

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

**MEMORANDUM
MS 59**

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DATE: April 20, 2015

TO: Scott Chadwick, Chief Operating Officer

FROM: Lara Easton, Deputy City Attorney

SUBJECT: Prevailing Wage and New Requirements Under Senate Bill 854

INTRODUCTION

This memo provides guidance to Purchasing and Contracting (P&C) and the Public Works Department (Public Works) concerning prevailing wages and the implementation of Senate Bill 854 (SB 854).

BACKGROUND

On October 13, 2013, Governor Brown signed California Senate Bill 7 (SB 7) into law adding section 1782 to the California Labor Code. Generally, SB 7 prohibits a charter city, like San Diego, from receiving state funding or financial assistance for construction projects unless the charter city complies with state prevailing wage laws on all of its public works projects.¹ Under SB 7, charter cities are prohibited from receiving or using state funding or financial assistance on construction projects if a city has awarded, within the prior two years, a public works project without requiring compliance with the California Labor Code. Cal. Labor Code § 1782(b). While SB 7 was in the State Legislature, the City Council adopted a prevailing wage ordinance (Ordinance). San Diego Ordinance No. 0-20299 (Sep. 26, 2013); San Diego Municipal Code (SDMC) § 22.3019. The Ordinance incorporates the definition of “public works” found in the California Labor Code and requires certain projects to comply with state prevailing wage laws:

For contracts and *task orders* awarded, entered into, or extended on or after January 1, 2014, the City shall require compliance with California Labor Code section 1770-1781, as may be amended, for construction work over \$25,000 and for alteration, demolition, repair or *maintenance* work over \$15,000.

SDMC §§ 22.3019(a) and (c).

¹ This Office has previously opined that SB 7 is probably unconstitutional. City Att’y MOL No. 2013-10 (June 17, 2013). However, the constitutionality of SB 7 is still being litigated.

On June 20, 2014, the Governor signed SB 854 into law and it became effective immediately.² Cal. Sen. Bill 854 (2013-2014 Reg. Sess.). Primarily, SB 854 was meant as a funding and revenue generating bill to pay for Public Works Enforcement for the Labor Commissioner's Office and other Department of Industrial Relations (DIR) public works functions. SB 854 also amended the laws governing how the DIR monitors, administers, and enforces compliance with the California Labor Code and prevailing wage requirements on public works projects.³ Until the passage of SB 854, the City's Labor Compliance Program (LCP) handled monitoring, administration, and enforcement functions. Those amendments to the California Labor Code directly impact the City and will be phased in as follows.

I. IMMEDIATE CHANGES

A. Duty to Notify the DIR When Awarding a Public Works Project

The City, as the awarding body, must provide electronic notice of the award of a public works project to the DIR within five days of award. Cal. Labor Code § 1773.3(a)(1). The DIR refers to this notice as the "PWC-100 Form."⁴ This electronic notice is required on all public works projects including, but not limited to, work completed through right of entry permits, applicable contracts awarded by Maintenance Assessment Districts (MADs) and Business Improvement Districts (BIDs),⁵ private developer agreements, and financial assistance agreements.⁶ This requirement is triggered whether a public works project is awarded by purchase order, Invitation to Bid, Request for Proposal, or contract.

B. Duty to Provide the DIR a Copy of the Notice of Completion or Evidence of Acceptance of a Public Works Project

If requested by the DIR, the City must respond within ten days by providing the DIR a copy of the valid notice of completion filed with the county recorder or a document evidencing acceptance of a public works project. Cal. Labor Code § 1741.1(b)(1). The City must respond to the DIR even if the City has not yet filed a notice of completion or has not yet accepted the public work. *Id.* These documents start the eighteen month statute of limitations for the service of civil wage and penalty assessments. Cal. Labor Code § 1741.1(b)(2). The statute of limitations period for civil wage and penalty assessments is tolled for the length of time that the notice is not sent to the DIR. *Id.*

This Office recommends that the City implement internal policies and procedures to provide direction to staff and City contractors on these notice requirements to ensure compliance. This

² The passage of SB 854 was expedited. The bill was introduced in January 2014 and signed into law six months later.

