
OFFICE OF THE INDEPENDENT BUDGET ANALYST REPORT

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Proposed Amendments to the Municipal Code related to the City's Living Wage Ordinance

OVERVIEW

At the March 5, 2008 meeting of the Budget and Finance Committee (Committee), the Office of the City Attorney provided an update on the effectiveness of the City's Living Wage Ordinance (LWO), enforcement issues and the status of two City LWO complaints. In response to direction from the Committee, the Office of the City Attorney returned to the Committee on July 9, 2008 to present draft revisions to the LWO. These revisions were designed to 1) create a cost recovery fund to help fund LWO enforcement, 2) narrow the existing professional services exemption to exclude emergency medical technicians, paramedics and possibly other employees, and 3) reduce inconsistency in the application of LWO by eliminating the 90-day requirement for City facility agreements and service contracts.

The Committee moved to forward the draft LWO revisions, together with proposed LWO amendments received from the Center for Policy Initiatives (CPI), to the City Council for consideration. The Committee's action requested the City Attorney's Office to further analyze proposed revisions to the LWO and draft ordinances incorporating CPI's proposed amendments to both the LWO and Contractor's Standards sections of the San Diego Municipal Code (Code). Additionally, the Committee requested analysis from the IBA and the Mayor related to the proposed amendments.

The Office of the City Attorney submitted two reports (dated October 6, 2008 and October 16, 2008) to the Mayor and City Council in response to the Committee's action on July 9th. These reports discuss and present three ordinances for City Council consideration. Except for different language regarding the professional services

exemption, two of the ordinances (Exhibits A and B) are identical and address proposed changes to the LWO (Division 42 of the Code). The third ordinance (Exhibit C) incorporates CPI's proposed revisions to Contractor Standards (in Division 32 of the Code).

The IBA understands that the Mayor's Office is currently developing a report in response to the proposed LWO revisions and amendments to the Code. Our office has discussed the proposed LWO amendments with representatives from the City Attorney's Office, the Purchasing Department, CPI and various other stakeholders. This report endeavors to provide fiscal and policy considerations associated with the proposed amendments to the LWO.

FISCAL/POLICY DISCUSSION

Exhibit D of the City Attorney's report dated October 16, 2008 provides a matrix of the proposed revisions to the Code. The matrix lists all of the proposed revisions in the order they appear in the Code. Although this report does not comment on all of the proposed revisions, our comments are presented below in the order they appear in the matrix and the Code.

Living Wage Ordinance

Section 22.4205 (f): Definitions - City Facility (Civic Theatre)

Except for specified exemptions, the LWO currently applies to following five "City facilities": Petco Park, Qualcomm Stadium, San Diego Sports Arena, San Diego Convention Center and the San Diego Concourse. As footnoted in their October 6th report, the City Attorney has previously opined that the Civic Theatre is not included in the San Diego City Concourse as used in the LWO. In order to incorporate CPI's proposed amendment to include workers at the Civic Theatre, the Civic Theatre is proposed to be defined as a sixth City facility within this section of the Code.

In order to ascertain the potential fiscal impact of the LWO, Civic Theatre management (Don Telford) analyzed the Theatre's payroll records for calendar year 2007 and determined that application of the LWO would result in an additional operating expense of approximately \$192,000 for the Civic Theatre. A new collective bargaining agreement is in the process of being negotiated for concession stand workers and bartenders (the Theatre is currently negotiating with HERE Local 30). If approved, the estimated increase in operating expense would be reduced to approximately \$170,000. IF LWO had been applied in 2007, impacted workers at the Theatre would have included Ushers/Ticket Takers (101), Ticket Sellers (16), Housekeepers (8), Public Safety (16) and Concession Stand Workers/Bartenders (32).

The IBA notes the following considerations with respect to this proposed revision:

- The San Diego Civic Theatre is owned by the City and operated by San Diego Theatres (SDT), a nonprofit corporation. SDT does not receive financial support from the City for operating the Theatre. SDT's annual budget to operate the Civic Theatre is approximately \$3.1 million. As a percentage of their annual operating budget, \$192,000 is approximately 6.2% and \$170,000 is approximately 5.5%.
- In calendar year 2007, the Civic Theatre hosted 167 performances and had total attendance of 315,358. Dividing total 2007 attendance (315,358) into the potential LWO fiscal impact of \$192,000 into equates to approximately 61 cents a ticket. The IBA is not sure whether SDT has the ability to add a surcharge to ticket prices or if they could alternatively build these costs into individual user contracts. If the latter, sufficient lead time would be required as we understand that such contracts are typically negotiated one or two years in advance.
- If the LWO were to be applied to the Civic Theatre, SDT management could consider moving to a partial or all volunteer ushering staff which could have unintended consequences for current workers. The IBA has been informed that the Civic Theatre and the Balboa Theatre are the only theatres in the San Diego region that use paid ushers; other theaters use volunteer ushers.

