

FW: City Council Meeting 3/28/2023 Agenda Item 3.6

City Clerk <city.clerk@sanjoseca.gov>

Mon 3/27/2023 10:14 AM

To: Agendadesk <Agendadesk@sanjoseca.gov>

📎 1 attachments (326 KB)

3.28.23 Agenda Item 3.6 Wage Theft Prevention Revisiosns.pdf;

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**From:** Tomas Margain <[REDACTED]>

**Sent:** Monday, March 27, 2023 9:45 AM

**To:** City Clerk <city.clerk@sanjoseca.gov>; Webmaster Manager <webmaster.manager@sanjoseca.gov>; Cranford, Sandra <Sandra.Cranford@sanjoseca.gov>; Hickey, Christopher <Christopher.Hickey@sanjoseca.gov>; Loesch, Matthew <Matt.Loesch@sanjoseca.gov>; Mauricio Velarde [REDACTED] Ruth Silver Taube [REDACTED]

**Subject:** City Council Meeting 3/28/2023 Agenda Item 3.6

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Chris

I wanted to send you the attached letter regarding the proposed Revisions to the Wage Theft Prevention Policy

Warm regards,  
Tomas



**Tomas E. Margain**  
Attorney at Law

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*Attorneys*  
TOMÁS E. MARGÁIN  
HUY TRAN

March 27, 2023

Christopher Hickey  
Division Manager, Office of Equality Assurance  
City of San Jose  
200 East Santa Clara Street, 16th Floor  
San Jose, California 95113-1905

Re: Wage Theft Prevention Revisions, 3/28/2023 Agenda Item 3.6

Dear Chris:

I am writing to you because after our call of last week, I took the time to look at the City Council's March 28, 2023, Agenda to look at the Wage Theft Prevention Policy Revisions.

I commend City Staff, as well as elected Officials, for their work on the Wage Theft Item. This is the continuation of hard work since at least 2016. I am particularly interested in this as my law partner and I represent Wage Theft victims including workers who worked on Silvery Towers and workers who worked on City of San Jose Public Works Projects including those employed by Pacific Plumbing & Sewer Services, Inc. (at the San Jose Convention Center); Tucker Construction (performing unhoused encampment cleanup), and Veev Builders/Aerotek (working at the Monterey@Bernal Emergency Housing project).

As I indicated on the phone, I have not been keeping up with the City's work on the Policy and this late letter is my fault as I should have reached out to you or others earlier on in the process. Nonetheless, I am writing as I don't think I can keep quiet as the proposed revisions are a missed opportunity and create a Policy which will be harder to properly enforce.

I want to draw your attention to my concerns in the redlined proposals to Policy Number 0-44 the Wage Theft Prevention Policy.

First, at page 2 paragraph 1, the proposal is for "final wage judgments" to be limited to those from the Labor Commissioner's Office. There is no reason why the final wage judgments cannot be from: (1) Federal or State Court's; (2) final administrative decisions; (3) final awards in Arbitration; and (4) Orders from restitution in criminal matters. All of the foregoing final Judgments, Decisions or Awards are made after a finding of facts have been made and appeals exhausted. To illustrate my point, I have clients that have recently received Arbitration awards against Pacific Plumbing, one of which arises out of the San Jose Convention Center project, and there is no reason why these final Judgments, Decisions or Awards should not be included.

Second, with respect to Mandatory Disclosures and a Bid Certificate, this should not be limited to final Judgments, Decisions or Awards. It should also include Complaints filed before the State, Administrative Bodies, Courts and in Arbitration. It is important for Bid Submissions to have these disclosures<sup>1</sup>. Having broader disclosure requirements allows municipalities and their compliance departments, like the OEA, to better monitor projects as they can see if a contractor or subcontractor has a pattern of wage claims. As you know, most cases settle so limiting this to judgments would potentially allow a contractor who is a repeat offender to be on a job without anyone knowing this history. Second, this would allow interested parties to know if a Bid was submitted by a contractor with again a pattern of issues to potentially file a Bid protest. Finally, groups who monitor Public Works construction would also be able to red flag these projects to focus their laudable effort to monitor projects for wage theft.

I want to be clear that the disclosure of wage theft Complaints filed before the State, Administrative Bodies, Courts and in Arbitration does not lead to automatic disqualification. This is a tool for San Jose to better understand who is submitting a Bid. This self-reporting, especially if there are consequences for making false or evasive statements, can only help in ensuring that a project is being let out, in Public Works language, to the lowest responsible bidder. It also prevents the problem of bad deeds being swept under the rug.

