a preference for those bidders who meet the goal.2

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Pursuant to Section 14837 of the Government Code, the director of the Department of General Services ‘shall conduct a biennial review of the average annual gross receipt levels specified in this subdivision and may adjust that level to reflect changes in the California Consumer Price Index for all items. To reflect unique variations or characteristics of different industries, the director may establish, to the extent necessary, either higher or lower qualifying standards than those specified in this subdivision, or alternative standards based on other applicable criteria.’”

Mason Tillman Associates, Ltd. September 2002
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Overview and Implementation

1-2
The Bill requires the Department of General Services to submit a report annually to the Legislature, detailing the level of participation by small and microbusiness enterprises, by race, ethnicity and gender of owner, in specified contracts. Further, and pursuant to a subsequent Executive Order of the Governor, if an individual agency fails to meet the 25 percent goal, it too must submit a report to the Governor’s Office explaining why the goal was not met. The report must also include suggestions for improving contracting opportunities for small businesses.

B. Public Contracting Code Section 2002

Section 2002 is added to the Public Contract Code and allows state and local agencies to do any of the following in facilitating contract awards to small businesses:

a. Provide for a small business preference in construction, the procurement of goods, or the delivery of services where responsibility and quality are equal. Preference to a small business allows up to 5 percent of the lowest responsible prime bidder’s price;

b. Establish a subcontracting participation goal for small businesses preference to non-small prime bidders up to 5 percent; and

c. Require good faith efforts to meet a small business subcontracting participation goal. Bidders who fail to make the goal must demonstrate their good faith efforts.

C. Public Contracting Code Section 10116

Pursuant to this Section, each awarding department is required to report to the Legislature and the Governor on the level of participation of business enterprises, by race, ethnicity, and gender of owner, in contracts as identified in this article for the fiscal year beginning July 1 and ending June 30. The reports shall contain the levels of participation of business enterprises, by race, ethnicity, and gender of owner, for the following categories of contracts:

a. Construction
b. Purchases of materials, supplies, or equipment
c. Professional services
d. All contracts for a dollar amount of less than $25,000
D. Government Code Section 14838

This Section mandates that the director of General Services and other state agencies that enter into contracts must establish goals consistent with those articulated by the Office of Small Business Certification and Resources\(^3\) and provide for a small business preference. The way in which this preference is determined will be discussed in greater detail in Section 2 of this memorandum.

This Section also requires that departments and state agencies give special consideration to small and micro-businesses by reducing the experience required and reducing the level of inventory normally required, in addition to giving special assistance to these entities in the preparation and submission of requested information.

Awards are to be granted to small and micro-businesses whenever feasible, and such businesses are to have precedence over non-small business bidders even when non-small bidders may in fact be eligible for an award.

E. Government Code Section 14838.5

Pursuant to this Section, a state agency may limit competition to two or more certified small businesses, micro-businesses or disable veterans business enterprises when awarding contracts under certain dollar thresholds.

The table below demonstrates the threshold dollar amounts and industries described above.

<table>
<thead>
<tr>
<th>Threshold Dollar Amount</th>
<th>Construction</th>
<th>All Other Goods and Services</th>
</tr>
</thead>
<tbody>
<tr>
<td>$5,000 - $100,000</td>
<td>T</td>
<td></td>
</tr>
<tr>
<td>$5000 - $200,000</td>
<td>T</td>
<td></td>
</tr>
</tbody>
</table>

If the estimated cost to the state is less than $5000 dollars for the acquisition of goods, services or information technology, or a greater amount as administratively established by the director, a state agency must obtain at least two price quotations from responsible suppliers whenever there is reason to believe a response from a single source is not a fair and reasonable price.

\(^3\) This goal will be discussed in greater detail in a section below.
II. Discussion

A. What is a small business.

AB 1084 squarely addresses the issue of how to define a small business. The Bill expressly defines a small business as “an independently owned and operated business, which is not dominant in its field of operation, the principal office of which is located in California, the officers of which are domiciled in California, and which, together with its affiliates, has 100 or fewer employees, and average annual gross receipts of ten million dollars or less over the previous three years, or is a manufacturer, as defined in subdivision (c), with 100 or fewer employees.”

The Bill also includes micro-businesses which are defined as “a small business that, together with affiliates, has average annual gross receipts of two million five hundred thousand dollars or less over the previous three years, or is a manufacturer, as defined in subsection (c), with 25 or fewer employees.”

