MEMORANDUM OF LAW

DATE: September 11, 1997

TO: Deputy Mayor Barbara Warden

FROM: City Attorney

SUBJECT: Concession Worker Retention Ordinance

QUESTION PRESENTED

You have asked us to re-examine an ordinance drafted by the San Diego-Imperial Counties Labor Council ("Labor Council") which would generally require successor contractors, to a services contract, to retain existing employees of the predecessor contractor under certain circumstances. In addition, you have requested us to draft an alternative ordinance that strongly encourages successor contractors to retain existing employees, but does not mandate their retention.

SHORT ANSWER

The Labor Council's proposed ordinance is legal under current law, and it is within the City Council's discretion to adopt it. We provide our observations on the breadth of the draft ordinance's application, offering suggestions to narrow that application if the City Council so desires, as well as our observations on various legal and policy issues that the proposed ordinance implicates. None of these issues is, in our opinion, fatal or insurmountable. Finally, we provide an alternative draft ordinance as you requested.

BACKGROUND

In response to a change in vending contractors at the Sports Arena, the Labor Council originally proposed a "worker retention ordinance" in the spring of 1996. As drafted at that time, the ordinance, modeled after an ordinance adopted by the City of Los Angeles, required a contractor, succeeding to a contract to provide services, to retain the existing employees of the predecessor contractor under certain circumstances. A copy of the ordinance as proposed at that time is enclosed as Attachment 1.

In particular, the contractors to whom the ordinance applied were defined as any person or entity, or subcontractor, that has one of the following relationships with the City of San Diego: 1) receives financial assistance, through revenue bond, tax increment or other type of financing,

or tax credits, in excess of $25,000 from the City; 2) contracts with the City to furnish services pursuant to contracts in excess of $5,000; 3) leases City facilities for the purpose of operating the facility through the use of service employees; or 4) subcontracts to provide services at a City facility from a lease holder. An "employee," who would benefit from the ordinance, was defined to include hotel employees, restaurant, food service or banquet employees, janitorial employees, security guards, parking attendants, nonprofessional health care employees, gardeners, waste management employees and clerical employees.

In a previous Memorandum of Law (MOL) dated September 13, 1996, this office analyzed various issues implicated in the adoption and implementation of that proposed ordinance. The MOL concluded that the requirements in the ordinance were within the City's power to impose, but advised that it could open questions concerning the legal status of the new contractor's employees. The major concern expressed in the MOL was that persons intended to be independent contractors would be considered by law to be employees of the City, and entitled to the benefits flowing from that status. The MOL pointed out that the retained employees might feel they have a right to City benefits, as was the case with a prior dispute involving the Convention and Performing Arts Center ("CPAC") in 1993. In addition, the MOL cautioned on the potential liability exposure to the City for acts of persons the law would consider employees, and addressed the potential conflict between the ordinance and San Diego City Charter section 100. A copy of that MOL is enclosed as Attachment 2.

We understand that the Labor Council has modified its original proposal so that, for those situations where the ordinance would apply to a contractor who leases a City facility, it applies only to facilities the City owns, operates or leases and in which floor space exceeds 17,000 square feet. The ordinance's applicability in such instances would thus appear to be limited to Qualcomm Stadium, the Sports Arena, Chargers' Training Facility, Convention Center, and CPAC. In all other substantive or material respects, the proposed ordinance remains the same. A copy of the revised proposed ordinance is enclosed as Attachment 3. We shall direct our comments to the proposed ordinance as revised.

ANALYSIS

I

Breadth Of The Proposed Ordinance

The proposed ordinance is not a law of general applicability as it does not affect purely private transactions. The proposed ordinance places certain requirements on those that do business with or receive certain benefits from the City. As explained in the discussion that follows, we do not doubt that the City may legally place such requirements on those that seek business or benefits from the City, but the reach or extent of those requirements raises policy issues for the Council to consider.

