

FORT ORD REUSE AUTHORITY BOARD REPORT

BUSINESS ITEMS

Subject:	Consider Fort Ord Reuse Authority ("FORA") Prevailing Wage Program	
Meeting Date:	November 13, 2015	INFORMATION/ACTION
Agenda Number:	8c	

RECOMMENDATION:

- i. Provide direction regarding FORA's prevailing wage compliance role.
- ii. Approve a FORA's Master Resolution Amendment (**Attachment C**) requiring contractors to register with California Department of Industrial Relations ("DIR") and returning responsibility for monitoring and enforcement of the former Fort Ord prevailing wage requirements from jurisdictions to FORA.
- iii. Approve Staff's recommendation to implement **Option A (Attachment B)** by issuing a Request for Proposal to obtain Labor Compliance Monitoring Services for one year in an amount not to exceed \$250,000.

BACKGROUND:

Adopting a prevailing wage requirement (as a base-wide policy) surfaced in legislative debates during FORA's creation. While the FORA enabling legislation did not include prevailing wage provisions, the initial FORA Board meeting explored the policy questions in the adoption of a procurement code. In fact, the FORA Board's first action in setting prevailing wage policy occurred on July 14, 1995, with the adoption of Ordinance No. 95-01, establishing FORA's Procurement Code and requiring prevailing wages to be paid to all workers employed on FORA's construction contracts. The FORA Master Resolution was adopted on March 14, 1997. Article 3.03.090 of the Master Resolution required/confirmed that prevailing wages be paid for all first generation projects occurring on parcels subject to the Base Reuse Plan (BRP).

Discussion regarding prevailing wage requirements continued and included in BRP compliance actions through 2006, when the Board engaged in further policy clarification actions. In August 2006, the Board received a status report on jurisdiction efforts to adopt and implement prevailing wage policies consistent with Chapter 3 of the Master Resolution. That report was the result of FORA Executive Committee and Authority Counsel's examination of FORA's role in implementing prevailing wage policies on the former Fort Ord. Since 2006, the FORA Board has heard compliance concerns expressed by the Labor Council, received several additional reports, slightly modified a section of Chapter 3 of the Master Resolution, and directed staff to provide information to the jurisdictions about compliance.

Prevailing Wage New Legislation

In June 2014, the California legislature adopted registration requirements for contractors and subcontractors involved in public works projects or other projects as may be determined by the Labor Commissioner. SB 854 was passed to fund the California DIR monitoring and enforcement of prevailing wage laws, and requires 1) online registration, 2) payment of a \$300 fee, 3) filing by agencies of notices of their public works projects with DIR, and 4) submittal of certified payroll records to DIR. Contractors/Subcontractors must be clear of any record of delinquent unpaid wages or penalty assessments.

DISCUSSION:

At its March 13, 2015 meeting, the FORA Board authorized the Executive Officer to request a formal DIR determination on FORA projects. However, several Board members requested that staff not wait for DIR's determination and return with a plan for a FORA prevailing wage compliance program. Other Board members expressed concern that FORA would set up a prevailing wage compliance program when individual jurisdictions are responsible for compliance.

On November 5, 2015, FORA's Executive Officer received DIR's response (relayed from Senator Bill Monning's Office after personal contact from the Senator) which is attached as **Attachment A**. DIR's response cited the following:

...For the project to be defined as a public work there must be construction, alteration, demolition or repair work, and the project must contain public funds. Labor Code section 1720(b) further defines public funds to include:

(a) For purposes of this section, "**paid for in whole or in part out of public funds**" means all of the following:

- (1) The payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer.
- (2) Performance of construction work by the state or political subdivision in execution of the project.
- (3) Transfer by the state or political subdivision of an asset of value for less than fair market price.
- (4) Fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision.
- (5) Money loaned by the state or political subdivision that is to be repaid on a contingent basis.
- (6) Credits that are applied by the state or political subdivision against repayment obligations to the state or political subdivision.

In our previous telephonic discussions, you have confirmed that First Generation Projects have public funds and are construction projects over \$1,000. As such, there would be a statutory obligation to treat these projects as a public works and ensure all contractors performing this work were subject to the public works statutes (Labor Code sections 1720-1861), which would include contractor registration.

FORA staff has researched options for a FORA prevailing wage compliance program. **Attachment B** contrasts three (3) options for a FORA prevailing wage compliance program.

