From:	Ron Chesshire
To:	Sheri Damon; Michael Houlemard; Robert Norris; FORA Board
Cc:	Andy Hartmann; John Papa; Steve MacArthur; Manuel Pinheiro
Subject:	Local Preference and Local EMPLOYMENT
Date:	Monday, March 13, 2017 9:34:38 AM
Attachments:	Benson- Local Pref..pdf Local Pref. - Chang.pdf Local preference opinion - league of cities.pdf Los Angeles Local Preference.pdf

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Sheri, quite awhile back I sent you the Weinberg, Roger, and Rosenfeld opinion regarding the two subjects of Local Preference and Hire. Along with it I have attached a few others and there are more if you search around but they all say about the same thing. Now, before we go any further we want to make something really clear as to LOCAL HIRE. We do NOT use that term and this is why and you will see the distinction. Many years ago we were part of an effort to get Local Hire language at the County. After it was done a project was bid out and the contractor brought his whole crew with him from out of the area. We issued a complaint for non compliance to the County. County Counsel came back and stated, "the Contractor didn't HIRE anyone". Since then we have used the term Local **EMPLOYMENT**. Regardless of who is on a project they have to be employed. Therefore when levels of Local Employment are set the contractor can't evade them by not being in the **hiring** mode. Needless to say, that attorney hit the top of our "Favorites List"as he sat in on talks regarding the subject, knew the intent, but never suggested a better alternative.

The City of Los Angeles has been very aggressive regarding local preference. It spends millions of dollars in capital projects, maintenance, and repairs. It has a citizenry that needs the opportunities and it has the "political will" to to make things better for its citizens. FORA is not the only player here as there are 5 jurisdictions with land within FORA that can look to do the same.

Please note that Los Angeles also has a policy toward the use of PLA's (Project Labor Agreements) and CBA's (Community Benefit Agreements) which are very beneficial regarding the protection of workers and training through apprenticeship.

Lastly, I heard and understand Supervisor Parker's concern. There are instances where a purveyor of goods (not too often) and services (even Construction) can be determined by Qualification. In this instance there can be a preference applied, it isn't just a matter of deducting a percentage off a straight bid. Maybe I need to meet with her office to explain. She was concerned about eliminating (i) in one of the sections and that may not be necessary or language to satisfy her concern can be added.

So, as to not make this email a War and Peace sized document I will end here and suggest we meet to discuss the issue?

Thank you, Ron Chesshire CEO M/SC BCTC

Weinberg, Roger & Rosenfeld

M E M O R A N D U M

DATE: February 10, 2012
TO: Sandra Rae Benson
FROM: Nina Fendel, Sharon Seidenstein
RE: Local Hire Ordinances
CC: .Public Works

I. Introduction

This memo addresses the following questions:

- What are the legal issues involved in establishing local hire requirements for public works construction projects?
- How might prequalification procedures and bid specifications be used to implement local hire requirements?

II. Legal Background

A. Overview

For more than 100 years, advocates and opponents of efforts by states and local public entities to institute local hire requirements in competitive bidding for public works have fought their battles in court. The legal challenges to these types of laws and programs have generally relied on federal constitutional arguments (sometimes accompanied by state constitutional issues) and the language contained in state competitive bidding laws.

B. Constitutional Issues

Constitutional challenges to local resident requirements have primarily centered on:

- The Equal Protection Clause of the 14th Amendment to the US Constitution
- The Commerce Clause of the U.S. Constitution
- The Privileges and Immunities Clause of the U.S. Constitution

1. Equal Protection

The Equal Protection guarantee in the federal constitution is found in the 14th Amendment, which states in relevant part: "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." The provision may be used to protect against discriminatory treatment, and in this context, is used to challenge preferential treatment.

To bring a challenge based on the Equal Protection guarantee, the opponent must first establish the presence of government action. Once government action is established, the courts must then determine if there is a valid basis for the different treatment. For instance, if the group is a "suspect classification" (one based on race, religion or national origin), the state must have a compelling state interest to protect in order to justify treating the group differently. If the classification is not considered a "suspect classification", a *rational basis* for the governmental rules will generally be sufficient to justify different treatment for the group.

Suspect classifications tend to be those with a long and dramatic history of discrimination. Local hire ordinances treat individuals located within the confines of particular geographic areas in a preferential manner. However place of residence or location of a business is not generally considered a suspect classification for purposes of analysis under equal protection guarantees. Therefore, if a government has a "rational basis" for enacting the law in question, the law can probably survive legal challenge under an equal protection analysis. Challenges to local hire ordinances under the Equal Protection Clause have, for the most part, not been effective in striking them down. The rational basis test does not pose a very difficult hurdle to overcome, and the right to work on a public works project is not considered a "fundamental right," which would also trigger a more stringent analysis under equal protection requirements of the constitution. (*United Bldg. & Constr. Trades Council v. Mayor of Camden* (1984) 465 U.S. 208)

The Illinois Supreme Court considered a statute that gave preference to Illinois residents on public works projects. The law defined Illinois residents as citizens (a category that did not include resident aliens). The Court found that while the state could give preference to Illinois residents, the distinction between citizens and others who are authorized to work in the United States (i.e. resident aliens) violated the Equal Protection Clause of the U.S. and state Constitutions. (*People ex. rel. Holland v. Bleigh Constr. Co.* (1975) 61 Ill.2d 258). The Court stated that classifications based on resident alien (citizenship) status are subject to strict scrutiny; that resident aliens are in the country legally, pay taxes, and are eligible to work; therefore, the statute's prohibition on the hiring of non-citizens who are in the country legally and are eligible to work was a denial of equal protection. The Court also used similar reasoning to strike down the requirement that in order to be eligible for employment on a public works project, potential employees must have been in the country for at least one year.[1]

The U.S. Supreme Court, in *McCarthy v. Philadelphia Civil Service Commission*[2] (a case dealing with residency requirements for city employees), made a distinction between residency requirements involving past residency (for example, a requirement that a person be a resident for one year before getting a job with local government), and continuing residency requirements (in which the worker is required to live within the borders of the local public entity offering employment) in a local hire ordinance. In this case, a continuing residency requirement for firefighters was upheld despite a challenge under the Equal Protection Clause.[3]

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[1] The Court found that apart from the citizenship and duration of residency clauses, the remainder of the statute did not violate the Equal Protection Clause of the Constitution.

[2] (1976) 424 U.S. 645.

[3] The ordinance in question had been challenged under the Equal Protection and Due Process clauses of the 14th amendment only, not under the Privileges and Immunities Clause.

2. Commerce Clause

The Commerce Clause of the U.S. Constitution[4] provides that Congress shall have the power "to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." This grant of power to the federal government has been interpreted to carry with it corresponding limitations on the rights of states to interfere with commerce among the states. This subtext to the Commerce Clause is generally referred to as the "dormant Commerce Clause" and is used to prohibit interference with interstate commerce.[5]

In analyzing restrictions on governmental activity under the dormant Commerce Clause theory, courts draw a distinction between government as a *regulator, whose rights are more restricted,* and government as a *market participant*, with broader rights. Whether a government is acting as a regulator or market participant is a threshold question in analyzing the constitutional limits of the dormant Commerce Clause.

Court decisions have generally found the state or municipality to be acting as a market participant in situations where the government is participating directly in some aspect of the market as a purchaser, seller, or producer. In determining whether the government entity is acting as a market participant, courts tend to ask the following questions:

- Is the regulation limited to a job or contract in which a governmental entity is engaged as a purchaser or end user?
- Does the regulation advance a specific proprietary interest of the government entity (and therefore the government is acting as a market participant) or is the regulation designed merely to enforce rules on all applicable projects in the jurisdiction (in which case government is acting as a regulator)?
- Is it tailored to address only the government's proprietary interest?
- Does the government's involvement affect only those with whom the entity is dealing in the market, or does it impact others or set broad policy?[6]

Courts have consistently allowed government to take actions in its capacity as a market participant that might not withstand challenge if the government were attempting to regulate the market.[7] This analysis has been recognized and applied by the California courts as well as the federal courts.[8] Diligence and care on the part of those drafting ordinances in documenting the need for such measures can help make a local hire ordinance legally sound, particularly when the state is acting in its proprietary capacity of the purchaser of services.

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[4] Article I, Section 8, Clause 3.

[5] James L. Buchwalter, J.D., *Construction and Application of Dormant Commerce Clause, U.S. Const. Art. I, § 8, cl. 3 -- Supreme Court Cases*, 41 A.L.R. Fed. 2d 1 (2011).

[6] *Tri-M Group v. Sharp* (2011) 638 F. 3d 406, quoting from *White v. Mass. Council of Constr. Emplrs.* (1983) 460 U.S. 204.

[7] *Bldg. & Constr. Trades Council v. Associated Builders & Contrs.* (1993) 507 U.S. 218; *White v. Mass. Council of Constr. Emplrs.* (1983) 460 U.S. 204; *Reeves, Inc. v. Stake* (1980) 447 U.S. 429; *Hughes v. Alexandria Scrap Corp.* (1976) 426 U.S. 794; See also 24 Whittier L. Rev. 541 (2002).

