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A Professional Corporation

Leslie E. Devaney
ldevaney@stutzartiano.com

January 11, 2013

VIA E-MAIL AND U.S. MAIL

Leslie Valdez
Procurement Specialist
Purchasing & Contracting Department
1200 Third Avenue, Suite 200
San Diego, CA 92101
lvaldez@sandiego.gov

Re: Request for Proposal No. 10024458-13-V (RFP – Security Guard Services for Qualcomm) Item # 5 for the January 16, 2013 Committee on Budget and Finance

Dear Ms. Valdez:

I am responding on behalf of Staff Pro, Inc. ("Staff Pro") to your letter dated January 9, 2013, to Cory Meredith, President/CEO of Staff Pro related to the applicability of the City's Living Wage Ordinance to the above referenced contract.

Your letter is disturbing given that it appears that staff is unilaterally changing the bid requirements as well as the City's Living Wage Ordinance ("LWO" or "Ordinance"). We note that neither the Mayor, Council or City Attorney are copied in that correspondence and are left to surmise that conflicted Stadium Authority personnel may once again be attempting to influence this process in favor of Elite Show Services, Inc. ("Elite"). (See Meredith letter to Chair Todd Gloria and Members of the Budget and Finance Committee dated January 2, 2013 and enclosed).

As an initial matter, I should point out that, Staff Pro has confirmed its obligation to comply with the LWO on two (2) prior occasions. First, as required by the RFP, Staff Pro certified that it would comply by executing a "Living Wage Ordinance Certification of Compliance" ("Certification") included with the RFP and required as part of the bid submission. (Certification with signature redacted enclosed). Then on September 11, 2012, responding to a September 10, 2012, email, Staff Pro again confirmed that it would comply with the LWO as requested throughout the RFP. (See attached email exchange)

Your January 9, 2013, letter purports to again seek "confirmation" from Staff Pro on the matter of compliance with the Living Wage Ordinance. Instead, however, what the City has now presented to Staff Pro is a revised contract term related to wages that is inconsistent with the requirements of the LWO and inconsistent with the provisions of the RFP to which Staff Pro responded. Far from confirming the terms of the LWO, this new provision attempts to extend the scope of the LWO under <u>this</u> contract to situations beyond the scope of the Council adopted

LWO and eradicates all the Council approved exemptions contained in the Ordinance. We understand that an exemption for government agencies is not in effect at City facilities. As an RFP provision affecting pricing and upon which bidders relied in making their bids to the City, it is inappropriate for the City to attempt to demand this type of contract revision after bid opening.

When the LWO was amended in 2008, the City Council carefully considered its scope and exemptions. It is important to note that as a part of that consideration, Elite specifically asked that the scope of the LWO be expanded so that, in effect, nearly any event held at a City facility would trigger the requirements of the LWO. Nevertheless, the City Council elected to retain a scope of the Ordinance as originally drafted and did not eliminate the exemptions that result in some events at City facilities being subject to the Ordinance and others exempt. (See City Attorney Report to the Mayor and City Council dated October 6, 2008.)

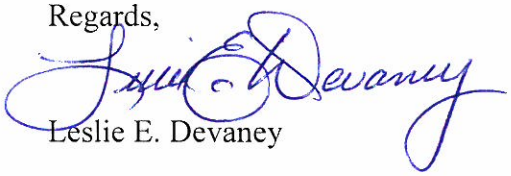
I would also point out that the revised contract provision now requested is vague. The new unauthorized contract term provides that "service workers" shall be paid a living wage. The LWO is applicable to "covered employees" which are specifically defined in the LWO. The term "service worker" is not defined in the Living Wage Ordinance. Consequently, it is unclear to which employees the staff intends to apply the LWO pursuant to this contractual expansion of the LWO. Though this issue is academic for the reasons stated above, I bring it to your attention in the event staff attempts to contractually expand the provisions of the LWO in other contracted matters.

The awarding of this contract has been noticed for the January 16, 2013 Committee meeting. We would welcome the opportunity to meet with you to discuss the intent of this requested provision before the Committee acts on this matter.