FORA staff's assumption of two full-time staff positions or equivalent consultant hours to monitor, respond to inquiries, and prepare reports is based on FORA Capital Improvement Program development forecasts. A redacted master services agreement is included under **Attachment C** to provide an example of a consultant contract for prevailing wage services to a public agency. FORA staff recommends pursuing **Option A**. The FORA Board may want to consider appropriate funding sources for this compliance work at the mid-year budget. The cost for FORA to take on this work could range from \$120,000 to \$350,000/year.

Master Resolution Amendment

The FORA Master Resolution (“MR”) was adopted originally by Ordinance # 97-01 to establish the “governing code” by which FORA’s operation of its powers and authority would be deployed in the Monterey Bay Region’s recovery from Fort Ord closure. The MR formally adopted definitive direction and operational authority for the business of FORA consistent with California Law under the Authority Act. When the MR was adopted, the FORA Board anticipated that the MR would ultimately be amended to account for changes in California law, alterations to operational provisions, and to maintain consistency between Board decisions and the Authority Act.

The Board is requested to approve a FORA Master Resolution Amendment (**Attachment C**) to require contractors to register with DIR and authorize FORA to take, monitor and enforce the prevailing wage policy.

FISCAL IMPACT:

Reviewed by FORA Controller 

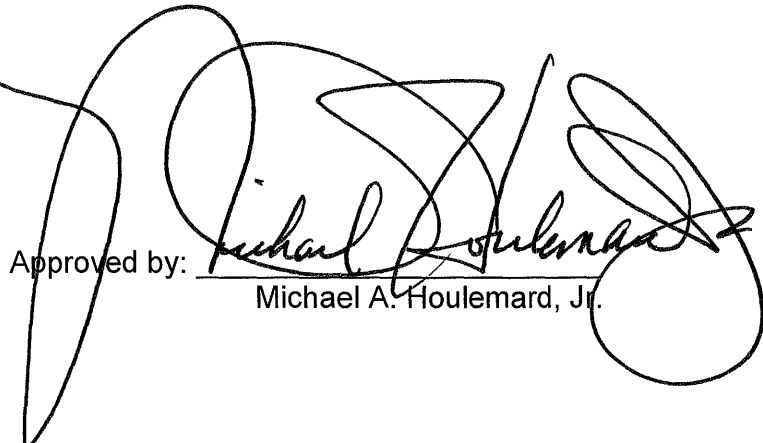
Staff time for this item is included in the approved FORA budget. Should the FORA Board direct staff to proceed with any of the three options for implementing a FORA prevailing wage compliance program, an additional FORA budget will be needed. The Board may want to consider funding options to pay for these costs which were previously jurisdictional obligations.

COORDINATION:

FORA Board, City of Marina, Authority Counsel, Department of Industrial Relations.

AMENDED

Prepared by: D. Steven Endsley for
Robert J. Norris, Jr.

Approved by: 
Michael A. Houlemard, Jr.

Questions to and answers received from Eric Rood, Assistant Labor Commissioner, CA Department of Industrial Relations

November 5, 2015

1. In review of the recently enacted SB 854, Fort Ord Reuse Authority (FORA) staff noted that SB 854 encompasses public works projects, as specified, to be paid the general prevailing wage as determined by the Director of the Department of Industrial Relations (DIR). In reviewing the FORA Master Resolution prevailing wage provisions, First Generation Construction on the former Fort Ord is required, by FORA covenant, to pay not less than general prevailing rate of wages as determined by the Director of DIR. FORA's prevailing wage provisions define First Generation Construction projects as public works projects subject to SB 845. Does DIR agree with this determination?

Answer: SB 854 did not expand the definition of public works. It does require all contractors has defined in Labor Code section 1722.1, to register, pay a \$300 fiscal annual fee and be of good legal standing in order to perform public works.

Labor Code section 1722.1 defines a contractor as:

For the purposes of this chapter, "contractor" and "subcontractor" include a contractor, subcontractor, licensee, officer, agent, or representative thereof, acting in that capacity, when working on public works pursuant to this article and Article 2 (commencing with Section 1770).

In short, a contractor/vendor who is subject to public works laws as defined in Labor Code sections 1720 through 1861, would be required to register.

