MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

PEDRO DE LARA, JR.
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Jan I. Goldsmith
CITY ATTORNEY

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

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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

ENERGY EFFICIENCY HEALTH AND SAFETY
STANDARDS RECOMMENDATIONS

INTRODUCTION

On October 6, 2009, Councilmember Marti Emerald presented a Memorandum to Council President and Rules Committee Chair Ben Hueso on the subject of Energy Efficiency Health and Safety Standards. The memorandum requested the Rules Committee to direct the City Attorney to prepare an ordinance for consideration by the City Council on several issues, some of which require legal analysis. The legal issues relate to: (1) requiring an apprenticeship program approved by the California Division of Apprenticeship Standards [CDAS]; (2) requiring a certain percentage or number of all journeymen on public works projects to be graduates of an apprenticeship program approved by CDAS; (3) requiring a certain percentage or number of jobsite workers to be certified for OSHA 10-hour and 30-hour General Industry Safety and Health Certification; and (4) specifying the type of license that contractors and subcontractors must possess to perform work on public works projects.

On October 13, 2009, David Jarrell, Public Works Deputy Chief Operating Officer, responded to Councilmember Emerald's Memorandum. Mr. Jarrell noted that many of San Diego's journeymen are not approved by the CDAS, and do not count toward the recommended 70 percent minimum on City contracts. Mr. Jarrell explained that such a requirement may effectively eliminate many otherwise fully qualified contractors from bidding on City projects. Mr. Jarrell explained that Federal OSHA and Cal OSHA health and safety standards are already incorporated in all City construction contracts. The City's construction contracts hold the primary contractor, not the City, responsible for site safety. Further, the State already addresses licensing requirements in a comprehensive manner, and adding subcontractor licensing requirements would be redundant with state laws. Finally, Mr. Jarrell explained that

adding the proposed apprenticeship program would restrict competition for some projects to union contractors, and would increase construction costs.[1]

On October 14, 2009, at the Rules, Open Government, and Intergovernmental Relations Committee, the Committee directed the City Attorney to present a report on the legal issues raised by the memoranda.

On January 11, 2010, Council President Ben Hueso presented a Memorandum to the Hon. Mayor Jerry Sanders expressing concern over a historically high unemployment rate, and proposing the creation of a Local Jobs Policy. According to the policy, the goal is to create jobs for local residents and veterans, and job opportunities for residents who are economically disadvantaged. The policy would apply to all public works contracts, including those funded by American Recovery Reinvestment Account of $25,000 or more and development contracts where a developer will receive redevelopment funding assistance of $500,000 or more.

On January 21, 2010, the City Attorney received a letter from the Associated General Contractors of America concerning Council President Ben Hueso's proposed Local Jobs Policy, and a letter from the law firm of Sheppard, Mullen, Richter & Hampton on the behalf of the Associated General Builders and Contractors of the San Diego, Inc. Both letters express concern as to the legality of the proposed Local Jobs Policy and the proposed requirements to the apprenticeship program for journeymen in light of the Federal Constitution's Privileges and Immunities Clause and the Commerce Clause.

QUESTIONS PRESENTED

1. Is the City required by the State to utilize a State approved apprenticeship program on public works projects?

2. May the City require a certain percentage or number of all journeymen on public works projects to be graduates of an apprenticeship program approved by the CDAS?

3. May the City require a certain percentage or number of jobsite workers to be certified for OSHA 10-hour and 30-hour General Industry Safety and Health certification?

4. May the City require certain trade work on public works projects be performed only by contractors and subcontractors holding a specialty "C" license?

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[1] Mr. Jarrell's response also addresses testing energy efficiency in the construction of new facilities and health and safety requirements that are imposed by Federal OSHA and California OSHA. These issues do not require legal analysis.

SHORT ANSWERS

1. Apprenticeship programs are not required to have State approval to operate, nor are apprentices required to obtain registration with the State, however, strong financial incentives exist for the City's program to have approval from the State.