In conclusion, having previously and repeatedly certified that it will comply with the LWO, it should be abundantly clear that Staff Pro will comply with the requirements of the LWO. Unfortunately, Staff Pro cannot agree to a new RFP term affecting pricing subsequent to having submitted its bid, but reiterates and reconfirms once again, its prior LWO Certifications.

Should you have any questions, please feel free to contact me.

Regards,



Leslie E. Devaney

Enclosures

cc: Mary Jo Lanzafame, Assistant City Attorney
Honorable City Councilmembers
Mayor Bob Filner
Committee Consultant to the Budget and Finance Committee (*via e-mail)*
Office of the Independent Budget Analyst (*via e-mail)*

January 2, 2013

Chair Todd Gloria and Members of the Budget and Finance Committee
City Administration Building
202 C Street 10-A
San Diego, CA 92101

RE: QUALCOMM SECURITY SERVICES CONTRACT (RFP No. 10024458)

Dear Chair Gloria and Committee Members:

This letter is a follow up to the Budget and Finance Committee ("Committee") meeting of November 28, 2012. I am the CEO for Staff Pro, Inc. ("Staff Pro"), one of two successful bidders in the City's recent Request for Proposal ("RFP") for security services at Qualcomm Stadium (RFP No. 10024458). I am writing to advise that significant misinformation was presented to the Committee at the November meeting about Staff Pro and to express our extreme disappointment that, as a successful bidder on this RFP, we were never notified of the Committee meeting. I want to correct the record regarding my Company and the inaccurate information you received. Finally, I want to call to your attention, information about Elite Show Services ("Elite"), the other successful bidder, that has come to light since the Committee meeting and which demand additional inquiry on the part of the Committee before taking up this matter again in January.

Let me say first how pleased and honored Staff Pro is to have been recommended through the City's RFP process to receive a portion of the security work at Qualcomm Stadium. This is particularly true in light of our protest after the City's first attempt to procure these services.

To provide just a little historical context, in 2006, Elite was awarded an oddly long 29-year "sole source no-bid deal" until 2035 without Council approval. Only after negative and critical news reports were published did the City of San Diego bid these services out. Even then, however, the process favored the City's long time contractor. As the attached Appeal Panel Decision clearly states, that earlier process was tainted and evidence was presented suggesting City staff involved in that first attempt were biased. Staff Pro welcomed the second RFP process and the opportunity to compete on a level playing field. Unfortunately, as a result of what happened at the Committee meeting, we are concerned that staff's bad behavior has not ended.

Briefly stated, the members of the Committee have been lead to believe that Staff Pro is an out of town company, a newcomer to the San Diego market, and that it does not intend to follow important laws and policies of the City of San Diego – in particular the Living Wage Ordinance. Nothing could be further from the truth. Had we been advised in response to our numerous requests of Purchasing Department Staff (see attached) that this matter would be heard at your November meeting, we would have been there and you could have heard that directly from me.

Instead, Elite, our competitor, had the opportunity to malign Staff Pro without our ability to respond. Given past behavior related to this particular procurement, we fear that the presentation was coordinated and that we were intentionally kept in the dark. Indeed, it was apparent in

making the presentation to the Committee that Mr. Nail 'teed up' the living wage issue for Mr. Kontopuls' false allegations regarding Staff Pro.

Although Staff Pro is headquartered in Orange County, contrary to assertions made during the November meeting, we are not newcomers "trying to get a foot hold" in this region. We have in fact been providing event-based security services in San Diego County and elsewhere since 1987. Indeed, Staff Pro has been in existence longer than Elite, a company formed by several former Staff Pro employees. Until Qualcomm staff unilaterally and inexplicably began advising tenants in 2007 that they were required to use Elite, we provided security for numerous events at Qualcomm.

