

Constitutional Issues Relating to Buy Local and Local Hiring and Contractor Preferences

By

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I. INTRODUCTION

In recent years, city council members and local taxpayers look to legal counsel for analysis of methods for increasing participation of local businesses and local workers on city public works projects. This paper sets forth analysis of the basic legal requirements and constraints relating to potential options to fulfill this stated goal.

II. CONSTITUTIONAL ISSUES RELATING TO BUY LOCAL CONTRACTOR PURCHASING PREFERENCES.

A. Introduction

To determine the constitutionality of a local purchasing preference law (See attached **Exhibit A** for an example ordinance), three clauses of the U.S. Constitution must be considered: the Commerce Clause, the Privileges and Immunities Clause, and the Equal Protection Clause. As discussed herein, when a local government acts as “market participant” expending its own funds to purchase goods and services, a local purchasing preference will be valid under the Commerce Clause. Likewise, when a local purchasing preference does (1) not burden a fundamental privilege protected by the Privileges and Immunities Clause; or (2) if it does burden a fundamental privilege, but there is a “substantial reason” for discrimination against citizens of another state, then the preference will not violate the Privileges and Immunities Clause. Finally,

since non-local vendors are not a suspect classification, to survive an Equal Protection Clause challenge, a preference law need only demonstrate that the classification (e.g., local vs. non-local businesses) is rationally related to a legitimate governmental purpose, such as encouraging local industry.

B. The Commerce Clause

Constitutional challenges against local purchasing preferences arise primarily from the Commerce Clause (Article I, Section 8 of the U.S. Constitution). The “dormant” or “negative” Commerce Clause affects local purchasing preferences in that it prohibits state and local governments from taking actions that burden interstate commerce. *See, e.g., Healy v. Beer Institute, Inc.* (1989) 491 U.S. 324, fn. 1. There is, however, a well-recognized exception to the dormant Commerce Clause for “market participants,” that was established by the Supreme Court in *Hughes v. Alexandria Scrap Corp.* (1976) 426 U.S. 794. In *Hughes*, a Maryland program offered money to scrap processors who removed abandoned cars or “hulks” from state roads. Stricter documentation requirements were imposed on out-of-state processors than on in-state processors. *Id.* at 797-801. Finding that Maryland entered the hulk market as a purchaser, not a regulator, the Court held that the state needed no independent justification for its action. *Id.* at 809. “Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.” *Id.* at 810. This “market participant exception” means that when a state or local government acts in the market like a business or customer, rather than a regulator, the government may favor certain customers or suppliers. The government must be expending its own funds in order to be considered a market participant rather than a regulator. *White v. Massachusetts Council of Construction Employers, Inc.* (1983) 460 U.S. 204, 214.

The State of California’s Buy American Act (Cal. Govt Code §§ 4300-4305) (the “Act”) was found to be unconstitutional by the California Court of Appeal in *Bethlehem Steel Corp. v. Board of Commissioners of the Dept of Water & Power of the City of Los Angeles* (1969) 276 Cal.App.2d 221. The Act requires that contracts for construction or for the purchase of materials for public use be awarded only to those who agree to use or supply materials manufactured in the United States. *Id.* at 223-224. The Court found that the Act unconstitutionally encroached on

exclusive power of the federal government. The next year, the California Attorney General concluded that the California Preference Law (Cal. Govt Code §§ 4330-4334) was similarly unconstitutional because it “affects foreign commerce as much as did the...Act.” 53 Ops.Cal.Atty.Gen. 72, 73 (1970).

In *Reeves, Inc. v. Stake* (1980) 447 U.S. 429, the Supreme Court held that a policy of the South Dakota Cement Commission was constitutional. Due to a cement shortage, the State Cement Commission enacted a policy that required a state cement plant that had previously produced cement for in-state residents and out-of-state buyers to now confine its sales only to in-state residents. *Id.* at 429. This policy caused an out-of-state buyer to drastically cut its distribution. *Id.* at 432-433. The Court found that South Dakota “unquestionably” fit the definition of a market participant and that the resident preference program was valid. *Id.* at 440.

In *Big Country Foods, Inc. v. Board of Education of the Anchorage School District, Anchorage, Alaska* (1992) 952 F.2d 1173, the Ninth Circuit held that a policy that gave a 7% bidding preference to in-state milk harvesters was valid under the market participant exception to the dormant Commerce Clause.

C. The Privileges and Immunities Clause

The Privileges and Immunities Clause, in the 14th Amendment to the U.S. Constitution, comes into play with respect to local purchasing preferences, although it is somewhat more applicable to local hiring preferences. The Privileges and Immunities Clause prevents states and local governments from discriminating against citizens of other states. This Clause only protects individuals, however, not corporations. *Western and Southern Life Ins. Co. v. State Bd. of Equalization of California* (1981) 451 U.S. 648, 656. Therefore, since local purchasing preferences affect corporations that sell goods, not individuals that sell goods, this Clause is less likely to provide a substantial basis for a challenge to a local purchasing preference law.

Notwithstanding this applicability issue, in order to overcome a Privileges and Immunities Clause challenge, a local purchasing preference must (1) not burden a fundamental privilege protected by the Clause; or (2) if it does burden a fundamental privilege, there must be “substantial reason” for discrimination against citizens of another state. *United Bldg. & Construction Trades Council of Camden County & Vicinity v. Mayor and Council of the City of*

Camden (1984) 465 U.S. 208, 222. Moreover, “[a]s part of any justification offered for the discriminatory law, nonresidents must somehow be shown to ‘constitute a peculiar source of the evil at which the statute is aimed.’” *Id.* (quoting *Toomer v. Witsell* (1948) 334 U.S. 385, 396). The Court noted, however, that “[e]very inquiry under the Privileges and Immunities Clause ‘must ... be conducted with due regard for the principle that the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures.’ [citation] This caution is particularly appropriate when a government body is merely setting conditions on the expenditure of funds it controls.” *United Bldg., supra*, 465 U.S. at 222-223.

In 1989, the California Attorney General determined that a county policy that gave a 5% preference to local vendors did not violate the Privileges and Immunities Clause under certain circumstances. The contract had to be for supplies that were either (1) not subject to the requirement that preference be given to the lowest responsible bidder (Cal. Govt Code § 25482), or (2) in a general law county that employs a purchasing agent. In making this finding of constitutionality, the Attorney General noted several important factors. First, the county was expending its own funds. Second, neither “the opportunity to be employed by or to contract with the government is...a fundamental interest explicitly or implicitly guaranteed by the Constitution.” 72 Ops.Cal.Atty.Gen. 86 (1989). Therefore, the Equal Protection Clause of the 14th Amendment required only that there be a rational relationship between the classification and a legitimate government purpose. *Id.* The Attorney General found that the classification of vendors inside and outside the county was “rationally related to the legitimate governmental purpose of economic development.” *Id.*

D. The Equal Protection Clause

The Equal Protection Clause of the 14th Amendment has also been used to attack local purchasing preferences. Under the Equal Protection Clause, no state may “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, Sec. 1. An equal protection analysis only requires strict scrutiny of a legislative classification when the classification impinges on certain fundamental rights or operates to the peculiar disadvantage of a suspect class; otherwise, a rational relationship test is used. 13 Cal.Jur.3d Constitutional Law § 366. This test asks “whether the classification is rationally related to a legitimate governmental purpose.” *Id.* Regarding government contracts, the Supreme Court has stated that “like private

individuals and businesses, the government enjoys the unrestricted power to produce its own supplies, to determine with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.” *Perkins v. Lukens Steel Co.* (1940) 310 U.S. 113, 127. This principle appears to leave little room for an equal protection challenge where no suspect class is involved. Since non-local vendors are not a suspect class, the Equal Protection Clause does not present a likely obstacle to local purchasing preference laws. If the preference reflects a legitimate interest of the local governments, such as encouraging local industry or enhancing the local tax base, the preference should be valid.

E. Local Preference Case Study – City of Riverside

In 1976, the City of Riverside amended their then existing Purchasing Resolution to add a provision to award a contract to a local bidder who was not the lowest bidder if the local bidder’s quote does not exceed one percent of the sales taxable portion of the lowest bid or when it can be demonstrated that the cost of dealing with the lower out-of-town bidder would exceed the local bid. (Resolution No. 12867)

In 1991, when the City of Riverside revised and revamped its Purchasing Resolution, they carried over the one percent sales tax provision but clarified it was for the purchase of goods. Eleven years later, desiring to award more contracts to local bidders, the City retained the services of John Husing, Ph.D., of Economics & Politics, Inc. (“Husing”) to analyze the economics and viability of establishing a five percent (5%) local preference.

Husing’s study found, among other things, that: a) purchasing products from local vendors allows for the money paid to circulate through the local economy longer, thereby stimulating the local economy as opposed to purchases made outside the City which money would only serve to stimulate other economies; b) every new dollar entering into the City creates from 1.97 to 2.61 times more total economic activity and household income before it “leaks” away to other geographic areas; c) local vendors would tend to use other local vendors, thus multiplying and continuing to expand the local economy; d) the Inland Empire is not as mature a region as Los Angeles and Orange Counties, and by increasing the local preference it would help increase that maturity in the area, draw and return more businesses including professional

services, and expand the local economy; and e) giving local vendors a five percent (5%) preference would be a modest way in which to stimulate and expand the City's economy.

Based on that study, the City amended its Purchasing Resolution (Resolution No. 20363) to establish a preference for the procurement of goods from a local vendor, define a qualified local vendor and to award a contract to a local vendor provided the difference between the local responsible bidder and the lowest responsible bidder does not exceed five percent (5%) of the lowest responsible bidder. To qualify as a local vendor, the bidder must certify at the time of bid the following:

- a) it has fixed facilities with employees located within the City limits;
- b) it has a business street address (Post Office box or residential address shall not suffice to establish a local presence);
- c) all sales tax returns for the goods purchased must be reported to the State through a business within the geographic boundaries of the City and the City will receive one percent (1%) of the sales tax of the goods purchased; and
- d) it has a City business license.

The current Purchasing Resolution No. 21182, adopted in June 2006, carried over the provisions of Resolution No. 20363 and the City currently has a five percent (5%) preference.

III. CONSTITUTIONAL ISSUES RELATING TO LOCAL HIRE PROGRAMS.

A. Mandatory Local Participation.

1. Legal Requirements for Mandatory Local Participation
 - a. Requirements for Use on *Private* Development

With the goal of increasing employment opportunities for residents, cities and counties nationwide have established programs to encourage and, in some cases, to require private developers of construction projects to hire locally for skilled and unskilled labor. For example, the City of Pasadena recently adopted an ordinance (See attached **Exhibit B**) mandating that

private developers who receive city financial assistance, in the form of grants financing, revenue sharing, provision for the sale of city property at less than market rate, fee waivers or other forms of financial assistance, to enter into a local hire agreement establishing a minimum percentage of construction-related payroll or equivalent that must be accomplished with resident employee hours either during construction or as part of on-going, non-temporary employment following completion of the project. Pasadena's local hire program is voluntary for private development not receiving city financial assistance; however, participating developers receive a partial rebate of the city's construction tax. Unlike private developers, who are free to negotiate the terms and price of construction contracts, the requirement for the city to award construction contracts to the lowest responsive bidder, makes use of local programs difficult. City council members and taxpayers may not appreciate that competitive bidding rules make it difficult to require a mandatory number of local firms or workers and make it difficult to predict the results of such well-intentioned programs.

b. Requirements for Use on *Public Works*

Local hiring ordinances mandating use of local contractors and workers on public works projects have historically been faced with constitutional scrutiny at the federal and state level.

(1) Commerce Clause – Not an Issue if Only City Funds Used

The Commerce Clause, Article I, § 8, cl. 3 of the United States Constitution prevents state and local governments from interfering with Congress's power to regulate commerce among the states. In *White v. Massachusetts Council of Const. Employers, Inc.*, 460 U.S. 204 (1983), the mayor of Boston issued an executive order requiring all projects funded in whole or in part by city funds to be performed by a work force at least half of which were city residents. The Supreme Court held that when a state or local government expends only its own funds for a public project, the city acted as a market participant and was not subject to the restraints of the Commerce Clause. Thus, local participation programs can rarely be used when federal or state funds are involved in project funding.

(2) Privileges and Immunities Clause – Must Have a “Substantial Reason” for the Program and the Program Must be Narrowly Tailored to Address Underlying Reason

The Privileges and Immunities Clause, Article IV, § 2, of the United States Constitution prevents a state from discriminating against out-of-state citizens. In *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*, 465 U.S. 208 (1984), the Supreme Court extended the privileges and immunity protection to municipal residency classifications. Thus, there must be a "substantial reason" for discrimination against citizens of another state when awarding local public contracts. Nonresidents must be the cause of a "particular evil" and the local hire law must bear a close relationship/be narrowly tailored to address the particular evil. The Supreme Court held that Camden's ordinance requiring 40% of employees of contractor and subcontractors to be city residents, was subject to the strictures of the Privileges and Immunity clause and the ordinance discriminated against nonresidents but it was impossible to evaluate the city's justification for the local hire program to determine if there was a "substantial reason" for the program.

In *Hicklin v. Orbeck*, 437 U.S. 518 (1978), the Supreme Court analyzed a constitutional challenge to the "Alaska Hire" law, which was an extremely broad local hire law. The Supreme Court held that the Alaska Hire law violated the Privileges and Immunities Clause because it found that Alaska's unemployment was not caused by non-resident jobseekers, but rather by lack of education, lack of training, or geographic remoteness. Moreover, even if non-residents could be shown to be "a peculiar source of the evil" at which the Alaska Hire law was aimed, the statute would still be invalid because the hiring preference was given to all Alaskans, not just unemployed Alaskans. The Supreme Court noted that the means by which Alaska discriminates against non-residents "must be more closely tailored to aid the unemployed the [Alaska Hire law] is intended to benefit." *Id.* at 528. The Alaska Hire law was also overly broad in terms of what businesses fell within its scope, and effectively attempted to mandate that all businesses that benefit in any manner from Alaska's development of oil and gas bias their employment practices in favor of Alaska residents.

Thus, in order withstand strict scrutiny analysis any local hire or local business contracting program that mandates a specified percentage of local participation, must be supported by a study supporting the substantial reason for the program and a nexus showing the program is narrowly tailored to correct the underlying reason for the program. See the San Francisco program (attached as **Exhibit C**) discussed below for the information that must be

included in a disparity study to support a local participation program and note that the San Francisco program has not been tested by the courts.

