



THE CITY OF SAN DIEGO

OFFICE OF THE INDEPENDENT BUDGET ANALYST REPORT

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Information about Actions Other Cities Have Taken to Oppose Federal Actions Calling for the Construction of a Border Wall

OVERVIEW

On September 19, 2017, the City Council adopted Resolution #311327 (Resolution) in opposition to Executive Order 13767 (To Build a Wall Along the United State Border with Mexico) and U.S. House of Representatives Bill H.R. 1813 (Border Wall Funding Act of 2017). Citing financial, environmental, international trade, and cross-border relations concerns, the Resolution opposed all associated actions calling for construction of a wall along the entire U.S.-Mexico border and expressed the City's intent to seek disclosure from all companies who submit a bid or are awarded a contract related to designing, building, or financing the proposed border wall. Additionally, the Resolution stated, "the City will explore legally permissible options for this disclosure as soon as practicable."

In making the motion to adopt the Resolution, Councilmember Gomez asked the IBA to research what other cities, who have similarly resolved to oppose the border wall, are doing to seek disclosure and any related actions. Councilmember Gomez additionally asked if the IBA could work with the Office of the City Attorney to develop a recommendation as to how to best proceed with the disclosure element of the Resolution. This report summarizes actions taken to date by other cities who have adopted resolutions or ordinances in opposition to the border wall and concludes with possible approach for seeking disclosure.

FISCAL/POLICY DISCUSSION

In response to the request from Councilmember Gomez, the IBA has researched six cities that have similarly taken actions and explored options to oppose construction of a border wall. A short synopsis of the actions taken by each of these cities to date follows:

City of Los Angeles

After discussion by the Budget and Finance Committee on July 31, 2017, the City Council requested the City Attorney, with assistance from the Bureau of Contract Administration, to prepare and present an ordinance "directing prospective and existing contractors with the City of Los Angeles to disclose under affidavit whether they have any contracts for design, construction, supply, procurement, or other development related services regarding building any proposed border wall between Mexico and the United States of America". In response, Ordinance #185600 was presented and adopted by the City Council on June 5, 2018. The Ordinance makes legislative findings in support of the City's opposition to the proposed border wall and states that "no contract shall be awarded to any Person who has failed to complete fully and accurately an affidavit listing all Border Wall Bids and Border Wall Contracts."

The Ordinance specifies the disclosure requirement shall apply to all contracts, and amendments to contracts, entered on or after March 17, 2017. A disclosure affidavit is currently in the process of being finalized. The affidavit will be sent to applicable existing contracting entities and incorporated into the contracting process going forward. There are a few exceptions to the City's disclosure requirement (certain investment contracts, grant funded contracts, emergency repair contracts, etc.). The disclosure requirement will be administered by the Department of Public Works and the Bureau of Contract Administration. In summary, the City of Los Angeles will be collecting and maintaining border wall disclosure affidavits from the companies they contract with. This information will be made available should there be a public record request.

City of Oakland

In February and March of 2017, a draft resolution in opposition to the proposed border wall on the U.S.-Mexico border was discussed by the Rules & Legislation and Finance & Management Committees. The resolution was approved and forwarded to the full City Council for consideration. On March 21, 2017, the City Council adopted Resolution #86662 which makes several findings to support their opposition to the proposed border wall and resolved in part to:

- Refrain from entering into new or amended contracts with businesses that provide services, goods, materials, or supplies to build the proposed border wall in instances where there is no significant additional cost or conflict with the law.
- Not renew or extend any existing City contracts with businesses that are contractually engaged to provide services or goods in support of the proposed border wall.
- Direct the City Administrator to return to the City Council with an ordinance establishing the policy by law and developing implementing regulations.

On November 28, 2017, the City Council adopted Ordinance #13459 to implement direction from the aforementioned Resolution into Oakland's Municipal Code. In addition to the general prohibition against entering into contracts with Border Wall Entities (as defined in their Ordinance), the Ordinance requires the City to develop (from a credible external source that is available to the public) and post a list of Border Wall Entities that have entered into Border Wall Contracts as defined. This list is currently posted on the City's website and is required to be updated twice a year. The City is required to notify all contractors on the list in writing and provide them with an opportunity to appeal their inclusion on the list if desired.

