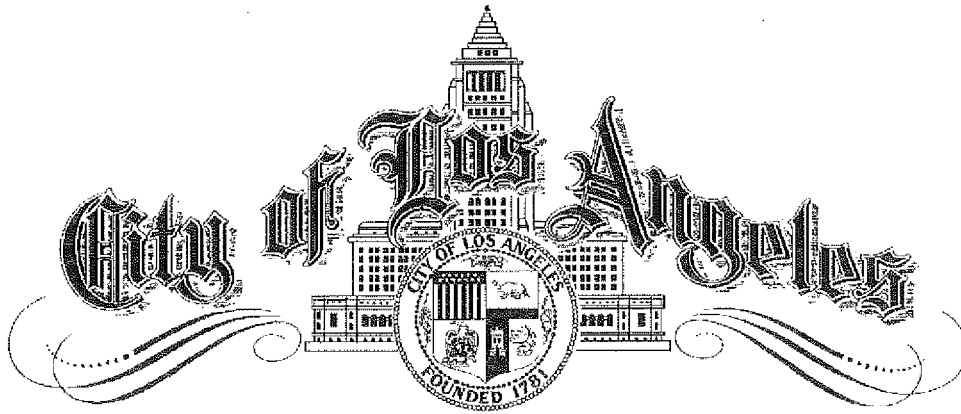


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CARMEN A. TRUTANICH
City Attorney

REPORT NO. R 1 1 - 0 2 3 4
JUN 17 2011

REPORT RE:

DRAFT ORDINANCE ADDING ARTICLE 20 TO CHAPTER I OF DIVISION 10 OF THE LOS ANGELES ADMINISTRATIVE CODE REGARDING CONTRACTING WITH BUSINESSES BASED IN OR WITH HEADQUARTERS IN THE STATE OF ARIZONA

The Honorable City Council
of the City of Los Angeles
Room 395, City Hall
200 North Spring Street
Los Angeles, California 90012

Council File No. 10-0002-S36

Honorable Members:

Pursuant to your request, this Office has prepared and now transmits for your consideration the enclosed draft ordinance, approved as to form and legality. The draft ordinance restricts, to the extent allowed by law, City contracting with persons and entities based in or with headquarters in the State of Arizona.

Background and Summary of Ordinance Provisions

Your Honorable Body requested that this Office prepare and present an ordinance to ". . . restrict, to the extent permissible and consistent with the City's interests, [the City's] contracting relative to goods and services to persons or entities which are not based in the State of Arizona . . ." (Council File No. 10-0002-S36.) Although limited by the City Charter, the State and federal Constitutions and other applicable law, the City has the ability to make certain contracting decisions as a market participant. This draft ordinance relies on that authority to restrict City contracting in the manner requested. We note, however, that proprietary departments would not be

bound by the provisions of the ordinance and would need to take action to adopt similar provisions with respect to their department's contracts. In addition, because of the constraints imposed by the Charter requiring that contracts subject to competitive bidding be awarded to the lowest bidder, and since the draft ordinance would have the effect of limiting the pool of participants in the City's future competitive bidding processes, the ordinance must contain an exemption for contracts that are subject to the competitive bidding requirements of Los Angeles City Charter Section 371. The California Supreme Court in *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, reiterated the Charter restrictions, but upheld the City's contractor outreach program requirements against a challenge that the requirements violated the Charter's competitive bidding provisions. The basis of the Court's decision was that the City's program expanded the pool of participants in the bid process and was therefore, consistent with the purposes of competitive bidding requirements, which include obtaining "the best economic result for the public." *Id.* at 173. The *Domar* Court distinguished the contractor outreach program from a program that would limit the pool of competitive bid participants. Therefore, to be consistent with the *Domar* decision and other case law, the draft ordinance cannot apply to contracts that must be competitively bid.

We note also that the ordinance includes a definition of "Based in" for the purpose of applying its provisions to businesses that are Based in or have Headquarters in the State of Arizona. The definition of Based in includes a level of employees in the state of a total of 50 employees or more. Of course, the Council is free to adopt a different level of employees as part of that definition, or a different definition, as it deems reasonable and appropriate for this purpose.

