

Procurement Policy Update & Discussion

City Council
March 31, 2014

Ethics

- Based on Council's discussion
 - Replaced ethics narrative in Procurement Policy with reference to Council Policy #CP-14
 - Recommend revising #CP-14 to remove references to City employees
 - Replaced ethics narrative in Procurement Manual with reference to Employee Policies section on Conflicts of Interest

Preferences

- Investigated preference policies in other cities:
 - In area, only Denver has preference policy for minority/women owned businesses
- City Attorney's Office researched case law
 - found enacting a preference policy could subject City to significant & expensive legal challenges based on Equal Protection clause of U.S. Constitution

Case Law

- 2003, Concrete Works of Colorado, Inc. v. City and County of Denver; court said:
 - Racial (minority) preferences is “highly suspect tool” in remedying racial discrimination & “race based” preferences are subject to “strict judicial scrutiny”,
 - City can only use racial preferences in awarding contracts & procurements if the City:
 - Identifies past or present discrimination with specificity
 - Demonstrates strong basis in evidence that remedial action is necessary
 - For gender-based preferences courts apply “intermediate scrutiny” & City must show the preferences:
 - Serve important governmental objectives based on reasoned analysis
 - Substantially related to achieving those objectives

Studies

- Commerce City cannot use Denver's study since it only reviewed Denver's contracting & procurement process
- Commerce City cannot use state study since it is not specific to our community
- Commerce City currently has no evidence to show discrimination or support preferences
 - Could collect data on its contracts & procurements

Studies

- Commerce City would need to study its contracting & procurement process
- Must find sufficiently strong evidence of significant statistical disparities between qualified M/WBE's available & utilized
- Must show City to have actively or passively perpetuated the discrimination
- Must design narrowly tailored remedies based on data
- Must continue to update information & revise program

Discussion & Questions