



Office of the City Auditor

**Report to the City Council
City of San José**

**AN AUDIT OF THE CITY OF
SAN JOSÉ'S OFFICE OF
EQUALITY ASSURANCE**

**Improvements Are Needed To Better
Enforce The City's Prevailing Wage And
Living Wage Resolutions**

**There Appears To Be Insufficient Workload
To Justify Current Fair Employment And
Disability Access Staffing**

**Report 02-10
September 2002**



CITY OF SAN JOSÉ, CALIFORNIA

800 N. First Street • San Jose, California 95112 • Tel: (408) 277-4601

GERALD A. SILVA
City Auditor

September 25, 2002

Honorable Mayor and Members
of the City Council
801 North First Street, Room 600
San Jose, CA 95110

Transmitted herewith is a report on *An Audit Of The City Of San José's Office of Equality Assurance*. This report is in accordance with City Charter Section 805. An Executive Summary is presented on the blue pages in the front of this report. The City Administration's response to Recommendations #1, #2, and #4 through #10 is shown on the yellow pages before the Appendices. We provided the City Attorney's Office with an opportunity to submit a written response to Recommendation #3. The City Attorney's Office has verbally communicated to us their concurrence with Recommendation #3.

I will present this report to the Finance and Infrastructure Committee at its October 9, 2002, meeting. If you need additional information in the interim, please let me know. The City Auditor's staff members who participated in the preparation of this report are Gitanjali Mandrekar and Eduardo Luna.

Respectfully submitted,

Gerald A. Silva
City Auditor

finaltr
GS:lg

cc: Nina Grayson
Del Borgsdorf
Kay Winer
Peter Jensen

Katy Allen
Jose Obregon
Anna Jatczak
Rick Doyle

Brian Doyle
Alex Gurza



Table of Contents

Executive Summary	i
Introduction	1
Background	1
Proposition 209 Resulted In Key OEA Program Changes.....	4
Key OEA Functions Reassigned As A Result Of Reorganization.....	6
Scope, Objective, And Methodology	8
Finding I	
Improvements Are Needed To Better Enforce The City’s Prevailing Wage And Living Wage Resolutions.....	9
The Number Of Contracts Each Contract Compliance Specialist Monitored Varied From 62 Contracts Per Year To 310 Contracts Per Year.....	10
Service And Maintenance Staff Did Not Ensure Compliance With The City’s Prevailing And Living Wage Resolutions In Almost 58 Percent Of The Service And Maintenance Cases We Sampled	12
Purchasing Did Not Check Off Appropriate Prevailing And Living Wage Boxes For 37 Percent Of The Purchase Orders We Sampled.....	16
OEA Does Not Impose Financial Penalties On Contractors That Failed To Submit Requested Documents In A Timely Manner	18
The OEA Should Evaluate Becoming A Designated Labor Compliance Program In Order To Effectively Enforce The Resolutions And Retain Fines And Penalties Collected	19
CONCLUSION	21
RECOMMENDATIONS	22
Finding II	
There Appears To Be Insufficient Workload To Justify Current Fair Employment And Disability Access Staffing	25
The OEA Investigates An Average Of 38 Harassment And Discrimination Cases Yearly	25
The FEDA Section’s Workload Is Insufficient To Justify Two Staff Persons	27
In 2002-03 The Administration Moved The FEDA Section To The Office Of Employee Relations	27
Estimated Annual Cost Of The Two FEDA Positions Is \$181,970.....	28
OEA Overstated The Number Of Hours That Its Staff Spent Training City Employees	28
CONCLUSION	30
RECOMMENDATIONS	30

Administration's Response.....	31
Appendix A	
Definition Of Priority 1, 2, And 3 Audit Recommendations	A-1
Appendix B	
The California Labor Code Provides Additional Enforcement Tools For Non-Compliant Contractors	B-1