Oakland's contracting departments are required to include a reference to their Border Wall Contractor Prohibition Law in all solicitations for contracts, RFPs, and RFQs. Contracting departments must require that all proposals submitted to the City, and all contractors doing business with the City, complete a Border Wall Prohibition form (Schedule W) declaring, under penalty of perjury, that they "will not, have not, and do not plan to participate in the building, servicing, maintenance of the operations of the so called Border Wall." If a contractor declares involvement with construction of the border wall, they are not precluded from submitting a bid and/or competing for the contract as there are defined circumstances that could allow them to be selected. The IBA was informed that Oakland has yet to refrain from selecting an otherwise desired contractor because of their involvement in support of the proposed border wall.

City and County of San Francisco

In March of 2017, two Committees of the Board of Supervisors (Board) considered a proposed ordinance that was very similar to the Ordinance adopted by the City of Oakland. The ordinance proposed to amend the Administrative Code to require that a list of Border Wall Entities (as defined in the proposed ordinance) be developed and posted on the City's website using credible information available to the public. It further stated that the City would not enter into a contract with Border Wall Entities. The proposed ordinance was referred to several City departments for review. The Board subsequently received legal advice that there could be litigation risks associated with full implementation of the ordinance as proposed. Given this legal advice, the Board decided not to adopt the proposed ordinance believing it would ultimately have to be watered down and largely symbolic when their intention was to take significant actions in opposition to the proposed border wall.

City of Berkeley

On March 14, 2017, the City Council adopted Resolution #67,865 denouncing Executive Order 13767 to build a U.S.-Mexico border wall and directing the City of Berkeley to divest from all companies involved with designing, building, or financing any such wall. On June 27, 2017, the City Council amended the City's Investment Policy to reference Resolution #67,865 and explicitly provide that the "City of Berkeley will divest from all companies involved with designing, building, and financing the border wall". Last December, the City Manager was directed to develop and return to Council with an ordinance that would prohibit companies involved with construction of the border wall from contracting with the City. A Citizen's Advisory Commission is providing input to the City Manager and a draft ordinance is in the final stages of review.

City of Austin TX

On February 1, 2018, the City Council adopted Resolution # 20180201-067 strongly opposing Executive Order 13767 and all associated actions calling for the construction of a wall or continuous physical/economic barrier along the entire United States-Mexico border. The Resolution states that it "is the policy of the City Council, to the best of its ability, not to procure services from any company involved in the design, construction, or maintenance of the border wall". The Resolution directed the City Manager to:

- study and review the economic and other effects any physical border wall could have on Austin.
- consult on the development of policy options with other cities (Tucson and San Diego were specifically named) that have explored or established financial policies related to the proposed border wall.
- develop a policy that requires every entity seeking to do business with the City disclose, for itself and any parent company or subsidiary, any bid submitted, or contract awarded, related to the design, construction, or financing of the proposed border wall, considering all legally permissible options and all relevant operational impacts to City departments.

City officials indicate they are still in the process of developing a policy and have yet to refrain from doing business with any entity because of border wall involvement concerns. Their procurement officer is sensitive to potential legal concerns associated with contemplated operational policies and is also interested in more specifically defining targeted types of border wall activity (e.g., whether the policy should apply to construction of a new wall versus rebuilding portions of an existing border barrier, should the policy apply to suppliers of materials or to indirect service providers to border wall contractors, etc.).

City of Tucson AZ

On June 6, 2017, the Mayor and City Council approved Resolution # 22763 expressing opposition to Executive Order 13767 and calling for a comprehensive analysis of the cost, effectiveness, necessity, and consequences of U.S. border security policies including the border wall. The Resolution also expressed the City's "intent to identify all companies involved with the designing, building, or financing of the border wall, and its intent to divest, as soon as practicable, from those companies". Tucson has yet to identify an existing or desired contractor that would be impacted by the Resolution.

With respect to the call for divestment from companies involved with the border wall, the City reviewed six companies involved with the development of border wall prototypes and determined that they were not doing business with the City of Tucson. The City also has determined that companies involved with rebuilding portions of the existing border barrier, as opposed to the proposed construction of a new wall, would not be subject to provisions of the Resolution. City officials affirmed their intent to require disclosure of any border wall involvement from all companies doing business with Tucson; however, it is not their intent to publish this disclosure but instead to maintain it as a public record.

Developing an Approach for Obtaining Disclosure

In developing a legally permissible approach for obtaining disclosure of border wall involvement from existing or prospective City contractors, the IBA has considered the information obtained from the aforementioned cities and information provided in the City Attorney Report dated September 11, 2017 (Attachment 1). We have also discussed a legally permissible approach with the Office of the City Attorney.

