**Office of**
**The City Attorney**
**City of San Diego**

**MEMORANDUM**
**MS 59**

**(619) 533-5800**

**DATE:** July 18, 2011

**TO:** Councilmember Carl DeMaio

**FROM:** City Attorney

**SUBJECT:** Applicability of Prevailing Wage Laws Involving the Use of Funds Received by the City from the Redevelopment Agency pursuant to the Repayment Agreement Between the Redevelopment Agency and the City of San Diego for Community Development Block Grant (CDBG) Debt

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## INTRODUCTION

The City of San Diego is currently receiving funds from the Redevelopment Agency of the City of San Diego (Agency) through the Repayment Agreement By and Between the Redevelopment Agency of the City of San Diego and the City of San Diego dated June 30, 2010, involving CDBG Debt (Repayment Agreement). For ease of reference, the Repayment Agreement is attached as Exhibit A.

The Repayment Agreement obligates the Agency to repay $78,780,000 to the City for CDBG debt over a ten-year period, which sum was originally utilized by the Agency to establish various Redevelopment project areas throughout the City. The Agency's repayment of this CDBG debt was mandated by an audit conducted in 2008 by the Office of Inspector General (OIG) of the U.S. Department of Housing and Urban Development (HUD) on the City's use of CDBG funds. The funds from the Repayment Agreement are deposited into a fund designated for CDBG program-related activities. In turn, the City may consider using a portion of this "debt repayment" for the City's Storefront Improvement Program.

As set forth in Council Policy 900-17, the City's Storefront Improvement Program (Program) provides financial incentives to small business or property owners to improve their storefronts consistent with design standards for their commercial areas. The objective of the Program is to generate additional revenues for businesses and the City by stimulating private investment in the City's commercial areas to make the business and surrounding communities more attractive. The City only accepts Program applications from small businesses with twelve or fewer employees.

## QUESTION PRESENTED

To what extent, if any, do federal, state and local prevailing wage laws apply to the use of Repayment Agreement funds for the Program?

## SHORT ANSWER

Federal prevailing wage laws apply if Repayment Agreement funds are used to fund construction and painting costs related to the Program and if the value of a contract for such services exceeds $2,000. State prevailing wage law is likely inapplicable because the Program is a purely municipal affair. Likewise, the City's local prevailing wage law is inapplicable because businesses with twelve or fewer employees, which are the only ones that qualify for the Program, are expressly exempted from its provisions.

## ANALYSIS

### I. FEDERAL PREVAILING WAGE LAW

Pursuant to the terms of the Repayment Agreement and HUD regulations, all repayments by the Agency of CDBG debt are to be treated by the City as CDBG program income. Repayment Agreement, Section 2(f); 24 C.F.R. § 570.504.

The primary part of the federal prevailing wage law, known as the Davis-Bacon Act (DBA), is codified at 40 U.S.C. §§ 3141-48. The Secretary of Labor has promulgated regulations for the administration of the DBA, which are set forth in 29 C.F.R. § 5. Section 5.5(a) sets forth the contract provisions, which require the payment of federal prevailing wages to mechanics and laborers for "any contract in excess of $2,000, which is entered into for the actual construction, alteration and/or repair, including painting and decorating of a public building or public work, or building or work financed in whole or in part from Federal funds . . ."

By its terms, the DBA applies only to public works contracts to which the federal government is a party. 40 U.S.C. § 3142. However, certain statutes known as the Davis-Bacon and Related Acts (DBRA), which are listed in 29 C.F.R. § 5.1(a), make prevailing wage requirements applicable to public works contracts where the federal government is the source of funds, not a party to the contract. *See* U.S. Dep't of Labor, *Prevailing Wage Resource Book*, p. 4 (2010) (Resource Book). One of the DBRA statutes is the Housing and Community Development Act of 1974 (HCDA). *Id.*

Pursuant to 24 C.F.R. § 570.0603, section 110(a) of the HCDA, also referred to as section 5310(a) of Title 42 of the United States Code, applies specifically to the use of CDBG funds. This section requires payment of prevailing wages on works or activities receiving CDBG funding. Section 110(a) states:

> All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with sections 3141-3144, 3146, 3147 of Title 40. . .