2. A requirement that a certain percentage or number of all of journeymen on public works projects be graduates of an apprenticeship program approved by CDAS may be included on a project-by-project basis if it is determined that the specification is consistent with the Charter, the City's interest, and the Privileges and Immunities Clause.

3. A requirement that a certain percentage or number of jobsite workers be certified for OSHA 10-hour and 30-hour General Industry Safety Certification may be included on a project-by project basis if it is determined that the specification is consistent with the Charter and the City's interests.

4. Yes. The City may specify that contractors and subcontractors possess the proper specialty "C" license to perform work on public works projects.

DISCUSSION

I. AN APPRENTICESHIP PROGRAM IS NOT REQUIRED TO HAVE STATE APPROVAL, HOWEVER, STRONG FINANCIAL INCENTIVES EXIST FOR THE CITY'S PROGRAM TO HAVE APPROVAL FROM THE STATE.

No apprenticeship program is required by California law to meet California standards. *Southern Cal. Associated Builders and Contractors, Inc. v. California Apprenticeship Council*, 4 Cal. 4th 422, 428 (1992). If a contractor chooses to hire apprentices for a public works project, it need not hire them from an approved program (although if it does not, it must pay these apprentices journeyman wages). *California Division of Labor Standards Enforcement v. Dillingham Construction, N. A., Inc.*, 519 U.S. 316, 332 (1997). While neither federal nor state approval is required for a sponsor to operate an apprenticeship program, strong financial incentives exist at both the state and federal levels for sponsors to obtain approval. For example, only apprentices participating in an approved apprenticeship program may be paid wages lower than the applicable journeyman wage on federal and state public works projects, and there are additional incentives in the form of direct financial subsidies for training provided by approved programs. *Southern Cal. Associated Builders and Contractors, Inc.,* 4 Cal. 4th at 428-429; Cal. Lab. Code § 1777.5.

On May 1, 1995, the City of San Diego enacted the Equal Employment Opportunity Outreach [EEO] Program with the objective of ensuring that contractors doing business with, or receiving funds from the City would not engage in unlawful discriminatory employment practices prohibited by state or federal law. The selection for training, including apprenticeship, is one of the employment practices contained in the EEO program. San Diego Municipal

Code § 22.2701. On March 18, 2002, the City Council adopted an Apprenticeship Program for City funded construction projects exceeding $1 million. San Diego Resolution R-296197. The City Apprenticeship Program does not require compliance with the CDAS.

On August 1, 2003, the City of San Diego instituted a Labor Compliance Program for the purpose of implementing its policy relative to the labor compliance provisions of state and federally funded public works contracts, including California Labor Code section 1777.5, which requires contractors to employ registered apprentices on public works projects. City of San Diego, Labor Compliance Program (August 1, 2003). On November 23, 2009, the City revised and reinstituted the Labor Compliance Program [LCP] for the purpose of implementing its policy relative to labor compliance provisions of state and federally funded public works contracts. The program is applicable to all public works projects which are designated as requiring prevailing wages. The LCP further adopted California Labor Code section 1777.5, which requires contractors and subcontractors to employ apprentices to be registered in State-approved apprenticeship programs on public works projects. The LCP does not require journeymen to have graduated from a CDAS approved apprenticeship program.

II. JOURNEYMAN AND OSHA TRAINING SPECIFICATIONS MAY BE INCLUDED IN A PUBLIC WORKS MUNICIPAL AFFAIR CONTRACT IF IT IS DETERMINED ON A CASE BY CASE BASIS THAT THE SPECIFICATIONS ARE CONSISTENT WITH COMPETITIVE BIDDING REQUIREMENTS.