If, for reasons articulated in the City's Resolution, the Council wishes to obtain contractor disclosure of border wall involvement, it seems reasonable to develop a simple affidavit, or incorporate the requested disclosure in an existing document (e.g., Contractor Standard Pledge of

Compliance Form), that contractors and bidders seeking to do business with the City would be required to complete. It would be important for the resulting form to clearly state whether border wall involvement includes work on the border wall prototypes, work on a new wall, repair work on pre-existing border barriers, or some combination thereof. The Resolution expresses intent to “seek disclosure of all companies who submit a bid or are awarded a contract related to designing, building, or financing the proposed border wall.” It would be helpful to clarify who is considered to be a border wall contractor subject to the disclosure requirement. For example, is there a desire to exempt or include any of the following:

- Suppliers and vendors of goods and materials to border wall contractors?
- Service providers (accountants, truckers, lenders, etc.) to border wall contractors?
- Certain or all sub-contractors to border wall contractors?

The goal should be to develop a disclosure form that is easy for City contractors to understand and complete.

With respect to how the resulting information is managed, a conservative approach would be for staff to simply maintain the information as a public record that could be made available to the public if requested, as the City of Los Angeles is currently in the process of doing. As a matter of practice, several City departments (notably Purchasing and Contracting and Public Works) already collect information in keeping with other City programs and provisions (Equal Opportunity Contracting, Charter Section 225, etc.). There would likely be some limited expense associated with developing an affidavit, amending existing contracting documents, maintaining, and/or making information available if requested.


If the Committee desires to pursue this approach for obtaining contractor disclosure of border wall involvement, direction could be given to councilmember staff to continue working with the Office of the City Attorney, the IBA, the Office of the Mayor, and all appropriate City departments, to develop a draft ordinance for further consideration. The requested ordinance would codify contractor border wall disclosure requirements within the City’s Municipal Code. Additionally, the Office of the City Attorney could be asked to work with the main contracting departments to develop a draft disclosure form and bid/contract language if needed. The cities of Los Angeles and Oakland can provide examples of affidavits currently being developed or used for this purpose. The resulting draft ordinance and disclosure forms could be returned to the Committee for further discussion and then forwarded to the full Council for consideration.

CONCLUSION

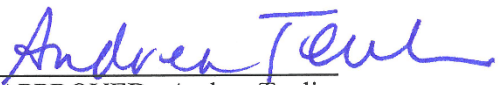
In making a motion to adopt the City’s Resolution in opposition to the proposed construction of a border wall along the United States border with Mexico, Councilmember Gomez asked the IBA to research actions that other cities have taken, particularly with respect to obtaining disclosure. This report provides information on six cities that have also adopted resolutions and/or considered ordinances in opposition to the proposed border wall. A few of these cities have already requested their contractors to disclose any work done in support of the proposed border wall. Several of these cities have considered, or requested that staff develop, ordinances detailing

protocols for refraining from doing business with contractors determined to be performing work in support of the border wall.

The City of San Diego has resolved to explore legally permissible options for obtaining contractor disclosure of border wall involvement. After discussing with the Office of the City Attorney, this report presents a possible approach for Committee consideration. We also raise a few questions to better clarify what contractors and bidders are required to disclose. If the Committee wishes to move forward with this disclosure approach, direction could be given to councilmember staff to continue working with the Office of the City Attorney, the IBA, the Office of the Mayor, and all appropriate City departments, to develop a draft ordinance for further consideration. The requested ordinance would codify contractor border wall disclosure requirements within the City's Municipal Code. Additionally, the Office of the City Attorney could be asked to work with the main contracting departments to develop a disclosure form and bid/contract language if needed. The resulting draft ordinance and disclosure forms could be returned to the Committee for review and then forwarded to the full Council for further consideration.



Jeff Kavar
Deputy Director



APPROVED: Andrea Tevlin
Independent Budget Analyst

Attachment: 1. City Attorney Report dated 9-11-17

SANNA R. SINGER
ASSISTANT CITY ATTORNEY

MARY T. NUESCA
ASSISTANT CITY ATTORNEY

CATHERINE C. MORRISON
DEPUTY CITY ATTORNEY

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

MARA W. ELLIOTT

CITY ATTORNEY

ATTACHMENT 1

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178

TELEPHONE (619) 236-6220

FAX (619) 236-7215

September 11, 2017

REPORT TO HONORABLE MAYOR AND COUNCILMEMBERS

RE: PROPOSED RESOLUTION IN OPPOSITION TO EXECUTIVE ORDER 13767 TO BUILD A WALL ALONG THE UNITED STATES BORDER WITH MEXICO AND U.S. HOUSE OF REPRESENTATIVES BILL H.R. 1813 TITLED BORDER WALL FUNDING ACT OF 2017

INTRODUCTION

On September 19, 2017, the City Council will consider a Resolution in Opposition to Executive Order 13767 To Build A Wall Along The United States Border With Mexico And U.S. House Of Representatives Bill H.R. 1813 Titled Border Wall Funding Act Of 2017 (Border Wall Resolution) proposed by Councilmember Georgette Gómez. In addition to opposing the President's Executive Order and H.R. 1813, the proposed resolution expresses the City Council's intent to disclose the names of any company that bids on the border wall. This Report to Council addresses the legal issues associated with the proposed resolution.

