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MEMORANDUM OF LAW

DATE: August 30, 2005

TO: Elmer L. Heap, Jr., Environmental Services Director

FROM: City Attorney

SUBJECT: Applicability of State Prevailing Wage Law to the Construction and Demolition Materials Recovery Facility Project Proposed for the Miramar Landfill

QUESTION PRESENTED

Is the design and construction of the proposed mixed construction and demolition materials recovery facility at the Miramar Landfill a municipal affair for which state prevailing wage requirements do not apply?

SHORT ANSWER

Yes. The design and construction of the proposed mixed construction and demolition materials recovery facility at the Miramar Landfill is a municipal affair and, because it does not contemplate the use of state or federal monies, it is not subject to prevailing wage requirements.

BACKGROUND

In November 2004, the City issued a Request for Proposals [RFP] for a Construction and Demolition Materials Recovery Facility [MRF]. Basically, the project would require the Contractor to design, construct, and operate a mixed construction and demolition [C&D] waste recycling facility on an eight-acre portion of Parcel 2 at the Miramar Landfill [Landfill], which the City would sublease to the contractor for a seven-year term. The Contractor would finance, design, construct, and provide all labor, equipment, and materials to operate the MRF.

The MRF is envisioned as an open-air processing facility with, among other things, crushers, sorters, conveyor belts, screens, three-sided bunkers to separate the sorted wastes, shading and dust control structures, office trailers, and aboveground storage tanks.

The City would charge $1.00/year for the use of the site. The City would also bring utilities to the site and provide about $500,000 in capital improvements. The contractor would retain title to the structures and equipment it constructs/installs at the site and would have to remove these from the site at termination or expiration of the agreement. The City could retain temporary possession of structures and equipment in the event of a default, but only until the City could acquire new C&D processing services.

Loads of waste which appear to contain significant amounts of mixed C&D waste would be selected at the Landfill gate by contractor representatives and directed to the MRF. The standard tipping fee will be charged for those loads, but a portion of that fee will be passed on as payment to the contractor for the C&D recycling services. The MRF will accept mixed C&D waste generated both inside and outside the City. The contractor is expected to divert, i.e., market and sell for reuse or recycling, a certain amount of the recyclable materials and deliver the residue to the Landfill face for disposal. The contractor will retain any revenue it generates from sales of the recyclables. The contractor would also be required to be responsible for, at its sole cost, any unacceptable (hazardous, universal, etc.) wastes it receives at the MRF.

The primary purpose of the contract is to obtain the C&D recycling services. These services are necessary for two reasons: (1) to meet state diversion mandates; and (2) to preserve and extend the useful life of the Landfill. The Landfill was built primarily to serve City needs. However, the Landfill currently accepts waste generated both inside and outside the City, including military waste. Out-of-City waste is charged a higher tipping fee than waste generated inside the City. While the Landfill is operated by the City, it is included as a regional asset in the San Diego County Siting Element, required by the Integrated Waste Management Act. In the Siting Element, the Landfill is treated as one component of the overall solid waste disposal capacity for the County of San Diego.

The City generally has treated improvements to the Miramar Landfill as a municipal affair. Neither the RFP, nor the draft agreement, specified whether the project was a "public works" project for which prevailing wages would apply. In response to the above RFP, questions were raised by prospective proposers at the pre-bid meeting about whether the construction and/or operations portion of the MRF project were subject to the prevailing wage laws.

ANALYSIS

A. Prevailing Wage Laws

State prevailing wage requirements are found in the California Labor Code, Part 7, Chapter 1, sections 1720-1781. California Labor Code section 1771 requires the payment of prevailing wages to all workers employed on a public works project over $1,000. Section 1720

defines "public works" for purposes of prevailing wage requirements and provides in pertinent part:

> (a) As used in this chapter, "public works" means:
>
> (1) Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds . . . . For purposes of this paragraph, "construction" includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work. [1]
>
> . . .
>
> (b) For purposes of this section, "paid for in whole or in part out of public funds" means all of the following:
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> . . .
>
> (2) Performance of construction work by the . . . political subdivision in execution of the project.
>
> (3) Transfer by the . . . political subdivision of an asset of value for less than fair market price.
>
> (4) Fees, costs, rents . . . that would normally be required in the execution of the contract, that are . . . reduced, charged at less than fair market value, waived or forgiven by the . . . political subdivision.

Cal. Lab. Code § 1720.