In 2003, this office was asked whether the City could require payment of prevailing wage specifications on all City of San Diego public works projects. We concluded that the City could only require prevailing wages on a project-by-project basis, determining in each case whether or not it would be consistent with the competitive bidding requirement of the Charter. Op. City Att'y 2003-1 (April 8, 2003). The questions we address in this report include the same type of analysis we conducted in that opinion.[2]

The Charter requires that certain public works municipal affair contracts be competitively bid and awarded to the lowest responsible and reliable bidder. It must be determined on a case-by-case basis (1) whether the inclusion of a requirement that a certain percentage or number of all journeymen on public works projects be graduates of apprenticeship program approved by CDAS specification is consistent with the competitive bidding requirement; and (2) whether the inclusion of requirement that a certain percentage of jobsite workers be certified for OSHA 10-hour and 30-hour General Industry Safety Certification is consistent with the competitive bidding requirement.

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[2] On August 19, 2009, in *State Building and Construction Trades Council of California AFL-CIO v. City of the Vista*, the California Supreme Court granted a Petition for Review as to whether prevailing wages are a matter of statewide concern, which could affect the City Attorney opinion and this Report.

A. The City Charter and Municipal Affairs.

1. The State's Apprenticeship Program Laws and OSHA do not Apply to the City's Public Works Municipal Affair Projects.

The City of San Diego is a chartered city. *Mira Development Corp. v. City of San Diego*, 205 Cal. App. 3d 1201, 1214 (1988). A city's charter represents the supreme law of the city, subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law. *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 170 (1994). Further, under the California Constitution, a chartered city enjoys autonomy over its "municipal affairs." Cal. Const. art. XI, § 5. Consequently, a chartered city's enactments that deal with purely municipal affairs are valid even if they conflict with general state law. *Vial v. City of San Diego*, 122 Cal. App. 3d 346, 348 (1981).

There is no exact definition of the term "municipal affairs." *Bishop v. City of San Jose*, 1 Cal. 3d 56, 62 (1969). The ultimate decision as to what is a municipal affair is one which rests with the courts. *Smith v. City of Riverside*, 34 Cal. App. 3d 529, 537 n. 5 (1973). The courts have articulated three factors to weigh in determining whether a project is a municipal affair: 1) the extent of non-municipal control over the project; 2) the source and control of the funds used for the project; and 3) the nature, purpose, and geographic scope of the project. *See Southern California Roads Co. v. McGuire*, 2 Cal. 2d 115, 123 (1934). The Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern. *Bishop v. City of San Jose*, 1 Cal. 3d at 63.[3]

Charter provisions are construed in favor of the exercise of the power over municipal affairs and against the existence of any limitation or restriction thereon which is not expressly stated in the charter. *Domar Electric*, 9 Cal. 4th at 171. Restrictions on a charter city's power may not be implied. *Id.* A charter city may not, however, act in conflict with its charter. *Id.* Any act that violates or does not comply with the charter is void. *Id.* Thus, it must be determined whether requiring an apprenticeship program or Cal OSHA requirement on the City's public works municipal affair project would conflict with the Charter.

Here, the Charter specifically limits the City's power to award its public works municipal affair contracts by requiring that those contracts over a City Council-specified amount be competitively bid and awarded to the lowest responsible and reliable bidder. San Diego Charter §94. The Charter contains no provision expressly authorizing or prohibiting the inclusion of an apprenticeship program or Cal-OSHA requirement specification in the City's municipal affair public works projects. Under the rules of charter construction, however, the mere failure of the Charter to expressly grant or prohibit the power to include such a specification does not render

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[3] Examples of municipal affairs include the construction of city water and sewer facilities and the expenditure of city funds on a city public works project. *See Domar Electric*, 9 Cal. 4th at 170-71; *Smith v. City of Riverside*, 34 Cal. App. 3d at 534-35.

the specification void. Therefore, we consider whether an apprenticeship or Cal OSHA requirement falls within the parameters of "lowest responsible and reliable bidder."

B. Journeyman and OSHA Training Requirements in City Contracts May Be Consistent with Charter Section 94 for Purposes of Competitive Bidding.