Section 22.4205 (f): Definitions - City Facility Agreement

Amending this definition to remove “with a term of more than 90 days” would make sub-90 day subcontracts and concession agreements at defined *City facilities* subject to LWO. City departments rarely enter into service contracts of less than 90 days duration, so this change would have a negligible impact for City service contracts subject to LWO. The IBA is concerned that this amendment would require additional LWO administrative staff to monitor compliance or conduct periodic audits. Additionally, there is some question as to the ability of City Purchasing Department staff to effectively oversee subcontracts and concession agreements controlled by different management structures.

The IBA acknowledges the concerns raised by Elite Show Services related to enforcement and equity that have been noted in the City Attorney's October 6th memorandum. Limited City Purchasing Department staff currently must rely on management at the defined *City facilities* to monitor their obligations under the LWO. Purchasing staff currently assists the defined *City facilities* by providing information and support materials to their managements. Finally, the IBA understands that CPI currently favors leaving this definition unchanged, with the under 90-day exemption in place.

Section 22.4205 (f): Definitions – Service Contract (Managed Competition) and Services (Defined)

These definition amendments include language further defining the term *service contract* to include all services provided through the managed competition program. This amendment would ensure that all services contracted out pursuant to managed competition would be subject to provisions of the LWO.

CPI has further proposed to amend the definition of *services* by including street cleaning; waste collection and disposal, including recycling; right-of-way maintenance; and water and wastewater maintenance. This amendment would expressly include these services as types of non-managerial, non-supervisory, non-professional services intended to be covered by the LWO. These services have been identified for inclusion due to their presumed targeting for managed competition. It should be noted that this proposed amendment is not intended to extend to contracts for public works construction or capital improvements, which are categorically exempt from the LWO.

The apparent overarching intent of the latter two proposed definition amendments is to ensure that any service contracted out under managed competition is subject to the LWO. To the extent that would-be private contractors are currently paying wages that are below those mandated by the LWO, these amendments may potentially result in higher bid prices submitted by private contractors under the competition process. Given that the City pays a living wage, this would provide for an even playing field with respect to wage in a managed competition scenario.

However, it is important to note that the City may have existing contracts for the four services proposed to be expressly included in the definition of *Services* (street cleaning; waste collection and disposal, including recycling; right-of-way maintenance; and water and wastewater maintenance). If so, adoption of this revised definition for *Services* may have a financial impact if these contracts are not currently abiding by LWO requirements. Further analysis would be necessary to determine the financial impact, if any, for this proposed amendment.

Section 22.4215 (a) (4): Exemptions

This section removes the current exemption for *recycling or solid waste management franchises*. See the comments above for 22.4205 (f) as they relate to the proposal to amend the definition of *Services*.

Section 22.4215 (a) (7): Exemptions

There are two proposed changes to this section of the Code. The first change was initiated by CPI and is captured in both the Exhibit A and Exhibit B ordinances (attached to the October 16th City Attorney report). The proposed change seeks to better define professional service contracts by referencing the California Labor Code [Section 515(a)]. This section of the Labor Code defines professional employees and further specifies that they earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment (\$8.00/hour).

When asked by the IBA, the City Attorney's Office was uncertain if this Labor Code reference would exclude service workers (administrative staff, tellers, clerks, etc.) from the LWO at professional service firms used by the City (banks, law firms, etc.). CPI's Labor Code reference could be interpreted to bring service workers in professional fields who are making less than twice the current minimum wage within the protections of the

LWO. As noted in the City Attorney's October 6th report, this could make it challenging for the City to enter into certain professional service contracts (banking, legal services, etc.). If the City Council does not intend to bring such workers within the protections of the LWO, we recommend either not adopting this revision to Subdivision (a) (7) or directing the City Attorney's office to draft clarifying language to better define professional service contracts. Alternatively, if the City Council intends to apply the LWO to professional service contracts, the IBA notes that there will likely be a significant increase in compliance monitoring responsibilities for LWO administrative staff.

