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MEMORANDUM OF LAW

DATE: June 17, 2013
TO: Committee on Rules and Economic Development
FROM: City Attorney
SUBJECT: Proposal to Apply State Prevailing Wage Laws to City Public Works Projects

INTRODUCTION

On May 15, 2013, the Committee on Rules and Economic Development considered a proposal to adopt an ordinance applying state prevailing wage laws to City public works projects. An ordinance from the City of Los Angeles was provided as a model for the City to consider. Currently, the City pays prevailing wages generally on projects with funding from federal or state agencies, and on a project-by-project basis for water or sewer projects estimated to cost over \$10 million to construct. By adopting state law, the proposal would require prevailing wages be paid on all public works projects costing over \$1,000 to construct, or \$25,000 as long as the City maintains a certified labor compliance program, along with apprenticeship, documentation, and reporting requirements.

In 2003, this Office issued a legal opinion explaining that the City could not require prevailing wages on all public works projects without an amendment to the City Charter. This memorandum will review the 2003 legal opinion to determine whether it still represents the status of the law. As requested by the Committee, this memorandum will also review California Senate Bill 7 (SB 7) currently pending in the State Legislature, to determine whether it could impact our legal opinion. Also as requested by the Committee, this report will propose alternatives for implementing state prevailing wage laws for the Committee's consideration consistent with the legal conclusions of this memorandum.

QUESTIONS PRESENTED

1. Can the City require compliance with state prevailing wage laws on its municipal affair public works projects?
2. If so, under what circumstances can the City require compliance with state prevailing wage laws?

SHORT ANSWERS

1. Yes, the City can require compliance with state prevailing wage laws on its municipal affair projects.

2. The City can require compliance if the City reasonably determines that there is a benefit to the projects from applying state prevailing wage laws. The City does not have to analyze projects individually. Projects may be grouped together by cost, type of work, or other similarities the City reasonably determines are the types of public works projects that will benefit from compliance with state prevailing wage laws. That decision should be made based upon substantial evidence in the record. If the City Charter is amended to require compliance, then the City can adopt an ordinance like Los Angeles and apply state prevailing wage laws to all public works projects without further analysis.

ANALYSIS

I. THE CITY CAN, BUT IS NOT REQUIRED TO FOLLOW STATE PREVAILING WAGE LAWS ON MUNICIPAL AFFAIR PROJECTS

Prior to 2003, the opinion of this Office was that the City could not require payment of prevailing wages on municipal affair projects. In the context of public works, “municipal affairs” are generally projects paid for with City funds and primarily benefit City residents. *See* 2003 City Att’y MOL 128 (2003-8; Apr. 11, 2003) (construction at the Miramar Water Treatment Plant is a municipal affair). This Office explained that including prevailing wage specifications on municipal affair projects would violate the requirement of Charter section 94 to award contracts to the “lowest responsible and reliable bidder.” 1990 City Att’y MOL 164 (90-14; Jan. 22, 1990). This Office indicated that the Charter would need to be amended for the City to require prevailing wages on municipal affair projects. 1993 City Att’y MOL 318 (93-45; Apr. 8, 1993).

In 2003, the question was raised again whether the City could require payment of prevailing wages on municipal affair projects. This Office revised its opinion and concluded that the City could require payment of prevailing wages on municipal affair projects if the City determines on a project-by-project basis that such a requirement is consistent with the purposes of competitive bidding. 2003 Op. City Att’y 1 (2003-1; Apr. 8, 2003). To be consistent with the purposes of competitive bidding, the City must identify how prevailing wage requirements benefit the projects in some manner, such as through increased competition for the contracts, realizing a better economic result for the City, or ensuring that bidders have the quality, fitness, and capacity to satisfactorily perform the work. *Id.* This Office reiterated, though, that the City Charter would have to be amended for the City to require prevailing wages on public works projects without a project-by-project determination. *Id.* at 10, 11.