³ For purposes of this memo, public works projects are defined as construction contracts over \$25,000 and alteration, demolition, repair, or maintenance contracts over \$15,000 that require the payment of prevailing wages. SDMC § 22.3019(c).

⁴ This form is only available on line and can be accessed via the DIR website at <https://www.dir.ca.gov/pwc100ext/>.

⁵ This Office has previously opined that the prevailing wage ordinance extends to entities responsible for infrastructure like MADs and BIDs. City Att'y MOL No. 2013-18 (Nov. 19, 2013).

⁶ Specific legal questions regarding right of entry permits, private developer agreements, or financial assistance agreements should be directed to the department's assigned deputy city attorney.

would include updating Administrative Regulation (A.R.) 25.20 entitled, "Filing Procedure for Notices of Completion and Acceptance," which has not been updated since 1993.

II. PHASED-IN CHANGES

A. Contractor Registration

As of July 1, 2014, all contractors and subcontractors⁷ who bid or work on a public works project must register with the DIR and pay an annual fee of \$300.⁸ Cal. Labor Code § 1725.5. To register with the DIR, contractors must meet the following minimum requirements: (1) provide workers compensation coverage for all employees; (2) be licensed in accordance with Chapter 9 of the California Business and Professions Code, if applicable; (3) have no delinquent unpaid wage or penalty assessments owed to any employee or enforcement agency; (4) must not be debarred under state or federal law;⁹ and (5) be lawfully registered within the preceding twelve months or since the effective date of the requirements, whichever is sooner, before bidding on a public works contract, being listed in a bid proposal, or engaging in a public works contract. Cal. Labor Code § 1725.5(2)(A-E).

Beginning March 1, 2015, the City may not accept a bid, proposal, or quote from a contractor who is not registered with the DIR. Cal. Labor Code § 1771.1(g). After April 1, 2015, the City may not award a contract to a contractor who is not registered with the DIR. *Id.* Contracts entered into with unregistered contractors violate the California Labor Code and the SDMC.

The DIR will maintain an up to date list of all registered contractors.¹⁰ Cal. Labor Code § 1771.1(e). The City's current prevailing wage template language requires contractors to certify that he or she is registered and has verified that all subcontractors used on the public works project are registered. In addition, upon request, contractors will be required to show proof of subcontractor registration to the City. Despite the prevailing wage template language, City staff must verify that the City does not accept bids or enter into contracts with unregistered contractors. Prior to accepting a bid, proposal, or quote and prior to entering into a contract, the City must verify the contractor is on the DIR's list of registered contractors.

The California Labor Code includes provisions to prevent an increase in bid protests as a result of the new contractor registration requirements. A contractor's inadvertent error in listing an unregistered subcontractor is not grounds for filing a bid protest or deeming a bid nonresponsive if any one of the following apply: (1) the subcontractor is registered prior to the bid opening; (2) within twenty-four hours after the bid opening, the subcontractor is registered with the DIR and pays the penalty pursuant to California Labor Code section 1725.5; or (3) the subcontractor is replaced by another registered subcontractor pursuant to California Public Contract Code section 4107. Cal. Labor Code § 1771.1(c)(1-3). Contracts entered into with unregistered

⁷ This requirement also applies to consultants and their subconsultants who perform work on public works projects. Any work triggering the payment of prevailing wages will trigger the registration requirement.

⁸ This fee is subject to a yearly adjustment.

⁹ The California Labor Code is silent on whether local debarment would disqualify a contractor from registering with the DIR.

¹⁰ This list may be accessed at <https://efiling.dir.ca.gov/PWCR/Search>.

contractors or with contractors who list unregistered subcontractors are not void or voidable, but are subject to cancellation by the City. Cal. Labor Code § 1771.1(f).

B. City of San Diego's Labor Compliance Program (LCP)

The City established its LCP in December 2009. LCP staff are part of the Equal Opportunity Contracting Program (EOCP) which is a program within the Department of Purchasing and Contracting (P&C). The LCP's responsibilities include, but are not limited to, educating contractors of their prevailing wage obligations, reviewing and auditing certified payrolls to ensure the payment of the appropriate prevailing wage rates and benefits, conducting preconstruction conferences, performing site visits, investigating worker complaints, identifying wage miscalculations and violations, interacting with the DIR, and taking appropriate enforcement action when violations are found. Cal. Labor Code § 1771.5.

