

## City of Fair and Open Competition Ordinance Brief Summary

SDCTA **SUPPORTS** the proposed measure because it seeks to prohibit the ability of the San Diego City Council to require a Project Labor Agreement for public works projects. The proposal is in line with past measures supported by SDCTA as a means to promote open competition between union and open shop contractors to ensure taxpayers receive the best return on investment.

- The “Fair and Open Competition in Construction” Ordinance is an initiative measure that gathered and submitted 90,433 signatures to appear on the City of San Diego’s (City) June 2012 ballot.
- The proposed measure includes similar language to that of the measures passed by Chula Vista, Oceanside and County of San Diego voters during the 2010 election cycle.
- This measure is similar in that the language does not prevent a private developer or contractor from entering into a collective bargaining agreement or outright ban PLAs, but rather prohibits the City from requiring a contractor enter into such an agreement as a condition of bidding, negotiating, awarding or the performing of a contract.
- One additional inclusion within the proposed measure is the requirement of posting contracts greater than \$25,000 online for public viewing. The proposal also requires the Mayor to post all written justification for sole source contracts.
- In June 2010, the San Diego County Taxpayers Association (SDCTA) supported Propositions G (City of Chula Vista Fair & Open Competition Ordinance) and K (Oceanside City Charter) and Proposition A in November 2010 (County of San Diego Fair & Open Competition Charter Amendment), which prohibits each jurisdiction’s respective governing boards from mandating the use of Project Labor Agreements (PLAs) for publicly-funded projects.
- Passage of Senate Bill 922 prohibits a charter city from using state funding on a project if a charter provision, initiative or ordinance prohibits the city’s governing board from considering a project labor agreement.
- It is unclear if SB 922 will impact the City if voters pass the proposed measure.

## City of San Diego Fair & Open Competition Ordinance

**Board Action:**

**SUPPORT**

**Rationale:**

As with past measures approved by voters throughout the county, the “Fair and Open Competition Ordinance” seeks to prohibit the ability of the San Diego City Council to require a Project Labor Agreement for public works projects. In addition, the proposal requires posting of all contracts online as well as the rationale for use of sole source contracting. Despite dual legal opinions differing as to the impact of state legislation on the City of San Diego should the proposal be approved by voters, the proposal is in line with past measures supported by SDCTA as a means to promote open competition between union and open shop contractors to ensure taxpayers receive the best return on investment.

**Background:**

*Project Labor Agreements*

Project labor agreements (sometimes referred to as project stabilization agreements) are a pre-hire form of collective bargaining agreements that set the stage for labor relations on projects. These agreements typically occur between construction sponsors—in many cases, a public entity—and labor unions. Project labor agreements (PLAs) set forth the terms of work for the construction project, such as striking rules, hiring procedures, wages and benefits. Through these agreements, it is also typically arranged that the construction project will hire a specified percent or number of contractors through union halls as well as a specified number or percent of location-based contractors. Even if they are not members of the specified union or construction firm awarded the bid. If hired on, all contractors must abide by the PLA, which may include paying union dues and altering usual employment procedures. The purpose of a PLA or Project Stabilization Agreement (PSA) is to establish a harmonious working environment that will deliver the project on-time and on-budget without labor disputes, e.g. striking.

Proponents of PLAs argue that these agreements do the following:

- Mitigate labor disputes (including strikes and lockouts)
- Prevent schedule conflicts and variances
- Assist in the completion of projects in a timely manner
- Provide skilled craftsmen in sufficient quantity
- Ensure less likelihood of safety issues to arise
- Ensures local workers would receive the work
- Ensure at least the prevailing wage is being paid
- Ensure high quality work through union certifications and apprenticeships

Opponents of PLAs argue against PLAs for the following reasons:

- Inhibits competition by reducing the numbers of bidders

- Increases construction costs through union rules and regulations
- Imposing union dues and union rules on non-union contractors is unfair and disadvantageous
- Union work rules can be arduous and archaic

**National:** At the national level, President Bush prohibited the mandatory use of PLAs in federal construction projects through Executive Order 13202, issued in 2001. In February 2009, President Obama overturned this Executive Order. Nationwide, 16.2% of employed construction workers were represented by unions in 2008 (or 83.8% were unrepresented).<sup>1</sup>

**State:** In California, project labor agreements have a long history. The construction of the Shasta Dam from 1938-1944 used a PLA and was one of the only projects during that time that was completed without labor strikes.<sup>2</sup> To-date, numerous projects have been completed using PLAs throughout the state as well as the San Diego region.