A competitive bidding scheme with a lowest responsible and reliable bidder restriction ordinarily requires a contract to be awarded to the bidder who submits the lowest monetary bid and is responsible. *Domar Electric*, 9 Cal. 4th at 178. The term "responsible" in the context of "responsible bidder" refers not only to the attribute of trustworthiness, but also to the quality, fitness, and capacity of the bidder to perform the proposed agreement satisfactorily. *City of Inglewood-Los Angeles County Civic Center Authority v. Superior Court of Los Angeles County*, 7 Cal. 3d 861, 867 (1972). There is no basis for the application of relative superiority concept, i.e., that one bidder is superior to another. *Id.* at 867. This office has previously opined that, prior to formation of contract, if a bidder cannot or will not furnish the requisite security and insurance in the time directed by the invitation for bids, the City in its sound discretion may determine that the contractor is not responsible, and proceed to award to the next lowest bidder who satisfies all the criteria. *See* 1991 City Att'y MOL 306. A bid submitted to a public agency by a contractor who is not properly licensed is considered nonresponsive. *Associated Builders and Contractors, Inc. v. San Francisco Airports Commission*, 21 Cal. 4th 352, 362 (1999).

The purposes of competitive bidding are: to guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; to obtain the best economic result for the public; and to stimulate advantageous market place competition. *Associated Builders and Contractors, Inc. v. San Francisco Airports Commission*, 21 Cal. 4th 352, 365 (1999). Further, competitive bidding laws are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest. *Associated Builders*, 21 Cal. 4th at 372-73.

At issue in *Associated Builders* was whether a project stabilization agreement [PSA] that was included as a bid specification in a ten-year 2.4 billion dollar project to expand and renovate the San Francisco International Airport violated state or local competitive bidding laws. *Associated Builders*, 21 Cal. 4th at 363-65. The PSA was designed to eliminate potential delays resulting from labor strife, to ensure a steady supply of skilled labor, and to provide a contractually binding means of resolving worker grievances. *Id.* at 359. Specifically, the PSA required the signatory unions to agree for the life of the project to a no-strike pledge, to arbitrate jurisdictional disputes among crafts, and to continue working on the project despite the expiration of any applicable collective bargaining agreements. *Id.* at 358. In exchange, the Airports Commission agreed to require all contractors to accept the terms of the PSA, to abide by each craft's labor management grievance procedure in cases of discipline or discharge, to use the union hiring hall for any new hires needed beyond the employer's own core workforce, and to pay union wages and benefits. *Id.* at 358-59.

The Court found that all prospective bidders enjoyed equal opportunity to compete for contracts on the project. *Associated Builders*, 21 Cal. 4th at 367. The Court reasoned that the fact that some contractors may have been disinclined to accept the terms of the PSA did not imply any favoritism toward the bidders that did not share that disinclination. *Id.* The Court further reasoned that on its face, the PSA did not exclude any contractor from bidding on the project. *Id.* Additionally, the Court found no evidence that union contractors had an advantage in attracting workers or in the bidding process generally. *Id.* at 368. The Court added that there was no authority presented supporting the existence of an "unfettered competition" policy underlying the competitive bidding law of California. *Id.* at 372.

The Court also found that there was no evidence in the record to conclude that the PSA would raise the costs of the project. *Associated Builders*, 21 Cal. 4th at 369. The project was already subject to payment of prevailing wages. *Id.* at 369. The Court reasoned that the substitution of unskilled workers to lower costs was potentially contrary to both state and federal law applicable to prevailing wage public works jobs and reasoned that a bidder could not lower its costs by substituting unskilled "helpers" for any skilled workers demanded by the contract specifications. *Id.*

Finally, the California Supreme Court concluded that substantial evidence supported the inclusion of the PSA bid specification as being in furtherance of the legitimate governmental interests of preventing costly delays and assuring contractors access to skilled craft workers. *Associated Builders*, 21 Cal. 4th at 374. The record reflected that the San Francisco Airports Commission [Commission] was concerned about the potential for labor strife during the life of the project. *Id.* There was evidence that for every month of delay, the cost of administering the project would substantially increase, and revenue would be lost. *Id.* at 374-75. The PSA applied only to the airport project, not to all city public works projects. *Id.* at 358-359. The Court held that the PSA specification was consistent with the purposes of competitive bidding. *Associated Builders*, 21 Cal. 4th at 365.The court further held: "Having concluded ABC has failed to demonstrate that the PSA in the present case conflicts with competitive bidding laws, we observe that future challenges to the imposition of project labor agreements as bid requirements will be reviewed, on a case-by-case basis, for consistency with the competitive bidding laws under the principles articulated in this opinion." *Id.* at 376.

