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MEMORANDUM OF LAW

DATE: July 5, 2011

TO: Tom Tomlinson, Facilities Financing Program Manager
Hildred Pepper, Purchasing and Contracting Director

FROM: City Attorney

SUBJECT: City Competitive Bidding and Contracting Requirements for Developers that Enter Into Reimbursement Agreements with the City for the Construction of Public Works

INTRODUCTION

You have asked the Office of the City Attorney to summarize the requirements that a private developer must satisfy when constructing public infrastructure improvements paid for or reimbursed by facilities benefit assessments (FBA).[1] This memorandum summarizes the current contracting procedures and prevailing wage requirements unique to this specific situation. This memorandum is not intended to provide an exhaustive list of all the requirements applicable in this situation, but rather addresses issues that arise more frequently.

QUESTIONS PRESENTED

1. Are private developers that contract for the design and construction of public improvements that will be paid for or reimbursed from public funds subject to the City's contracting procedures?

a. Are private developers that contract for the construction of public improvements that will be paid for or reimbursed from public funds subject to the City's competitive bidding procedures?

b. Are private developers that contract for the construction of public improvements that will be paid for or reimbursed from public funds subject to the City's equal employment opportunity requirements?

[1]The City also collects DIFs for development within the non-FBA communities (and within the FBA communities where an FBA was not assessed). SDMC § 142.0640(b). For purposes of ease, DIF communities are not specifically discussed; however, the conclusions in this Memorandum are equally applicable to DIF communities.

c. Are private developers that contract for the design of public improvements that will be paid for or reimbursed from public funds subject to the City's consultant selection procedures?

d. Are private developers that contract for the design and construction of public improvements that will be paid for or reimbursed from public funds subject to the City's equal benefits ordinance?

2. Are private developers that contract for the design and construction of public works to be paid for or reimbursed from public funds subject to prevailing wage laws?

SHORT ANSWERS

1. Yes. By entering into an agreement with a private developer for the design and construction of a public improvement that will be paid for or reimbursed from FBA or other public funds, the City delegates its public contracting function. We believe that the City's public contracting procedures may not be circumvented through this delegation. Therefore, the private developer must comply with the City's contracting procedures when contracting for the design and construction of a public improvement.

a. Yes. Private developers that contract for the construction of public works that are to be paid for or reimbursed from FBA or other public funds are subject to the City's competitive bidding procedures because the City may not circumvent its requirements by delegating its administrative functions to a third party. In addition, competitive bidding is required by San Diego Charter section 94.

b. Yes. Under the San Diego Municipal Code (Municipal Code), private developers that contract for the construction of public works that are to be paid for or reimbursed from FBA or other public funds are subject to the City's equal employment opportunity requirements because the City may not circumvent its requirements by delegating its administrative functions to a third party.

c. Yes. Private developers that contract for the design of public works that are to be paid for or reimbursed from FBA or other public funds are subject to the City's consultant selection procedures because the City may not circumvent its requirements by delegating its administrative functions to a third party. However, as these procedures are set forth only as council policies and administrative regulations, compliance may be waived.

d. No. Under the Municipal Code, private developers that enter into a reimbursement agreement with the City are not subject to the City's equal benefits ordinance because the equal benefits ordinance does not apply to contracts with a sole source. However, the City's equal benefits ordinance is applicable to any contracts that the developer enters into with respect to the completion of the public works project to be paid for or reimbursed from FBA or other public funds. Therefore, while the developer itself is not required to comply with the equal

benefits ordinance, the developer nonetheless must ensure that its prime contractors and prime consultants comply with the equal benefits ordinance.

2. It depends. For public works projects that are purely municipal affairs, neither the City nor a private developer is generally subject to prevailing wage laws. For public works projects that are matters of statewide concern, all public improvements paid for in whole or in part from FBA or other public funds are subject to prevailing wage laws.

BACKGROUND

As part of the City's development approval process, private developers are sometimes required or choose to construct public improvements that are installed for the benefit of the developer's project, but that also contain supplemental size, capacity, number, or length for the benefit of other property near the developer's project. In such cases, the private developer enters into an agreement with the City to obtain reimbursement for the supplemental improvement. There seems to be some uncertainty regarding which rules and regulations, applicable to the City, would apply to the private developer in this unique circumstance. This memorandum is intended to clarify the applicability of certain City requirements.

