



Legislation Text

File #: 2019-0016, **Version:** 1

DATE: January 16, 2019

SUBJECT:

RESOLUTION AMENDING BOARD OF PORT COMMISSIONERS POLICY NO. 356 - LESSEES' WAGE RATES - TO COMFORM WITH EXISTING STATE LAW AND RENAME THE POLICY - PAYMENT OF PREVAILING WAGES

EXECUTIVE SUMMARY:

California State law requires the payment of Prevailing Wages for Public Works projects. Prevailing Wages are the general prevailing rate for per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft classification or type of worker.¹ Prevailing wages are established by the State Department of Industrial Relations (DIR) for each trade and occupation employed in the performance of Public Works and other areas of employment as determined by the DIR. The Prevailing Wage rates are usually based on rates specified in collective bargaining agreements.² Public Works is construction, design or repair work done under contract and paid for in whole or in part by public funds.³

Public agency construction projects including those performed by the District and other public agencies are considered Public Works projects, as they are paid for in whole or in part by public funds, and therefore require the payment of Prevailing Wages, pursuant to the California Labor Code (Prevailing Wage Law).

The San Diego Unified Port District's (District) Board of Port Commissioners (BPC) Policy No. 356 - Lessees' Wage Rates for Tenants, which was adopted in 1972 is presently not in conformance with the Prevailing Wage Law. On one hand, the current Policy does not conform with the Prevailing Wage Law, as it limits the payment of Prevailing Wages to persons who are "employed by lessee on the tidelands" which fails to account for independent contractors and other laborers who perform Public Works on tideland leaseholds but are not employed by District tenants. Prevailing Wages must be paid for Public Works on tenant leaseholds, if construction is required under a lease or contract and the project includes a contribution of money by the District, credits, reduced rent, waived obligations, or any other form of assistance as defined by the Prevailing Wage Law.

On the other hand, the current Policy is also overbroad as it could be read to require the payment of Prevailing Wages to District tenant employees involved in "service industry" jobs such as servers or waiters for hotels, restaurants and marinas, as well as potentially many other tenant employees. These work classifications and areas of employment are not work constituting Public Works as defined by the Prevailing Wage Law. The Prevailing Wage Law does not require payment of Prevailing Wages to workers performing services.

The Office of the General Counsel (OGC) recommends that BPC Policy No. 356 be amended to require payment of Prevailing Wages on tidelands Public Works projects, and conform to all requirements of State law, not require the payment of Prevailing Wages for service jobs. The OGC also recommends renaming the policy to “Payment of Prevailing Wages” to accurately describe the subject and purpose of the Policy.

The proposed changes to BPC Policy No. 356 address the issues presented and conform with existing State law. These proposed changes BPC Policy No. 356 are also consistent with the District’s present contract language for District projects and present lease language for tenant development projects.

RECOMMENDATION:

Adopt a Resolution Amending Board of Port Commissioners Policy No. 356 - Lessees’ Wage Rates - to Conform with Existing State Law and rename the Policy - Payment of Prevailing Wages.

FISCAL IMPACT:

This agenda item has no fiscal impact.

Compass Strategic Goals:

This agenda item is part of the reporting system to promote communications with the community and supports the following Strategic Goal(s).

- A Port that the public understands and trusts.

DISCUSSION:

Prevailing Wage Requirements

California State law requires the payment of Prevailing Wages for Public Works projects. Prevailing Wages are the general prevailing rate for per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft classification or type of worker.⁴ Prevailing wages are established by the State Department of Industrial Relations (DIR) for each trade and occupation employed in the performance of Public Works and other areas of employment as determined by the DIR. The Prevailing Wage rates are usually based on rates specified in collective bargaining agreements.⁵ Public Works is construction, design or repair work done under contract and paid for in whole or in part by public funds.⁶

1. Public Agencies

Public agency construction projects including those performed by the District and other public agencies require the payment of Prevailing Wages, as they are Public Works projects paid for by public funds, pursuant to California Labor Code §§ 1720 through 1815, *et seq.* (Prevailing Wage

Law). The District's construction contracts require that all work performed pursuant to District construction contracts comply with the Prevailing Wage Law.

2. Tenant Projects

Projects performed by District tenants or private contracts are not typically considered Public Works projects. Private contracts do not require the payment of Prevailing Wages. However, tenant projects may be considered Public Works and require the payment of Prevailing Wages if the project includes certain conditions. These conditions include a requirement to perform construction under a contract or a lease and a contribution of money by a public agency such as the District. Contributions of money include but are not limited to: cash contributions; credits; reduced rent; waived obligations; or any other form of assistance, by the public agency, as defined by the Prevailing Wage Law.

Present BPC Policy No. 356 Language

Board of Port Commissioners (BPC) Policy No. 356 (Policy) states:

SUBJECT: LESSEES' WAGE RATES

PURPOSE: To Establish Prevailing Wage Rates for Tenants

POLICY STATEMENT:

"It is the policy of the District that prevailing wage rates shall be paid all persons who are employed by lessee on the tidelands of the District."