This Office revised its opinion in light of a California Supreme Court case published after the earlier opinions were written. In *Associated Builders and Contractors, Inc. v. San Francisco Airports Commission*, 21 Cal. 4th 352 (1999), the Supreme Court upheld a requirement that bidders on a public works project accept the terms of a project stabilization agreement (PSA), also known as a project labor agreement, as a condition of being awarded a contract. The airports

commission was required to award public works contracts to the lowest responsible bidder. *Id.* at 365. The Supreme Court reasoned that the PSA was consistent with competitive bidding laws because it was designed to prevent strikes and work stoppages, ensure a steady and reliable source of skilled labor, and did not preclude non-union contractors from bidding. *Id.* at 367, 374-75. The Supreme Court observed, however, that future challenges to project labor agreements as bid requirements should be reviewed on a case-by-case basis for consistency with competitive bidding laws. *Id.* at 376. *Associated Builders* is still valid case law.

The California Supreme Court also recently reaffirmed that charter cities like San Diego do not have to pay prevailing wages. *State Building and Construction Trades Council of California, AFL-CIO v. City of Vista*, 54 Cal. 4th 547 (2012). The plaintiffs in *City of Vista* argued that the regional nature of the construction industry made the wages paid to construction workers by all charter cities a matter of statewide concern subject to state prevailing wage laws. *Id.* at 560-61. State legislation also says it is a matter of statewide concern that every public agency pays prevailing wages. *Id.* at 559-60, 565. The Supreme Court, however, explained that determining what is a municipal affair or a statewide concern is a judicial determination, not a legislative decision. *Id.* at 565. The Supreme Court rejected the Legislature's position and held that wages paid to workers on locally funded public works projects is a municipal affair exempt from state prevailing wage laws. *Id.* at 565-66. This has been the status of the law now for over eighty years. *See City of Pasadena v. Charleville*, 215 Cal. 384 (1932) (overruled on other grounds by *Purdy and Fitzpatrick v. State*, 71 Cal. 2d 566 (1969)).

II. SENATE BILL 7 IS PROBABLY UNCONSTITUTIONAL

As last amended in the State Senate on February 19, 2013, SB 7 would prohibit a charter city from receiving state funding or financial assistance for construction projects for two calendar years if the charter city awards a public works contract on or after January 1, 2014, without requiring the contractor to comply with state prevailing wage laws. Cal. Sen. Bill 7, § 2(b) (2013-2014 Reg. Sess.). A charter city would also be ineligible for state funding or financial assistance if the city has a charter provision or ordinance authorizing contractors not to comply with state prevailing wage laws. *Id.* at § 2(a). A charter city would continue to be eligible for state funding if it adopts a local prevailing wage ordinance "equal to or greater than" the requirements of state prevailing wage law. *Id.* at § 2(c). SB 7 was introduced in response to the Supreme Court's decision in *City of Vista*. SB 7 at § 1(f). The bill generally reiterates the Legislature's position that state prevailing wage laws address a statewide concern. *Id.* at § 1.

The legal question raised by SB 7 is whether the State can condition funding or financial assistance on a charter city complying with state law on municipal affair projects. The right of a charter city to govern its municipal affairs without State interference is rooted in the California Constitution. Cal. Const. art XI, § 5. If passed in its current form, SB 7 would deprive charter cities of state funding if they exercise their constitutional right to govern their municipal affairs, while providing state funding to general law cities and charter cities that agree to follow state law.

This Office addressed a similar question last year regarding City Proposition A and California Senate Bill 829 (SB 829). Proposition A prohibits the City from requiring a contractor on a construction project "to execute or otherwise become a party to a Project Labor Agreement as a condition of bidding, negotiating, awarding or the performing of a contract." SDMC § 22.4402.

SB 829 prohibits a charter city from receiving state funding or financial assistance for a construction project if the city has a charter provision, initiative, or ordinance that “prohibits, limits, or constrains in any way” the city’s ability to use a project labor agreement. Cal. Pub. Cont. Code § 2503. Proposition A unquestionably “constrains” the City’s ability to utilize a project labor agreement on public works projects within the meaning of SB 829. However, this Office concluded that SB 829 was unenforceable to the extent it makes the City ineligible for state funding for complying with Proposition A on municipal affair projects. City Att’y MOL No. 2012-10 (Nov. 30, 2012).