The second amendment to the professional services exemption resulted in the two revised versions of the LWO presented as Exhibit A (broad definition version) and Exhibit B (narrow definition version). The last added sentence of Subdivision (a) (7) in the Exhibit A ordinance purposefully does not exempt all non-professionals providing support services for professionals contracting with the City. The last added sentence of Subdivision (a) (7) in the Exhibit B ordinance purposefully narrows the exemption to only apply to emergency medical technicians (EMTs) and/or paramedics (hence they would be covered by the LWO).

The IBA has learned that depending on the shift schedule worked and overtime factors, most EMTs and paramedics earn close to or exceed LWO requirements. For example, entry level EMTs working 12-hour shifts start at \$8.50 an hour for the first 8 hours and \$12.75 an hour for the final four hours of each shift which equates to just under \$10 an hour with benefits. The current living wage requirement is \$10.58 an hour plus benefits or \$12.70 an hour without benefits. Paramedics working 12-hour shifts begin at \$12.24 an hour for the first 8 hours and \$18.36 for the final four hours of each shift with benefits.

It should also be noted that the City's contract for Emergency Medical Services ends on December 31, 2008 and a new contract process for 2009 is currently underway. We further understand that there may no longer be an interest in adopting the Exhibit B ordinance that would apply LWO to EMTs and paramedics. If that is the case and to the extent that the Exhibit A ordinance is alternatively considered, the IBA would again note the City Attorney's comments about certain professional service firms potentially being deterred from bidding on City contracts because LWO provisions would apply to their service workers.

Section 22.4215 (c): Exemptions

This section retains a sentence recommended by CPI specifying that when LWO applicability is in doubt (with respect to the definitions of *service contract*, *financial assistance agreement*, or *City facility agreement*), there will be a presumption against the determination of exempt status.

Section 22.4225 (d): Reporting and Notification Requirements

This section has been recommended by CPI and would require each covered employer to submit an annual report with significant employee data to the *City Manager*. This subsection goes on to define detailed records that must be maintained for three years without specifying if they are to be maintained by the covered employer, the City or both. The IBA recommends that the City Council request that the City Attorney clarify this language. We further note that while this provision helps LWO enforcement, it also imposes a recordkeeping burden on the covered employer and City staff (who must review and file this information).

Section 22.4230 (c): Enforcement – Complaint Investigations

The proposed revision to this section imposes a mandatory, rather than a discretionary, duty on the City to investigate and address any alleged LWO violations. Although failure by the City to follow-up as required on an alleged violation does not create any right or action to recover damages from the City, such a requirement could impose a significant workload burden on current LWO administrative staff (1.5 employees in the Purchasing Department) and support from the City Attorney’s Office.

Section 22.4230 (d): Enforcement – LWO Violations

Proposed revisions to this section allow a covered employer 10 days to correct a violation. If a violation is not corrected within that timeframe, the City Manager is compelled to take one or more actions including, but not limited to: declaring a material breach of the service contract, initiating proceedings to debar a covered employer, or requesting the City Attorney to bring a civil action against the covered employer. At the October 8th stakeholder meeting convened by the Office of the City Attorney, Lani Lutar of the San Diego Regional Chamber of Commerce expressed concern that 10 days may not allow a covered contractor sufficient time to correct a violation and suggested that the proposed timeframe be extended.

Section 22.4230 (g): Enforcement – Living Wage Enforcement Fund

This provision was developed to fund a sufficient level of LWO monitoring and enforcement. If adopted, it would impose a yet to be determined fee on service contractors to cover the costs of reasonable LWO monitoring and enforcement as determined by the City Manager. There were 105 City LWO service contracts in FY 08. While this language provides a useful cost recovery mechanism, the Purchasing Department and other LWO stakeholders have yet to agree on what might constitute a “reasonable” level of monitoring and enforcement. Until that is known, it is difficult to develop/implement a fee structure and hire LWO administrative staff if needed.

There are also contractor fee equity considerations that have yet to be addressed. As noted in the City Attorney’s October 6th memorandum, this provision does not extend to *City Facility Agreements* even though those agreements impose just as much of an

enforcement burden on Purchasing Department staff as *Service Contracts*. Additionally, the cost of monitoring and enforcement may change over time, yet changing an established fee structure to maintain equity and reflect actual costs can be challenging.

