

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

Michael J. Aguirre
CITY ATTORNEY

July 3, 2008

REPORT TO THE BUDGET & FINANCE COMMITTEE

**LIVING WAGE ORDINANCE: PROPOSED REVISIONS, ENFORCEMENT, AND UPATE
ON STATUS OF COMPLAINTS**

INTRODUCTION

At the March 5, 2008 hearing of the Budget and Finance Committee [Budget Committee], the City Attorney provided an update on the effectiveness of the City's Living Wage Ordinance, codified at San Diego Municipal Code [SDMC] sections 22.4201, *et seq.* [LWO or the Ordinance], enforcement issues, and the status of the City's two active Living Wage complaints. In response to the City Attorney's report and the testimony of speakers during public comment, the Committee asked the City Attorney to make recommendations regarding revisions to the Ordinance, particularly in the area of enforcement. This Report includes proposed revisions to Ordinance, an analysis of the potential consequences of the proposed revisions, and an update on the status of the City's two active Living Wage complaints.

DISCUSSION

I. Proposed Revisions.

The Budget Committee requested that the Office of the City Attorney provide draft revisions to the LWO, and analysis of those revisions, in the following areas: a) creation of a cost recovery mechanism for enforcement; b) revision of the professional services exemption to allow the LWO to apply to certain workers in professional services industries; and c) revisions to address specific concerns about anti-competitive effects, as raised by representatives of Elite Show Services. Each of these draft revisions is included in the draft ordinances attached hereto, and discussed in detail below.

A. Cost Recovery Fund.

Councilmember Frye proposed, and the Budget Committee included in its motion, a proposal to create a cost recovery fund to meet the consensus need for improved enforcement of the LWO. As was reported to the Budget Committee, enforcement activities are currently the responsibility of one employee in the Purchasing and Contracting Department, who devotes half of her time to the LWO and the other half to unrelated matters. Because of the volume of City

contracts subject to the LWO, this staffing level permits only complaint-driven enforcement, and even that is minimal. Given the City's current fiscal constraints, the Committee felt that a self-funding mechanism to enhance enforcement efforts would stand the best chance of actually making a positive difference, and thus included in its motion a request for such a proposal.

Councilmember Frye's proposal was that all City Requests for Bid contain a component under which the contracting business would pay into an enforcement fund. We assume that this provision would also apply to contracts entered through other forms of City service procurement such as Requests for Proposals and sole source procurements, to the extent that the LWO would apply. Ms. Frye's suggestion would require the procuring City Department, when preparing the governing bid documents, RFP, or other contract documents, to require that the winning contractor pay an amount into an enforcement fund created specifically to cover enforcement-related costs. The amount of this payment would be determined by estimating the anticipated LWO management and enforcement costs associated with the specific contract.

The proposal as drafted by Councilmember Frye did not specify the timing or mechanism of this payment. We have drafted the revision based upon the presumption that the payment would only be required of a winning bidder or proposer. Further, we have assumed that the payment would be required after the completion of the competitive process, but prior to the final execution of a contract, during the time when the City is also obtaining other contract documents such as bonds and insurance certificates. In a competitive procurement context, the contractor would have the option of either building such cost into its bid or not, according to how they anticipated it would affect their competitive position. All payments received under this provision, as well as any other funds received as a result of enforcement efforts, would be segregated in a special fund for LWO enforcement.

Thus, we suggest the following addition to SDMC section 22.4230, to implement the Committee's intent as expressed in its motion:

(g) The *City* will incur costs to monitor a *service contract* with a *business*. To defray such costs, each *service contractor* shall, prior to the award of any *service contract*, remit to the *City* an amount equal to the *City's* reasonably anticipated costs of monitoring and enforcing this division with respect to the *service contract*, as determined by the Living Wage Administrator. The City Auditor shall, upon request of the *service contractor*, review and determine the reasonableness of such costs. The amount of such payment, with respect to any *service contract*, shall be stated in any request for bid, request for proposal, or other document through which the *City* solicits *service contracts*, which document shall state that the obligation of the *service contractor* to remit such payment as provided in this section is a condition precedent to the award of such *service contract*. Such payments shall be placed in a separate *City* fund, called the Living Wage Enforcement Fund, and may be used for costs associated with administration, monitoring, enforcement, and other

activities necessary to ensure compliance with this division.

B. Professional Services Exemption.

As discussed in the City Attorney's previous Reports to Council, the LWO currently exempts contracts in "professional service" categories. See Report to Council dated March 3, 2008 [RC-2008-8], pp.2-3 and Report to Council dated February 13, 2008 [RC-2008-5], pp. 3-4. Section 22.4215 of the Ordinance expressly exempts, in pertinent part:

contracts for design, engineering, financial, technical, legal, banking, medical, management, operating, advertising, *or other professional services*. SDMC § 22. 4215(a)(7) (emphasis added).

Under this exemption, *all* service contracts falling within the listed categories (e.g. "legal" or "medical") are exempt from the Ordinance regardless of the nature of the service provided. In addition, all contracts in *other professional fields* are exempt. This exemption, as written, reaches service workers in professional fields, such as legal messengers or orderlies.