City staff presenting the matter to you at the Committee meeting seemed unaware that a City Appeal Panel had determined that the prior bid process was improperly conducted. The Appeal Panel also acknowledged receiving evidence suggesting that Qualcomm Stadium staff were biased. Indeed, Mr. McSweeney and Mr. Nail were excluded from the current Bid Evaluation Panel; presumably because of the bias allegations raised in the earlier appeal. So it is particularly troublesome that these individuals made the presentation at the Committee meeting. Why, if Mr. McSweeney and Mr. Nail were ineligible to participate on the evaluation panel, is it appropriate for them to present this matter to the Committee or City Council? If there is evidence of bias on the part of departmental staff, should they be participating at any level?

Though Qualcomm Stadium staff testified to the Committee members that they were not involved in the selection process and did not have the information to answer any of your questions, our interactions with Purchasing Department staff indicates that Qualcomm Stadium staff were in charge of preparing docket materials and coordinating the timing of the Committee's consideration.

Finally, after the Committee meeting, we contacted Roy Nail to ask why Staff Pro had not been advised of the meeting and he stated that it is not their practice to invite vendors to attend Committee meetings. How odd that when asked by the Committee, Mr. Nail responded that they <u>had</u> notified Staff Pro.

To directly address the issue of the City's Living Wage Ordinance, which Elite and, to a lesser extent, Qualcomm Stadium staff implied Staff Pro does not intend to comply with, let me be clear. Staff Pro has signed an agreement, as part of its contract with the City, which obligates us to abide by the Living Wage Ordinance. It is one of numerous compliance documents we are understandably required to sign ensuring that Staff Pro will comply with City policies and code provisions as we do business with the City. Purchasing Department staff pointed out that the Living Wage Ordinance is not applicable in every conceivable situation that may arise under the work awarded to Staff Pro. Unlike the work Elite was awarded, which will be paid directly by the City for services provided directly to the City, Staff Pro will be providing security to tenant events at the Stadium. The City has acknowledged that some of those events do not trigger the City's Living Wage Ordinance, but where it does, we will fully comply.

It is noteworthy that Elite, which has been under contract to the City since the inception of the Living Wage Ordinance, has recently been accused of very serious child-labor law violations related to its work at the Stadium. In particular, they are under investigation by the U.S.

Department of Labor ("DOL") of engaging in predatory practices in which children at local high schools were forced to work for free at Charger games in exchange for gifts of donations by Elite to schools and other non-profit organizations. Upon learning of the DOL investigation, the San Diego Unified School District ("SDUSD") initiated its own investigation and advised Elite that no contract of this kind would be honored by the SDUSD. Clearly, these are very serious allegations. If borne out, it will mean that far from having paid a 'living wage,' Elite would have paid far less than even minimum wage to children. News of the DOL and SDUSD investigations were published in the San Diego Union Tribune on December 6, 2012, just one week after Elite asked you not to approve the portion of the contract recommended for Staff Pro.

As I said at the beginning of my letter, Staff Pro is proud and honored to have been recommended to provide security at Qualcomm Stadium. We are a well established company which has done business in this area for many years. We are proud of the services we provide and look forward to bringing that excellent service to a City facility once again. At the same time, and particularly in this instance where the City has already been criticized for favoritism in this area, we are troubled by what appears to have been a conscious effort to keep us in the dark creating an opportunity for Elite to criticize us without the opportunity to respond.

I welcome the opportunity to meet with you and to answer any questions you may have. In an effort not to overwhelm you with voluminous information, I have attached only a few documents that relate to the issues in this letter. I would of course be happy to share additional back up materials at your request.

I look forward to the opportunity to attend the January 16, 2013 Budget and Finance Committee meeting and share our enthusiasm to begin working for the City at this important facility.

Regards,

Cory Meredith
President and CEO, Staff Pro

cc: Councilmembers Tony Young, Lorie Zapf, Scott Sherman, and Marti Emerald
Mayor Bob Filner
Committee Consultant to the Budget and Finance Committee
Office of the Independent Budget Analyst

Attachments: Staff Pro Protest Panel Brief
Protest Panel Decision
Emails from Staff Pro to Purchasing Staff Re: Committee and Council Consideration of Qualcomm Security RFP.
December 6, 2012, Union-Tribune article regarding Elite's child labor law violations (including linked letters from DOL and SDUSD)
2009 Union Tribune articles regarding City favoritism toward Elite

RFP. No. 10024458-13-V

LIVING WAGE ORDINANCE CERTIFICATION OF COMPLIANCE

Send form to:

CITY OF SAN DIEGO
LIVING WAGE PROGRAM
202 C Street, MS 9A, San Diego, CA 92101
Phone (619) 236-6682 Fax (619) 533-3240

COMPANY INFORMATION

Company Name: Staff Pro Inc.

