

CITY OF OAKLAND



ONE FRANK H. OGAWA PLAZA • 6TH FLOOR • OAKLAND, CALIFORNIA 94612

OFFICE OF THE CITY ATTORNEY

(510) 238-3601

Barbara J. Parker, City Attorney

OFFICE OF THE CITY ADMINISTRATOR

(510) 238-3301

John A. Flores, Interim City Administrator

March 11, 2015

Phil Tagami
California Capital and Investment Group
300 Frank Ogawa Plaza, Suite 340
Oakland, CA 94612

Re: Clarification of interpretation issues regarding Construction Jobs Policy for Public Improvements

Dear Mr. Tagami:

I write to you in your capacity as construction manager for the public improvements construction at the former Oakland Army Base (the "Project") pursuant to the Property Management Agreement dated October 23, 2012 ("PMA") and the Design Build Contract dated October 16, 2013.

I am in receipt of your December 19, 2014 letter to Deputy City Attorney Dianne Millner and outside counsel Julian Gross, requesting clarification on certain issues regarding the Construction Jobs Policy for Public Improvements ("Jobs Policy"), applicable to the Project. The City provides the following information to clarify interpretation and enforcement of the Jobs Policy.

- 1. Application of Apprenticeship and Disadvantaged Worker Requirements for Certain Trades.** The Jobs Policy requires (i) that in each construction trade, each contractor must ensure that at least 20% of work hours are performed by apprentices (Jobs Policy section III.C.3), and (ii) that in each construction trade, each contractor must ensure that at least 25% of hours worked by apprentices are worked by disadvantaged workers (Jobs Policy section III.C.2). **The City will not apply these requirements to construction trades for which the State of California Division of Apprenticeship Standards has not registered a labor-management apprenticeship program.** This position stems from the Jobs Policy's definitions of "Apprentice" and "Registered Apprenticeship Program."

2. Professional Services Contracts. Terms of the Jobs Policy establishing hiring and employment requirements are applicable only to construction work, pursuant to the Jobs Policy's definition of "Project Construction Work" and related terms. Therefore, **employment under professional services contracts is not subject to requirements of the Jobs Policy establishing terms of hiring and employment.** The City considers work to be "construction work," and therefore covered by the Jobs Policy, if the California Department of Industrial Relations (DIR) has issued a "general prevailing wage journeyman" determination for it. (Such determinations are posted at <http://www.dir.ca.gov/OPRL/PWD/index.htm>.) This rule for determination of what tasks are "construction work" follows the approach set forth in the PLA for this project, the City's local employment program, and of course the state prevailing wage law itself. That said, the City recognizes that with respect to the work of the geological consultant Berloger that is being performed pursuant to a subcontract with the JV General Contractor, there are questions that need to be answered before that work can be characterized as professional services or construction work; City contract compliance staff will promptly inform you of the City's final determination on these points.

Note that under a given contract, both construction work and professional services work may be performed; regardless of the type of firm and the contract's title, only work falling into DIR prevailing wage classifications is covered by the Jobs Policy. For example, under a "professional services" contract related to project design, the bulk of work under the contract is likely to be professional services work that does not fall into a DIR category, although certain employees might perform work hours covered by the DIR's "Building/Construction Inspector" category. Only the latter hours from that contractor would be covered by the Jobs Policy and reported in Jobs Policy compliance reports. Similarly, only the latter hours would be covered by prevailing wage laws and subject to the PLA.

Conversely, a construction contract with an electrical contractor might include hours that do not constitute construction work. The work of a manager or administrative assistant for the contractor would be performed on site as part of the contract, but likely would not fall within any DIR prevailing wage scope of work. Therefore such work would not be covered by the Jobs Policy, the prevailing wage laws, or the PLA.

- 3. Liquidated Damages Assessment for Disadvantaged Workers.** Jobs Policy section III.C requires for each trade in which a contractor works: (i) that twenty percent of work hours be performed by apprentices; and (ii) that twenty-five percent of apprentice hours be performed by disadvantaged workers. You requested clarification regarding the compliance determination in a hypothetical situation in which a contractor falls short of the 20% apprentice utilization requirement, but exceeds the 25% disadvantaged worker requirement with regard to the apprentices actually used. The City agrees that in this hypothetical situation, **the contractor would be deemed out of compliance (and potentially subject to liquidated damages) only with regard to the apprentice utilization requirement, and not with regard to the disadvantaged worker requirement as well.**
- 4. Definition of "Trade."** Jobs Policy section III.C specifies several requirements "for each construction trade" in which a contractor performs work, but the Jobs Policy does not define "construction trade." The City will follow its established approach to scope of construction trades, which is to utilize the trade classifications set forth in DIR's "general prevailing wage journeyman" determinations. (Trade classifications and scopes of work are posted at <http://www.dir.ca.gov/OPRL/PWD/index.htm>.) This approach has proven workable and effective over a period of years on City-funded projects subject to the City's Local Employment Program.
- 5. Credit for Hours Worked on Other Projects.** The Jobs Policy allows hours worked by residents and disadvantaged workers on "other projects" to contribute to a contractor's compliance determination under sections III.C.1 and III.C.2. (Jobs Policy section III.C.4.) The Jobs Policy does not define "other projects." In applying this provision of the Jobs Policy, the City will allow contractors to reallocate excess hours worked on contemporaneous Army Base contracts, as well as other construction projects, so long as those hours are not "double-counted."