BACKGROUND

On August 2, 2017, Councilmember Gómez presented a version of the Border Wall Resolution to the Budget and Government Efficiency Committee (Committee). The proposed resolution opposed the federal action discussed in the Introduction and expressed concern that a border wall may adversely affect the economic, environmental, and societal health of the San Diego region. In addition, the August 2 version provided:

Section 2. The City Council expresses its intent to identify all companies involved with the designing, building or financing the border wall, and its intent to divest, as soon as practicable, from these companies (emphasis added).

The Committee did not discuss the meaning of the word "divest" or the scope of company involvement with the border wall that would trigger divestiture. Nor did the Committee discuss the practical steps necessary for the City to "divest" from those companies, or give specific direction regarding the "divestiture" concept. On a 2-2 vote, the Committee forwarded the resolution to the full Council without a recommendation.

Our Office has advised that the term “divest” in the proposed resolution is vague and undefined, and therefore likely unenforceable. We have worked with Councilmember Gómez and the Mayor’s office to provide alternative language that is more likely to withstand legal challenge. The revised Border Wall Resolution for Council consideration (Resolution R-2018-88) now specifies the Council’s intent to seek disclosure of the identities of companies involved in designing, building, or financing the proposed border wall. If the Council wishes, this Office will work with staff to achieve the goal of disclosure. However, there are legal considerations the Council should bear in mind if it chooses to move forward.¹

DISCUSSION

I. TO WITHSTAND LEGAL CHALLENGE, THE RESOLUTION MUST BE CLEAR AND UNAMBIGUOUS

A. REMOVAL AND REPLACEMENT OF “DIVEST” LANGUAGE

In drafting legislation, the author needs to be clear and give adequate guidance regarding the municipality’s intended action. Here, use of the word “divest” was not clear and specific, and did not adequately give guidance on what action would be taken and against whom. Also, the Committee did not discuss the intended meaning of the term “divest” as used in the draft resolution. *See, e.g., State v. Beltran*, 116 Haw. 146 (2007) (vague words used in legislation rendered ordinance unenforceable); *Amaral v. Cintas Corp.*, 163 Cal. App. 4th 1157 (2008) (the underlying concern of a vagueness challenge is the core due process requirement of adequate notice) (citing U.S.C.A. Const. amend. 14).

“Divest” is a broad term subject to multiple interpretations. It means “to take away or alienate.” In the context of commerce, it means to sell off or get rid of through sale.² As used here, it appears to mean that the City intends to cease doing business with companies that design, build, or finance the border wall. It is unclear whether that prohibition would apply to companies that are currently contracting or subcontracting with the City, or companies in which the City holds investments.

B. INTENT TO BEGIN DISCLOSURE PROGRAM

In place of the Section 2 language presented at Committee on August 2, 2017, the proposed resolution now includes the following language:

Section 2. The City Council expresses its intent to seek disclosure of all companies who submit a bid or are awarded a contract related to designing, building, or financing the proposed border wall. The City will explore legally permissible options for this disclosure as soon as practicable.

¹ This report is intended to provide preliminary analysis only. Disclosure mechanisms could draw various types of legal challenges depending on the mechanism used. We will provide specific legal advice if the Council adopts the resolution.

² *Divest*. Dictionary.com, <http://www.dictionary.com/browse/divest?s=t> (last visited Aug. 25, 2017).

This revised language avoids the vague, undefined use of the term “divest” and confirms that the City will explore legally permissible options for disclosure.

If the Council chooses to adopt this resolution, this Office would review legal issues that disclosure involves. For example, First Amendment issues may arise if the stated purpose of disclosure is to publically shame companies (by posting a list on the City’s website, for example). *See Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917 (9th Cir.2004) (company stated a claim against a public agency for violation of its First Amendment rights when the agency allegedly retaliated against the company for exercising its expressive rights). A public list also raises the potential for civil lawsuits alleging intentional interference with prospective business advantage, defamation, negligent misrepresentation, and unfair business practices.

