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REPORT TO HONORABLE MAYOR AND COUNCILMEMBERS

RE: PROPOSED RESOLUTION IN OPPOSITION TO EXECUTIVE ORDER 13767 TO BUILD A WALL ALONG THE UNITED STATES BORDER WITH MEXICO AND U.S. HOUSE OF REPRESENTATIVES BILL H.R. 1813 TITLED BORDER WALL FUNDING ACT OF 2017

INTRODUCTION

On September 19, 2017, the City Council will consider a Resolution in Opposition to Executive Order 13767 To Build A Wall Along The United States Border With Mexico And U.S. House Of Representatives Bill H.R. 1813 Titled Border Wall Funding Act Of 2017 (Border Wall Resolution) proposed by Councilmember Georgette Gómez. In addition to opposing the President's Executive Order and H.R. 1813, the proposed resolution expresses the City Council's intent to disclose the names of any company that bids on the border wall. This Report to Council addresses the legal issues associated with the proposed resolution.

BACKGROUND

On August 2, 2017, Councilmember Gómez presented a version of the Border Wall Resolution to the Budget and Government Efficiency Committee (Committee). The proposed resolution opposed the federal action discussed in the Introduction and expressed concern that a border wall may adversely affect the economic, environmental, and societal health of the San Diego region. In addition, the August 2 version provided:

Section 2. The City Council expresses its intent to identify all companies involved with the designing, building or financing the border wall, and its intent to divest, as soon as practicable, from these companies (emphasis added).

The Committee did not discuss the meaning of the word "divest" or the scope of company involvement with the border wall that would trigger divestiture. Nor did the Committee discuss the practical steps necessary for the City to "divest" from those companies, or give specific direction regarding the "divestiture" concept. On a 2-2 vote, the Committee forwarded the resolution to the full Council without a recommendation.

Our Office has advised that the term “divest” in the proposed resolution is vague and undefined, and therefore likely unenforceable. We have worked with Councilmember Gómez and the Mayor’s office to provide alternative language that is more likely to withstand legal challenge. The revised Border Wall Resolution for Council consideration (Resolution R-2018-88) now specifies the Council’s intent to seek disclosure of the identities of companies involved in designing, building, or financing the proposed border wall. If the Council wishes, this Office will work with staff to achieve the goal of disclosure. However, there are legal considerations the Council should bear in mind if it chooses to move forward.¹

DISCUSSION

I. TO WITHSTAND LEGAL CHALLENGE, THE RESOLUTION MUST BE CLEAR AND UNAMBIGUOUS

A. REMOVAL AND REPLACEMENT OF “DIVEST” LANGUAGE

In drafting legislation, the author needs to be clear and give adequate guidance regarding the municipality’s intended action. Here, use of the word “divest” was not clear and specific, and did not adequately give guidance on what action would be taken and against whom. Also, the Committee did not discuss the intended meaning of the term “divest” as used in the draft resolution. *See, e.g., State v. Beltran*, 116 Haw. 146 (2007) (vague words used in legislation rendered ordinance unenforceable); *Amaral v. Cintas Corp.*, 163 Cal. App. 4th 1157 (2008) (the underlying concern of a vagueness challenge is the core due process requirement of adequate notice) (citing U.S.C.A. Const. amend. 14).

“Divest” is a broad term subject to multiple interpretations. It means “to take away or alienate.” In the context of commerce, it means to sell off or get rid of through sale.² As used here, it appears to mean that the City intends to cease doing business with companies that design, build, or finance the border wall. It is unclear whether that prohibition would apply to companies that are currently contracting or subcontracting with the City, or companies in which the City holds investments.

B. INTENT TO BEGIN DISCLOSURE PROGRAM

In place of the Section 2 language presented at Committee on August 2, 2017, the proposed resolution now includes the following language:

Section 2. The City Council expresses its intent to seek disclosure of all companies who submit a bid or are awarded a contract related to designing, building, or financing the proposed border wall. The City will explore legally permissible options for this disclosure as soon as practicable.

¹ This report is intended to provide preliminary analysis only. Disclosure mechanisms could draw various types of legal challenges depending on the mechanism used. We will provide specific legal advice if the Council adopts the resolution.

² *Divest*. Dictionary.com, <http://www.dictionary.com/browse/divest?s=t> (last visited Aug. 25, 2017).

This revised language avoids the vague, undefined use of the term “divest” and confirms that the City will explore legally permissible options for disclosure.

