

MEMORANDUM OF LAW

DATE: September 13, 1996

TO: Jack McGrory, City Manager

FROM: City Attorney

SUBJECT: Service Contractor Worker Retention Ordinance

QUESTION PRESENTED

You have asked this office to review a proposed service contractor retention ordinance which was forwarded to you by Dennis J. Hayes, Esq. of Olins, Foerster and Hayes.

SHORT ANSWER

The adoption and enforcement of such an ordinance by the City of San Diego, while not illegal per se under current law, may increase the City's liability exposure. In addition, the ordinance must be drafted in compliance with Charter section 100.

BACKGROUND

Mr. Hayes represents the San Diego-Imperial Counties Labor Council, AFL-CIO, and the Hotel Employees and Restaurant Employees Local 30. He forwarded the ordinance in question to you in support of a request to the Council made during public comment on Tuesday, May 14, 1996, by Jerry Butkiewicz and Barbara Balban regarding the termination of employment of eighty-six (86) concession workers at the San Diego Sports Arena. These employees were fired on April 30, 1996, when a new contractor obtained the food and beverage contract at the San Diego Sports Arena.

Mr. Hayes has requested that the City Council direct the City Attorney to prepare a draft ordinance patterned after similar ordinances in Los Angeles and Washington, D.C. for submission to the City Council to review. The draft ordinance provides that a successor contractor, who was awarded a contract by the City of San Diego to provide similar covered services provided by the terminated contractor, must retain, for a ninety-day transition employment period, covered employees who have been employed by the terminated contractor

for the proceeding eight months or longer at the site or sites covered by the contract. The draft ordinance states that the terms "contractor" or "successor contractor" or "terminated contractor" as used throughout the ordinance means any corporation, joint venture, business partnership, limited liability company, or sole proprietorship, individual or subcontractor, that has one of the following relationships with the City of San Diego:

1. Receives financial assistance in excess of \$25,000 from the City, such as, through revenue bond financing, planning assistance, tax increment financing, tax levies, tax credits or any other form of financial assistance if the purpose of the assistance is economic development or growth; or
2. Is a party to a contract in excess of \$5,000 entered into by the City as a contractor for the principal purpose of furnishing services for the City through the use of service employees; or
3. Is a party to a lease of a City facility, entered into by the City and a lessor for the principal purpose of operating the City facility for the City through the use of service employees; or
4. Is a subcontractor of a party to a contract or lease as set forth in (A) (1- 3), for the principal purpose of furnishing services for the City through the use of service employees.

"Employee" is defined as any service employee of a contractor or successor contractor including but not limited to; hotel employees; restaurant; food service or banquet employees; janitorial employees; security guards; parking attendants; non-professional health care employees; gardeners; waste management employees; and clerical employees. This definition of employees does not include managerial, supervisory or confidential employees, or those persons required to possess an occupational license or certificate.

ANALYSIS

The alleged purpose of this ordinance is to retain incumbent workers who have invaluable knowledge and experience with the work schedules, practices, patrons and plans of the original contractor. The proponents of this ordinance believe that replacing the workers without such experiences decreases the efficiency and results in a disservice to the City and its City assisted projects. They also believe that retaining existing service workers while changing contractors, reduces the likelihood of labor disputes and disruptions and results in the assured continuity of services to citizens who need services. They also believe that it is unacceptable that contracting decisions involving the expenditure of City funds should have the potential effect of creating unemployment and the consequential need for social services.

It should be noted at this point, that the above arguments are those of the proponents of the ordinance and that these views are not universally accepted.

The City has great leeway, consistent with its Charter, in exercising its contractual power

to make certain labor practices applicable to its contractors. Alioto's Fish Co. v. Human Rights Com. of San Francisco, 120 Cal. App. 3d 594, 605 (1981). While there are no current cases interpreting this type of ordinance, we believe that its provisions fall within the court's holding in the Alioto case.

However, a provision in a contract or lease agreement that requires a contractor to either hire, fire or retain specific individuals in the work force could very well be interpreted by a court as indicating that the contractor is not an independent contractor, as that term is used in the law, but is in fact an employee. As the courts have indicated, the existence of the right of control and supervision over employees establishes the existence of an agency as opposed to a principle and independent contractor relationship. Malloy v. Fawn, 37 Cal. 2d 356, 370 (1951). Another general rule is that, absent statutory authority, an individual does not have a claim to benefits as a governmental employee. County of San Diego v. Milotz, 46 Cal. 2d 761, 767 (1956); Kennelly v. Lowery, 64 Cal. App. 2d 903, 905 (1944); Hallinan v. Melon, 218 Cal. App. 2d 342, 348 (1963). Therefore, under these circumstances, the legal status of the contractor and the contractor's employees is uncertain.

If not for our recent experience with the employees of a contractor at the San Diego Convention and Performing Arts Center ("CPAC"), we would conclude that the employees under such contracts would never allege to be City employees. However, in late 1993, a group of employees of CPAC alleged that they were in fact entitled to City benefits upon termination of their employment with the independent contractor because the City of San Diego exercised control over certain aspects of their employment. Rather than risk disturbing the current law in California with a case that contained unfavorable facts, the City of San Diego settled with the disgruntled employees. Under the arrangement proposed by this ordinance, it is conceivable that employees employed by a contractor under the authority of this ordinance could allege that they are in fact employees of the City of San Diego and entitled to City of San Diego benefits.

The ordinance may also have the unintended consequence of increasing the City's exposure to liability. At the present time, the law provides some protection for the City for the acts of an independent contractor and the contractor's employees. A contractor could reasonably argue that the City of San Diego ought to be responsible for any act of negligence committed by the contractor's employees if the City required the contractor to employ that individual pursuant to the ordinance.

We are also concerned that this ordinance is broad enough to encompass contracts covered by Section 100 of the San Diego City Charter. That section states in part: "No officer or employee of the City shall aid or assist a bidder in securing a contract to furnish labor or material or supplies at a higher price or rate than that proposed by any other bidder . . ." The purpose of this Charter section is to protect against favoritism, improvidence, extravagance, fraud and corruption, and to assure that the City gets the most work for the least money. Domar Electric, Inc. v. City of Los Angeles, 41 Cal. App. 4th 810, 826 (1995). Requiring a contractor to employ certain individuals at a preset rate of compensation, as this ordinance requires, may cause the cost of the contractor's bid to be increased accordingly. A rejected contractor, using the principles espoused in the Domar case, could challenge the awarding of a contract for services on the basis that the requirement to retain the former contractor's employees is an immaterial aspect

of the contract causing an unjustifiable expense to a bidder. Under such circumstances a court could reasonably infer that service worker retention provisions in an ordinance or a lease are in conflict with the strict mandates of Charter section 100. To avoid this difficulty, the ordinance should be amended to provide that any contract containing such a provision will be reviewed for compliance with Charter section 100 prior to its award. Depending upon the specific contract, this requirement may be difficult to meet.

CONCLUSION

At the present time, there appears to be no legal impediment to the adoption of the proposed ordinance. However, its enactment may very well increase the City's exposure to liability. Additionally, the ordinance must be drafted in a manner that complies with the provisions of Charter section 100.

JOHN W. WITT, City Attorney

By

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Assistant City Attorney

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cc Honorable Mayor Susan Golding
Councilmember Juan Vargas
Councilmember Barbara Warden
Mac Strobl, Director of Intergovernmental Relations