The courts have intervened on several occasions regarding the legality of PLAs. However, it has been affirmed through the California Supreme Court (*ABC v. San Francisco Airports Commission*) that PLAs do not discourage market competition if crafted appropriately.

**Local:** Following the passage of Proposition S in November 2008, the San Diego Unified School District Board of Trustees approved a PSA for specific bond-related projects. In December 2011, the Board expanded the applicability of the Project Stabilization Agreement to expand its scope to cover all projects paid for in whole or in part with state bond funds and extend the term of the PSA project for the life of the Proposition S program.

While the City of San Diego has never mandated the use of a PLA, projects completed within the City have utilized a PLA. Most notably, construction of Petco Park was done with a PLA in place. The San Diego County Water Authority has also entered into a PLA for construction of its Emergency Storage Project.

### **Proposal:**

The “Fair and Open Competition in Construction” Ordinance is an initiative measure that gathered and submitted 90,433 signatures to appear on the City of San Diego’s (City) June 2012 ballot.

The proposed question that will go before voters reads as follows:

“Should the City of San Diego be prohibited from requiring contractors to use Project Labor Agreements for City construction projects, except where required by law, and should the Mayor be required to post online all construction contracts over \$25,000?”

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<sup>1</sup> U.S. Bureau of Labor Statistics. “Union affiliation of Employed Wage and Salary Workers by Occupation and Industry.” Data for 2008.

<sup>2</sup> Johnston Dodds, Kimberly. *Construction California: A Review of Project Labor Agreements*. October 2001.

If approved by voters, the City Municipal Code will be amended to add the following pertinent sections (amendment includes other sections not listed below):

**§22.4402: Fair and Open Competition – Prohibition on Requiring Project Labor Agreements**

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.

**§22.4403: Fair and Open Contracts – Posting City Construction Project Contracts Online**

To help ensure City compliance with the purposes of this Ordinance, the Mayor shall post on the City’s website in a searchable format the text of all Construction Project contracts entered into by the City valued at more than \$25,000 in a given fiscal year. The Mayor shall redact any proprietary, trade secret, or otherwise legally privileged or confidential information from contracts prior to posting. For each contract, the Mayor shall note the number of total bidders who competed for the contract. For any sole source contract, the Mayor shall post a written justification for the sole source determination.

**§22.4405: Applicability**

- (b) Nothing in this Ordinance shall be construed as prohibiting private parties that may perform work on Construction Projects from voluntarily entering into Project Labor Agreements or engaging in activity protected by law.
- (c) Nothing in this Ordinance shall be construed as prohibiting a Contractor from entering into any individual collective bargaining relationship, or otherwise as regulating or interfering with activity protected by applicable state or federal law, including but not limited to, the Act (National Labor Relations Act).

**Policy Discussion:**

*Senate Bill (SB) 922*

On October 2, 2011 Governor Jerry Brown signed into law SB 922 (Steinberg). SB 922, a gut and amend bill<sup>3</sup>, “prohibits a charter city from using state funding or financial assistance to support a project if a charter provision, initiative or ordinance prohibits the city’s governing board from considering a project labor agreement that includes required taxpayer protection provisions 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

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<sup>3</sup> SB 922 was originally drafted as a public health policy involving tuberculosis.

an agreement.”<sup>4</sup> If a charter provision, initiative or ordinance was in effect prior to November 1, 2011, this section of the bill will not be applicable until January 1, 2015. In San Diego County, the cities of Chula Vista and Oceanside may need to evaluate their measures that have recently passed and any potential impacts by the passage of SB 922.

Following passage of this bill, debate has centered around whether the language in the proposed measure allows the City to “consider” approving a PLA for projects receiving state funding. A legal opinion on behalf of opponents of the initiative states, “SB 922 conditions State funding on the *existence of the authority* in a city council *to consider on its own* whether or not to use a project labor agreement for a city project.”<sup>5</sup> Therefore, the opponents of the measure believe passage of SB 922 puts at risk all projects in which the City receives state funding should the FOCO measure be approved by voters. Opponents of the proposal have stated publicly that the legislative intent of SB 922 is to specifically undo Proposition A, which was approved by voters throughout the County of San Diego in November 2010.

Proponents of the measure received a legal opinion stating that any analysis of SB 922’s impact begins with a plain language reading of the proposed measure and SB 922.<sup>6</sup> The opinion states:

“SB 922 does not prevent a charter city from enacting an ordinance prohibiting project labor agreements on any projects where state funding is not involved or anticipated...Further, SB 922 does not require employment and use of project labor agreements by a charter city in city projects where state funding is anticipated.”