[8] *Associated General Contractors of America v. San Diego Unified School District* (2011) 195 Cal. App. 4th 748; *Burns International Security Services Corp. v. County of Los Angeles* (2004) 123 Cal. App. 4th 162.

When a state is acting as a market regulator, it may only discriminate against out-of-state residents or businesses under very narrow circumstances. Courts will ask the following questions:

- Is the law even-handed or does the law discriminate against out-of-state interests?
- Does the law advance a legitimate local purpose?
- Is this discriminatory law necessary or can this local purpose be adequately served by reasonable nondiscriminatory alternatives?
- Is the impact on out-of-state persons incidental?
- Does federal statute or regulation explicitly authorize the action? (If so, it may be allowable under the Commerce Clause.)[9]

When the state is acting as a market participant it has much broader leeway to set conditions for contracts to which it is a party or an end user.

3. Privileges and Immunities Clause

a. General Principles

The Privileges and Immunities Clause of the federal Constitution provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.[10] This constitutional prohibition has been relied on in numerous cases as the basis for overturning local hire ordinances.

A state or local government's role as a market participant does not shield it from scrutiny under the Privileges and Immunities Clause of the U.S. Constitution. This is because the Commerce Clause limits the power of states to regulate commerce (and is therefore interpreted differently depending on the capacity in which states are acting), while the Privileges and Immunities Clause imposes a direct restraint on the rights of states to discriminate against out-of-state residents, and thus focuses on the rights of individuals.[11] Whether or not the rights of individuals to cross state lines for employment have been infringed does not depend on the capacity in which a government is acting. The Privileges and Immunities Clause has been found by many courts to invalidate particular local hire ordinances. However it is possible to draft a legal local hire ordinance if one understands the case law.

The courts have developed a series of tests to determine whether a statute or ordinance violates the Privileges and Immunities Clause:

1) Is there government action constituting clear discrimination against out-of-state residents[12] on matters of fundamental concern?[13]
2) Is there "substantial reason" for such discrimination?

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[9] *Tri-M Group v. Sharp, Id.*, quoting *from Oregon Waste Sys., Inc. v. Dep't. of Env. Quality of Or.* (1994) 511 U.S. 93; *United Bldg. & Constr. Trades Council v. Camden* (1984) 465 U.S. 20.

[10] 14th Amendment, Section 1, Clause 2.

[11] *United Bldg. & Constr. Trades Council v. Camden* (1984) 465 U.S. 208.

[12] Ordinances that restrict employment to residents of a particular community have been found to discriminate against out-of-state residents. (*United Bldg. & Constr. Trades Council v. Camden* (1984) 465 U.S. 208.

[13] The right to employment in the private sector is generally considered by most courts to be a matter of fundamental concern, for purposes of the Privileges and Immunities Clause.

3) Does the degree of discrimination bear a close relationship to the substantial reason(s) for the discrimination?
4) Do nonresidents constitute a "peculiar source of evil"[14] at which the law it aimed?[15]

The Privileges and Immunities Clause does not impose an absolute bar on employment discrimination against out-of-state residents. However as the questions above indicate, local preferences must be carefully drafted to avoid violating the clause.[16] Court decisions analyzing local hire ordinances under the Privileges and Immunities Clause vary considerably depending on how the court weighs the facts against the legal principles and how well the legal and factual basis for the ordinance was documented by the government entity.[17]

b. Discussion of Several State Supreme Court Cases on the Privileges and Immunities Clause

The Wyoming Supreme Court, in the case of *State of Wyoming v. Antonich*[18] upheld a state statute giving preference to Wyoming residents for employment on public works jobs. The state had identified the evil the statute was intended to combat as "a resident remaining unemployed while a nonresident takes a job on a Wyoming public works project." The court considered this evil to be narrowly defined. However this decision is not representative of the majority of cases where courts have considered the legality of local hire statues.

In contrast to the high court of Wyoming, the high court of Virginia asked more in-depth questions about whether the degree of discrimination had a close relationship to the reasons for the discrimination and whether the state had "equally or more effective means that do not themselves infringe constitutional protections" to deal with the problem.[19] The court considered a requirement that attorneys who practiced law in another state and wished to be admitted without taking the bar exam could only do so if they lived in Virginia. The law was struck down as violating the Privileges and Immunities Clause, because it did not appear to be essential to advancing the state's interest in ensuring that attorneys keep abreast of changes in the law, fulfill their civic duties, and comply with Virginia's full-time practice requirement. When local governments cannot satisfactorily answer these kinds of questions, laws are less likely to withstand scrutiny.

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[14] This terminology, though odd, was used in early cases analyzing the privileges and Immunities Clause and has been used by subsequent courts.

[15] Andrea G. Nadel, J.D., *Validity of state statute or local ordinance requiring, or giving preference to the employment of residents by contractors or subcontractors engages in, or awarded contractor for the construction of public works or improvements* (2009) 36 A. L.R. 4th 941; Patrick Sullivan, *In Defense of Resident Hiring Preferences: A Public Spending Exception to the Privileges and Immunities Clause*, 86 California L. Rev. 1335 (1998) (This article suggests possible future directions for advocacy and development of the law based on greater government rights when the government is spending its own funds). See also Thomas H. Day, *Hiring Preference Acts: Has the Supreme Court Rendered Them Violations of the Privileges and Immunities Clause?* 54 Fordham L. Rev. 271 (1985).

[16] *United Bldg. & Constr. Trades Council v. Camden* (1984) 465 U.S. 208; *Toomer et al. v. Witsell et al.* (1948) 334 U.S. 385.

[17] Some courts reveal clear trends in how they analyze state preference statutes. For example, Wyoming state courts appear to lean towards finding such statutes constitutional. Alaska courts view them under a very exacting standard, perhaps because Alaska has had many preference statutes struck down by federal courts in the past.

[18] (1985) 694 P.2d 60.

[19] *Supreme Court of Virginia v. Friedman* (1988) 487 U.S. 59, 69. This case dealt with the right of attorneys licensed in other states to gain admission to the Virginia bar without taking the bar exam.

Hicklin v. Orbeck[20] involved a challenge to an Alaska statute that required that qualified Alaska residents be given preference over non-residents for jobs on Alaskan oil and gas leases. The law regulated private sector jobs that were not part of public works projects supported by public funds. The law was challenged under both the Commerce Clause[21] and the Privileges and Immunities Clause. The Supreme Court found that ownership by the state of the oil and gas did not provide a sufficient basis to require private employers to discriminate against nonresidents and that no showing had been made that nonresidents were a peculiar source of the state's high unemployment rate. The Court examined the connection between the state's unemployment rate and the influx of nonresident job seekers. It determined that Alaska's high rate of unemployment was attributable to residents' lack of education and training and their geographical remoteness from job opportunities. Nonresident job seekers were not found to cause Alaska's high unemployment.[22] The fact that the preference was granted to all Alaskans, not just unemployed job seekers, was found by the Court to show that the law was not narrowly targeted at the problem of unemployment.

In *Laborers Local Union v. Felton Constr. Co.,*[23] the Washington state Supreme Court considered a challenge under the Privileges and Immunities Clause to a statute requiring that 90-95% of the workers on state and local public works projects be Washington residents. In striking down the law, the court held that the bare allegation that the state will benefit from local hire requirements was insufficient to overcome the prohibition of the Privileges and Immunities Clause on unjustified discrimination against out-of-state residents. The court made it clear that underlying facts, not mere assertions, were required in order to justify discrimination against out-of-state job-seekers. [24]

In *Robison v. Francis*,[25] Alaska's Supreme Court again struck down a law giving preference to local job-seekers and held that mere benefit to local residents was an insufficient basis for discriminating against nonresidents. The court made extensive findings of fact to the effect that the Alaska economy was growing; that the construction industry was the strongest sector in Alaska's economy; and that the major factor affecting employment in Alaska was the climate, not an influx of nonresident job-seekers. Therefore the court ruled that the state had failed to prove that the preference was closely tailored to alleviating the "evil" of unemployment in Alaska's construction industry.

In *International Organization of Masters, Mates & Pilots v. Andrews,*[26] the court upheld preferential cost-of-living increases for state residents as opposed to non-residents. The

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[20] (1978) 437 U.S. 518.

[21] The Court found that the state was acting to regulate the market, not acting as a market participant, and therefore the law did not survive scrutiny under the Commerce Clause.

[22] See Appendix 2, which includes a copy of very detailed findings in Alaska's current law giving hiring preference on Alaska public works to unemployed Alaskans (Alaska Statute §36.10.005, pages 1 and 2 of Appendix 2). These extensive findings appear to be an attempt by the state legislature to overcome possible challenges based on the Privileges and Immunities Clause.

[23] (1982) 654 P. 2d 67.

[24] See also *A. L. Blades & Sons v. Yerusalim* (1997) 121 F.3d 865, in which the court held that the "migration of economic benefits" (i.e. removal of salaries from the state) was insufficient to justify discrimination against non-residents under the Privileges and Immunities Clause.

[25] (1986) 713 P.2d 259, remanded on limited issue of remedy (1989) 777 P.2d 202.