(BPC Policy No. 356 was adopted by resolution of the District Board on January 11, 1972.) (see Attachment A, BPC Policy No. 356)

Inconsistency with State Law

The historical or 1972 agenda sheet and resolution that established BPC Policy No. 356 does not provide any clarification of the intended purpose or scope of the Policy. The Policy as written does not apply to all types of work which require the payment of Prevailing Wages pursuant to State law. The Policy limits the payment of Prevailing Wages to persons who are "employed by lessee on the tidelands." This fails to account for independent contractors and other laborers who perform Public Works on tideland leaseholds for District tenants which require the payment of Prevailing Wages, due to construction requirements under a lease or contract and contributions of money by public agencies. Therefore, the present wording of BPC Policy No. 356 does not conform to the full scope work covered by the Prevailing Wage Law.

BPC Policy No. 356 is also overbroad as it requires the payment of Prevailing Wages to District tenant employees involved in "service industry" jobs for hotels, restaurants and marinas, as well as potentially many other tenant employees. These areas of employment are not designated fields which are defined as jobs engaging in Public Works or jobs that require the payment of Prevailing Wages. The Prevailing Wage Law only requires Prevailing Wages be paid to workers doing Public Works projects or other specific categories set out by the DIR. The DIR has not designated "service

industry” jobs or other non-Public Works jobs as those requiring the payment of Prevailing Wages. The present BPC Policy No. 356 is too broad as it does not limit the payment of prevailing wages to Public Works projects or those specifically designated by the DIR but includes all tenant employees regardless of the field in which they are employed.

Clarifying Policy Language

The present language in BPC Policy No. 356 is unclear as to the parties the Policy applies to and is unclear as to the type of work covered by the Policy. The application of the Policy is also inconsistent with the requirements of State law. Due to these inconsistencies BPC Policy No. 356 should be amended to conform to State law. The OGC proposes to amend BPC Policy No. 356 to the following:

SUBJECT: PAYMENT OF PREVAILING WAGES

PURPOSE: To Establish a Policy for the Payment of Prevailing Wages

POLICY STATEMENT:

“It is the policy of the San Diego Unified Port District that applicable prevailing wage rates shall be paid for “public works” within the District, if required under the applicable provisions of California Prevailing Wage Law.” (Labor Code § 1720, et seq.)

(see Attachments B and C, BPC Policy No. 356 Redline and clean version)

This proposed amendment to BPC Policy No. 356 clarifies that Prevailing Wages shall only be paid for work on Public Works projects and job categories specifically set out the DIR and not “service industry” or other non-covered work. The proposed amended Policy language also applies to work performed by independent contractors engaged or working on qualifying Public Works projects for District tenants on tidelands.

The wording of the proposed amended Policy is derived from present State law and provides guidance to all contractors, tenants, independent contractors and other entities doing work on tidelands as to the proper applicability of Prevailing Wages. The proposed Policy amendments and name change will assist the proper application of the Prevailing Wage Law on District tidelands.

Conclusion

The OGC recommends that BPC Policy No. 356 be amended to require payment of Prevailing Wages on tidelands Public Works projects, not require the payment of Prevailing Wages for non-Public Works jobs and conform with all requirements of State law. It is also requested to change the name of the policy to “Payment of Prevailing Wages” to accurately describe the subject and purpose of the Policy.

The proposed changes to BPC Policy No. 356 address the issues presented and conform with existing State law. These proposed changes BPC Policy No. 356 are also consistent with the District’s present contract language for District projects and present lease language for tenant

development projects.

General Counsel's Comments:

The OGC has reviewed the issues presented in the amendment to and renaming of BPC Policy No. 356 and approves as to form and legality.

Environmental Review:

The proposed Board direction or action, including without limitation, a resolution amending BPC Policy No. 356, does not constitute a "project" under the definition set forth in California Environmental Quality Act (CEQA) Guidelines Section 15378 because it will not have a potential to result in a direct or indirect physical change in the environment and is, therefore, not subject to CEQA. No further action under CEQA is required.

In addition, the proposed Board action complies with Sections 21 and 35 of the Port Act, which allow for the Board to pass resolutions and to do all acts necessary and convenient for the exercise of its powers. The Port Act was enacted by the California Legislature and is consistent with the Public Trust Doctrine. Consequently, the proposed Board action is consistent with the Public Trust Doctrine.

The proposed Board direction or action does not allow for "development," as defined in Section 30106 of the California Coastal Act, or "new development," pursuant to Section 1.a. of the District's Coastal Development Permit Regulations. Therefore, issuance of a Coastal Development Permit or exclusion is not required.

Equal Opportunity Program:

Not applicable.

PREPARED BY:

David Catalino
Deputy General Counsel

Attachments:

Attachment A: Existing BPC Policy No. 356
Attachment B: BPC Policy No. 356 Proposed Redline
Attachment C: Amended BPC Policy No. 356

¹ California Labor Code § 1773

² Department of Industrial Relations website (www.dir.ca.gov/Public-Works/Prevailing-Wage.html)

³ California Labor Code § 1720

⁴ California Labor Code § 1773

⁵ Department of Industrial Relations website (www.dir.ca.gov/Public-Works/Prevailing-Wage.html)

⁶ California Labor Code § 1720