CEQA Clearance

The approval of the ordinance is not subject to the California Environmental Quality Act (CEQA) because it is not a project as defined by CEQA, Pub. Res. Code Section 21065 and State CEQA Guidelines Section 15378(b), which state that a CEQA project is an activity that may result in a direct physical change in the environment or a reasonably foreseeable indirect change in the environment. Rather, the ordinance will simply exercise the City's right to establish conditions upon its participation in the free market.

Council Rule 38 Referral

A copy of the revised draft ordinance was sent, pursuant to Council Rule 38 to all City Offices, Boards and Departments asking that they make any comments that they may have directly to the City Council when you consider this matter.

If you have any questions regarding this matter, please contact Assistant City Attorney Laurel Lightner at (213) 978-8128. She or another member of this Office will be present when you consider this matter to answer any questions you may have.

Very truly yours,

CARMEN A. TRUTANICH, City Attorney

By 

PEDRO B. ECHEVERRIA
Chief Assistant City Attorney

PBE:LL:fa
Transmittal

ORDINANCE NO. _____

An ordinance adding Article 20 to Chapter 1 of Division 10 of the Los Angeles Administrative Code regarding contracting by the City of Los Angeles with businesses based in or with headquarters in the State of Arizona.

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

Section 1. A new Article 20 is added to Chapter 1 of Division 10 of the Los Angeles Administrative Code to read as follows:

**ARTICLE 20
CONTRACTS WITH ARIZONA-BASED ENTITIES**

Sec. 10.46. Findings and Purpose.

The City Council finds and declares:

That the City of Los Angeles (City) spends millions of dollars annually contracting with the private sector for services and for the purchase or rental of equipment, goods, materials and supplies. The prudent expenditure of public dollars requires that the City's selection process lead to the selection of responsible contractors who have the ability to perform the required services, and that the City's procurement process lead to the provision of goods and materials that are suitable for the purposes for which they are procured.

That the City long ago established a policy of contracting only with businesses that comply with the non-discrimination and Affirmative Action provisions of the laws of the United States of America, the State of California and the City of Los Angeles, and to that end City entities and contracting agents are required to place in all City contracts a provision that the person choosing to do business with the City agrees to comply with the City's non-discrimination laws.

That discrimination on the basis of race, ethnicity, language, national origin, or any other protected classification, damages all people and weakens the social fabric by preventing minority persons from fully developing their skills and abilities and contributing to a community's economy, culture and life.

That the enactment of SB 1070 by the State of Arizona in April of 2010, requires all local law enforcement to investigate a person's immigration status when involved in a lawful stop, detention or arrest, and where there is a reasonable suspicion that a person is in the Country without lawful documentation, even where the individual is not suspected of engaging in criminal activity.

That SB 1070 does not prohibit law enforcement officers from relying on race, ethnicity, national origin or language to determine whether to investigate a person's immigration status, and that even though HB 2162 amended SB 1070 to state that a law enforcement officer may not consider race, color or national origin in carrying out the provisions of SB 1070, such considerations will be inextricably a part of any law enforcement officer's determination of a person's immigration status.

That SB 1070 encourages racial profiling and discrimination against persons of Hispanic descent and violates numerous laws and legal precepts, including the Fourteenth Amendment guarantees of due process and equal protection for United States citizens, legal residents and visitors who are merely suspected of being in the Country unlawfully.

That in enacting this Article, the City is exercising its power to make economic decisions as a participant in the free market, and desires to restrict, to the extent lawful and possible, the expenditure of City funds in instances where it might constitute, or be construed to be, an endorsement of the discriminatory policy and actions embodied in SB 1070 by supporting the economic development of Arizona through contracts with persons or entities based in or with headquarters located in the State of Arizona.

Sec. 10.46.1. Definitions.