In order to address this issue, it is first instructive to understand the policies behind entering into reimbursement agreements with private developers for the design and construction of public works. The City is divided into various community areas, and the City adopts Public Facilities Financing Plans (Financing Plans) for each of those communities. Communities that are not fully built-out and that would require significant new infrastructure to serve any future development are classified as FBA communities. In these FBA communities, the City collects an FBA from private developers when they develop their properties. SDMC § 61.2210(a). The FBAs are deposited into an interest earning special fund established for the community and are thereafter expended solely for the purposes for which the FBAs were assessed. *Id.* When a developer seeks to develop its property within an FBA community, the City may require as a condition of the development approvals that the developer construct certain public improvements identified in the applicable Financing Plan. Often, the developer accepts this condition with the understanding that it will be eligible for reimbursement from the applicable FBA fund for the portion of the cost of the improvement that is supplemental to the requirements for the developer's project. Alternatively, the developer may voluntarily choose to construct a supplemental public improvement to accelerate the timing of its development project. In either case, the City enters into a reimbursement agreement with the developer for the supplemental improvement. This arrangement is advantageous to the City in that the public improvements can be constructed more quickly and efficiently than if the City were to contract for the public improvement itself, and is advantageous to the developer in that its development can move forward sooner. Such an arrangement is generally consistent with the General Plan Public Facilities, Services and Safety Element's goal of ensuring that "[a]dequate public facilities [are] available at the time of need," as well as with General Plan Policy PF-A.2.c, which calls for "[u]tilizing development, reimbursement, and other agreements to provide timely public facilities to [the] area of benefit." City of San Diego General Plan at PF-9, PF-14.

Thus, rather than entering into a public works contract with a contractor or a consultant agreement with a design consultant, the City enters into a reimbursement agreement with a private developer, who then contracts with a consultant and contractor for the design and construction of the public improvement project. However, in the end, the public improvement will be paid for with FBA or other public funds.

ANALYSIS

I. A PRIVATE DEVELOPER THAT CONTRACTS FOR THE DESIGN AND CONSTRUCTION OF A PUBLIC IMPROVEMENT TO BE PAID FOR OR REIMBURSED FROM PUBLIC FUNDS MUST COMPLY WITH THE CITY'S CONTRACTING PROCEDURES.

If the City were to contract for the design and construction of a public improvement directly with a contractor or consultant, clearly, each of the City's various contracting procedures and requirements would apply. Here, the issue is whether the City's contracting requirements apply to a private developer that acts as the City's agent in contracting for the design and construction of public improvements. Public improvements are improvements upon the property of a municipality which serve to further the operation of the municipal government and the interest and welfare of the public, but do not include private affairs or commercial enterprises. 13 McQuillin Mun. Corp. § 37:1 (3d ed. 2011). FBA-funded projects by their nature further the operation of the municipal government and the interest and welfare of the public by providing needed public infrastructure to the community. However, improvements that are designed and constructed by a private developer as a completely private affair and are later dedicated to the City are not public improvements within the context of this memorandum. This memorandum solely addresses improvements that are designed and constructed by a private developer that are paid for or reimbursed from public funds.

As a threshold issue, we understand that some developers believe that FBA funds are not public funds and that therefore, a public improvement project that is paid for or reimbursed from FBA funds should not be subject to the City's contracting procedures. Specifically, they assert that the City acts as a mere conduit for payment by the City to private developers that construct public improvements, and that the City merely holds the FBA funds in trust for the benefit of the assessment area. However, the City does not act as a mere conduit for payment of the FBA funds. To the contrary, the City collects FBA funds, and maintains control of those funds authorizing expenditure only upon successful completion of a public works project as identified in an applicable Financing Plan, which is prepared and adopted by the City. The FBA funds also reside in a City account. Additionally, similar assessments have previously been determined to be public funds. Specifically, money collected by a business improvement district, where membership may be involuntary for some of the members and can result in a member's money being taken through the use of the government's power to tax and assess, and used to benefit others' property through the provisions of public services, has been held to be public money. *Epstein v. Hollywood Entertainment Dist. II Business Improvement Dist.*, 87 Cal. App. 4th

862, 874-75 (2001). Likewise, Mello-Roos bonds, which are paid for by a community facilities district (CFD), a public entity, are also considered to be public funds. *See Azusa Land Partners v. Dep't. of Industrial Relations*, 191 Cal. App. 4th 1, 39 (2010). FBA funds are similar to the business improvement district assessments in *Epstein* in that the City collects the money from potentially unwilling property owners and uses it for the benefit of other property owners through the provision of public infrastructure. Moreover, just like the Mello-Roos bond funds in *Azusa*, FBA funds are held in the City's coffers, and the City controls the disbursement of the FBA funds. Therefore, FBA funds are, and should be treated as, public funds.

Since FBA funds are public funds, the next issue is whether FBA-funded improvements are public improvements that are subject to the City's contracting procedures. Clearly, if the City contracted for these FBA-funded improvements, the City's contracting procedures would apply. Therefore, the issue is whether the City's contracting procedures and requirements may be circumvented when the City uses a third-party private developer to contract for the public improvement. A public body may "delegate the performance of administrative functions to a private entity if it retains ultimate control over administration so that it may safeguard the public interest." *Int'l Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc.*, 69 Cal. App. 4th 287, 297 (1999) (citing *County of Los Angeles v. Nesvig*, 231 Cal. App. 2d 603, 616 (1965)). However, the entity "to which such administrative functions are delegated *must comply with the same laws and regulations as the public entity that is delegating its authority*." *See Epstein*, 87 Cal. App. 4th at 873 (citing *Int'l Longshoremen's*, 69 Cal. App. 4th at 300; 81 Op. Cal. Att'y Gen. 281 (1998)) (holding that a nonprofit corporation to which administrative functions are delegated is subject to the Brown Act and stating that a determination whether the nonprofit corporation was bound to follow the City's competitive bidding laws should be guided by the conclusion that the Brown Act does apply to the nonprofit's actions).