While the genesis of the proposed ordinance was a change in service contractors at the Sports Arena, a City facility, the proposed ordinance would apply to a variety of contractors that have various relationships with the City, not just those who lease City facilities. For example, because the proposed ordinance would apply to contractors who receive financial assistance from the City, contracts funded by Community Development Block Grants, or Transient Occupancy Tax appropriations, could be covered. Similarly, the proposed ordinance could apply to

contracts between the City and the Chargers or Padres, and any of their subcontractors, on the theory that both organizations receive "financial assistance" through revenue bond financing for the expansion of Qualcomm Stadium or, in the case of the Chargers only, the construction of the new training facility. The proposed ordinance could also apply to the variety of economic incentive programs the City has in place to stimulate job growth and economic activity.

In addition, the Labor Council's proposed ordinance is not limited to concession workers but includes a variety of service employees, including hotel, janitorial, security, parking, nonprofessional health care, gardening, and clerical employees. Finally, the ordinance applies not only to the prime or direct contractors, but to subcontractors as well.

As mentioned above, the proposed ordinance appears to be patterned after an ordinance adopted by the City of Los Angeles. The current Los Angeles ordinance differs in several significant respects from the proposed ordinance, however. The Los Angeles ordinance applies to those entities that receive City financial assistance in excess of *$100,000*, whereas the proposed ordinance sets the threshold at $25,000. In addition, the Los Angeles ordinance specifically exempts those entities receiving City financial assistance that are nonprofit organizations, which include charitable or educational organizations. The proposed ordinance here does not make such exemptions.

Further, the Los Angeles ordinance provides that the retained employees be hired, during the transition period, under the terms and conditions established by the *new* contractor. The Labor Council's proposed ordinance requires the retained employees to be hired under the same terms and conditions as those of the *existing* contractor thus requiring the new contractor to change its terms and conditions of employment to accommodate the existing contractor's employees. Also, the Los Angeles ordinance applies to those employees that have worked for the existing contractor for *twelve* months, where the Labor Council's proposed ordinance applies to those employees who have worked for the existing contractor for *eight* months.

Both the Los Angeles and Labor Council's ordinances state that, during the transition period, the retained employees can only be terminated for "cause." The Los Angeles ordinance specifies that "cause" can include conduct under the existing contractor that contributed to any decision to terminate the contract for fraud or poor performance. The Labor Council's proposed ordinance does not contain this language.

II

New Case Law

Since the September 13, 1996, MOL, there has been one court decision concerning a Washington, D.C. law which is similar to the proposed ordinance.[1] In Washington Service Contractors Coalition, et al. v. District of Columbia, 54 F.3d 811 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 1015 (1996), a coalition of service contractors argued that the District of Columbia's Displaced Worker Protection Act (DWPA) was preempted by the National Labor Relations Act (the "Act") for several reasons: (1) that it conflicted with Section 14(a) of the Act which provides that employers are not required to treat "supervisors" as "employees" for purposes of collective bargaining (the coalition argued that the DWPA would infringe upon contractors' abilities to ensure the loyalty of their supervisors); (2) that the DWPA was in violation of the Act because it could transform some non-union contractors, who retain union employees, into "successor employers" under the Act and would so oblige the new contractors to bargain with the union; (3) that the statute would improperly regulate contractors' rights to hire whomever they wished and, therefore, would inhibit free enterprise; and (4) that the DWPA would interfere with their contract rights in violation of the Contracts Clause of the United States Constitution.

The district court found that the DWPA conflicted with the Act on the issue of treating supervisors as employees, and determined such an application must be enjoined. Id. at 814. The district court also found that the DWPA was preempted by the Act because it would upset the free market balance of power between employers and unions. It would force a contractor to hire particular employees, who may be represented by a union, thereby requiring the contractor to bargain with the union.

The Court of Appeals for the D.C. Circuit disagreed with the lower court's findings. The Court of Appeals found that the DWPA did not conflict with the Act and, therefore, was not preempted by it. The court determined it was not clear that, if the contractor was forced to hire previously represented employees, the National Labor Relations Board (the "Board") would require it to bargain with the union as a "successor employer." The court stated "the [Board] may or may not impose successorship obligations on the new employer. We will not know until the [Board] addresses the issue." Id. at 817. However, the court found that even if the Board did require the new contractor to bargain with the employees' union, such a position would not be in conflict with the Act. The court noted that the Act applies to issues of collective bargaining and, though the DWPA did restrict the *hiring decisions* of the contractors, it did not address the *collective bargaining issues*. Id.

