

REPORT FROM

OFFICE OF THE CITY ADMINISTRATIVE OFFICER

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Council District:

To: Chair, Housing, Community and Economic Development Committee

From: William T Fujioka, City Administrative Officer

Reference: Committee Instructions of August 13, 2003

Subject: **SWEAT-FREE PROCUREMENT ORDINANCE AND AMENDMENT
TO CONTRACTOR RESPONSIBILITY ORDINANCE**

SUMMARY

The Housing, Community and Economic Development Committee instructed the City Attorney to develop a Sweat-free Procurement Ordinance ("Ordinance") and for this Office to report on an enforcement mechanism.

The Ordinance (Attachment 1) applies to contracts for materials, supplies (including apparel and accessories), equipment, and laundry services where the value of the contract exceeds \$25,000 and the contract term exceeds three (3) months. It also applies to subcontractors who perform some or all of the work. The dollar threshold would result in the ordinance applying to all commodities contracts that would be of concern to anti-sweatshop advocates.

The Ordinance requires contractors to sign a Contractor Code of Conduct affirming that they and their subcontractors will comply with all applicable workplace laws. In addition, the Code of Conduct obligates certain contractors and their subcontractors to pay their employees performing City work a procurement living wage, as defined by the Ordinance. The payment of a procurement living wage would apply to domestic and foreign operations. The contracts subject to the procurement living wage are those involving garments, uniforms, foot apparel, related garment accessories, and laundry services. Additional contracts that would become subject to the procurement living wage would be effected over time through amendments to the Ordinance. These contracts would include commodities that have a high probability of being assembled or manufactured in sweatshop working conditions as reported by anti-sweatshop advocates.

We have been working closely with the City Attorney to consider the legality of imposing the procurement living wage. The City Attorney advises that it is subject to some degree of legal uncertainty because the ability of a municipality to impose wage restrictions through contract, especially to foreign operations, has yet to be tested by the courts.

Contractors in violation of the Ordinance would be subject to escalating ramifications, starting with requiring the contractor to provide access to independent human rights monitors as well as

management and worker training to ensure future compliance with the Ordinance. Subsequent enforcement actions can include statutory monetary penalties and contract termination.

The Department of General Services would be the designated administrative agency (DAA) responsible for enforcing the Ordinance. The implementation and compliance mechanisms would include:

- Forming an advisory working group comprised of representatives of the City, advocacy groups and labor organizations.
- Providing to the public a list of contractors and subcontractors working on City commodity contracts in languages of employees who form the majority of the employment pool (English, Spanish, Chinese, Thai, Vietnamese).
- Accessing inter-governmental public records and information from non-governmental entities of potentially non-responsible contractors and subcontractors.
- Requiring vendors who are not under contract with the City but who are included on department-approved apparel lists, to also sign the Code of Conduct as a condition of being placed on the list.
- Coordinating with an entity to-be-determined by the DAA to provide on-site employer/employee education if the contractor or subcontractor is found to have been in violation.
- Contracting with an independent monitor to conduct on-site factory assessments.

RECOMMENDATIONS:

That Council, subject to approval of the Mayor:

1. Approve the Sweat-free Procurement Ordinance and amendment to the Contractor Responsibility Ordinance, approved as to form and legality by the City Attorney;
2. Request that the respective Boards of Commissioners of the Los Angeles World Airports, the Harbor Department and the Department of Water and Power adopt a policy that parallels or is similar to the Sweat-free Procurement Ordinance;
3. Instruct the Police Department and Fire Department only to include on their lists of approved apparel vendors those that have signed a Code of Conduct;
4. Authorize one new Resolution position of Management Analyst I (subject to paygrade determination by the Office of the City Administrative Officer) within the Department of General Services, exempt the new position from the 2004-05 Hiring Freeze, and authorize the Department to fill the position; and
5. Instruct the Controller to transfer \$50,000 from the Reserve Fund to the Unappropriated Balance, Fund 100/58 and appropriate therefrom to the Department of General Services, Fund 100/40, Contractual Services Account No. 3040 to contract with an independent social compliance monitor to enforce the Sweat-free Procurement Ordinance.

FISCAL IMPACT

The cost of the recommended Management Analyst I position would be absorbed through salary savings by the Department of General Services. A transfer of \$50,000 would be required from the Fiscal Year 2004-05 Reserve Fund to the Department of General Services Contractual Services Account to fund enforcement activities by an independent monitor. If payment of a procurement living wage is required for apparel and related accessories contracts, it is estimated that the annual contract costs could increase between approximately \$20,000 to \$70,000.