A political subdivision includes a city. Cal. Lab. Code § 1721. Based on the above facts, it could be argued that the C&D MRF project constitutes a "public works" under section 1720 because the project involves both construction work and the transfer of property rights at less than fair market rent plus the performance of about $500,000 in capital improvements.

On the other hand, it is clear that the primary purpose of the MRF contract is to obtain ongoing C&D debris recycling services. Services are not included in the definition of "public work" and, therefore, are not subject to the prevailing wage requirements. However, the statute does not address hybrid contracts which involve both construction and services. One court, which considered a hybrid contract similar to the MRF contract, suggested that where the construction work is incidental to, rather than the primary purpose of, the contract, prevailing wages would not apply.[2] Specifically, the court held that "paying public funds for public services

[1] Public works also includes hauling of refuse from a public works site to an outside disposal location. Cal. Lab. Code § 1720.3

[2] See also City Att'y MOL No. 2002-13 (Nov. 26, 2002) for a discussion of hybrid contracts

does not make incidental construction work done by a private provider of those services 'public works' under section 1720, subdivision (a). The statute requires payment for 'construction;' to take that as meaning 'services' would violate plain, unambiguous language, which we cannot do." *McIntosh v Aubry,* 14 Cal. App. 4th 1576, 1586 (1993) (county contract to sublease property to private contractor for thirty years to build and operate residential care facility for mentally disturbed minors was not a public work under section 1720). Similarly, it is arguable that the C&D MRF project is not a public work because the construction is incidental to the project for the following reasons: (1) the primary purpose of the contract is to obtain the C&D debris recycling services; (2) the contractor retains title to the improvements; and (3) all of the contractor's improvements will be removed by the contractor at the conclusion of the project term.

B. Municipal Affair

Even if the project were considered a public work, however, state prevailing wage requirements may not apply. It is well established that public works projects which constitute "municipal affairs" are not subject to the prevailing wage requirements. Article 11, Section 7 of the California Constitution, provides that a city "may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." *Horton v. City of Oakland*, 82 Cal. App. 4th 580, 584 (2000). Because the City of San Diego is a charter city, Article 11, Section 5 of the state constitution, known as the "home rule doctrine" is also applicable. It specifically "reserves to charter cities the right to adopt and enforce ordinances that conflict with general state laws, provided the subject of the regulation is a 'municipal affair' rather than one of statewide concern." *Id.* at 585 (citations omitted); *Bishop v. City of San Jose*, 1 Cal. 3d 56, 61 (1969) (preemption doctrine).

The "lowest responsible and reliable bidder" provision of San Diego City Charter section 94 prohibits the specification of prevailing wages in public works contracts involving the City's "municipal affairs." This proposition was confirmed in *Vial v. City of San Diego*, 122 Cal. App. 3d 346 (1981), where the Court upheld the City of San Diego's resolution declaring that payment of prevailing wages is appropriate "only when required by Federal or State grants and on other jobs considered to be of State concern . . . ." *Id*. at 347-48. The court concluded that the state prevailing wage laws do not apply to the public works projects of a chartered city, such as San Diego, so long as the project at issue was within the realm of "municipal affairs." *Id.* In other words, the expenditure of city funds on such public works projects and the rates of pay for workers hired to carry them out is a municipal affair. *Id.* at 348; *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 170-71 (1994).

Construction and demolition waste is solid waste. Cal. Pub Res. Code § 40191(a). Historically, solid waste management has been considered a municipal affair. *Waste Resources Technology v. Dept. of Public Health of City and County of San Francisco*, 23 Cal. App. 4th 299, 304, 307 (1994); *Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc.*, 43 Cal. App. 4th 630, 638 (1996). However, matters which traditionally have been viewed as municipal affairs may become matters of statewide concern when the project transcends City limits or affects matters

which are acknowledged to be of statewide concern. Matters which are regional in nature also qualify as a statewide concern. *City of Santa Clara v. Von Raesfeld,* 3 Cal. 3d 239, 246 (1970). In *Santa Clara*, for example, the court concluded that a charter city's issuance of bonds to fund the city's share of "regional water pollution control facilities involving the efforts of several cities acting in common" was not a municipal affair. *Id.* at 247. The court acknowledged that, traditionally, sewer projects were municipal affairs and bonds issued therefore were also municipal affairs. *Id.* at 246. However, in that case, the bonds were part of a regional project, the facilities could not be constructed without the city's participation and payment of its share of the costs, and the project protected the health and welfare of not only the city's inhabitants, but the region's inhabitants as well. Accordingly, the court determined the project was not a municipal affair. *Id.* at 247.