[26] (1987) 831 F.2d 843.

court held that the nonresident workers were not prevented from seeking employment, that the statute did not interfere with interstate relations or the right to seek employment, and that therefore the discrimination in the wage law was permissible under the Privileges and Immunities Clause.

It is apparent upon reviewing the cases in this area of the law that careful groundwork can provide a proper legal basis for many types of local hire ordinances, and that ordinances that have been struck down by the courts lacked a proper foundation in factual findings and care in drafting.

c. The Right of Corporations to Challenge Laws on the Basis of the Privileges and Immunities Clause.

Some court cases have found that corporations, not being citizens of a state, do not have standing to bring a claim based on the Privileges and Immunities Clause, and that employees do not have standing to protest treatment of the corporation.[27] To some extent, this analysis shields local bidder preferences from some of the obstacles faced by local hire laws with regard to findings of constitutionality under the Privileges and Immunities Clause. However corporations have been recently found by the U.S. Supreme Court to have First Amendment freedom of speech rights.[28] The constitutional rights of corporations may be a changing area of the law.

C. Competitive Bidding Laws

1. Understanding How Language in Competitive Bidding Laws May Forbid Preferences Affecting Bid Price

Another factor to be considered in weighing the vulnerability of local hire and ordinances to legal challenge is the requirement in most of California's competitive bidding statutes that contracts be awarded to the *lowest* responsible bidder.[29] If an existing statute requires award to the lowest bidder and a newly adopted local regulation or ordinance authorizes award to a local bidder who does not submit the lowest bid, the law may be subject to challenge on the grounds that it violates competitive bidding laws.

Since more than 50 different competitive bidding statutes apply to public entities in California, the first step is to examine the statute that applies to the particular public entity to determine if it contains a requirement that contracts be awarded to the lowest responsible bidder. A minority of statutes use other criteria in awarding contracts for public works construction (for instance, a finding of best value based on specified criteria).[30]

2. Requirement that Contracts be Awarded to the Lowest Bidder

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[27] *J.F. Shea Co. v. City of Chicago* (7th Cir. 1993) 992 F. 2d 745.

[28] *Citizens United v. Federal Election Commission* (2010) 130 S. Ct. 876.

[29] See, for example, California Public Contracts Code §§10180 (state contracts), 10780 (California State University), 20128 (counties), and 21051 (municipal water districts). A more complete list of California's competitive bidding statutes related to construction of public works can be found on the Pubic Works Compliance Website (publicworkscompliance.org), under California Competitive Bidding, Statutes.

[30] See the California Education Code §§17250.15(a) and 17250.25(c)(1)(b), which govern design-build projects for school districts.

If the public entity is a general law city, county, or other public entity covered by state competitive bidding laws, preference systems that violate the requirements of the state statute will be vulnerable to legal challenge. If the applicable law requires that the contract be awarded to the lowest bidder, a preference system that attempts to provide a "local preference discount"[31] to bidders hiring local workers would potentially cost more and violate the requirement that the contract be awarded to the lowest bidder. Below we suggest approaches to avoid conflict with legally mandated contracting procedures and standards.

a. Using the Prequalification Process to Create Local Preferences

Where public entities use prequalification procedures, local hire programs can be built into the prequalification process. For instance, in order to prequalify, a contractor might be required to agree to implement a local hire system. These requirements would still have to pass muster in terms of the constitutional requirements previously discussed, but since they don't affect the bottom line they should survive a lowest bidder challenge.

b. Building Local Preferences into the Bid Specifications

Another option would be to build local hire requirements into the bid specifications, again keeping in mind the constitutional issues previously discussed. Bidders could be asked to certify compliance with these requirements as a condition of submitting a responsive bid.

3. Summary

Assuming that the approach taken does not violate relevant constitutional prohibitions, either the prequalification or specific bid requirement approach should work to implement local bidder requirements without violating competitive bidding laws mandating awards be made to the lowest bidder.

III. Most Effective Strategies For Promoting Local Hire Programs

A. Legal strategies for establishing local hire requirements

- Equal Protection: The Equal Protection Clause is not generally a serious problem for hire programs at this point in time. However, if an Equal Protection argument is raised, argue that place of residence is not generally considered a suspect classification for purposes of Equal Protection, and that there is a rational basis for the local hire requirement.

- Commerce Clause: To assure that a local hire program does not violate the Commerce Clause, design the program to apply exclusively where the public entity is operating in its capacity as a market participant (also referred to as its proprietary capacity), not as a market regulator. If you are defending an already existing program, find facts that support the local government's proprietary interest and downplay the regulatory nature of the government action.

[31] A common provision in preference schemes is to discount the bid price by 5 – 10% before a determination is made as to the identity of the lowest bidder. This has been referred to as a local preference discount in this memo.

- Privileges and Immunities: To assure that a local hire program does not violate the Privileges and Immunities Clause, make clear findings based on empirical data that out-of-state workers are a source of "peculiar evil" and that the statute or ordinance is narrowly tailored to combat that evil. If the local hire law is already adopted, be prepared to support it with convincing facts and figures establishing (1) the peculiar evil presented by out-of-state workers and (2) the fact that the law is narrowly focused on combating that evil (i.e., that the law is not overbroad). See Appendices 2 and 3 for more information on findings.

- State Competitive Bidding Statutes: If you are dealing with a charter city, the city could adopt an ordinance that does not require award to the lowest bidder.[32] If you are dealing with any other entity, use prequalification and bid specifications rather than preferences that affect the bottom line and cause award to a bidder other than the lowest bidder.

IV. Conclusion

Local hire programs can be very appealing to communities struggling with high unemployment and budget shortfalls. The information provided in this memo may be used as a basis for arguing for such programs, and also to provide guidance in creating local hire programs that will withstand challenge, where a determination has been made that this approach will be beneficial to local communities and their workers.[33] Drafters of local hire ordinances should carefully review the legal principles outlined in this memorandum and craft an approach that is firmly rooted in the current legal approaches to permissible types of local hire ordinances.

Enc.

Appendices:

1. Cases Dealing with Local Hire Requirements
2. Sample Findings and Statutes from Alaska
3. Fordham Law Review (except): Model Hire Preference Act
4. California List of Bidder/Hire Preference Statutes

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[32] Whether the removal of a low bidder requirement might lead to other problems (for instance, increased favoritism or corruption) will have to be analyzed on a case-by-case basis.

[33] Note: For more information about what has transpired when states have attempted to pass local hire and local bidder preference statutes please see Appendices 1 and 2.

Appendix 1
Cases Dealing with Hiring Preferences[1]

Cases Upholding Hiring Preferences

State	Preference law	Case	
Massachusetts	Mayor of Boston's executive order	*White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983)	Preference did not violate Commerce Clause
New Jersey	Salem Municipal Residency Ordinance	*Salem Blue Collar Workers Ass'n v. City of Salem*, 33 F.3d 265 (3d Cir. 1994)	Preference in direct public employment did not violate the Priv. and Imm. Clause or Equal Protection.
Wyoming	Wyo. Stat. Ann. §§16-6-201 –206	*State v. Antonich*, 694 P.2d 60 (Wyo. 1985)	Preference did not violate Priv. and Imm. Clause.

Cases Finding Hiring Preferences Illegal

State	Preference law	Case	
Alaska	AK Stat. § 36.10.010	*Robison v. Francis*, 713 P.2d 259 (Alaska 1986)	Violated Privileges and Immunities clause – Preference was too broad.
Alaska	Alaska Hire Law, AK Stat. Ann. §§ 38.40/010 – 090	*Hicklin v. Orbeck*, 437 U.S. 518 (1978)	Violated the Privileges and Immunities clause – Preference was too broad.
Alaska	Personnel Rules of the State of Alaska, Rule 4 01.0	*State v. Wylie*, 516 P.2d 142 (Alaska 1973)	Violated Equal Protection – Durational residency requirement was not tailored enough to satisfy the compelling state interest test.
New Jersey	Camden municipal ordinance	*United Building & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208 (1984)*	Remanded for determination of validity under appropriate constitutional standard – Insufficient record to evaluate the ordinance under Priv. and Imm.
Washington	Wash. Rev. Code § 39.16.040	*Laborers Local Union No. 374 v. Felton Constr. Co., 654 P.2d 67 (Wash. 1982)*	Violated Priv. and Imm. clause – No evidence that nonresidents were a peculiar evil, no showing that statute was closely tailored to achieving a legitimate purpose.

[1] This is not a listing of all cases on this topic, but of cases that are representative of important legal principles.

Appendix 2

SAMPLE STATUTES/ LOCAL HIRE PREFERENCES: ALASKA

Alaska Statutes Sec. 36.10.005. Legislative findings.