Labor Code section 1720(a)(1) defines what comprises a public works. It states:

(a) As used in this chapter, "public works" means:

(1) Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority. For purposes of this paragraph, "construction" includes work performed during the design and preconstruction phases of construction, including, but not limited to, inspection and land surveying work, and work performed during the post construction phases of construction, including, but not limited to, all cleanup work at the jobsite. For purposes of this paragraph, "installation" includes, but is not limited to, the assembly and disassembly of freestanding and affixed modular office systems. [emphasis added]

In addition, for the project to be defined as a public work there must be construction, alteration, demolition or repair work, and the project must contain public funds. Labor Code section 1720(b) further defines public funds to include:

(b) For purposes of this section, “paid for in whole or in part out of public funds” means all of the following:

- (1) The payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer.*
- (2) Performance of construction work by the state or political subdivision in execution of the project.*
- (3) Transfer by the state or political subdivision of an asset of value for less than fair market price.*
- (4) Fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision.*
- (5) Money loaned by the state or political subdivision that is to be repaid on a contingent basis.*
- (6) Credits that are applied by the state or political subdivision against repayment obligations to the state or political subdivision.*

Labor Code section 1771 brings in the term maintenance to be included in a public work and sets a minimum dollar threshold for projects over \$1,000. Section 1771 states:

*Except for **public works projects of one thousand dollars (\$1,000) or less**, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.*

*This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to **contracts let for maintenance work**.*

The general rule to determine if a project is subject to public works is:

- Is the project construction, alteration, demolition, installation, repair or maintenance work;
- Is the project paid out by public funds;
- Is the project over \$1,000

*In our previous telephonic discussions, you have confirmed that First Generation Projects have public funds and are construction projects over \$1,000. As such, there would be a statutory obligation to treat these projects as a public works and ensure all contractors performing this work were subject to the public works statutes (Labor Code sections 1720-1861), which would include contractor registration.*¹

¹ Please note that in *Monterey/Santa Cruz County Bldg. and Const. Trades Council v. Cypress Marina Heights LP* (2011) 191 Cal.App.4th 1500. In that case, the developer bought the land (at FMV) from FORA and argued that it did not have to pay prevailing wages, because there was no public money and the purchase agreement did not specify that prevailing wages were required on the construction. The local building trades brought suit and won. Court found that FORA’s Master Resolution (requiring prevailing wages) and deed covenants (also requiring prevailing wages) applied to downstream government entities and developers, even on non-public works projects, as it was a contractual requirement to pay prevailing wages that ran with the land. So, it is DIR’s

Please note that if the Federal government is administering any FORA projects, this could change the determination. If there are federal administrated projects, you should make a request to the DIR's Director's Legal Unit for a determination.²

If a state agency or private developer is overseeing a construction project where there is public monies; the project would more than likely be subject to California public works labor laws.

Please note FORA can provide stricter contractual obligations for private work where there are no public funds. This may include requiring contractor registration, filing CPRs, and paying prevailing wages; however, any enforcement would have to go through the courts as a breach of contract.

2. Does FORA need to follow a formal process for DIR to consider whether or not FORA is subject to SB 854?
Answer: In most instances, you will not need to request a formal determination to DIR's Office of the Director's (OD) Legal Unit. In most instances, formal determinations are made when there is controversy on what comprises public funds. Section 1720(b) of the Labor Code which I provided in the last answer, is the statute to determine if a project contains public funds.

Labor Code section 1720(b), reproduced above, defines public funds.

3. If yes, to whom should FORA address its request for a determination?
Answer: There are two types of determinations: (1) a request for a craft/classification wage rate and (2) a coverage determination to determine if a project is subject to public works laws. A written **request for a wage rate** should be sent to the following address:

DIR- Office of Policy, Research and Legislation
455 Golden Gate Boulevard, 9th Floor
San Francisco, California 94102

You may also send an email to DIR at statistics@dir.ca.gov.

A formal **request for a coverage determination** should be in writing and sent to the following address:

DIR- Office of the Director
Attention: Legal Unit
1515 Clay Street, 7th Floor
Oakland, California 94612

understanding that the prevailing wage requirements apply to both public and private projects under the FORA Master Resolution are subject to prevailing wage projects. Only those projects that are statutory public works can be enforced by DLSE.

² See also *Southern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry* (1997) 54 Cal.App.4th 873.

Labor Code section 1773.4 and 1773.5 provides the legal mechanisms to request a determination for wage rates under section 1773.4, and to determine if a project is subject to public works under section 1773.5.

Section 1773.4 and 1773.5 state:

Labor Code 1773.4.