At the March 5 Budget Committee hearing, Councilmember Frye asked the City Attorney to propose revisions to SDMC section 22. 4215(a)(7) designed to narrow the professional services exemption so as not to include service workers in professional fields. Previously, at the October 17, 2007 hearing of the Budget Committee, Councilmember Frye expressed particular concern with the status of paramedics and emergency medical personnel [EMT] contracts, and requested that the City Attorney analyze the applicability of the Ordinance to such contracts. In our February 13, 2008 Report, we found that EMT contracts were exempt from the Ordinance because they fall within the category of "medical" contracts. Because the contracts for services in the medical field were categorically exempt, we did not reach the question of whether EMTs constitute "service workers" as opposed to "professionals." See RC-2008-5, pp. 3-4.

The City Attorney recommends two possible approaches for addressing Councilmember Frye's concerns. The first approach would be to revise SDMC § 22. 4215(a)(7) so that the exemptions applies *only to professionals* within professional service fields. For example, Council could amend SDMC section 22. 4215(a)(7) as follows:

contracts for professional services, such as design, engineering, financial, technical, legal, banking, medical, management, operating, advertising, or other professional services requiring professional judgment or expertise. This exemption shall not be interpreted to exempt non-professionals providing support services to professionals under such contracts, to the extent such non-professionals would otherwise be entitled to receive the wages required by this division (emphasis added to indicate defined terms).

A draft version of the Ordinance with this proposed revision, as well as the other revisions proposed in this Report, is attached hereto as **Exhibit A**.

Revising the Ordinance in this manner would broadly address the concern that service workers in professional fields are not currently protected by the Ordinance; however, narrowing the professional services exemption to this extent may substantially increase the number of contracts subject to the Ordinance. For example, the City's contracts with banking and financial institutions would be covered to the extent those contracts entail the involvement of service workers, such as tellers. Large, national banks could be deterred from bidding on City contracts if required to pay local tellers a higher rate than tellers in other locations. Likewise, law firms contracting with the City would be required to pay the Living Wage rate to service employees such as clerks or messengers. This may act as a deterrent to large law firms with employees outside of San Diego, who are paid less than the Living Wage. As Committee Chair Toni Atkins commented at the March 5 hearing, this broad a re-working of the exemption may undermine the protracted negotiations and many compromises that were reached when the Ordinance was first passed in 2005.

A second, more focused approach would be to specifically carve out paramedics and EMTs from the professional service exemption. For example, as the City Attorney proposed in our February 13, 2008 Report, Council could amend the above-referenced exemption to add the following language:

contracts for design, engineering, financial, technical, legal, banking, medical, management, operating, advertising, or other professional services. The exemption for medical service contracts does not extend to contracts for emergency medical personnel, such as emergency medical technicians and/or paramedics. See RC-2008-5, pp. 3-5.

This approach would expressly entitle paramedics and EMTs to payment of the Living Wage while still generally exempting contracts in professional service categories. If the Committee prefers this approach, we would also recommend adding to the list of examples of service contracts in SDMC section 22.4205:

(g) Service workers in the medical field, such as emergency medical technicians and/or paramedics.

A draft version of the Ordinance with these proposed revisions, as well as the other revisions proposed in this Report, is attached hereto as **Exhibit B**.

The City Attorney is prepared to assist with either approach, as the Committee deems appropriate at this time.

C. Concerns Raised by Elite Show Services.

In addition to the provisions discussed above, Councilmember Frye also requested that the City Attorney consider revisions to the Ordinance designed to address the concerns raised by representatives of Elite Show Services. During the public comment portion of the March 5

hearing, a representative from Elite Show Services – a provider of security guards for large events – discussed some of his concerns regarding enforcement of the Ordinance. The Elite representative expressed two primary concerns:

First, the Elite representative commented that companies that are complying with the Ordinance are at a competitive disadvantage when bidding against companies that are not in compliance. This is largely due to the City's inability to proactively enforce the Ordinance. As discussed above, enforcement of the Ordinance is essentially complaint-driven at this time. Currently, the City has only one-half of a staff member – the Living Wage Administrator - dedicated to monitoring Living Wage issues. Obviously, this does not provide sufficient personnel to conduct periodic audits or engage in other proactive enforcement activities. Therefore, LWO violations usually come to the City's attention only after a complaint has been formally lodged by an aggrieved employee. Enhanced enforcement through increased staffing would most certainly be the most effective means of addressing this first concern.¹

Second, the Elite representative suggested that due to the wording of the Ordinance, some events at a particular City facility are covered, while other events at that same City facility are not. This results in Elite having to pay all of its workers the Living Wage rate because it would be difficult to justify paying different rates depending on the event. This second concern has to do with how "City facility agreements" are defined in the Ordinance. As discussed in our March 3, 2008 Report, the Ordinance currently applies not only to agreements for the use of space at the five "City facilities" enumerated in the Ordinance,² but also to "subcontracts and concession agreements for *services* at [a] *City facility* with a combined annual value of payments in excess of \$25,000 for any single subcontractor or concessionaire, and with a term of more than 90 days." SDMC § 22.4205 (emphasis in original to indicate defined terms); see also RC-2008-8, p. 2.