(a) The legislature finds that

(1) because of its unique climate and its distance from the contiguous states, the state has historically suffered from unique social, seasonal, geographic, and economic conditions that result in an unstable economy;

(2) the unstable economy is a hardship on the residents of the state and is aggravated by the large numbers of seasonal and transient nonresident workers;

(3) the rate of unemployment among residents of the state is one of the highest in the nation;

(4) the state has one of the highest ratios of nonresident to resident workers in the nation;

(5) the state has a compelling interest in reducing the level of unemployment among its residents;

(6) the construction industry in the state accounts for a substantial percentage of the available employment;

(7) construction workers receive a greater percentage of all unemployment benefits paid by the state than is typical of other states;

(8) historically, the rate of unemployment in the construction industry in the state is higher than the rate of unemployment in other industries in the state;

(9) it is appropriate for the state to consider the welfare of its residents when it funds construction activity;

(10) it is in the public interest for the state to allocate public funds for capital projects in order to reduce unemployment among its resident construction workers;

(11) the influx of nonresident construction workers contributes to or causes the high unemployment rate among resident construction workers because nonresident workers compete with residents for the limited number of available construction jobs;

(12) nonresident workers displace a substantial number of qualified, available, and unemployed Alaska workers on jobs on state funded public works projects;

(13) the state has a special interest in seeing that the benefits of state construction spending accrue to its residents;

(14) the natural resources of land owned by the state belong to the citizens of the state;

(15) Alaskans have chosen to use the majority of the royalties derived from the state's natural resources to fund state government;

(16) the vast majority of the state's revenue is derived from natural resource income rather than from other forms of taxation;

(17) because the state has no personal income tax or sales tax, nonresident workers use services provided by the state but do not contribute fairly to the costs of those services; and

(18) Alaskans, more than the residents of other states, suffer economically when nonresidents displace qualified residents since resident workers contribute local taxes as well as their share of the royalties from natural resources.

(b) The legislature further finds that

(1) the state and its political subdivisions, when acting as a market participant in funding public works projects, should give Alaska residents an employment preference to promote a more stable economy;

(2) the state and its political subdivisions have a duty of loyalty to their citizens and should fulfill this duty by giving residents preference for employment on public works projects they fund;

(3) there is a legitimate and compelling governmental interest and that the public health and welfare will suffer if state residents are not afforded employment preference in state-funded construction-related work.

(c) The legislature finds that the following factors are reasonable but not exclusive indicators of the ratio of nonresident to resident employees in the state:

(1) the ratio of applicants for unemployment insurance who list out-of-state residences to applicants who list residences in the state;

(2) the ratio of employees who are subject to unemployment insurance coverage and who did not apply for or were denied a permanent fund dividend to employees who were found eligible for a dividend.

(d) The legislature finds that

(1) the number of state residents who are unable to find work is considerably higher than is reflected by unemployment rates based on nationally accepted measures;

(2) many rural state residents who wish to work do not seek employment as frequently as necessary to meet federal definitions of unemployment because of continuing lack of employment opportunities in rural areas of the state.

Sec. 36.10.140. Eligibility for preference.

(a) A person is eligible for an employment preference under this chapter if the person certifies eligibility as required by the Department of Labor and Workforce Development, is a resident, and

(1) is receiving unemployment benefits under AS 23.20 or would be eligible to receive benefits but has exhausted them;

(2) is not working and has registered to find work with a public or private employment agency or a local hiring hall;

(3) is underemployed or marginally employed as defined by the department; or

(4) has completed a job-training program approved by the department and is either not employed or is engaged in employment that does not use the skills acquired in the job-training program.

(b) In approving job-training programs under (a) of this section, the department shall use information and findings from other state and federal agencies as much as possible.

(c) An employer subject to a resident hiring requirement under this chapter shall certify that persons employed as residents under the preference were eligible for the preference at the time of hiring.

(d) A labor organization that dispatches members for work on a public works project under a collective bargaining agreement shall certify that persons dispatched as residents to meet a preference were eligible for the preference at the time of dispatch.

(e) An employer or labor organization may request assistance from the Department of Labor and Workforce Development in verifying the eligibility of an applicant for a hiring preference under this chapter.

Sec. 36.10.150. Determination of zone of underemployment.

(a) Immediately following a determination by the commissioner of labor and workforce development that a zone of underemployment exists, and for the next two fiscal years after the determination, qualified residents of the zone who are eligible under AS 36.10.140 shall be given preference in hiring for work on each project under AS

36.10.180 that is wholly or partially sited within the zone. The preference applies on a craft-by-craft or occupational basis.

(b) The commissioner of labor and workforce development shall determine the amount of work that must be performed under this section by qualified residents who are eligible for an employment preference under AS 36.10.140 . In making this determination, the commissioner shall consider the nature of the work, the classification of workers, availability of eligible residents, and the willingness of eligible residents to perform the work.

(c) The commissioner shall determine that a zone of underemployment exists if the commissioner finds that

(1) the rate of unemployment within the zone is substantially higher than the national rate of unemployment;

(2) a substantial number of residents in the zone have experience or training in occupations that would be employed on a public works project;

(3) the lack of employment opportunities in the zone has substantially contributed to serious social or economic problems in the zone; and

(4) employment of workers who are not residents is a peculiar source of the unemployment of residents of the zone.

Sec. 36.10.160. Preference for residents of economically distressed zones.

(a) Immediately following a determination by the commissioner that an economically distressed zone exists, and for the next two fiscal years after the determination, qualified residents of the zone who are eligible under AS 36.10.140 shall be given preference in hiring for at least 50 percent of employment on each project under AS 36.10.180 that is wholly or partially sited within the zone. The preference applies on a craft-by-craft or occupational basis.

(b) The commissioner shall determine that an economically distressed zone exists if the commissioner finds that

(1) the per capita income of residents of the zone is less than 90 percent of the per capita income of the United States as a whole, or the unemployment rate in the zone exceeds the national rate of unemployment by at least five percentage points;

(2) the lack of employment opportunities in the zone has substantially contributed to serious social or economic problems in the zone; and

(3) employment of workers who are not residents is a peculiar source of unemployment of residents of the zone.

Sec. 36.10.170. Preference for economically disadvantaged minority residents.

(a) Immediately following a determination by the commissioner that the minority residents of a zone are economically disadvantaged, and for the next two fiscal years after the determination, qualified minority residents of the zone who are eligible under AS 36.10.140 shall be given preference in hiring for at least 25 percent, or a percent representative of the civilian minority residents in the zone, whichever is greater, of employment on each project under AS 36.10.180 that is wholly or partially sited within the zone. The preference applies on a craft-by-craft or occupational basis.

(b) The commissioner shall determine that the minority residents of a zone are economically disadvantaged if the commissioner finds that

(1) the percentage of civilian minority residents in the zone exceeds the percentage of civilian minority residents in the state;

(2) either the percent of unemployment of civilian minority residents of the zone is at least two times the percent of unemployment of nonminority residents of the zone or the civilian minority population of the zone has suffered past economic discrimination;

(3) the economic disadvantage of civilian minority residents of the zone has substantially contributed to serious social or economic problems in the zone; and

(4) employment of workers who are not residents is a peculiar source of unemployment of civilian minority residents of the zone.

(c) In this section, a person is considered to be a member of a minority if the person is Hispanic, Asian or Pacific Islander, American Indian or Alaskan Native, or Black as those terms are defined by the Equal Employment Opportunity Commission.

Sec. 36.10.175. Preference for economically disadvantaged female residents.

(a) Immediately following a determination by the commissioner that the female residents of a zone are economically disadvantaged, and for the next two fiscal years after the determination, qualified female residents of the zone who are eligible under AS 36.10.140 shall be given preference in hiring for at least 25 percent of employment on each project under AS 36.10.180 that is wholly or partially sited within the zone. The preference applies on a craft-by-craft or occupational basis.

(b) The commissioner shall determine that the female residents of a zone are economically disadvantaged if the commissioner finds that

(1) either the percent of unemployment of female residents of the zone is at least two times the percent of unemployment of male residents of the zone or the female population of the zone has suffered past economic discrimination;

(2) the economic disadvantage of female residents of the zone has substantially contributed to serious social or economic problems in the zone; and

(3) employment of workers who are not residents is a peculiar source of unemployment of female residents of the zone.

Sec. 36.10.180. Projects subject to preference.

(a) The preferences established in AS 36.10.150 - 36.10.175 apply to work performed

(1) under a contract for construction, repair, preliminary surveys, engineering studies, consulting, maintenance work, or any other retention of services necessary to complete a given project that is let by the state or an agency of the state, a department, office, state board, commission, public corporation, or other organizational unit of or created under the executive, legislative, or judicial branch of state government, including the University of Alaska and the Alaska Railroad Corporation, or by a political subdivision of the state including a regional school board with respect to an educational facility under AS 14.11.020 ;

(2) on a public works project under a grant to a municipality under AS 37.05.315 or AS 37.06.010 ;

(3) on a public works project under a grant to a named recipient under AS 37.05.316;

(4) on a public works project under a grant to an unincorporated community under AS 37.05.317 or AS 37.06.020 ; and

(5) on any other public works project or construction project that is funded in whole or in part by state money.

(b) If the governor has declared an area to be an area impacted by an economic disaster under AS 44.33.285 , then the preference for residents of the area established under AS 44.33.285 - 44.33.310 supersedes the preference under AS 36.10.150 - 36.10.175 for contracts awarded by the state.

(c) The commissioner shall define the boundaries of a zone within which a preference applies.