Any prospective bidder or his representative, any representative of any craft, classification or type of workman involved, or the awarding body may, within 20 days after commencement of advertising of the call for bids by the awarding body, file with the Director of Industrial Relations a verified petition to review the determination of any such rate or rates upon the ground that they have not been determined in accordance with the provision of Section 1773 of this code. Within two days thereafter, a copy of such petition shall be filed with the awarding body. The petition shall set forth the facts upon which it is based. The Director of Industrial Relations or his authorized representative shall, upon notice to the petitioner, the awarding body and such other persons as he deems proper, including the recognized collective bargaining representatives for the particular crafts, classifications or types of work involved, institute an investigation or hold a hearing. Within 20 days after the filing of such petition, or within such longer period as agreed upon by the director, the awarding body, and all the interested parties, he shall make a determination and transmit the same in writing to the awarding body and to the interested parties.

Such determination shall be final and shall be the determination of the awarding body. Upon receipt by it of the notice of the filing of such petition the body awarding the contract or authorizing the public work shall extend the closing date for the submission of bids or the starting of work until five days after the determination of the general prevailing rates of per diem wages pursuant to this section.

Upon the filing of any such petition, notice thereof shall be set forth in the next and all subsequent publications by the awarding body of the call for bids. No other notice need be given to bidders by the awarding body by publication or otherwise. The determination of the director shall be included in the contract.

Labor Code section 1773.5:

(a) The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out this chapter, including, but not limited to, the responsibilities and duties of awarding bodies under this chapter.

(b) When a request is made to the director for a determination of whether a specific project or type of work awarded or undertaken by a political subdivision is a public work, he or she shall make that determination within 60 days receipt of the last notice of support or opposition from any interested party relating to that project or type of work that was not unreasonably delayed, as determined by the director. If the director deems that the complexity of the request requires additional time to make that determination, the director may have up to an additional 60 days if he or she certifies in writing to the requestor, and any interested party, the reasons for the extension. If the requestor is not a political subdivision, the requester shall, within 15 days of the request, serve a copy of the request upon the political subdivision, in which event the political subdivision shall, within 30 days of its receipt, advise the director of its position regarding the request. For projects or types of work that are otherwise private development projects receiving public funds, as specified in subdivision (b) of Section 1720, the director shall determine whether a specific project or type of work is a public work within 120 days of receipt of the last notice of support or opposition relating to that project or type of work from any interested party that was not unreasonably delayed, as determined by the director.

(c) If an administrative appeal of the director's determination is made, it shall be made within 30 days of the date of the determination. The director shall issue a determination on the administrative appeal within 120 days after receipt of the last notice of support or opposition relating to that appeal from any interested party that was not unreasonably delayed, as determined by the director. The director may have up to an additional 60 days if he or she certifies in writing to the party requesting the appeal the reason for the extension.

(d) The director shall have quasi-legislative authority to determine coverage of projects or types of work under the prevailing wage laws of this chapter. A final determination on any administrative appeal is subject to judicial review pursuant to Section 1085 of the Code of Civil Procedure. These determinations, and any determinations relating to the general prevailing rate of per diem wages and the general prevailing rate for holiday, shift rate, and overtime work, shall be exempt from the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).

4. If subject to SB 854, FORA staff would continue to monitor prevailing wage compliance on former Fort Ord. How would FORA staff access online prevailing wage compliance information in the future?

Answer: For all projects awarded on or after April 1, 2015, contractors are required to directly enter their certified payroll data directly to the DIR online CPR or to upload their data using an xml upload. Today, all certified payroll records are available on our website at <https://efiling.dir.ca.gov/eCPR/pages/search>. The records today are fully redacted and do not provide the public with the employee's name, address and social security number. All other CPR data is available.

Awarding bodies will be required to provide DIR notice of its public works project in our PWC 100 at <https://www.dir.ca.gov/pwc100ext/LoginPage.aspx>. Labor Code section 1773.3 states:

*(a) (1) An awarding agency shall provide notice to the Department of Industrial Relations of any public works contract subject to the requirements of this chapter, **within five days of the award.***

(2) The notice shall be transmitted electronically in a format specified by the department and shall include the name of the contractor, any subcontractor listed on the successful bid, the bid and contract award dates, the contract amount, the estimated start and completion dates, job site location, and any additional information the department specifies that aids in the administration and enforcement of this chapter.

*(c) In lieu of responding to any specific request for contract award information, the department may make the information provided by awarding bodies pursuant to this section available for public review on its Internet Web site. **[Emphasis added]***

An awarding body is defined in the Labor Code under section 1722, which states:

"Awarding body" or "body awarding the contract" means department, board, authority, officer or agent awarding a contract for public work.

Awarding bodies should have language within its bid and/or contract documents the specific Labor requiring the contractor to be registered pursuant to Labor Code section 1771.1(a), as well as, the following Labor Code sections: 1720, 1771, 1772-1776 and 1810-1815. In addition, the contractor should be advised apprenticeship laws apply if the project is over \$30,000 pursuant to Labor Code section 1777.5.