(3) Privileges and Immunities Clause – Must Have a “Substantial Reason” for the Program and the Program Must be Narrowly Tailored to Address Underlying Reason

The California Constitution, Article XI, § 10 (b) provides that, a city or county, including any chartered city or chartered county, or public district, may not require that its employees be residents of such city, county, or district; except that [after employment] such employees may be required to reside within a reasonable and specific distance of their place of employment or other designated location. In *Cooperrider v. San Francisco Civil Service Commission*, 97 Cal.App.3d 495 (1979), the Court of Appeal held the city’s one-year residency requirement for city job applicants was unconstitutional because it violated Article XI, § 10 (b), which protects the right to migrate, resettle, find a new job and start a new life and violated the right to seek public employment without discrimination under the equal protection clause Article IV, § 16. Since two fundamental rights were at issue, the court applied a strict scrutiny test, requiring that the city demonstrate a compelling state interest was advanced by the policy and that no less intrusive means could achieve the same result. The city offered evidence only as to its attempts to use city funds to prevent unemployment among the impoverished residents of the city and its affirmative action policy, but was not able to establish that there was a rational relationship, let alone a compelling interest, between those objectives and the one-year residency requirement. In light of this case, durational residency requirements are typically minimal, 2 weeks to 3 months when part of a local participation program, if duration of residency is addressed at all.

(4) Local Hire Requirement Cannot Restrain Freedom of Association or Require Unfair Labor Practices

In *O’Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996) a towing firm sued after it was dropped from the city’s list of available contractors when it refused to contribute to the city mayor’s reelection campaign. The Supreme Court held that First Amendment protections afforded to public employees against being discharged for refusing to support a political party or candidates also extended to independent contractors.

Based on the ruling in the *O'Hare* case, many attorneys recommend that a local hire program include exceptions for union contractors who are already bound by collective bargaining agreements or project labor agreements or date of last employment arises from the terms of the collective bargaining agreement to which contractor and subcontractors are signatories.

29 USC 158(b) provides that it shall be an unfair labor practice for a labor organization or its agents: (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title [Section 157 grants employees the right to organize, engage in concerted activities, etc.] . . . (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section [Section 158(a)(3) makes it an unfair labor practice for an employer to discriminate . . . in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .]

Generally, it is a violation of Section 8(b) of the National Labor Relations Act (28 U.S.C. 158(b)) for a union to engage in a systematic and continuous pattern of making referrals in violation of the terms of a collective bargaining agreement without a legitimate purpose. *See, National Labor Relations Board v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 433*, 600 F.2d 770, 777 (9th Cir. 1979), *see also, Laborers and Hod Carriers Local No. 341*, 564 F.2d 834, 839-40 (9th Cir. 1977).

Although we have not found a case directly on point, the requirement to abide by a local hiring ordinance may provide a legitimate purpose and thus no unfair labor practice. Although criminal liability may arise from an unfair labor practice, generally, criminal liability attaches only when there is an unfair labor practice that results in physical injury.

(5) Mandatory Local Business Participation Requirement May Violate Charter Requirement to Award to Lowest Bidder Unless Exceptions Apply

In *Associated General Contractors v. City and County of San Francisco*, 813 F.2d 922 (1987), the Ninth Circuit evaluated the city ordinance, as it existed at the time, giving local firms a 5% bidding preference for contracts put out to bid and found that the ordinance was invalid

because it conflicted with the city charter requirement that the contract be let to the lowest reliable and responsible bidder and did not fall within any of the charter exceptions to competitive bidding. The Ninth Circuit rejected the argument that determination of a bidder's responsibility includes the determination that a bidder is "socially responsible" and able to comply with a local hire requirement.

Thus, it is unlikely that a public entity can mandate use of local businesses or local workers at specified levels without modifying a charter that requires award to the lowest responsibility bidder, or unless there is an existing charter exception for award to other than the low bidder (such as a reciprocal preference similar to Public Contract Code Section 6107).

(6) Local Participation Program May Not Violate Equal Protection Clause If Supported by a Substantial Reason and the Program is Narrowly Tailored

In *Associated General Contractors v. City and County of San Francisco*, 813 F.2d 922 (1987), the Ninth Circuit also held that the 5% preference to local firms did not violate the equal protection clause by promoting local businesses at the expense of nonresident competitors because "the city may rationally allocate its own funds to ameliorate disadvantages suffered by local businesses, particularly where the city itself creates some of the disadvantages". The Ninth Circuit noted that two of the ordinance's findings are relevant to this issue: 1) local businesses are at a competitive disadvantage with businesses from other areas because of the higher administrative costs of doing business in the city (e.g. higher taxes, higher rents, higher wages and benefits for labor, higher insurance rates, etc.); and 2) the public interest would best be served by encouraging businesses to locate and remain in San Francisco through the provision of a minimal preference. The court found that the preferences given local businesses were "relatively slight" as the local businesses got only a 5% preference, there were no goals, quotas or set-asides. The preference applied only to those transactions where the city itself was a party. Moreover, the definition of a local business was rather broad; foreign businesses can become local businesses by acquiring fixed offices or distribution points within the city and paying their permit and license fees from a city address. Thus, any business willing to share some of the burdens of a San Francisco location (higher rents, wages, insurance etc.) can enjoy the benefits of the preference.

(7) City and County of San Francisco Ordinance

Prior to the enactment of the San Francisco Local Hiring Policy for Construction (Policy), San Francisco required contractors "to make a good faith effort" to hire qualified individuals who are residents of the City and County of San Francisco to comprise not less than 50% of each contractor's total construction workforce, measured in labor work hours, and to give special preference to minorities, women, and economically disadvantaged individuals. A 2010 study by Chinese for Affirmative Action and Brightline Defense Project found that, since 2003, the average local hire figures on city-funded construction was less than 25% and actually dipped below 20% for 2009.

On December 14, 2010, the San Francisco Board of Supervisors passed an ordinance establishing the San Francisco Local Hiring Policy for Construction, in order "to advance the city's workforce and community development goals, removing obstacles that may have historically limited the full employment of local residents on the wide array of opportunities created by public works projects, curbing spiraling unemployment, population decline, and reduction in the number of local businesses located in the city, eroding property values, and depleting San Francisco's tax base." The San Francisco Policy requires contractors and their subcontractors performing public works projects for the City and County of San Francisco worth \$400,000 or more to hire local San Francisco residents and extends to projects at sites located up to 70 miles beyond the jurisdictional limits of San Francisco. The San Francisco program requires an initial local hiring requirement with a mandatory participation level of 20% of all project work hours within each trade performed by local residents, with no less than 10% to be performed by disadvantaged workers. Subject to periodic review, the mandatory participation level increases annually over 7 years at increments of 5%, up to a mandatory participation level of 50%, with no less than one-half to be performed by disadvantaged workers. The San Francisco program authorizes the negotiation of reciprocity agreements with other local jurisdictions that maintain local hiring programs. The San Francisco Program exempts: 1) Projects using federal or state funds if application of the Policy would violate federal or state law, or would be inconsistent with the terms or conditions of a grant or contract with an agency of the United States or the State of California; 2) Project work hours performed by residents of states other than California (to prevent a challenge based on the Privileges and

Immunity Clause of the U.S. Constitution); and 3) Projects where the local hire program conflicts with an existing Project Labor Agreement or collective bargaining agreement (to prevent a challenge based on the *O'Hare* decision).

While it is understandable for San Francisco to want to increase local jobs, favoring local workers can negatively impact neighboring cities that are also experiencing high unemployment levels. According to the December 2010 figures by the California Employment Development Department, six of the nine Bay Area Counties have higher unemployment rates than, San Francisco which was at 9.2%. While local hiring goals are laudable, such goals should not be accomplished by introducing new obstacles for the regional workforce; the Bay Area is a mobile and economically interdependent region and it does not benefit from pitting neighboring communities against each other. A similar analysis applies to the Los Angeles basin.

B. Local Participation Goals with Good Faith Efforts.

Because of the legal limitations and practical difficulty of implementing mandatory programs set forth above most local subcontractor and hiring ordinances relating to public works projects require bidders to document a "good faith" effort to meet the local participation goal, but do not require that bidders meet the goal in order to receive award of the contract.

1. California Supreme Court Review of a Targeted Outreach Program

In the 1980's, the City of Los Angeles City Council adopted a policy to ensure that minority (MBE) and women-owned (WBE) businesses have the maximum opportunity to participate in the performance of contracts and subcontracts. The Los Angeles program examined the adequacy of bidders' good faith in conducting subcontractor outreach efforts to obtain MBE, WBE and other business enterprises (OBE) utilizing 10 factors including selecting specific work items for subcontracting, advertising, good faith negotiations, etc. Although the city established a percentage "goal" for MBE and WBE participation, the program made clear that failure to meet the stated goal would not disqualify a bidder. Only bidders who failed to document good faith efforts to obtain MBE/WBE/OBE subcontractor participation would be disqualified.

The California Supreme Court case of *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal.4th 161 (1995) expressly held that a Los Angeles City charter provision requiring award of contracts to the “lowest and best regular responsible bidder” did not bar the city from requiring bidders to comply with a subcontractor outreach program that involved no bid preferences, set-asides or quotas. The Court reviewed provisions of the LA City Charter that expressly stated that “bidders may be required to submit with their proposals detailed specifications of any item to be furnished, together with guarantees as to efficiency, performance ... and other appropriate factors” and that a local bidder preference may be allowed if provided for by ordinance. Since these charter provisions neither expressly authorize or forbid the city from adopting a subcontractor outreach requirement, the Court indicated that the validity of the program must be ascertained with reference to the purposes of competitive bidding, which are “to guard against favoritism, improvidence, extravagance, fraud and corruption to prevent waste of public funds; and to obtain the best economic result for the public”. The Court found no conflict between the city’s outreach program and the purposes of competitive bidding, which necessarily imply equal opportunities to all. The Court discussed that despite the lack of empirical evidence it was not unreasonable for the city to conclude that in the absence of mandated outreach, prime contractors will tend to seek out familiar subcontractors and therefore their bids may or may not reflect as low a price had reasonable outreach efforts been made.

2. Discussion

A local contractor/worker outreach program with non-mandatory goals and mandatory good faith efforts would likely be subject to the same level of review as the MBE/WBE program examined by the *Domar* court and should be structured in a similar manner in order to withstand a potential legal challenge. In fact, the majority of local participation programs implemented by California local agencies use a good faith effort model. These programs are often initially well received because they establish a public policy for use of local firms and workers. The results of the programs, however, are often criticized because it is difficult to structure a good faith effort program and achieve significant levels of local participation. Some critics view good faith efforts as meaningless and push for mandatory programs.

Programs which require review of bidders' documentation of good faith efforts can also complicate the bidding and contract award process and may provide new grounds for disappointed bidders to protest proposed contracts.

C. Bonus/Incentive Payments for Local Participation.

In light of the shortcomings of good faith effort outreach programs, charter cities may wish to explore the use of incentives, such as a line item allowance in the bid and contract, which can be used to fund bonus/incentive payments based on documented levels of actual local participation achieved throughout the duration of the project discussed in the next section.

1. California Constitutional Prohibition on Gift of Public Funds

Article XVI, Section 6 of the California Constitution prohibits the legislature from making or authorizing the making of any gift of public money or thing to an individual or corporation. California Government Code Section 82028(a) defines "gift" as "any payment that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received..." The gift prohibited by the Constitution includes voluntary transfers of personal property without consideration, as well as "all appropriations of public money for which there is no authority or enforceable claim, even if there is a moral or equitable obligation." 58 Cal. Jur. 3d State of California § 91.

To determine whether an appropriation of public funds is a "gift," the primary question is whether the funds are to be used for a public purpose or a private purpose; if the funds will be used for a public purpose, the appropriation is not a gift. 45 Cal. Jur. 3d Municipalities § 172. "The benefits to the state from an expenditure for a public purpose is in the nature of a consideration; therefore, the funds expended are not a gift, even though private persons are benefitted from them." *Id.* What constitutes a public purpose is generally left to the discretion of the legislature, and courts will not disturb such a determination if it has a reasonable basis. *Sturgeon v. County of Los Angeles* (2008) 167 Cal.App.4th 630, 638-639 (*review denied*).

2. Charter City Exemption

The California Constitutional prohibition on gifts of public funds, however, does not apply to charter cities. *Mullins v. Henderson* (1946) 75 Cal.App.2d 117, 129; *Sturgeon*, 167 Cal.App.4th at 637; 45 Cal. Jur. 3d Municipalities § 172.

3. Payments for a Public Purpose are Not Gifts

A local contractor/local hire program that gave a bonus to the contractor or its key personnel at project closeout based on local participation levels on the project would likely not be viewed as a gift of public funds because the bonus payment would be for a public purpose, even though the contractor/individual would also benefit. “A mere incidental benefit to an individual does not convert a public purpose into a private purpose, within the meaning of the rule.” 45 Cal. Jur. 3d Municipalities § 172. The rationale for a local hiring program is to use taxpayer dollars that are invested into public projects in the city while also increasing the economic strength of the city by providing city residents with an opportunity to be employed on those projects. This rationale would likely be determined to be a public purpose. Rewarding a contractor at the end of such a project with a bonus for actually using local hires on the project serves that public purpose by encouraging the contractor to look locally for new hires whenever possible. The fact that the contractor also benefits is a consequential advantage to the program, but not its purpose. The city’s concern is the public—the local residents, and in turn, the entire city economy—that stands to gain from a local hiring program.

Examples of expenditures that have been deemed public purposes by the courts include: providing inhabitants of a municipality with utility services; public housing projects for low-income families; and a joint study by two municipalities of common sewage problems. *County of Riverside v. Whitlock* (1972) 22 Cal.App.2d 863; *Housing Authority of City of Los Angeles v. Shoecraft* (1953) 116 Cal.App.2d 813; *City of Oakland v. Williams* (1940) 15 Cal.2d 542.

One case that is particularly analogous to paying bonuses for using local contractors/hires is *Sturgeon v. County of Los Angeles* (2008) 167 Cal.App.4th 630. In *Sturgeon*, the plaintiff challenged the validity of benefits provided by the County to superior court judges. The challenge was based in part on the argument that the benefits were an unconstitutional gift of public funds. The court of appeal held that the benefits given to the judges were not gifts of public funds. The court noted that most earlier California cases had found that a public

employer's provision of benefits to its employees, "including bonuses for work already performed," serve public, not private purposes. *Id.* at 638. In *Sturgeon*, the court found that the benefits to judges helped with recruitment and retention of judges, and therefore the benefits were not gifts under the meaning of Article XVI, Section 6 of the Constitution.

A bonus paid to a contractor for using local contractors/hires helps a city's economy by incentivizing that contractor to look to city residents first when subcontracting and job openings arise on a project, which benefits a city and its residents. Therefore an incentive bonus for local hires should not be viewed as a gift of public funds, because it is an expenditure for a public purpose—the contractor is giving consideration (utilizing city residents) for the payment of public funds (the bonus).

IV. SUMMARY

A. Mandatory Local Participation.

In order to survive a challenge under the U.S. Constitution Commerce, Privileges and Immunity and Equal Protection clauses, a mandated "preference" (as opposed to a "goal") for local participation on a city public works project:

- 1) Requires project funding from city funds only (no federal, state or grant funding);
- 2) Requires a "substantial reason" for the local preference, e.g., nonresidents must be the cause or a particular "evil" (such as similar preferences legislated by other states or municipalities, or a disparity study that shows local contractors or workers are not getting their expected share of city public work contracts);
- 3) Must be narrowly tailored to address the particular evil or address the local disadvantage;
- 4) Must indicate that the program does not apply if it violates federal or state law or a grant so as to jeopardize funding for the project;

- 5) Local residence requirement cannot impair California Constitutional right to resettle and find a job (Article XI §10(b))
- 6) Must not conflict with charter provisions requiring award to low bidders; and
- 7) With respect to local hiring, cannot restrain freedom of association or require unfair trade practices, (i.e., should either provide exceptions for union hall hiring practices, however disparate treatment could raise equal protection challenges by non-union contractors) or the city should attempt to obtain union cooperation *before bidding* a project with a local participation program or use only with negotiated contracts.