This requirement is to be fulfilled in accordance with the DBA, including the provision that it apply to construction-related contracts in excess of $2,000. 42 U.S.C. § 5310(a); 40 U.S.C. § 3142. Although not defined in the HCDA or 24 C.F.R. part 570, the term "construction" is defined in Title 29, part 5 of the Code of Federal Regulations[1] as:

> All types of work done on a particular building or work at the site thereof, including work at a facility which is deemed a part of the site of the work within the meaning of paragraph (l) of this section by laborers and mechanics employed by a construction contractor or construction subcontractor . . . including without limitation—
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> (i) Altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site;
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> (ii) Painting and decorating;
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> (iii) Manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work . . .;
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> (iv) (A) Transportation between the site of the work within the meaning of paragraph (l)(1) of this section and a facility which is dedicated to the construction of the building or work and deemed a part of the site of the work within the meaning of paragraph (l)(2) of this section; and
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> (B) Transportation of portion(s) of the building or work between a site where a significant portion of such building or work is constructed, which is a part of the site of the work within the meaning of paragraph (l)(1) of this

[1] 29 C.F.R. § 5.1(a) provides: "The regulations contained in this part are promulgated . . . in order to coordinate the administration and enforcement of the labor standards provisions of each of the following acts . . ." Section 5.1(a) then lists the specific acts to which it applies, including the HCDA listed at no. 46.

> section, and the physical place or places where the building or work will remain.

Therefore, to the extent that funds received by the City through the Repayment Agreement will be used to fund the costs of construction related to the Program, as set forth in the foregoing definition, and any contract executed for such work exceeds $2,000, federal prevailing wage laws apply.

## II. STATE PREVAILING WAGE LAW

Notwithstanding the applicability of federal prevailing wage law, the state prevailing wage law, which is contained in the California Labor Code, may also be applicable. The California Court of Appeal has ruled that "state enacted prevailing wage regulations are valid and not preempted by federal law when applied to contracts of the state or its political subdivisions." *Southern California Labor Management Operating Engineers Contract Compliance Committee v. Lloyd W. Aubry, Jr.*, 54 Cal. App. 4th 873, 886 (1997).

The core of the state prevailing wage law is California Labor Code section 1771, which provides in relevant part:

> Except for public works projects of one thousand ($1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

The applicability of state prevailing wage law depends upon whether the particular activity for which the CDBG funds are being utilized is a matter of statewide concern or a municipal affair. Because the City of San Diego is a charter city, the City is not required to comply with general laws of the state, such as the state prevailing wage law in matters that are purely municipal affairs.[2] *See Vial v. City of San Diego*, 122 Cal. App. 3d 346, 348 (1981); City Att'y MOL No. 2005-23 (Nov. 22, 2005). It is important to note that the "lowest responsible bidder" provision in San Diego Charter section 94 prohibits the payment of state prevailing wages in public works contracts involving the City's municipal affairs. However, in construction contracts involving matters of statewide concern, general law is applicable and state prevailing wage law would apply. 1993 City Att'y MOL 318 (Apr. 8, 1993).

Whether a particular matter is a municipal affair is ultimately a judicial determination that must be made on a case-by-case basis, but is generally determined by three factors: (1) the extent of

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[2] This issue is currently before the California Supreme Court in the case of *State Building and Construction Trades Council of California v. City of Vista*, 93 Cal.Rptr.3d 95 (2009), *depublished by* 99 Cal.Rptr.3d 559 (2009).

non-municipal control over the project, (2) the source and control of the funds used to finance the project, and (3) the nature, purpose, and geographic scope of the project. *See Smith v. City of Riverside*, 34 Cal. App. 3d 529, 537 n. 5 (1973); *Bishop v. City of San Jose*, 1 Cal. 3d 56, 62-63 (1969) (superseded by statute on other grounds); *Southern California Roads Co. v. McGuire*, 2 Cal. 2d 115, 123 (1934); City Att'y MOL No. 2005-23 (Nov. 22, 2005).