The following words and phrases, whenever used in this Article, shall be construed as defined in this Section:

"Awarding Authority" shall have the meaning set forth in Section 10.8.1 of this Code.

"Based in" means having a business presence that includes the ownership or control of real or personal property and at least 50 employees in total at one or more locations in the state.

"Bidder Statement" means a statement required pursuant to the provisions of Section 10.46.3.

"City" means the City of Los Angeles, including all Awarding Authorities of the City, including those departments that control their own funds and that adopt policies consonant with the provisions of this Article.

"Contract" shall have the meaning set forth in Section 10.8.1 of this Code.

"Contractor" means any Entity that submits a competitive proposal pursuant to the provisions of City Charter Section 372, or that enters into a Contract with the City.

"Entity" means business, contractor, joint venture, joint stock company, firm, partnership of any kind, association, club, company, corporation, business trust, or

organization.

“**Headquarters**” means the location where an Entity’s business activities are directed, coordinated and controlled.

Sec. 10.46.2. Prohibited Acts.

The City shall not enter into, extend or renew any Contract with a Contractor Based in or with a Headquarters located in the State of Arizona unless the Contract is exempt from the provisions of this Article.

Sec. 10.46.3. Required Bidder Statement.

Prior to reviewing responses to invitations for Contracts subject to the provisions of this Article, the Awarding Authority shall obtain from each Entity seeking a contract award, a statement under penalty of perjury from an authorized representative, on a form to be provided by the Awarding Authority, declaring that the Entity is not Based in and does not have Headquarters located in the State of Arizona, and that the Entity does not intend to establish a Base or Headquarters in the State of Arizona during the term of the Contract for which the Entity is submitting a response.

Sec. 10.46.4. Mandatory Contract Provisions.

Unless otherwise exempted, every Contract entered into by the City shall contain language that obligates the Contractor to comply with the provisions of this Article. The language shall include provisions for the following:

(a) The Contractor certifies that the Contractor does not have a Based in or Headquarters located in the State of Arizona, and that the Contractor does not presently intend to have a Base or Headquarters located in the State of Arizona during the term of the Contract;

(b) The failure of the Contractor to comply with the provisions of this Article or the filing of a false Bidder Statement will be deemed to be a material breach of the Contract;

(c) If the Contractor fails to comply with the provisions of this Article or files a false Bidder Statement, the City may revoke, terminate, or suspend the Contract, in whole or in part, and the City may retain all monies due or to become due under the Contract. The City may also pursue any and all other remedies available at law or in equity for any failure to comply with the provisions of this Article;

(d) The City may use a Contractor's failure to comply with the provisions of this Article or filing of a false Bidder Statement in an action taken pursuant to the provisions of the Los Angeles Administrative Code Section 10.40, *et. seq.*, the Contractor Responsibility Ordinance; and

(e) If the City determines that a Contractor created or used an Entity for the purpose of evading the requirements of this Article, the City may revoke, terminate or suspend the Contract and pursue any and all other remedies available at law or in equity. The City may use a Contractor's violation of this provision in an action taken pursuant to the provisions of the Los Angeles Administrative Code Section 10.40, *et. seq.*, the Contractor Responsibility Ordinance.

Sec. 10.46.5. Notice Required During Term Of Existing Contract.

Any Entity that has a Contract with the City and that establishes a Base or Headquarters in the State of Arizona during the term of the Contract, including any extension of the Contract, shall notify the City in writing prior to engaging in business at the Arizona Base or Headquarters.

Sec. 10.46.6. Exemptions.