Again, I understand that my comments are coming at the eleventh hour. However, City Staff and elected Officials, by the use of their legislative priorities, have a lot of policy work and my concern is that if the Wage Theft Prevention Policy is adopted without consideration of these issues, it will be a missed opportunity that may not come around in the near future.

Very Truly Yours,



Tomas E. Margain

Cc: City Clerk  
City Manager Jennifer Maguire  
Assistant Public Works Director Matt Loesch  
Ruth Silver-Taub  
Mauricio Velarde

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<sup>1</sup> The Bid Certificate should instruct the Contractor or Subcontractor to use a workers initials only for their privacy as well as state the forum and case number of the pending or closed claim.

FW: San Jose City Council Meeting 3-28-2023

City Clerk <city.clerk@sanjoseca.gov>

Tue 3/28/2023 7:53 AM

To: Agendadesk <Agendadesk@sanjoseca.gov>

 1 attachments (222 KB)

3-28-2023 City Council Meeting Item 3.6 Wage Theft Prevention Policy Revision from SBP.pdf;

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**From:** Mauricio Velarde <[REDACTED]>

**Sent:** Monday, March 27, 2023 5:53 PM

**To:** City Clerk <city.clerk@sanjoseca.gov>; Webmaster Manager <webmaster.manager@sanjoseca.gov>; Hickey, Christopher <Christopher.Hickey@sanjoseca.gov>; Cranford, Sandra <Sandra.Cranford@sanjoseca.gov>; Loesch, Matthew <Matt.Loesch@sanjoseca.gov>; District1 <district1@sanjoseca.gov>; District2 <District2@sanjoseca.gov>; District3 <district3@sanjoseca.gov>; District4 <District4@sanjoseca.gov>; District5 <District5@sanjoseca.gov>; District 6 <district6@sanjoseca.gov>; District7 <District7@sanjoseca.gov>; District8 <district8@sanjoseca.gov>; District9 <district9@sanjoseca.gov>; District 10 <District10@sanjoseca.gov>; Mauricio Velarde <[REDACTED]>; Ruth Silver Taube <[REDACTED]>

**Subject:** San Jose City Council Meeting 3-28-2023

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To Whom It May Concern:

Please see attachment.

Thank you,

***Mauricio Velarde***

***Director of Compliance***

South Bay Piping Industry

Santa Clara & San Benito Counties

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## South Bay Piping Industry Labor Management Trust

March 27, 2023

Hon. Mayor Matt Mahan  
City Councilmembers (Kamei, R; Jimenez, S; Torres, O.; Cohen, D.; Ortiz, P.; Davis, D.; Doan, B.;  
Candelas, D.; Foley, P.; Batra, A.)  
City Clerk  
City Manager Jennifer Maguire  
Assistant Public Works Director Matt Loesch  
Director of Office of Equality Assurance Christopher Hickey

Re: 3/28/2023 City Council Meeting Agenda  
Item 3.6 Wage Theft Prevention Policy Revision

I am the Director of Compliance of the South Bay Piping Industry. The South Bay Piping Industry is a Labor Management Cooperative Trust established under Federal Law, comprised of UA Local 393, representing 3,138 unionized workers – over 2,367 active members; 400 apprentices; and 771 retired members- in the Plumber, Steamfitter and HVAC/R trades in Santa Clara and San Benito Counties and three employer organizations representing signatory contractors who perform work in Santa Clara and San Benito counties, including several legacy contractors who helped build the infrastructure of the South Bay and who have been in business for over 100 years.

We cannot support the Wage Theft Prevention Policy Revision as written and want to be on record with our concerns. Our issues are with the proposed revisions as written and not the need to strengthen the current Policy. Again, we applaud the efforts to strengthen and clarify the current policy. The Wage Theft Prevention Policy represents the earnest efforts of City Staff, elected Officials, and interested parties ever since this was made a priority item.

Among the core tasks of the South Bay Piping Industry is labor compliance. This is done by monitoring and investigating public works construction projects to make sure that all contractors compete on a level playing field and that low road contractors do not use wage theft to gain an economic advantage in an otherwise competitive bidding process. In fact, the investigations I have participated in have led to monetary recoveries by workers, or penalty assessments imposed by the State of California, for wage theft involving five contractors who worked on San Jose Public Works projects. Wage Theft and the economic impact to San Jose residents is real. The City of San Jose through its purchasing power has the right and ability to not reward cheating contractors. This is not a race to the bottom.

I want to address both Assistant Public Works' Director Matt Loesch's memorandum of March 6, 2023, and the proposed Redlined changes to the Wage Theft Prevention Policy, Policy Number 0-44 ("Policy").