The Jobs Policy requires that hours credited in this manner have been worked *during the term of the contract for which compliance is being determined*. (Jobs Policy section III.C.4.) This requirement applies when the "other project" is an Army Base contract, as it does for any other project.

Please see examples set forth in Attachment A.

- 6. Clarification of Referral Procedures.** The Jobs Policy allows contractors to attain compliance by following specified procedures with regard to staffing performance of the contract. Jobs Policy section III.B.1 describes these procedures. The City wishes to clarify certain aspects of the procedures required for a contractor to demonstrate compliance.

The general rule is that a contractor needs to request targeted categories of workers from union hiring halls *only up to the percentage requirements set forth in Jobs Policy section III.C, regarding work to date.* The following examples concern the requirements for attempting to hire Oakland residents.

Initial hiring:

- If a contractor needs ten ironworkers for the job and is requesting workers from the union hiring hall, the contractor should request referral of five Oakland residents.
- Pursuant to the Project Labor Agreement, the hiring hall is required to refer at least five residents, if they are *anywhere* on the out-of-work list. The contractor and the hiring hall should work out which if any of these residents are referred pursuant to name call provisions under the relevant collective bargaining agreement.
- If the hiring hall does not have a sufficient number of Oakland residents to refer, then the contractor should request referral of Oakland residents from the West Oakland Job Resource Center, up to the five positions originally requested.
- ***Contractors should note that there is no general exception to the Jobs Policy for use of a contractor's core workforce or existing workers.*** Under Jobs Policy section III.B, required hiring procedures are *not* limited to "new hires." To the extent that the contractor wants to staff the job with workers already on payroll (*i.e.*, a core workforce), that need can be met either (i) through assignment of Oakland residents who are part of that contractor's core workforce (pursuant to Step One of the required procedures in Jobs Policy section III.B), or (ii) through name calls for referrals *other than* the five Oakland residents requested.

Ongoing hiring:

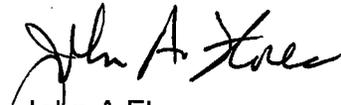
- Once a job has commenced, each time a contractor needs to add a worker to its Army Base site, the contractor should follow the process set forth in Jobs Policy section III.B, as follows.
- If the contractor is *above 50%* in work hours to date worked by Oakland residents, then the contractor can make general requests to the hiring hall for workers, regardless of residency.
- If the contractor is *below 50%* in work hours to date worked by Oakland residents, then the contractor may *only* request referral of Oakland residents from the hiring hall.
- As with initial hiring, if the hiring hall does not have sufficient numbers of Oakland workers to request, then the contractor should request referral of Oakland residents from the West Oakland Job Resource Center.

7. Request for Negotiation of a Compliance Plan. Thank you for forwarding the design-build contractor's request for negotiation of a compliance plan. The City is not willing to negotiate a compliance plan at this time. First, pursuant to language of the Jobs Policy on this point, it was the clear intent of City Council that any compliance plan be negotiated prior to commencement of construction. Second, addressing the issue raised in the design-build contractor's request (consolidation of compliance determinations at the first-tier subcontractor level) could not be achieved through a compliance plan, since the Jobs Policy requires that compliance plans "not conflict with" the Jobs Policy. Please convey this response to the design-build contractor.

If you have any questions regarding the above clarifications or any other points raised in your letter, the City team will be available to meet with you. We appreciate your assistance in identifying issues relevant to the Jobs Policy for this project, and in communicating the City's policies to all project contractors.

Very truly yours,


Barbara J. Parker
City Attorney


John A. Flores
Interim City Administrator

Attachment A

Examples related to Paragraph 5, regarding resident hours worked on “other projects”

Example 1: A contractor is simultaneously working on two contracts on the Army Base, both subject to the Jobs Policy. The contractor completes one contract, and demonstrates compliance on that contract through section III.C.1, by showing performance of more than 50% of work hours by Oakland residents. Upon completion of the *second* contract, the contractor may add Oakland resident work hours that were in excess of 50% on the first contract to the actual Oakland resident hours on the second contract, in an effort to obtain compliance through III.C.1 for the second contract. Hours from the first contract may be credited *only* if they were actually worked *during the term of the second contract*.

Example 2: A contractor is simultaneously working on two contracts: one on the Oakland Army Base subject to the Jobs Policy, and one on a City public works project subject to the City’s Local Employment Program (LEP), which establishes a goal of 50% of work hours being performed by residents. The contractor completes the non-Army-Base contract, and demonstrates compliance with LEP by showing performance of more than 50% of work hours by residents. Upon completion of the Army Base contract, the contractor may add Oakland resident work hours in excess of 50% on the non-Army-Base contract to Oakland resident hours on the Army Base contract, in an effort to obtain compliance through III.C.1 for the Army Base contract. Hours from the non-Army-Base contract may be credited *only* if they were actually worked *during the term of the Army Base contract*.

Example 3: A contractor is simultaneously working on two contracts on the Army Base, both subject to the Jobs Policy. The contractor completes one contract, and has achieved actual Oakland resident hiring of only 30% of work hours. The contractor *may not* “borrow” against Oakland resident hours from its yet-to-be completed Army Base Contract, nor against any future Army Base contracts, in order to show compliance under III.C.1 for the completed Army Base contract. Liquidated damages and other remedies will be enforced with regard to the completed contract.