In addition, we believe the City should follow the general rule that an agency may not circumvent its obligations by assigning administrative responsibilities to a third party. The California Attorney General has opined that a redevelopment agency may not avoid statutory public bidding requirements by delegating its administrative responsibilities to a nonprofit corporation which is subject to its control. 81 Op. Cal. Att'y Gen. at 291. Furthermore, the California Attorney General has also opined that the construction of a fire station and a library by a developer, which would become a county's property immediately upon completion, is subject to California's prevailing wage laws, where the construction of the public facilities was a condition precedent to the developer's final subdivision map. 69 Op. Cal. Att'y Gen. 300, 306 (1986). The California Attorney General found significant the fact that the county would retain ultimate control over the construction of the facilities. *Id*. This general rule is also consistent with other nearby jurisdictions which have held that a municipality cannot "avoid . . . competitive bidding requirements by entering into an agreement with a private party whereby the municipality gives the private party control over the letting of [a] contract for public improvements." *Achen-Gardner, Inc. v. Superior Court In & For County of Maricopa*, 173 Ariz. 48, 53 (1992).

Under the Municipal Code, the City assesses and collects FBAs from private development and is then responsible for expending the FBA funds for the purposes for which it was collected. SDMC § 61.2210(a). By entering into a reimbursement agreement with a developer, the City is delegating its administrative function of contracting for the construction of public facilities to a private developer.[2] The specific applicability of competitive bidding, equal employment opportunity, consultant selection, and equal benefits to a private developer to which the City delegates its public works contracting functions are discussed below.

A. Private Developers that Contract for the Construction of Public Improvements that Will Be Paid for or Reimbursed from Public Funds Are Subject to the City's Competitive Bidding Procedures.

Public works contracts are subject to the competitive bidding requirements set forth in Charter section 94 and Chapter 2, Article 2, Divisions 30 through 36 of the Municipal Code. Specifically, "[i]n the construction, reconstruction or repair of *public buildings, streets, utilities and other public works*," the Charter requires that the San Diego City Council (Council) let contracts over a specified amount to the "lowest responsible and reliable bidder, not less than ten days after advertising for one day in the official newspaper of the City for sealed proposals for the work contemplated." Charter § 94 (emphasis added). In addition, to implement the Charter, the Municipal Code provides that public works contracts are subject to a competitive bidding process before such a contract may be awarded. SDMC §§ 22.3006, 22.3026, 22.3102. Public works contracts are also subject to Chapter 2, Article 2, Division 36 of the Municipal Code which establishes a small and local business program for public works contracts, including small and local business bid preferences and mandatory subcontractor participation requirements for major public works and a sheltered competition program for minor public works. SDMC § 22.3601. A "public works contract" is defined as a "*contract* for the construction, reconstruction or repair of public buildings, streets, utilities and other public works."[3] SDMC § 22.3003. The Municipal Code exempts certain contracts from competitive bidding requirements. However, third-party contracts are not included within those exceptions. SDMC § 22.3212.

The issues are: (1) whether a contract between a private developer and a contractor for the construction of a public work where the cost to the developer will ultimately be paid for, in whole or in part, by the City is a "public works contract" within the meaning of the Municipal Code; (2) whether the improvement is a "public work" within the meaning of the Charter; and (3) whether the City's competitive bidding procedures therefore apply to that contract. It is this Office's understanding that the City's practice is to require a public works contract with a private developer that seeks reimbursement for the costs associated with a public improvement to be competitively bid. This Office advises that the practice be continued as it is required by the Charter and the Municipal Code.

[2]Under these circumstances, the City is likely also delegating its administrative functions to construct the public facilities. Since the issue related to this situation is related to the manner in which a contractor is ultimately selected to construct a public work, this particular delegation of administrative function is the focus of this analysis.
[3]Unless otherwise noted, words in italics are in the original and indicate defined terms in the Municipal Code.

When the City enters into a reimbursement agreement with a private developer for the construction of a public improvement, the City is essentially delegating its public works contracting functions to a third party. As discussed above, in doing so, the City may not circumvent its contracting obligations by delegating this function to a private developer and the developer's contractors must comply with the "same laws and regulations" as the City.

See Epstein, 87 Cal. App. 4th at 873; 81 Op. Cal. Att'y Gen. at 291.

Such a conclusion is consistent with the purpose behind competitive bidding procedures. """"The provisions of statutes, charters and ordinances requiring competitive bidding in the letting of municipal contracts are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable . . . ."""" *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority*, 23 Cal. 4th 305, 314 (2000) (citing *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 173 (1994)). If the City could circumvent its competitive bidding requirements by contracting with a third party to perform its public contracting function, there would be a serious risk that a private developer would not share the City's same interests in inviting competition. Instead, a private developer may simply use its preferred contractor. A private developer also does not share the City's same interests in securing the best work at the lowest price practicable since it will not ultimately own the improvement and since it will be reimbursed for its costs. Therefore, when delegating the function of contracting for the construction of a public works project to a private developer, in order to retain sufficient control over its administrative function, the City must require the developer to competitively bid its public works contracts in accordance with City requirements and procedures. Doing so also ensures that the City retains ultimate control over the construction of the public improvement.