B. Local Participation Goals with Good Faith Efforts.

Legal requirements for a program that requires bidders to undertake good faith efforts to meet a goal for local firm/resident participation on a city project include (See **Exhibit D** for sample):

- 1) Establishes a goal for local participation, but does *not* require bidders to meet the goal,
- 2) Requires *all* bidders, including local firms, to undertake subcontractor/supplier and worker outreach,
- 3) Requires bidders to undertake outreach to *all* qualified subcontractors, suppliers and workers including, but not limited to, local firms and individuals, and
- 4) Compliance with any charter or ordinance requirements for approval by the city council.

C. Bonus/Incentive Payments for Local Participation.

The California constitutional prohibition against gifts of public funds does not apply to charter cities unless there is specific language in their charters prohibiting such use of funds. The test for whether payments of public funds are a gift is whether the funds are used for a public purpose, regardless of whether a private person also benefits from the expenditure. Incentive payments tied to the level of participation local firms and workers on a city project reasonably appear to advance a public purpose of improving the lives of city residents, improving the revenue of local businesses and improving the overall local economy; therefore a bonus paid to a firm or individual to serve that public purpose would likely not be considered a gift waste of public funds.

V. FURTHER CONSIDERATIONS

- A. Determine the scope and nature of the local participation program
- B. Gather statistics from federal, state and local entities regarding labor statistics, sales tax revenues, etc. to support need for program even if a mandatory participation level program is *not* used to support the program as consistent with the basic policies of competitive bidding
- C. Adopt a resolution, ordinance or similar legislative action on the public benefit, specifically addressing the fact that there will be no gift of public funds if an incentive/bonus payment is part of the program.
- D. Consider methods of measuring results
- E. Consider incorporating a sunset date and reporting requirements for projects where no incentive provided as well as projects with local business/hire program, and review to determine whether program/bonus increased use of locals

TABLE OF EXHIBITS

- Exhibit A** -- City of Pasadena Local Purchasing Preference –
Municipal Code Chapter 4.08, Sections 15, 20 and 46
- Exhibit B** -- City of Pasadena – First Source Hiring –
Municipal Code Chapter 14.80
- Exhibit C** -- City and County of San Francisco – Local Hiring Policy for Construction –
Administrative Code Section 6.22(G)
- Exhibit D** -- City of Riverside – City Council Memorandum Regarding Community
Benefit Program for Use with Design-Build Requests for Proposals

EXHIBIT A

City of Pasadena Local Purchasing Preference –
Municipal Code Chapter 4.08, Sections 15, 20 and 46

4.08.015 - Equal opportunity and local contracting policy.

It is the policy of the city to:

- A. Promote the principles of equal opportunity in its contracting activities by assuring that those seeking to do business with the city are treated equally and are not discriminated against because of their race, religion, color, national origin, ancestry, disability, sex, age, marital status, medical condition, sexual orientation or any other protected class.
- B. Promote the local economy by encouraging local business enterprises to make bids and proposals for city contracts and to provide the preferences for such firms when competing for city contracts as set forth in this chapter.

(Ord. 6899 § 2 (part), 2002)

4.08.020 - Definitions.

- A. "City Council" means city council the city of Pasadena.
- B. "City" means city of Pasadena.
- C. "Contract" means a written order for labor, material, supplies or services entered into by the city; any concession granted by the city; any license granted by the city which results in the production of income by the licensee; and any franchise granted by the city except for franchises of gas, electric, water or telephone utilities.
- D. "Employer" means a contractor or subcontractor as the context requires.
- E. "Good Faith Efforts" include but are not limited to the following factors:
 - 1. Attendance at presolicitation or pre-bid meetings that were scheduled by the city to inform contractors or subcontractors of contracting and subcontracting opportunities for minority business enterprises, women business enterprises, disadvantaged business enterprises, local business enterprises, and other business enterprises.
 - 2. Advertisement in minority, women, and other media concerning contracting and subcontracting opportunities.
 - 3. Providing written notice to a reasonable number of minority business enterprises, women business enterprises, disadvantaged business enterprises, local business enterprises and other business enterprises soliciting their interest in contracting or subcontracting in sufficient time to allow them to participate effectively.
 - 4. Following up initial solicitation of interest by contacting minority business enterprises, women business enterprises, disadvantaged business enterprises, local business enterprises and other business enterprises by telephone to determine with certainty whether they are interested in participating.
 - 5. Selecting portions of the work to be performed by minority business enterprises, women business enterprises, disadvantaged business enterprises, local business enterprises and other business enterprises.
 - 6. Providing interested minority business enterprises, women business enterprises, disadvantaged business enterprises, local business enterprises and other enterprises with adequate information about the plans, specifications and requirements of contracts and subcontracts.
 - 7.

- Negotiating in good faith with interested minority business enterprises, women business enterprises, disadvantaged business enterprises, local business enterprises and other business enterprises. Not rejecting as unqualified without documented reasons based on a thorough investigation of the business enterprises' capabilities.
8. Making efforts to assist interested minority business enterprises, women business enterprises, disadvantaged business enterprises, local business enterprises and other business enterprises in obtaining necessary sources of supply, lines of credit or insurance.
- F. "Local business" means a business with a fixed place of business located in the city.
- G. "Material" means supplies, equipment, stores, provisions and other personal property.
- H. "Minority" means African Americans; Hispanic Americans; Native Americans (including American Indians, Eskimos, Aleuts, and Native Hawaiians; Asian Pacific (including persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, and the Northern Marianas); Asian Indians (including persons whose origins are from India, Pakistan and Bangladesh); and Armenian (including persons whose origins are from the territory east of Asia Minor, known as Armenia and people of the Aryan race that migrated from Europe into that area).
- I. "MWOBE" means a business owned and controlled by a woman, minority or a group of women or minorities or other individual or group.
- J. "Owned or Controlled" means owning at least 51 percent of the business and having management control of the business.
- K. "Public works" means all fixed works constructed for public use or protection, including but not limited to, bridges, waterworks, sewers, electric works, public buildings and street improvements.
- L. "Purchase order" means a written authorization by the issuing party for the recipient to provide labor, materials or services, for which the issuing party agrees to pay.
- M. "Services" means, but is not limited to, rental, repair and maintenance of equipment, machinery and other personal property, and professional services, but does not include public works.
- N. For the purposes of this chapter, "small business" and "microbusiness" shall be any business which has been certified by the state of California or by the city, under purchasing procedures adopted by the city manager, as meeting the definitions set forth in California Government Code Section 14837, or any successor provision.

(Ord. 6984 § 1, 2004; Ord. 6899 § 2 (part), 2002; Ord. 5068 § 1.00, 1972)

4.08.046 - Local preference for competitively bid contracts.

For contracts for the purchase of goods and materials of \$25,000 or more where it has been determined that the city will receive a return of sales tax, a preference to local businesses equal to the amount the city will receive in sales tax revenue shall be provided. The city manager may modify or eliminate this preference where it is in conflict with federal or state laws or regulations.

(Ord. 6921 § 2, 2002; Ord. 6899 § 2 (part), 2002)

EXHIBIT B

City of Pasadena – First Source Hiring –
Municipal Code Chapter 14.80

Chapter 14.80 - FIRST SOURCE HIRING

Sections:

14.80.010 - Short title.

14.80.020 - Purpose.

14.80.030 - Definitions.

14.80.040 - Applicability to projects receiving city financial assistance.

14.80.050 - Applicability to private construction projects.

14.80.060 - City assistance in the first source hiring program.

14.80.070 - Administration—First source hiring program implementation guidelines.

14.80.010 - Short title.

This chapter shall be known as the "first source hiring program."

(Ord. 6995 § 2 (part), 2004)

14.80.020 - Purpose.

The purpose of this chapter is to establish a first source hiring program for the city of Pasadena to increase employment opportunities for qualified residents. In accordance with this chapter, construction projects which receive city financial assistance will be required to employ residents in the construction of the project, and projects that do not receive city financial assistance will be encouraged with construction tax rebates to employ residents in the construction of the project.

(Ord. 6995 § 2 (part), 2004)

14.80.030 - Definitions.

- A. "City" means the city of Pasadena.
- B. "City agreement" means any written contract between a developer and either the city or the Pasadena community development commission.
- C. "City-assisted construction project" means any construction project for which a developer and the city or the Pasadena community development commission enter into a city agreement that includes a provision for city financial assistance.
- D. "City financial assistance" means the provision of loans, grants, financing, revenue sharing, the provision of property at less than market rate, fee waivers or any other form of financial assistance.
- E. "Construction project" means the building, enlargement, or rehabilitation of any structure, or any portion thereof, and includes, without limitation, alterations or improvements to an existing structure, where such work both: (i) requires a building permit; and (ii) includes work performed by contractors that are subject to the

Contractors' State License Law (California Business and Professions Code Section 7000, et seq.).

- F. "Developer" means a person that proposes to undertake a construction project.
- G. "First source hiring agreement" means an agreement entered into between a developer and the city that implements the first source hiring program provisions set forth in this chapter.
- H. "First source hiring program" means the provisions of this chapter and any guidelines or policies adopted by the city to implement this chapter.
- I. "Private construction project" means any construction project in excess of \$50,000.00 that does not receive city financial assistance.
- J. "Resident" means any person whose primary residence is in the city of Pasadena and who has maintained such residency for at least one year prior to commencement of work on the construction project.
- K. "Resident employee" means any resident that is eligible for employment through the first source hiring program.

(Ord. 6995 § 2 (part), 2004)

14.80.040 - Applicability to projects receiving city financial assistance.

- A. **Mandatory Participation.** All developers receiving city financial assistance are required to participate in the first source hiring program and enter into a first source hiring agreement. The local resident hiring requirement shall be determined on a case-by-case basis, and shall take into consideration the nature of the project, the duration of construction and the level of city financial assistance. Failure of a developer to comply with any one of the requirements in this chapter shall constitute a default and breach of the corresponding city agreement and shall result in the penalties described in subsection C of this section.
- B. **Requirements.** All requirements for compliance with the first source hiring program for city-assisted construction projects shall be set forth in a first source hiring agreement between a developer and the city. These requirements include the following:
 1. The minimum percentage of construction-related payroll or equivalent that must be accomplished with resident employee hours either during the construction project or as part of on-going, non-temporary employment following completion of the construction project;
 2. Procedures the developer must follow in order to comply with the first source hiring program;
 3. The schedule within which above referenced procedures must be completed;
 4. Required record-keeping and documentation for demonstrating a developer's compliance with the first source hiring agreement;
 5. Any other matters that the city manager deems appropriate to include in the first source hiring agreement.
- C. **Penalties.** Upon a default and breach of the city agreement by a developer, the city financial assistance shall be cancelled. Any funds or other valuable consideration provided to developer shall become due and payable.

(Ord. 7136 § 1, 2008; Ord. 6995 § 2 (part), 2004)

14.80.050 - Applicability to private construction projects.

- A. **Voluntary Participation.** The first source hiring program shall apply to private construction projects on a voluntary basis. The city encourages all developers of private construction projects to participate in the first source hiring program. A developer of a private construction project who voluntarily participates in the first source hiring program must enter into a first source hiring agreement with the city at the time such developer obtains a building permit for a private construction project. A developer of a private construction project who complies with all requirements of the first source hiring agreement shall receive the construction tax rebate described in subsection C of this section.
- B. **Requirements.** At the time of hire and throughout the construction of the project, a developer seeking a construction tax rebate shall provide documentation acceptable to the city manager that evidences the developer's compliance with the first source hiring program. Additionally, the developer shall allow the city to undertake on-site inspections and interviews in order to validate the developer's claims of resident hiring.
- C. **Construction Tax Rebate.** For each resident employed on a private construction project prior to the issuance of a certificate of occupancy the developer shall receive a partial rebate of construction tax required by Section 4.32 of the Pasadena Municipal Code. The amount of the construction tax rebate shall be based on a formula established by resolution of the city council.

(Ord. 6995 § 2 (part), 2004)

14.80.060 - City assistance in the first source hiring program.

The city shall assist developers in complying with the first source hiring program by:

- A. Providing referral information for developers and resident employees;
- B. Monitoring the progress of resident employees in the first source hiring program;
- C. Developing effective outreach and education for and recognition of developers who participate in the first source hiring program;
- D. Promoting the first source hiring program throughout the city.

Failure of the city to implement any of the activities described in this section shall not excuse the performance by a developer of obligations set forth in the applicable first source hiring agreement.

(Ord. 6995 § 2 (part), 2004)

14.80.070 - Administration—First source hiring program implementation guidelines.

- A. **Generally.** The city manager is hereby authorized to implement all aspects of the first source hiring program.
- B. **First Source Hiring Program Implementation Guidelines.** The city manager shall cause to be prepared a form first source hiring agreement and first source hiring program implementation guidelines that set forth the procedures and standards for implementing the first source hiring program. The first source hiring program implementation guidelines shall address the following items:
 - 1. The criteria for determining the minimum percentage of construction-related payroll that shall be performed by resident employees;
 - 2.

Procedures that developers of city-assisted construction projects must follow in order to comply with the first source hiring program;

3. Instructions regarding what constitutes proper documentation for demonstrating a developer's compliance with the first source hiring agreement for a given project;
4. The schedule within which above referenced procedures must be completed;
5. A system that measures compliance with the first source hiring program;
6. Any other matters deemed appropriate by the city manager or city council.

(Ord. 6995 § 2 (part), 2004)

EXHIBIT C

City and County of San Francisco – Local Hiring Policy for Construction –
Administrative Code Section 6.22(G)

San Francisco Administrative Code

SEC. 6.22. PUBLIC WORK CONSTRUCTION CONTRACT TERMS AND WORKING CONDITIONS.

All construction contracts awarded by the City and County of San Francisco shall contain the following minimum terms and conditions:

(A) **Bonds.** Before the execution of any contract for public work or improvement in excess of \$25,000, the department head authorized to execute such contracts shall require the successful bidder to file corporate surety bonds for the faithful performance thereof and to guarantee the payment of wages for services engaged and of bills contracted for material, supplies and equipment used in the performance of the contract. The bond shall be for a sum not less than 100 percent of the award.

The City and County of San Francisco, acting through its Human Rights Commission ("HRC"), intends to provide guarantees to private bonding assistance companies and financial institutions in order to induce those entities to provide required bonding and financing to eligible contractors bidding on and performing City public work contracts. This bonding and financial assistance program is subject to the provisions of Administrative Code Chapter 14B.