WTF:JWG:jwg

FINDINGS

Background

On October 9, 2002, Council adopted a motion (Garcetti-Ridley-Thomas) instructing the formation of a "Sweat-free Apparel Working Group" to: (a) conduct an inventory of the type of apparel procured by the City; and, (b) develop a City policy for the procurement of "sweat-free" apparel, including mechanisms for independent monitoring or verification of working conditions at companies that produce City apparel.

Over the next several months, numerous meetings were held with representatives of various anti-sweatshop advocacy groups, and representatives from the offices of councilmembers Eric Garcetti and Martin Ludlow, the City Attorney, the City Administrative Officer and the Department of General Services. Discussions were held regarding the elements that should be included in a "sweat-free procurement policy," and which companies within the supply chain should be covered by the policy.

As instructed by Council motion, the CAO conducted a survey of departments relative to their procurement of uniforms and other apparel items for its employees (Attachment 2); compiled a summary of uniform or clothing allowances contained in Memoranda of Understanding (Attachment 3); and identified the listing of vendors from which City apparel is procured (Attachment 4). In summary, uniforms and other apparel items for civilian employees are procured through City contracts. Police officers and fire fighters receive an annual uniform allowance which is used to purchase uniform items from a list of department-approved vendors, or any other vendor they choose as long as department uniform specifications are met.

On August 13, 2003, the Housing, Community and Economic Development Committee instructed the CAO to report on an enforcement mechanism, and for the City Attorney to draft an ordinance that included the following: (a) a requirement that manufacturers sign a Code of Conduct; (b) payment of a non-poverty level wage to employees working on a City agreement; and, (c) a requirement for violators to hold employer-employee education sessions on compliance with the Ordinance.

As a result of subsequent meetings between staff and the advocacy groups, it was agreed that sweatshop working conditions could exist in the manufacture of other commodities the City procures, and that it would be appropriate to try and expand the coverage of the proposed Ordinance to other commodity contractors. Accordingly, the requirement of the Ordinance to adhere to all applicable workplace rules and laws applies to all City commodity contractors and their subcontractors.

Presented below is a summary of the draft Ordinance, and discussions of applying a procurement living wage, a proposed enforcement program, and estimated costs to enforce the program.

Summary of Sweat-free Procurement Ordinance

The proposed Sweat-free Procurement Ordinance includes the following provisions:

- Applicable to all contracts over \$25,000 and over three (3) months for the procurement or rental of equipment, materials and supplies including garments and related accessories. The \$25,000

threshold and contract term were established to be consistent with the Contractor Responsibility Ordinance, which has similar purposes for ensuring that the City only contracts with companies that are responsible and that comply with local, state and federal laws. All annual commodities contracts would be covered by these thresholds. Commodity contracts less than \$25,000 are generally one-time purchase orders in which there is no continuing contractual relationship with the City. Contractors not meeting the thresholds may still be found non-responsible by the awarding department and debarred from contracting, as provided in Charter Section 371.

- Contractors must sign a Code of Conduct (Attachment 5) affirming that they and their subcontractors comply with all applicable workplace laws.
- Contractors and their subcontractors found in violation of the Ordinance would be subject to escalating ramifications, starting with providing access to independent human rights monitors and training to bring the workplace into compliance.
- Enforcement measures for violations escalate to include:
 - Assessment of financial penalties equal to the greater of \$1,000 or 20% of the value of the commodity that was produced and supplied to the City under the contract;
 - Contract termination;
 - Debarment.
- Exceptions to the Ordinance include contracts for commodities that are:
 - Necessary to respond to an emergency that endangers public health or safety.
 - Available only from a single source.
 - With a public entity.

Application of a Procurement Living Wage

Advocacy groups and labor organizations have strongly urged the City to adopt a non-poverty level wage as part of the Sweat-free Procurement Ordinance. This wage standard is referred to as a “procurement living wage” (see discussion of “City Charter Requirement on Competitive Bidding” below) in the proposed Ordinance, utilizing the following formula established by the Union of Needletrades, Industrial and Textile Employees (UNITE) (Attachment 6):

For domestic manufacturers, a base hourly wage adjusted annually to the amount required to produce, for 2,080 hours worked, an annual income equal to or greater than the U.S. Department of Health and Human Services most recent poverty guideline for a family of 3 plus an additional 20 percent of the wage level paid either as hourly wages or health benefits. For production outside of the United States, a nationwide wage and benefit level which is comparable to the non-poverty wage for domestic manufacturers, adjusted to reflect the country’s level of economic development by using the World Bank’s Gross National Income Per Capita Purchasing Power Parity index.

