CITY OF AUSTIN

L A W D E P A R T M E N T

M E M O R A N D U M

TO: Zero Waste Advisory Commission

FROM: Brandon W. Carr, Assistant City Attorney

DATE: 10/01/2018

SUBJECT: Miscellaneous Legal References for the Landfill Criteria Matrix

Race, Gender, Ethnic Origin, etc. cannot be considered in Awarding Contracts

- Local Government Code Chapter 252, under which most City contracts are procured and awarded, does not list race, gender, ethnic origin, etc. as criteria the City may consider when awarding a contract.
- The Fourteenth Amendment to the U.S. Constitution makes it illegal to deny any person "equal protection of the laws" and to deprive any person of "life, liberty, or property, without due process of law." These provisions guarantee all people the right to be treated equally regardless of their race, gender, ethnic origin, etc.
- In the landmark case of *Croson*, the U.S. Supreme Court struck down the City of Richmond's race based contract set-aside program. See *City of Richmond v. J.A. Croson Company*, 109 S.Ct. 706 (1989). The Supreme Court stated that when the government uses race or ethnic origin based classifications the program is subject to what is known as strict scrutiny. Meaning a court will look very closely at such programs and the burden is on the government to (1) demonstrate a compelling governmental interest, and (2) the plan must be narrowly tailored to achieve its goal. The government must also provide evidence substantiating the need for its program. The City's M/WBE program is supported by a disparity study commissioned by the City and updated periodically. Even benign regulations that are based on race or gender are subject to this highest level of scrutiny by a court. *Id.*, at 721 ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.")
- In the *Virginia* case, the U.S. Supreme Court stated that there is "a strong presumption that gender classifications are invalid." *United States v. Virginia*, 518 U.S. 515, 532 (1996).

Historically, the City has applied the strict scrutiny test when it comes to classifications based on gender.

- 42 U.S.C.A. § 2000d prohibits discrimination in the awarding of contracts using federal funds. It states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."
- Awarding contracts based on race, gender, ethnic origin, etc. is also inconsistent with the City's ordinances which prohibit employers from classifying or employing people "based on the individual's race, color, religion, sex, sexual orientation, gender identity, national origin, age, or disability." See City Code § 5-3-4 (Unlawful Employment Practices).

EEO1 Information is Confidential under Federal Law

Please see Section 709(e) of Title VII of the Civil Rights Act of 1964:

> (e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

EE01 reports are confidential under Section 709(e) of the Civil Rights Act, cited above. Violation of 709(e), i.e. sharing EE01 reports, could subject the violator to federal criminal charges, including up to a $1,000 fine and imprisonment for up to a year.

Labor Peace Agreements can violate the National Labor Relations Act

The National Labor Relations Act (29 U.S.C. § 151 et seq.) was enacted to create a uniform national labor policy. In order to prevent conflicts between state, local, and federal laws, the rules promulgated by the National Labor Relations Board generally preempt all other state and local rules, laws, and regulations of labor policy. See *Cab Operating Corp. v. City of New York*, 243 F. Supp. 550, 555–56 (S.D.N.Y. 1965) and *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 245, 79 S. Ct. 773, 780, 3 L. Ed. 2d 775 (1959).

Living Wage Requirements are set by Council Resolutions

Council has adopted a resolution specifically outlining when the Living Wage will apply to a City contract. See Resolution No. 20160324-020. For non-construction related procurements the Living Wage applies when: 1) the contract is competitively and formally solicited by the City, and is subject to award by the City Council, except as may be preempted by other applicable law or agreement; and 2) all the work solicited will be *performed on City property or on City vehicles*. The Living Wage applies to all prime and subcontractors on a City contract. Unless the contract meets all of the criteria above, the Living Wage does not apply.

Benefits are generally governed by Federal Law

ERISA, or the Employee Retirement Security Act of 1974, is a complex federal law that regulates employee health care benefit and pension plans. ERISA regulations preempt all similar (or conflicting) state or local laws. See 29 U.S. Code § 1144.