(B) **Insurance.** All construction contracts awarded under this Chapter must conform to the insurance requirements established by the Risk Manager. The Risk Manager shall develop uniform insurance requirements for City contracts subject to this Chapter and shall publish such requirements in the Risk Manager's Manual. The Risk Manager shall review and update such insurance requirements on an annual basis.

Every contractor and subcontractor shall comply with the provisions of California Labor Code section 3700. Prior to commencing the performance of work under any public work contract, the contractor and all of its subcontractors shall file with the awarding department a certificate of insurance against liability for workers compensation or proof of self-insurance in accordance with the provisions of the California Labor Code.

(C) **Indemnification.** All construction contracts awarded under this Chapter shall require that the contractor fully indemnify the City and County to the maximum extent provided by law, such that each contractor must save, keep, bear harmless and fully indemnify the City and County and any of its officers or agents from any and all liability, damages, claims, judgments or demands for damages, costs or expenses in law or equity that may at any time arise.

This indemnification requirement may not be waived or abrogated in any way for any contract without the recommendation of the City's Risk Manager and the express permission and approval of the Board of Supervisors.

(D) **Assignment.** No contract shall be assigned except upon the recommendation of the department head concerned and with the approval of the Mayor or the Mayor's designee, relative to the department under the Mayor's jurisdiction, or the approval of the board or commission concerned for departments not under the Mayor.

(E) **Prevailing Wages.**

(1) **Generally.** All contractors and subcontractors performing a public work or improvement for the City and County of San Francisco shall pay its workers on such projects the prevailing rate of wages as provided below. For the purpose of prevailing wage requirements only, the definition of a public work shall include those public works or improvements defined in the foregoing section 6.1 of this Chapter and shall also include (a) any trade work performed at any stage of construction (including preconstruction work) and (b) any public work paid for by the City and County of San Francisco with "the equivalent of money" under the meaning of Labor Code section 1720(b).

(2) **Leased Property Included.** For the limited purposes of this subsection, a "public work or improvement" also means and includes any construction work done under private contract when all of the following conditions exist:

(a) The construction contract is between private persons; and

(b) The property subject to the construction contract is privately owned, but upon completion of the construction work will be leased to the City and County of San Francisco for its use; and

(c) Either of the following conditions exist: (1) The lease agreement between the lessor and the City and County of San Francisco, as lessee, is entered into prior to the construction contract, or (2) The construction work is performed according to the plans, specifications, or criteria furnished by the City and County of San Francisco, and the lease agreement between the lessor and the City and County of San Francisco as lessee, is entered into during, or upon completion, of the construction work.

(3) **Determination of the Prevailing Wage.** It shall be the duty of the Board of Supervisors, from time to time and at least once during each calendar year, to fix and determine the prevailing rate of wages as follows:

On or before the first Monday in November of each year, the Civil Service Commission shall furnish to the Board of Supervisors data as to the highest general prevailing rate of wages of the various crafts and kinds of labor as paid in private employment in the City and County of San Francisco, plus "per diem wages" and wages for overtime and holiday work. The Civil Service Commission shall provide the Board of Supervisors data for "per diem wages" pursuant to California Labor Code sections 1773.1 and 1773.9, as amended from time to time. The Board of Supervisors shall, upon receipt of such data, fix and determine the prevailing rate of wages. The prevailing rate of wages as so fixed and determined by the Board of Supervisors shall remain in force and shall be deemed to be the highest general prevailing rate of wages paid in private employment for similar work, until the same is changed by the Board of Supervisors. In determining the highest general prevailing rate of wages per diem wages and wages for overtime and holiday work, as provided for in this section, the Board of Supervisors shall not be limited to the consideration of data furnished by the Civil Service Commission, but may consider such other evidence upon the subject as the Board shall deem proper and thereupon base its determination upon any or all of the data or evidence considered.

In the event that the Board of Supervisors does not fix or determine the highest general prevailing rate of wages in any calendar year, the rates established by the California Department of Industrial Relations for such year shall be deemed adopted.

(4) **Specifications to Include Wage Rate.** The department head authorized to execute a construction contract under this Chapter shall include in the contract specifications, or make available in the offices of the department or at the job site, a detailed statement of the prevailing rate of wages as

fixed and determined by the Board of Supervisors at the time the department issued the Advertisement For Bids on the contract. The contractor shall agree to pay to all persons performing labor in and about the public work or improvement the highest general prevailing rate of wages as determined pursuant to this Chapter, including wages for holiday and overtime work. If the specifications do not include the prevailing rate of wages, the specifications shall include a statement that copies of the prevailing rate of wages as fixed and determined by the Board of Supervisors are on file at the department's principal office or at the job site and shall be made available to any interested party on request.

(5) **Subcontractors Bound by Wage Provisions.** Every contract for any public work or improvement shall also contain a provision that the contractor shall insert in every subcontract or other arrangement which he or she may make for the performance of any work or labor on a public work or improvement. This provision shall be that the subcontractor shall pay to all persons performing labor or rendering service under said subcontract or other arrangement the highest general prevailing rate of wages as fixed and determined by the Board of Supervisors for such labor or services.

(6) **Records to be Kept by Contractors and Subcontractors.** Every public works contract or subcontract awarded under this Chapter shall contain a provision that the contractor shall keep, or cause to be kept, for a period of four years from the date of substantial completion of a public work, payrolls and basic records including time cards, trust fund forms, apprenticeship agreements, accounting ledgers, tax forms and superintendent and foreman daily logs for all trades workers performing work at or for a City and County of San Francisco public work or improvement. Such records shall include the name, address and social security number of each worker who worked on the project, including apprentices, his or her classification, a general description of the work each worker performed each day, the rate of pay (including rates of contributions for, or costs assumed to provide fringe benefits), daily and weekly number of hours worked, deductions made and actual wages paid. Every subcontractor who shall undertake the performance of any part of a public work or improvement shall keep a like record of each person engaged in the execution of the subcontract.

The contractor shall maintain weekly certified payroll records for submission to the awarding department as required. The contractor shall be responsible for the submission of payroll records of its subcontractors. All certified payroll records shall be accompanied by a statement of compliance signed by the contractor indicating that the payroll records are correct and complete, that the wage rates contained therein are not less than those determined by the San Francisco Board of Supervisors and that the classifications set forth for each employee conform with the work performed.

All such records as described in this section shall at all times be open to inspection and examination of the duly authorized officers and agents of the City and County of San Francisco, including representatives of the Office of Labor Standards Enforcement.

Should the department head responsible for the public work or the Labor Standards Enforcement Officer determine that a contractor or subcontractor is not in compliance with the requirements of this subsection, the department head or the Labor Standards Enforcement Officer shall issue written notification to the contractor or subcontractor mandating compliance within not fewer than ten calendar days from the date of the notification. Should the contractor or subcontractor fail to comply as required in the notification, the department head who executed the contract or the Labor Standards Enforcement Officer may impose a penalty of \$25.00 for each calendar day of noncompliance, or portion thereof, for each worker. Upon the request of the responsible department head or the Labor Standards Enforcement Officer, the Controller shall withhold these penalties from progress payments then due or to become due.

(7) **Additional Required Contract Provisions.** Every public works contract shall contain

provisions stating that (1) the contractor will cooperate fully with the Labor Standards Enforcement Officer and other City employees and agents authorized to assist in the administration and enforcement of the prevailing wage requirements and other labor standards imposed on public works contractors by the Charter and Chapter 6 of the San Francisco Administrative Code; (2) the contractor agrees that the Labor Standards Enforcement Officer and his or her designees, in the performance of their duties, shall have the right to engage in random inspections of job sites and to have access to the employees of the contractor, employee time sheets, inspection logs, payroll records and employee paychecks; (3) the contractor shall maintain a sign-in and sign-out sheet showing which employees are present on the job site; (4) the contractor shall prominently post at each job-site a sign informing employees that the project is subject to the City's prevailing wage requirements and that these requirements are enforced by the Labor Standards Enforcement Officer; and (5) that the Labor Standards Enforcement Officer may audit such records of the contractor as he or she reasonably deems necessary to determine compliance with the prevailing wage and other labor standards imposed by the Charter and this Chapter on public works contractors. Failure to comply with these requirements may result in penalties and forfeitures consistent with California Labor Code section 1776(g), as amended from time to time.

(8) Non-compliance with Wage Provisions – Penalties.

(a) **Penalty and Forfeiture.** Any contractor or subcontractor who shall fail or neglect to pay to the several persons who shall perform labor under any contract, subcontract or other arrangement on any public work or improvement as defined in this Chapter the highest general prevailing rate of wages as fixed by the Board of Supervisors under authority of this Chapter, shall forfeit; and, in the case of any subcontractor so failing or neglecting to pay said wage, the original contractor and the subcontractor shall jointly and severally forfeit to the City and County of San Francisco back wages due plus the penal sum of \$50.00 per day for each laborer, workman or mechanic employed for each calendar day or portion thereof, while they shall be so employed and not paid said highest general prevailing rate of wages, and in addition shall be subject to the penalties set forth in Article V of this Chapter, including debarment.

(b) **Enforcement.** It shall be the duty of the officer, board or commission under whose jurisdiction said public work or improvement is being carried on, made or constructed, when certifying to the Controller any payment which may become due under said contract, to deduct from said payment or payments the total amount of said forfeiture provided for in this subsection. In doing so, the department head must also notify in writing the Labor Standards Enforcement Officer of his/her action. The Labor Standards Enforcement Officer may also upon written notice to the department head who is responsible for the project, certify to the Controller any forfeiture(s) to deduct from any payment as provided for in this Subsection 6.22(E)(8). Certification of forfeitures under this subsection shall be made only upon an investigation and audit by the responsible department head or the Labor Standards Enforcement Officer and upon service of written notice to the contractor that includes identification of the grounds for the forfeiture or forfeitures ("Certification of Forfeiture"). The audit supporting the forfeiture shall be appended to the Certification of Forfeiture, but failure to append such documentation shall not invalidate the Certification. Service of the Certification of Forfeiture shall be made by United States mail and the date of service shall be the date of mailing. The Controller, in issuing any warrant for any such payment, shall deduct from the amount which would otherwise be due on said payment or payments the amount of said forfeiture or forfeitures as so certified.

(c) **Recourse Procedure.** A contractor and/or a subcontractor may appeal from a Certification of Forfeiture. The Controller shall adopt and maintain rules and regulations for any appeal under this Subsection 6.22(E)(8)(c), which rules shall generally include the following parameters for efficient and effective due process:

(i) Any Appeal from Certification of Forfeiture shall be filed in writing by the contractor and/or subcontractor (referred to in this Subsection 6.22(E)(8)(c), whether singular or plural, as the "Appellant") within 15 days of the date of service of the Certification of Forfeiture. Appellant shall file the Appeal from Certification of Forfeiture with the City Controller and serve a copy on the Labor Standards Enforcement Officer. Failure by the contractor or subcontractor to submit a timely, written Appeal from Certification of Forfeiture shall constitute concession to the forfeiture, and the forfeiture shall be deemed final upon expiration of the 15-day period.

(ii) The Office of Labor Standards Enforcement shall promptly afford Appellant an opportunity to meet and confer in good faith regarding possible resolution of the Certification of Forfeiture in advance of further proceedings under this Subsection 6.22(E)(8)(c), with the intention that such meeting occur within 30 days of the date the Appeal from Certification of Forfeiture is filed.

(iii) After the expiration of 30 days following the date the Appeal from Certification of Forfeiture is filed, any party may request in writing, with concurrent notice to all other parties, that the Controller appoint a hearing officer to hear and decide the appeal. If no party requests appointment of a hearing officer, the Certification of Forfeiture shall be deemed final on the 60th day after the date the Appeal from Certification of Forfeiture is filed.

(iv) Within 15 days of receiving a written request for appointment of a hearing officer under Section 6.22(E)(8)(c)(iii), the Controller shall appoint an impartial hearing officer and immediately notify the enforcing official and Appellant, and their respective counsel or authorized representative if any, of the appointment. The appointed hearing officer shall be an Administrative Law Judge with at least ten years experience with the City and not less than two years experience in labor law, prevailing wage, and/or wage and hour matters; or shall be an attorney with knowledge and not less than five years' experience in labor law, prevailing wage, and/or wage and hour matters.

(v) The hearing officer shall promptly set a date for a hearing. The hearing must commence within 45 days of the date the Controller notice of the hearing officer appointment, and conclude within 75 days of such notice. The hearing officer shall conduct a fair and impartial evidentiary hearing in conformance with the time limitations set forth in this subsection 6.22(E)(8)(c) and in the rules and regulations, so as to avoid undue delay in the resolution of any appeal. The hearing officer shall have the discretion to extend the times under this subsection 6.22(E)(8)(c), and any time requirements under the rules and regulations, only upon a showing of good cause.

(vi) Appellant has the burden of proving by a preponderance of the evidence that the basis for the Certification of Forfeiture is incorrect, including any back wage and penalty assessments that are at issue in the appeal.

(vii) Within 30 days of the conclusion of the hearing, the hearing officer shall issue a written decision affirming, modifying, or dismissing the forfeiture. The decision of the hearing officer shall consist of findings and a determination. The hearing officer's findings and determination shall be final.

(viii) Appellant may appeal a final determination under this section only by filing in the San Francisco Superior Court a petition for a writ of mandate under California Code of Civil Procedure, section 1084, et seq., as applicable and as may be amended from time to time.

(d) **Distribution of Forfeiture.** The Controller shall withhold any forfeiture as provided in the foregoing paragraphs until such time as either the contractor or subcontractor has conceded to the

forfeiture or, in the event of an appeal, there is a determination no longer subject to judicial review. The Controller shall then distribute the amounts withheld in the following order: (1) the Labor Standards Enforcement Officer shall make best efforts to distribute back wages withheld to the individual workers identified as not having been paid the proper wage rate; (2) the penal sums provided for above shall inure to the benefit of the general fund of the City and County of San Francisco; (3) the Controller shall hold the balance of any back wages in escrow for workers whom the Labor Standards Enforcement Officer, despite his/her best efforts, cannot locate. In the event back wages are unclaimed for a period of three years, the Controller shall undertake administrative procedures for unclaimed funds in conformance with Government Code Section 50050, et seq., as may be amended from time to time.

(F) **Hours and Days of Labor.**

(1) **Generally.** For the purpose of meeting prevailing conditions and enabling employers to secure a sufficient number of satisfactory workers and artisans, no person performing labor or rendering service in the performance of any contract or subcontract for any public work or improvement as defined in this Chapter shall perform labor for a longer period than five days (Monday through Friday) of eight hours each, with two 10-minute breaks per eight-hour day, except in those crafts in which a different work day or week now prevails by agreement in private employment. Any person working hours in addition to the above shall be compensated in accordance with the prevailing overtime standards and rates.

(2) **Noncompliance and Forfeiture.** Any contractor or subcontractor who shall violate any of the provisions of this subsection shall be liable for the same penalties and forfeits as those specified in Subsection 6.22(E) of this Chapter; penalties and forfeits shall be applicable for each laborer, mechanic or artisan employed for each calendar day or portion thereof whereon such laborer, mechanic or artisan is compelled or permitted to work more than the days and hours specified herein. The provisions of this subsection shall be made a part of all contracts and subcontracts for the construction of any public work or improvement.

