



## City Council Staff Report

DATE: July 13, 2016

LEGISLATION

SUBJECT: AN ORDINANCE OF CITY OF PALM SPRINGS, CALIFORNIA, AMENDING SECTION 7.01.040 OF, AND ADDING SECTION 7.06.090 TO, THE PALM SPRINGS MUNICIPAL CODE, RELATING TO NON-DISCRIMINATION IN CITY CONTRACTING.

FROM: David Ready, City Manager

BY: Douglas Holland, City Attorney

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### SUMMARY

This Ordinance reaffirms the policy of the City to promote the principles of equal opportunity in its contracting activities by including terms and conditions in its various contracts that will require those seeking to do business with the city that they will treat contractors, subcontractors, and employees equally and will not engage in discrimination against their contractors, subcontractors, or employees because of their actual or perceived race, color, religion, ancestry, national origin, disability, medical condition, marital status, domestic partner status, sex, gender, gender identity, gender expression, or sexual orientation or as a member of any other protected class.

### RECOMMENDATION:

Waive text and introduce for first reading an Ordinance of the City Council "AN ORDINANCE OF CITY OF PALM SPRINGS, CALIFORNIA, AMENDING SECTION 7.01.040 OF, AND ADDING SECTION 7.06.090 TO, THE PALM SPRINGS MUNICIPAL CODE, RELATING TO NON-DISCRIMINATION IN CITY CONTRACTING."

### ENVIRONMENTAL ASSESSMENT:

Staff has reviewed the proposed amendment to the Palm Springs Municipal Code and determined that it can be seen with certainty that there is no possibility that the proposed ordinance may have a significant adverse effect on the environment. Therefore, consideration and approval of the ordinance is not subject to the California Environmental Quality Act (CEQA), and no further study is needed. (Refer to 15061(b)(3) of the CEQA Guidelines.)

ITEM NO. 1.G.

## ANALYSIS

The City's general rules and regulations relating to procurement and contracts are contained in Title 7 of the Palm Springs Municipal Code. Chapter 7.06 of the Code discusses the terms and conditions that are typically required in various agreements and contracts. The City currently includes general non-discrimination provisions in its agreements. This is a general administrative requirement; it is not specifically mandated in the Municipal Code. The proposed ordinance will include various non-discrimination requirements as mandatory provisions in city contracts. These provisions will prohibit all city contractors from discrimination on the basis of actual or perceived race, color, religion, ancestry, national origin, disability, medical condition, marital status, domestic partner status, sex, gender, gender identity, gender expression, or sexual orientation as these terms are defined by California Law, or association with members of classes protected under this Section or in retaliation for opposition to any practices forbidden under this Section, against any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations, operated by that contractor, and will also require each contractor to include a similar provision in all subcontracts.

The ordinance also prohibits any contractor with a contract in excess of \$10,000.00 to discriminate in the provision of typical employee benefits between employees on the basis of an employee's, employee's spouse's, employee's domestic partner's, or dependent's actual or perceived race, color, religion, ancestry, national origin, disability, medical condition, marital status, domestic partner status, sex, gender, gender identity, gender expression, or sexual orientation as these terms are defined by California Law.

Per the request of Council, language has been added that provides a contractor will not be deemed to discriminate in the provision of benefits if the contractor is unable to extend an employee benefit after taking reasonable measures to comply and provides the employee with a cash equivalent.

The proposed ordinance requires that each contractor will submit certifications of the contractor's compliance with the provisions of the requirements of the ordinance.

The ordinance also requires contract provisions that will allow the City to review, monitor, and investigate compliance and requires that each contractor will allow full access to applicable records. The ordinance provides for enforcement and appeals to the City Manager while retaining the City Council's call-up option in the event the Council wishes to review any administrative action in the enforcement of the ordinance. The City Manager also has the ability to waive requirements of the ordinance with the consent of the Council under specified circumstances. The City Manager is also required to provide an annual report on the administrative implementation of the ordinance.

FISCAL IMPACT:

Additional costs will be incurred in the revision of contract language to implement the requirements of the ordinance and to perform the basic administrative requirements in the initiation of the program. It is anticipated that these additional costs will be minimal. Enforcement will be complaint based and staff does not anticipate any significant compliance issues during the initial implementation of the ordinance during this fiscal year.



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Douglas Holland, City Attorney



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David Ready, City Manager

ORDINANCE NO. \_\_\_\_\_

AN ORDINANCE OF CITY OF PALM SPRINGS, CALIFORNIA, AMENDING SECTION 7.01.040 OF, AND ADDING SECTION 7.06.090 TO, THE PALM SPRINGS MUNICIPAL CODE, RELATING TO NON-DISCRIMINATION IN CITY CONTRACTING.