Appendix 3
Excerpts
54 Fordham L. Rev. 271, 292-294 (1985)

Drafting a Model Hiring Preference Act

Taking into account all of the Supreme Court's concerns, the requirements of a Model Hiring Preference Act would appear to be as follows:

a. No durational requirements for residency. These violate the equal protection clause of the fourteenth amendment.

b. No quota of residents. Quotas may bear no relation to the degree to which nonresidents constitute the peculiar source of the evil.

c. No exemptions from discrimination for the residents of states which offer similar exemptions in return. These reciprocal agreements undermine the basic policy of the privileges and immunities clause.

d. No retaliatory provisions enforced only against states which enforce their own acts against the preference act's state. Again, these retaliatory measures undermine the basic policy of the privileges and immunities clause.

e. Preference given only to the "unemployed" whose condition is the "evil against which the statute is aimed." No preference given to those who become "available" merely to switch jobs.

f. The state must provide at least some funding to avoid "regulating" in conflict with the commerce clause. Also for this reason, to avoid commerce clause challenges, the state should not impose restrictions on municipalities or other political subdivisions of the state on projects for which the state has provided no funds of its own.

g. The preference act's reach may extend only to the state's direct dealings with primary contractors. Again, this limit is necessary to avoid conflict with the commerce clause.

h. The act must set up procedural steps through which the state can produce the evidence necessary to justify discrimination in the first place and to monitor conditions thereafter.

Proposed Model Hiring Preference Act

On showing, other than by mere conclusory evidence, after thorough administrative investigation and proceedings, that a designated area's construction employment opportunities for residents of the state have been decreased by nonresidents, the state may require primary contractors working on state-funded public works construction projects, in that designated area, to give preference to the state's residents in hiring construction workers. Such preference shall be limited to those residents who are unemployed and whose unemployment was caused primarily by the employment of such nonresidents, and was not caused by other conditions in the state or in the nation, or by characteristics peculiar to the residents themselves, such as, but not limited to, disparities between residents and nonresidents in their ability to perform the work. Such preference shall extend, as shown by other than mere conclusory evidence, after thorough administrative investigation and proceedings, only as long as nonresidents primarily -- and not other conditions in the state or in the nation, or characteristics peculiar to the residents themselves, such as, but not limited to, disparities between residents and nonresidents in their ability to perform the work -- continue to, or would, deprive residents of construction employment opportunities in that designated area.

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Appendix 4
Statutes and Regulations Dealing with
California Resident Hiring and Bidder Preferences

Alphabetical listing:

- **Agricultural Aircraft Operators: Giving contracts and purchasing supplies from residents**, Cal. Gov't Code § 4361.
  Preference given to agricultural aircraft operators who are residents if bids do not exceed by more than 5% lowest bid of nonresident agricultural aircraft operators.

- **Art in Public Buildings: State architect and council; duties**, Cal. Gov't Code § 15813.3.
  Preference may be given to artists who are California residents.

- **Employment and Economic Incentive Act: Worksite preference—contract for goods**, Cal. Code Regs. tit. 2, § 1896.101.
  For contract in excess of $100,000, preference of 5% for California based companies with no less than 50% of labor accomplished at worksite or worksites located in program area.

- **Employment and Economic Incentive Act: Hiring preference—contract for goods**, Cal. Code Regs. tit. 2, § 1896.102.
  Additional preferences for bidder complying with rule 1896.101 from 1% to 4% in accordance with Cal. Gov't Code § 7084.

- **Employment and Economic Incentive Act: Worksite preference—contract for services**, Cal. Code Regs. tit. 2, § 1896.104.
  For contract for services in excess of $100,000, preference of 5% for California companies that perform contract at worksite or worksites located in program area.

- **Employment and Economic Incentive Act: Hiring preference—contract for services**, Cal. Code Regs. tit. 2, § 1896.105.
  Additional preferences for bidder complying with rule 1896.104 from 1% to 4% in accordance with Cal. Gov't Code § 7084.

- **Enterprise Zone Act: State contracts for goods; preferences for bidders with worksites in enterprise zones**, Cal. Gov't Code § 7084.
  Subsection (a)—Preference of 5% when a the state prepares a solicitation for a *contract for goods* in excess of $100,000 to California based companies who certify that not less than 50% of the labor hours required to perform the contract shall be accomplished at a worksite or worksites located in an enterprise zone.

Subsection (b)—Preference of 5% in evaluating proposals for *contracts for services* in excess of $100,000 to California based companies who certify that not less than 90% of the labor hours required to perform the contract shall be accomplished at a worksite or worksites located in an enterprise zone.

Subsection (c)—Bidders complying with subsection (a) or (b) receive additional preference as follows: 1% preference given to bidders who agree to hire persons living within a targeted employment area or enterprise zone equal to 5 to 9% of its workforce. 2% preference given to bidders who agree to hire persons living within a targeted employment area or enterprise zone equal to 10 to 14% of its work force. 3% preference given to bidders who agree to hire persons living within a targeted employment area or enterprise zone equal to 15 to 19% of its workforce.
4% preference given to bidders who agree to hire persons living within a targeted employment area or enterprise zone equal to 20% or more of its workforce during the period of the contract performance.

Subsection (e)—Small business bidders qualified in accordance with Section 14838 shall have preference over nonsmall business bidders.

- **Local Agency Military Base Recovery Area Act: Preferences awarded to bidders on state contracts**, Cal. Gov't Code § 7118.
Subsection (a)—Preference of 5% is awarded to California-based companies in *contracts for goods* in excess of $100,000 if no less than 50% of the labor required to perform the contract is accomplished at a worksite or worksites located in a local agency military base recovery area ("LAMBRA").

Subsection (b)—Preference of 5% is awarded to California-based companies in *contracts for services* in excess of $100,000 if no less than 90% of the labor required to perform the contract is accomplished at a worksite or worksites located in a local LAMBRA.

Subsection (c)—Bidders complying with subsection (a) or (b) receive additional preference as follows: 1% preference for bidders who agree to hire persons living within a LAMBRA that is equal to 5 to 9% of its work force during the period of contract performance. 2% preference for bidders who agree to hire persons living within a LAMBRA that is equal to 10 to 14% of its work force during the period of contract performance. 3% preference for bidders who agree to hire persons living within a LAMBRA that is equal to 15 to 19% of its work force during the contract performance. 4% preference for bidders who hire persons living within a LAMBRA that is equal to 20% or more of its work force during the contract performance.

Subsection (e)—Small business bidder qualified in accordance with Section 14838 given preference over nonsmall business bidder.

- **Public Contracts: Acquisition of information technology goods and services**, Cal. Pub. Cont. Code § 12102.
  Preference of 5% for small business.

- **Small Business: Application of preferences**, Cal. Code Regs. tit. 2, § 1896.6.
  Small Businesses granted 5% preference.

- **Small Business: Computing the preferences**, Cal. Code Regs. tit. 2, § 1896.8.
  Application of small business preference.

- **Small Business: Eligibility for Certification as small business**, Cal. Code Regs. tit. 2, § 1896.12.
  Eligibility for certification as small business includes requirement that the principal office is located in California.

- **Small Business Procurement and Contract Act: Definitions**, Cal. Gov't Code § 14837.
  Definition of "small business" includes requirement that the principal office of the business is located in California.

- **Small Business Procurement and Contract Act: Duties of directors of General Services and other state agencies**, Cal. Gov't Code § 14838.
  Small business given 5% preference over the lowest responsible bidder meeting specifications in state procurement, construction contracts, and in service contracts. The maximum small business preference shall not exceed $50,000 for any bid and the combined cost for preferences granted by law shall not exceed $100,000.

- **Redevelopment Agencies: Training and employment of Lower-Income Residents**, Public Contract Code § 20688.2 and 20988.3
  Grading, clearing, demolition or construction costing $5000 or less may be let without competitive bidding, and in contracting the work the agency may give priority to the residents of the redevelopment project areas and to persons displaced from those areas as a result of redevelopment activities. To the greatest extent feasible, opportunities for training and employment shall be given to the lower income residents of the project area. (See PCC § 20688.3(b) for provisions related to unions and preferences).

- **Target Area Contract Preference Act: Legislative declaration and intent,** Cal. Gov't Code § 4531.
  Preference for California based companies submitting bids or proposals for state contracts to be performed at worksites in distressed areas by persons with a high risk of unemployment when the contract is for goods or services in excess of $100,000.00.

- **Target Area Contract Preference Act: Contracts for goods; preference to companies performing contracts in distressed areas**, Cal. Gov't Code § 4533. Preference of 5% in contracts for goods in excess of $100,000 given to California based companies that have at least 50% of the labor hours required to manufacture the goods and perform the contract performed at a worksite or worksites located in a distressed area.

- **Target Area Contract Preference Act: Contracts for goods; additional preference**, Cal. Gov't Code § 4533.1.
  Additional preference awarded to bidders for contracts of goods in excess of $100,000 and who comply with § 4533 in following amounts: 1% preference for bidders who agree to hire persons with high risk of unemployment equal to 5 to 9% of its work force during the period of contract performance; 2% preference for bidders who agree to hire persons with high risk of unemployment equal to 10 to 14% of its work force during the period of contract performance; 3% preference for bidders who agree to hire persons with high risk of unemployment equal to 15 to 19% of its workforce during the period of contract performance; and 4% preference for bidders who agree to hire persons with high risk of unemployment equal to 20% or more of its workforce during the period of contract performance.

