

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

HALL OF JUSTICE

TENTATIVE RULINGS - June 20, 2019

EVENT DATE: 06/21/2019

EVENT TIME: 10:30:00 AM

DEPT.: C-64

JUDICIAL OFFICER: John S. Meyer

CASE NO.: 37-2019-00026631-CU-WM-CTL

CASE TITLE: ASSOCIATED GENERAL CONTRACTORS OF AMERICA SAN DIEGO CHAPTER INC
VS CITY OF SAN DIEGO [IMAGED]

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Writ of Mandate

EVENT TYPE: Motion Hearing (Civil)

CAUSAL DOCUMENT/DATE FILED: Petition for Writ of Mandate, 05/23/2019

Motion for Preliminary Injunction

Plaintiffs/Petitioners Associated General Contractors of America, San Diego Chapter, Inc. and Associated General Contractors of America, San Diego Chapter, Inc. Apprenticeship and Training Trust Fund (referred to jointly as "AGC") bring this motion, seeking a preliminary injunction enjoining Defendants/Respondents City of San Diego, et al. ("the City") from requiring that bidding contractors for the North City Pure Water Facility project use apprentices registered in Joint Labor Management Apprenticeship Programs ("JLMAP"). AGC contends that the City's requirement that bidding contractors use apprentices registered in a JLMAP violates SDMC §22.4402.

"[T]he question whether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief." *White v. Davis* (2003) 30 Cal.4th 528, 554.

On February 19, 2019, the City began soliciting construction contract proposals for the "North City Pure Water Facility" ("the Contract"), which purportedly has an "Estimated Bid Value" of \$398,000,000. Bids for the Contract were due by May 31, 2019, but the City agreed to extend the bidding process until after this preliminary injunction could be heard.

The Contract's specifications, and its "Submittal Requirements," include the following labor force condition: "[A]ll apprentices used on the Project shall further be registered in Joint Labor Management Apprenticeship Programs [{"JLMAP"}] approved by the State of California." See Bidding Documents for the North City Pure Water Facility, §11.1. Further, the "Submittal Requirements" state that documentation "demonstrating that all apprentices working on the Project will be registered in a Joint Labor Management Apprenticeship Program" shall be "submitted to the City within 30 days after bid opening, unless additional time is granted by the City in its sole discretion." *Id.* § 11.2.

The "Fair and Open Competition - Prohibition on Requiring Project Labor Agreements" Ordinance states:

"Except as required by state or federal law as a contracting or procurement obligation, or as a condition of the receipt of state or federal funds, the City shall not require a Contractor on a Construction Project to execute or otherwise become a party to a Project Labor Agreement as a condition of bidding, negotiating, awarding or the performing of a contract." SDMC §22.4402.

The City does not dispute that the JLMAP requirement is counter to the intent of the Ordinance, which mandates that no contractor may be required to become a party to a Project Labor Agreement ("PLA") as a condition to bidding on a City contract.

Apprentices working for unionized contractors receive their training through union-sponsored apprentice programs, known as JLMAPs. Apprentices working for non-union contractors receive their training through non-JLMAPs, such as AGC Apprentice Program.

Instead, the City argues that the exception stated in SDMC §22.4402 applies. "[A] major exemption in Proposition A states the City can use PLA's if it is using State of California funding for a project." [Oppo. 4:3-4, emphasis added] The City does not state the City must use PLAs if the exception applies, only that it has discretion to require PLAs.

According to the City, the City of San Diego has been allocated \$30 million in state grants to various Pure Water San Diego Phase 1 projects, including the North City Pure Water Facility. The City also applied to the California State Water Resources Control Board for a Clean Water State Revolving Fund ("SRF") loan. "The North City Pure Water Facility project application received a total SRF loan allocation of \$282,030,000 in state funds." [R. Charvel decl., ¶4]

Although there is evidence of state funding, there is no evidence that the State has conditioned receipt of these funds by requiring a Contractor execute or be a party to a PLA. The exception set forth in SDMC §22.4402 applies in cases when there is a State requirement as a condition to receiving state funds.

The City contends that the state law requires that the City have discretion to implement a PLA as a condition of the receipt of state funds, citing Public Contract Code §2502:

"If a charter provision, initiative, or ordinance of a charter city prohibits the governing board's consideration of a project labor agreement that includes all the taxpayer protection provisions of Section 2500 for a project to be awarded by the city, or prohibits the governing board from considering whether to allocate funds to a city-funded project covered by such an agreement, then state funding or financial assistance shall not be used to support that project." PCC §2502.

Accordingly, PCC §2502 prohibits state funding if there is an ordinance that prohibits PLAs that include the protections set forth in PCC §2500.

The City's Ordinance does not prohibit PLAs. The City's Ordinance prohibits requiring a PLA as a condition to being awarded a contract on a City construction project. PCC §2502 does not support the City's position.

