

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

SANNA R. SINGER
DEPUTY CITY ATTORNEY

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

Jan I. Goldsmith
CITY ATTORNEY

July 7, 2010

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

LOCAL HIRE PROGRAM: FOLLOW-UP LEGAL ANALYSIS

INTRODUCTION

At the April 28, 2010 hearing of the City Council's Rules, Open Government and Intergovernmental Relations Committee (Rules Committee), this Office presented a draft ordinance that would require contractors to endeavor to hire locally for public works projects (Local Hire Ordinance). The draft Local Hire Ordinance included advisory goals for local workers and veterans, but specified that there was no penalty for not meeting the goals and provided that contractors retained ultimate discretion in employment decisions. This Office recommended against mandatory goals as potentially unconstitutional under article IV, section 2, clause 1 of the U.S. Constitution (Privileges and Immunities Clause). *See* Report to Rules Committee dated April 22, 2010, entitled "Local Hire Program: Legal Issues and Draft Ordinance." City Att'y Report 2010-15 (Apr. 22, 2010) (RC-2010-15).

The Rules Committee moved to forward the draft Local Hire Ordinance to the City Council for consideration with the following modifications: (1) the ordinance would include an 80 percent goal for local workers and 10 percent goal for disadvantaged and/or veteran workers¹; and (2) there would be no penalty for failing to meet the goals, but if a contractor committed to reaching the goals at the time of bid, the contractor would receive a 20 percent bid discount. We provide follow-up legal analysis of the Rules Committee's revisions below.

DISCUSSION

I. CONSTITUTIONALITY OF 20 PERCENT BID DISCOUNT

As discussed in the April 22, 2010 Report, programs that require contractors to employ a local workforce are legally problematic under the Privileges and Immunities Clause of the

¹ The Rules Committee specified that the 10 percent goal could be achieved through the employment of veteran workers, disadvantaged workers, or a combination of both. A "disadvantaged worker" is defined as an individual whose primary residence is and has been within the City of San Diego for at least three months and: (a) has been unemployed for at least six months; (b) resides within a zip code containing at least part of one census tract with lower than the average median income; or (c) falls within the definition of "Section 3 resident" under the Housing and Urban Development Act of 1968.

Federal Constitution, which prohibits a state from discriminating between its residents and non-residents without a “substantial reason” for doing so. U.S. Const. art. IV, § 2, cl. 1; *United Bldg. and Const. Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden*, 465 U.S. 208, 222 (1984). Specifically, a public agency would have to show that non-residents “constitute a peculiar source of evil at which the statute is aimed” in order for a mandatory local hire ordinance to withstand constitutional challenge. *Id.* at 222, citing *Toomer v. Witsell*, 334 U.S. 385, 398 (1948). See RC-2010-15 at 1-5.

Although it does not expressly require local hiring, the Committee’s inclusion of a 20 percent bid discount may still violate the Privileges and Immunities Clause. The current draft ordinance does not mandate that contractors employ local residents in certain percentages, but it does provide a significant advantage – in the form of a 20 percent bid discount – for doing so. While no cases address this exact framework, a court may find that a significant bid discount has the same practical effect as imposing a penalty for failing to meet certain goals, and is therefore unconstitutional under *Camden* and its progeny. See, e.g., *Connerly v. State Personnel Board*, 92 Cal. App. 4th 16, 34 (2001) (holding that assuring the participation of a certain percentage of one group is tantamount to discriminating against another). See also *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 702 (1997) (holding that, in the equal protection context, racial or gender classifications have the same legal significance whether in the form of a benefit or a burden).

We have attempted to reduce this risk by including a provision in the ordinance stating that, when determining local hire percentages, out-of-state residents shall be excluded from the calculation. In the *Camden* case, the Court left open the possibility that excluding out-of-state residents from such calculations would eliminate the Privileges and Immunities problem. *Camden* 465 U.S. at 217 (holding that New Jersey residents living outside of Camden would “have no claim under the Privileges and Immunities Clause”). See also *City of Cleveland v. Ohio*, 508 F.3d 827, 848 (6th Cir. 2007) (finding that Cleveland Local Hire statute did not discriminate against out-of-state workers because they were excluded when calculating the 20 percent Local Hire mandate). That said, it is uncertain whether a court will uphold an otherwise impermissible program on the basis that out-of-state residents are excluded from local hire calculations. The only way to eliminate this risk completely is by striking the bid discount provision from the ordinance. This a policy decision left to the City Council.

II. SAN DIEGO CHARTER RESTRICTIONS

At the April 28 hearing, this Office informed the Rules Committee that the San Diego Charter also places restrictions on the proposed Local Hire Ordinance. As previously advised in connection with the City’s recently-adopted Small and Local Business Enterprise (SLBE) Program, the San Diego Charter requires the award of a construction contract to the “lowest responsible and reliable bidder” if the contract exceeds a sum established by the City Council by ordinance. San Diego Charter § 94; see also Report to the Rules Committee dated May 20, 2009, entitled “Legal Options for Small or Local Business Preference Programs.” City Att’y Report 2009-9 (May 20, 2009) at 3-6.

The proposed Local Hire Ordinance contains a bid discount for achieving local hiring goals, thus it permits award to other than the lowest responsible and reliable bidder. Therefore,

the City Council must cap the program at a specific dollar amount in order to comply with San Diego Charter section 94. The draft ordinance caps the applicability of the program to contracts up to a dollar amount to be determined by the City Council.²

III. INTERACTION WITH SLBE PROGRAM

At the April 28 hearing, the Mayor's staff requested that the Rules Committee consider the interaction between the SLBE Program and proposed Local Hire Ordinance in order to ensure consistency and the effectiveness of both programs. The SLBE Program, which takes effect on July 1, 2010, provides for sheltered competition for minor public works contracts and grants small and local businesses a 5 percent bid discount on major public works contracts up to \$1 million.

In order to preserve the intent of the SLBE Program (i.e., to provide small and local businesses with a competitive edge in public works contracts), the Local Hire Ordinance only applies to major public works contracts and the 20 percent bid discount will be in addition to any discount received under the SLBE Program. This would preserve the minor public works program as set forth in the SLBE ordinance, and maintain the 5 percent bid advantage for small and local firms bidding on major public works contracts. However, it is the City Council's policy decision whether to retain or revise these modifications.

CONCLUSION

As drafted, the Local Hire Ordinance reflects the Rules Committee's direction with the modifications previously discussed. However, the 20 percent bid discount may still be unconstitutional under the U.S. Privileges and Immunities Clause. To reduce this risk, the ordinance includes a provision excluding out-of-state residents from local hire percentage calculations, but the only way to eliminate the risk entirely is to remove the bid discount. In order to comply with San Diego Charter section 94, the applicability of the Local Hire Ordinance must be capped at a specific dollar amount to be determined by the City Council. To ensure consistency with the goals of the SLBE program, the Local Hire Ordinance is limited to major public works contracts, and specifies that the 20 percent bid discount will be in addition to any discount received under the SLBE Program; it is a policy decision for the City Council whether to retain or revise these modifications.

Respectfully submitted,

By

Sanna R. Singer
Deputy City Attorney

SRS:amt

² This Office cautions that a dollar threshold far in excess of most City-funded construction projects could be construed as an attempt to contravene the general intent of Charter section 94, which is to award construction contracts to the lowest responsible and reliable bidder.

RC-2010-27