- **Target Area Contract Preference Act: Contracts for services; preference to companies performing contract in distressed areas**, Cal. Gov't Code § 4534. Preference of 5% in contracts for services in excess of $100,000 given to California based companies that have no less than 90% of the labor required for the contract performed at a worksite or worksites located in a distressed area.

- **Target Area Contract Preference Act: Contracts for services; additional preferences**, Cal. Gov't Code § 4534.1.
  Additional preference awarded to bidders for contracts for services in excess of $100,000 and who comply with § 4534 in following amounts: 1% preference for bidders who agree to hire persons with high risk of unemployment equal to 5 to 9% of its work force during the period of contract performance; 2% preference for bidders who agree to hire persons with high risk of unemployment equal to 10 to 14% of its work force during the period of contract performance; 3% preference for bidders who agree to hire persons with high risk of unemployment equal to 15 to 19% of its workforce during the period of contract performance; and 4% preference for bidders who agree to hire persons with high risk of unemployment equal to 20% or more of its workforce during the period of contract performance.

- **Target Area Contract Preference Act: Maximum preference; small business bidder preference**, Cal. Gov't Code § 4535.2.
  The maximum preference and incentive a bidder may be awarded under Chapter 10.5, the Target Area Contract Preference Act, is 15% and is not to exceed a cost preference of $50,000. The combined cost of preferences and incentives granted pursuant to Chapter 10.5 and any other provision of law is not to exceed

$100,000. Small business bidders qualified in accordance with Section 14838 shall have precedence over non-small business bidders.

- **Target Area Contract Preference Act: Worksite preference—purchase of goods**, Cal. Code Regs. tit. 2, § 1896.31.
  For contract in excess of $100,000, preference of 5% for California based companies who certify that no less than 50% of labor shall be accomplished at worksite located in distressed area.

See also:

- **Unemployment Relief: Extension of Public Works**, Labor Code §§ 2010 – 2015
  The California Dept. of Finance shall secure tentative plans for the extension of public works which are best adapted to supply icreased opportunities for advantageous public labor during periods of temporary unemployment. DLSE may determine that a condition of extraordinary unemployment cause by industrial depression exists in the state, and the Department of Fiance may apportion available emergency funding among state agencies to extend public works projects in order to advance maximum public employment consistent with the most useful, permanent, and economic extension of public works. Preference for employment on projects carried out under this law shall go to citizens of the state, citizens of other U.S. states, and legal residents who are within the state at the time of application. (Note: this law is from the 1930s. It does not appear to have been legally challenged. It is unclear whether or how much it has been utilized.)

Considering Local Business Preference Policies in Bids and Purchases

By Semoon Chang

Finance officers need to consider the approximate economic benefit the community receives from local preference policies.

Many state and local governments give preference to local businesses in bidding and purchasing, but jurisdictions don't always analyze the concept. Finance officials need to know approximately, if not exactly, how much economic benefit the community receives from purchasing goods from local suppliers, rather than from outside suppliers. This article reviews the issues involved with local preference policies, allowing finance officers to take a closer look at the practice.

The term "local preference" encompasses several ways in which local governments favor local businesses. What is meant by a "local business" varies and can refer to a business that is owned by local residents, or to the local branch of a multi-state business that has a local business license, pays all local taxes, and hires all local residents as its employees. There is also more than one type of local preference. One jurisdiction might issue requests for proposals specifying that qualifying businesses have a local presence; another might allow extra points or higher bid prices for local contractors; a higher bid price for locally produced goods or local suppliers in construction and public works projects; and still others might require vendors to employ local residents.

PRACTICES IN CITIES AND COUNTIES

Issues relating to local preference policies at the municipal level vary widely; there are no national surveys of preference policies at the local level. Exhibit 1 summarizes policies in selected cities for local preferences in terms of percentage benefits, types of contracts subject to local preference, any limitation in dollar amounts, and reciprocal laws. The appropriate cells are left blank whenever information was not clearly stated.

Cities that maintain local preference policies usually limit their preference to businesses with city business licenses and locations within the city limits, although some expand their location requirement to include the county in which the city is located. Some cities require the local business to have been in their jurisdiction for at least a year. Most cities, however, do not have an explicit statement of such requirement.

The percentage preference given to local businesses ranges from 1 to 5 percent, with the 5 percent being most popular. Also, some cities set a maximum amount of contracts that their preference will apply to, and others set a minimum amount. Many cities exclude public works and construction contracts from their preference policies, while others include public

Exhibit 1: Local Preference Policies in Selected Cities

City	State	Preference	Public Works/Reciprocity? Construction Included?	Note
Albuquerque	NM	5% local +5% local small	No	Small = SBA standards
Baltimore	MD	3% women-owned 20% minority-own	No	Applies to purchases over $25,000
Berkeley	CA	5% (up to $25,000)		Vendor pays full price once selected
Chicago	IL	2%	No	
Columbus	OH	1%: $10,000+ 5%: $10,000-	No	
Dallas	TX		Yes	Texas law provides reciprocity
Detroit	MI	2%: $500000.01+ 3%: $100,000.01+ 4%: $10,000.01+ 5% up to $10,000	No	
D of Columbia		5%		Administrative practice
Fremont	CA	5% on $25,000+ 2.5% on bids	No	Benefit limited to $10,000 purchases
Grover Beach	CA	5%	Yes	Public works 5% or $5,000, whichever is lower
Houston	TX		Yes	Texas law provides reciprocity
Los Angeles	CA	10% small & local	No	Small business with gross receipts up to $3 million; applies to contracts up to $100,000 PLA applies in hiring
Memphis	TN	5% on $10,000	No	Preference not to exceed purchases $100,000 5% on RFPs
Milwaukee	WI	5%	No	Applies to bids and purchases
New York	NY			5% local preference repealed in 1999
Oakland	CA	1% for every 10% of contract dollars up to 5% total	Yes	Applies to bids and 75% of construction under $100,000 awarded to local business; construction over $100,000 should have 20%+ local participation
Palmetto	FL			"The city reserves the right to select any applicant…"
Pearland	TX	3% $3,000-50,000 5% $50000-100000		
Phoenix	AZ	5% to $250,000 2.5% to $500,000		Called bid incentives
Pismo Beach	CA	2%		
Redding	FL	5%		
Richmond	CA		Yes	Local hiring requirements: 20%+ for construction, 30%+ for other contracts
San Francisco	CA	10% bid price	Yes	To qualify, average sales should not exceed $14M for construction; $2.5 to $7M for other contracts
San Jose	CA	2.5% on purchase 5% on RFPs local +5% local and small		Small business with 35 employees
Seattle	WA	2%; local business 5%; women-owned 5%; minority-owned		
Sunnyvale	CA	1% on all bids		

Source: Summarized from numerous Web sources.

works projects. Reciprocal requirement is not popular among cities unless it is required by state law. Cities with blank space in the Reciprocity Required column of Exhibit 1 do not have a reciprocity requirement in their ordinances.

Counties that maintain local preference policies limit their preference to businesses that have business licenses with the county and are located within their county limits. One of the main differences between city and county preference policies is that a greater number of counties have reciprocal arrangements with other counties. Another difference is that the percentage preference counties give to local businesses is higher, at 5 to 10 percent, than it is for cities. Local preference policies in selected counties are summarized in Exhibit 2.

POLICY CONSIDERATIONS

To make the playing field equal for all businesses, while still pursuing savings in costs, cities and counties that do not currently have local preference policies might consider pursuing reciprocal arrangements with other jurisdictions. They could do so by inserting a clause in competitive bidding and purchasing contracts that requires reciprocity in local business preference policies. A reciprocity clause in contracts might have the following properties:

- If the bids submitted are identical, the local business with the lowest bid will be selected. This is because local businesses spend a greater amount in the local economy than businesses from other areas.
- If an outside business submits the lowest bid and the jurisdiction in which the outside business is located does not have local business preference policies, the contract will be awarded to the outside business with the lowest bid.
- If an outside business submits the lowest bid and the jurisdiction in which the outside business is located has local business preference policies, the bid amount by the outside business will be increased by the same percentage preference that jurisdiction gives to local businesses. If the outside business's bid amount remains lower than any bid submitted by a local business, the contract will still go to the outside business.

Exhibit 2: Local Preference Practices in Selected Counties

City	State	Preference	Public Works/Reciprocity? Construction Included?	Note
Alameda	CA	5% for local +5% for small	No	Small by SBA standards
Charlotte	FL	5% for local	Yes	Reciprocity among selected nearby counties
Collier	FL	10% for local	Yes	Reciprocity to Lee County
Lee	FL	Yes	Yes	Reciprocity to Collier County
Los Angeles	CA			Small business certified by the State of California
Manatee	FL	Selection of local if bids are identical	Yes	Reciprocity among Manatee, Desoto, Hardee, Hillsboro, Pinellas and Sarasota counties
Miami-Dade	FL	5% for local		Policy for the Miami-Dade Expressway Authority (MDX). Policy not applicable for emergency or sole procurements
Monroe	FL	2.5% for local +2.5% for 50%+ Local subcontract		
Multnomah	OR		Yes	Oregon requires reciprocal preference
Sacramento	CA	2% for small 3% for local 5% for local & small	Yes	Reciprocity applies to regional market area that reciprocates preference. Applies to $250,000 contract
Sarasota	FL	10% for local	Yes	Reciprocity among Sarasota, Manatee, Desoto or Charlotte counties
Suffolk	NY	10% for local	Yes	

Source: Summarized from numerous Web sources.