We share the goal of mandatory disqualification as addressed in Mr. Loesch's memo. However, the mandatory disqualification circumstance, based on the proposed language of three or more final wage judgments from the "California Labor Commissioner's Office" in the last three years prior to the date of submission, is not something we can support. This does not go far enough.

We agree that the mandatory disqualification circumstances should be triggered by judgments, orders, or final administrative decisions as opposed to allegations or complaints. However, the disqualifying circumstance should be two judgments, orders, or final administrative decisions in three years or three in five years.

The more troubling aspect of the mandatory disqualifying circumstances is that the "judgments" referenced are limited to "California Labor Commissioner" proceedings. The proposed language ignores final judgments from the U.S. Department of Labor, findings of criminal restitution for wage theft in criminal proceedings, judgments from workers who hired counsel to pursue wage theft claims in civil court, final administrative decisions such as from San Jose's OEA, small claims judgments from workers who had the wherewithal to take their employer to court without an attorney, and arbitration decisions that have been confirmed as Court Judgments for wage theft because of the expanded use of mandatory arbitration agreements. Frankly, it also ignores the later section of the City's policy where "Final Judgments Decisions or Awards" are clearly spelled out. Finally, it creates a vague reference of the "California Labor Commissioner" which can then be used by a Contractor to argue that this only references one Office of the State of California's Department of Industrial Relations to potentially exclude actions by the offices commonly called the Bureau of Field Enforcement (BOFE) and the Public Works Unit which issues Civil Wage and Penalty Assessments (CWAPAS). Now is the time to draft clear language.

As currently crafted, the proposed revisions of the mandatory disqualification language are so limited that potential low road contractors with numerous court judgments or restitution orders for wage theft not arising from the California Labor Commissioner would be free to contract with the City. It also creates vague criteria when the Policy should be crystal clear so as not to create ambiguity when enforced.

The bigger issue with the proposed revisions involves Mandatory Disclosures. We agree that this is a necessary change. In fact, we applaud the use of a Bid Certificate. However, this disclosure requirement relates to "final" Judgments Decisions or Awards and clarifies that these stem from wage theft findings by a Court or investigatory governmental agency. No to repeat myself, but when one reads this, the omission of this language on what a "final judgment" is in the Disqualifying Circumstances cited above is glaring. However, this disclosure needs to be included not just in the bid submission but on an ongoing basis anytime a Subcontractor is hired by a Contractor. Our request is for both Contractors and Subcontractors, during the bidding process, execute a Disclosure at the point they submit a bid to perform the work.

Moreover, the Mandatory Disclosures should not be limited to "final judgments." This is just a disclosure and not a Disqualifying Circumstance. Because of that, the Mandatory Disclosure should include any administrative claim, claim by a governmental entity, or lawsuit alleging wage theft pending within a 5-year period of the execution of the Bid Certificate.

We understand that wage theft allegations or claims have to be substantiated and that everyone is innocent until proven guilty. We also understand that a disgruntled employer may bring a claim they cannot prove. However, the purpose of the disclosure is for the City to efficiently monitor a project. While again, there are usually two sides to any claim or allegation, the purpose for the disclosure is for the City to identify any potential red flags to better marshal its resources.

In our labor compliance role, we certainly want to know that a contractor or subcontractor with numerous wage theft claims in the past 5 years is going to be working on a City project to aid in how we monitor numerous projects in both Santa Clara and San Benito Counties.

We understand that disclosing a claim made by a worker is embarrassing, especially if an employer believes it is not true or settled as a result of the cost of doing business. However, this process ultimately makes labor compliance monitoring more efficient. It also protects contractors who may compete with a contractor that steals the wages of ten workers with the hope that only one worker brings a claim for wage theft, which they would promptly pay. That is a business model where a wage claim is quickly paid relying on the fact that they stole enough money from the other workers to offset any settlement money paid to another worker. Again, any business model where you rob 10 banks, get caught once and return the money on only one occasion, is not a business plan that should be encouraged.

Again, the South Bay Piping Industry cannot support the policy as written. However, the Policy does need to be revised and now is the time. This current Wage Theft Prevention policy represents years of hard work by City Staff, elected Officials who made this a priority, constituents, and stakeholders. The proposed revisions are both a step back in enforcement and a missed opportunity to strengthen current policy.

We would request that the policy be further revised with the implementation of the above comments.

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Mauricio Velarde  
Director of Compliance  
South Bay Piping Industry  
Santa Clara and San Benito Counties