The City cites Resolution R-309276, which the City states was passed in response to Public Contract Code §2502. The Resolution resolves "that as required by California Public Contract Code section 2500-2503, and under the exception clause of San Diego Municipal Code section 22.4402, the City and the City Council are not prohibited, limited or constrained in any way from adopting, requiring or utilizing PLAs that include the taxpayer protection provisions of California Public Contract Code section 2500 on any construction projects awarded by the City."

Resolution R-309276 is puzzling because it appears to be an attempt to amend or repeal SDMC §§22.4401, et seq., which is precluded under the Ordinance. "This Ordinance shall not be amended or repealed except by a majority vote of the voters of the City of San Diego." SDMC §22.4406.

Based on the foregoing, it appears that the City is claiming the City can choose to ignore SDMC

§22.4402 if there is any state funding, as opposed to complying with §22.4402 except when the State requires a PLA that includes the protections set forth in PCC §2500 as a condition of receipt of state funds.

The City next contends that the JLMAP "requirement can be implemented in this contract without requiring a PLA." [Oppo., 5:12-13] This contention only highlights the City's discretionary approach to SDMC §22.4402.

Under the bid specifications, the bidder can satisfy the JLMAP requirement by providing a written commitment with a JLMAP to provide JLMAP apprentices by submitting (1) a PLA, (2) Collective Bargain Agreement; (3) a contract with a JLMAP to provide and use JLMAP apprentices, or (4) written correspondence to the bidder from a JLMAP committing to provide JLMAP apprentices for the project.

Accordingly, a PLA (or CBA) is not required; what is actually required are JLMAP apprentices. In other words, only union apprentices are allowed to work on the project.

The City doesn't explain why JLMAP apprentices are required when, according to AGC, AGC apprentices also receiving training that is certified by the State of California. There is no explanation for this preferential treatment. This is contrary to the intent of SDMC §22.4401: "[T]he City should treat union and non-union Contractors equally and not give special advantages to either. All City Construction Project job opportunities should be open equally to both union and non-union workers."

"In considering the purpose of legislation, statements of the intent of the enacting body contained in a preamble, while not conclusive, are entitled to consideration. Although such statements do not confer power, determine rights, or enlarge the scope of a measure, they properly may be utilized as an aid in construing a statute." *Audio Visual Services Group, Inc. v. Superior Court* (2015) 233 Cal.App.4th 481, 492.

Based on the foregoing, the likelihood that plaintiffs/petitioners will prevail on the merits has been demonstrated.

There is obvious harm to AGC apprentices: They have no chance to obtain work on the project unless they forego their training program, join a union and register with a JLMAP training program.

Moreover, "the loss of an opportunity to fairly compete on future government contracts constitutes irreparable harm. *RhinoCorps Ltd. Co. v. United States*, 87 Fed.Cl. 673, —, No. 08–410C, 2009 WL 1362843, at (2009). This is because "[a]n action at law only allows recovery of 'bid preparation costs in a suit for damages, but not loss of anticipated profits.'" *Bannum, Inc. v. United States*, 60 Fed.Cl. 718, 730 (2004) (quoting *Essex Electro Eng'rs, Inc. v. United States*, 3 Cl.Ct. 277, 287 (1983)), aff'd, 404 F.3d 1346 (Fed.Cir.2005); see 28 U.S.C. § 1491(b)(2) (limiting this court's ability to award monetary relief in bid protests 'to bid preparation and proposal costs')." *ViroMed Laboratories, Inc. v. U.S.* (Fed. Cl. 2009) 87 Fed.Cl. 493, 503.

The City contends that it will be harmed by delay in the project. According to the City, if it does not open bids and proceed with the construction of the North City Pure Water Facility by August 2016, delays will cost the City approximately \$4 million per month. There is also consideration that the North City Pure Water Facility is one of eleven separate construction projects in Phase 1 of the City's Pure Water San Diego Program (which, according to AGC, those separate projects do not include the JLMAP requirement).

However, the City has not provided the Court with information as to the length of a delay if the bidding remained opened for a reasonable period in order to allow non-union contractors the opportunity to submit bids on the Contract without the JLMAP requirement.

In balancing the harm that is likely to result, plaintiffs/petitioners are likely to suffer significant harm

whereas the City is likely to suffer a slight delay in the bidding process.

THEREFORE, the motion for a preliminary injunction is **GRANTED**.

Defendants/Respondents City of San Diego; City of San Diego Public Utilities Department, and Kevin L. Faulconer are enjoined and restrained from requiring that bidding contractors for the North City Pure Water Facility project use apprentices registered in Joint Labor Management Apprentice Programs. They are further enjoined and restrained from closing or completing the bidding process for the North City Pure Water Facility, or awarding a contract for the North City Pure Water Facility, based on a requirement that bidders use apprentices registered in Joint Labor Management Apprentice Programs.

Counsel for plaintiffs/petitioners shall prepare an Order, approved as to form by the City, for the Court's approval and signature.

Request for Judicial Notice

The Court grants AGC's request for judicial notice of the November 30, 2012 Memorandum of Law from the City Attorney's Office. However, it has limited application here inasmuch as that Memorandum discusses PCC §2503, which is not raised or discussed by the parties in this motion.