Under this formula, the 2004 procurement living wage for domestic manufacturers would be a minimum of \$9.04 per hour without health benefits, or \$7.53 per hour with health benefits of at least \$1.51 per hour.

The Ordinance applies the procurement living wage to contracts involving the procurement of garments, uniforms, foot apparel, and related garment accessories. We understand that the greatest concern over workplace abuses and wages have occurred within these industries.

Additional contracts that would become subject to the procurement living wage would be effected over time through amendments to the Ordinance. These contracts would include commodities that have a high probability of being assembled or manufactured in sweatshop working conditions as reported by anti-sweatshop advocates.

The Worker Rights Consortium estimates that a non-poverty level wage requirement could increase procurement costs by 0.8% to 2.2%. City contracts for apparel and related accessories total about \$3 million annually. Therefore, it is estimated that the cost of City apparel and related accessories contracts could increase between approximately \$20,000 to \$70,000 annually if payment of a procurement living wage is required. As discussed below under "Legal Defensibility," the City Attorney advises that the procurement living wage should only apply to the employees working on the City contract. In order to apply the procurement living wage, the contractor might have to develop a mechanism for identifying which employees would be working on the City contract. It is important to note that because no other jurisdiction appears to have enforced their version of a non-poverty level wage, we do not have reliable evidence to base an accurate estimation of the increased cost to the City.

1. City Charter Requirement for Competitive Bidding

We have worked closely with the City Attorney to determine how best to include a non-poverty wage component in the Ordinance. Charter Section 371(a) states, in pertinent part, that "[c]ontracts shall be let to the lowest responsive and responsible bidder...." In compliance with this Charter Section, each contract let by the City for commodities (equipment, goods, materials and supplies) is through a competitive bidding process in which the contract is awarded to the bidder with the lowest priced bid that meets the City's specifications. This Charter requirement ensures objectivity in the contract award process as well as fiscal responsibility. We note that every municipality that we are aware generally awards procurement contracts to the lowest priced bidder.

Because the Charter requires that commodity contracts be awarded to the lowest priced bidder, our ability to evaluate commodity bids on any factor other than price (as driven by our specifications) is very limited. The Charter allows only a few non-specification driven price factors: a bid preference for California and County of Los Angeles businesses, and a domestic and recycled material content specification. Although the Charter does not expressly authorize the inclusion of a non-poverty level wage, Section 378 does allow for the City to require that a living wage be provided to employees of contractors doing business with the City. The City's existing Living Wage Ordinance requires certain employers to pay their employees a living wage. The ordinance applies to employers who: (a) provide contracted personal services to the City; (b) receive financial assistance from the City; or, (c) lease City property.

The City Attorney and our office believe that Charter Section 378 allows the City to include a "procurement living wage" in the Sweat-free Procurement Ordinance. The procurement living wage is based on the UNITE formula described above. The contracts that would be subject to the procurement living wage are those involving garments, uniforms, foot apparel and related accessories. This obligation would apply to the contractors' and subcontractors' employees working on the City contract in both domestic and foreign operations.

2. Legal Defensibility

There are approximately 30 jurisdictions that have adopted a sweat-free procurement law. As of the date of this report, this Office was able to confirm that six included a non-poverty level wage (procurement living wage under the City's Ordinance): State of New Jersey; City of Boston; Cuyahoga, Ohio; New York State; City of New York; and Los Angeles Unified School District. None of these jurisdictions has implemented an enforcement mechanism to verify that employers are paying the non-poverty level wage requirement. It should also be noted that the New York City law is being challenged in New York State court on a number of grounds, including various constitutional issues. We do not know when the court might rule on some or all of the challenges.

The City Attorney advises that the Ordinance is subject to some degree of legal uncertainty because the ability of a municipality to impose wage restrictions through contract, especially on foreign contractor operations, has yet to be tested by the courts. The City Attorney also advises that the procurement living wage should only apply to the employees working on the City contract. This requirement is a feature of the City's Living Wage Ordinance where it has been relatively easy to apply and enforce because service contractor employees and those working on property leased from the City are easily identifiable. They generally are providing a direct service to the City (e.g. custodial, landscaping) or are working on City property.

