

DEPARTMENT OF SOCIAL SERVICES

744 P Street, Sacramento, California 95814



May 11, 1998

ALL-COUNTY INFORMATION NOTICE: I-28-98 I

TO: ALL COUNTY WELFARE DIRECTORS

REASON FOR THIS TRANSMITTAL

- State Law Change
 Federal Law or Regulation
 Change
 Court Order or Settlement
 Agreement
 Clarification Requested
 by One or More Counties
 Initiated by CDSS
-

SUBJECT: THE PROCUREMENT STATUS OF THE STATEWIDE FINGERPRINT IMAGING SYSTEM (SFIS)

This letter provides a status update regarding the procurement and implementation of the Statewide Fingerprint Imaging System (SFIS). The last update was sent on March 12, 1998 and, since that time, there has been a significant change in the procurement and project implementation schedule.

As reported in the March 12, 1998 update, North American MORPHO Systems, Inc. (MORPHO) filed a writ petition in Sacramento Superior Court requesting that the court determine whether this procurement violated the constitutional requirements of Proposition 209. This procurement included Minority and Women Business Enterprise (MWBE) requirements pursuant to Public Contract Code 10115 et. seq.(10115). As a result of the petition, the Superior Court issued a temporary stay of the protest proceedings pending at the Board of Control until the March 27, 1998 hearing, at which time the Court would hear a portion of the writ.

Article III, Section 3.5 of the California Constitution requires State agencies and departments to follow the law until it is determined to be unconstitutional by an appellate court. Thus, the State was required to keep the MWBE provisions of 10115 in its procurements and contracts despite Proposition 209 until an appellate court ruled 10115 was unconstitutional.

On March 10, 1998, the Department of General Services issued Management Memo 98-04 to implement Executive Order W-172-98 issued by Governor Wilson (copies enclosed). This Executive Order was issued as a result of the Monterey Mechanical decision. (Monterey Mechanical v. Wilson was a lawsuit filed in Federal District Court challenging the enforcement of 10115 as violating the Equal Protection provisions of the Federal Constitution. In September 1997, the Ninth Circuit Court of Appeals issued an opinion that 10115 did violate

All County Welfare Directors
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the equal protection provisions of the Constitution; however, because of a unique procedural issue, the opinion of the Ninth Circuit did not become final until March 9, 1998.)

Management Memo 98-04 required departments to re-bid all state procurements that had already received final proposals but did not yet have a fully executed contract (by both the State and the vendor) prior to March 10, 1998. Since SFIS did not have a fully executed contract on March 10, 1998, the State canceled the procurement on March 16, 1998. Because of the cancellation of the procurement, MORPHO dismissed its suit.

The State intends to release the ~~Request for Proposal (RFP)~~ for the new procurement during May 1998. The estimated contract award date is eight to twelve months after the release of the RFP and implementation of the SFIS is projected to begin approximately seven months after the contract is awarded.

If you have any questions, please call Valerie Maule! of the Fraud Bureau, at (916) 445-2423.

Sincerely,

Bruce Wagstaff
Deputy Director
Welfare to Work Division

Enclosure

Executive Department
State of California
Executive Order W-172-98

Whereas, California should lead the nation in creating an optimum environment which affords all individuals and businesses equal access to the economic opportunities available in our diverse and powerful economy; and

Whereas California Public Contract Code §10115 et. seq. requires the state to award contracts only to bidders which to contract or demonstrate good faith efforts to contract certain percentages of their work to businesses based on race, gender or disabled veteran status of the business owners; and

Whereas, awarding tax payer-funded contracts on the basis of race and gender is discriminatory and in conflict with the fundamental principle of equal rights under the law upon which our richly diverse society must be based on both theory and practice if it is to prosper and

Whereas, the Ninth Circuit court of Appeals has determined in *Monterey Mechanical Co. V. Wilson*, 125 F.3d 702 (9th Cir. 1997), rehearing denied, _F3d_ (March , 1998), that the provisions of public contract code 10115 et seq. requiring the achievement of minority and women business enterprise goals or good faith efforts to achieve the same are unconstitutional and violate the Equal Protection Clause of the fourteenth amendment of the United states Constitution , but did not address or invalidate the disabled veteran provisions of the statute; and percentages of their work to businesses based on the race, gender, or disabled veteran status and

Whereas, article III, section 3.5 of the California Constitution provides that administrative agencies may not refuse to enforce the administer state statutes on the basis of their being unconstitutional unless an appellate court determines such statutes to be unconstitutional; and

Whereas , the Ninth circuit's decision in *Monterey Mechanical Co. v. Wilson* is such an appellate determination; and

Whereas, state government must ensure that its contract selection procedures safe guard against discrimination on the basis of race, sex, color, ethnicity and national origin.