Finally, the Court of Appeals found that the DWPA did not violate the Contracts Clause of the United States Constitution. Article I, Section 10 of the Constitution provides that "[no] state shall . . . pass any . . . law impairing the Obligation of Contracts." The coalition claimed that the DWPA would force them to terminate the employment relationship they had with their current employees in order to hire the new employees. The court disagreed and stated, "On its face, the DWPA only requires contractors to *hire* their predecessors' employees, not to *fire* their own employees." Id. at 818.

The Washington Service Contractors decision thus supports, at least in part, the validity of the proposed ordinance, although some issues, not addressed in nor resolved by the court

case, remain. Those issues are more fully discussed below.

III

Remaining Issues

A. Contracts Clause.

Notwithstanding the D.C. Circuit decision, and indeed as the decision illustrates, it remains to be determined if the Contracts Clause of the United States Constitution would be violated by application of a worker retention law if the new contractor is forced to *fire* its own employees in order to hire the predecessor's employees. This could occur if, for example, the new contractor lacks the financial wherewithal to absorb the predecessor's employees while retaining its own employees. A violation of the Contracts Clause of the United States Constitution requires a contractual relationship between the employer and employee and a change in law that substantially impairs that contractual relationship. A law that, when applied, requires the new contractor to fire its existing employees, could be considered a substantial impairment of an existing contractual relationship. General Motors Corp. v. Romein, 503 U.S. 181, 186 (1992). The D.C. Circuit found that the DWPA did not "on its face" create such a violation. However, if *as applied*, such a situation were to occur, the question may again go before the courts.

Similar to the D.C. law, the proposed ordinance does not on its face require a successor contractor to fire existing employees. More importantly, since the ordinance is not retroactive (thus forcing contractors to fire existing employees under current contract), there is no change in the law that affects an existing contractual relationship. That relationship could change only if the contractor bids for and receives the work, but such circumstance is no different than any other prospective change in the law that affects how business is conducted.[2] There may be a private cause of action by the employee against the employer, for breach of contract, but that does not make the law invalid.[3]

B. National Labor Relations Act.

The Board has apparently not determined whether a new contractor, under a worker retention ordinance, would be considered a "successor employer" for purposes of bargaining with the union. Under the Act, when an employer hires a majority of a prior employer's workforce to do the same work, the new employer is termed a "successor employer" and must bargain with the union representing the newly hired employees. Given case law on the matter, we expect that the Board would find the new contractor to be a successor employer. See, e.g., Board v. Burns International Security, 406 U.S. 272, 281 (1972). If that becomes the case, then the new contractor would not be bound by any existing collective bargaining agreement but would be forced to bargain collectively with the union for a new agreement. The D.C. Circuit Court was not concerned with this situation. However, should the Board determine that the contractor is a successor employer, this determination would provide an opportunity for other courts to reexamine the labor issues raised by a worker retention ordinance.

C. Impact on Benefits of Competitive Bidding.

As pointed out in the previous MOL, the City has wide discretion in exercising its

contracting powers as long as it does not violate federal, state or local laws. Alioto's Fish Co. v. Human Rights Com. of San Francisco, 120 Cal. App. 3d 594, 603-605 (1981). There appears to be no conflict between the proposed ordinance's provisions and any specific federal or state law, or the San Diego City Charter, however, the requirements of the proposed ordinance are not consistent with current Municipal Code requirements for competitive pricing or bidding in the award of services contracts.[4] The ordinance would amend the Municipal Code, and thus that inconsistency would be resolved. We offer some observations on the purpose of competitive bidding, and the possible effect of the proposed ordinance on contracts for services to the City.

