

**ATTORNEY TO CLIENT
CORRESPONDENCE**

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

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: January 20, 2016

TO: Economic Development & Intergovernmental Relations Committee

FROM: City Attorney

SUBJECT: Application of the Living Wage Ordinance to City Contracts with Allan Company and IMS Recycling Services, Inc.

INTRODUCTION

On October 22, 2015, the Economic Development and Intergovernmental Relations Committee received the annual report from the Living Wage Program, Report to Council No. 15-078 (Oct. 15, 2015). In response to public comment from a representative of the Center on Policy Initiatives (CPI), Council President Lightner and Councilmember Cole requested that this Office review the applicability of the Living Wage Ordinance (LWO) to contracts with Allan Company (Allan Co.) and IMS Recycling Services, Inc. (IMS).

QUESTION PRESENTED

Are the City's contracts with Allan Co. and IMS subject to the LWO?

SHORT ANSWER

No. The LWO does not apply to contracts for services where the City does not expend taxpayer funds.

BACKGROUND

According to City staff, the City currently has contracts with Allan Co. and IMS, which are administered by the Environmental Services Department (ESD): (1) the Miramar Recycling Center Service Contract/Real Property Lease Agreement with Allan Co. (Lease Agreement) and

(2) the Curbside Recyclable Materials Processing and Marketing Contract with Allan Co. and IMS (Curbside Recyclables Contract). As currently drafted, neither of these contracts are subject to the LWO.

1. Lease Agreement

In 1999, the City conducted a competitive process seeking a contractor to operate the Miramar Recycling Center (Recycling Center). The Recycling Center provides a one-stop location for City residents to recycle paper, cardboard, beverage containers, scrap metal, electronics, and appliances, among other items.¹ The Recycling Center is located on property leased by the City from the United States of America, acting by and through the Department of the Navy. Allan Co. is the sublessee and operates the Recycling Center on the City's behalf.² San Diego Resolution R-295859 (Dec. 10, 2001).

The Lease Agreement has been extended seven times, with the latest approval occurring on March 24, 2014, extending the agreement until December 31, 2018. San Diego Resolution R-308837 (Apr. 11, 2014). Under the Lease Agreement, Allan Co. pays the City rent³ plus an annual revenue sharing payment of 1 percent of Allan Co.'s total gross revenues from the sale of recyclable materials accepted at the Recycling Center. The combined annual rent and revenue sharing payments received in Fiscal Year (FY) 2013 and FY 2014 was \$216,171 and \$219,675, respectively. Council Action Exec. Summ. Sheet (Feb. 11, 2014). According to City staff, the annual rent and revenue sharing payment received in FY 2015 was \$220,849. Email from Kenneth Prue to Deputy City Attorney Amanda Guy (Nov. 4, 2015) (on file with the author). The City does not expend funds under the Lease Agreement.

2. Curbside Recyclables Contract

On October 19, 1998, the City Council approved the Curbside Recyclables Contract with Allan Co. and IMS to process, transport, and market the commingled recyclables collected by the City. The City Council subsequently approved four amendments to the Curbside Recyclables Contract. The contract terminates on June 30, 2019. San Diego Resolution R-307492 (June 26, 2012).

The City receives \$27.75 from Allan Co. and \$25.75 from IMS for each ton of recyclable material collected, with the price per ton increasing annually by \$0.25. Council Action Exec. Summ. Sheet (May 4, 2012). In addition, the Curbside Recyclables Contract required both companies to deposit \$25,000 for FY 2013 and \$50,000 for FY 2014 into ESD's Recycling Fund for contamination reduction efforts and a lump sum of \$1,000,000 to the City in consideration of the contract's extension to 2019. *Id.* The City does not expend City funds under the Curbside Recyclables Contract.

¹ Depending on the item, City residents are paid a fee to purchase the recyclables based on market conditions.

² Contracts for the purchase of goods, property, or the leasing of property are expressly exempt from the LWO. San Diego Municipal Code (SDMC) § 22.4215(a)(6). As such, the Lease Agreement is expressly exempt from the LWO. Notwithstanding the exemptions found in Municipal Code section 22.4215, the requirement to pay living wages may be negotiated into the terms of individual service contracts.

³ The rent is adjusted annually based on the Consumer Price Index.

The following analysis considers whether the LWO applies to the Lease Agreement and Curbside Recyclables Contract, both of which are revenue-generating contracts.

ANALYSIS

I. THE LWO DOES NOT APPLY TO SERVICE CONTRACTS WHERE THE CITY DOES NOT EXPEND FUNDS.

A. Language of the LWO

A service contract is “a contract between the *City*⁴ and a *business*, and any applicable subcontracts or franchises, to furnish *services*...[and] includes all contracts for *services* provided through the managed competition program under Charter section 117(c).”⁵ SDMC § 22.4205. Employers covered by the LWO must provide living wages and health benefits to covered employees for work performed under service contracts, City facility agreements, or financial assistance agreements. San Diego Ordinance O-19386 (June 6, 2005). The LWO initially defined a service contract as “a contract between the *City* and a *business* with a combined annual value of payments in excess of \$25,000 and with a term of more than ninety days, and any applicable subcontracts or franchises, to furnish *services*.” SDMC § 22.4205. The City removed the \$25,000 annual contract payment threshold in 2014.

B. Statutory Interpretation of the LWO

The LWO does not define the term “payment.” This leads to some ambiguity as to whether a service contract must involve payments from the City to a contractor for the LWO to apply, or whether payments from a contractor to the City (i.e., revenue-generating contracts), are subject to the ordinance. To answer this question, we turn to the rules of statutory interpretation.

