MEMORANDUM OF LAW

DATE: April 8, 1993

TO: Councilman John Hartley

FROM: City Attorney

SUBJECT: Charter Prohibition Against Specification of Prevailing Wages in Public Works Contracts Involving Municipal Affairs

By memorandum to City Attorney John W. Witt dated March 4, 1993, you requested an opinion from this office regarding the following question:

QUESTION

What legal avenues (i.e. resolution, ordinance or Charter change) would have to be pursued in order to accomplish the objective that payment of prevailing wages be specified for all public works contracts with The City of San Diego ("City")?

ANSWER

The "lowest responsible and reliable bidder" provision of San Diego City Charter ("Charter") section 94 prohibits the specification of prevailing wages in public works contracts involving the City's "municipal affairs." No resolution or ordinance adopted by the Council of The City of San Diego ("Council") may legally supersede the limitations imposed by the Charter. Therefore, an amendment to the Charter (requiring a vote of the electorate) would be necessary before prevailing wages may be lawfully specified in contracts involving the City's municipal affairs. In contracts involving matters of statewide concern, however, general law is applicable, and prevailing wages must be specified, as is presently the City's practice.

ANALYSIS

The history of California prevailing wage laws as applied to the City has already been well documented in a January 22, 1990 Memorandum of Law by Deputy City Attorney Mary Kay Jackson (copy attached). That Memorandum of Law gives a thorough discussion of the question now again in issue, and contains citations to authorities which support the conclusion that the City is bound by its Charter to award public works contracts involving its municipal affairs to the lowest responsible and reliable bidder without any requirements or constraints on

bidders as to the wages to be paid for the work. Please refer to the January 22, 1990 Memorandum of Law for the principal analysis of your question.

Some further elaboration still may be helpful to understanding how and why the Council had previously legally adopted a resolution calling for payment of prevailing wages. As noted in the earlier Memorandum of Law, "in order to comply with California statutory law, the City adopted Resolution No. 218685, dated June 22, 1977, stating that prevailing wages would be included in all City contracts until such time that the resolution should be superseded by a later resolution of the Council." At that time, the question whether compliance with the state prevailing wage statues would unlawfully conflict with Charter section 94 had not been directly addressed or resolved by the courts. Although the case of City of Pasadena v. Charleville, 215 Cal. 384 (1932), had by then long established that local projects were municipal affairs, in 1977 no case had considered the question whether the wage rates paid under those contracts might nonetheless be a matter of statewide concern. Since the issue had not been raised, the Council was not then prohibited by any case law precedent from adopting a resolution calling for payment of prevailing wages on all contracts, and did in fact adopt such a resolution to comply with state general law.

Thus, the City specified prevailing wages in all contracts from mid-1977 to 1980. In 1980, City Manager's Report No. 80-191 was issued recommending a change in policy providing that prevailing wages should be specified only when the contract in issue was a matter of statewide concern. This recommendation was accepted by the Council with the adoption of Resolution No. R-251555 in April 1980. The adoption of that resolution ultimately put the prevailing wage-municipal affairs question to test. The State Department of Industrial Relations sued over the City's action, seeking a writ of mandate to compel the City to comply with state prevailing wage law in all of its contracts, including those that for other purposes would be considered municipal affairs under the Charleville case. This suit eventually resulted in the decision of Vial v. City of San Diego, 122 Cal. App. 3d 346 (1981), which conclusively put the controversy to rest. The Court of Appeal held: "The prevailing wage law, a general law, does not apply to the public works projects of a chartered city, as long as the projects in question are within the realm of 'municipal affairs.'" Id., 122 Cal. App. 3d at 348.

From the decision in Vial results the further conclusion that the prevailing wage law, a general law, cannot apply to the public works contracts of The City of San Diego which involve

municipal affairs, as such an application would violate the City Charter provision requiring award to the lowest responsible and reliable bidder. Please see the January 22, 1990 Memorandum of Law at pages 3-5 for discussion of why prevailing wage requirements are violative of "lowest responsible bidder" Charter provisions. Thus, ever since Vial decided that the holding in Charleville extends to the prevailing wage laws, the Council has been without authority to adopt a resolution or ordinance which is inconsistent with the "lowest responsible and reliable bidder" requirement of Charter section 94. The earlier resolution adopted in 1977 calling for prevailing wages on all City contracts was valid only because no authority had spoken to the question of whether California's prevailing wage laws apply to contracts of chartered cities involving municipal affairs. The Vial case later became that authority, and now makes it clear that prevailing wages are not applicable to the municipal affairs contracts of a chartered city. Moreover, where the Charter requires an award to the lowest responsible and reliable bidder, such a provision would be violated by a prevailing wage requirement.

This conclusion regarding the limitations imposed by Charter section 94 is further supported by the fact that a previous specific Charter provision that mandated payment of prevailing wages in City contracts was repealed by the voters in 1963. That repealed provision was contained in what was formerly Charter Article XII ("Labor on Public Work"). Specifically relevant to this discussion is former Charter section 193 ("Prevailing Rate of Wages to be Paid on Public Work"). The fact that the voters have spoken by repealing Charter section 193 plainly establishes that the Council may not reinstitute a prevailing wage requirement in municipal affairs contracts unless the voters, by election, reverse the 1963 repeal.

Again, the Council was not constrained by this limitation in 1977 when it adopted a prevailing wage resolution (No. 218685) only because it then remained an open question whether the City's Charter was applicable to municipal public works contracts where it was in conflict with state law on the subject of prevailing wages. It was then unresolved whether prevailing wage requirements were a matter of statewide concern regardless of the nature of the underlying contract. Following the Vial case, however, this no longer remains an open question. Vial holds that a chartered city is subject to its own laws (i.e., Charter provisions) where matters of concerning "municipal affairs" are at issue.

The resolution in question in Vial (No. 251255) remains valid today because it distinguishes projects which are matters

of "statewide concern" from those which are "municipal affairs." This distinction is now in fact absolutely necessary because there presently is a difference in law between relevant provisions of the California Labor Code and the City Charter. Where the contract involves a project which is a matter of "statewide concern," general law must be followed and thus prevailing wages must be paid in accordance with Labor Code sections 1770-1779. On the other hand, where the project is a "municipal affair," the City Charter must be followed and prevailing wage specifications are prohibited by the "lowest responsible and reliable bidder" requirement of Charter section 94 and by the express repeal in 1963 of Charter section 193. In conclusion, it is our certain opinion that prevailing wages may not be specified in the City's "municipal affairs" public work contracts unless the voters approve amendments to the City Charter.

JOHN W. WITT, City Attorney
By
Frederick M. Ortlieb
Deputy City Attorney

FMO:lc:mb:200x820(x043.2)
Attachment
ML-93-45

TOP
TOP