Please note, contractors can only provide DIR certified payroll data if the awarding body has provided DIR notice of the project using our PWC 100 online notification. The PWC 100 will generate a unique DIR project ID number, which the contractor can use to submit certified payroll data.

Fort Ord Prevailing Wage Policy Options

Attachment B -Amend Item 8c
 FORA Board Meeting, 11/13/15

Description	Option A	Option B	Option C
Summary	FORA compliance with mix of 1 FORA staff and consultant monitors as needed	FORA compliance through staff monitors	Status Quo compliance provided by individual jurisdictions
FORA Master Resolution Amendment	Yes	Yes	Yes
Estimated Cost	80 hours week compliance software \$250,000 per FY.	Assuming 2 FTE compliance software: \$350,000 /per year.	Varies by jurisdiction
Estimated Schedule	Selection period Estimated 2 months.	Selection period Estimated 4 months.	Unknown
Estimated Duration	5 years if jurisdictions assume after 06/30/20	5 years if jurisdictions assume after 06/30/20	5 years or more; May change after 06/30/2020
Flexibility with changing development cycles	Flexibility could be addressed in contract	Hiring additional personnel when needed will be challenging	
Long-term obligations	FORA responsibility ends on 06/30/2020	Any retiree benefits will be addressed in FORA dissolution plan	

RESOLUTION NO. 15-__

**A RESOLUTION OF THE GOVERNING BODY OF THE FORT ORD REUSE AUTHORITY
AMENDMENT TO MASTER RESOLUTION SECTION 3.03.090 (b)(c) PREVAILING WAGE
AND REGISTRATION REQUIREMENT WITH DEPARTMENT OF INDUSTRIAL
RELATIONS**

WHEREAS, the Fort Ord Reuse Authority (“FORA”) adopted Ordinance No. 95-01 establishing a Procurement Code requiring prevailing wages to be paid to all workers employed on FORA’s construction contracts; and,

WHEREAS, the Fort Ord Reuse Authority Master Resolution (“MR”) was adopted originally by Ordinance No. 97-01 to establish the “governing code” by which FORA’s operation of its powers and authority would be deployed in the Monterey Bay Region’s recovery from Fort Ord closure; and,

WHEREAS, the Fort Ord Reuse Authority has adopted an amendment to the Master Resolution requiring the payment of Prevailing wage on former Fort Ord projects; and,

WHEREAS, the FORA Board of Directors (“Board”), at its November 13, 2015 meeting, authorized the inclusion of a requirement that all contractors and subcontractors on the former Fort Ord register with the California Department of Industrial Relations (DIR) as specified by the California Labor Code 1725.5; and,

WHEREAS, the FORA Board, at its November 13, 2015 meeting, authorized FORA to take responsibility for monitoring and enforcement of the FORA prevailing wage policy previously delegated to individual jurisdictions; and,

WHEREAS, the FORA Board intends this requirement to take effect from and after adoption of this Resolution.

NOW, THEREFORE, BE IT RESOLVED that the governing body of the Fort Ord Reuse Authority hereby adopts the amendments to its Master Resolution 3.03.090 adding amendments (a)(b)(c)(d) requiring registration with the California Department of Industrial Relations for:

(a) All contractors performing “First Generation Construction” must be registered and in good standing with the California Department of Industrial Relations (DIR) as defined in California Labor Code section 1725.5 [with limited exceptions from this requirement for bid purposes only under Labor Code section 1771.1(a)].

(b) Evidence of compliance with this Master Resolution provision and any specific or additional enforcement action must be submitted to the Fort Ord Reuse Authority when any land use decision is submitted for Base Reuse Plan consistency concurrence/determination.

(c) Member agencies must include language in all of their contracts and deeds for the conveyance, disposition and/or development of former Fort Ord property to give notice of and assure compliance with the policy set forth above in subsections 3.03.090(a) and (b).

(d) FORA staff will monitor and determine compliance by member agencies with this section at the time of and as part of FORA's consistency determination under Chapter 8 of this Master Resolution.

ADOPTED this ____ th day of November, 2015 by the Fort Ord Reuse Authority by the following roll call votes listed by name:

AYES:

NOES:

ABSTENTIONS:

ABSENT:

ATTEST:

APPROVED:

Michael A. Houlemard, Jr.,
Executive Officer

Frank O'Connell, FORA Board Chair

DRAFT