Identification of which employees are assembling or manufacturing commodities purchased by the City is more problematic. For example, LAPD officers wear a generic dark blue shirt that may be purchased by any law enforcement agency or security company that has a similar uniform standard. The distinguishing feature of an LAPD shirt is the patch that must be sewn on separately. Currently, the contractors cannot identify which employees assembled the shirts that are purchased by the City for the LAPD. In order to apply the procurement living wage, the contractor might have to develop a mechanism for identifying which workers would be assembling apparel and related accessories to be procured by the City. It is not known how feasible this might be or the cost that would be incurred and, probably, passed on to the City in higher bid prices.

3. Enforceability

This Office believes that the City should adopt an ordinance intended to protect employees of contractors only if it is legally defensible and enforceable. The City has enacted several socially-conscious ordinances within the past eight years (e.g. Service Contractor Worker Retention, Living Wage, Equal Benefits, Contractor Responsibility, Slavery Disclosure). We believe that the success of these programs is attributable in large measure to the City Attorney having developed ordinances that are legally defensible, and to this Office, as the designated administrative agency, having developed enforcement procedures to monitor contractors' compliance.

Enforcement Program

Enforcement of the Sweat-free Procurement Ordinance would include, but not be limited to, the following activities:

1. Require contractors to provide a list of subcontractors working on the City contract.

Obtaining such a list is fundamental to monitoring and enforcing the Ordinance to ensure that contractors and their subcontractors working on City contracts are in compliance with the provisions of the Ordinance. The list would be accessible to the public in languages of employees who form the majority of the employment pool (e.g. English, Spanish, Chinese, Thai, Vietnamese).

2. Form an advisory working group to resolve implementation and enforcement issues.

The working group would be comprised of representatives of sweat-free advocacy organizations, the City Attorney, and the Department of General Services, which is recommended as the designated administrative agency (DAA) responsible for implementing and enforcing the proposed Ordinance. In addition, staff of the CAO would be available to provide assistance as we have had considerable success in using the advisory working group model to resolve implementation and enforcement issues for the living wage and service contractor worker retention ordinances.

3. Develop networks with advocacy groups, labor organizations and public agencies.

The sweat-free advocacy organizations on the advisory working group would serve as a resource in establishing a network with other advocacy groups, labor organizations and other appropriate entities that would provide information regarding non-compliant manufacturers, vendors, suppliers, etc. in the United States and in foreign countries. The DAA would also establish working relationships with other public agencies that have enacted sweat-free laws to share information regarding manufacturers, vendors, suppliers, etc.

4. Explore the possibility of developing a consortium of governmental entities to allow for cost-sharing of monitoring and enforcement activities by an independent monitor.

The consortium could be modeled after those formed by colleges and universities that fund monitoring and enforcement activities by an independent monitor through payment of an annual fee. The independent monitor for the colleges and universities conducts comprehensive on-site assessments at targeted factories identified as having the most egregious working conditions based on information obtained from employees, advocacy groups and other sources.

5. Access inter-governmental public records and information from non-governmental entities of potentially non-responsible contractors.

The DAA would access information and records maintained by public agencies (e.g., state agencies responsible for enforcement of wage, hour, health and safety laws; National Labor Relations Board), advocacy groups, labor organizations, and social compliance organizations regarding contractors that have been found to be in violation of the sweat-free procurement ordinances around the country.

6. Establish a database of potentially non-responsible manufacturers, vendors, suppliers, etc.

The DAA would establish a database of potentially non-responsible manufacturers, vendors, suppliers, etc. through information obtained from other governmental and non-governmental entities.

It must be noted, however, that these contractors may not be debarred from contracting with the City unless they are provided with due process.

7. Require that vendors not contracted with the City, but are included on a department-approved list as meeting the City's apparel specifications, sign a Code of Conduct as a condition of being placed on the list.

The Police Department and the Fire Department have lists of vendors that meet their respective uniform specifications. Vendors would be required to sign a Code of Conduct as a condition of being placed on the department-approved list. Because sworn personnel are not restricted to purchasing their uniforms from these vendors, the advisory working group would discuss "marketing strategies" for encouraging police officers and firefighters to purchase their uniforms from the approved list. One approach could be inclusion of an insert in the employees' paychecks. Another could be to request that the unions allow the advocacy groups to prepare an article for the respective union newspapers.

8. Provide on-site employer/employee education if the contractor is determined to have been in violation.

The Ordinance includes training as a remedy if a contractor is found to be in violation. The training would assist the employer to come into compliance with the Ordinance, and inform the employees of the requirements of the Ordinance and the proper conditions to which they are entitled to work. The DAA will determine the appropriate entity to conduct such training.

