

MEMORANDUM OF LAW

DATE: November 9, 2001

TO: Leslie J. Girard, Assistant City Attorney

FROM: Theresa C. McAteer, Deputy City Attorney

SUBJECT: Gas Tax Revenues and State Law Prevailing Wage Requirements

INTRODUCTION

The City annually receives from the State a distribution of funds generated by the Highways Users' tax (imposed and administered pursuant to Article XIX of the California Constitution and California Streets & Highways Code section 2101 et seq.) [the Gas Tax]. Mindful that the City, as a charter city, is generally not subject to prevailing wage requirements in the California Labor Code, we have been asked whether the use of Gas Tax funds on a particular project triggers a requirement that the City pay prevailing wage on that project.

QUESTION PRESENTED

Does the use of Gas Tax revenues on a project trigger the state law requirement for payment of prevailing wage on that project?

SHORT ANSWER

Although there is no case or administrative decision directly on point, for the reasons set forth below, the mere use of Gas Tax funds on a City project does not impose a requirement to pay prevailing wage on that project.

DISCUSSION

1. Prevailing Wage Requirements

General prevailing wage requirements are found in the California Labor Code, sections 1770-1779, pertaining to "Public Works and Public Agencies." Case law has established that these provisions do not generally apply to public works by the City, because they conflict with the City Charter's requirement to award such contracts to the "lowest responsible bidder." The "municipal affairs" doctrine, which has been discussed in numerous previous City Attorney Memoranda of Law, makes these general provisions of the Labor Code inapplicable to charter cities. *Vial v. City of San Diego*, 122 Cal. App. 3d 346, 348 (1981).

Prevailing wage requirements sometimes appear in more specific bodies of law (such as California redevelopment law, at California Health & Safety Code section 33423), and depending on the circumstances those specific requirements could be found to override the City Charter's authority in this area. The Gas Tax laws do not contain any requirements for payment of prevailing wage.

Even so, prevailing wage may be required under some circumstances.¹ The courts have articulated three factors to weigh in determining whether a project is a "municipal affair" subject to the charter city exemption: (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. *Southern California Roads Co. v. McGuire*, 2 Cal. 2d 115, 123 (1934). These factors are consistently cited by the California Department of Industrial Relations [DIR] in determining whether prevailing wage requirements apply in a particular case.²

¹For example, as we have explained in previous Memoranda of Law, the statewide concern evident in the special legislation authorizing TransNet taxes -- commonly referred to as "Proposition A" -- may trigger the prevailing wage requirement for certain projects funded with TransNet tax revenues. The same analysis and conclusion does not apply to the Gas Tax statutes addressed in this Memorandum.

²The DIR's website -- www.dir.ca.gov -- is a good source for the DIR's Precedential Decisions on the subject of prevailing wage determinations.

Thus, for example, in a letter dated May 16, 2001, the DIR acknowledged the City of San Diego's general exemption from the Labor Code's prevailing wage requirements. [See Attachment 1]. Applying the three-factor analysis of *Southern California Roads*, the DIR concluded there was no factor warranting the imposition of a prevailing wage requirement in connection with the project analyzed therein.

By contrast, in a lengthy decision related to a waterline reconstruction project in the City of Big Bear Lake (a charter city), the DIR found that the three factors in that case took the project outside the realm of "municipal affairs" and weighed in favor of applying a prevailing wage requirement. [See Attachment 2]. Importantly, the DIR stated that the mere fact the source of funding was a state loan did not by itself take the project outside the scope of "municipal affairs." Rather, it was the "extent of statewide involvement and control" that "removes the project from the purview of a municipal affair . . ." [Attachment 2, pages 4-5]. Acknowledging the general exemption for charter cities, the DIR noted:

In the instant case, the \$5 million funding for the waterline replacement project derives entirely from a state loan under the 1986 Bond law³. Operating Engineers [the entity protesting the city's refusal to pay prevailing wage] first argues that the City cannot claim the charter city exemption . . . because the receipt of state funds alone places the project outside the scope of a municipal affair. *This argument is without merit.* In past public works coverage determinations, this Department has consistently held that loan funds take on the character of the recipient. In this case, the state funds loaned to the City pursuant to the Bond law became municipal funds.