The proposed journeyman and OSHA training requirements require the same type of analysis as in *Associated Builders* to determine whether those proposals are consistent with competitive bidding under Charter section 94.

Preliminarily, journeyman requirements included in the construction trade apprenticeship training programs, are covered under the Shelley-Maloney Apprentice Labor Standards Act of 1939 (codified at Cal. Lab. Code § 3070 et seq.), which are integrated into the prevailing wage law. State law requires that prevailing wages be paid on certain public works projects. Cal. Lab. Code § 1771. The courts have held that the state's prevailing wage law is a general law and does not apply to public works municipal affair projects of a chartered city. *Vial v. City of San Diego*,

122 Cal. App. 3d 346, 348 (1981).[4] Thus, the apprenticeship program does not apply to the public works municipal affair projects of a chartered city. *Vial v. City of San Diego*, 122 Cal. App. 3d at 348. As such, the City is not required to include a contract specification for an apprenticeship program in its public works municipal affairs projects. The *Vial* court, however, did not conclude that the City's charter prohibits the City from requiring an apprenticeship program. See *Id.* at 347-348.

The CDAS apprenticeship program does not require that a certain percentage or number of all journeymen on public works projects be graduates of an apprenticeship program approved by CDAS. However, the Labor Code section 3086 allows the City to impose apprenticeship standards relative to fostering and promoting the welfare of the apprentice industry, improving the working conditions of apprentices and advancing their opportunities for employment, not inconsistent with competitive bidding.

In 1973, the Legislature enacted the California Occupational Safety and Health Act (Cal-OSHA) which establishes a comprehensive scheme for the regulation of health and safety in the workplace. Cal-OSHA does not require that a certain percentage or number of jobsite workers be certified for OSHA 10-hour and 30-hour General Industry Safety Certification. However, Labor Code section 6316 allows the City to impose additional regulations relative to workplace safety, not inconsistent with competitive bidding.

In a recent case before the San Diego Superior Court, *Associated General Contractors of America, San Diego Chapter, Inc. v. San Diego Unified School District*, San Diego Unified School District [School District] adopted a resolution directing School District staff to negotiate terms of a PSA with the San Diego-Imperial Counties Building and Construction Trades Council, and to address, among other goals, that Proposition S funded projects be completed on time and within budget to maximize the efficiency of the School District's participation in the construction marketplace. The School District argued that the scope of the PSA was narrow as it did not exclude non-union contractors from bidding, and the PSA only related to Proposition S projects exceeding $1 million. On December 11, 2009, the San Diego Superior Court held that the contractually apprenticeship provisions in the School District's PSA are consistent with the Labor Code and will not circumvent legislative authority. The court held that the School District acted in its proprietary interest in adopting the PSA, the PSA is specific to Proposition S projects, and does not discriminate against non-union contractors. The Superior Court decision has been appealed by Associated General Contractors of America.

The School District argued it did not adopt a rule or regulation having the effect of law, which would be improper. School District's Brief in Opposition to AGC-San Diego's Motion for Issuance of a Writ of Mandate, page 4. The School District concedes if it applied the terms of the PSA to all school projects, it would violate competitive bidding requirements. The School District's argument is consistent with our analysis that the proposed Journeyman and OSHA requirements be examined on a project-by-project basis.

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[4] See Footnote 2 supra.

C. A Requirement That a Certain Percentage or Number of All of Journeymen on Public Works Projects be Graduates of an Apprenticeship Program Approved by CDAS Should be Determined on a Project-By-Project Basis.