Company Address: 15272 Newsboy Circle Huntington Beach, CA 92649

Company Contact Name: Cory Meredith Contact Phone: (714) 230-7200

CONTRACT INFORMATION

Contract Number (if no number, state location): San Diego, California Start Date: TBD

Contract Amount: TBD End Date: TBD

Purpose/Service Provided: Security Guard Services for Qualcomm Stadium

TERMS OF COMPLIANCE

A contractor or subcontractor working on or under the authority of an agreement subject to the Living Wage Ordinance (LWO) must comply with all applicable provisions of the LWO unless specifically approved for an exemption. The basic requirements of the LWO obligate contractors and subcontractors to:

(a) Pay covered employees a wage no less than the minimum initial compensation of $11.14 per hour (adjusted annually on July 1).

(b) Provide covered employees a health benefit of $2.23 per hour (adjusted annually on July 1) or, if any lesser amount is applied toward a health plan, to add this difference to the hourly wage rate as cash payment.

(c) Provide a minimum of 10 compensated days off per year for vacation, sick leave, or other personal need at the employee's request and provide 10 additional uncompensated days off for personal or family illness when accrued compensated days off have been used.

(d) Inform all covered employees of their possible right to Federal Earned Income Tax Credit within 30 days of contract start.

(e) Permit access for authorized City representatives to work sites and relevant records to review compliance with the LWO.

(f) Maintain wage and benefit records for covered employees for 3 years after final payment.

(g) Prohibit retaliation against any employee who alleges non-compliance with the requirements of the LWO.

If a subcontractor fails to submit this completed form, the prime contractor may be found in violation of the LWO for failure to ensure its subcontractor's compliance. This may result in a withhold of payments or termination of the agreement.

CONTRACTOR CERTIFICATION

By signing, the contractor certifies under penalty of perjury under laws of the State of California to comply with the requirements of the Living Wage Ordinance.

Cory Meredith
Name of Signatory

President/CEO
Title of Signatory

Signature

May 15, 2012
Date

FOR OFFICIAL CITY USE ONLY

Date of Receipt: LWO Analyst: Contract Number:

rev 07.01.2011

From: Cory Meredith
Sent: Tuesday, September 11, 2012 10:10 AM
To: Valdez, Leslie
Cc: Bob Schmitt; Moreno, Frank; Baer, Jeffrey; Leslie Devaney
Subject: Re: Request for Clarification - RFP 10024458-13-V - Security Guard Services for Qualcomm Stadium

Concerning Leslie Valdez procurment specialist e-mail inquiry on 9-10-12 concerning Staff Pro's complying with the San Diego living wage ordinance, please consider this confirmation once again, that Staff Pro will comply with San Diego's living wage ordinance as requested throughout the RFP.

Cory Meredith
310 991 8617
Sent from my iPhone

On Sep 10, 2012, at 6:46 AM, "Valdez, Leslie" <LValdez@sandiego.gov> wrote:

Mr. Meredith,

I need clarification.

Please acknowledge living wage will be paid by your company under this contract for providing event security services. The City of San Diego conditions in the subject contract state that the work performed under the contract is subject to the Living Wage Ordinance (reference RFP: Section C, item 3 on page 18; Section I.05 on page 31; and Section I.63 on page 53). The notation made by Staff Pro, Inc. on its proposal submittal of the Event Security Guard Services pricing page 4 contained a note stating "Please note: Unit costs rates are not subject to Living Wage Ordinance due to client exemptions and short-term nature of contracts for events." This notation does not relieve Staff Pro, Inc. from complying with the requirements of the Living Wage Ordinance. Qualcomm Stadium is operated as a living wage facility. The certificate of compliance was signed and submitted by Staff Pro, Inc.