(3) **Contracts Outside City and County.** In the event that any public work or improvement is to be constructed outside of the City and County of San Francisco and at such a distance therefrom that those engaged in performing labor on said public work or improvement must under ordinary conditions remain at or near the site of said work or improvement when not actually engaged in the performance of labor thereon, then the officer, board or commission responsible for the construction of said public work or improvement may, in making specifications or letting contracts therefor, make provision therein for days and hours of labor beyond the limitations provided for in Section 6.22(F) of this Chapter; but not to exceed eight hours in any one calendar day, or six days in any calendar week. In the event that emergency conditions shall arise, making a change advisable during the performance of any such contract, or any portion thereof, the hours and days of labor may be extended beyond the limits hereinabove expressed; but not to exceed eight hours per day, upon the written authority of the officer, board or commission awarding such contract. Failure of the contractor to perform such contract within the time provided shall not constitute an emergency.

(G) **Short Title.** This subsection 6.22(G) shall be known as and may be cited as the San Francisco Local Hiring Policy for Construction ("Policy").

(1) **Findings and Purpose.**

(a) The Board of Supervisors passed Ordinance 286-94 on August 4, 1994, to establish local hiring requirements for City public work or improvement projects performed within the boundaries of the City.

(b) In 2010, the San Francisco Redevelopment Agency and the City's Office of Economic and Workforce Development commissioned a study of the labor market in the construction industry in San Francisco (the "Labor Market Analysis"), including review of comparative demographic data regarding workers on public and private projects, scope of past and future public and private construction work in San Francisco, comparative compensation on public and private projects, demographic data regarding apprenticeship programs operating in San Francisco, and income and residency data regarding construction workers in San Francisco.

(c) In 2010, the Walter and Elise Haas Fund and the San Francisco Foundation, with assistance of the City's Office of Economic and Workforce Development, convened a local hiring stakeholder process to discuss possible revision of subsection 6.22(G), at which community, labor, contractor, and City stakeholders participated.

(d) In August 2010, a report from Chinese for Affirmative Action and Brightline Defense Project entitled, "The Failure of Good Faith," found that the City has historically failed to meet its local hiring goals.

(e) The Budget & Finance and Land Use & Economic Development Committees of the Board of Supervisors held public hearings regarding local hiring and proposed revisions to subsection 6.22(G).

(f) The San Francisco Public Utilities Commission, Redevelopment Agency, Human Rights Commission, and other City departments and agencies held public hearings regarding local hiring.

(g) The construction industry is one of the few industries providing a path to middle-class careers for individuals without advanced degrees or facing barriers to quality employment, and is therefore a crucial component of the effort to build economic opportunities for targeted residents of San Francisco, with a particular emphasis on low-income and underrepresented workers in various building and construction trades, in order to elevate historically disadvantaged populations and create more sustainable communities throughout San Francisco.

(h) The City has awarded more than \$8 billion in public work and improvement contracts during the last 10 years.

(i) The City anticipates that it will award approximately \$27 billion in public work and improvement contracts in the next 10 years.

(j) City spending on public work and improvement projects over the next 10 years will generate tens of thousands of construction work hours.

(k) The Board desires to ensure that employment and training opportunities created by such public work and improvement projects provide consistent and high-quality opportunities to the San Francisco labor pool, especially low-income residents of San Francisco and other disadvantaged residents.

(l) Although approximately 40% of construction workers employed in San Francisco are San Francisco residents, from 2002 to 2010 San Francisco residents worked only approximately 24% of the work-hours on publicly-funded construction projects in the City, and only 20% of work-hours since July 2009.

(m) The City faces unemployment levels that have risen dramatically over the past four years, climbing from a low of 3.7% in December 2006 to an average of 9.8% for each month of 2010 through July, leaving at least 44,500 San Franciscans out of work according to the California Employment Development Department, with disproportionate concentrations of high unemployment in neighborhoods such as Bayview-Hunters Point, Chinatown, the Mission, Western Addition, Visitacion Valley, the Excelsior, South of Market, Ocean View, Merced Heights and Ingleside.

(n) The 2010-2014 Consolidated Plan for the City and County of San Francisco indicates that several San Francisco neighborhoods face concentrated poverty and San Francisco's slow job growth rate and changing job base has had major impacts on patterns of income inequality and disparity in the City, with distinctive, adverse, neighborhood-specific effects.

(o) The loss of middle-income jobs has been associated with a diminishing middle class in San Francisco, as indicated by rising income inequality. San Francisco's unequal income distribution threatens the City's future competitiveness and overall economic stability, and the City's anti-poverty strategy aims to ensure that the City and its partners are marshaling its limited resources in an effective and coordinated way to create economic opportunities in San Francisco's low-income communities.

(p) The City has made substantial public investments in its workforce development system, including CityBuild and the City's community-based partners, to create job opportunities in industries such as construction, which are vital to the economic health of the local economy, have a capacity to generate a significant number of jobs, are accessible to low- and middle-skilled individuals, have career ladder opportunities where workers can move up with additional training and skill development, and provide access to living wage and family-sustaining jobs.

(q) City-funded construction projects provide a crucial opportunity to connect participants in these City-funded or City-operated workforce development programs with employment and training opportunities, and to direct employment and training opportunities created by the City's public expenditures.

(r) The City and the San Francisco Redevelopment Agency have made substantial public investments toward creating and facilitating growth in economic opportunities for low-income individuals and neighborhoods in San Francisco.

(s) CityBuild, San Francisco's construction training workforce program, was initiated in 2005 to serve as a training vehicle for ushering disadvantaged workers into the construction skilled trades. The program is a multi-craft pre-apprenticeship training program, and has assisted over 450 graduates, into union-sponsored apprentice programs. CityBuild, in 2009-2010, contributed approximately 44 percent of all new San Francisco resident apprentice intakes based on data provided by the California Department of Industrial Relations, Division of Apprenticeship Standards. San Francisco's workforce construction training infrastructure has the capacity to meet future demand for high quality and well trained workers in the construction trades.

(t) Employment of workers that reside close to job sites has environmental benefits, including reducing the distance of commutes and resulting vehicle emissions. These environmental benefits are consistent with the mandates, policies and goals of the California Global Warming Solutions Act (AB 32), the Sustainable Communities and Climate Protection Act (SB 375), and the Climate Action Plan for San Francisco.

(u) The Board seeks terms and conditions that advance the City's workforce and community

development goals, removing obstacles that may have historically limited the full employment of local residents on the wide array of opportunities created by public works projects, curbing spiraling unemployment, population decline, and reduction in the number of local businesses located in the City, eroding property values and depleting San Francisco's tax base.

(v) A local hiring policy is necessary to counteract these grave economic and social ills.

(2) **Definitions.** For purposes of this subsection 6.22(G), the following terms shall have the following meanings:

(a) "Apprentice" means any worker who is indentured in a construction apprenticeship program that maintains current registration with the State of California's Division of Apprenticeship Standards.

(b) "Area Median Income" or "AMI" means unadjusted median income levels derived from the Department of Housing and Urban Development ("HUD") on an annual basis for the San Francisco area, adjusted solely for household size, but not high housing cost area.

(c) "Awarding department" means a department or commission empowered on behalf of the City to contract for a covered project.

(d) "City" means the City and County of San Francisco, California.

(e) "Contractor" means any person, firm, partnership, owner operator, limited liability company, corporation, joint venture, proprietorship, trust, association, or other entity that contracts directly with the City to perform construction work on a covered project. A contractor may also be referred to as a "prime contractor" or "general contractor."

(f) "Covered project" means a public work or improvement project or part thereof to which this subsection 6.22(G) applies, under standards set forth in subsection 6.22(G)(3).

(g) "Disadvantaged worker" means a local resident, as defined below, who (i) resides in a census tract within the City with a rate of unemployment in excess of 150% of the City unemployment rate, as reported by the State of California Employment Development Department; or (ii) at the time of commencing work on a covered project has a household income of less than 80% of the AMI, or (iii) faces or has overcome at least one of the following barriers to employment: being homeless; being a custodial single parent; receiving public assistance; lacking a GED or high school diploma; participating in a vocational English as a second language program; or having a criminal record or other involvement with the criminal justice system.

(h) "Local hiring incentives" means the incentives set forth in subsection 6.22(G)(5) of this Policy.

(i) "Local hiring requirements" means the requirements set forth in subsection 6.22(G)(4) of this Policy.

(j) "Local resident" means an individual who is domiciled, as defined by Section 349(b) of the California Election Code, within the City at least seven (7) days prior to commencing work on the project.

(k) "OEWD" means the City's Office of Economic and Workforce Development.

(l) "Policy" means this subsection 6.22(G).

(m) "Project work" means construction work performed as part of a covered project.

(n) "Project work hours" means the total hours worked on a construction contract by all apprentices and journey level workers, whether those workers are employed by the contractor or any subcontractor.

(o) "Subcontractor" means any person, firm, partnership, owner operator, limited liability company, corporation, joint venture, proprietorship, trust, association, or other entity that contracts with a prime contractor or another subcontractor to provide services to a prime contractor or another subcontractor in fulfillment of the prime contractor's or that other subcontractor's obligations arising from a contract for construction work on a covered project.

(p) "Targeted worker" means any local resident or disadvantaged worker.

(q) "New hire" means any employee of a contractor who is not listed on the contractor's quarterly tax statements for the tax period and has been hired prior to the commencement of work.

(r) "Core employee or worker" means an apprentice or journey level employee, who possesses any license required by state or federal law for the project work to be performed, of a contractor or subcontractor who appears on that contractor or subcontractor's certified payroll sixty (60) of the previous one hundred calendar (100) days prior to date of award of a city contract.

(3) Coverage.

(a) **Threshold for Public Work and Improvement Projects.** This Policy applies to contracts with prime contractors for public works or improvements estimated to cost in excess of the Threshold Amount set forth in Section 6.1 of this Chapter, as that amount may be amended.

(b) **Projects Constructed Outside the City.** Covered City projects constructed within 70 miles from the jurisdictional boundary of the City and County of San Francisco shall be governed by the terms of this Policy, except that percentage requirements shall apply in proportion to the City's actual cost after reimbursement from non-City sources compared to the total cost of the project. Covered City projects constructed 70 miles or more beyond the jurisdictional boundary of the City and County of San Francisco shall be subject to this Policy, except the "local" requirement shall include San Francisco residents, workers local to the area where the work is located, and workers residing within the region where the work is located. Awarding departments shall work with OEWD and regional local hiring programs to comply.

(c) Projects Utilizing Federal or State Funds.

(i) **Segregation of Funds and Contract Awards.** Where the application of this Policy would violate federal or state law, or would be inconsistent with the terms or conditions of a grant or a contract with an agency of the United States or the State of California, the City department or agency receiving the grant or contract shall, where administratively feasible, segregate federal or state funds from City funds, and/or segregate project administration and contracts, so as to maximize application of this Policy to City-funded construction work.

(ii) **Alternative Terms in Case of Conflict.** Where the provisions of this Policy would be prohibited by Federal or State law, or where the application of this Policy would violate or be inconsistent with the terms or conditions of a grant or a contract with an agency of the United States or the State of California, and where segregation of funds pursuant to subsection 6.22(G)(3)(c)(i) is not administratively feasible with regard to some or all of the project in question, then OEWD, in consultation with the awarding department, shall adapt requirements of this Policy into a set of contract provisions that advance the purposes of this Policy to the maximum extent feasible without conflicting with federal or state law or with terms or conditions of the State or Federal grant or contract in question. The awarding department shall include this set of contract provisions in the public works or improvement contract with regard to the project or portions of the project for which this Policy would conflict with Federal or State requirements.

(d) **Out-of-State Workers.** Project work hours performed by residents of states other than California shall not be considered in calculation of the number of project work hours to which the local hiring requirements apply. Contractors and subcontractors shall report to awarding departments and OEWD the number of project work hours performed by residents of states other than California.

(4) **Local Hiring Requirements.**

(a) For each covered project, the following requirements shall apply to each prime contractor and subcontractor that performs project work in excess of the Threshold Amount set forth in section 6.1 of this Chapter, as that amount may be amended, with regard to project work actually performed by the prime contractor and work included under any subcontract, including all work performed by a subcontractor and all lower-tier subcontractors under the subcontract:

(i) The initial mandatory participation level is 20% of all project work hours within each trade performed by local residents, with no less than 10% of all project work hours within each trade performed by disadvantaged workers. Subject to the periodic review process set forth in subsection 6.22 (G)(4)(b), below, the mandatory participation level for project work hours shall increase annually over seven years up to a mandatory participation level of 50% of project work hours within each trade performed by local residents, with no less than 25% of all project work hours within each trade performed by disadvantaged workers. For each mandatory participation percentage specified below, one-half of the specified percentage of project work hours within each trade shall be performed by disadvantaged workers.

Year After Effective Date That Contract Is Advertised for Bids	Mandatory Participation Level For Project Work Hours
0	20%
1	25%
2	30%
Periodic Review	Periodic Review
3	35%

4	40%
5	45%
Periodic Review	Periodic Review
6	50%

(ii) At least 50% of the project work hours performed by apprentices within each trade shall be performed by local residents, with no less than 25% of project work hours performed by apprentices within each trade to be performed by disadvantaged workers.

(b) **Periodic Review By OEWD and Controller.** OEWD, in coordination with the Controller's Office, shall every three years from the effective date of this Policy, evaluate the impact of existing mandatory participation levels and the continued need for financial incentives as set forth in subsection 6.22(G)(5). The OEWD/Controller review shall (i) determine whether there is a sufficient supply of qualified unemployed resident workers to meet the escalation rate set forth in subsection 6.22(G)(4)(a)(i), above; (ii) assess the length of time required for each trade to develop a pool of qualified resident workers sufficient to support a 50% mandatory participation target; and (iii) make relevant findings in support of those determinations, and, if necessary, propose amendments to the mandatory participation level by trade. OEWD and the Controller's Office shall further report on the financial incentive program and make relevant findings and, if necessary, propose reducing or eliminating financial incentives. During the periodic review process, OEWD and the Controller's Office shall consult with a broad spectrum of relevant stakeholders (including the community, the California Department of Industrial Relations Division of Apprenticeship Standards, contractors, building trades, and City departments and agencies). Promptly upon completion of a periodic review, OEWD and the Controller's Office shall furnish to the Board of Supervisors a report setting forth their findings, determinations and proposed amendments to the mandatory participation level by trade and/or the financial incentive program, if any. The Board shall, by resolution, fix and determine the mandatory participation levels by trade and available financial incentives, if any. The mandatory participation levels by trade and financial incentives as so fixed and determined by the Board shall supplant the mandatory participation levels and financial incentives that this Policy sets and shall remain in force until the same are changed by the Board. In determining the mandatory participation levels by trade and available financial incentives, as so provided for in this subsection, the Board shall not be limited to consideration of the periodic review report furnished by OEWD and the Controller's Office, but may consider other such evidence upon the subject as the Board shall deem proper and base its determination upon any or all of the evidence considered.