The purpose of competitive bidding in public contracts is "to guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; and to obtain the best economic result for the public." Domar Electric, Inc. v. City of Los Angeles, 9 Cal. 4th 161, 173 (1994). On one hand, if all contractors bidding on a contract must hire the same workforce at the same pay, then one portion of the bid package should be consistent. Therefore, the proposed ordinance could be seen to level the playing field on the work force issue. However, the proposed ordinance may impact the City's ability to get the best price for the needed services.

First, the obstacles and costs associated with hiring the predecessor's employees may be too great for small contractors and could discourage them from bidding. It is important to note that small contractors are often those that are newly emerging, including Minority Business Enterprises, Women Business Enterprises, and Historically Underutilized Business Enterprises. Second, bids may contain inflated costs due to the current pay rates of existing employees, or anticipated pay rates after bargaining with the union, and, therefore, the City may not ultimately obtain the best economic result for the public.

We reiterate that none of these concerns make the proposed ordinance illegal, and it is extremely difficult to estimate exactly what impact on costs the proposed ordinance may have. The Council would be justified, however, in determining that any increased costs were offset by the benefits of ensuring job stability for the affected employees, and continuity in the provision of services to the City and the public. These policy considerations are within the Council's purview to decide.

D. City as Employer Issues.

The previous MOL discussed several concerns arising from the possible characterization of private employees being considered employees of the City. As discussed above, these concerns arose from a situation that existed at CPAC. While these concerns are valid in a broad sense, we believe that the CPAC experience was unique, and should not be recreated through careful consideration, adoption and implementation of the proposed ordinance.

To protect against the remote possibility that the risks set forth in the previous MOL materialize, the City should clearly state its intent that the benefitted service employees are not to be considered City employees. In addition, the City should require that all bidders for service contracts agree to indemnify the City for claims arising from worker's compensation, or negligent or wrongful acts of the employees.

IV

Alternatives

The Council is free to alter or modify the proposed ordinance in many respects. For example, if the Council wished to address solely the issue of service workers at City facilities, or service contracts of the City, those provisions of the proposed ordinance extending coverage to people or entities receiving financial assistance from the City could be deleted. The Council also need not extend coverage to subcontractors, on the theory that there is no nexus to the City's contracts and facilities justifying that broad coverage. In addition, the thresholds for application of the ordinance (minimum contract amounts and levels of City assistance) could be raised, as they are in Los Angeles, to limit the extent and coverage of the ordinance's provisions.

You also asked us to analyze the concept of an ordinance that *strongly encourages* new contractors to hire existing employees without *requiring* the new contractor to do so. A sample of such an ordinance is enclosed as Attachment 4. That draft ordinance requires a new contractor to give notice of employment opportunities to the incumbent employees. The contractor can be provided leeway in drafting such a notice. The specific content of the notice and placement is flexible. A time period of sixty days for notice is consistent with the federal statutes dealing with notice of plant closings.[5] This time period should be sufficient for the new contractor to process and hire employees yet not disrupt the existing contractor's business.

The alternative ordinance reduces the complexity of the Labor Council's ordinance, making it easier to understand, and applies to all service contracts at a City facility regardless of size. The alternative ordinance does not apply to organizations receiving financial assistance from the City. Those City departments that exercise independent control over their expenditure of funds are also not included in the alternative ordinance because, as independent agencies, they are in control of their contracting abilities. For example, the Redevelopment Agency is created as a matter of state law, under the Health and Safety Code and is not bound by the City Charter. Should it wish to adopt the ordinance, it is free, but not required, to do so.

CONCLUSION

We believe that the Labor Council's proposed ordinance is legal and within the discretion of the City Council to adopt. The terms of the proposed ordinance raise numerous policy issues which we have set forth in this memorandum. The City Council is free to modify the terms of the proposed ordinance in many ways, as it sees fit, or may adopt an ordinance that is not mandatory in application.

We hope this memorandum is helpful. Please let us know if we can be of further assistance in the analysis of this matter.

CASEY GWINN, City Attorney

By
Leslie J. Girard
Assistant City Attorney

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Attachments

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