B. Small business goals

Pursuant to Executive Order D-37-01, issued by Governor Davis in May of 2001, state agencies should “aggressively pursue an annual 25 percent small business participation level in state contracting.” The Department of General Services (DGS) is the main resource for state agencies seeking assistance with developing a plan for the necessary actions toward achieving the annual 25 percent goal.

C. Prime and subcontractor bid preferences

As discussed above, Government Code Section 14838 sets forth the formula used to determine prime and subcontracting bid preferences. The formula is as follows:

a. In solicitations where an award is to be made to the lowest responsible bidder meeting specifications, the preference to small businesses and micro-business prime contracts shall be five percent of the lowest responsible bidder meeting specifications. The preference for subcontracting shall be for non-small businesses

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4 “Manufacturer” means a business that is both the following: (1) Primarily engaged in the chemical or mechanical transformation of raw materials or processed substances into new products; (2) Classified between Codes 2000 to 3999, inclusive, of the Standard Industrial Classification (SIC) Manual published by the US Office of Management and Budget, 1987 edition.
five percent of the lowest responsible bidder meeting specifications, determined by the Department of General Services (DGS).

b. In solicitations where an award is to be made to the highest scored bidder based on evaluation factors in addition to price, the preference to small business or micro-business shall be five percent of the highest responsible bidder’s total score. The preference to non-small business bidders that provide for small business or micro-business subcontractor participation shall be up to a maximum five percent of the highest responsible bidder’s total score, determined according to rules and regulations established by DGS.

c. The preference under paragraphs (1) and (2) may not be awarded to a noncompliant bidder and may not be used to achieve any applicable minimum requirements.

d. The preference under paragraph (1) may not exceed $50,000 for any bid, and the combined cost of preferences granted pursuant to paragraph (1) and any other provision of law may not exceed $100,000. In bids where the state has reserved the right to make multiple awards, this $50,000 maximum preference cost shall be applied, to the extent possible, so as to maximize the dollar participation of small businesses, including micro-businesses, in the contract award.

D. Good faith efforts

AB 1084 requires state agencies to exercise “good faith efforts” in contracting and procurement with small and micro-businesses. However, unlike its explicit directives and definitions concerning other areas of the law, good faith efforts are not clearly set forth within the Bill.

Presumably, actions previously deemed to constitute good faith efforts are applicable to the requirements of AB 1084. There does not appear to be any increased standards.
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STRATEGY FOR IMPLEMENTATION

Mason Tillman has been asked to discuss (1) the benefits of implementing Assembly Bill 1084 (AB 1084), (2) the challenges, including the strategies and resources necessary for implementation and (3) other public agencies’ response to the enactment of AB 1084. In addition, City College has also requested a discussion of the use of baseline goals and Mason Tillman’s recommendations regarding those goals.

I. The benefits of implementing AB 1084

Although slightly difficult to quantify, there are many cost benefits associated with the implementation of AB 1084. First, from a public relations standpoint, incorporation of the provisions of AB 1084 into the SLBE Program would be a windfall. The business community would perceive this as a commitment by City College to increase the contracting opportunities available to the community, particularly in the procurement of construction and goods and other services. Moreover, given the positive impact such action would have upon minority and women owned businesses, City College would be at the forefront of diminishing the negative implications of Proposition 209.

Implementing AB 1084 provisions could result in an increased number of bidders for City College contract opportunities. This may reduce the costs associated with each project.

A less tangible cost benefit, but one that is equally important, would be an increase in contracting opportunities in construction and goods and services for many members of the small, local business community. An additional benefit would be the reduction in staff time spent dealing with complaints by the business community regarding the lack of contracting opportunities in construction and goods and other services.
Another cost benefit would be the effect upon City College’s bond measure. A commitment to broadening contracting opportunities for small local businesses would likely result in garnering increased support for the passage of any future bond measure.

Lastly, implementing the provisions of AB 1084 extending goals and bid discounts authorized by AB 1084 to construction and goods and services would be responsive to the Board of Trustee’s request.

II. The challenges associated with the implementation of AB 1084

A. Strategies and resource requirements

Implementing the provisions of AB 1084 requires a three step approach: (1) design, (2) set up and (3) maintenance. Each step will involve some cost, most of which will be incidental, as many of the steps are currently used to operate the SLBE Program.