Currently, contractors submit certified payrolls directly to the City's LCP. This process will change under SB 854. For all new public works projects awarded after April 1, 2015, contractors and subcontractors must submit certified payrolls directly to the DIR. Cal. Labor Code § 1771.4(c)(2)(B). Beginning January 1, 2016, this requirement applies to all public works projects, whether new or ongoing. Cal. Labor Code § 1771.4(c)(2)(D). While the City will have access to certified payrolls submitted by the contractor directly to the DIR, the City's current contract language requires that contractors also submit certified payrolls to the City's LCP.¹¹

Despite the passage of SB 854, the DIR has indicated that the City continues to share the responsibility of monitoring and enforcing prevailing wage compliance on public works projects.¹² The City's LCP must continue to monitor, enforce, and conduct compliance investigations on public works projects awarded prior to April 1, 2015, when required by certain statutes, and on projects funded by Proposition 84, the Safe Drinking Water, Water Quality and Supply, Flood Control, River and Coastal Protection Bond Act of 2006. Cal. Pub. Res. Code § 75075. Additionally, the City's LCP must continue to monitor public works projects entered into under a collective bargaining agreement, even if the project is also monitored by the DIR. Cal. Labor Code § 1771.4(b)(2).

Trainings conducted by the DIR indicate that their enforcement activities will focus on egregious contractors by increasing debarments and criminal actions. Without further guidance, the extent of the City's responsibilities remain unclear. Conversations between this Office and the DIR indicate that the California Code of Regulations (CCRs) is being updated relating to the responsibilities and duties of the awarding body. Cal. Labor Code § 1773.5(a). Given the harsh penalties of SB 7 (i.e. loss of state funding for the City's public works projects), the City should continue to "take cognizance" of violations and "promptly report" suspected violations directly to the DIR as mandated by the California Labor Code. Cal. Labor Code § 1726(a). The City may still require that contractors provide copies of certified payrolls for review and inspection. Cal. Labor Code § 1776(b)(2). In addition, the City is required to follow certain procedures when

¹¹ This was a policy decision made by the Public Works Contracting Group and P&C at a meeting on January 14, 2015.

¹² See SB 854 – Important Information for Awarding Bodies available at <http://www.dir.ca.gov/Public-Works/SB854.html>.

it has determined there has been a violation of California Labor Code sections 1720, *et seq.*, and to withhold contract payments. Cal. Labor Code § 1726(b). This Office will provide guidance on the City's enforcement and monitoring obligations as the California Labor Code and the California Code of Regulations are revised and updated.

III. ADDITIONAL ISSUES

A. Purchase Orders

All calls for bids, contracts, and purchase orders for public works projects must include the required prevailing wage language. Cal. Code of Regs. title 8 §§ 16421(a)(1) and 16433(b). This Office has provided P&C and Public Works with the legally required prevailing wage language for all bids, contracts, and purchase orders.¹³ To comply with SB 7 and the Municipal Code, this Office recommends that the City immediately include this language in all purchase orders issued for public works projects. It is the City's responsibility, as an awarding body, to determine whether prevailing wage applies to a specific project and to include required prevailing wage language in all calls for bids, contracts, and purchase orders for public works projects. *Id.* References to the DIR's website, the City's website, or general language that prevailing wage "may" apply is not legally permissible. *Id.*

As previously described in section IA of this Memorandum, a PWC-100 Form is required on all public works projects regardless of how the project is paid for or awarded. The City must ensure mechanisms are in place to: (1) monitor purchase orders initially issued for maintenance contracts that are less than \$15,000, but have subsequently been amended to exceed \$15,000, thus triggering prevailing wages; and (2) require City staff complete the PWC-100 Form once the dollar threshold is met. P&C and Public Works may wish to develop internal policies and procedures to monitor all purchase orders to ensure compliance with the California Labor Code.

