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DEPARTMENT OF JUSTICE
CIVIL DIVISION
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OPINION 16-0020

90-A-1 PUBLIC FUNDS & CONTRACTS

La. R.S. 38:2211 *et seq.*

Louisiana's Public Bid Law does not provide any authority for establishing a local hiring preference.

Hon. Conrad Appel, III
State Senator – District 9
721 Papworth Avenue, Suite 102A
Metairie, LA 70005

Dear Senator Appel:

Your request for an Attorney General's Opinion has been assigned to me for research and reply. You asked for our opinion on the legality of a recently adopted ordinance which established local hiring preferences for certain construction projects let by the City of New Orleans ("City"). For reasons which follow, we conclude that absent any legal authority to establish a local hiring preference or otherwise require contractors to hire local workers, the inclusion of such a requirement would be impermissible. Similarly, it is also our opinion that including and evaluating a contractor's efforts to hire local workers as part of the public bid law bid solicitation process would be impermissible.

According to your request, Mayor Council Series, Ordinance No. 26607 ("Ordinance") established the HireNOLA program. Our review of the Ordinance reveals it applies to all public works contracts valued at over \$150,000 let by the City. It also applies to any cooperative endeavor agreement where the City is a party and provides tax incentives for an economic development public works project valued at over \$150,000. Pursuant to the Ordinance, contractors and subcontractors for such projects are required to make good faith efforts that a certain percentage of the work hours performed on the projects are performed by "local workers" and "disadvantaged local workers."¹ Additionally, contractors are required to use the City as its first source for recruitment, referral and placement of all new hires for employment opportunities created by such projects. The Ordinance further provides that the City shall not enter into a contract unless it is supported by documentation establishing the prime contractor has met the local hiring

¹ Ordinance No. 26607 defines a local worker as "any person domiciled in Orleans Parish," and a disadvantaged local worker as a local worker who "has a household income equal to or less than 50 percent of Area Median Income (AMI), adjusted for household size, of the New Orleans-Metairie-Kenner Metropolitan Statistical Area, or (ii) faces at least one of the following barriers to employment: (1) is eligible to receive public assistance; (2) suffering from chronic unemployment; (3) being a custodial single parent; (4) having a prior arrest or conviction; (5) being homeless; (6) having been emancipated from the foster care system; or (7) being a veteran of the U.S. Military."

goals or commits to demonstrating good faith efforts to meet the goals and commits to implementing the first source provisions of the Ordinance.

You have expressed concerns about the legality of the Ordinance in light of the strict provisions of Louisiana's Public Bid Law and various other provisions of State and Federal law. Specifically, you note that similar local hiring ordinances have been attempted by cities in other states only to be struck down after legal challenges. You also recognize the practical effect of allowing this sort of local preference would only motivate other local public bodies to do the same. Additionally, you note the Ordinance fails to provide for any exception based upon the source of funding and fails to consider the various procurement rules and regulations established by certain Federal agencies. In light of these concerns, you ask for our opinion as to whether the Ordinance is legal.

As a public entity, as defined in La. R.S. 38:2211, the City is subject to the provisions of Louisiana's Public Bid Law. Under Louisiana's Public Bid Law, contracts for public works projects exceeding \$150,000 must be advertised and let to the lowest responsible and responsive bidder. La. R.S. 38:2212(A)(1). La. R.S. 38:2211(12) defines a public work as "the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity."

