

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;

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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[External Email]

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

Justice at Work Law Group
1550 The Alameda, Suite 302
San Jose, California 95126
Telephone: 408.317.1100 | Facsimile:
408.351.0105
[REDACTED] | www.jawlawgroup.com

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SAN JOSE, CALIFORNIA 95126
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FACSIMILE: 408.351.0105

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 disclosures¹. 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


¹ 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;

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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[External Email]

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.

A solid black rectangular box used to redact a signature.

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

FW: Support CM Kamei, Candelas, and Cohen memo

City Clerk <city.clerk@sanjoseca.gov>

Mon 4/10/2023 7:42 AM

To: Agendadesk <Agendadesk@sanjoseca.gov>

From: Lita Kurth [REDACTED]

Sent: Saturday, April 08, 2023 10:16 AM

To: City Clerk <city.clerk@sanjoseca.gov>

Subject: Support CM Kamei, Candelas, and Cohen memo

[External Email]

San Jose City Clerk Toni Taber,

Dear Ms. Davis (my councilor) and all,

I'm sharing a letter I agree with. As evidenced by that horrible "slavery towers" and the wage theft decisiosn that employers have ignored, we do not have enough teeth or oversight of subcontractors in the current policy. Could we make a rule that those who win contracts have to give the names of all employees of all subcontractors and sent the wage theft contact person's phone number to those employees? I am writing as a resident of San José to urge you to protect and empower workers on City contracts by supporting the memo by Vice Mayor Kamei and Councilmembers Candelas and Cohen to strengthen the proposed revision to the Wage Theft Prevention Policy.

Wage theft is a widespread and heinous crime. Millions of dollars are being stolen each year from our San Jose families - with the hardest impacts falling on workers of color, immigrants and working women. When unscrupulous corporations steal from their workers, it affects not just the worker themselves, but their family and their entire community. Letting bad actors get away with wage theft also harms our many small businesses and immigrant entrepreneurs who are trying to play by the rules and treat their workers fairly, but get undercut and pushed out of business by companies who cheat, break the law to exploit their workers, and get away with it.

The U.S Dept. of Labor estimated that workers overall in California lose a total of \$22.5 million to \$28.7 million each week due to minimum wage violations alone – just one of the many types of wage theft.

Over 6 years ago, the San Jose City Council voted unanimously to enact a Wage Theft Policy, but the policy excluded all public works projects. Since then, it has become clear that this omission excludes thousands of working people, including many in the construction sector which has one of the highest rates of wage theft. Even today, workers

who try to speak out continue to face retaliation from their boss – people have been fired or even deported for standing up for their rights and the needs of their families.

We need to do much more in our city to protect and empower working people, to uplift responsible businesses who pay their workers fairly, and to prevent and prosecute wage theft.

That's why today I am asking you to strengthen our existing wage theft prevention policy by supporting the memo from Kamei, Candelas and Cohen, which does the following:

- 1) Protects collective bargaining for janitors and security officers, so that workers do not face losing union protections that they fought for every time a contract is re-bid;
- 2) Ensures that construction workers on City contracts are protected by covering the types of wage theft claims that are common in construction, specifically Civil Wage and Penalty Assessments (CWPAs) and Bureau of Field Enforcement (BOFE) citations;
- 3) Bars bidders from getting City contracts if they have been found by the State to have committed wage theft two or more times in the past five years, so that companies who have adopted a pattern and practice of wage theft are not getting City support to continue it; and
- 4) Directs staff to finally develop the Responsible Construction Ordinance to protect construction workers on private projects, which has been stalled since February 2020.

An inclusive recovery must address the huge and growing issue of wage theft in our city. I urge you to show leadership towards a San Jose that supports and empowers our most vulnerable workers.

Lita Kurth



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FW: Support CM Kamei, Candelas, and Cohen memo

City Clerk <city.clerk@sanjoseca.gov>

Mon 4/10/2023 7:43 AM

To: Agendadesk <Agendadesk@sanjoseca.gov>

From: Marick Payton <[REDACTED]>

Sent: Saturday, April 08, 2023 7:46 AM

To: City Clerk <city.clerk@sanjoseca.gov>

Subject: Support CM Kamei, Candelas, and Cohen memo

[External Email]

San Jose City Clerk Toni Taber,

I am writing as a resident of San José to urge you to protect and empower workers on City contracts by supporting the memo by Vice Mayor Kamei and Councilmembers Candelas and Cohen to strengthen the proposed revision to the Wage Theft Prevention Policy.