The fundamental rule of statutory construction is to determine the intent of the Legislature in enacting the statute and intent is determined first by the language of the statute itself. *People v. Aston*, 39 Cal. 3d 481, 489 (1985). Each word should be given its plain meaning, unless the word is specifically defined in the statute. *Halbert’s Lumber, Inc. v. Lucky Stores, Inc.*, 6 Cal. App. 4th 1233, 1238 (1992). The words must be read in context, considering the nature and purpose of the statutory enactment, and the statutory framework as a whole. *People v. Cottle*, 39 Cal. 4th 246, 254 (2006). If the meaning is in doubt, the courts will look to the legislative history and the context within which the measure was enacted. *Halbert’s Lumber*, 6 Cal. App. 4th at 1238.

The literal reading of the phrase “a contract between the *City* and a *business* with a combined annual value of payments in excess of \$25,000” anticipates that the City must spend at least \$25,000 for the LWO to apply. SDMC § 22.4205. This interpretation is supported by the dictionary definition of “payment” as “an amount of money that is paid for something.” *Payment*

⁴ Italicized words indicate defined terms in the LWO.

⁵ In 2013, this Office analyzed the applicability of the LWO to security contracts for Qualcomm Stadium. 2013 City Att’y MOL 15 (2013-02; Feb. 6, 2013). City staff thereafter updated the Rules Implementing the LWO to clarify that service contracts are not subject to the LWO unless they involve the expenditure of funds entirely within the City’s control. See Rules Implementing the LWO last updated on July 1, 2014.

Definition. Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/payment> (last visited Jan. 4, 2016). This means that the contract would not be subject to the LWO unless the City spent at least \$25,000 for the services.

Additionally, in interpreting particular words, phrases, or clauses in a statute, the entire substance of the statute or that portion relating to the subject under review should be examined to determine the scope and purpose of the provision containing such words, phrases, or clauses. The words in question must be construed in context, keeping in mind the nature and obvious purpose of the statute in which they appear. *Frazier v. City of Richmond*, 184 Cal. App. 3d 1491, 1496-97 (1986).

Municipal Code section 22.4201 expressly sets forth the legislative purpose and intent for adopting the LWO and for requiring the payment of living wages:

The *City* awards many taxpayer-funded agreements to *businesses* that provide *services* to the public and to the *City*. . . . This Division provides that when agreements, including *service contracts*, . . . are extended by the *City* to *businesses* these taxpayer funded benefits are used in a way that advances the interests of the *City* as a whole, by creating jobs that keep workers and their families out of poverty Businesses that do not fall into any of the above described categories are not required to comply with this Division.

SDMC § 22.4201.

When the legislature has expressly declared its intent, the courts must accept its declaration. *Tyrone v. Kelley*, 9 Cal. 3d 1 (1973); *Moore v. State Bd. Of Control*, 112 Cal. App. 4th 371 (2003). Municipal Code section 22.4201 states that the LWO is intended to apply to service contracts where the City pays a contractor, and not to contracts in which the City receives funds from the contractor.

Other sections of the LWO support the conclusion that the LWO applies to contracts involving the expenditure of City funds. For example, the LWO prohibits service contracts from being subdivided into two or more contracts to avoid paying living wages and also requires covered employers to maintain compliance records for at least three years after the City's final payment on service contracts, financial assistance agreements, or City facility agreements.

SDMC §§ 22.4210(b), 22.4225(d).

A review of the LWO's legislative history also supports the conclusion that the City intended the LWO to only apply to service contracts where the City expends taxpayer funds. In analyzing the Living Wage policies of 71 local governments, City staff noted, "[t]he characteristics of the policies vary, but all intend to ensure that public monies are not used to contract with or subsidize employers who pay poverty-level wages." City Mgr. Report No. 05-090 (Apr. 7, 2005).

A subsequent City Manager's Report documented the City's administration of the LWO's during its first year. City Mgr. Report No. 07-144 (Oct. 10, 2007). City staf freported that service contracts subject to the ordinance in FY 2007 were awarded through the Purchasing and Contracting (P&C) procurement process and involved the expenditure of City funds. *Id.* at Attachment B. Staf falso noted that San Diego Charter section 99 caps the length of service contracts subject to the LWO at five years without a public hearing and two-thirds vote. *Id.* at 4. Charter section 99 applies only to contracts or agreements for the expenditure of funds by the City with a term in excess of five years. 1998 City Att'y MOL 298 (98-14; June 4, 1998). "Other long-term agreements and contracts, where the City receives funds, or where the City is not required to pay out funds, were not intended to be subject to the provisions of Section 99." *Id.* at 5. Thus, the Report's analysis of LWO service contracts in the context of the Charter section 99 leads to the same conclusion that the City did not intend the LWO to apply where the City receives, rather than "pay[s] out," funds.⁶

Given the LWO's plain language with respect to service contracts, the LWO's codified intent, and its legislative history, we conclude that the City did not intend the LWO to apply to service contracts where the City receives payments and does not expend funds to a contractor. Therefore, the Lease Agreement and the Curbside Recyclables Contract are not subject to the LWO's requirements.

CONCLUSION

The plain language of the LWO with respect to service contracts, the LWO's codified intent and the legislative history surrounding the LWO's adoption demonstrate that the LWO does not apply to City contracts in which the City does not expend funds to a contractor. As such, the Lease Agreement and the Curbside Recyclables Contract are not subject to the LWO. However, the City Council may choose to amend the LWO to expand the definition of service contracts to include revenue-generating contracts.⁷ This Office is available to assist in drafting requested amendments or to answer any additional legal questions.

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cc: Nora Nugent, Living Wage Program Manager

⁶ Both the Lease Agreement and the Curbside Recyclable Contract were approved by resolution, rather than ordinance.

⁷ This Office will defer to staf fand the IBA to determine the potential fiscal impact of amending the LWO.