- If an outside business submits the lowest bid and the jurisdiction in which the outside business is located has local business preference policies, the bid amount by the outside business will be increased by the same percentage preference the other jurisdiction gives to local businesses. If the bid amount by the outside business becomes higher than one submitted by a local business, the local business will be given an opportunity to match the lowest bid made by the outside business. This matching opportunity process helps ensure the efficiency of the local business and cost savings for the local jurisdiction. If the local business can match the lowest bid made by the outside business, the contract will be awarded to the local business at the matched lowest bid. If the local business cannot match the lowest bid, the contract will be awarded to the outside business at the original, lowest bid.

Reciprocity requirements should apply only to those projects in which both local and outside businesses are equally qualified to do the work or local and outside products are of equal quality. The only difference between local and outside businesses should be the quoted cost or price. Further, the reciprocity requirement in contracts would apply to all future bids, contracts, and purchases made by public and private organizations and also to all future contracts and subcontracts of projects that are attracted with state and local incentive packages.

If contracts are awarded and purchases are made without a competitive process, city and county decision makers might also consider using local businesses or businesses that hire local workers, although this should not be required, as such a requirement goes beyond leveling the playing field level between local and outside businesses and might prompt retaliation against local businesses by outside jurisdictions.

CONCLUSIONS

Hiring outside businesses instead of equally qualified local businesses does create disadvantages. For instance, outside businesses may not pay business licenses on contracts that do not require permits, if the business license fee is based on gross revenues (as it is common among southern cities and counties). Also, the principals of outside businesses may not file non-resident state income tax returns, where non-resident income tax returns are required. Outside rental businesses may also have a cost advantage if the jurisdictions where they are located do not require tax on inventories of rental properties. In addition, local businesses have been shown to contribute more to local taxes and to local charities.[1] Local governments might decide that these considerations are more important than a simple comparison of costs.

Note

1. Semoon Chang, "RIMS II-Based Model of Estimating Economic Impacts: An Illustration Based on the Mobile, Alabama, Area Study," *Applied Research in Economic Development*, Vol. 3, No. 2, 2006.

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

Thursday, May 3, 2012 General Session; 2:00 – 4:15 p.m.

Barbara R. Gadbois, Gibbs, Giden, Locher, Turner & Senet
Theodore L. Senet, Gibbs, Giden, Locher, Turner & Senet
Kristi J. Smith, Supervising Deputy City Attorney, Riverside

Notes . . .

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

By

Barbara R. Gadbois, Esq., LEED AP, Partner, Gibbs, Giden, Locher, Turner & Senet, LLP and Kristi J. Smith, Esq., Supervising Deputy City Attorney, Office of the City Attorney, City of Riverside

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 Constructions 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 that 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. <u>California Supreme Court Review of a Targeted Outreach Program</u>

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. <u>Discussion</u>

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

ORDINANCE NO. 181910

An ordinance adding Article 21 to Division 10, Chapter 1 of the Los Angeles Administrative Code establishing a Local Business Preference Program for the City's procurement of goods, equipment and services, including construction, when the contract involves an expenditure in excess of $150,000.00.

THE PEOPLE OF THE CITY OF LOS ANGELES DO ORDAIN AS FOLLOWS:

CHAPTER I, ARTICLE 21

LOCAL BUSINESS PREFERENCE PROGRAM

Section 1. Article 21 is added to Division 10, Chapter 1 of the Los Angeles Administrative Code to read as follows:

Sec. 10.47. Findings and Purpose.

Pursuant to City Charter Section 371, the City Council hereby adopts a Local Business Preference Program and makes the following findings. The City has a proprietary interest in leveraging, to the greatest extent possible, the millions of dollars it spends yearly contracting with private firms for goods, equipment and services to and for the benefit of the City and its residents. The City has a proprietary interest in leveling the playing field among those entities competing for City contracts, to assure the greatest level of competition possible, to decrease local unemployment, and to increase its revenues. Significant benefits are associated with a Local Business Preference Program. These include an increase in local jobs and expenditures in the local private sector. Preference programs in other jurisdictions have been successful where the business conditions approximate the conditions currently being experienced in the Los Angeles area. For example, preference programs work best where unemployment is high. Unemployment in Los Angeles County is at an historical high. The Los Angeles area also hosts a range of local markets to manage the necessary transportation and logistical support for local contractor services.

Historically, many of the larger cities within the County, especially the City of Los Angeles itself, experience labor costs that are among the highest in the nation. Los Angeles area labor costs are more than 5% higher than the hourly wages in competing neighboring states. Business space in the Los Angeles metropolitan area is even more costly than comparable space in other counties and states. Specifically, average office rents in the Los Angeles area are 40% higher than the national average and almost 30% higher than those in neighboring counties, including San Bernardino and Riverside. On a national level, Los Angeles is one of the ten most expensive places to do business as a result of the local tax and fee structure. All corporations in California are subject to a corporate tax that is among the highest in the nation. These conditions create a very expensive climate in which local businesses must compete. The cost of doing business

in Los Angeles is more than 10% higher than other cities. Local businesses confront cost structures that are weighted much heavier, in terms of labor and costs of doing business, than competitive firms that are located in outlying counties or other states.

This narrowly tailored preference program is fashioned to encourage businesses to compete for City contracting opportunities, to locate operations in the City, and to encourage existing local businesses to refrain from relocating to different, less expensive areas.

Sec. 10.47.1. Definitions.

The following definitions shall apply to this Section:

A. **"Awarding Authority"** means any Board or Commission of the City, or any employee or officer of the City, except those of departments that control their own funds, authorized to award or enter into any Contract, as defined in this Article, on behalf of the City. The Proprietary Departments and the Departments of Recreation and Parks, Library and the Community Redevelopment Agency are strongly encouraged to adopt local preference programs consonant with the provisions in this Article.

B. **"Bid"** means any response to a City solicitation for bids pursuant to Charter Section 371.

C. **"City"** means the City of Los Angeles.

D. **"Contract"** means a written agreement involving consideration in excess of $150,000.00 for the purchase of goods, equipment or services, including construction, by or for the benefit of the City or its residents.

E. **"Contractor"** means the person, business or entity awarded the Contract by the Awarding Authority.

F. **"County"** means the County of Los Angeles.

G. **"Designated Administrative Agency," or "DAA,"** means the Department of Public Works, Bureau of Contract Administration.

H. **"Local Business"** means a business entity that meets all of the criteria established under this Article.

I. **"Local Subcontractor"** means a subcontractor that meets the same criteria as a "Local Business" as defined in this Article.

J. **"Proposal"** means any response to a City solicitation for Proposals pursuant to Charter Section 372.

Sec. 10.47.2. Qualified Local Business.

A Local Business for purposes of this Article must satisfy all of the following criteria, as certified by the DAA:

A. The business occupies work space within the County. The business must submit proof of occupancy to the City by supplying evidence of a lease, deed or other sufficient evidence demonstrating that the business is located within the County.

B. The business must submit proof to the City demonstrating that the business is in compliance with all applicable laws relating to licensing and is not delinquent on any Los Angeles City or Los Angeles County taxes.

C. The business must submit proof to the City demonstrating one of the following:

(1) The business must demonstrate that at least 50 of full-time employees of the business perform work within the boundaries of the County at least 60 percent of their total, regular hours worked on an annual basis, or;

(2) The business must demonstrate that at least half of the full-time employees of the business work within the boundaries of the County at minimum of 60 percent of their total, regular hours worked on an annual basis; or

(3) The business must demonstrate that it is headquartered in the County. For purposes of this Article, the term "headquartered" shall mean that the business physically conducts and manages all of its operations from a location in the County.

Sec. 10.47.3. Provisionally Qualified Local Business.

A business that has not yet established operations in Los Angeles and therefore is unable to qualify under the terms of Section 10.47.2 may, as an alternative, qualify as a Local Business on a provisional basis if the Contractor satisfies all of the following criteria, as certified by the DAA:

A. The proposed Contract between the Contractor and the City involves consideration valued at no less than $1,000,000 and has a term of no less than three years;

B. The Contractor can demonstrate that the Contractor is a party to an enforceable, contractual right to occupy commercial space within the County and its occupancy will commence no later than 60 days after the date on which the

Contract with the City is executed. The Contractor must demonstrate proof of occupancy or an enforceable right to occupancy in the County by submitting to the City a lease, deed or other sufficient evidence; and

C. The Contractor can demonstrate that, before the Contractor is scheduled to begin performance under the Contract with the City, the Contractor will satisfy the requirements of Subsection C of Section 10.47.2. The Contractor must demonstrate proof of ability to satisfy the requirements of Subsection C of Section 10.47.2 by submitting to the City a business plan or other evidence deemed sufficient by the DAA.