(c) **Pipeline and Retention Compliance.** Contractors and subcontractors may use one or more of the following pipeline and retention compliance mechanisms to receive a conditional waiver from the local hiring requirements on a project-specific basis:

(i) **Specialized Trades.** Every two calendar years, OEWD shall publish a list of trades designated as "Specialized Trades," for which the local hiring requirements of this Policy shall not be applicable. Prior to designating a trade as a Specialized Trade, OEWD shall have made findings that: (a) considering all referral sources and best estimates of workers residing in the City, there will be insufficient numbers of qualified and available local residents and disadvantaged workers to enable contractors and subcontractors to satisfy the local hiring requirements for such trade; and (b) best estimates indicate that on all covered projects during those calendar years, in the aggregate, demand for

work hours in such trade will not exceed a maximum number of hours as determined by OEWD through the regulatory process set forth in subsection 6.22(G)(8)(a). All contractors and subcontractors shall report to OEWD the project work hours utilized in each designated Specialized Trade.

(ii) **Credit for Hiring on Non-covered Projects.** Contractors and subcontractors may accumulate credit hours for hiring San Francisco disadvantaged workers on non-covered projects in the nine-county San Francisco Bay Area and apply those credit hours to contracts for covered projects to meet the applicable minimum mandatory hiring requirements set forth above or to work off penalties assessed under subsection 6.22(G)(7)(f). OEWD shall establish criteria for credit hours and their application to meet the minimum participation requirements. OEWD shall consider credit hours to be accumulated for work on non-covered projects performed by San Francisco disadvantaged workers only if (a) the San Francisco disadvantaged worker performing work on the non-covered project is paid prevailing wages for such work; and, in the case of non-covered projects in the City and County of San Francisco, (b) the number of hours to be credited for the non-covered project in question exceed one-half of the number of disadvantaged worker hours that would be required if the project were a covered project.

(iii) **Sponsoring Apprentices.** A contractor or subcontractor may avoid the assessment of penalties under subsection 6.22(G)(7)(f) for failing to meet applicable hiring requirements by demonstrating the high impracticality of complying with the mandatory participation level for a particular contract or classes of employees before project commencement by agreeing to sponsor an OEWD-specified number of new apprentices in trades in which noncompliance is likely and retaining those apprentices for the entire period of a contractor's or subcontractor's work on the project. OEWD will verify with the California Department of Industrial Relations Division of Apprenticeship Standards that the OEWD-specified number of new apprentices are registered and active apprentices prior to issuing a release from penalties.

(iv) **Direct Entry Agreements.** OEWD is authorized to negotiate and enter into direct entry agreements with apprenticeship programs that are registered with California Department of Industrial Relations' Division of Apprenticeship Standards, and, if OEWD is successful in such negotiations, to develop standards and procedures through which contractors and subcontractors may avoid assessments of penalties by hiring and retaining apprentices who enrolled through such direct entry agreements. Such standards and procedures shall allow avoidance of penalty assessments only where OEWD has made a project-specific determination that compliance with local hiring requirements would be impractical for that contractor or subcontractor. Direct entry agreements negotiated pursuant to this section shall: (a) be enforceable contracts; (b) require apprenticeship programs to enroll a class of apprentices no less frequently than every 365 days; (c) specify all admissions standards related to applicants' training and skills; (d) specify a minimum number of local residents and disadvantaged workers meeting those standards who shall be admitted in each class of apprentices; and (e) be on file with and deemed permissible by the Division of Apprenticeship Standards. OEWD's annual report to the Board as required by subsection 6.22(G)(8)(f) shall include the number of releases from penalties granted based on this subsection, the number of local residents enrolled as apprentices based on direct entry agreements, and the number of direct entry agreements in effect, and shall identify the trades in question.

(5) **Local Hiring Incentives.**

(a) **Incentive Criteria.** Contractors and subcontractors may receive financial and non-financial incentives for exceeding the local hiring requirements on a covered project. Project work hours credited under subsection 6.22(G)(4)(c) shall not be the basis for any financial or non-financial incentive payment or entitlement.

(b) **Administration.** Awarding departments will work in consultation with OEWD to establish the operation and amounts of the incentives, if any.

(i) Any financial incentives provided on a covered project shall comply with applicable law and shall not exceed one percent of the estimated cost of the project. If financial incentives are made available for a covered project, awarding departments shall pay such incentives, if earned by a contractor or subcontractor, only after a contractor or subcontractor has completed work on the project and OEWD has approved the contractor's or subcontractor's request for incentive payment. Subcontractors requesting incentive payments shall submit requests to the awarding department and OEWD through the prime contractor, not directly to the awarding department or OEWD. Payment of subcontractor incentives shall be paid to the prime contractor for the benefit of the appropriate subcontractor(s). Prime contractor must pay subcontractor(s) within 10 days of receipt of financial incentives from the City.

(ii) OEWD shall, by regulation, develop non-financial incentives such as expedited permitting and reduced administrative burden.

(6) **Additional Contractor Rights and Responsibilities.**

(a) **Local Hiring Plan for Large Projects.** For covered projects estimated to cost more than \$1,000,000, the prime contractor shall prepare and submit to the awarding department and OEWD for approval a local hiring plan for the project. The local hiring plan shall be a written plan for implementation of the requirements of this Policy, including an approximate timeframe for hiring decisions of subcontractors, a description of the hiring processes to be utilized by subcontractors, an estimate of numbers of targeted workers needed from various referral sources, qualifications needed for such targeted workers, and a recruitment plan detailing an outreach strategy for candidates representative of local demographics. An awarding department shall not issue a Notice to Proceed (NTP) without receiving the Local Hiring Plan. The awarding department may issue an NTP upon submittal of the Plan, but in no case may any payment be made until such time as it has verified in writing that OEWD has approved the prime contractor's local hiring plan.

(b) **Referral Sources.** Where a contractor's or subcontractor's preferred hiring or staffing procedures for a covered project do not enable that contractor or subcontractor to satisfy the local hiring requirements of this Policy, the contractor or subcontractor shall use other procedures to identify and retain targeted workers. These procedures shall include requesting workers from CityBuild, San Francisco's centralized referral program, and considering targeted workers who are referred by CityBuild within three business days of the request and who meet the qualifications described in the request. Such consideration shall include in-person interviews. Qualifications described in the request shall be limited to skills directly related to performance of job duties. When a contractor or subcontractor has taken these steps and a local resident or disadvantaged worker is not available, contractor or subcontractor may request a conditional waiver as described in subsection 6.22(G)(4)(c).

(c) **Hiring Discretion.** This Policy does not limit contractors' or subcontractors' ability to assess qualifications of prospective workers, and to make final hiring and retention decisions. No provision of this Policy shall be interpreted so as to require a contractor or subcontractor to employ a worker not qualified for the position in question, or to employ any particular worker.

(d) **Subcontractor Compliance.** Each contractor and subcontractor shall ensure that all subcontractors agree to comply with applicable requirements of this Policy. All subcontractors agree as a term of participation on a covered project that the City shall have third party beneficiary rights under

all contracts under which subcontractors are performing project work. Such third party beneficiary rights shall be limited to the right to enforce the requirements of this Policy directly against the subcontractors. All subcontractors on a covered project shall be responsible for complying with the recordkeeping and reporting requirements set forth in this Policy. Subcontractors with work in excess of the Threshold Amount shall be responsible for ensuring compliance with the local hiring requirements set forth in subsection 6.22(G)(4) based on project work hours performed under their subcontracts, including project work hours performed by lower tier subcontractors with work less than the Threshold Amount.

(7) **Enforcement.**

(a) **Role of OEWD.** OEWD is authorized to enforce all terms of this Policy. Awarding departments shall work cooperatively with OEWD to implement requirements of this Policy, to include the provisions of the Policy in every contract for which inclusion is required, to assist contractors and subcontractors in complying with the Policy, and to assist OEWD in furthering the purposes of the Policy through monitoring and enforcement activities. OEWD shall determine the records required to be verified and/or provided by contractors and subcontractors to establish workers' qualifications and statuses relevant to this Policy.

(b) **Role of Community-Based Partners.** OEWD shall be authorized to engage its community-based partners in the City's workforce development system to assist with the recruitment and retention of targeted workers. OEWD shall, through the existing Workforce Investment Board, provide a forum for community members, community-based organizations, and representatives of all stakeholders affected by or interested in this Policy to exchange information and ideas and to advise OEWD staff concerning the operation and results of the Policy.

(c) **Recordkeeping.** Each contractor and subcontractor shall keep, or cause to be kept, for a period of four years from the date of substantial completion of project work on a covered project, certified payroll and basic records, including time cards, tax forms, and superintendent and foreman daily logs, for all workers within each trade performing work on the covered project. Such records shall include the name, address and social security number of each worker who worked on the covered project, his or her classification, a general description of the work each worker performed each day, the apprentice or journey-level status of each worker, daily and weekly number of hours worked, the self-identified race, gender, and ethnicity of each worker, whether or not the worker was a local resident or disadvantaged worker, and the referral source or method through which the contractor or subcontractor hired or retained that worker for work on the covered project (e.g., core workforce, name call, union hiring hall, City-designated referral source, or recruitment or hiring method). Contractors and subcontractors may verify that a worker is a local resident through the worker's possession of a valid SF City ID Card or other government-issued identification. OEWD and awarding departments may require additional records to be kept with regard to contractor or subcontractor compliance with this Policy. All records described in this section shall at all times be open to inspection and examination by the duly authorized officers and agents of the City, including representatives of the awarding department and the OEWD.

(d) **Reporting.** The OEWD shall establish reporting procedures for contractors and subcontractors to submit to OEWD and the awarding department the records described above, for purposes of monitoring compliance with and effectiveness of this Policy and monitoring operation of the City's public construction sector for other valid purposes. All records submitted by contractor or subcontractor shall be accompanied by a statement of compliance signed by an authorized representative of contractor or subcontractor indicating that the records are correct and complete.

(e) **Monitoring.** From time to time and in its sole discretion, OEWD and/or the awarding

department may monitor and investigate compliance of contractor and subcontractors working on covered projects with requirements of this Policy. OEWD and awarding departments shall have the right to engage in random inspections of job sites, subject to construction schedule and safety concerns. Each contractor and subcontractor shall allow representatives of OEWD and the awarding department, in the performance of their duties, to engage in random inspections of job sites and to have access to the employees of the contractor and subcontractor and the records required to be kept by this Policy. The OEWD shall establish an administrative procedure for OEWD monitoring of compliance with this Policy and to address allegations of noncompliance. The OEWD shall have sole authority over the administration of this procedure. Except as prohibited by law, OEWD will make data collected under subsections 7(c) and (d) of this Policy available on-line to the public in real-time and create a process for members of the public to submit complaints regarding alleged violations of this Policy. The OEWD shall investigate all complaints filed by members of the public; the scope, methods, and conclusions of all such complaint-driven investigations shall be within the discretion of OEWD, with no right of the complaining party to determine the scope or methods of the investigation. All contractors, subcontractors and awarding departments shall cooperate fully with the OEWD in monitoring and compliance activities. The OEWD may interview, either at the worksite or elsewhere, any witness who may have information related to a complaint.

(f) **Compliance Procedures.**

(i) **Consequences of Noncompliance.** Awarding departments and OEWD have the authority to seek for violations of this Policy all of the consequences imposed by or described in this Policy, in the contract for a covered project, or by statute, including the authority to assess penalties as described herein, assess damages for other violations of terms of this Policy, and/or seek penalties set forth in Article V of this Chapter, including debarment.

(ii) **Penalties Amount.** Any contractor or subcontractor who fails to satisfy local hiring requirements of this Policy applicable to project work hours performed by local residents shall forfeit ; and, in the case of any subcontractor so failing, the contractor and subcontractor shall jointly and severally forfeit to the City an amount equal to the journeyman or apprentice prevailing wage rate, as applicable, with such wage as established by the Board of Supervisors or the California Department of Industrial Relations under subsection 6.22(E)(3), for the primary trade used by the contractor or subcontractor on the covered project for each hour by which the contractor or subcontractor fell short of the local hiring requirement. The assessment of penalties under this subsection shall not preclude the City from exercising any other rights or remedies to which it is entitled.

(iii) **Assessment of Penalties.** It shall be the duty of the awarding department, when certifying to the Controller any payment which may become due under a contract, to deduct from said payment or payments the total amount of penalties due under this subsection. In doing so, the department head must also notify the OEWD of his or her action. OEWD may also upon written notice to the awarding department, certify to the Controller any forfeiture to deduct from any payment as provided for in this subsection. Certification of forfeitures under this subsection shall be made only upon an investigation by the awarding department or OEWD and upon written notice to the contractor or subcontractor identifying the grounds for the forfeiture or forfeitures, and providing the contractor or subcontractor with the opportunity to respond. The Controller, in issuing any warrant for any such payment, shall deduct from the amount which would otherwise be due on said payment or payments the amount of said forfeiture or forfeitures as so certified. Any retainage to cover contract performance that may become due to contractor under subsection 6.22(J) may be withheld by the City pending a determination by the awarding department or OEWD as to whether a contractor or subcontractor must pay a penalty or penalties.

(iv) **Recourse Procedure.** If the contractor or subcontractor disagrees with the assessment of penalties as so provided in this subsection, then the following procedure applies:

(a) The contractor or subcontractor may request a hearing in writing within 15 days of the date of the final notification of assessment. The request shall be directed to the City Controller. Failure by the contractor or subcontractor to submit a timely, written request for a hearing shall constitute concession to the assessment and the forfeiture shall be deemed final upon expiration of the 15-day period. The contractor or subcontractor must exhaust this administrative remedy prior to commencing further legal action.

(b) Within 15 days of receiving a proper request, the Controller shall appoint a hearing officer with knowledge and not less than five years' experience in labor law, and shall so advise the enforcing official and the contractor or subcontractor, and/or their respective counsel or authorized representative.

(c) The hearing officer shall promptly set a date for a hearing. The hearing must commence within 45 days of the notification of the appointment of the hearing officer and conclude within 75 days of such notification unless all parties agree to an extended period.

(d) Within 30 days of the conclusion of the hearing, the hearing officer shall issue a written decision affirming, modifying, or dismissing the assessment. The decision of the hearing officer shall consist of findings and a determination. The hearing officer's findings and determination shall be final.

(e) The contractor or subcontractor may appeal a final determination under this section only by filing in the San Francisco Superior Court a petition for a writ of mandate under California Code of Civil Procedure, section 1084, et seq., as applicable and as may be amended from time to time.

(v) **Distribution of Penalties.** The Controller shall withhold any penalties assessed as provided in the foregoing subparagraphs until such time as either the contractor or subcontractor has conceded to the penalties or, in the event of an objection, there is a determination no longer subject to judicial review. The Controller shall then deposit the amounts withheld into a special account which shall be created for the sole purpose of receiving said funds. The funds deposited into this account shall be used to support the enforcement of this Policy and the further development of workforce development initiatives to train and prepare local residents for careers in construction.