Attachment 2, page 11 [emphasis added].

However, the DIR then went on to analyze the degree of statewide involvement and control:

³ California Water Conservation and Water Quality Bond Law of 1986, Cal. Water Code ? 13450 et seq.

In the instant case, the waterline project is funded by a state Bond law which, in its declarations and findings, references the specific, statewide purposes of the law . . . In addition, the Bond law and applicable regulations provide that local agencies and the Department of Water Resources must comply with specific procedures, requirements and criteria for the application, approval and ongoing monitoring of funded projects. The loan contract between the City and the state which governs the funding of the waterline project *reflects a substantial level of state involvement in the project*, including the designation of a specific description of the project, review or approval for the plans, specifications, and bid documents, long term operation and maintenance requirements, a completion deadline, water sale/transfer restrictions, state inspection and access rights, and state reservation of claims dispute resolution.

Given both the express statewide interests and the degree of state involvement and control in this particular project, the DIR found that the project in question was not merely a local or municipal affair of the city. [Attachment 2, pages 13-14]. This opinion is useful to illustrate the way in which the DIR applies the three-factor test to particular situations.

2. The Gas Tax

The Gas Tax and the City's use of Gas Tax funds are substantively different from the situations the DIR has found to be covered by a prevailing wage requirement. The permitted uses of Gas Tax funds are enumerated in Streets & Highways Code section 2101. Gas Tax funds are then apportioned to counties and cities according to statutory formulae incorporating a variety of factors such as population, miles of roads, etc, none of which have to do with the characteristics of any particular projects. The requirements attached to the receipt of those funds include minimum spending limits (§ 2105), restrictions on the amount that can be used by a recipient for debt service (§ 2107.4), the recipient's establishment of a road or street fund (§ 2119), and annual reporting requirements (§§ 2150-2158). There are also several sections in the Gas Tax law dealing with contracts, but most of them are permissive. For example, section 2113.5 provides that "Any city may have any or all of its engineering and administrative work with respect to city streets done by contract." None of the contract sections in the Gas Tax law mention -- much less require -- the use of a prevailing wage. In summary, the level of state involvement and control in the City's use of its Gas Tax allocation is limited and does not meet the level of involvement and control that the DIR would find requires prevailing wage.

The "Guidelines Relating To Gas Tax Expenditures," published by the State Controller's Division of Local Government Fiscal Affairs, confirm the essentially local control over the use of Gas Tax funds. [See Attachment 3]. While reminding local governments that the expenditure of Gas Tax funds is subject to audit by the State Controller, the Guidelines state that

The local jurisdiction is not required to subject their proposed expenditures to prior administrative and engineering reviews. The Highway Users taxes are apportioned and allocated directly and *it is within their administrative discretion to determine local priorities*, providing the expenditure is permitted by the constitution and authorized by law . . . the exercise of such discretion is not subject to review or approval by the Controller. The Controller may not substitute judgment for that of the local agency providing the expenditure is for a legal purpose.

Attachment 3, pages 1-2 (emphasis added). The Guidelines identify thirty-four categories of construction projects, twenty-three categories of physical maintenance and traffic services, and twelve categories of overhead expenses that may be paid for with Gas Tax funds. There are fourteen identified categories of ineligible expenditures.

Neither the Gas Tax law, nor the Guidelines issued to implement the Gas Tax law, reflect any intent to apply prevailing wage requirement to project using Gas Tax funds. Moreover, the law and guidelines confirm that the use of these funds is not substantially controlled by the state but is generally left to the sound discretion of the local agency receiving the funds.

CONCLUSION

As a charter city, the City of San Diego is not subject to general prevailing wage laws; even the Department of Industrial Relations acknowledges that fact. If the DIR were to apply the three-factor test to projects the City funds with Gas Tax revenues, the DIR should agree that: (1) the mere fact the revenues come from the state does not cancel the essentially municipal character of the projects, and (2) the low level of control exercised by the state over the use of Gas Tax funds is not sufficient to take the projects funded by those revenues outside the purview of municipal affairs. As such, the use of Gas Tax funds for a particular project would not destroy the local nature of the project and impose a prevailing wage requirement on that project.

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By

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