Furthermore, the opinion states there are only two instances in which state funding would be lost on a specific project: 1) if the project is prohibiting from considering a PLA as a result of an ordinance, or if the city adopted a global ordinance that totally prohibited consideration of a PLA on any project. A plain reading of the proposed measure sets forth that the City of San Diego may consider a PLA if state or federal funding would be withheld for failure to consider it. The opinion concludes by stating:

“[N]othing in the plain language reading and analysis of the interaction between the two pieces of legislation supports a conclusion that the two cannot operate and be applied consistently. Nothing set forth in SB 922 prevents the implementation of San Diego’s Fair and Open Competition Ordinance.”

#### *Proposed Measure vs. Past Measures*

The proposed measure includes similar language to that of the measures passed by Chula Vista, Oceanside and County of San Diego voters during the 2010 election cycle. This measure is similar in that the language does not prevent a private developer or contractor from entering into a collective bargaining agreement or outright ban PLAs, but rather

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<sup>4</sup> SB 922 Senate Governance & Finance Committee Bill Analysis. September 8, 2011 version.

<sup>5</sup> “SB 922 – Application to Charter Cities”. Scott A. Kronland & Caroline P. Cincotta, Altshuler Berzon LLP. October 31, 2011.

<sup>6</sup> “Legal Opinion Regarding Impact of California SB 922 on San Diego Fair and Open Competition Ordinance”. Law Offices of Donald R. McKillop. November 29, 2011.

prohibits the City from requiring a contractor enter into such an agreement as a condition of bidding, negotiating, awarding or the performing of a contract.

*San Diego Municipal Code*

One additional inclusion within the proposed measure is the requirement of posting contracts greater than \$25,000 online for public viewing. The proposal also requires the Mayor to post all written justification for sole source contracts. Municipal Code section 22.3212 outlines which contracts are not required to be competitively bid:

**§22.3212 Contracts Not Required to be Competitively Bid**

The contracts listed in section 22.3212(a)-(g) are not required to be competitively bid:

- (a) A contract that provides for an expenditure of less than \$5,000;
- (b) A cooperative procurement contract in an amount less than \$10,000;
- (c) A contract to remedy an emergency that affects public health or safety, provided that:
  - (1) The Purchasing Agent immediately reports the emergency award and its justifications to the City Council; and
  - (2) The Council by resolution acknowledges and ratifies the procurement;
- (d) A cooperative procurement contract administered by an agency provided that:
  - (1) The City Manager certifies in writing that the cooperative procurement contract is in the best interests of the City; and
  - (2) The cooperative procurement is to the City's economic advantage; and
  - (3) The agency's bidding process substantially complies with the City's competitive bidding requirements.
- (e) A contract that is available from a Sole Source only, if, in advance of the contract, the City Manager certifies in writing in accordance with Section 22.3037 the Sole Source status of the provider;
- (f) Annual blanket purchase orders for an expenditure greater than \$5,000 for commercially available materials and supplies, provided that they are:
  - (1) required by City forces for immediate completion of work in progress;
  - (2) not normally kept in City stores; and
  - (3) less than \$50,000.
- (g) Contracts for Inmate Services which comply with Section 22.3221.
- (h) Contracts for Services with Agencies or Non-Profit Organizations which comply with Section 22.3222.

*Past SDCTA Positions*

In June 2010, the San Diego County Taxpayers Association (SDCTA) supported Propositions G (City of Chula Vista Fair & Open Competition Ordinance) and K (Oceanside City Charter) and Proposition A in November 2010 (County of San Diego Fair

& Open Competition Charter Amendment), which prohibits each jurisdiction's respective governing boards from mandating the use of Project Labor Agreements (PLAs) for publicly-funded projects. The rationale for these positions stated:

“SDCTA supports open competition on projects that are partially or wholly funded with public dollars as a means to ensure taxpayers receive the best return on investment. Mandatory project labor agreements discourage competition between union and open shop contractors, thereby increasing the likelihood that public agencies will not achieve the most cost-effective arrangement.”

#### *Fiscal Impact*

The most recent estimate from the San Diego County Registrar of Voters for a five-page ballot measure to be placed on the June 5, 2012, ballot is between \$525,000 and \$619,000.

Since the impacts of SB 922 have yet to be determined, it is unclear if there are any impacts to state funding for city projects. The City Attorney has committed to working with the Independent Budget Analyst's Office to produce a fiscal impact analysis that will incorporate the opinions of the City Attorney. It can be expected though that the outcome of the election and eventual impacts will be litigated should voters approve the measure.