As mentioned above, solid waste management traditionally has been viewed as a municipal affair. However, in 1989, the Legislature enacted the California Integrated Waste Management Act [Act], codified at Public Resources Code sections 40000-49620. The purpose of the Act is to "reduce, recycle, and reuse solid waste generated in the state to the maximum extent feasible in an efficient and cost-effective manner to conserve water, energy, and other natural resources, to protect the environment, to improve regulation of existing solid waste landfills . . . and to specify the responsibilities of local governments to develop and implement integrated waste management programs." Cal. Pub. Res. Code § 40052. The Act established a comprehensive program for solid waste management, and its purview is broad. *Waste Resources Technology,* 23 Cal. App. 4th at 305. Nevertheless, the mere fact that the Legislature chose to deal with a particular subject on a statewide basis does not mean it has preempted the field. Rather, the Courts look to the purpose and intent of the Legislature in enacting the general law. *Bishop*, 1 Cal. 3d at 62.

Clearly, the intent of the Act was not to dismantle local control over solid waste management. On the contrary, it expressly recognizes that " 'the responsibility for solid waste management is a shared responsibility between state and local government' and that local government responsibilities 'are integral to the successful implementation of the Act.' " *Waste Resources Technology,* 23 Cal. App. 4th at 306-07 (quoting from Cal. Pub. Res. Code § 40001). Moreover, the Act "as a practical matter demands supplementary local regulation to spell out the details of solid waste collection and disposal." *Id.* at 309. Hence, the Act effected a very narrow restriction on traditional local authority over solid waste management. *Id.* at 306. In large part, it was a consolidation and recodification of existing law which had historically accepted that local government had the dominant role in refuse handling. *Id.* at 307. In fact, Section 40059(a) of the Act expressly states that: "Notwithstanding any other provision of law,

each . . . city . . . may determine all of the following: (1) Aspects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services." Cal. Pub. Res. Code § 40059(a)(1). This section alone is a compelling indicator that the Act was not intended to supplant local authority over solid waste matters. *Id.* at 308; *see also, Valley Vista Services, Inc. v. City of Monterey,* 118 Cal. App. 4th 881, 887-91 (2004) (city ordinance prohibiting waste disposal company from soliciting new business after receiving five-year termination notice does not conflict with the Act); *City of Dublin v. County of Alameda*, 14 Cal. App. 4th 264, 275-79 (1993) (local initiative regarding development of local recycling plan was not preempted by the Act).

Two other sections of the Act lend even more support to this conclusion. California Public Resources Code section 43021, regarding disposal standards, states in relevant part: "Regulations . . . shall not include aspects of solid waste handling or disposal which are solely of local concern . . . ." Similarly, California Public Resources Code section 49400, regarding acquisition and operation of landfills, states in pertinent part: "No city . . . shall acquire and operate, or cause to be acquired or operated, a dump or site for the disposal of garbage or refuse, or a transfer station or collection point for garbage or refuse, within a city without the consent of the city council . . . ."

In sum, the Act does not

> represent a fundamental change in the Legislature's traditional outlook towards the subject of waste handling. California Public Resources Code section 40059 – as well as the entire scope of the Act – establishes the Legislature's awareness that "substantial geographic, economic, ecological or other distinctions are persuasive of the need for local control" and thus precludes the subject from being "comprehensively dealt with at state level."

Waste Resources Technology, 23 Cal. App. 4th at 309 (citations omitted).[3]

These factors demonstrate that there is no exclusive or even paramount state concern which requires disabling traditional local power in this area." *Id.* Accordingly, the Act has not transformed the business of solid waste management from a municipal to a state affair.