(vi) **Other Violations; Repeated Violations.** Violations of this Policy for which penalties or other remedies are not specified above constitute violations of contract terms, for which the full range of remedies under the contract may be invoked, including but not limited to withholding of progress payments in amounts deemed proportional to the violation. Awarding departments shall comply with and implement damages claims and other noncompliance consequences assessed or required by OEWD.

(8) **Miscellaneous.**

(a) **Regulations and Administrative Guidance.** OEWD shall be the primary department authorized to implement and enforce this Policy. OEWD shall issue regulations and/or administrative guidance regarding implementation of the Policy, including (i) documentation and recordkeeping requirements, (ii) incentive payments, (iii) monitoring and compliance activities, (iv) project and/or

contract coverage determinations, (v) designated referral sources, (vi) bid and contract documents implementing the Policy, (vii) procedures for application of the Policy to alternative competitive bidding processes set forth in Article IV of this Chapter, and (viii) other matters related to implementation of this Policy. Awarding departments shall cooperate with and assist in implementation of OEWD actions and determinations regarding this Policy.

(b) **Assistance in Monitoring, Investigations, and Implementation.** In accordance with applicable law, the City may enter into one or more contracts for investigative and monitoring services to further the purposes of this Policy, or to assist OEWD or awarding departments in developing and implementing systems needed to advance the purposes of this Policy.

(c) **Departmental Assistance with Monitoring and Enforcement Costs.** Subject to the fiscal and budgetary provisions of the City Charter and applicable federal and state laws and regulations, OEWD is authorized to receive from awarding departments the amount reasonably calculated to pay for the costs, including litigation costs, of monitoring and enforcing requirements of this Policy. OEWD shall supervise the expenditure of all funds appropriated for these purposes.

(d) **Effective Date.** This Policy shall become effective upon the date of its enactment and shall apply to covered projects first advertised for bids by awarding departments more than sixty (60) days after such date.

(e) **Existing Project Labor Agreements.** This Policy shall not apply to project labor agreements entered into by awarding departments prior to the effective date of this Policy ("Existing PLAs") or to public work or improvement contracts advertised for bids after the effective date of this Policy that are covered by Existing PLAs, where the terms of the Existing PLAs and this Policy are in conflict. Notwithstanding the foregoing, this Policy shall apply to (i) any material amendment to an Existing PLA executed by an awarding department after the effective date of this Policy; (ii) any new public work or improvement contract over the threshold amount set forth in subsection 6.22(G)(3)(a) that is added to the scope of an Existing PLA based on a discretionary decision by the awarding department after the effective date of this Policy.

(f) **Annual Report To Board.** Commencing on March 1, 2012, and annually thereafter, the Director of OEWD shall submit a written report to the Board of Supervisors. That report shall document each awarding department's performance under the terms of this Policy, including, among other things, the compliance of each department's contractors and subcontractors with the requirements of this Policy, any significant challenges experienced by OEWD or awarding departments in implementing or enforcing this Policy, and proposed remedies to address any such challenges. That report shall include documentation, organized by awarding department, of the overall percentage of project work hours on covered projects performed by local residents, disadvantaged workers, local resident apprentices, and residents of states other than California. The report shall also compare the demographics of workers performing work on covered projects, using data collected under the Policy, to the demographics of the qualified labor pool. Awarding departments shall cooperate with requests by OEWD for information needed by the Director to make such reports to the Board.

(g) **Material Term; Contractors' Agreements.** All contracts and subcontracts for performance of project work shall include compliance with this Policy as a material term, directly enforceable by the City as described herein. As a condition of performance of project work, each contractor and subcontractor agrees: to comply with all provisions of this Policy; that provisions of this Policy are reasonable and are achievable by the contractor or subcontractor, including the reporting requirements and consequences for noncompliance described herein; and that the contractor or subcontractor had a full and fair opportunity to review and understand terms of this Policy, in

consultation with counsel if so desired.

(h) **Severability.** If any provision of this Policy or any application thereof to any person or circumstances is held invalid by final judgment of any court of competent jurisdiction, such invalidity shall not affect other provisions or application of this Policy which can be given effect without the invalid provision or application, and to this end the provisions of this Policy are declared to be severable.

(i) **Conflicting Agreements.** In case of conflict between terms of this Policy and a contractual agreement entered into by a contractor, subcontractor or awarding department, terms of this Policy shall govern. Each party to a contract incorporating terms of this Policy agrees through that contract that either it is not a party to such a conflicting agreements, or that it will comply with terms of this Policy as incorporated into the contract, rather than with any conflicting agreements. After the effective date of this Policy, no awarding department may enter into a project labor agreement or other contract relating to or applying to the performance of project work on a covered project that conflicts with or precludes contractor and subcontractor compliance with terms of this Policy.

(j) **Reciprocity.** An awarding department or OEWD may negotiate reciprocity agreements with other local jurisdictions that maintain local hiring programs, provided that such agreements advance the Policy goals of this subsection. Any such reciprocity agreement shall allow targeted workers in each jurisdiction to utilize and benefit from local hiring requirements and referral systems in the other jurisdiction on the same terms as do the workers residing in that jurisdiction. When such a reciprocity agreement is in effect, residents of another jurisdiction may be counted toward satisfaction of the local hiring requirements of this Policy. Any reciprocity agreement negotiated by an awarding department or OEWD shall be subject to the approval of the Board of Supervisors by resolution.

(H) **Modifications - Requirements.** If it becomes necessary in the prosecution of any public work or improvement under contract to make alterations or modifications or to provide for extras, such alterations, modifications or extras shall be made only on written recommendation of the department head responsible for the supervision of the contract, together with the approval of the Mayor or the Mayor's designee or the Board or Commission, as appropriate to the department, and also the approval of the Controller, except as hereafter provided. The Mayor or the Board or Commission, as appropriate to the Department, may delegate in writing the authority to approve such alterations, modifications or extras to the Department head, except as provided below. The Controller may delegate in writing the authority to encumber funds from prior appropriations for such alterations, modifications or extras to the Department head prior to the certification for payment. Such authority, when granted, will clearly state the limitations of the changes to be encompassed.

(1) **Increasing or Decreasing Price.** Alterations, modifications or extras in any contract, which will increase or decrease the contract cost or scope, may be made or allowed only on the written recommendation of the department head responsible for the supervision of the contract stating the amount and basis for such increase or decrease. For any cumulative increase or decrease in price in excess of ten percent of the original contract price or scope, the Department head shall obtain the approval of the Mayor or Mayor's designee or the Board or Commission as appropriate and also the approval of the Controller notwithstanding any delegation provided for above.

(2) **Extensions of Time.** Upon finding that work under a construction contract cannot be completed within the specified time because of an unavoidable delay as defined in the contract, the Department head may extend the time for completion of the work. If the cumulative extensions of time exceeds ten percent of the original contract duration, the Department head shall first obtain the approval

of the Mayor, the Mayor's Designee, Board or Commission, as appropriate to the Department notwithstanding any delegation provided for above. All time extensions shall be in writing, but in no event shall any extension be granted subsequent to the issuance of a certificate of final completion.

(a) **Time Extension Not Waiver of City's Rights.** The granting of an extension of time because of unavoidable delays shall in no way operate as a waiver on the part of the City and County or the Department head, Mayor, Board or Commission of the right to collect liquidated damages for other delays or of the right to collect other damages or of any other rights to which the City and County is entitled.

(b) **No Extension Granted When Contract Based on Time Estimates.** When any award of contract has been made in consideration, in whole or in part, of the relative time estimates of bidders for the completion of the work, no extension of time may be granted on such contract beyond the time specified for completion, unless the liquidated damages for each day the work is uncompleted beyond the specified time shall be collected; provided, however, that this shall not apply to unavoidable delays due to acts of God.

(c) **Avoidable and Unavoidable Delay; Limitation of Damages for Delay.** The department head administering the public work shall have the authority to specify in the contract the delays that shall be deemed avoidable or unavoidable. The City and County shall not pay damages or compensation of any kind to a contractor because of delays in the progress of the work, whether such delays be avoidable or unavoidable; provided, however, the City and County may pay for (1) delays caused to the contractor by the City and County and (2) such unavoidable delays as may be specifically stated in the contract. Such latter delays will be compensated for only under the conditions specified in the contract.

(d) **Notice of Delay Required.** The contractor shall promptly notify the Department head in writing, of all anticipated delays in the prosecution of the work and, in any event, promptly upon the occurrence of a delay, the notice shall constitute an application for an extension of time only if the notice requests such extension and sets forth the contractor's estimate of the additional time required together with a full recital of the causes of unavoidable delays relied upon. The Department head may take steps to prevent the occurrence or continuance of the delay, may classify the delay as avoidable or unavoidable and may determine to what extent the completion of the work is delayed thereby.

(I) **Liquidated Damages.** Any contract may provide a time within which the contract work, or portions thereof, shall be completed and may provide for the payment of agreed liquidated damages to the City and County for every calendar or working day thereafter during which such work shall be uncompleted.

(J) **Retention of Progressive Payments.** Any contract may provide for progressive payments, if the Advertisement For Bids shall so specify. Each progress payment shall constitute full compensation for the value of work performed and materials furnished for a specified period, less amounts withheld as a result of dispute or as required by law.

(1) From every progress payment, the City shall hold 10 percent in retention.

(2) If the Department head responsible for the public work determines that the contract is 50 percent or more complete, that the contractor is making satisfactory progress, and that there is no specific cause for greater withholding, the Department head, upon the written request of contractor, may authorize one of the following two options: (a) the City shall release part of the retention to the contractor so that the amount held in retention by the City, after release to the contractor, is reduced to

an amount not less than 5 percent of the total value of the labor and materials furnished, and the City shall proceed to retain 5 percent of any subsequent progress payment under the contract; or (b) the City shall continue to hold the already withheld retention amount, up to 5 percent of the total contract price, and shall not deduct further retention from progress payments.

(3) The Department head shall authorize the release of retention, in whole or in part, for work completed by subcontractors certified by the HRC as LBEs. The Department head shall do so only upon a written request by the contractor certifying (i) the work by the certified LBE subcontractor is completed and satisfactory (ii) the total final amount paid to the certified LBE subcontractor and (iii) the amount of retention associated with the work performed by the certified LBE subcontractor. Following a release of such retention, and in order to calculate retention and retention withholding from further progress payments, the City will reduce the total retention required under the foregoing paragraphs (1) and (2) by the amount paid to the certified LBE subcontractor(s) for whom the City released the retention. The release of retention under this subparagraph shall not reduce the responsibilities or liabilities of the contractor or its surety under the contract or applicable law. For any contract awarded under this Chapter prior to the enactment of this subparagraph, a Department head may in his or her sole discretion incorporate this subparagraph by change.

(4) The Department head shall authorize the release of retention, in whole or in part, for work completed by subcontractors under any public work contract awarded under this Chapter with a construction duration of more than two years. The Department head shall do so only upon a written request by the contractor certifying (i) the work by the subcontractor is completed and satisfactory (ii) the total final amount paid to the subcontractor and (iii) the amount of retention associated with the work performed by the subcontractor. The City may issue the retention within six months of the date of the request. Following a release of such retention, and in order to calculate retention and retention withholding from further progress payments, the City will reduce the total retention required under the foregoing paragraphs (1) and (2) by the amount paid to the subcontractor(s) for whom the City released retention. The release of retention under this subparagraph shall not reduce the responsibilities or liabilities of the contractor or its surety under the contract or applicable law. For any contract awarded under this Chapter prior to the enactment of this subparagraph with a construction duration of more than two years, a Department head may in his or her sole discretion incorporate this subparagraph by change order.

(5) Retention shall be withheld solely for the benefit and protection of the City,

(6) The City shall release retention to the contractor upon the following conditions: (a) the contractor has reached final completion under the contract terms and conditions and (b) the contract is free of offsets by the City for liquidated damages, defective work and the like, and is free of stop notices, forfeitures, and other charges. When the Department head responsible for the public work or his/her designee determines that the contract is 98 percent or more complete, the Department head or his/her designee may reduce retention funds to an amount equal to 200 percent of the estimated value of work yet to be completed, provided that the contract is free of offsets by the City and is free of stop notices, forfeitures, and other charges.

(7) In no event shall the City be liable for interest or charges arising out of or relating to the date the City issues any progress payment or the date the City releases all or part of the retention, except that the City will pay interest at the legal rate, as set forth in section 685.010(a) of the California Code of Civil Procedure as that section may be amended from time to time, on any improperly withheld amounts commencing no earlier than 90 days after the date the City should have made any progress payment or released all or part of the retention. Under no circumstances shall the legal rate of interest paid by the City under this provision exceed 10 percent per annum. The payment of interest under this provision is

the limit of the City's liability with respect to any claim for interest on improperly withheld amounts

(K) **Inspection and Acceptance of Completed Work; Final Payment.** The Department head authorized to execute any contract for public works or improvements shall be responsible for the inspection and acceptance of such work on completion. Such acceptance shall be in writing and shall include the certificate of the Department head concerned that the work covered by the contract has been fully and satisfactorily completed in accordance with the plans and specifications therefor. Receipt of copy of such acceptance in writing shall constitute the Controller's authority to complete any payments due the contractor under the contract; provided that the Controller may make such additional investigation or inspection as is provided by Administrative Code Section 10.07.

(L) **Termination for Convenience.** In all contracts for the construction of any public work or improvement, the Department head authorized to execute any contract for any public work or improvement may include in the specifications setting forth the terms and conditions for the performance of the contract a provision that the City and County may terminate the performance of work under the contract whenever the Department head shall determine, with the approval of the Mayor, the Mayor's designee or the Board or Commission concerned, that such termination is in the best interest of the City and County. Any such termination shall be effected by delivery to the contractor of a notice of termination specifying the extent to which performance of work under the contract is terminated and the date upon which such termination becomes effective. The Department head is hereby authorized to include within such construction contract the appropriate language to implement this subsection.

(M) **Articles Not to be Prison Made.** No article furnished under any contract awarded under the provisions of this Chapter shall have been made in a prison or by convict labor except for articles made in prisons or by convicts under the supervision and control of the California Department of Corrections and limited to articles for use by the City and County's detention facilities.

(N) **Employment of Apprentices.** All construction contracts awarded under this Chapter shall require the Contractor to comply with the requirements of the State Apprenticeship Program (as set forth in the California Labor Code, Division 3, Chapter 4 [commencing at Section 3070] and Section 1777.5), as it may be amended from time to time, and shall require the Contractor to include in its subcontracts the obligation for subcontractors to comply with the requirements of the State Apprenticeship Program.

(O) **Safety.** All construction contracts awarded under this Chapter shall require the Contractor and all of its subcontractors to abide by the applicable Occupational Safety and Health statutes and regulations.

Additionally, all construction contracts awarded under this Chapter shall require the Contractor and all of its subcontractors to abide by the requirements of Administrative Code Section 64.1, prohibiting masonry-dry cutting and masonry dry-grinding, with exceptions.

(P) **Claims.** The City shall consider only those claims for additional payment under a public work contract that are certified and that conform to the contract requirements for claims, pricing, and schedule.