LWO Program administration currently consists of 1.5 staff. In addition to routine program administration (contract management, responding to requests for information, working with covered employers and their employees, developing and distributing informational materials for the program, etc.), it is reasonable to expect that LWO administrative staff will increasingly be asked to investigate complaints, perform audits, and otherwise monitor compliance. The IBA believes the various ordinance proposals discussed in this report could significantly add responsibilities for LWO administrative staff. The IBA concurs with the Committee that it is important for the City to monitor and enforce its programs and the Code. However, we are concerned that there may not be sufficient staff to effectively administer the current or potentially modified LWO Program. For example, the Program has yet to complete a contractor audit despite having capable and committed staff.

Having said that, it may be that only one or two additional administrative staff is needed. If that is determined to be the case, then it may be more practical to add an additional staff member than to quickly attempt to develop an accurate/equitable contractor fee structure. An alternative idea might be to partially cost recover through the LWO covered *City facility agreements*.

The IBA understands the difficult fiscal environment the City currently faces. We struggle to balance this primary concern with our unease that the City may not be able to effectively monitor and enforce its LWO Program. Noting the current projected fiscal year deficit, CPI has indicated that they do not support establishing a fee on contracts at this time, which means there would be no identified funding source for increased enforcement. However, concerns have also been raised that such a fee, if created, would simply be passed back to the City through bidders' cost proposals. This is a significant concern that should be further evaluated given the City's projected deficit.

Section 22.4235: Administration

This revision would require that the City Manager submit an annual report to the City Council generally describing the effects of the LWO. The IBA supports this revision as a means of systematically evaluating program effectiveness and keeping the City Council regularly apprised of this program.

Contractor Standards Ordinance

The IBA believes the City Attorney has done a good job of explaining the origin and implications of this proposed ordinance (Exhibit C) on page 10 of their October 6th report. It is important to note that the proposed revisions apply to all City contracts including consultant agreements, maintenance contracts and public works contracts.

While these proposed revisions may help with LWO enforcement, they will also have broader implications for other City contracts and operations.

Section 22.3224 (d): Contractor Standards – Pledge of Compliance

This provision would require all contractors to complete a Pledge of Compliance attesting under penalty of perjury to comply with the provisions of this ordinance. Additionally subcontractors whose subcontracts are greater than \$50,000 in value must also complete a Pledge of Compliance. If a contractor is subsequently found to have violated the provisions of this ordinance, the contractor could be found to be in breach of their contract and subject to remedies including termination. Additionally, after a hearing, the City could declare a contractor to be “non-responsible” and not eligible to do business with the City for a period of two years.

The Purchasing Department currently requires contractors to complete (and sign under penalty of perjury) a Contract Standards Questionnaire providing useful financial contractor information, contact performance history and compliance records. Additionally, contractors subject to LWO are required to complete (and sign under penalty of perjury) an LWO Certification of Compliance. The IBA felt this should be mentioned acknowledging that we do not fully understand the legal/enforcement advantages garnered with an additional Pledge of Compliance.

Section 22.3224 (f): Contractor Standards – Audit Committee Hearings

This provision contemplates the City’s Audit Committee serving as an appeal hearing body for contractors who have been found by the City Manager to be non-responsible as described above. This responsibility has yet to be contemplated for the Audit Committee and is not within the current Audit Committee Charter. Agendas for regularly scheduled monthly Audit Committee meetings have been fully booked and special meetings are often held for priority issues such as reviewing the City’s financial statements or hearing the results of completed audits. Additional research is needed to determine if this is an appropriate role for an Audit Committee or whether a different form of appeals board should be established for this purpose.

CONCLUSION

The IBA does not provide recommendations for many of the proposed revisions to the LWO and the Contractor Standards Ordinance before the City Council. The purpose of this report is to provide additional information on proposed amendments to the Code that could have significant fiscal or policy implications. The IBA does believe that the City should be able to reasonably monitor and enforce its adopted programs like LWO.

After considering the implications associated with the proposed LWO amendments, it may be determined that additional LWO administrative staff is required. The IBA generally supports the concept of recovering costs from those entities requiring

monitoring and enforcement. However, the possibility of these costs being passed back to the City through increased contract costs needs to be evaluated particularly in these difficult fiscal times. We have also suggested that it may be possible to partially recover costs through *City facility agreements* covered by the LWO.

Additional discussion should be thoughtfully undertaken between LWO administrative staff and stakeholders to determine what constitutes a “reasonable” level of administrative staff to ensure adequate monitoring and LWO enforcement. Once a reasonable staffing level has been determined and the potential fiscal implications of new contractor fees has been evaluated, the City Council will be better able to evaluate the possibility of new fees or, alternatively, evaluate LWO staffing as one budget priority competing with other budget priorities in a difficult fiscal environment.

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