Determining whether a particular project constitutes a municipal affair and not a matter of statewide concern is a judicial, rather than a legislative, function. *Vial,* 122 Cal. App. 3d at 348; *Bishop,* 1 Cal. 3d at 61-62 (1969). What constitutes a "municipal affair" has not been specifically defined. *Bishop,* 1 Cal. 3d at 62-63. The determination depends on the particular facts

[3] "There can be no question of the power of the state to surrender to a city or county control over certain matters which are of general concern to the people of the state if, in the judgment of the state, it is for the best interests of the people to do so." *So. Cal. Roads Co. v. McGuire*, 2 Cal. 2d 115, 123 (1934) (citations omitted).

of each case. *Id.* at 62. However, the courts have articulated three factors to consider in making this determination: (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, purposes, and geographic scope of the project. *See So. Cal. Roads Co. v. McGuire*, 2 Cal. 2d 115, 121-23 (1934). An analysis of these three factors follows.[4]

1. Extent of non-municipal control

The Landfill is owned and operated by the City on land leased from the Department of the Navy [DON] pursuant to a 50-year ground lease. The Landfill is located entirely within City limits. It has been in operation since the 1960s. The City has traditionally treated improvements to the Landfill as a municipal affair. The C&D MRF project will be overseen by the City. The project will be designed and constructed according to the City's requirements, needs, and specifications. Federal approval, not state, is required for the sublease and for the plans and specifications, but only as to compatibility with DON operations. A state solid waste facility permit and waste discharge permit will be required for the project. Plans are submitted for purposes of these permits, but the state agencies do not "approve" the plans. So, while there may be state regulatory interest in the outcome of the projects, the state does not control the construction process, means, methods, or mode.

2. Source and control of funds used to finance the project

The City is financing the C&D MRF project from Landfill tipping fee revenues. No state or federal monies will be used for the project. While some tipping fee revenue is derived from waste generated outside the City, the amount of that revenue is only about 12% of the total. To the extent that some of those revenues may be used to partially finance the project, the amount would be insignificant.

3. Nature, purpose, and geographic scope of the project

The ultimate purpose of the project is to obtain mixed C&D recycling services at the Landfill. Such services currently are not offered anywhere in the City or County of San Diego. The City needs these services for two reasons: (1) to meet its state diversion mandates under the Act; and (2) to preserve and extend the useful life of the Landfill. The Landfill's primary purpose is to serve the solid waste management needs of the City, its residents, and its businesses. This is the target customer base for the C&D MRF project as well.

The Landfill currently accepts waste from surrounding jurisdictions, as well as military waste from nearby DON facilities. However, about 86% of the waste disposed to the Landfill is City-generated waste. Only about 14% comes from outside the City. Moreover, under Municipal Code section 66.0129(b), the City Manager has the authority to restrict the Landfill to City-generated and DON waste only.

The lease agreement with the DON does not require payment of prevailing wages for any

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[4]A similar analysis of the three factors in the *Southern California Roads* case, as applied to the Miramar Water Treatment Plant Upgrade and Expansion contract, can be found at City Att'y MOL No. 2003-8 (Apr. 11, 2003).

projects at the Landfill. Moreover, the mere fact that the City has a lease agreement with the federal government to accept nearby DON waste for disposal at no charge in lieu of paying rent would not transform an otherwise municipal affair into a statewide concern.

Finally, in the County of San Diego Siting Element filed pursuant to the Act, the Landfill is considered an essential component of the region's total landfill capacity. However, inclusion in the Siting Element would not convert a municipal affair into a statewide concern. This is especially true in light of the intentions of the Act to preserve traditional local control over solid waste management.

CONCLUSION

In sum, even assuming the C&D MRF project is a public work, state prevailing wage requirements are not applicable to public works which are municipal affairs. Solid waste management traditionally has been considered a municipal affair. That view holds true today as specifically expressed in the Act and subsequent case law. The C&D MRF project is a project designed to manage solid waste by providing recycling services for construction and demolition solid waste which would otherwise be disposed at the Landfill. The goal of the MRF project is to conserve landfill capacity for the benefit of the citizens of the City and to help the City meet state-mandated waste diversion requirements. The MRF will be constructed and operated at the Landfill which is located entirely within City limits and is owned and operated by the City. The City has historically treated Landfill projects as municipal affairs. The MRF will be financed through Landfill tipping fee revenues, the bulk of which originate from waste generated within the City. No state or federal monies will be applied to this project. The MRF design and construction will be overseen by the City and performed according to City requirements and specifications. While state permits will be necessary for operation of the MRF, state regulatory approval of the construction plans and specifications is not necessary. Further, the ground lease with the DON does not require payment of prevailing wages for Landfill projects and, although, the DON has the right to approve the MRF construction plans and specifications, that approval is limited to ensuring compatibility with DON operations at the adjoining Marine Corps Air Station. Accordingly, design and construction of the C&D MRF project is a municipal affair, not subject to state prevailing wage laws.

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