Moreover, even if the competitive bidding requirements set forth in the Municipal Code could be circumvented by delegating the contracting of a public works project to a private developer, the Charter's competitive bidding requirements would nonetheless apply. As discussed above, Charter section 94 requires competitive bidding for the construction, reconstruction, or repair of "public buildings, streets, utilities and other public works." Projects that are or will be public buildings or public infrastructure after completion by a private developer as a result of public funds are public buildings or public infrastructure projects that are subject to Charter section 94's competitive bidding requirement. *See* 13 McQuillin Mun. Corp. § 37:1. Charter section 94 does not distinguish between public works projects that are accomplished through the City's normal contracting procedures and those that are accomplished by contracting with a third-party to contract for the project. Therefore, Charter section 94's competitive bidding requirements apply to private developers that contract for public works projects to be paid for or reimbursed from FBA funds or any other public funds. Thus, where a private developer contracts for the construction of a public improvement that will be paid for or reimbursed from FBA or other public funds, the private developer must comply with the City's competitive bidding procedures.

B. Private Developers that Contract for the Construction of Public Improvements that Will Be Paid for or Reimbursed from Public Funds are Subject to the City's Equal Employment Opportunity Requirements.

In addition to competitive bidding procedures, the City's Equal Employment Opportunity Outreach Program requires contractors to prepare a Workforce Report or an Equal Employment Opportunity Plan. SDMC § 22.2705. The Municipal Code specifically provides that prime contractors are responsible for ensuring that their subcontractors comply with the Equal Employment Opportunity Outreach Program. SDMC § 22.2704. The Municipal Code also exempts certain contractors from the Equal Employment Opportunity Outreach Program.

SDMC § 22.2703. Third-party public works contracts are not included within those exceptions. *Id.* Therefore, where the City enters into a reimbursement agreement with a developer for the construction of a public work, the developer, on behalf of the City, awards a construction contract to a prime contractor. Thus, the developer must ensure that its contractor complies with the Equal Opportunity Employment Program.

Additionally, the City's Small and Local Business Program for Public Works Contracts includes small and local business bid preferences and mandatory subcontractor participation requirements for major public works projects, and a sheltered competition program for minor public works. SDMC § 22.3601. The Small and Local Business Program applies to all "*public works contracts* except for *contracts* that are not 'municipal affairs' . . . ." SDMC § 22.3602. As discussed in Section I, a contract between a private developer and a contractor for the construction of a public work where the cost to the developer will ultimately be paid for, in whole or in part, by the City is a public works contract, and the private developer to which the City's public works contracting function has been delegated must comply with the same laws and regulations that would otherwise be applicable to the City. Therefore, unless the public works contract is not a "municipal affair," then the City's Small and Local Business Program is also applicable to a developer that contracts for the construction of public works pursuant to a reimbursement agreement. For discussion regarding municipal affairs, *see* Section II.

C. Private Developers that Contract for the Design of Public Works Pursuant to a Reimbursement Agreement with the City Are Subject to the City's Consultant Selection Procedures.

Consultant contracts, which include contracts with providers of expert or professional services, such as design consultants, are not subject to the City's competitive bidding requirements set forth in the Municipal Code.[4] SDMC § 22.3003. However, Council Policy 300-07 sets forth policies to evaluate the need for and process for selecting consultants. Specifically,

[4]A contract includes contracts for services; however, a contract for services specifically excludes consultant services. SDMC § 22.3003. The Municipal Code only sets forth the circumstances under which a consultant contract may be entered into; it does not identify competitive bidding procedures for consultant contracts. *See* SDMC §§ 22.3201, 22.3223.

Council Policy 300-07 calls for consideration of a minimum of three qualified consultants and contract negotiation with the highest qualified person or firm at a compensation determined to be fair and reasonable. Council Policy 300-07. Council Policy 100-10 also sets forth policies establishing a small and local business preference program that is applicable to consultant contracts. Specifically, Council Policy 100-10 requires the award of additional points to consultant contract proposals that contain specified levels of emerging local business enterprise or small local business enterprise participation. In addition, San Diego Administrative Regulation 25.60 sets forth procedures for the selection of consultants for work requiring licensed architect and engineering skills. The regulation is intended to augment Council Policy 300-07 by establishing procedures for selecting and hiring licensed architectural and engineering consultants and setting forth procedures related to the award, selection, and advertising requirements for these contracts. San Diego Admin. Reg. 25.60 §§ 1.1, 2.1. The issue is whether the council policies and administrative regulation apply to a private developer's contract with a design or other consultant for a public works project where the cost of the consultant contract will be paid for or reimbursed by the City.