Based on *Associated Builders*, a case-by-case/project-by-project approach should be used to determine whether requiring a certain percentage or number of all journeymen be graduates of an apprenticeship program approved by the CDAS furthers legitimate government interests consistent with the purposes of competitive bidding. Consistency can be shown if the CDAS apprenticeship program will get the project done on time, on budget with skilled labor, or provides a unique benefit to the project. Projects should be reviewed to see if there is an identifiable advantage to requiring CDAS apprenticeships before such specification is added.

If the CDAS specification would increase the cost of the project, and there is no evidence that the specification would provide any corresponding benefit to the City, the specification may be inconsistent with the purposes of competitive bidding. There is a potential for discrimination against journeymen from non-approved State apprenticeship programs. For example, according to Mr. Jarrell, contractors cannot employ apprentices outside of state lines. Journeymen trained under these or other apprenticeship programs will not count toward the proposed 70 percent minimum on City contracts. This 70 percent provision for journeymen may effectively eliminate many otherwise fully qualified contractors from bidding on City projects.[5] (Memorandum from David Jarrell, Deputy Chief Operating Officer, Public Works, pg. 2, October 13, 2009.)

D. The Proposed Journeyman Training Requirement will Require a Showing of a "Substantial Reason" for the Difference in Treatment, and "a Peculiar Source of Evil" under the Privileges and Immunities Clause.

The Associated Builders and Contractors of San Diego, Inc. [ABC] argue that the proposed journeyman requirement violates the Privileges and Immunities Clause. (Letter from Sheppard, Mullin, Richter & Hampton, dated January 20, 2010). The Privileges and Immunities Clause of the United States Constitution provides that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States." United States Constitution art. IV, 2, Cl. 1. ABC contends that the proposed regulation would disqualify journeymen who graduated from an apprenticeship program outside of California because only California residents are eligible to enter the CDAS apprenticeship program. Thus, workers who have been trained in another state would be discriminated against in favor of California residents. ABC

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[5] On February 12, 2010, Channel 10 News reported that the San Diego Unified School District's school improvements at Hoover High School may be more expensive for taxpayers because of the PSA agreement. With a budget of $3.1 million, the lowest bid came in at $4.2 million (35 percent higher than expected). Only five contractors bid on the project, where a similar-sized project usually gets 20 bidders because of the economy. On February 19, 2010, the Voice of San Diego reported that bids for a second project for the San Diego Unified School District came in lower than expected. Renovating the automotive shop at Clairemont High School was estimated to cost $4.1 million, but the lowest bid came in at $2.5 million (40 percent under the estimate) according to a school district press. The winning bidder is based in Oceanside and is not unionized.

contends that the proposed regulation is irrational if safety is a primary objective because there are better alternatives to achieve such an objective.

This office previously explained that requiring local workers on public works projects may be legally problematic under the Privileges and Immunities Clause, which prohibits a state from discriminating between its residents and non-residents without a "substantial reason" for doing so, and nonresidents "constitute a peculiar source of evil at which the statute is aimed." (Report to the Committee on Rules, Open Government and Intergovernmental Relations, dated October 22, 2009). If ABC is correct that this proposal will result in a California workforce requirement, then the same Privileges and Immunities Cause analysis applies.

In *United Building and Construction Rates Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*, 465 U. S. 208 (1984), the city of Camden New Jersey adopted a municipal ordinance requiring that at least 40% of the employees of contractors and subcontractors working on city construction projects be Camden residents. The resident-hiring preference was designed to increase the number of unemployed persons living in Camden and to arrest the "middle-class flight" currently plaguing the city. The city also argued that all non-Camden residents employed on city public works projects, whether they resided in New Jersey or Pennsylvania, constituted a "source of the evil at which the statute was aimed." That is, they "live off" Camden without "living in" Camden. Camden contended that the scope of the discrimination practiced in the ordinance, with its municipal residency requirement, was carefully tailored to alleviate the evil without unreasonably harming nonresidents, who still had access to 60% of the available positions.