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Marick Payton



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FW: Support CM Kamei, Candelas, and Cohen memo

City Clerk <city.clerk@sanjoseca.gov>

Mon 4/10/2023 7:43 AM

To: Agendadesk <Agendadesk@sanjoseca.gov>

From: Maria Marroquin [REDACTED]
Sent: Saturday, April 08, 2023 8:23 AM
To: City Clerk <city.clerk@sanjoseca.gov>
Subject: Support CM Kamei, Candelas, and Cohen memo

[External Email]

San Jose City Clerk Toni Taber,

I am writing as a resident of San José to urge you to protect and empower workers on City contracts by supporting the memo by Vice Mayor Kamei and Councilmembers Candelas and Cohen to strengthen the proposed revision to the Wage Theft Prevention Policy.

Wage theft is a widespread and heinous crime. Millions of dollars are being stolen each year from our San Jose families - with the hardest impacts falling on workers of color, immigrants and working women. When unscrupulous corporations steal from their workers, it affects not just the worker themselves, but their family and their entire community. Letting bad actors get away with wage theft also harms our many small businesses and immigrant entrepreneurs who are trying to play by the rules and treat their workers fairly, but get undercut and pushed out of business by companies who cheat, break the law to exploit their workers, and get away with it.

The U.S Dept. of Labor estimated that workers overall in California lose a total of \$22.5 million to \$28.7 million each week due to minimum wage violations alone – just one of the many types of wage theft.

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- 1) Protects collective bargaining for janitors and security officers, so that workers do not face losing union protections that they fought for every time a contract is re bid;
- 2) Ensures that construction workers on City contracts are protected by covering the types of wage theft claims that are common in construction, specifically Civil Wage and Penalty Assessments (CWPAs) and Bureau of Field Enforcement (BOFE) citations;
- 3) Bars bidders from getting City contracts if they have been found by the State to have committed wage theft two or more times in the past five years, so that companies who have adopted a pattern and practice of wage theft are not getting City support to continue it; and
- 4) Directs staff to finally develop the Responsible Construction Ordinance to protect construction workers on private projects, which has been stalled since February 2020.

An inclusive recovery must address the huge and growing issue of wage theft in our city. I urge you to show leadership towards a San Jose that supports and empowers our most vulnerable workers.

Maria Marroquin




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FW: Public comment for City Council April 11, item 3.3: Wage Theft Prevention Policy

City Clerk <city.clerk@sanjoseca.gov>

Mon 4/10/2023 7:44 AM

To: Agendadesk <Agendadesk@sanjoseca.gov>

 1 attachments (441 KB)

Wage Theft Policy letter 7 April 2023.pdf;

From: Louise Auerhahn [REDACTED]

Sent: Friday, April 07, 2023 6:28 PM

To: District1 <district1@sanjoseca.gov>; Jimenez, Sergio <sergio.jimenez@sanjoseca.gov>; Torres, Omar <Omar.Torres@sanjoseca.gov>; Cohen, David <David.Cohen@sanjoseca.gov>; District5 <District5@sanjoseca.gov>; District 6 <district6@sanjoseca.gov>; District7 <District7@sanjoseca.gov>; District8 <district8@sanjoseca.gov>; Foley, Pam <Pam.Foley@sanjoseca.gov>; District 10 <District10@sanjoseca.gov>; The Office of Mayor Matt Mahan <mayor@sanjoseca.gov>

Cc: City Clerk <city.clerk@sanjoseca.gov>

Subject: Public comment for City Council April 11, item 3.3: Wage Theft Prevention Policy

[External Email]

Dear Mayor and City Councilmembers,

Attached please see a joint letter from the South Bay Labor Council, the Santa Clara Building Trades Council, the Santa Clara County Wage Theft Coalition, and Working Partnerships USA regarding the proposed revisions to the Wage Theft Prevention Policy. Thank you for the opportunity to provide comment on this matter.