9. Contract with an independent monitor to conduct on-site factory assessments.

The most effective enforcement mechanism is to conduct on-site assessments at the locations where the commodities are being manufactured or assembled. Approximately 85 percent of the City's apparel and related accessories contractors are located outside of Los Angeles County, including some in foreign countries. Because it would not be practicable to have City employees travel to those locations, it would be appropriate to contract with an independent monitor that has the capabilities and experience to conduct on-site assessments at targeted factories or other workplaces. The City's contracting policies require adherence to a selection process to determine the best-qualified proposer to be awarded a contract to provide a particular service to or for the City. For that reason, if Council approves the recommended funding for the independent monitor, the Department of General Services should issue a request for proposals to both non-profit and for-profit social compliance entities to determine the contractor with the most effective monitoring and enforcement plan for the recommended contract amount of \$50,000. The scope of services could also include providing employer/employee education discussed in #8 above.

Funding the Proposed Enforcement Program

It is anticipated that implementing all of the activities described above would require an additional Management Analyst I (subject to paygrade determination by this Office) to be authorized to the Department of General Services under Resolution Authority in the Fiscal Year 2004-05 Budget. Because of the City's financial condition, it is recommended that the costs of the position (\$49,151 (1st Step) + indirect costs of \$11,008 = \$60,159) be absorbed through salary savings.

Start-up enforcement activities by an independent monitor are estimated to cost \$50,000 annually, inclusive of travel and other expenses. This amount would provide targeted on-site factory assessments based on an analysis of the list of vendors and manufacturers and their subcontractors, and criteria to be developed by the advisory working group.

Approval of the position and funding for the independent monitor would place the City as the only governmental agency with resources dedicated to monitoring and enforcing a Sweat-free Procurement Ordinance.

Application of the Sweat-free Procurement Ordinance to Proprietary Departments

Ordinances adopted by Council are not applicable to Los Angeles World Airports (LAWA), the Harbor Department and the Department of Water and Power unless the respective Board of Commissioners adopts a parallel or similar policy. This Office recommends that Council request the respective Boards to take such an action. If a sweat-free procurement policy were adopted, it is also recommended that staff within each department absorb enforcement. For example, LAWA has adopted its version of the Contractor Responsibility Ordinance, for which enforcement is conducted internally. Enforcement of a Sweat-free Procurement Ordinance could also be performed by existing LAWA staff.

Amendment to the Contractor Responsibility Ordinance

It is recommended that the Contractor Responsibility Ordinance be amended to: (a) reduce the monetary threshold for commodities from contracts over \$100,000 to contracts over \$25,000 and over three (3) months to be consistent with service contracts; and (b) streamline the processing requirements for the CRO by eliminating the 14-day waiting period before contracts may be awarded (Attachment 1).

The 14-day waiting period allows for posting on the City's website the three pages of the CRO Questionnaire relative to a prospective bidder/proposer's business ownership and structure. The information allows the public to notify the designated administrative agency (General Services for commodities; CAO for services; Bureau of Contract Administration for construction) of prospective contractors who have allegedly behaved non-responsibly, leading to an investigation to determine the merits of the claim before a contract is awarded. Since the CRO was implemented in September 2001, the Bureau of Contract Administration has received some complaints against construction bidders as a result of the posting. However, approximately 1700 prospective service contractors, and approximately 800 prospective commodities contractors have been posted on the website, with no complaints received. This Office and the Department of General Services do not believe that the posting requirement has been cost effective for service and commodities contracts, given the staff resources needed to scan the documents and remove the information from the website after the 14 days.

Furthermore, there is now an alternative to the posting requirement in obtaining a list of bidders and proposers. The Mayor's Business Assistance Virtual Network (BAVN), accessible on the City's website, provides a centralized listing of contracting opportunities by all City departments. Through

this website, the public can obtain information regarding bids/proposals that have been released, and contact the respective departments to obtain a listing of bidders and proposers. The public will continue to have the opportunity to notify the designated administrative agencies of allegations of non-responsible conduct by a bidder/proposer, and for an investigation to be conducted before the contract is awarded. With staffing resources significantly reduced in this Office and General Services due to the fiscal situation and the hiring freeze, we believe this is an effective and efficient alternative to meeting the requirement for transparency and providing information to the public, without expending resources for an activity that in almost three years has yielded no claims requiring investigations. It should be noted that the recommended change does not affect the ability of employees of contractors, advocacy groups and other interested parties to file complaints alleging non-responsible conduct by contractors after contract award.

The Department of Public Works believes that the posting of the CRO Questionnaire has been beneficial and plans to retain this step in the bidding process. The CRO amendment would not hinder its ability to do so.