*City Attorney's Summary*

*This Ordinance requires the inclusion of various non-discrimination requirements as contract terms and conditions in all agreements where the City is a part. These provisions include various non-discrimination contract terms that will require those seeking to do business with the City that they will treat contractors, subcontractors, and employees equally and will not engage in discrimination against their contractors, subcontractors, or employees because of their actual or perceived race, color, religion, ancestry, national origin, disability, medical condition, marital status, domestic partner status, sex, gender, gender identity, gender expression, or sexual orientation or as a member of any other protected class.*

THE CITY COUNCIL OF THE CITY OF PALM SPRINGS ORDAINS:

**Section 1.** Section 7.01.040 is amended by amending and or adding the following definitions therein:

“City Manager” means the City Manager of the City, or the designee of the City Manager who shall be an Assistant City Manager, Department Head, or an independent third party hearing officer.

“Contract” means all types of city agreements, regardless of what they may be called, for the procurement of goods, supplies, services, or construction, including without limitation an award of a grant or a real property agreement. For the purpose of this Chapter, the term “contract” includes “subcontract.”

“Contract Administrator” means the Department Head or other city employee designated by the City Manager to administer a Contract between the City and a Contractor and oversee and monitor the Contractor’s performance under the terms of the Contract.

“Contractor” means any person having a contract or purchase order with the City. For the purpose of this Chapter, the term “contractor” includes “subcontractor” and any person who is a party to a real property agreement as defined in this Section.

“Domestic partner” shall mean any person who has a currently registered domestic partnership with a governmental body pursuant to State or local law authorizing such registration.

“Real property agreement” means any agreement for the sale, lease, or use of real property owned by or in the lawful possession of the City, including without limitation concessions, franchises, and easements.

“Subcontract” shall mean an agreement to (i) provide goods and/or services, including construction labor, materials or equipment, to a contractor, if such goods or services are procured or used in the fulfillment of the contractor’s obligations arising from a contract with the City, (ii) to transfer the right to occupy or use all or a portion of a real property interest subject to a property contract to a subcontractor and pursuant to which the contractor remains obligated under the property contract.

“Subcontractor” means any person or persons, firm, partnership, corporation or any combination thereof, who enters into a subcontract with a contractor. Such term shall include any person or entity who enters into an agreement with any subcontractor for the performance of 10 percent or more of any subcontract.

**Section 2.** Section 7.06.090 is added to the Palm Springs Municipal Code to read:

#### 7.06.080 Non-Discrimination in Contracting

(1) Statement of Policy.

(a) It is the policy of the City to promote the principles of equal opportunity in its contracting activities by assuring that those seeking to do business with the city will treat contractors, subcontractors, and employees equally and will not engage in discrimination against their contractors, subcontractors, or employees because of their actual or perceived race, color, religion, ancestry, national origin, disability, medical condition, marital status, domestic partner status, sex, gender, gender identity, gender expression, or sexual orientation or as a member of any other protected class.

(b) It is also the policy of the City to ensure that work performed on behalf of the City is done in a cost effective and high level manner. Employees who are treated fairly are more productive in their jobs and less likely to change jobs, thus helping to ensure that government contracts are both cost effective and completed in a professional manner.

(2) Basic Contract Requirement Prohibiting Non-Discrimination.

All contracts shall include provisions prohibiting discrimination on the basis of actual or perceived race, color, religion, ancestry, national origin, disability, medical condition, marital status, domestic partner status, sex, gender, gender

identity, gender expression, or sexual orientation as these terms are defined by California Law, or association with members of classes protected under this Section or in retaliation for opposition to any practices forbidden under this Section, against any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations, operated by that contractor, and shall require such contractor to include a similar provision in all subcontracts.

(3) Requirement Prohibiting Discrimination in the Provision of Benefits.

(a) No contractor of the City with a contract in the amount of ten thousand dollars (\$10,000.00) or more shall discriminate in the provision of health benefits, bereavement leave, family medical leave, moving expenses, pensions or retirement benefits, travel benefits, or membership or membership discounts between:

(i) employees on the basis of an employee's, employee's spouse's, employee's domestic partner's, or dependent's actual or perceived race, color, religion, ancestry, national origin, disability, medical condition, marital status, domestic partner status, sex, gender, gender identity, gender expression, or sexual orientation as these terms are defined by California Law;

(ii) employees on the basis of an employee's or dependent's actual or perceived gender identity, including, but not limited to, the employee's or dependent's identification as transgender; or.