Sincerely,

Louise Auerhahn

Director of Economic & Workforce Policy

[REDACTED]

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April 7, 2023

Honorable Mayor and City Council
City of San José
200 E. Santa Clara Street
San Jose, CA 95113

RE: April 11, 2023 City Council, item 3.3 – Wage Theft Prevention Policy Revision

Dear Mayor Mahan, Vice Mayor Kamei, and Councilmembers Jimenez, Torres, Cohen, Ortiz, Davis, Doan, Candelas, Foley, and Batra:

Whether you're a janitor, a construction worker, a childcare provider or any other profession, all working people deserve a fair day's pay for a fair day's work, and a workplace free of fear and intimidation. Yet working people in our city and state face an ongoing epidemic of wage theft, with our vulnerable Latino, Black, API and immigrant communities suffering the largest impacts from this crime. **For these reasons, we write in strong support of the wage theft prevention memo submitted by Vice Mayor Kamei and Councilmembers Candelas and Cohen, and urge its swift passage by the City Council.**

Over 6 years ago, on May 24, 2016, the San Jose City Council voted unanimously to enact a Wage Theft Policy. The original policy requires that bidders disclose wage theft judgments, and mandates disqualification if the potential contractor has been found by a court or final administrative action of an investigatory government agency to have violated wage and hour laws on more than one occasion or has one unpaid wage judgment in the past five years prior to the date of submission of the bid. We are grateful to the City Council for enacting this policy.

At the time of adoption, Administration requested that the Wage Theft policy exclude all public works projects. In the past six years, it has become clear that this omission is untenable. The construction sector has one of the highest rates of wage theft, with grave impacts on workers' livelihoods and on their families and communities. A Stanford study found 4,180 San Jose construction workers have been victims of wage theft, robbed of over \$12 million dollars - and that includes only documented cases resulting in final federal administrative decisions or state judgements.

The current staff proposal recommends rescinding that exclusion and covering public Works under the revised Wage Theft Policy. We thank the Administration and the Office of Equality Assurance for their work on this issue.



However, in order to effectively add Public Works projects to the policy, it is critical that the policy explicitly address not only judgments, but also final administrative decisions such as Civil Wage and Penalty Assessments (CWPAs) and Bureau of Field Enforcement (BOFE) citations, which are important ways in which the State pursues wage theft claims against construction contractors.¹ **Because CWPAs and BOFE citations are not technically considered “judgments”, we ask that they explicitly be included in the Wage Theft Policy** to avoid differing interpretations in the future that might end up making the revised policy ineffective in protecting construction workers.

A strong San José Wage Theft Prevention Policy is necessary to empower workers to collect the wage they are owed. When a worker files a wage theft claim with the State, the worker and employer go through a process to determine if wages were in fact stolen. Yet even when workers speak up and go through the whole intimidating process to report wage theft, file a claim, get a hearing, and get a ruling in their favor – finding their employer committed wage theft, and ordering them to pay – most workers who win their cases still don’t get paid. An estimated 83% of workers who win a favorable wage theft judgment from the State Division of Labor Standards Enforcement never get a penny.

San Jose’s Wage Theft policy can help break this logjam. By requiring bidders to pay any unpaid final wage theft judgments or administrative decisions before they are allowed to contract with the City, it gives low-wage workers a new tool to collect what they are owed.

Further, by **barring companies which have committed wage theft two or more times in the last five years**, the recommendation in the Councilmembers’ memo disincentivizes companies from adopting a pattern and practice of wage theft as part of their business model. While it is plausible that a responsible employer may encounter a misunderstanding of their responsibilities as an employer, and receive a final judgement, two or more such judgements is indicative of willful ignorance or habitual wage theft.

We further call on the City Council to protect Collective Bargaining rights for workers on janitorial and security contracts, so that workers need not fear having their hard-won union protections taken away from them when a contract is re-bid. As you are aware, this exact situation arose a few months ago during the re-bidding of the City’s security contract, where workers who had just recently organized for and won a collective bargaining agreement faced losing it due to a contracting change. We thank the City Council for helping to resolve that issue; the language proposed in the Councilmembers’

¹ CWPAs are the only way that the wage theft claims are pursued by the Labor Commission on Public Works projects. BOFE citations are issued for violations involving multiple workers.



memo will help ensure such a situation does not happen again. We also emphasize that a Collective Bargaining Agreement must be legitimately negotiated and agreed to by both the workers and the employer; a document unilaterally created or imposed by the employer is not an equivalent to workers exercising their collective voice to speak for themselves.

Finally, we ask the City to fulfill its long-delayed promise to enact a Responsible Construction Ordinance, following the lead of Mountain View and Sunnyvale, to extend critical wage theft protections to all construction workers.