This Office’s opinion on Proposition A and SB 829 was based in part on the California Supreme Court’s decision in *Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal. 3d 296 (1979). In *Sonoma County*, the State was distributing funds to local agencies to provide relief from the financial impacts of Proposition 13, but only on the condition that the local agencies not give their employees cost-of-living wage increases larger than the increases given to state employees. *Id.* at 302. Employee organizations of local agencies challenged that condition arguing it interfered with their existing labor contracts (that provided for larger raises) and violated the rights of charter cities to govern their municipal affairs. The Supreme Court held that the condition limiting the amount of cost-of-living increases violated the State and Federal Constitutions. *Id.* at 314. The Supreme Court also held that the wages paid to employees of a charter city is a municipal affair, despite language in the state legislation declaring the condition a matter of statewide concern. *Id.* at 316-17. The Supreme Court explained:

[W]hile the state may impose conditions upon the granting of a privilege, including restrictions upon the expenditure of funds distributed by it to other governmental bodies, “constitutional power cannot be used by way of condition to attain an unconstitutional result.” (internal citations omitted) Thus, while the state may not have been under an obligation to distribute state funds to local agencies to assist them in resolving whatever fiscal problems were contemplated in the wake of Proposition 13, it could not require as a condition of granting those funds that the local agencies impair valid contracts to pay wage increases.

Sonoma County at 319 (citations omitted). The condition limiting the cost-of-living increases was severed from the legislation and unenforceable against the local agencies. *Id.* at 320.

SB 7 is probably unconstitutional in light of the Supreme Court’s decision in *Sonoma County*. Like the wages a charter city pays its employees, the wages a charter city pays workers on its locally funded public works projects is a municipal affair. *City of Vista*, 54 Cal. 4th at 566. Similar to the legislation in *Sonoma County*, SB 7 uses the leverage of state funding as a means to control the municipal affairs of charter cities. Therefore, if SB 7 becomes state law in its current form, the requirement to pay prevailing wages on municipal affair projects as a condition of receiving state funding is probably unconstitutional.

III. THE CITY CHARTER MUST BE AMENDED TO ADOPT A PREVAILING WAGE ORDINANCE LIKE THE CITY OF LOS ANGELES

An ordinance from the City of Los Angeles was presented to the Committee as a model for the City to consider. Los Angeles requires compliance with state prevailing wage laws on all its municipal affair projects. The Los Angeles Administrative Code provides:

The provisions of that certain Act of the Legislature of the State of California entitled, "An act to provide for the payment of not less than the general prevailing rate of wages on public works, and not less than the general prevailing rate of wages for legal holiday and overtime work or public works, provided for the ascertainment of such general prevailing rate by the public body awarding the contract and its insertion in the contract and call for bids for the contract, providing for the keeping of records of the wages paid all workers engaged in public work and the inspection of such records by the proper public officials, providing for a forfeiture for each calendar day, or portion thereof, any worker is paid less than the said rate and for a stipulation to this effect in the contract, and providing other penalties for violation of the provisions thereof" (approved May 25, 1931, Statutes, 1931, Chapter 397), as amended or as hereafter shall be amended, are hereby accepted and made applicable to the City of Los Angeles, its departments, boards, officers, agents and employees notwithstanding the exemption of said City therefrom created by Section 5 of Article XI of the Constitution of the State of California with respect to municipal affairs.

Los Angeles Admin. Code § 10.7

The Los Angeles ordinance specifically recognizes that as a charter city, Los Angeles is exempt from state prevailing wage laws on its municipal affair projects, but requires compliance with prevailing wage laws anyway. The Los Angeles ordinance does not require a project-by-project analysis to apply state prevailing wage laws.

The city charters of Los Angeles and San Diego have some similarities regarding public works contracts, but also have a critical difference. Both city charters require that public works contracts be awarded to the lowest responsible and reliable bidder. San Diego Charter § 94; Los Angeles Charter § 371(a) ("Contracts shall be let to the lowest responsive and responsible bidder furnishing satisfactory security for performance"). But unlike San Diego, the Los Angeles Charter has a specific provision applying state prevailing wage laws to its public works projects:

The provisions of California Labor Code Section 1770 et seq. regarding prevailing wages on public works and related regulations, as now existing and as may be amended, are accepted and made applicable to the City, its departments, boards, officers, agents and employees.