(iii) employees with spouses and employees with domestic partners, or discrimination between employees with spouses or domestic partners of a different sex and employees with spouses or domestic partners of the same sex, or discrimination between same-sex and different-sex domestic partners of employees or between same-sex and different-sex spouses of employees.

(b) For purposes of this Section, an employee health plan is discriminatory if the plan is not consistent with California Law including, but not limited to, Section 1365.5 of the Health and Safety Code and Section 10140 of the Insurance Code.

(c) A contractor shall not be deemed to discriminate in the provision of benefits if, despite taking reasonable measures to extend a particular employee benefit and is unable to do so, the contractor provides the employee with a cash equivalent.

(4) Certification.

Every contractor shall submit a nondiscrimination certificate in a form acceptable to the City Manager. No contract shall be awarded until the contractor has submitted to the city such certificate. The certificate shall contain the following:

(a) Contractor certifies and represents that, during the performance of the contract, the contractor and any other parties with whom it may subcontract shall adhere to the City's non-discrimination and equal benefits as provided in the Section to assure that applicants and

employees are treated equally and are not discriminated against because of their actual or perceived race, color, religion, ancestry, national origin, disability, medical condition, marital status, domestic partner status, sex, gender, gender identity, gender expression, national origin, ancestry, or sexual orientation. Contractor further certifies that it will not maintain any segregated facilities.

(b) Contractor shall, in all solicitations or advertisements for applicants for employment placed by or on behalf of this contract, state that it is an "equal opportunity employer" or that all qualified applicants will receive consideration for employment without regard to their actual or perceived race, color, religion, ancestry, national origin, disability, medical condition, marital status, domestic partner status, sex, gender, gender identity, gender expression, or sexual orientation.

(c) Contractor shall, if requested to so do by the Contract Administrator, certify that it has not, in the performance of this contract, discriminated against applicants or employees because of their actual or perceived race, color, religion, ancestry, national origin, disability, medical condition, marital status, domestic partner status, sex, gender, gender identity, gender expression, or sexual orientation.

(d). If requested to do so by the Contract Administrator, contractor shall provide the city with access to copies of all of its records pertaining or relating to its employment practices, except to the extent such records or portions of such records are confidential or privileged under state or federal law.

(e) Contractor agrees to recruit Coachella Valley residents initially and to give them preference, if all other factors are equal, for any new positions which result from the performance of this contract and which are performed within the city. The Contract Administrator may agree to modify requirement where it is in conflict with federal or state laws or regulations

(f) Nothing contained in this contract shall be construed in any manner so as to require or permit any act which is prohibited by law.

(g) The contractor shall include the provisions set forth in paragraphs (a) – (f) of this Subsection (4) of this Section, inclusive, in each of its subcontracts.

(5) Investigation and Monitoring.

All contracts shall include appropriate provisions that will allow the Contract Administrator to review, monitor, and investigate compliance with this Section and to require each contractor to allow and provide full access to all applicable records, rules, regulations, documents, and other pertinent data necessary for the qualitative and quantitative evaluation of each contractor's compliance with the provisions of this Section.

(6) Enforcement and Appeals.

(a) In the event the Contract Administrator determines the Contractor is not in substantial compliance with the provisions of this Section, the

Contract Administrator may recommend to the City Manager, the initiation of one or more of the following rights and remedies described in this subsection, in addition to any rights and remedies otherwise provided in the applicable contract or by law or equity:

- (i) Termination of the contract and bar the contractor from bidding on future contracts with the City for two (2) years from the effective date of the contract termination;
- (ii) Assess liquidated damages in the amounts specified in the contract where it is found the Contractor willfully violated the requirements of this Section; and
- (iii) Seek recovery of reasonable attorneys' fees and costs incurred for enforcement of this Section.

(b) The Contract Administrator shall issue written findings and mail a copy of the findings to the Contractor by first class mail and by any other means provided in the contract.

(7) Appeals.

(a) Within five (5) business days of the notice of the Contract Administrator's findings, the Contractor may file a written appeal of the Contract Administrator's determinations to the City Manager.

(b) The City Manager shall set the matter for hearing and shall cause a Notice of Hearing to be given to the Contractor and to such other persons as may have identified themselves as interested in the decision and as otherwise required by the California Ralph M. Brown Act.

(c) The hearing shall be conducted as an independent reexamination of the matter. The Contractor shall have the burden of proof in all cases, and if the Contractor fails to appear either in person or by counsel, or fails to present or offer any evidence, the City Manager may adopt the decision of the Contractor Administrator or may decide the matter upon the record with or without taking any additional evidence. Any oral or documentary evidence may be received, but the City Manager shall exclude irrelevant, immaterial or unduly repetitious evidence. The City Manager's decision shall be made upon substantial evidence. In other words, if an essential finding is based upon hearsay or secondary evidence, such evidence must be of the type which would be admissible in a court of law as proof of such finding.