In reality, many subcontracts and concession agreements for services at City facilities relate to short-term, high-revenue events. For example, a large scale event like Comic Con may involve subcontracts or concession agreements that far exceed \$25,000 in value, even though the duration of the event is only three days. As long as contracts for service workers at such events (e.g. security guards or food vendors) do not exceed a 90-day term, those workers are not currently entitled to receive a Living Wage. This can result in a security guard working one event at a City facility being covered by the Ordinance, while a security guard working another event *at that same City facility* is not due the difference in duration of the respective contracts.³ In

¹ As discussed above, the staff member who currently fills this position is also assigned to other duties accounting for about half of her time. Since the March 5 hearing, the Purchasing and Contracting Department has indicated that it may be getting one Senior Management Analyst position for Living Wage administration, contingent on the Fiscal Year 2009 budget.

² The five specified City facilities are: Petco Park, Qualcomm Stadium, the San Diego Sports Arena, the San Diego Convention Center, and the San Diego City Concourse. SDMC § 22.4205 (a)-(e).

³ In addition, a contract term may be easily manipulated. For example, a large, short-term event at the Convention Center may be planned two years in advance; however, the contract may be drafted to state that term of the contract commences just before the event and concludes shortly thereafter. This may lead to the purposeful drafting of

order to avoid this, Council may wish to amend the definition of “City facility agreements” in SDMC section 22.4205 to eliminate the 90-day term requirement as follows:

City facility agreement means an agreement between the *City* and a *business* for the lease, use, or management of a *City facility* that generates \$350,000 or more in annual gross receipts to the *business*. *City facility agreement* includes (a) subleases or other agreements for the use of the *City facility* for 30 days or more in any calendar year; and (b) subcontracts and concession agreements for *services* at the *City facility* with a combined annual value of payments in excess of \$25,000 for any single subcontractor or concessionaire, ~~and with a term of more than 90 days.~~

If Council chose to eliminate the 90-day term requirement in the definition of City facilities as described above, we would also recommend removing the 90-day term requirement from the definition of “service contracts” in SDMC section 22.4205 as follows:

Services contract means a contract between the *City* and a *business* with a combined annual value of payments in excess of \$25,000 ~~and with a term of more than 90 days~~, and any applicable subcontracts or franchises, to furnish *services*.

Although the 90-day term requirement is less likely to be an issue where services providers are in a direct contractual relationship with the City, we recommend revising the definition of service contracts in this manner for consistency.

The City Attorney is prepared to provide further analysis of any of the revisions proposed above, as well as assist the Committee with alternative revisions it may wish to pursue.

II. Status of Two Living Wage Complaints.

At the March 5, 2008 hearing, the City Attorney reported on the City’s two active Living Wage complaints, which are currently pending against Prudential Overall Supply and Jani-King, Inc. We have included below a brief update on each complaint.

A. Prudential Overall Supply.

At the July 24, 2007 hearing of the City Council, employees of Prudential Overall Supply submitted a formal complaint for violations of the LWO. The employees claimed that Prudential, which provided uniform and laundry services to several City departments, was not paying a Living Wage to employees working on City contracts. The City has not renewed its contract with Prudential, and has since procured a new uniform and laundry vendor. After a preliminary investigation, the City Attorney found sufficient evidence of Living Wage violations to warrant filing a lawsuit against Prudential.

At the March 5 hearing, the Committee requested that the City Attorney provide an informational update in Closed Session when appropriate. The parties have since reached a tentative settlement agreement, which we anticipate will be executed and made available to the public within the next twenty days.

B. Jani-King, Inc.

At the January 15, 2008 hearing of the City Council, a janitor previously employed by a franchisee of Jani-King, Inc. submitted a formal complaint for violations of the LWO. The City's Living Wage Administrator, in consultation with the City Attorney, is currently investigating the Jani-King complaint to determine to whether and to what extent Living Wage violations have occurred. To this point, counsel for Jani-King, Inc. has been cooperating with the City's requests for payrolls and other documentation, and has agreed to assist us in our efforts to obtain information from franchisees providing janitors for City contracts.

According to counsel for Jani-King, the complainant has been offered and has accepted an alternative position with Jani-King. The City has conducted interviews with key witnesses, and anticipates resolving remaining issues regarding this complaint within the next thirty days.

CONCLUSION

The City Attorney recommends the revisions to the Ordinance proposed above in order to: a) create a cost recovery fund to provide an additional income stream for monitoring contract compliance, b) narrow the exemption for professional services so as not to reach service workers in professional fields, and c) eliminate the 90-day term requirement for City facility agreements in order to reduce inconsistencies in application of the Ordinance. The City Attorney is prepared to assist with further analysis of these proposed revisions and other alternatives for enhancing enforcement, and will continue to keep the Council apprised regarding the two active Living Wage complaints.

Respectfully submitted,

MICHAEL J. AGUIRRE
City Attorney

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RC-2008-17