Los Angeles Charter § 377.

The Los Angeles ordinance merely implements the legal requirement in the Los Angeles Charter to apply state prevailing wage laws to all public works projects. Los Angeles does not have to determine whether requiring compliance with prevailing wage laws is consistent with the purposes of competitive bidding because as a charter provision, it is entitled to equal weight with

the Los Angeles Charter requirement that public works contracts be awarded to the lowest responsible bidder. The San Diego Charter must similarly be amended to permit the City to require compliance with state prevailing wage laws without determining that prevailing wage laws benefit the projects. 2003 Op. City Att’y 1 (2003-1; Apr. 8, 2003); 1993 City Att’y MOL 318 (93-45; Apr. 8, 1993).

IV. SIMILAR PROJECTS MAY BE CONSIDERED TOGETHER IN DETERMINING WHETHER TO APPLY STATE PREVAILING WAGE LAWS

On June 10, 2013, the San Diego County Building & Construction Trades Council provided us with a written legal opinion indicating that the City does not have to apply prevailing wage laws on a project-by-project basis. The Trades Council explains that the *Associated Builders* case, relied upon by this Office’s 2003 legal opinion, only requires judicial review on a case-by-case basis, not the City’s determination to require compliance with prevailing wage laws.

In 2003, the City Council adopted a policy to determine on a project-by-project basis whether to pay prevailing wages on water and wastewater projects estimated to cost over \$10 million to construct. San Diego Resolution No. R-298185 (July 14, 2003). Since then, the City Council has included prevailing wage specifications on several municipal affair projects. *See* San Diego Resolution Nos. R-298712 (Dec. 8, 2003) (Sorrento Valley Trunk Sewer and Pump Station 89), R-301250 (Mar. 1, 2006) (Sewer Pipeline Rehabilitation Phase C-1); R-304274 (Oct. 27, 2008) (South Mission Valley Trunk Sewer); R-304987 (June 25, 2009) (Lake Murray Trunk Sewer); R-305723 (Apr. 12, 2010) (Water Group Job 3012). This policy is still in effect today.

We agree with the Trades Council that *Associated Builders* does not require a public agency to conduct a project-by-project analysis. This Office’s 2003 legal opinion relies solely on language in *Associated Builders* referring to *judicial* review on a case-by-case basis:

Having concluded ABC has failed to demonstrate that the PSA in the present case conflicts with competitive bidding laws, we observe that future challenges to the imposition of project labor agreements as bid requirements will be reviewed, on a case-by-case basis, for consistency with the competitive bidding laws under the principles articulated in this opinion.

Associated Builders, 21 Cal. 4th at 376. The Supreme Court was explaining its opinion did not mean that project labor agreements were always valid bid requirements, but that under the facts of that case it was valid. There is nothing wrong with the City doing a project-by-project analysis, but it is not legally required.

The City can group similar projects together in determining whether to require compliance with state prevailing wage laws. For example, the City performs many road resurfacing projects which are similar in nature and cost. Theoretically, either all or none of the projects would benefit from applying state prevailing wage laws because the projects are the same. We defer to City staff as to what types of projects, dollar thresholds, or other similarities define the public works projects that would benefit from applying state prevailing wage laws. Whatever decision is made, however, needs to be based upon substantial evidence in the record.

The City's determination will be upheld if there is substantial evidence showing a benefit to the project that is consistent with competitive bidding laws. *See Associated Builders*, 21 Cal. 4th at 374. If requiring compliance with state prevailing wage laws increases the cost of the project without a corresponding benefit, it will violate the City Charter. 2003 Op. City Att'y 1 (2003-1; Apr. 8, 2003).

V. PROPOSED ORDINANCE

The City needs to determine which public works projects will benefit from compliance with state prevailing wage laws. The decision should be made based upon substantial evidence in the record. We recommend that reliable information be submitted and that the City Council make appropriate findings. A draft ordinance is attached to this memorandum, but the types of projects and the dollar thresholds are blank. We can complete the ordinance based on the direction we receive from the Committee.