(d) Upon the hearing of the appeal the City Manager may refer the matter back to the Contract administrator with directions for further consideration, or the City Manager may reverse, affirm, or modify the decision as may appear just and reasonable in light of the evidence presented. The decision of the City Manager shall be supported by written findings and shall include the reasons for the ruling. Notice of the City Manager's decision shall be served on the Contractor, the Contract Administrator, and the City Clerk. The decision shall be final unless City Council agrees to review the matter pursuant to Section 2.06.030 of this Code..



(8) Exceptions and Waivers.

(a) The City Manager, with the consent of the Council, may waive the requirements of this Section under the following circumstances:

(i) Whenever the City Manager finds that there is only one prospective contractor willing to enter into a real property agreement with the City for use of City property on the terms and conditions established by the City, or that the needed goods, services, construction services for a public work or improvement, or interest in or right to use real property are available only from a sole source, and the prospective contractor is not currently disqualified from doing business with the City, or from doing business with any governmental agency based on any contract compliance requirements;

(ii) Where the City Manager certifies in writing to the City Council that the contract or real property agreement is necessary to respond to an emergency which endangers the public health or safety and no entity which complies with the requirements of this Chapter capable of responding to the emergency is immediately available; provided that such certification must be made prior to or within twenty-four (24) hours of execution of the contract or real property agreement on behalf of the City;

(iii) Where the City Attorney certifies in writing to the City Council that the contract involves specialized litigation requirements such that it would be in the best interests of the City to waive the requirements of this Chapter; provided such certification is made prior to execution of the contract on behalf of the City.

(b) This Chapter shall not apply where the prospective contractor is a public entity and the City Manager finds that goods, services, construction services for a public work or improvement or interest in or right to use real property of comparable quality or accessibility as are available under the proposed contract or property contract are not available from another source, or that the proposed contract or property contract is necessary to serve a substantial public interest.

(c) This Chapter shall not apply where the City Manager finds that the requirements of this Chapter will violate or are inconsistent with the terms or conditions of a grant, subvention or agreement with a public agency or the instructions of an authorized representative of any such agency with respect to any such grant, subvention or agreement, provided that the contracting officer has made a good faith attempt to change the terms or conditions of any such grant, subvention or agreement to authorize application of this Chapter.

(d) Upon the request of a potential contractor or upon the contracting officer's own initiative, after taking all reasonable measures to find an entity that complies with the law, the City Manager may waive any or all of the requirements of this Chapter for any contract, real property agreement,

or bid package advertised and made available to the public, or any competitive or sealed bids received by the City under the following circumstances:

- (i) Where the City Manager determines that there are no qualified responsive bidders or prospective contractors who could be certified as being in compliance with the requirements of this Chapter and that the contract or real property agreement is for goods, a service, or a project that is essential to the City or City residents; or
  - (ii) Where the City Manager determines that transactions entered into pursuant to bulk purchasing arrangements through federal, State, or regional entities which actually reduce the City's purchasing costs would be in the best interests of the City; or
  - (iii) Where the City Manager determines that the requirements of this Chapter would result in the City's entering into a contract with an entity that was set up, or is being used, for the purpose of evading the intent of this Chapter, which is to prohibit the City from entering into contracts with entities that discriminate based on the criteria set forth in this Chapter;
- (e) The waiver authority granted to City Manager in this Section shall be subject to the requirements that:
- (i) All proposed waivers must set forth the reasons the City Manager officer is requesting the waiver, what steps were taken to find an entity that complies with this Chapter and why the waiver does not defeat the intent of this Chapter, which is to prohibit the City from entering into contracts with entities that discriminate based on the criteria set forth in this Chapter. Such waivers shall be filed in the Office of the City Clerk and a notice of such waiver shall be presented to the City Council on the next available City Council agenda, and
  - (ii) For any contract or real property agreement subject to approval by the City Council, the City Manager shall include a statement in the approving resolution and related staff report whether any waiver under this Section is proposed for that contract, and

(9) **Annual Reports.** The City Manager shall conduct an annual comprehensive review of the administrative implementation of the provisions of this Section, including without limitation, the use of the waiver authority under Subsection (9) and the disposition of complaints of contractor non-compliance with any provision of this Section, and shall submit a report to the City Council.

**Section 3.** The Mayor shall sign and the City Clerk shall certify to the passage and adoption of this Ordinance and shall cause the same, or the summary thereof, to be published and posted pursuant to the provisions of law and this

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Ordinance shall take effect thirty (30) days after passage.