1. Design

Designing the SLBE Program to conform with the requirements of AB 1084 will entail the following: (1) the setting of goals for construction and purchasing, (2) the formulation of written policy, (3) the drafting of specification language for the standard contract documents, (4) the training of staff about AB 1084 enhancements and their effects upon the SLBE Program, and (5) the public notification of the expansion of the SLBE Program to include AB 1084 provisions.

2. Goal Setting

Setting the goals for the SLBE Program in light of AB 1084 should involve a consensus building process which incorporates the considerations and suggestions from the business community as used in developing both the M/WBE and SLBE Programs.

The business community should be allowed to participate in the development of specific goals for the SLBE Program. This would be accomplished by providing the business community with a draft of the Program with the revised goals for review. Thereafter, the business community’s suggestions should be incorporated into setting the ultimate goals. The cost for this task may not be low.
3. Formulation of Written Policy

Any enhancements to the SLBE Program which reflect the provisions of AB 1084 must be codified in written form. The Policy must first be drafted and enacted by the Board of Trustees as an amendment to the SLBE Program. It is then imperative to create a written articulation of the provisions to be inserted within the SLBE Program procedures. The costs for these tasks may not be low.

4. Preparation of Specification Language

Each contract executed between City College and a provider of goods or services must contain as part of the standard provisions specifications outlining the requirements of AB 1084. Costs associated with this task will be minimal, as this may be accomplished for construction contracts simply by revising the previous M/WBE language.

5. Public Notification

The business community must be made aware of the modification to the SLBE Program. A statement explaining the modification should first be posted to the Facilities Planning & Construction and Contract Compliance Office’s web sites. The explanatory statement should then be distributed to the business community electronically through electronic mail and facsimile. Further notification might include the creation of a newsletter, holding an informational community meeting or producing leaflets explaining the legislation and its effects upon the Program. The costs for these tasks may not be low.

6. Staff Training

It is imperative that City College staff be trained as to the basic provisions of AB 1084 so they may fully understand its impact and allow them to efficiently implement the Program. A trained staff is better suited to carry out the objectives of the modified Program and will be capable of answering questions from the business community. Additionally, an informed staff will understand the benefits of complying with the procedures designed to minimize the staff time required to carry out the Program. Here, the associated costs would be low.

7. Set Up

The Facilities Planning & Construction and Contract Compliance Office’s web sites should be updated with all information necessary to answer questions from the business community about AB
1084 and the modifications to the Program from This will assist in alleviating the burden upon staff. The costs associated with this process would be incidental, at most.

8. Monitoring

Monitoring the contracts for purposes of tracking and reporting is necessary to ensure that the enhanced requirements are met. Here, there will be an increase in cost, although monitoring standards are currently utilized for the existing Program. The increase in cost is attributed to the addition of two industries which are not included in the current SLBE Program and therefore not tracked: construction and purchasing. In addition to review of these contracts for compliance, a determination as to whether each subcontractor was actually being paid, creates a new task that adds to the present costs. The costs may not be low.

The table below sets forth the strategies for implementation and an approximation of the associated costs.

<table>
<thead>
<tr>
<th>Fiscal Impact</th>
<th>Approximate Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Goal Setting(^1)</td>
<td>$15,000</td>
</tr>
<tr>
<td></td>
<td>Annual Cost</td>
</tr>
<tr>
<td>Written Policy</td>
<td>$2,500</td>
</tr>
<tr>
<td></td>
<td>One-time Cost</td>
</tr>
<tr>
<td>Preparation of Specification Language</td>
<td>$1,500</td>
</tr>
<tr>
<td></td>
<td>One-time Cost</td>
</tr>
<tr>
<td>Public Notification</td>
<td>$5,000</td>
</tr>
<tr>
<td></td>
<td>One-time Cost</td>
</tr>
<tr>
<td>Staff Training</td>
<td>$3,500</td>
</tr>
<tr>
<td></td>
<td>Annual Cost</td>
</tr>
<tr>
<td>Monitoring</td>
<td>$2,400</td>
</tr>
<tr>
<td></td>
<td>Monthly Cost</td>
</tr>
</tbody>
</table>

\(^1\) Costs will vary, depending on method of goal setting. Shown, are the fixed costs of baseline goal setting.