The Court held that a determination of whether a privilege is "fundamental" for purposes of that Clause does not depend on whether the employees of private contractors and subcontractors engaged in public works projects can or cannot be said to be "working for the city." The opportunity to seek employment with such private employers is "sufficiently basic to the livelihood of a Nation," as to fall within the purview of the Privileges and Immunities Clause even though the contractors and subcontractors are employed in projects funded in whole or in part by the City. Id. at 221-222. In addition, to preclude a finding of discrimination against citizens of other states, there must be a finding that there is a "substantial reason" for the difference in treatment. "[The] inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them." As part of any justification offered for the discriminatory law, nonresidents must somehow be shown to "constitute a peculiar source of the evil at which the statute is aimed." *Id.* at 222.

The City will need to examine the CDAS program against other programs and determine whether there is a "substantial reason" for treating them differently. The City will then need to ensure that the difference in treatment is narrowly tailored to address that reason. If the effect of the proposed journeymen training requirement is to require a California workforce, then the City will be required to justify and build a factual record that journeymen not trained by CDAS apprenticeship program "constitute a peculiar source of the evil at which the statute is aimed." The City will have to show that nonresident workers will be "a peculiar source of evil," which needs to be remedied.

E. A Requirement That a Certain Percentage or Number of Job Site Workers be Certified for OHSA 10-Hour and 30-Hour General Industry Safety and Health Certification Should be Determined on a Project-By-Project Basis.

As with apprentices, a case-by-case/project-by-project approach should be used to determine whether requiring a certain percentage or number of jobsite workers be certified for OSHA 10-hour and 30-hour General Industry Safety and Health Certified [OSHA requirement] is consistent with the purposes of competitive bidding. There may be particularly hazardous projects or activities which would benefit from an OSHA requirement. Some studies suggest an OSHA requirement may reduce project costs. (CPI Memorandum dated July 28, 2009.) Projects should be reviewed to see if there is an advantage to including an OSHA requirement before adding it to the specifications.

If the OSHA requirement specification would increase the cost of the project, without any corresponding benefit to the City, the specification may be inconsistent with the purposes of competitive bidding. Federal OSHA and Cal OSHA Health and Safety standards are arguably already incorporated in all City's construction contracts, and those requirements should be left intact. (Memorandum from David Jarrell, Deputy Chief Operating Officer, Public Works, pg. 3.) In addition, contractors with high rate of infractions will face higher bonding requirements. (Independent Budget Analyst, Budget Analyst Report, pg. 13.)

III. THE CITY MAY SPECIFY THE TYPE OF LICENSE CONTRACTORS AND SUBCONTRACTORS MUST POSSESS TO PERFORM WORK ON PUBLIC WORKS PROJECTS.

The California Contractors' State License Board issues class "A" licenses for general engineering contractors whose principal business involves fixed works requiring specialized engineering knowledge and skill, including irrigation, drainage, water supply, flood control, pipeline, and related excavating, grading, trenching and concrete work. (Cal. Bus. & Prof. Code, § 7056; Cal. Code Regs., tit. 16, § 830.) Class "B" licenses are issued for general building contractors whose principal business involves buildings and similar structures. (Cal. Bus. & Prof. Code, § 7057; Cal. Code Regs., tit. 16, § 830.) Class "C" specialty licenses are issued for specialty contractors who perform construction work requiring special skills, and whose principal business involves the use of specialized building trades or crafts. (Cal. Bus. & Prof. Code, § 7058; Cal. Code Regs., tit. 16, § 832.) The awarding body determines which license will be necessary to bid and perform public works projects. (Cal. Bus. & Prof. Code, § 7059 (b)).

In *M & B Construction v. Yuba County Water Agency,* 68 Cal. App. 4th 1353 (1999), Yuba County Water Agency [Agency] solicited bids for construction of the first phase of a canal and pipeline project. The Agency's bid specifications required that the contractor constructing the project have a "Class A" general engineering contractor's license. All bidders had a class "A" license, except plaintiff M & B Construction [M & B], which had only a class "B" general contractor's license and two class "C" specialty licenses (class "C-8" for concrete and "C-12" for

earthwork and paving). M & B submitted the lowest monetary bid, but was rejected because it lacked the class "A" license.