The following Contracts are exempt from the provisions of this Article:

(a) Contracts that are subject to competitive bid requirements pursuant to the provisions of Los Angeles City Charter Section 371;

(b) Contracts, including any amendments to, or modification or renewal of such contracts in existence at the time of the effective date of this Article, and any subsequent amendment, modifications or renewals of such Contracts in which the scope of the underlying Contract is not significantly altered and in which the duration of the underlying Contract is not extended for more than one year;

(c) Contracts for the purchase of any goods or services on a sole source basis;

(d) Contracts for which application of this Article would disqualify all but a single bidder;

(e) Contracts for the acquisition of news publication services;

(f) Contracts under which a financial institution engages in activities required to assure repayment of credit extended before the effective date of this Article;

(g) Contracts that involve the investment of trust monies, bond proceeds or agreements relating to the management of these funds, indentures, security enhancement agreements (including, but not limited to, liquidity agreements, letters of credit, or bond insurance) for City tax-exempt and taxable financings, deposits of City's surplus funds in financial institutions, the investment of City monies in competitively bid investment agreements, the investment of City monies in securities permitted under the California State Government Code or the City's investment policy, investment

agreements, repurchase agreements, City monies invested in U.S. government securities or pre-existing investment agreements;

(h) Contracts involving City monies in which the Treasurer, or a successor officer or department, or the City Administrative Officer finds that either:

(1) No Entity that does not have a Base or Headquarters in the State of Arizona is capable of providing the required services or performing the required transaction; or

(2) The City would incur a financial loss or forego a financial benefit by applying the provisions of this Article, and that either the Treasurer, or a successor officer or department, or Chief Administrative Officer determines that application of the provisions of this Article would violate their fiduciary duties;

(i) Contracts for which the Awarding Authority, based on specific facts, determines that application of the provisions of this Article would reasonably be expected to result in a significant diminution in the quality of goods provided to the City or significant additional costs to the City; and

(j) Contracts for which the Awarding Authority, based on specific facts, determines that application of the provisions of this Article would be contrary to the best interests of the City.

Sec. 10.46.7. Remedies.

(a) In addition to all remedies allowed by law or in equity, the failure of the Contractor to comply with any provision of this Article, or the filing of a false Bidder Statement, may be deemed to be a material breach of the Contract;

(b) If the Contractor fails to comply with any provision of this Article or if the Contractor files a false Bidder Statement, the Awarding Authority, may revoke, terminate, or suspend the Contract, in whole or in part, and the City may retain all monies due or to become due under the Contract. The City may also pursue any and all remedies available at law or in equity for any failure to comply with any provisions of this Article;

(c) The City may use a Contractor's failure to comply with any provision of this Article or a filing of a false Bidder Statement in an action taken pursuant to the provisions of the Los Angeles Administrative Code Section 10.40, *et. seq.*, the Contractor Responsibility Ordinance;

(d) If the City determines that a Contractor created or used an entity for the purpose of evading the requirements of this Article, the Awarding Authority may revoke, terminate or suspend the Contract in whole or in part. The City may use a Contractor's violation of this provision in an action taken pursuant to the provisions of the Los

Angeles Administrative Code Section 10.40, *et. seq.*, the Contractor Responsibility Ordinance; and

Sec. 10.46.8. Administrative Provisions.

(a) For the purpose of investigating compliance with the provisions of this Article, a Contractor must provide the City with access to all records pertaining to the location of the Contractor's Headquarters and other business locations, and must provide to the City certified copies of such documents upon request;

(b) The provisions of this Article shall not apply in instances in which the application of the Article would violate federal or State law, or where the application would be inconsistent with the terms or conditions of a grant or contract with an agency of the United States, the State of California, or the instruction of an authorized representative of any such agency with respect to any such grant or contract; and

(c) Nothing in this Article is intended to waive or diminish the right of the City to waive the provisions of this Article when it would further the interests of the City.

Sec. 2. Severability.

If any provision of this ordinance is found to be unconstitutional or otherwise invalid by any court of competent jurisdiction, that invalidity shall not affect the remaining provisions of this ordinance, which can be implemented without the invalid provisions, and to this end, the provisions of this ordinance are declared to be severable.

Sec. 3. 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 _____.

JUNE LAGMAY, City Clerk

By _____ Deputy

Approved _____

Mayor

Approved as to Form and Legality:

CARMEN A. TRUTANICH, City Attorney

By Laurel L. Lightner (ALS)
LAUREL L. LIGHTNER
Assistant City Attorney

Date _____

File No. CF 10-0002-S36