1. Applicability of Council Policies and Administrative Regulations

The council policies and administrative regulation do not directly address the scenario under which a private developer contracts with a consultant where that consultant contract will be paid for or reimbursed from FBA or other public funds. Nonetheless, we believe the City must comply with the general rule that it may not circumvent its consultant selection obligations by assigning administrative responsibilities to a third party. Thus, the private developer to which the City's public works contracting function has been delegated must comply with the same laws and regulations that would otherwise be applicable to the City. A contract between a private developer and a contractor for the design of a public work where the cost to the developer will ultimately be paid for, in whole or in part, by the City is essentially a City contract as the developer is merely acting as the City's agent in awarding the contract.

We understand that Council Policy 800-12 expresses the Council's intention "to facilitate, to the greatest extent practicable, the practice of providing needed public facilities through the accelerated turnkey development method by private parties."[5] However, it is not clear from the language in Council Policy 800-12 whether the Council's intent is to facilitate turnkey development by exempting that turnkey development from other applicable policies. We cannot read Council Policy 800-12 to exempt turnkey development from Council Policies 300-07 and 100-10 in the absence of an express exemption. *See* 58 Cal. Jur. 3d *Statutes* § 131 (2011) (except as it may be necessary to avoid absurd results, a court is not authorized in the construction of a statute to create exceptions not explicitly stated by the legislature). In addition, Council Policy 800-12 does not explicitly relate to turnkey development where the development will be paid for or reimbursed from public funds. Therefore, the council policies and

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[5] In this context, turnkey development refers to the deliverance to the City of a completed facility, ready for occupancy, so that the City need do no more than "turn the key" and commence operation of the project. 4 Miller & Starr, Cal. Real Est. Forms § 4:7 (2011).

administrative regulation are applicable to a private developer's contract with a design or other consultant for a public works project where the cost of the consultant contract will be paid for or reimbursed from FBA or other public funds.

2. Effect of Council Policies and Administrative Regulation

The first issue is what effect these council policies and the administrative regulation have. Council policies are adopted by resolution of the Council and establish municipal policies to guide the various functions of the City and, where necessary, to establish procedures by which functions are performed. Council Policy 000-01. Generally, council policy statements only include such municipal matters for which the responsibility of decision is placed in the Council by virtue of the Charter, the Municipal Code, or other ordinances or resolutions. *Id.* The Municipal Code places the decision-making authority with regard to consultant contracts that exceed $250,000 with the Council. SDMC § 22.3223. Therefore, the consultant selection procedures set forth in Council Policy 300-07 and Council Policy 100-10 clearly apply to consultant contracts that exceed $250,000.

The City's administrative regulations are citywide administrative policy and procedure directives of a continuing nature issued by the Mayor or Chief Operating Officer or both. The administrative regulations do not have the force of law; rather, they set forth the procedures that the Mayor expects to be followed. Since the administrative regulations are mayoral regulations, they can be waived by the Mayor's own act in approving a contract that does not conform to the applicable regulation. 1997 City Att'y MOL 263, 275 (97-15; May 2, 1997). However, Council Policy 100-10 requires compliance with Administrative Regulation 25.60.

3. Complying with Council Policies and Administrative Regulation

The next issue is how the City can ensure consistency with the requirements of the council policies and administrative regulation regarding consultant selection. Obviously, the first option is for the developer to work with City staff to ensure that the selection of the consultant complies with the applicable policies and administrative regulation. Alternatively, when the reimbursement agreement between the City and the private developer go to the Council for approval, City staff or the developer could request a waiver of the applicability of Council Policy 300-07 and Council Policy 100-10. With regard to Administrative Regulation 25.60, City staff should seek approval from the Mayor's Office to determine whether or not to require compliance with the requirements set forth in the regulation in the reimbursement agreement with the developer.

4. Complying with Council Policies and Administrative Regulation After a Consultant Has Already Been Selected

In many instances, a developer has already hired a consultant to design a public improvement by the time a reimbursement agreement for the work is entered into because the developer hired the design consultant for necessary public improvements at the same time that it hired the design consultant for its private development that would be served by the public

improvement. In such instances, the design consultant has often already completed work on the project under its contract with the developer. The issue is whether the council policies and administrative regulation apply under these circumstances, and how to ensure compliance if they do apply.

As a practical matter, where a consultant has been selected prior to negotiating a reimbursement agreement with the City, compliance with the council policies and administrative regulation in all likelihood cannot be shown. The council policies and administrative regulation generally do not apply in these circumstances since at the time the developer hired the consultant, the City had not contracted with the developer to design the public works project, and thus, at the time the consultant contract was entered into, the council policies and administrative regulation were not applicable to those contracts because they did not involve the City.

However, this Office cautions that the City may not encourage a developer to enter into a consultant contract prior to entering into a reimbursement agreement with the City so that it may avoid being subject to the City's consultant selection procedures. Likewise, a developer may not enter into a consultant contract prior to entering into a reimbursement agreement with the City in order to avoid these consultant selection requirements. As discussed in Section I, we believe that to do so would go against the general rule that an agency may not circumvent its obligations by assigning administrative responsibilities to a third party. Therefore, where a developer enters into a consultant contract absent the knowledge that it will later seek reimbursement for its costs associated with that contract, we conclude that such contracts are not subject to the City's consultant selection procedures. However, where a developer enters into a consultant contract with the expectation that it will later seek reimbursement for that contract, the City's procedures would likely apply. In those instances, application of the City's procedures would occur on a case-by-case basis.