If the Council chooses to adopt this resolution, this Office would review legal issues that disclosure involves. For example, First Amendment issues may arise if the stated purpose of disclosure is to publically shame companies (by posting a list on the City’s website, for example). *See Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917 (9th Cir.2004) (company stated a claim against a public agency for violation of its First Amendment rights when the agency allegedly retaliated against the company for exercising its expressive rights). A public list also raises the potential for civil lawsuits alleging intentional interference with prospective business advantage, defamation, negligent misrepresentation, and unfair business practices.

II. NUMEROUS LEGAL ISSUES ARISE IF A COMPANY’S ABILITY TO CONTRACT WITH THE CITY IS IMPACTED

While disclosure may be legally tenable, a process that actually penalizes a company’s ability to bid on City projects raises a variety of legal issues related to City contracting laws and policies. For instance, San Diego Charter (Charter) section 94 requires that public works contracts be competitively bid as set forth by ordinance and the City is required to follow its charter. *See Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171 (1994) ([A] charter city may not act in conflict with its charter . . . any act that is violative of or not in compliance with the charter is void). The City’s contracting ordinances and policies cover a wide variety of contracts, from public works contracts to consultant agreements. All of these regulations would have to be reviewed and potentially amended to address any intention not to contract with identified companies.³

For example, we would need to review whether it is legally permissible for the City to use involvement with the border wall in determining the “responsibility” of the contractor under San Diego Municipal Code (SDMC) section 22.3004 (Contractor Standards). Although public agencies are typically given wide latitude to decide the requirements for responsibility, “any requirements [must be] reasonably related to the ‘quality, fitness and capacity of a bidder to satisfactorily perform the proposed work’.” *Associated Builders and Contractors, Inc. v. San Francisco Airports Comm’n*, 21 Cal. 4th 352 (1999) (citing *City of Inglewood-L.A. County Civic Center Auth. v. Superior Court*, 7 Cal. 3d 861,867 (1972)). An open question is whether a contractor’s book of business is “reasonably related” to one of these factors and whether the City can permissibly reject a contractor for that reason alone.⁴ In addition, it may be necessary to amend the definition of a “responsible” bidder to include an element of social responsibility. SDMC Chapter 2, Article 2, Division 1.

Moreover, if a contractor is indefinitely barred from bidding or working on border wall construction, an argument could be made that a de facto debarment occurred. SDMC Chapter 2, Article 2, Division 8. The Debarment Ordinance sets forth various procedures that give

³ If the City wants to cancel an existing contract, legal review is needed to determine whether the contract language allows for termination short of breach.

⁴ The *City of Inglewood* court found that the “responsibility” of the contractor was limited to the bidder’s fitness and ability to perform the work advertised. “Responsibility” did not include factors unrelated to the ability to perform, such as whether the low bidder had demonstrated “social responsibility.” *Id.* at 867-68.

contractors rights, such as notice and hearing, before they can be permanently debarred from City contracts.

Rather than deeming border wall contractors “non-responsible,” the City might also attempt to penalize such contractors by inserting a commitment not to work on the border wall into bid specifications; however, this is also legally problematic. Although government agencies are generally afforded discretion in crafting bid specifications, they must further a legitimate government interest and not be “arbitrary, capricious, lacking in evidentiary support or procedurally unfair.” *Associated Builders and Contractors, Inc.*, 21 Cal.4th at 361. That would be a difficult standard to meet here because this exclusion of otherwise “responsible” contractors is essentially punishing them for the City’s disagreement with federal policy.

Finally, even if the City can justify rejecting contractors who have worked on the border wall, the City must clearly describe the amount of contractor involvement that may result in disclosure and the associated consequences. For example, contractors need to be advised whether only full scale involvement will disqualify the company, or whether minimal involvement, such as merely supplying materials, would be permissible. This could implicate other issues for legal review, such as whether the City would require separate bonding and insurance requirements, and the length of time in which a contractor may be banned from working with the City. The Council would also have to consider the interplay with the City’s Small and Local Business program if, for example, a contractor who bid or worked on the wall was also a small or emerging business and allowed certain bid preferences. *See* Council Policy 100-10.⁵

CONCLUSION

The proposed resolution has been revised to address legal concerns with the vague and undefined reference that the City “divest” from companies assisting in the construction of the border wall. The resolution is now in the form of a policy statement that can be voted on by the Council. This Office is available to further advise on the constitutional and other complex legal issues associated with any proposal that would affect City contracting.

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⁵ Although we may consider what other jurisdictions do, it is important to remember that the City is unique because it has its own Charter and Municipal Code. As such, other jurisdictions may have not considered the same legal issues facing San Diego. Notably, the State of California proposed legislation (Sen. Bill 30 (2017-2018 Reg. Sess.)) to amend the Government Code and the Public Contract Code prohibiting the State from contracting with or renewing contracts with companies that provide services for the construction of the border wall after January 1, 2018. That bill is in the Committee process.