Please confirm by return email no later than close of business today, September 10, 2012, that Staff Pro, Inc. acknowledges that living wage will be paid by your company under this contract.

Thank you.

Leslie Valdez, CPPB
Procurement Specialist
Purchasing & Contracting Department
Tele: (619) 236-7090 / Fax: (619) 533-3238
Hours: 7:00 a.m. to 4:00 p.m. (Monday through Friday)

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

October 6, 2008

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

LIVING WAGE ORDINANCE: BUDGET & FINANCE COMMITTEE RECOMMENDATIONS

INTRODUCTION

At the July 9, 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], and presented draft revisions requested by the Budget Committee at its March 5, 2008 hearing. The proposed revisions were designed to: (1) create a cost recovery fund to help fund enforcement, (2) narrow the professional services exemption so as to bring paramedics and emergency medical technicians, and possibly others, within the protections of the Ordinance, and (3) reduce inconsistency in application of the Ordinance by eliminating the 90-day requirement for City facility agreements and service contracts. See Report to Council dated July 3, 2008 [RC-2008-17].

The Budget Committee moved to forward these revisions to City Council for consideration, and also moved to forward a package of revisions proposed by the Center for Policy Initiatives [CPI] designed to further enhance the protections of the Ordinance. In addition, Councilmember Faulconer requested that our Office hold a public meeting to solicit input from various stakeholders regarding the proposed changes to the Ordinance. In cooperation with the Independent Budget Analyst and Council Districts 3 and 6, we held a meeting on September 25, 2008, which was attended by representatives from CPI, Elite Show Services, San Diego Theatres, Inc., Rural Metro, the San Diego Chamber of Commerce, and various other stakeholders. Due to the number of interested parties and complexity of the issues, we plan to hold another stakeholders' meeting on October 8, 2008. We will provide Council with a supplemental report regarding the outcome of the second stakeholders' meeting.

This Report provides a summary of the Budget Committee revisions and the revisions proposed by CPI, which we have reviewed and revised to ensure proper form and consistency with existing law. We have also included input from the stakeholders' meeting regarding the proposed revisions where appropriate. We have attached two versions of the Ordinance for Council's consideration, which incorporate both the revisions previously presented to the Budget

Committee and CPI's proposals; the first version (attached as **Exhibit A**) includes a broad rewording of the professional services exemption, and the second version (attached as **Exhibit B**) includes an alternative, more narrow rewording of this exemption, as will be discussed in more detail below.

DISCUSSION

I. Budget Committee Revisions.

At its March 5, 2008 hearing, the Budget Committee requested that the our Office provide draft revisions to the LWO, and analysis of those revisions, in the following areas: (1) creation of a cost recovery mechanism for enforcement; (2) revision of the professional services exemption to allow the LWO to apply to certain workers in professional services industries; and (3) revisions to address specific concerns about anti-competitive effects raised by representatives of Elite Show Services, a company that provides security guard services. We have provided a brief analysis of each of these revisions below.

A. Cost Recovery Fund.

Councilmember Frye proposed, and the Budget Committee included in its March 5 motion, a proposal to create a cost recovery fund to meet the consensus need for improved enforcement of the LWO. Until recently, enforcement activities were the responsibility of one employee in the Purchasing and Contracting Department, who devoted 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 permitted only complaint-driven enforcement. Although an analyst position has since been added to assist with LWO administration, there are still limited resources to engage in proactive enforcement measures, such as audits and field inspections. 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 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 [RFB] contain a component under which the contracting business would pay into an enforcement fund. We assumed that this provision would also apply to contracts entered through other forms of City service procurement such as Requests for Proposals [RFP] and sole source procurements, to the extent that the LWO would apply. Councilmember Frye's suggestion would require the procuring City Department, when preparing the governing RFB, 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.