Sincerely,

Jean Cohen
South Bay AFL-CIO Labor Council

David Bini
Santa Clara & San Benito Building & Construction Trades Council

Maria Noel Fernandez
Working Partnerships USA

Ruth Silver Taube
Santa Clara County Wage Theft Coalition

Support the CM Kamei, Candelas, and Cohen memo

Rebekah Jensen <[REDACTED]>

Mon 4/10/2023 7:51 PM

To: City Clerk <city.clerk@sanjoseca.gov>

[External Email]

San Jose City Clerk Toni Taber,

I am writing as a long-time resident of San José to urge you to protect and empower workers on City contracts by supporting the memo by Vice Mayor Kamei and Councilmembers Candelas and Cohen to strengthen the proposed revision to the Wage Theft Prevention Policy.

Silicon Valley has a history of empowering high-paying tech workers and leaving behind those that are required - essential - to make our area run. You think we'd learned during the height of the Covid pandemic that we cannot function without our restaurant workers, grocery store workers, janitors, etc. Wage theft is a huge problem for this class of workers, making their meager wages even more meager, and pushing them out of the valley. It adds to the problems caused by the incredibly high cost of living locally, such as higher traffic and lower school enrollment.

San Jose must have an inclusive recovery, which supports and empowers our most vulnerable workers.

Rebekah Jensen
[REDACTED]

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Support CM Kamei, Candelas, and Cohen memo

James Marshall <[REDACTED]>

Mon 4/10/2023 8:15 PM

To: City Clerk <city.clerk@sanjoseca.gov>

[External Email]

San Jose City Clerk Toni Taber,

I am writing as a resident of San José to urge you to protect and empower workers on City contracts by supporting the memo by Vice Mayor Kamei and Councilmembers Candelas and Cohen to strengthen the proposed revision to the Wage Theft Prevention Policy.

Wage theft is a widespread and heinous crime. Millions of dollars are being stolen each year from our San Jose families - with the hardest impacts falling on workers of color, immigrants and working women. When unscrupulous corporations steal from their workers, it affects not just the worker themselves, but their family and their entire community. Letting bad actors get away with wage theft also harms our many small businesses and immigrant entrepreneurs who are trying to play by the rules and treat their workers fairly, but get undercut and pushed out of business by companies who cheat, break the law to exploit their workers, and get away with it.

The U.S Dept. of Labor estimated that workers overall in California lose a total of \$22.5 million to \$28.7 million each week due to minimum wage violations alone – just one of the many types of wage theft.

Over 6 years ago, the San Jose City Council voted unanimously to enact a Wage Theft Policy, but the policy excluded all public works projects. Since then, it has become clear that this omission excludes thousands of working people, including many in the construction sector which has one of the highest rates of wage theft. Even today, workers who try to speak out continue to face retaliation from their boss – people have been fired or even deported for standing up for their rights and the needs of their families.

We need to do much more in our city to protect and empower working people, to uplift responsible businesses who pay their workers fairly, and to prevent and prosecute wage theft.

That's why today I am asking you to strengthen our existing wage theft prevention policy by supporting the memo from Kamei, Candelas and Cohen, which does the following:

- 1) Protects collective bargaining for janitors and security officers, so that workers do not face losing union protections that they fought for every time a contract is re-bid;
- 2) Ensures that construction workers on City contracts are protected by covering the types of

wage theft claims that are common in construction, specifically Civil Wage and Penalty Assessments (CWPAs) and Bureau of Field Enforcement (BOFE) citations;

- 3) Bars bidders from getting City contracts if they have been found by the State to have committed wage theft two or more times in the past five years, so that companies who have adopted a pattern and practice of wage theft are not getting City support to continue it; and
- 4) Directs staff to finally develop the Responsible Construction Ordinance to protect construction workers on private projects, which has been stalled since February 2020.

An inclusive recovery must address the huge and growing issue of wage theft in our city. I urge you to show leadership towards a San Jose that supports and empowers our most vulnerable workers.