B. Coverage Determinations

Coverage determinations are made by analyzing whether prevailing wages apply to a particular project. In making coverage determinations, this Office relies on the DIR's interpretive decisions¹⁴ and case law regarding prevailing wages. A contractor may sue the City for attorneys' fees, penalties, and wage underpayment on public works projects that are inaccurately designated. Cal. Labor Code § 1726(c)(1). P&C staff has been trained to make basic coverage determinations. However, coverage determinations involving unique facts or a case of first impression should be directed to the assigned deputy city attorney for the department requesting goods or services. Nevertheless, there may be instances where a project presents a case of first impression or a potential grey area of the law. In those instances, this Office may recommend that the department request a coverage determination from the DIR. Cal. Code of Regs. title 8 § 16001(a)(1).

¹³ On October 24, 2014, this Office provided P&C with twenty-seven approved templates, including a template for the legally required prevailing wage language. We updated this language on January 1, 2015, to incorporate changes as a result of SB 854. This Office issued a separate memo addressing changes to the Wage Requirements Language template on March 16, 2015.

¹⁴ These decisions are advisory only and have no precedential value. *See* DLSE Public Works Manual § 2.7.1 (June 2014). The DIR has cautioned that the decisions are current only as of the date of issuance. *Id.*

C. Wage Determinations

The California Labor Code requires the City to specify in its calls for bids, bid specifications, and contract documents the general rate of per diem wages for each craft, classification, or type of worker needed to execute the contract. Cal. Labor Code § 1773.2. In lieu of specifying the rate of wages, the City may include a statement that copies of the prevailing rate of per diem wages are on file at the City's principal office¹⁵ and are available upon request. *Id.* A copy of the prevailing rate of per diem wages must also be posted at each job site. *Id.*

However, if the City knows that a particular craft, classification, or type of worker is not covered by a general rate of per diem wages, the City may request a special determination from the DIR forty-five days prior to the solicitation advertisement date. Cal. Code Regs. title 8 § 16202(a). Additionally, any interested party, including prospective bidders, may directly petition the DIR for wage determinations. Cal. Code Regs. title 8 § 16202(b). After a solicitation is advertised, prospective bidders have twenty days to petition the DIR for review of the wage determinations that are specified or referred to in the solicitations. Cal. Labor Code § 1773.4; Cal. Code Regs. title 8 § 16302. After the petition has been filed, the DIR has twenty days, unless agreed by the parties otherwise, to make a determination and respond. Cal. Labor Code § 1773.4. The City must extend the solicitation closing date pending the DIR's determination. *Id.* The DIR's determination is binding on the City and must be included in the contract. *Id.*

Contractors and subcontractors who contact P&C or EOCP to request craft or classification determinations should be directed to the DIR, the enforcing agency. Moreover, as described above, the California Labor Code and the California Code of Regulations describe the process by which the City and interested parties may request wage determinations.

IV. PENALTIES FOR LABOR CODE VIOLATIONS

The penalty for non-compliance with the California Labor Code is severe. Under SB 7, the City will be prohibited from receiving or using state funding or financial assistance on construction projects if the City has awarded, within the prior two years, a public works project without requiring compliance with the California Labor Code. Cal. Labor Code § 1782(b). In addition, the City may be liable for attorneys' fees, penalties, and wage underpayment on projects that are inaccurately designated. Cal. Labor Code § 1726(c)(1). City representatives who willfully¹⁶ violate the California Labor Code may be guilty of a misdemeanor. Cal Labor Code § 1777.

CONCLUSION

To comply with our Municipal Code and avoid the severe penalties under SB 7, this Office recommends that the City adopt internal policies and procedures to ensure that all City departments are in compliance with the prevailing wage requirements of the California Labor Code. This Office stands ready to answer any legal questions and provide updated legal advice as

¹⁵ P&C staff have informed us that this information will be available electronically in the reception area of P&C. This information should be updated as necessary to capture changes in wage rate determinations.

¹⁶ Willful is defined as voluntary and intentional, but not necessarily malicious. Black's Law Dictionary 609 (10th ed. 2014).

Scott Chadwick, Chief Operating Officer

April 20, 2015

Page 7

the California Labor Code amendments are gradually phased in as a result of SB 854 or other California Labor Code amendments.

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