Mason Tillman Associates, Ltd. September 2002
Assembly Bill 1084
Overview and Implementation
III. Other agencies’ response to AB 1084

Mason Tillman conducted a survey of 100 agencies in the State of California. Twenty of those surveyed were community college districts. Of the 100 surveyed, one entity was aware of Assembly Bill 1084. However, of the 100 surveyed, approximately 90 percent expressed an interest in receiving information about the legislation, recognizing the benefits it would provide for their contracting programs.

IV. Use of Baseline Goals

City College has articulated two concerns: (1) the difficulty Facilities Planning & Construction is having meeting the current requirements of the SLBE Program and (2) the expansion of the Program to include more goals and bid discounts as authorized by Assembly Bill 1084 discussed above.

Given these concerns, Mason Tillman has been asked to develop a report outlining the implementation of baseline goals, to provide recommendations regarding Facilities Planning & Construction relative to the SLBE Program requirements, to determine other agencies’ response to the enactment of AB 1084 and lastly to explain the effectiveness of the M/WBE. What follows is a discussion outlining how to determine baseline goals as well as our recommendations. Mason Tillman can prepare a report to establish these baseline goals upon approval of our approach detailed below.

V. SLBE Program Background

The District’s SLBE Program currently uses contract specific goals, which are set on a contract by contract basis. These goals are based on current availability of contractors to perform the specific items of work. At the time the decision to use contract by contract goal setting was made, narrow tailoring of the contract goals was considered the most prudent method. The method was both legally sound, since the District was at the time operating a race based program, and it was administratively efficient because it utilized goals based on current availability, which was objective evidence that the goals were attainable.

VI. Definition of Baseline Goals

The District is currently considering modifying its goal setting method to use baseline goals for all contracts. The baseline goals would be determined by identifying various types of projects that would be subject to the SLBE program requirements and then setting goals for each of the types of projects.
Certainly having goals established prior to the time the contract is advertised would be a benefit that could reduce the administrative burden of advertising a project. Forecasting of contracts is a critical element of a timely goal setting process regardless to whether it involves baseline goals or contract specific goals. In fact the ideal standard for contract by contract goal setting has been to establish goals well in advance of a contract being advertised. Advanced preparation of contract goals requires early notice of a project.

VII. Determining a Baseline Goal

In determining an attainable baseline goal, one approach would be to study either past or future contracts and assess availability. We suggest using the prospective approach and analyzing the types of contracts that will be awarded in the next 12 to 24 month period. The process of setting the goals would essentially be the same as the method currently being used. The subcontractable items would have to be identified and the availability of SLBEs would have to be assessed. The process challenges all parties to rigorously assess the scope of each of the contract types for their subcontracting potential. Using contract specific information to set a goal ensures that the goal, when applied to all contracts of the same type, is actually able to be achieved without unduly burdening the particular department. The process of setting goals prospectively also requires Facilities Planning & Construction to prepare a comprehensive forecast that will identify the types of contracts to be advertised in the upcoming period for which City College wants to set baseline goals.

VIII. Implementing Baseline Goals

This baseline goal setting approach also requires some checks and balances. Decisions to exempt a contract from SLBE goals should only be made with the concurrence of the Contract Compliance Officer. Application of the baseline goals should be consistently applied to contracts by specific types. Please note, once a contract type is specified, it should not be reclassified without the concurrence of the Contract Compliance Officer.

This approach should offset some of City College’s concerns regarding the inverse relationship between the reduction of key staff and the anticipated increase in the number of projects. Baseline goals, determined by type, will reduce the amount of information staff will have to provide at the time each contract is being advertised.
IX. Issues Associated with Meeting SLBE Program Goals

Concerns have been expressed regarding City College’s ability to meet the demands of the current SLBE Program. This concern has increased in light of Assembly Bill 1084, which authorizes City College to expand the current Program to include goals and discounts for construction contracts. Mason Tillman has been asked to specifically address and provide documentation regarding procedures used to achieve the District’s former M/W/LBE Program’s past successes.

When the M/WBE Program was first approved, Mason Tillman created a program schedule which articulated various time frames within which certain outreach efforts were to be made and when Mason Tillman should receive information to be used to set goals. Pursuant to that schedule, the Facilities Planning & Construction staff created prospective schedules with upcoming contracts listed, also referred to as forecasts, which were made available to the business community before official bid notices were issued.