James Marshall



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Wage theft policy revision Collective bargaining Supporting document

Araceli Rueda <[REDACTED]>

Tue 4/11/2023 2:23 PM

To: Agendadesk <Agendadesk@sanjoseca.gov>

 1 attachments (255 KB)

Attorneys letter.pdf;

You don't often get email from [REDACTED] [Learn why this is important](#)

[External Email]

Supporting letter on wage theft policy and collective bargaining from SEIU-USWW attorney Weinberg, Rosen & Rosenfeld. --

In Solidarity,

Araceli Rueda
Political Organizer
SEIU-USWW
[REDACTED]

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STEWART WEINBERG
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ALEXANDER S. NAZAROV
SEAN W. McDONALD

April 4, 2023

Hon. Mayor Matt Mahan
Members of the City Council
200 East Santa Clara St.
San José, CA 95113

Re: SEIU-USWW's Proposed Revision to the Wage Theft Prevention Policy

Dear Mayor Mahan and Members of the City Council:

This letter is being submitted on behalf of Service Employees International Union – United Service Workers West (“SEIU-USWW”), which represents over 45,000 janitors, security officers, and other property service workers across California.

On March 6, 2023, City staff recognized that workers in the janitorial and security guard services industry experience a pattern of wage theft and that the low-wage nature of these jobs mean that these workers are less likely to pursue remedies when underpayments occur. Staff recommended, however, that “proposed contractors bidding on janitorial services and security guard services who have a history of wage theft will not be automatically disqualified from procurement when they can demonstrate how they will comply with labor requirements including wages, hours, and working conditions and provide employees with a wage theft grievance process. Proposed contractors may rely on provisions in a collective bargaining agreement or other documentation.” March 6 Recommendation at 4.

SEIU-USWW requests that the above cited language regarding janitorial and security guard service contractors be replaced with “Proposers are required to be covered by a collective bargaining agreement prior to the date of commencement of the contract. Such collective bargaining agreement must expressly provide for wages, hours of work, working conditions, and a mechanism for workers to file wage complaints and resolve wage issues through a grievance procedure.”

The Proposal to Require Security and Janitorial Contractors be Covered by a Collective Bargaining Agreement Would More Effectively Address the City's Wage and Hour Concerns

Staff accurately noted “shortcomings in the State’s Wage Theft enforcement capacity” in the “dearth of supportive resources[, which] leaves workers largely on their own to collect those wages after a judgment has been issued.” March 6 Recommendation at 2. This problem would be significantly eliminated by requiring contractors be covered by a collective bargaining agreement. If a contractor failed to comply with an arbitration award ordering the payment of back wages or penalties, a union would be able to petition a court for an order confirming the award. Instead of workers being left to fend for themselves, they would have resources for

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LABOR EDUCATOR

NINA FENDEL (Retired Attorney)

Admitted in California, unless
otherwise noted
Admitted in Hawaii
Also admitted in Nevada
Also admitted in Illinois
Also admitted in New York and
Alaska
Also admitted in Minnesota
Admitted in Nevada and
Washington
Also admitted in Idaho

enforcement.

The City Charter Does not Limit the City's Power to Impose Contracting Requirements for Janitorial or Security Services and the Proposal is Consistent with Competitive Bidding Laws

The City, as a charter city, “enjoys autonomous rule over municipal affairs pursuant to article XI, section 5 of the California Constitution, ‘subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law.’” *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.*, 21 Cal.4th 352, 363 (1999) (“ABC”). “[T]he charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation.” *Domar Elec., Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 170, 885 P.2d 934, 938 (1994). Charter cities have “broad discretion to make public expenditures, subject to the limitations that the expenditure be for a public purpose and not expressly forbidden by law. *Schroeder v. Irvine City Council*, 97 Cal. App. 4th 174, 184–85 (2002). “[T]he mode in which a city chooses to contract is a municipal affair.” *See ABC*, 21 Cal.4th at 364.

The absence of an express grant of power to impose specified contracting requirements does not render contracting requirements invalid. *See Domar*, 9 Cal.4th at 171. Here, the City’s Charter, while limiting bidding requirements on public works contracts, as defined, does not place limitations on bidding requirements for contracts for services. Since the making of public expenditures and the mode in which a city chooses to contract is a municipal affair, the City has the power to lawfully adopt SEIU-USWW’s recommendation regarding contractors being covered by a collective bargaining agreement, as long as the proposal isn’t otherwise unlawful. As will be discussed, the proposal is lawful.

Since the Charter does not expressly authorize or forbid the City to adopt the requirement advocated by SEIU-USWW, “the validity of such a requirement must be ascertained with reference to the purposes of competitive bidding, which are “to guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; and to obtain the best economic result for the public” *Domar*, 9 Cal.4th 161, 173 (1994). Laws “requiring competitive bidding in the letting of municipal contracts are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable, and they are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest.” *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.*, 21 Cal. 4th 352, 365 (1999) (“ABC”).