The Agency's engineer identified numerous reasons for requiring a class "A" licensed prime contractor on the project, including complexity, type of equipment involved, and the fact that class "A" contractors typically perform the type of work involved in constructing the heavy, reinforced vertical concrete walls involved in the project, while class "C" contractors typically do only flat work. The Agency engineer also urged the use of a class "A" contractor would minimize the number of subcontractors needed on the project, increasing the likelihood change orders could be implemented efficiently.

Upholding the Agency decision, the court held that the Agency's interpretation was supported by the legislative history of Section 7059(b). The court referred to the enrolled bill report, which stated: "This bill may reduce some of the board's request for classification determination since it will *allow* the awarding authority to determine the licensing classification necessary for bidding a project." *Id.* at 1360. It further noted that the specialty contractor would be protected from spending time and money in a public works bid process only to find him or herself disqualified after being the low bidder. "*The awarding authority would have more flexibility in controlling in deciding who it will be doing business with.*" *Id.* at 1360-1361. The court concluded that the Agency's act was more of an administrative act, subject to reversal only if it was arbitrary or capricious, contrary to public policy, unlawful, or potentially unfair. The court concluded that the Agency made a prebid determination that the public would be better served in terms of quality and economy by letting the project only to licensees with the most appropriate experience, while minimizing the need for subcontractors. Id. at 1361.

Under the current City policy, the City determines the licensing classification necessary for bidding on a project, and reviews the general contractors' licenses to determine if contractors possess the proper license. The general contractor is required to have the proper license for the project, however, general contractors are not required to possess all of the specialty licenses, if they have a subcontractor who is licensed to perform the type of work. For example, a general contractor who bids on City work only needs to have an "A" or "B" license, not necessarily a mechanical trade license for a majority of the work to be performed on the project. If the general contractor does not have all the proper licenses, the general contractor's bid or proposal is rejected as nonresponsive. Under City contracts, the general contractor is responsible for ensuring that qualified subcontractors working on public projects have a valid and proper license. This process allows the City to avoid having to hire numerous subcontractors where projects require various specialty licenses, and having to check subcontractor licenses, thus saving the City money.

The proponents of the draft ordinance admit that the proposal is duplicative of state law, but seek adoption of the proposal to "stress" its importance. We caution against adopting ordinances that are duplicative of state law. While the proposal may pass legal scrutiny, we recommend that you consult with staff to discuss the practical aspects and potential consequences to the City before implementing the proposal. For example, implementing the proposal may require the City to hire additional trained staff to check on subcontractor licenses, which may increase costs for the City. In addition, requiring that certain trade work on public

works projects be performed only by contractors and subcontractors holding a specialty "C" license, may impact the mandatory minimum self-performance component of City public works contracts or other programs. It is recommended that Purchasing and Contracting be consulted as to what impact this proposed licensing requirement might have on the City.

CONCLUSION

A requirement that a certain percentage or number of all journeymen on public works projects be graduates of an apprenticeship program approved by the CDAS may be included in a Public Works contract, if it is determined on a project-by-project basis, that the specification is consistent with the Charter, the City's interest, and the Privileges and Immunities Clause of the United States Constitution. A requirement that a certain percentage or number of jobsite workers be certified for OSHA 10-hour and 30-hour General Industry Safety Certification may be included in a Public Works contract, if it is determined on a project-by-project basis, that the specification is consistent with the Charter, and the City's interest.

The City may specify the type of license that contractors and subcontractors possess to perform work on public works projects. However, requiring that certain trade work on public works projects be performed only by contractors and subcontractors holding a specialty "C" license, may impact the mandatory minimum self-performance component of City public works contracts or other programs. Therefore, it is recommended that Purchasing and Contracting be consulted as to what impact this might have on the City regarding the practical aspects, including efficiency and costs.

Respectfully submitted,

JAN I. GOLDSMITH, City Attorney

By _____
Pedro De Lara, Jr.
Deputy City Attorney

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