If a developer has already entered into a contract with a consultant and that contract is subject to the City's consultant selection procedures, during the reimbursement agreement negotiation and approval process, this Office sees two possible ways to ensure compliance with those required procedures. First, the developer could seek approval of the contract as a sole source contract. Council Policy 300-07 provides for the sole source retainer of professional consulting services in certain circumstances. Specifically, with respect to sole source contracts, Council Policy 300-07 provides that:

> In particular instances it may be desirable to use a "sole source" consultant. This decision must be based on circumstances where competition is not feasible and such selection must be adequately justified. Such justification must contain substantive reasons as to why only one firm was selected and must reference specific items such as time constraints, cost savings, and unavailability of similar expertise.

Council Policy 300-07 § A.3.

This Office cannot determine in advance whether or not a particular consultant contract would qualify as a "sole source" contract. Based on the particular circumstances, the Mayor would need to determine on a case-by-case basis whether competition in the selection of the particular consultant was not feasible. The determination would need to be justified with substantive reasons, which are reasons that are real and appreciable, not reasons that are merely apparent, indefinite, or false. 1997 City Att'y MOL at 272. Alternatively, as discussed above, City staff or the developer could request a waiver of the applicability of Council Policy 300-07. If a waiver of Council Policy 300-07 is sought, City staff should confirm with the Mayor's Office to determine whether the Mayor will waive the applicable administrative regulation and approve the contract. In any case, a waiver of Council Policy 100-10 would be necessary since that policy does not contain any exceptions to its required procedures. Absent compliance or a waiver, the developer would be ineligible for reimbursement from the City for the earlier-entered into consultant contract. With regard to compliance with Administrative Regulation 25.60, City staff could seek approval from the Mayor's Office to waive compliance with the requirements set forth in the regulation in the reimbursement agreement. Alternatively, by approving the reimbursement agreement, the Mayor may waive the administrative regulation.

D. Private Developers that Contract for the Design and Construction of Public Works that Will be Paid for or Reimbursed from FBA or Other Public Funds Are Not Subject to the City's Equal Benefits Ordinance; However, Private Developers Must Ensure that Their Prime Contractor and Prime Consultant Comply with the City's Equal Benefits Ordinance.

In 2010, the Council adopted the Equal Benefits Ordinance (EBO). San Diego Ordinance O-20002 (Nov. 16, 2010). The EBO, which became effective on January 1, 2011, applies to "any *contract* entered into, awarded, amended, renewed, or extended on or after January 1, 2011." SDMC § 22.4303. A contract is defined as "any agreement between the *City* and another party for provision of goods, services, consultant services, grants from the *City*, leases of *City* property, or construction of public works." SDMC § 22.4302. A reimbursement agreement with a private developer, which requires the developer to deliver a public works project to the City in exchange for reimbursement, is an agreement with the City for both consultant services (typically project design costs) and construction of public works. However, the EBO is not applicable to "*[c]ontracts* with a *sole source*." SDMC § 22.4308(a). A sole source is defined as "the recipient of the *award* of a *public works contract*, *consultant* agreement, or *contract* without competitive selection or bidding." SDMC § 22.3003. A reimbursement agreement is both a public works contract and a consultant contract with a sole source since it is awarded without competitive selection or bidding. Therefore, the EBO is not applicable to the reimbursement agreement and thus, is not applicable to the private developer.

However, the EBO applies to the contracts that the developer enters into with its prime contractors and prime consultants for the completion of public improvements to be paid for or reimbursed from FBA or other public funds. Although the EBO provides that it does not apply to subcontractors, the EBO applies to contractors, which are defined as "any person or persons, firm, partnership, corporation, joint venture, or any combination of these, that enters into a

contract with the *City*." SDMC § 22.4302. As discussed above, a contract between a private developer and a contractor for the design and construction of a public work where the cost to the developer will ultimately be paid for, in whole or in part, by the City, is a City contract. Therefore, while the developer itself is not required to comply with the EBO, the developer nonetheless must ensure that its prime contractors and prime consultants comply with the EBO. The EBO's requirements are only applicable "[d]uring the *performance* of a contract." SDMC § 22.4304(b) (emphasis added). This means that a developer's prime contractor and prime consultant must comply with the EBO during the time that they are performing their construction or consulting services under their agreements with the developer. If the City has entered into an agreement to reimburse a developer for public improvements that have already been completed, the developer would not be required to ensure that its prime contractor and prime consultant comply with the EBO unless additional services or construction work is performed under the agreement.