We have drafted the provision to require payment only of a winning bidder or proposer. Further, 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 the contractor anticipated it would affect the contractor's 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 presented to the Budget Committee on July 9, 2008, the following addition to SDMC section 22.4230, to implement the Committee's intent as expressed in its March 5, 2008 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 Purchasing Agent.[1] The *City Manager*[2] 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.

The Budget Committee voted to forward this provision without amendment to the full Council.

At the September 25, 2008 stakeholders' meeting, some stakeholders pointed out that the cost recovery fund provision, as drafted, does not extend to City facility agreements even though those agreements may impose just as much of an enforcement burden on the City as service contracts. Because enforcement costs would be incorporated into bid documents, it would be difficult to extend this provision to City facility agreements, which are not generally procured through the City. Thus, although the stakeholders recognized an apparent inequity, there was no consensus on whether or how to correct it.

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[1] In the version of the Ordinance that was presented to the Budget Committee on July 9, this provision stated that contractors would remit the "reasonably anticipated costs of monitoring and enforcing this division with respect to the *service contract*, as determined by the Living Wage Administrator." RC-2008-17, pp. 2-3. Because the Living Wage Administrator is not a position codified in the City Charter or Municipal Code, we have since changed "Living Wage Administrator" to "Purchasing Agent."

[2] In the version of the Ordinance that was presented to the Budget Committee on July 9, this provision stated that the "City Auditor shall, upon request of the *service contractor*, review and determine the reasonableness of such costs." RC-2008-17, pp. 2-3. Based upon a consensus that has emerged since then, we have changed "City Auditor" to "City Manager," allowing the responsibility to be placed wherever the executive branch deems it appropriate.

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. See RC-2008-5, pp. 3-4.

The City Attorney has recommended, and the Budget Committee has forwarded for Council consideration, 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 Budget Committee hearing, this broad a reworking 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 reflected 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. <u>The exemption for medical service contracts does not extend to emergency medical personnel, such as emergency medical technicians and/or paramedics.</u> 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 Council prefers this approach, we would also recommend adding to the list of examples of service contracts in SDMC section 22.4205:

> <u>(q) Service workers in the medical field, such as emergency medical technicians and/or paramedics.</u>

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**.

At the July 9 Budget Committee hearing, CPI also proposed revisions to Section 22.415(a)(7) designed to clarify the professional services exemption, which are included in the attached draft Ordinances and discussed more fully below.

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 Budget Committee 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 and one-half staff members dedicated to monitoring Living Wage issues. 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 be the most effective means of addressing this first concern.

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, 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 four 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 to the difference in duration of the respective contracts.[3] In 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:

[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 contracts so as to avoid the requirements of the LWO.

> *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.

At the stakeholders' meeting, a representative from Elite also suggested eliminating the $25,000 threshold for City facility agreements and service contracts in order to broaden application and enhance consistency even further. The Elite representative also noted that since enactment of the LWO, his company has benefited from improved employee morale and reduced turnover. Elite contends that even-handed enforcement and application will be easier to achieve with this additional change.

II. CPI Revisions.

At the July 3 Budget Committee hearing, CPI presented a package of revisions designed to extend the protections of the Ordinance and enhance enforcement. We have summarized below the various revisions proposed by CPI. In some cases, we revised CPI's proposed language in order to ensure proper form and consistency with existing law. When we have done so, we have noted those changes below.

A. Inclusion of Civic Theatre as a City Facility.

CPI proposed revising the definition of City facilities in Section 22.4205 to include the Civic Theatre. Currently, the Ordinance applies not only to service contracts, but also to "City facility agreements." City facility agreements include certain agreements for use of space or services at five identified "City facilities," which include: (a) Petco Park, (b) Qualcomm Stadium, (c) San Diego Sports Arena, (d) San Diego Convention Center, and (e) San Diego City Concourse. SDMC § 22.4205. In our March 3 Report, we suggested that Council could expand

the list of City facilities to reach other large City-owned structures such as the Civic Theatre (see RC- 2008-8, pp. 1-2), and CPI specifically included the Civic Theatre in the package of revisions it presented to the Budget Committee on July 9. We have modified CPI's proposal slightly by listing the Civic Theatre as a separate subdivision (f) in Section 22.4205 rather than revising Section 22.4205(e) to state "San Diego City Concourse, including Civic Theatre."[4]