ABC involved a project stabilization agreement between the San Francisco Airports Commission and San Mateo County Building and Construction Trades Council, AFL-CIO in which contractors were required to accept the terms of the agreement, abide by each craft’s labor management grievance procedure in cases of discipline or discharge, to use the union hiring hall for any new hires needed beyond the employer’s own core workforce, and to pay union wages and benefits. *Id.* at 358. There, the plaintiff association of contractors argued that the agreement was akin to an unlawful specification restricting bids for printing jobs to union contractors. *Id.* at 367 (citing *Neal Publishing Co. v. Rolph*, 169 Cal. 190, 196–198 (1915)). *ABC* distinguished its case from *Neal* because “here, nonunion contractors are in no way excluded from bidding on the airport project.” *Id.* Similarly, SEIU-USWW’s proposal does not exclude nonunion contractors from bidding. It does not require that bidders be covered by a collective bargaining agreement at the time of bidding—just that they must be covered by a collective bargaining agreement “prior to date of contract . . .

.” This would allow a contractor to take the steps necessary to recognize a union as the representative of its employees at some point after award, but prior to commencing the contract.

This requirement also would not preclude a contractor’s employees from taking steps to decertify a union under section 9(c) of the National Labor Relations Act, nor would the decertification of a union result in a contractor being disqualified, as they must be covered by a collective bargaining agreement “prior to date of contract”—not necessarily throughout the entirety of the contract.

For these reasons, nonunion contractors would not be excluded from bidding on contracts. Such contractors would be able to compete in the bidding process, so long as they later recognized a labor organization and were covered by a collective bargaining agreement, but before the commencement of the contract. This proposal, if adopted, would be consistent with competitive bidding laws.

The Proposal to Require Security and Janitorial Contractors be Covered by a Collective Bargaining Agreement is not an Unlawful Prehire Agreement

The City may have concerns that SEIU-USWW’s proposed change requiring contractors to be covered by a collective bargaining agreement is an unlawful pre-hire agreement. “Prehire agreements are collective-bargaining agreements providing for union recognition, compulsory union dues or equivalents, and mandatory use of union hiring halls, prior to the hiring of any employees.” *Bldg. & Const. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 230 (1993). However, nothing in SEIU-USWW’s proposal requires union recognition, compulsory union dues or equivalents, or the use of hiring halls *prior* to the hiring of any employees. *Vario v. Petrolic Const. Co.*, No. 87 CV 1593, 1988 WL 36921, at *1 (E.D.N.Y. Apr. 14, 1988) (“This is not a pre-hire agreement as the plaintiff contends. Petrolic’s employees were hired long before the agreement went into effect.”). Under SEIU-USWW’s proposal, contractors may freely hire employees prior to voluntarily recognizing a labor organization as the representative of its employees. *See Mo-Kan Teamsters Pension Fund v. Creason*, 716 F.2d 772, 775 (10th Cir. 1983) (affirming the district court’s finding that a particular contract stipulation was not a prehire agreement, but “a contract in which defendant voluntarily recognized the desire of a majority of his current employees to be represented by Teamsters Local No. 541”). Since SEIU-USWW’s proposal is not a pre-hire agreement, it would not be prohibited by the National Labor Relations Act (“NLRA”).

The Proposal to Require Security and Janitorial Contractors be Covered by a Collective Bargaining Agreement Would Not be Preempted Because the City Would be Acting as a Market Participant

The proposal would also not be preempted by the NLRA because the City would be acting as a market participant. NLRA preemption prevents a state or local government from regulating within a zone protected by market freedom (*Machinists Preemption*, *Machinists v. Wisconsin Employment Relations Comm’n*, 427 U.S. 132 (1976)) or NLRB jurisdiction (*Garmon Preemption*, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)). A municipality “does not regulate, however, simply by acting within one of these protected areas. When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state *regulation*.” *Bldg. & Const. Trades Council of Metro Dist.*, 507 U.S. at 226-27. Whereas some cases find preemption when an agency tries to compel compliance with the National Labor Relations Act, *see e.g. Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 614 (1986) and *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 286 (1986), SEIU-

USWW's proposal does not such thing. Under this proposal, the City would be acting as a market participant—such action would not be preempted by the NLRA.

Conclusion

Please feel free to have your counsel contact me with any questions. And of course, please feel free to contact SEIU-USWW regarding this matter.

Sincerely,

/s/ David W. M. Fujimoto

David W. M. Fujimoto