II. NUMEROUS LEGAL ISSUES ARISE IF A COMPANY’S ABILITY TO CONTRACT WITH THE CITY IS IMPACTED

While disclosure may be legally tenable, a process that actually penalizes a company’s ability to bid on City projects raises a variety of legal issues related to City contracting laws and policies. For instance, San Diego Charter (Charter) section 94 requires that public works contracts be competitively bid as set forth by ordinance and the City is required to follow its charter. *See Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171 (1994) ([A] charter city may not act in conflict with its charter . . . any act that is violative of or not in compliance with the charter is void). The City’s contracting ordinances and policies cover a wide variety of contracts, from public works contracts to consultant agreements. All of these regulations would have to be reviewed and potentially amended to address any intention not to contract with identified companies.³

For example, we would need to review whether it is legally permissible for the City to use involvement with the border wall in determining the “responsibility” of the contractor under San Diego Municipal Code (SDMC) section 22.3004 (Contractor Standards). Although public agencies are typically given wide latitude to decide the requirements for responsibility, “any requirements [must be] reasonably related to the ‘quality, fitness and capacity of a bidder to satisfactorily perform the proposed work’.” *Associated Builders and Contractors, Inc. v. San Francisco Airports Comm’n*, 21 Cal. 4th 352 (1999) (citing *City of Inglewood-L.A. County Civic Center Auth. v. Superior Court*, 7 Cal. 3d 861,867 (1972)). An open question is whether a contractor’s book of business is “reasonably related” to one of these factors and whether the City can permissibly reject a contractor for that reason alone.⁴ In addition, it may be necessary to amend the definition of a “responsible” bidder to include an element of social responsibility. SDMC Chapter 2, Article 2, Division 1.

Moreover, if a contractor is indefinitely barred from bidding or working on border wall construction, an argument could be made that a de facto debarment occurred. SDMC Chapter 2, Article 2, Division 8. The Debarment Ordinance sets forth various procedures that give

³ If the City wants to cancel an existing contract, legal review is needed to determine whether the contract language allows for termination short of breach.

⁴ The *City of Inglewood* court found that the “responsibility” of the contractor was limited to the bidder’s fitness and ability to perform the work advertised. “Responsibility” did not include factors unrelated to the ability to perform, such as whether the low bidder had demonstrated “social responsibility.” *Id.* at 867-68.

contractors rights, such as notice and hearing, before they can be permanently debarred from City contracts.

Rather than deeming border wall contractors “non-responsible,” the City might also attempt to penalize such contractors by inserting a commitment not to work on the border wall into bid specifications; however, this is also legally problematic. Although government agencies are generally afforded discretion in crafting bid specifications, they must further a legitimate government interest and not be “arbitrary, capricious, lacking in evidentiary support or procedurally unfair.” *Associated Builders and Contractors, Inc.*, 21 Cal.4th at 361. That would be a difficult standard to meet here because this exclusion of otherwise “responsible” contractors is essentially punishing them for the City’s disagreement with federal policy.

Finally, even if the City can justify rejecting contractors who have worked on the border wall, the City must clearly describe the amount of contractor involvement that may result in disclosure and the associated consequences. For example, contractors need to be advised whether only full scale involvement will disqualify the company, or whether minimal involvement, such as merely supplying materials, would be permissible. This could implicate other issues for legal review, such as whether the City would require separate bonding and insurance requirements, and the length of time in which a contractor may be banned from working with the City. The Council would also have to consider the interplay with the City’s Small and Local Business program if, for example, a contractor who bid or worked on the wall was also a small or emerging business and allowed certain bid preferences. *See Council Policy 100-10.*⁵

CONCLUSION

The proposed resolution has been revised to address legal concerns with the vague and undefined reference that the City “divest” from companies assisting in the construction of the border wall. The resolution is now in the form of a policy statement that can be voted on by the Council. This Office is available to further advise on the constitutional and other complex legal issues associated with any proposal that would affect City contracting.

MARA W. ELLIOTT, CITY ATTORNEY

By 

Catherine Morrison
Deputy City Attorney

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⁵ Although we may consider what other jurisdictions do, it is important to remember that the City is unique because it has its own Charter and Municipal Code. As such, other jurisdictions may have not considered the same legal issues facing San Diego. Notably, the State of California proposed legislation (Sen. Bill 30 (2017-2018 Reg. Sess.)) to amend the Government Code and the Public Contract Code prohibiting the State from contracting with or renewing contracts with companies that provide services for the construction of the border wall after January 1, 2018. That bill is in the Committee process.