At the July 9 hearing, Mr. Patrick McNamara, an usher, discussed the positive impact the LWO would have on ushers employed at the Civic Theatre, and also suggested possible inclusion of the Balboa Theatre[5] as a City facility. At the September 25, 2008 stakeholders' meeting, Don Telford, a representative from San Diego Theatres, Inc., argued that each of the five City facilities currently listed in the Ordinance receives some form of support or subsidy from the City. Mr. Telford indicated that the Civic Theatre does not currently receive any subsidy from the City, and could be severely financially impacted by this extension of the LWO. In addition, Mr. Telford indicated that most or all other regional theatres have volunteer rather than paid ushers. The Civic Theatre would likely move to the use of volunteer ushers if subjected to the LWO, as it might be unable to absorb the fiscal impact.

B. Inclusion of Definition of Covered Employee.

CPI proposed adding a definition for "covered employee," which includes full-time, part-time, temporary and seasonal workers but does not include workers in academic and job training programs.

C. Expansion of Definition of Service Contracts.

CPI proposed revising the definition of service contracts in Section 22.4205 of the Ordinance to expressly include, "all services provided through the managed competition program under Charter section 117(c)." In addition, CPI recommended expanding the list of examples of service contracts in Section 22.4205 to include: street cleaning, waste collection and waste disposal, recycling, right-of-way maintenance, and water and wastewater maintenance contracts.

D. Clarification of Exemptions.

CPI proposed revising Section 22.4215 of the Ordinance ("Exemptions") to clarify the professional services exemption. Specifically, CPI suggested revising the professional services exemption (subdivision (a)(7)) to be consistent with California Labor Code section 515(a), which

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[4] The purpose of this modification is to avoid confusion regarding whether other structures in the Civic Center Plaza area are City facilities. In a memorandum to the City's Living Wage Administrator dated January 18, 2008, the City Attorney found that the "San Diego City Concourse," as used in the LWO, refers only to the 114,000 square-foot facility used as a public event center and meeting hall, and not other structures in the Civic Center Plaza area, such as the Civic Theatre. The City Attorney's conclusion was based on the legislative record, which revealed that *Council was presented with a fiscal analysis of the LWO as applied to the "City Concourse" as distinct from the* "Civic Theatre" when it passed the Ordinance.

[5] The Balboa Theatre is actually owned by the Redevelopment Agency, and thus cannot be made subject to the LWO.

defines the kinds of employees who are exempt from overtime pay.[6] Because this proposal is consistent with the other revisions to the professional services exemption discussed above, we have included CPI's proposal in both versions of the Ordinance attached hereto.

CPI also proposed revising Section 22.4215(c) to include a general presumption against a determination of exempt status. We modified CPI's proposal slightly to clarify that the Purchasing Agent (a position codified in the Charter and Municipal Code) rather the Purchasing Department would be responsible for establishing procedures for determining exemptions, and simplified the proposed wording of Subdivision (c).

E. Clarification of Reporting Requirements.

CPI proposed revising Section 22.4225 of the Ordinance ("Reporting and Notification Requirements") to specify the types of records covered employers would be responsible for maintaining, including "each covered employee name, address, date of hire, job classification, rate of pay, hours worked in each pay period, and paid and unpaid time off (accrued and used)." In addition, CPI proposed specifying that such records should be maintained for three years after the City's final payment on the relevant contract. We made non-substantive modifications to CPI's proposed language in order to be consistent with terminology used in remainder of the Ordinance, and clarified the timeframe within which such records shall be made available to the City if requested.

