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Contractor's Obligation to Comply with Local MBE/WBE Programs After Proposition 209 and the Hi-Voltage Decision

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In November of last year, the City of San Jose's program requiring contractors bidding on city projects to utilize a specified percentage of minority ("MBE") and women ("WBE") subcontractors or document outreach efforts to include such subcontractors in their bids was found unconstitutional by the California Supreme Court in Hi-Voltage Wire Works, Inc. v. City of San Jose, 24 Cal. 4th 537 (2000). The High-Voltage decision was the first Supreme Court case to rule on the legality of MBE/WBE programs since passage of the California Civil Rights Initiative, commonly known as Proposition 209, in 1996.

The challenge to San Jose's contracting program was brought by Hi-Voltage Wire Works, the low bidder on a contract to provide a circuit switcher upgrade for the city's sewage treatment plant. Hi-Voltage was denied award because it neither met San Jose's 5 percent goal for MBE/WBE subcontractor participation established for the contract nor documented efforts to provide special information and assistance to MBE/WBE subcontractors. Hi-Voltage claimed that it could not comply with the subcontracting requirement because it intended to perform all of the contract work with its own personnel.

After it was denied award of the contract by the City of San Jose for failing to comply with the requirements of the subcontracting program, Hi-Voltage sued claiming that the program violated Proposition 209 which prohibits the State and its political subdivisions from "discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in . . . public contracting." The City of San Jose defended its program and asserted that it was merely a screening device to *prevent* discrimination against minority and women contracting firms and that it served to expand the pool of potential subcontractors rather than grant "preferences" to any group.

The trial court ruled in favor of Hi-Voltage and the Court of Appeal affirmed. The City of San Jose then sought a ruling by the California Supreme Court.

The Supreme Court held that in adopting Proposition 209, California voters intended for the law to reflect the philosophy that a preference to any group constitutes inherent inequality, and to prohibit classification of individuals by race or gender. It found that the requirement of the San Jose program that general contractors document certain minimum outreach efforts to MBE/WBE subcontractors afforded preferential treatment to these subcontractors on the basis of race or gender. It also found that the participation goal in San Jose's program discriminated against non-MBE/WBE subcontractors as well as general contractors that failed to fulfill either the participation goal or the outreach documentation option when submitting their bids. Finally, the Supreme Court held that although affirmative action is permissible under federal regulations, it does not require preemption of a state law that prohibits affirmative action.

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Given the California Supreme Court's decision in Hi-Voltage, *must general contractors comply with MBE/WBE requirements when bidding and performing local public work contract?*

The Supreme Court's decision in Hi-Voltage specifically notes that it is still possible for local governments to fashion outreach programs to disseminate information concerning public contracting opportunities *provided* the programs are "not predicated on an impermissible classification," e.g. race, gender, color, ethnicity or national origin. Thus, contractors may encounter, and would need to comply with, local programs designed increase the participation of economically disadvantaged firms, small or emerging businesses, or contractors located in areas of high unemployment in the subcontracting process. Such programs would not violate Proposition 209, nor would local outreach and training programs not limited to MBE/WBE firms. State and local preferences for contracting with businesses owned by disabled veterans are not affected by Proposition 209.

Additionally, local programs established to comply with federal mandates and satisfy eligibility requirements for federal funding may be exempt from Proposition 209.

Finally, despite the Supreme Court's decision in the Hi-Voltage case, a number of local entities still require that contractors bidding on public works projects agree to subcontract a certain percentage of work to MBE/WBE firms or comply with other requirements designed to specifically assist minority-owned and women-owned firms in obtaining subcontract work. Although the constitutionality of such programs is questionable, the local entities that continue to have these requirements will disqualify bids that do not comply with them, and may terminate contractors for default for failing to comply with requirements in effect after contract award. It is also probable that many of these local entities will defend their actions in court, if necessary. Thus, unless a contractor is willing to engage in a legal battle with the local entity, as Hi-Voltage was willing to do with the City of San Jose, there may be situations, at least for the time being, where compliance with a MBE/WBE program is part of the reality of doing business with certain local entities in California.