Targeted distribution of the RFPs/RFBs and the forecasts was also an integral element of the outreach. This enabled businesses to prospectively assess potential contracting opportunities. This practice was an important component of the Program’s success. In addition the proactive approach used to inform the business community served as an excellent outreach method. Perhaps the most significant component of the M/WBE/SLBE Program which positively affected the outreach effort was the fact that local minority and women-owned business enterprises were being awarded prime and subcontracts.

Another factor that significantly contributed to the success of the Program was that good faith efforts were rigorously applied and monitored. And the M/WBE reporting requirements were strictly adhered to by the District staff in the award and administration of contracts.

Current participation has plummeted in the absence of construction goals and a decrease in the sub-consulting opportunities on construction-related professional services contracts. Further, there has been a marked decrease in the amount of small purchases with M/WBEs and SLBEs, although these contracts require no goals or competitive bidding. Apparently the pre award and post award SLBE reporting requirements set forth in the contract documents are not being adhered to by either the prime contractors or the District’s staff. These standard contract provisions were written by Mason Tillman Associates to facilitate the administration of SLBE contracts. The increased demand in the award of multiple contracts was anticipated when Mason Tillman Associates wrote the SLBE standard contract provisions.
These notable reductions in SLBE participation might reflect a need to enhance staff understanding of the SLBE Program objectives and to improve the use of existing SLBE monitoring and reporting procedures. Staff training as conducted in 2000 might be in order.

X. Recommendations

At a time when the state and other local governments are expanding the contracting benefits to SLBEs, City College should seriously evaluate the economic and political implications of reducing the SLBE Program’s scope or impact. Such action might compromise the SLBE Program’s intent to achieve contracting equity and it could be perceived negatively by the business community.

Detailed below are the recommendations City College has requested of Mason Tillman to address the achievement of the SLBE Program’s goals.

• If baseline goals are set, prepare them prospectively, using comprehensive forecasts of upcoming contracts for the next 12 to 24 month period.

• Create a forecast of contracts estimated to be awarded over the next 12 months. Review the contracts awarded in the previous 12 months and use the availability numbers of those contracts to set goals for the new types of contracts. Use the previous goals for the types of contracts awarded in the previous 12 months.

• If baseline goals are established those goals should be maintained for the 12 to 24 month period upon which the goal was calculated.

• Once contracts are classified by type they should not be reclassified.

• Use the State of California’s overall goal of 25 percent.

• Revise the SLBE policy and program to conform with the construction goals and bid discounts as provided for in Assembly Bill 1084.

• Serious consideration should be given to applying the goals and bid discounts as provided for in Assembly Bill 1084 to the purchase of goods and other services. This is in response to the Trustees’ inquiry at the February meeting.

• Utilize the M/WBE Program contracting schedule developed for the Facilities Planning & Construction staff in 2000.
• Maximizing SLBE participation should be a priority in designing a project’s scope of services.

• More frequent outreach meetings should be held, given the marked increase in future projects.

• Utilize and maintain the existing Contracting web site to minimize staff time spent answering inquiries from the business community.

• Require bidder and contractor compliance with submission of required SLBE documents thereby minimizing Facilities Planning & Construction’s involvement with reporting requirements.

• Continue to require good faith efforts to ensure compliance.

• Conduct training to ensure District staff understanding of the SLBE Program objectives.

• Prepare SLBE reports on a quarterly basis.

XI. Suggestions Regarding the Future Contractual Relationship Between Mason Tillman and the District

It was specifically requested in your May correspondence suggestions be set forth regarding the need for a future contractual relationship between Mason Tillman and City College. Many of the services Mason Tillman provides are a vital component of the continued success of City College’s SLBE Program, and therefore justifies a continued relationship with our firm. What follows is a list of needed services:

• Establish baseline goals for the contract types forecasted for next 12 months.

• Provide good faith effort review for construction and construction-related professional services contracts.

• Re-evaluate annually, and if necessary, modify the baseline goals set, based on changes in the forecasted contracts and the availability of SLBEs to perform them.

• Coordinate and publicize the outreach events.

• Maintain the Contracting web site to reduce Facilities Planning & Construction Department staff and the Contract Compliance Officer demand from businesses seeking information about
upcoming contracts, SLBE requirements, prime contractor payments and other contract related information.

• Prepare Quarterly SLBE reports.