Now, therefore, I, Pete Wilson, governor of the State of California, by virtue of the power and authority vested in me by the Constitution and the states of the Sate of California, do hereby issue this order to become effective immediately;

1. Every state agency , department, board and commission shall cease any enforcement of the minority and women business enterprise participation goals and the good faith effort requirements related thereto under Public Contract Code 101115 et seq. With respect to any state contracts or amendments thereto awarded or entered, or proposed to be awarded or entered, on or after March 10, 1998.

2. All actions, programs, and regulations which seek to monitor, promote , or comply with the minority of women business enterprise goals or the good faith efforts related there to under Public Contract code 101115 et seq shall no longer be administered and where appropriate, be repealed
3. The requirements under Public contract doe 10115 et seq. regarding participation goals and good faith efforts regarding disabled veteran business enterprises continue to be required by law and are not affected by this executive order.
4. Every state agency, department, board and commission shall take appropriate steps to ensure that state contracting programs are administered in a manner which is free from discrimination on the basis of race, sex, color, ethnicity and national origin.
5. Every state agency, department , board, or commission shall consider, and if appropriate, submit to the Governor's office, any recommendations which will promote equal opportunity in state contracting for all individuals and businesses without regard to their race, sex, color, ethnicity, or national origin.
6. The Department of General services shall provide, upon request, technical assistance to state agencies, departments, board, and commissions in complying with the requirements of this executive order.
7. State Constitutional Officer, the University of California, the California community colleges, and the State Board of education are directed to take all necessary action to comply with the intent and the requirements of this executive order.
8. Nothing in this executive order shall be construed to require any action that would result in the violation of a court order to a loss of eligibility for federal funding

In Witness Whereof I have hereunto set my hand and caused the Great Seal of the State of California to be affixed to this 10th day of March 1998

Original signed by

Pete Wilson

Governor of California

Attest

Original signed by

Bill Jones

Secretary of State

MANAGEMENT MEMONUMBER: **98-04**

SUBJECT:

DATE ISSUED: MARCH 10, 1998

MINORITY AND WOMEN BUSINESS ENTERPRISE
PARTICIPATION REQUIREMENTS FOR STATE
CONTRACTING

EXPIRES: UNTIL RESCINDED

REFERENCES: Executive Order W-172-98, and State Contracting
Manual

ISSUING AGENCY:

Department of General Services

This Management Memo is intended to assist state agencies, departments, boards, and commissions, in complying with the requirements of Executive Order W-172-98.

The Executive Order applies to specified contracting activities occurring on or after March 10, 1998, and affects **all** state contracts, including any agreement or joint development agreement to provide labor, services, materials, supplies, or equipment in the performance of a contract, franchise, concessions, or lease granted, let, or awarded for and on behalf of the State of California. It does not *apply* to federally-funded contracts or current statutory requirements for disabled veteran business enterprise (DVBE) goals and the good faith efforts to meet DVBE goals.

Table A attached to this memorandum relates to Contracts and lists appropriate actions agencies should take depending on the status of their contracts.

Table B attached to this memorandum relates to Solicitations and lists appropriate actions agencies should take depending on the status of their solicitation effort.

Table C attached to this memorandum contains some suggested language that agencies may utilize in specified situations relating to Contracts or Solicitations.

The Department of General Services (DGS) *will* be amending and/or repealing its regulations relating to MBE and WBE programs (CCR Title 2, section 1896.60, et seq.). Departments which have adopted the Department of General Services' regulations may be affected by these changes.

Should you have additional contracting questions, please call the Office of Legal Services at DGS at (916) 445-4084.



PETER G. STAMISON, Director
Department of General Services

TABLE A'²
(Contracts)

Status of Contracts	Appropriate Action
Contract does not contain MBE/WBE requirements.	No action is necessary
Contract awarded <u>prior</u> to 3/10/98, with MBE/WBE requirements.	Requirements for MBE/WBE remain as stated in the contract.
Contract with MBE/WBE requirements awarded on or after 3/10/98.	Contracts awarded on or after 3/10/98 must not be approved if they are the result of solicitations containing any MBE or WBE requirements. Agencies should notify the contractor that the contract will not be executed as it exists, and a new solicitation will be conducted. ³
Existing contract is in place and being performed by the contractor who now wants to eliminate the MBE and/or WBE subcontractors.	Agencies should inform the contractor they have a contractual obligation to comply with existing contract provisions, including the subcontracting provisions.
Existing contract is in place and being performed by the contractor, who has lost an MBE or WBE subcontractor, through no fault of their own.	Contractors must comply with any subcontractor substitution provisions contained in the contract, solicitation document, or in regulations.
Existing contract is amended on or after 3/10/98.	MBE/WBE participation, pursuant to PCC Section 10115, cannot be required in amendment. Agencies must be careful not to interfere with current contractual arrangements between contractor and sub-contractor.