To ensure compliance with the EBO, each reimbursement agreement should contain a provision requiring the developer to ensure that its prime contractors and prime consultants comply with the EBO. Specifically, the reimbursement agreement should require the developer to ensure that it include provisions in its contracts with prime contractors and prime consultants (1) stating that the prime contractor and prime consultant must comply with the EBO; (2) stating that failure to maintain equal benefits[6] is a material breach of those agreements; and (3) requiring the prime contractor and prime consultant to certify that they will maintain equal benefits for the duration of the contract. SDMC § 22.4304(e)-(f). In addition, the developer's prime contractor and prime consultant must comply with the requirement that they not discriminate in the provision of benefits between employees with spouses and employees with domestic partners, and that it notify employees of the equal benefits policy at the time of hire and during open enrollment periods during the performance of the contract. SDMC § 22.4304(a)-(b). The developer's prime contractor and prime consultant must also provide the City with access to documents and records sufficient for the City to verify compliance with the EBO's requirements. SDMC § 22.4304(c). Additionally, a developer's prime contractor and prime consultant may not use a separate entity to evade the requirements of the EBO. SDMC § 22.4304(d).

II. PRIVATE DEVELOPERS THAT CONTRACT FOR THE DESIGN AND CONSTRUCTION OF PUBLIC IMPROVEMENTS TO BE PAID FOR OR REIMBURSED FROM PUBLIC FUNDS MAY BE SUBJECT TO PREVAILING WAGE LAWS.

You have also asked this Office to review the applicability of prevailing wage laws to private developers that contract for the design and construction of public improvements to be paid for or reimbursed from public funds. Pursuant to California Labor Code section 1720, *et seq*., prevailing wages must be paid to workers for public works projects of one thousand dollars

[6]Equal benefits means "equality of *benefits* between employees with spouses and employees with *domestic partners*, between spouses of employees and *domestic* partners of employees, and between dependents and family members of employees with spouses and dependents and family members of employees with *domestic partners*." SDMC § 22.4302.

or more. Prevailing wages are determined by the Director of the Department of Industrial Relations (DIR). Cal. Labor Code § 1770. This Office has previously advised that whether prevailing wage laws apply to a particular project is a fact-driven analysis which will vary depending on whether the particular project meets the definition of a "public work," the type and amount of public funding involved, and whether the type of project would be classified as a "municipal affair." 2002 City Att'y MOL 124, 127 (2002-13; Nov. 26, 2002). This Office has also previously advised that the prevailing wage requirements do not extend to the City, as a charter city, with respect to purely "municipal affairs." 2002 City Att'y MOL at 128; 2001 City Att'y MOL 334 (2001-24; Nov. 19, 2001).[7] Additionally, California courts have held that prevailing wage statutes generally do not apply to public works by charter cities for projects which are municipal affairs. *City of Pasadena v. Charleville*, 215 Cal. 384, 389 (1932), *overruled in part by Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566 (1969); *Vial v. City of San Diego*, 122 Cal. App. 3d 346, 348 (1981).[8]

The determination of whether a project is a "municipal affair" is generally made by courts on a case by case basis, because the California Constitution does not define the term "municipal affairs." Three factors are weighed in determining whether a project is a municipal affair: (1) the extent of non-municipal control over the project; (2) the source and control of the funds used for the project; and (3) the nature, purpose, and geographic scope of the project. *Southern California Roads Co. v. McGuire*, 2 Cal. 2d 115, 123 (1934). These factors are routinely cited by the DIR in determining whether prevailing wage requirements apply in a particular case.

State prevailing wage laws apply to the "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds . . . ." Cal. Lab. Code § 1720(a)(1). As discussed in Section I, FBA funds are public funds, and therefore, if a public works project is to be paid for "in whole or in part out of public funds," and the public works project is not a municipal affair, then prevailing wages must be paid on the project.

You have asked us to review a recent California appellate court opinion, *Azusa Land Partners v. Department of Industrial Relations*, 191 Cal. App. 4th 1 (2010), and advise you on how it may affect prevailing wage requirements for public works projects constructed by private developers but paid for with FBA funds. In *Azusa*, the issue was whether California's prevailing wage law applied to a private development project which included publicly-funded offsite

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[7]However, San Diego Resolution R-298185 (July 14, 2003) provides that "the City Manager or designee is directed to advertise and include a specification requiring compliance with the State's prevailing wage laws on all City public works municipal affair water and/or sewer fund projects, including design-build projects, when the engineer's estimate for the construction of the project exceeds ten million dollars . . . ."

[8]In 2009, in *State Building & Construction Trades Council of California, AFL-CIO v. City of Vista*, the Fourth District California Court of Appeal again held that the matters the prevailing wage law addresses are not matters of statewide concern. However, on August 19, 2009, the California Supreme Court granted a petition to review the appellate court's decision. *State Building & Construction Trades Council of California, AFL-CIO v. City of Vista*, 99 Cal. Rptr. 3d 559 (2009).

improvements, and whether the law applied to all of the public improvements if some of the public improvements were paid for with private funds. As the City of Azusa is not a charter city, the case did not address whether or not the State prevailing wage law applied to a charter city. Therefore, the following advice related to this case is only currently relevant to the City if a public works project that is a statewide concern, rather than a municipal affair, is at issue.