Applying these factors, it is likely that the Program would be considered a municipal affair[3]. Although federal CDBG funds would be involved, the City controls the Program and has sole discretion in any award associated with the Program. This Office has previously opined that the source of funds by itself does not necessarily cause a particular matter to fall outside the realm of a purely municipal affair. *See* City Att'y MOL No. 2005-23 (Nov. 22, 2005). Perhaps, more importantly, the purpose of the Program also supports its characterization as a municipal affair because the Program's objective is to assist the City and businesses within the geographic limits of the City by generating additional revenues for businesses and the City through local storefront improvements. Therefore, state prevailing wage law would likely be inapplicable to Repayment Agreement funds expended in support of the Program.[4]

## III. LOCAL PREVAILING WAGE LAW

The City's local prevailing wage law, also known as the City of San Diego Living Wage Ordinance, generally applies to service contracts,[5] financial assistance agreements,[6] and City

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[3] In the unlikely event that the Program was determined to be a matter of statewide concern, however, state prevailing wage law would apply to contracts of over $1,000 or more involving any "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority." Cal. Labor Code § 1720(a)(1). The term "paid for in whole or in part out of public funds" includes "[t]he payment of money . . . by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer." Cal. Lab. Code § 1720(b)(1). The California Director of Industrial Relations has established rules and regulations set forth in title 8 of the California Code of Regulations, for the purpose of carrying out the California Labor Code. Section 16001 (b) makes it clear that "[t]he application of state prevailing wage rates *when higher* is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies of any sort." (emphasis added).

[4] It is worth noting that the Agency has its own Storefront Improvement Program, which is subject to state prevailing wage law because the California Court of Appeal has upheld the state legislature's preemption of the field of community redevelopment and the redevelopment of blighted areas to be a governmental function of statewide concern. *Redevelopment Agency of the City of Berkeley v. City of Berkeley*, 80 Cal. App. 3d 158, 169 (1978).

[5] A service contract is a contract between the City and a business with a combined annual value of payments in excess of $25,000, and any applicable subcontracts or franchises to furnish services. SDMC § 22.4205. The Living Wage Ordinance defines "services" to mean specific types of employment activities and any other non-managerial, non-supervisory, or non-professional services that are consistent with the intent of the ordinance. *Id.*

[6] A financial assistance agreement is an agreement between the City and a business to provide direct financial assistance with the expressly articulated and identified purpose of encouraging, facilitating, supporting, or enabling: (a) economic development, job creation, or job retention with a combined value of $500,000 or more over a period of five years; or (b) tourism, arts, and cultural programs with a combined annual value of $750,000 or more. *Id.*

facility agreements.[7] SDMC § 22.4210. The purpose of the Living Wage Ordinance is to allow such taxpayer funded benefits which advance the City's interests to create jobs that keep workers and their families out of poverty. SDMC § 22.4201.

The Living Wage Ordinance contains a number of express exemptions. SDMC § 22.4215. Among them, businesses employing twelve or fewer employees are exempt from its requirements. The Living Wage Ordinance is inapplicable to the Program because the Program only allows small businesses with twelve or fewer employees to participate. SDMC § 22.4215(b)(1).

## CONCLUSION

The City's use of Repayment Agreement funds for the Program triggers the need to comply with federal prevailing wage laws if the value of a contract for construction or painting or both, exceeds $2,000. State prevailing wage laws are likely inapplicable because the Program appears to be a municipal affair. The Living Wage Ordinance is inapplicable because the small businesses eligible to participate in the Program are exempt from its provisions.

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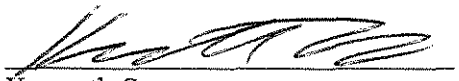
By 
Kenneth So
Deputy City Attorney

KS:mm
cc: Beth Murray, Deputy Director
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[7] A City facility agreement is an agreement between the City and a business for the lease, use, or management of a City facility that generates $350,000 or more in annual gross receipts to the business. *Id.*