F. Enhancement of Enforcement Provisions.

CPI proposed various revisions to Section 22.4230 of the Ordinance ("Enforcement"). For example, CPI proposed revising Subdivisions (a)(4) and (a)(5) to impose a mandatory, rather than discretionary, duty on courts to fine up to treble damages in the case of willful violations and award attorneys' fees to the prevailing partying in civil actions brought pursuant to the Ordinance. In addition, CPI proposed revising Subdivision (b) to broaden and clarify the LWO's protections against retaliation. CPI also proposed revising Subdivision (c) to impose a mandatory, rather than discretionary duty on the City to investigate LWO complaints. Finally, CPI proposed revising Subdivision (d) to specify the remedies available to the City for violations of the Ordinance, including declaring a material breach of the relevant contract, instituting debarment proceedings, requesting that the City Attorney bring a civil action, and ordering the payment of unpaid wages and/or fines up to $100 per day for each violation. We made non-substantive modifications to CPI's proposed language for Subdivisions (b) and (d) in order to be consistent with terminology used in remainder of the Ordinance, and to clarify that the City Manager rather than City Auditor would have authority to impose the various remedies.

G. Annual Reporting Requirement

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[6] Such an employee "customarily and regularly exercises discretion and independent judgment in performing [their] duties, and earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment." Labor Code § 515(a)

CPI proposed revising Section 22.4235 to impose an annual reporting duty on the City Manager. Previously, the LWO required only a single report on July 1, 2007.

H. Revisions to Division 32

Finally, CPI presented to the Budget Committee a set of proposed revisions to a different portion of the Municipal Code. Chapter 2, Article 2, Division 32 contains general rules for the City's procurement of contracts for goods, services, and consultants. At Section 22.3224, is addresses "Contractor Standards," and sets forth certain demonstrations of "capability to fully perform the contract requirements and...business integrity" that must be met for any contract exceeding $50,000. The CPI proposal would add significantly to this section. It would expand the section's applicability beyond service contracts, to also include contracts for goods and cooperative procurement contracts. It would require prospective contractors and subcontractors to sign a Pledge of Compliance with the section's requirements. Thereafter, failure to comply with the section's requirements could result in a finding that the contractor was in breach of the contract, resulting in the invocation of remedies up to and including termination. In addition, after a hearing, the City could declare a contractor "non-responsible" – in essence, a finding that the contractor does not have the "capability [or] business integrity" to perform City work for a period of two years, after which the contractor could apply for reinstatement. Absent an affirmative decision by the City to reinstate the contractor, a finding of non-responsibility would last for five years. Such a finding would have to follow a due process procedure under applicable law.

This proposal is modeled on a similar one that has been in place, and functioning effectively, in Los Angeles since 2000. It would provide a less drastic alternative to debarment, while still allowing the City to ensure that its contractors have the requisite resources and character to perform City work. It would also provide due process to prospective contractors prior to any exclusion from City contracting. While it would provide an additional tool for enforcement of the Living Wage Ordinance, the proposed revision of section 22.3224 would not be specific to that subject matter. We have made non-substantive modifications to CPI's proposed revisions to Section 22.3224 to clarify the procedure and ensure consistency existing municipal law.

CONCLUSION

These revisions reflect both the direction of the Budget Committee and the input of numerous stakeholders subsequent to that direction. Since there will undoubtedly be further input from interested parties as they review these draft Ordinances, the Office of the City Attorney stands ready to address this anticipated additional input in a subsequent report, and at the Council's hearings on this matter.

Respectfully submitted,

MICHAEL J. AGUIRRE
City Attorney

MPC:SRS:js
RC-2008-22

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10/20/08

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Re: Living Wage Ordinance

Dear Council Member:

I am an employee of the San Diego Theaters Inc, operators of the San Diego Civic Theater and the Balboa Theater. The Civic Theater is located in the San Diego City Concourse, which is one of the five venues included in the Living Wage Ordinance, which was approved by the City Council in May, 2005.

We believe we should have been included in the Living Wage Ordinance in May 2005 but we were omitted. We have been and still are the only service employees in the San Diego City Concourse.

The Balboa Theater is part of the San Diego Redevelopment Plan. This venue should also be included in the Living Wage Ordinance.

Your support for the inclusion of the San Diego Civic Theater and the Balboa Theater into the Living Wage Ordinance will be very much appreciated.

Priscilla B Leathers Date: 10-12-08
Signature

Priscilla B. Leathers
Print Name