Sec. 10.47.4. Local Business Preference.

Awarding Authorities shall grant an eight percent Local Business Preference to Local Businesses for Contracts involving consideration in excess of $150,000.00. This Article is not adopted in the City's regulatory capacity.

Sec. 10.47.5. Application of The Preference to Bids And Proposals.

The Local Business Preference shall be applied to Bids and Proposals in the Following Manner:

A. When applying the Local Business Preference to a Bid, the Awarding Authority shall apply the preference to the Bid price solely for Bid evaluation purposes such that the total price bid by a Local Business shall be reduced by eight percent of the amount bid by that Local Business, and the reduced Bid amount shall be deemed the amount bid by that bidder. The Contract price shall in all events be the amount Bid by the successful bidder awarded the Contract.

B. When applying the Local Business Preference to a Proposal, the Awarding Authority shall apply the preference in the form of additional points to the Proposal's final score such that the score awarded to a Proposal submitted by a Local Business is increased by eight percent of the total possible evaluation points.

Sec. 10.47.6. Local Subcontractor Preference.

The Awarding Authority shall provide a preference of up to five percent, to a Bid or Proposal submitted by a business that does not qualify as a Local Business, but that identifies a qualifying Local Subcontractor to perform work under the Contract, provided the Local Subcontractor satisfies the criteria enumerated in Sections 10.47.2 and 10.47.7.

Sec. 10.47.7. Application of the Local Subcontractor Preference.

The Local Subcontractor Preference shall be applied to Bids and Proposals in the following manner:

A. When applying the preference to a Bid, the Awarding Authority shall provide a one percent preference, up to a maximum of five percent, to the Bid price for every ten percent of the cost of the proposed work to be performed by the Local Subcontractor or Local Subcontractors.

B. When applying the Local Subcontractor Preference to a Proposal, the score awarded by the Awarding Authority to the Proposal submitted shall be increased by one percent of the total possible evaluation points, up to a maximum of five percent, for every ten percent of the total cost of the proposed work under the contract to be performed by a Local Subcontractor or Local Subcontractors; provided that each Local Subcontractor, the work of the Local Subcontractor and the cost of the work of the Local Subcontractor are specified clearly in the Proposal.

Sec. 10.47.8. Additional Requirements.

The preferences authorized under this Article shall be subject to the following additional requirements:

(1) The preferences awarded for services shall be applied only if the services are provided directly by the Local Business or Local Subcontractor using employees whose exclusive, primary working location is in Los Angeles County;

(2) The preferences awarded for equipment, goods or materials shall be applied only if the Local Business or the Local Subcontractor substantially acts as the supplier or dealer, or substantially designs, manufactures or assembles the equipment, goods or materials, at a business location in Los Angeles County. As used in this Section, "substantially" means not less than two thirds of the work performed under the Contract must be performed, respectively, by the Local Business or Local Subcontractor;

(3) The maximum Bid or Proposal preference shall not exceed one million dollars for any Bid or Proposal;

(4) The preferences applied pursuant to this Article shall be utilized solely for the purpose of evaluating and selecting the Contractor to be awarded the corresponding Contract. Except as provided pursuant to Section 10.47.9, the preference points shall in no way lower or alter the Contract price, which shall in the case of a Bid reflect the amount Bid by

the successful Local Business before the application of preference points or, in the case of a Proposal, reflect the amount proposed by the Local Business in the Proposal before the application of preference points;

(5) This Article neither creates a right to receive a Bid or Proposal preference, nor the duty to grant a Bid or Proposal preference;

(6) An Awarding Authority may, at anytime before the award of a Contract, determine that it is not in the City's best interest to grant a Bid or Proposal preference and award the Contract to the bidder or proposer eligible for the award without consideration of the provisions of this Article; and

(7) This Article applies only to contracts that involve the expenditure of funds entirely within the City's control and shall not apply to contracts that involve the expenditure of funds that are not entirely within the City's control, such as state and federal grant funds, that due to legal restrictions prohibit its application.

Sec. 10.47.9. Effect of Failure to Maintain Status as Local Business.

A. If for any reason the Contractor fails to qualify as a Local Business for more than 60 days during the entire term of the Contract, the Awarding Authority shall be entitled to withhold or recover funds from the Contractor in an amount that represents the value of the Bid or Proposal Preference.

B. If for any reason the Local Subcontractor, providing the basis for a Local Subcontractor Preference, is unable to, or does not, perform the work under the Contract; the Contractor shall, within 60 days, replace that Local Subcontractor with another Local Subcontractor. If the Contractor is unable to replace the Local Subcontractor specified in the Contract with another Local Subcontractor within 60 days, the Awarding Authority shall be entitled to withhold or recover funds from the Contractor in an amount that represents the value of the Bid or Proposal Preference.

C. For purposes of determining the value of the Bid or Proposal Preference in Subsections A and B herein, the Awarding Authority may withhold or recover the difference in Bid or Proposal price between the Contractor's Bid or Proposal and the Bid or Proposal of the next most competitive Bid or Proposal that did not receive the award of the Contract by the Awarding Authority. In addition, the Awarding Authority may withhold or recover the amount representing any other additional cost or detriment to the City from the Contractor's failure to maintain the Contractor's status as a Local Business for more than 60 days during the term of the Contract.

D. If a Contractor fails to maintain the Contractor's status as a Local Business for more than 60 days during the term of the Contract, as specified in Subsection A and B herein, the failure is subject to recording and reporting requirements as specified under Articles 13 and 14, Chapter 1, Division 10 of the Los Angeles Administrative Code (Contractor Performance Evaluation and Contractor Responsibility Ordinance.)

E. The remedies available to the City under this Subsection are cumulative to all other rights and remedies available to the City.

Sec. 10.47.10. Administration.

The Department of Public Works, Bureau of Contract Administration is the Designated Administrative Agency (DAA) with regard to this Article and shall have the authority to coordinate the administration of this Article. The DAA shall make determinations regarding whether a business qualifies as a Local Business, a Provisionally Qualified Local Business or Local Subcontractor. The DAA shall have broad discretion to promulgate rules to implement and supplement this Article. The DAA may audit Contractors and Subcontractors and monitor compliance, including the investigation of claimed violations.

Sec. 10.47.11. Timing of Application.

The provisions of this Article shall apply to all competitive Bid or Proposal contracts for which solicitations are issued after the effective date of the ordinance adopting this Article.

Sec. 2. The City Clerk shall certify to the passage of this ordinance and have it published in accordance with Council policy, either in a daily newspaper circulated in the City of Los Angeles or by posting for ten days in three public places in the City of Los Angeles: one copy on the bulletin board located at the Main Street entrance to the Los Angeles City Hall; one copy on the bulletin board located at the Main Street entrance to the Los Angeles City Hall East; and one copy on the bulletin board located at the Temple Street entrance to the Los Angeles County Hall of Records.

I hereby certify that this ordinance was passed by the Council of the City of Los Angeles, at its meeting of OCT 14 2011.

JUNE LAGMAY, City Clerk

By _____
Deputy

Approved OCT 19 2011

_____
Mayor

Approved as to Form and Legality:

CARMEN A. TRUTANICH, City Attorney

By _____
LAUREL L. LIGHTNER
Assistant City Attorney

Date October 4, 2011

File No. 11-1673

M:\Government Counsel\PETE ECHEVERRIA\Ordinance - Local Business Preference 10-3-11 Revised.doc

Juli Hofmann
3201 Martin Circle
Marina CA 93933
February 23, 2017

Deputy Clerk
Ford Ord Reuse Authority (FORA)
920 2nd Ave.
Marina, CA 93933

RE: Cal-Am Slant Well Project (MPWSP)

Dear FORA Board Members:

In addition to 791 signed letters sent to you prior to the first DEIR public comment deadline in February, I am now forwarding 126 additional signed letters as well as 312 new petition signatures, all opposing the Cal-Am slant well project (MPWSP) to be sited in Marina.
I expect that both the previous and current signatures have been and will be distributed, as required by law as a public document.

These letters and petitions are signed by individual citizens, like me, who wish to express concerns regarding the Cal-Am Slant Well project (MPWSP). With the previous mailings, the current total, as of March 23, 2017 is 1,229 signatures.

791 letters forwarded on Feb. 23, 2017
312 new petition signatures
126 add'l new signed letters

1,229 signatures to date

Citizens for Just Water ("Just Water") has collated and forwarded these responses from private citizens, mostly from the City of Marina and Ord Communities, and are NOT specifically related to the DEIR public comments. However, the issues are vital to us and we wish our collective voices to be heard.

I would appreciate confirmation of receipt of these CDs at jhofmann@redshift.com when they have been distributed to your commissioners.

Thank you very much,

Juli Hofmann

Juli Hofmann

Access the letters and petitions received with this cover letter HERE:
Letters - http://fora.org/Board/2017/emails/LettersW03232017.pdf
Petitions - http://fora.org/Board/2017/emails/petitionsW03232017.pdf