Assuming that the City enters into a reimbursement agreement with a private developer whereby the developer is to construct a public works project that is not a municipal affair, the state prevailing wage laws apply, and the issue addressed by the *Azusa* court is what part of a developer's project, including the public works to be constructed to serve the development, is subject to prevailing wages. A "public work" includes "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds . . . ." Cal. Lab. Code § 1720(a)(1).[9]

However, the California Labor Code specifies situations that may be excluded from the definition of "paid for in whole or in part out of public funds," including where an agency "requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private development project, and the state or political subdivision contributes no more money, or the equivalent of money, to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no proprietary interest in the overall project, then only the public improvement work shall thereby become subject to this chapter." Cal. Lab. Code § 1720(c)(2).

The developer in *Azusa* was required to construct a multitude of public works projects to be paid for in part through Mello-Roos bonds. The developer asserted that although it was obligated to pay prevailing wages for the public improvements actually financed with proceeds of Mello-Roos bonds, it was not required to do so for the construction of any infrastructure improvement for which it did not receive Mello-Roos funding. In that particular instance, the cost of all of the public works projects was $146 million, of which only $71 million was to be financed by the Mello-Roos bonds.

As discussed above in Section I, the developer first asserted that the Mello-Roos bonds were not public funds, and therefore, work paid for with Mello-Roos bonds was not a public

[9] Paid for in whole or in part out of public funds" includes:

(1) The payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer.
(2) Performance of construction work by the state or political subdivision in execution of the project.
(3) Transfer by the state or political subdivision of an asset of value for less than fair market price.
(4) Fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision.
(5) Money loaned by the state or political subdivision that is to be repaid on a contingent basis.
(6) Credits that are applied by the state or political subdivision against repayment obligations to the state or political subdivision.

Cal. Lab. Code § 1720(b).

work subject to prevailing wage. However, the court found that Mello-Roos bonds were public funds because they are paid by a CFD, which is a public entity. In making that determination, the court also found it relevant that the City maintained control over the Mello-Roos bond proceeds, and that the bond proceeds were held in the public coffers. *Azusa Land Partners*, 191 Cal. App. 4th at 26-27. Although different in some respects, FBA funds are similar to CFD funds in that they are controlled by the City and held in the City's coffers. As discussed in Section I, FBA funds are public funds, and therefore, if FBA funds are used to pay "in whole or in part" for a public work of statewide concern, then prevailing wages would apply.

The developer in *Azusa* also asserted that under California Labor Code section 1720(c)(2), prevailing wages only applied to the particular public works funded by the Mello-Roos bonds, and did not apply to the public works projects that were paid with the developer's private funds. The court found that to allow "developers to allocate lump sum public contributions to specific structures in order to minimize prevailing wage obligations . . . would render ineffectual [prevailing wage] requirements on most public improvement work." *Azusa Land Partners*,191 Cal. App. 4th at 32. Rather, the court explained that the exemption, which applies where the public contribution is no "more money . . . than is required to perform [the] public improvement work," only applies if the "public subsidy to the 'overall project' does not exceed the cost of all mandated public improvement work." *Id.* at 35.

Therefore, with respect to FBA-reimbursed projects constructed by a developer that are matters of statewide concern, under *Azusa*, if FBA funds are used to pay for any portion of a public work, or group of public works projects, the reimbursement agreement could not specify specific portions of the work to be reimbursed to avoid the prevailing wage obligation, and the developer would be obligated to pay prevailing wages for all of the public works projects. It is also this Office's opinion that the City could not enter into one reimbursement agreement for a portion of work to be funded with FBA funds, and then enter into a separate agreement for the portion of work to be paid for with private funds for the purpose of avoiding the prevailing wage obligation. However, so long as no more money than is required to perform the public works is paid for by the FBA funds, then the use of FBA funds for public works that serve private development would not subject the private development portion of the overall project to prevailing wage. Since FBA funds are not allowed to be used to fund private development, a developer's private development would not be subject to prevailing wages due to the use of FBA funds for the associated and required public improvement work.

This Office reminds that this case does not affect the applicability of prevailing wages to projects that are purely municipal affairs.[10] The preceding advice relates only to FBA funded projects that are of statewide concern.

[10]However, as discussed in footnote 8, prevailing wage requirements with respect to purely municipal affairs could change depending on the California Supreme Court's outcome in *State Building & Construction Trades Council of California, AFL-CIO v. City of Vista*. If such is the case, this Office can provide further advice at that time.

CONCLUSION

The City may not circumvent its competitive bidding and consultant selection procedures by contracting with a third-party developer for the design and construction of public works, and therefore, developers that enter into reimbursement agreements with the City for a public works project are subject to such requirements. However, the consultant selection procedures may be waived. The developer and its contractors are also subject to the City's equal employment opportunity program and the City's EBO. Finally, if a project is to be funded by the FBA through a reimbursement agreement for a public work that is a matter of statewide concern, then prevailing wages must be paid for all public improvement work constructed even if some of the work is to be completed with private funds.

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