Louisiana courts have recognized that Louisiana's Public Bid Law is a prohibitory law founded on public policy. *Broadmoor, L.L.C. v. Ernest N. Morial New Orleans Exhibition Hall Auth.*, 04-0211 (La. 3/18/04), 867 So.2d 651, 656. The statute was enacted in the interest of the taxpaying citizens for the purpose of protecting them against contracts of public officials entered into because of favoritism and involving exorbitant and extortionate prices. *Airline Construction Company, Inc. v. Ascension Parish School Board*, 568 So.2d 1029, 1032 (La.1990). Furthermore, Louisiana courts have recognized that Louisiana's Public Bid Law is *sui generis* and a political entity has no authority to take any action which is inconsistent with the Public Bid Law. *Wilkin v. Dev Con Builders, Inc.*, 561 So.2d 66 (La.1990); *Broadmoor*, 867 So.2d 651; *Louisiana Associated Gen. Contractors, Inc. v. Louisiana Dep't of Agric. & Forestry*, 05-0131 (La. 2/22/06), 924 So.2d 90, 95.

Our review of Louisiana's Public Bid Law fails to reveal any authority for establishing a local hiring preference. In accord are La. Atty. Gen. Op. Nos. 94-444 and 91-154. Additionally, we note La. R.S. 38:2225 provides the following:

§ 2225. Preference in letting contracts for public work

A. If a nonresident contractor bidding on public work in the state of Louisiana is domiciled in a state that provides a percentage preference in favor of contractors domiciled in that state over Louisiana resident contractors for the same type of work, then every Louisiana resident

contractor shall be granted the same preference over contractors domiciled in the other state favoring contractors domiciled therein whenever the nonresident contractor bids on public work in Louisiana.

B. Any local law, either by legislative act or otherwise, ordinance, or executive order enacted prior to the effective date of this Act, or enacted hereinafter in conflict with this Section, or granting any local contractor or subcontractor preference over other Louisiana resident contractors shall be contrary to the provision of this Section.

C. The Department of Transportation and Development and the office of facility planning and control within the division of administration shall keep on file a list of all states with a bid preference.

D. The provisions and requirements of this Section shall not be waived by any public entity.

Subsection (B) of La. R.S. 38:2225 specifically provides that any local law granting "any local contractor or subcontractor preference over other Louisiana resident contractors shall be contrary to the provision of this Section." Although the Ordinance in question appears to only require that a contractor use "good faith efforts" in hiring local workers and disadvantaged local workers, it prohibits the City from executing a public works contract if there is no documentation establishing the prime contractor has either met the local hiring goals or has committed to demonstrating good faith efforts to meet the goals. The Ordinance further requires that the contractor commits to implementing the first source provisions of the Ordinance.

As noted above, Louisiana's Public Bid Law is *sui generis*, and a political entity has no authority to take any action which is inconsistent with the Public Bid Law. Absent any legal authority to establish a local hiring preference or otherwise require contractors to hire local workers, it is the opinion of this office the inclusion of such a requirement would be impermissible and against Louisiana law. Similarly, it is also our opinion that including and evaluating a contractor's efforts to hire local workers as part of the public bid law bid solicitation process would be impermissible and against Louisiana law. Accordingly, in light of the applicable jurisprudence noted above it is the opinion of this office that if challenged Ordinance No. 26607 would likely be declared illegal and contrary to Louisiana law.

Additionally, we note the Ordinance may also run afoul of Federal procurement rules and regulations. For example, 24 CFR 85.36 applies to HUD projects, while 44 CFR 13.36 applies to FEMA projects. Both of these provisions provide that grantees and subgrantees will conduct procurements in a manner that prohibits the use of "in-State or local geographical preferences in the evaluation of bids or proposals, except in those

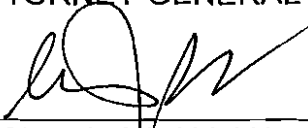
cases where applicable Federal statutes expressly mandate or encourage geographical preference." Therefore, for projects utilizing Federal funds it is possible the City would run afoul of these provisions which would in turn jeopardize funding for those projects.

We trust this adequately responds to your request. If you should have any questions about the response contained herein, please feel free to contact our office.

Yours very truly,

JEFF LANDRY
ATTORNEY GENERAL

BY:



MICHAEL J. VALLAN
Assistant Attorney General

JL/MJV/as