(1) **Claims by Contractors.** The contractor shall certify under penalty of perjury that (a) the claim is made in good faith; (b) the supporting data are accurate and complete to the best of Contractor's knowledge and belief; and (c) the amount request accurately reflects the Contract adjustment for which the Contractor believes the City is liable. An individual or officer authorized to act on behalf of the Contractor shall execute the certification.

(2) **Claims by Subcontractors.** Subcontractors at any tier are not third-party beneficiaries of any Contract awarded under this Chapter. The City shall not consider a direct claim by any subcontractor. A Contractor presenting to the City any claim on behalf of a subcontractor must certify the subcontractor's claim in the same manner the Contractor would certify its own claim under the foregoing paragraph (1).

(Added by Ord. 286-99, File No. 991645, App. 11/5/99; amended by Ord. 153-00, File No. 000805, App. 6/30/2000; Ord. 237-00, File No. 001207, App. 10/20/2000; Ord. 7-02, File No. 011675, App. 1/25/2002; Ord. 208-02, File No. 021221, App. 10/18/2002; Ord. 58-05, File No. 041571, App. 4/1/2005; Ord. 107-05, File No. 050215, App. 6/10/2005; Ord. 131-06, File No. 060444, App. 6/22/2006; Ord. 119-08, File No. 080277, App. 7/11/2008; Ord. 19-10, File No. 091163, App. 2/10/2010; Ord. 23-10, File No. 091233, App. 2/11/2010; Ord. 311-10, File No. 101311, App. 12/23/2010; Ord. 79-11, File No. 110330, App. 5/19/2011, Eff. 6/18/2011)

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EXHIBIT D

City of Riverside – City Council Memorandum Regarding Community Benefit Program for Use
with Design-Build Requests for Proposals



City of Arts & Innovation

City Council Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL DATE: APRIL 17, 2012

FROM: CITY ATTORNEY ITEM NO:
CITY MANAGER

WARD: ALL

**SUBJECT: COMMUNITY BENEFIT PROGRAM FOR USE WITH DESIGN-BUILD
REQUESTS FOR PROPOSALS**

ISSUE:

The issue presented for consideration by the City Council is whether to adopt an enhanced and expanded Community Benefit Program for use in future Requests for Proposals (“RFPs”) for Design-Build contracts.

COMMITTEE RECOMMENDATION:

That the City Council approve the attached Community Benefit Program template for use in RFPs for Design-Build contracts.

BACKGROUND:

The Public Works Department and the City Attorney’s Office were requested to prepare a staff report addressing local preference options in evaluating construction bids for the Riverside Regional Water Quality Control Plant Phase I Expansion. The staff report was presented to the Land Use Committee on June 16, 2011. As explained in that staff report, Section 1109 of the Riverside City Charter establishes the City’s authority in awarding public works contracts. Generally, “every project for the construction and/or improvement of public buildings, works, streets, drains, sewers, utilities, parks or playgrounds, ... when the total expenditures exceed \$50,000, shall be let by the City Council ... by contract to the lowest responsible bidder” (traditional “design-bid-build”); however, “projects for the construction and/or improvement of any public utility operated by the City or for the purchase of supplies or equipment for any such utility may be excepted from the requirements of this section, provided the City Council so determines by at least five affirmative votes.” In such cases, the City could utilize a “design-build” delivery method under Charter section 1114 and Chapter 1.07 of the Riverside Municipal Code.

Legally, there is a crucial difference between the two options. Riverside's traditional "design-bid-build" contracts must be awarded to the lowest responsible bidder; there are no exceptions. Efforts to favor local businesses, such as a simple percentage bidding preference, have been struck down for violating lowest bidder requirements. The criterion considered in lowest-bidder awards is the amount of the bid. Alternatively, Riverside's design-build ordinance allows award on the basis of the "best value to the City." While a simple percentage bidding preference would violate the ordinance, the City may lawfully enhance local participation through outreach and awareness, and consider that in the award.

The City of Riverside will have to comply with the following legal principles in order to lawfully consider local preference provisions in public works bidding:

- The City cannot mandate local residency quotas. Goals and incentives, short of fixed quotas, are permissible
- Residency requirements affecting union participation can violate the First Amendment and the National Labor Relations Act.
- Simple percentage-based preferences, even as low as 5%, would violate Section 1109 of the City Charter, which requires award to the lowest bidder, unless the City Council, by at least five (5) affirmative votes, adopts a resolution excepting the Project from competitive bidding, based upon factual findings to support the preference. Such findings would be challenging to make based on established case law.
- Any additional costs or expenses to a bidder could not be charged to the enterprise fund and paid out of rates. Local preference expenditures would necessarily have to be paid out of the City's General Fund.

We believe the best way to maximize the opportunities for local persons and businesses to fully and fairly participate in City project contracts and subcontracts is through extensive outreach efforts to inform local, qualified persons and businesses of those opportunities to participate. Having heard and received the information in the staff report, the Committee determined that good-faith efforts to meet local participation goals was the best option, and tasked the City Attorney's Office to develop implementing language. Based upon our research, the City Attorney's Office developed a Community Benefit Program for use with design-build RFPs. Having reviewed prior City RFPs, it was determined that the Community Benefit Program should be incorporated into all design-build RFPs.

For the Community Benefit Program, the term "local" is generally defined as within a 50-mile radius of the City's boundaries. The "local" area has been defined in past City agreements as a 50-mile radius extending from City boundaries; a smaller radius could be considered on a project-by-project basis if it does not reduce the available pool of qualified participants. Proposals must address: (1) local labor outreach; (2) local business outreach; and (3) a return-to-work program. Proposers must actively recruit and employ skilled craft workers with a primary residence located within a 50-mile radius (or other approved radius) of the Project site. At least 50% of the proposal labor must be local; if not, the Proposer must continue to make verified efforts to meet that goal.

All Proposers must undertake outreach to all qualified Local Businesses. To demonstrate good-faith efforts at engaging Local Businesses, Proposers must:

- Attend a Community Benefit Program information meeting;
- Identify and select supplies, specific work items, and services which can be locally provided;
- Advertise for bids from interested businesses in one or more daily or weekly newspapers, trade association publications, trade journals, or other media;
- Provide written notice of its interest in retaining those businesses enterprises, including Local Businesses, which express an interest in participation;
- Document efforts to follow up initial solicitations of interest by contacting the Local Businesses;
- Provide interested Local Businesses with information about the plans, specifications and requirements;
- Request assistance from organizations that provide assistance in the recruitment and placement of Local Businesses, such as the Greater Riverside Chambers of Commerce;
- Negotiate in good faith with interested Local Businesses and not unjustifiably reject as unsatisfactory their bids or proposals;
- Submit a list of all interested Local Businesses for each item of work for which bids were solicited, including dollar amounts of potential work for Local Businesses, and shall provide the reasons any Local Businesses were not selected; and
- Document efforts to advise and assist interested Local Businesses in obtaining bonds, lines of credit, and insurance required by the City or Proposer.

Proposers are also instructed to provide detailed information about local job training, apprenticeships, the Helmets to Hardhats program (for further information, see <http://www.helmetstohardhats.org/>) or other veteran employment opportunity programs.

Failure to failure to comply in good faith with the Community Benefit Program would be considered a material breach of the contract and, in addition to other remedies, the City may impose damages for noncompliance. Because the actual amount of the damages would be extremely difficult determine, a fixed, estimated and reasonable amount can be set (known as "liquidated damages").

The City has used liquidated damages for a contractor's failure to comply with community benefit program requirements in other RFPs. The particular amount of liquidated damages imposed would differ for each RFP, based on factors such as cost and duration of the contract; for example, the design-build Agreement for the \$13.7 Million Arlington Heights Sports Park project allowed for liquidated damages of \$1,000 per day of noncompliance. The \$110 Million RERC Units 3 & 4 project RFP imposed liquidated damages of \$2,500 per incident, or per day, of noncompliance with local labor efforts. In both projects, the contractor met the local labor and community benefits requirements. With the RERC 3 & 4 Project, the cumulative community benefit was \$5,310,137.85, or 144% of the contract requirement as verified by a third party compliance entity.

Efforts to improve local participation may meet future legal hurdles. Take for example, California Assembly Bill 359 ("AB 356"). AB 356 would prohibit any local agency from mandating that any portion or percentage of work on a public works project be performed by persons residing within particular geographic areas, if any portion of that project will take place outside the geographical boundaries of that local agency. It would also require a local agency to pay for the difference in

costs attributed to a local resident hiring policy, if the project is funded with state funds, even if the project is entirely within the local agency's geographical boundaries. Although AB 356 died in the Assembly last year, there may be future similar legislation introduced on this issue.

It is our considered opinion that the proposed Community Benefit Program would be legally consistent with and complimentary to Riverside's design-build ordinance, because it will affirmatively assist in providing the best value to the Riverside taxpayer.

On March 15, 2012, this Program was presented to the City Council's Land Use Committee. With all members present, the Committee voted unanimously to recommend the Program's adoption to the City Council. On March 27, 2012, this Program was presented to the Greater Riverside Chambers of Commerce Economic Development Council, which also voted unanimously to recommend City Council adoption of the Program.

FISCAL IMPACT:

The Community Benefit Program, if approved, could impose a small additional burden on some Proposers and the selected Contractor. Any increased Project cost from the Community Benefit Program would not be payable from enterprise funds, but from the General Fund.

Prepared by: Gregory P. Priamos, City Attorney
Scott C. Barber, City Manager

Concurs with: _____
William H. Bailey, III, Chair
Land Use Committee

Attachments: Community Benefit Program Template

RFP NO. _____

(PROJECT NAME)

(DATE)

ADDENDUM NO. __

COMMUNITY BENEFIT PROGRAM

This Addendum hereby becomes a part of the bid specifications and documents for the _____ project bid. The bid due date of _____ has not changed. Bid proposals submitted after _____ will not be accepted.

1) Community Participation in City Projects

1(a) It is important that all workers, contractors, subcontractors, suppliers, and businesses, particularly local workers, contractors, subcontractors, suppliers, and businesses, have a full and fair opportunity to participate in City projects. For the Community Benefit Program, "local" is defined as within a 50-mile radius of the City's boundaries. The Proposer shall be required, as part of its Proposal, to submit proposals for the following: (1) local labor outreach; (2) local business outreach; and (3) a return-to-work program.

1(b) Non-compliance with the Community Benefit Program will damage the City. Because the actual amount of the damages would be extremely difficult, if not impossible to determine, the Proposer will be subject to liquidated damages. Proposer and its surety shall be responsible for payment of any liquidated damages imposed.

1(c) Proposers must respond to each of the sections below. The responses must state whether or not the requirements are acceptable, and if further information is required, those details must be provided with adequate detail.

2) Local Labor Outreach

2(a) To the extent permitted by law, Proposers shall actively recruit and employ skilled craft workers located within a 50-mile radius of the Project site ("Local Labor").

2(b) The City has established a goal that Local Labor shall account for a minimum of 50% of Proposer's and its subcontractors' labor forces for Project construction. Proposals shall include

the proposed worker outreach methods, to provide the City with sufficient information to monitor and evaluate Proposer's post-award outreach efforts.

2(c) Achievement of the 50% goal shall be periodically evaluated by a review of certified payroll records, as submitted by the Proposer.

2(d) If Local Labor participation is at least 50%, the Proposer shall be deemed to be successful in its outreach efforts for that review period, without the need to document its outreach efforts. If Local Labor participation is below 50% for any compliance period, the Proposer must demonstrate that its outreach efforts conform to those proposed by submitting documentation of its outreach efforts to the City; as long as Local Labor participation remains below the 50% goal, outreach efforts must continue.

3) Local Business Outreach

3(a) Proposers shall make good-faith efforts to optimize local subcontractor, supplier, and service provider ("Local Business") participation through information and outreach. ALL Proposers, including local firms, must undertake Local Business outreach; and Proposers must undertake outreach to ALL qualified Local Businesses, including, but not limited to, those within a 50-mile radius from City boundaries ("Local Businesses"). To demonstrate good-faith efforts at engaging Local Businesses:

3(b) The Proposer must make a good faith effort to obtain participation by Local Businesses.

3(c) The Proposer will attend a pre-proposal meeting scheduled by the City to inform all Proposers of the project contract requirements. The City may waive this requirement only if a Proposer certifies in writing it is already informed as to those project requirements prior to the pre-proposal meeting.

3(d) The Proposer will identify and select supplies, specific work items in the project to be performed by subcontractors, and services to be performed by service providers, in order to provide an opportunity for participation by Local Businesses. For larger projects, the City may require the Proposer to subdivide the total contract work requirements into smaller portions or quantities to permit maximum active participation of Local Businesses.

3(e) Not less than 10 calendar days prior to the submission of bids or proposals, the Proposer will advertise for bids from interested businesses in one or more daily or weekly newspapers, trade association publications, trade journals, or other media specified by the City.

3(f) The Proposer will provide written notice of its interest in retaining those businesses enterprises, including Local Businesses, which express an interest in providing subcontracting, services, or supplies. All notices of interest shall be provided not less than 7 calendar days prior

to the date the bids are required to be submitted. In all instances, Proposer must document that invitations for subcontracting, services, and supplies were sent to available Local Businesses for each item of work to be performed.

3(g) The Proposer will document efforts to follow up initial solicitations of interest by contacting the Local Businesses to determine with certainty whether the Local Businesses are interested in supplying or performing specific services or portions of the project work and if they will submit a bid to the Proposer therefor.

3(h) The Proposer will provide interested Local Businesses with information about the plans, specifications and requirements for the selected subcontracting work, service, or supplies.

3(i) The Proposer will request assistance from organizations that provide assistance in the recruitment and placement of Local Businesses, such as local Chambers of Commerce, not less than 15 calendar days prior to the submission of bids.

3(j) The Proposer will negotiate in good faith with interested Local Businesses and will not unjustifiably reject as unsatisfactory their bids or proposals. As documentation, the Proposer will submit a list of all interested Local Businesses for each item of work for which bids were solicited, including dollar amounts of potential work for Local Businesses, and shall provide the reasons any Local Businesses were not selected.

3(k) The Proposer will document efforts to advise and assist interested Local Businesses in obtaining bonds, lines of credit, and insurance required by the City or Proposer.

4) Return-to-Work and Other Programs

The City, in awarding this project, will consider community benefit proposals including but not limited to local job training, apprenticeships, the Helmets to Hardhats program (for further information, see <http://www.helmetstohardhats.org/>) or other veteran employment opportunity programs. Please provide detailed information about such community proposals that Proposer would provide if awarded this Project.

5) Noncompliance

Should the Proposer not achieve the 50% goal of Local Labor participation AND not demonstrate compliance with the proposed outreach efforts; not satisfy all Local Business participation requirements; and/or, not satisfy the Return-to-Work or Other Community Benefit Programs; the Proposer will be notified, in writing, of the violation. The Proposer will have an appropriate cure period to remedy the violation. Failure to cure the violation within the time specified in the notice will subject the Proposer to liquidated damages. The City may impose liquidated damages of \$_____ for every day or every incident of noncompliance, as applicable.

For more information contact:

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