The City Council will need to rescind Council Resolution No. R-298185 as part of the proposed ordinance. That resolution indicates the City will not pay prevailing wages on City public works projects except on matters of state concern, when required by federal or state grants, and on water and wastewater projects over \$10 million on a project-by-project basis. Assuming the ordinance adopted by the City Council will conflict with the resolution, the resolution should be rescinded.

If the City Council is not prepared to determine which public works projects will benefit from compliance with state prevailing wage laws, as an alternative we can prepare an ordinance directing City staff to make a determination on a project-by-project basis. As we indicated above, a project-by-project analysis is not legally required but it is an acceptable approach.

CONCLUSION

As explained in this Office's 2003 legal opinion, the City can require compliance with state prevailing wage laws on municipal affair projects. To do so, the City must reasonably determine that there is a corresponding benefit to requiring compliance with prevailing wage laws. The City does not have to analyze each project individually, but may consider similar projects together in determining whether to require that prevailing wage laws be followed. That decision should be made based upon substantial evidence in the record. The City cannot require compliance with prevailing wage laws on all municipal affair projects like the City of Los Angeles without amending the City Charter.

JAN I. GOLDSMITH, City Attorney

By /s/Thomas C. Zeleny

Thomas C. Zeleny
Chief Deputy City Attorney

TCZ:mb
Doc.No:582073
Attachment:1
Draft Ordinance
ML-2013-10

ORDINANCE NUMBER O-_____ (NEW SERIES)

DATE OF FINAL PASSAGE _____

AN ORDINANCE AMENDING CHAPTER 2, ARTICLE 2,
DIVISION 31 OF THE SAN DIEGO MUNICIPAL CODE BY
ADDING NEW SECTION 22.3110 RELATING TO STATE
PREVAILING WAGE LAWS.

WHEREAS, City Council Resolution No. R-298185 provides that except for water or sewer fund projects estimated to cost over \$10 million to construct, the City will only require compliance with state prevailing wage laws on public works projects of state concern or when required by federal or state grants; and

WHEREAS, the City has discretion to require compliance with state prevailing wage laws when to do so is consistent with the competitive bidding requirements in the City Charter; and

WHEREAS, the City Council has heard and considered the public testimony that requiring compliance with state prevailing wage laws will benefit municipal affair projects; and

WHEREAS, compliance with state prevailing wage laws on municipal affair projects over \$[*insert amount and/or type of project*] will provide certain benefits to the projects, including but not limited to higher quality and lower cost through the use of a skilled labor force, a safer jobsite, projects completed on schedule, bidders who have the quality, fitness and capacity to satisfactorily complete the project, allowing all contractors to compete on an even playing field, and that the public benefit from requiring compliance with state prevailing wage laws will outweigh any potential increase in costs; NOW, THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. That City Council Resolution No. R-298185 is hereby rescinded.

Section 2. That Chapter 2, Article 2, Division 31, of the San Diego Municipal Code is amended by adding new Section 22.3110, to read as follows:

Division 31: Public Works Contracts

§22.3110 Compliance with State Prevailing Wage Laws

The City Manager shall require compliance with California Labor Code sections 1770 – 1781, as may be amended, on *public works contracts* and *task orders* over \$*[insert amount and/or type of project]*.

Section 3. That a full reading of this ordinance is dispensed with prior to its passage, a written or printed copy having been made available to the City Council and the public prior to the day of its passage.

Section 4. That this ordinance shall take effect and be in force on the thirtieth day from and after its final passage.

APPROVED: JAN I. GOLDSMITH, City Attorney

By _____
Thomas C. Zeleny
Deputy City Attorney

TCZ:mb
06/17/13
Or.Dept:Rules

I hereby certify that the foregoing Ordinance was passed by the Council of the City of San Diego, at its meeting of _____.

ELIZABETH S. MALAND, City Clerk

By _____
Deputy City Clerk

Approved: _____
(date)

BOB FILNER, Mayor

Vetoed: _____
(date)

BOB FILNER, Mayor