1 Note: The actions listed here are appropriate regardless of whether DOS or the awarding department has approval authority for the contract. For contracts submitted to DOS for approval, agencies must indicate the date of the contract award on the Std. 15 Contract Transmittal Form, or other transmittal document.

2 Note: For purposes of Tables A - Tables C, the following definitions apply: 1) the term "award" means the date the agency communicates to the bidder that they are being awarded the contract (this does not include any preliminary notification or an "intent to award"); and 2) the term "contract" means all such contracts, including but not limited to those defined in PCC Section 10115, including EDP and telecommunications contracts, and purchase orders,

3. See Suggested Language in Table C.

TABLE B
(Solicitations)

Status of Solicitation Effort	Appropriate Action
<p>Solicitation is still under development as of <u>3/10/98</u>. (<i>MBE/WBE subcontracting requirements are included</i>)</p>	<p>Do not include MBE/WBE requirements in the bid package. Include DVBE requirements⁴. Modify the final response due date if necessary. If this is a rebid of an existing contract, a contract extension may be necessary to provide additional time for revised solicitation.</p>
<p>Solicitation is under development as of <u>3/10/98</u>. (<i>If MBE/WBE subcontracting requirements are <u>not</u> included</i>)</p>	<p>Proceed without change.</p>
<p>Solicitation has been sent to bidders but final response due date has not yet occurred as of <u>3/10/98</u>. (<i>MBE/WBE requirements are included</i>)</p>	<p>Send addendum⁵ to <u>all</u> known bidders who received the original solicitation informing them that the MBE/WBE requirements are being deleted, but that the DVBE requirements remain. Re-advertise with a notation that MBE and WBE requirements have been deleted. Extend the final response due date to allow time for revised responses. If this is a rebid of an existing contract, a contract extension may be necessary to provide additional time for revised solicitation.</p>
<p>Responses have been received in response to the solicitation, but award has not yet been made as of <u>3/10/98</u>. (<i>MBE/WBE requirements are included</i>)</p>	<p>Notify all bidders who received the original solicitation that <u>all</u> bids have been rejected, that the solicitation has been canceled; and that a new solicitation will be forwarded to them without the MBE/WBE requirements. The new solicitation should be re-advertised with a final response date modified as necessary to accommodate the changes. Bidders who participated in the original solicitation should be advised that their DVBE efforts (i.e. advertisement, etc.) may be used for the new solicitation. If this is a rebid of an existing contract, a contract extension may be necessary to provide additional time for the new solicitation. If a letter of intent to award has been issued, agencies should send a letter to the intended awardee, retracting the previous letter of intent to award.</p>

4. The Office of Small and Minority Businesses (OSJ, 18) is currently preparing DVBE forms for use in state agency solicitations.

5. See Suggested Language in Table C.

Table C
(Suggested Language)

Situation /Based on Table A or 8)	Suggested Language
<p>Agency must notify contractor that the contract containing MBE/WBE requirements cannot be executed.</p>	<p><i>Contract XX-XXX cannot be executed. A recent decision by the U.S. Ninth Circuit Court of Appeals (<u>Monterey Mechanical</u>), which became final on March 9, 1998, has held that the statutory requirements for MBE and WBE goals and good faith efforts are unconstitutional. As a result, this contract will be rebid without these MBE and WBE requirements. (DVBE requirements remain unchanged. The efforts you made toward meeting the DVBE requirement may be submitted with your response to the new solicitation.)</i></p>
<p>Agency must send out an addendum to all holders of the current bid/solicitation package informing them the MBE and WBE requirements are being deleted.</p>	<p><i>A recent decision by the US Ninth Circuit Court of Appeals (<u>Monterey Mechanical</u>), which became final on March 9, 1998, has held that the statutory requirements for MBE and WBE goals and good faith efforts are unconstitutional. This addendum deletes all MBE and WBE requirements. (DVBE requirements remain unchanged, and the efforts you made toward meeting the DVBE requirement may be submitted with your new response.) The final response due date is/is not [agencies must choose one] being extended.</i></p>