Table of Exhibits

Exhibit 1	
Application Of Prevailing Wage And Living Wage Resolutions	3
Exhibit 2	
Summary Of Office Of Equality Assurance's Budget 1996-97 To 2001-02.....	6
Exhibit 3	
OEA Organization Chart.....	7
Exhibit 4	
OEA Construction Contracts Monitored In 2000-01	10
Exhibit 5	
OEA Service And Maintenance Contracts Monitored In 2000-01	11
Exhibit 6	
Summary Of OEA Investigations Of Harassment And Discrimination During 1998-99 Through 2002	26
Exhibit 7	
Salary Breakdown Of Two FEDA Positions	28
Exhibit 8	
Comparison Of OEA To City Auditor-Calculated Staff Training Hours For 2000-01	29

Executive Summary

In accordance with the City Auditor's 2001-2002 Audit Workplan, we have audited the Office of Equality Assurance (OEA). We conducted this audit in accordance with generally accepted government auditing standards and limited our work to those areas specified in the Scope and Methodology section of this report. The City Auditor's Office thanks the OEA staff for their time, information, insight, and cooperation during the audit process.

Finding I Improvements Are Needed To Better Enforce The City's Prevailing Wage And Living Wage Resolutions

As part of the labor compliance function, the Office of Equality Assurance (OEA) monitors and enforces the Prevailing Wage and the Living Wage Resolutions. This involves reviewing City contracts and ensuring contractor compliance with the resolutions. We found that improvements were needed in certain aspects of the OEA's functions. Specifically we found:

- the number of contracts each contract compliance specialist monitored varied from 62 contracts a year to 310 contracts per year;
- OEA staff did not ensure compliance with the City's Prevailing Wage and Living Wage Resolutions in almost 58 percent of the service and maintenance cases we sampled;
- OEA staff did not consistently withhold payments from non-complying contractors and did not track the number of times the withholding of payment was used to compel contractors to provide requested documents;
- the OEA lacks formal withholding procedures and guidance to staff on enforcing the Prevailing and Living Wage Resolutions;
- Purchasing did not check off appropriate Prevailing and Living Wage boxes for 37 percent of the Purchase Orders we sampled; and

- the OEA does not impose financial penalties on contractors that fail to submit requested documents in a timely manner.

In our opinion, the OEA needs to review the workload among construction contract compliance specialists. The OEA also needs to develop procedures on Prevailing Wage and Living Wage Resolutions enforcement, to ensure that staff

- 1) consistently uses all available enforcement tools and
- 2) follows-up with those contractors who do not send in requested documents.

Further, the City Attorney's Office should advise if and when the City should withhold payments to construction and service and maintenance contractors. In addition, the City Council should revisit and consider expanding the enforcement tools the Living Wage Policy recommends to ensure that contractors comply with the resolutions. Additionally, Purchasing needs to develop a formal process to ensure that the OEA is consistently informed of all awarded contracts that are subject to the Prevailing Wage and Living Wage Resolutions. Further, the OEA should impose financial penalties on contractors who willfully or blatantly violate the City's Prevailing Wage or Living Wage Resolutions. Finally, the OEA should submit to the City Council an evaluation on the advantages and disadvantages of becoming a designated Labor Compliance Program.

RECOMMENDATIONS

We recommend that the OEA:

- Recommendation #1** **Review the workload among construction contract compliance specialists and require staff to document when they received and reviewed compliance documents. (Priority 3)**
- Recommendation #2** **Develop Prevailing and Living Wage Resolutions enforcement procedures including the requirement that staff document when contractors return requested compliance documents. (Priority 3)**

In addition, we recommend that the City Attorney's Office:

Recommendation #3 Advise if and when the City should withhold payments to construction and service and maintenance contractors. (Priority 3)

We also recommend that the City Council:

Recommendation #4 Revisit its Living Wage Resolution and consider specifying the withholding of payments to contractors as a means to compel contractors to comply with OEA requests for documents. (Priority 3)

We also recommend that the OEA:

Recommendation #5 Develop Prevailing Wage and Living Wage Resolutions enforcement procedures including the use of withholding payments to non-compliant contractors and tracking the number of times the withholding of payments was used as an enforcement tool. (Priority 3)

Moreover, we recommend that Purchasing:

Recommendation #6 Formally inform its Buyers of the importance of checking off Prevailing and Living Wage boxes on Purchase Orders and forwarding those Purchase Orders to the OEA for Prevailing and Living Wage Resolutions review and enforcement. (Priority 3)

Further, we recommend that the OEA:

Recommendation #7 Impose financial penalties on contractors who willfully or blatantly violate the City's Prevailing Wage or Living Wage Resolutions. (Priority 2)

Recommendation #8 Submit to the City Council an evaluation of the advantages and disadvantages of becoming a designated Labor Compliance Program. (Priority 3)

Finding II There Appears To Be Insufficient Workload To Justify Current Fair Employment And Disability Access Staffing

The Fair Employment and Disability Access (FEDA) staff is responsible for implementing the City's employment policies.¹ In order to do so, Fair Employment and Disability Access staff investigate and resolve (1) City employee and applicant complaints of harassment and discrimination for employment and (2) disability access complaints that users of City services file. During our review of the FEDA section we found that:

- the OEA investigates an average of 38 harassment and discrimination cases yearly;
- the current FEDA section workload is insufficient to justify three staff persons;
- the OEA overstated the number of hours that staff spent training City employees; and
- in 2002-03 the Administration moved the FEDA to the Office of Employee Relations in the City Manager's Office.

In our opinion, the Office of Employee Relations should reassess the Fair Employment and Disability Access workload and if necessary reassign the analyst to other responsibilities. In addition, the Office of Employee Relations should accurately record the hours its staff spends providing training.

RECOMMENDATIONS

Finally, we recommend that the Office of Employee Relations:

- Recommendation #9 Reassess the Fair Employment and Disability Access workload and if necessary reassign the analyst to other responsibilities. (Priority 3)**
- Recommendation #10 Accurately record and report the hours its staff spends training City employees and the hours of harassment and discrimination training City employees receive. (Priority 3)**

¹ Equal Employment Opportunity Plan and Program.

Introduction

In accordance with the City Auditor’s 2001-2002 Audit Workplan, we have audited the Office of Equality Assurance (OEA). We conducted this audit in accordance with generally accepted government auditing standards and limited our work to those areas specified in the Scope and Methodology section of this report. The City Auditor’s Office thanks the OEA staff for their time, information, insight, and cooperation during the audit process.

Background

The OEA’s mission is “to ensure fair and equitable treatment of contractors, contractors’ employees, users of City facilities, programs and services and City employees.”

The OEA has two core services - (1) Labor Compliance and (2) Fair Employment and Disability Access. Labor Compliance staff is responsible for monitoring and investigating construction contracts and service and maintenance contracts for compliance with the City’s Prevailing Wage and Living Wage policies. Fair Employment and Disability Access staff is responsible for ensuring equal opportunity and access by investigating and resolving complaints and by providing assistance and information.

The Prevailing Wage And The Living Wage Resolutions Set The Rates Which Contractors Should Pay Employees

The OEA monitors two types of contracts - (1) construction and (2) service and maintenance. Construction contracts fall under the purview of the Prevailing Wage Resolutions, whereas, Service and Maintenance contracts may fall under both the purview of the Prevailing and the Living Wage Resolutions.

Prevailing Wage

The San Jose City Council passed its Prevailing Wage Resolution in October 1988. Under this resolution, all contractors for public works projects are required to pay employees a general prevailing wage of certain per diem wages. The California Department of Industrial Relations sets this rate. The Prevailing Wage Resolutions are applicable to all construction and maintenance contracts over \$1,000.

Living Wage

In November 1998, the City Council passed its Living Wage Resolution to meet the employment and economic development needs of low-wage workers. The Living Wage Resolution mandates a minimum level of compensation for workers

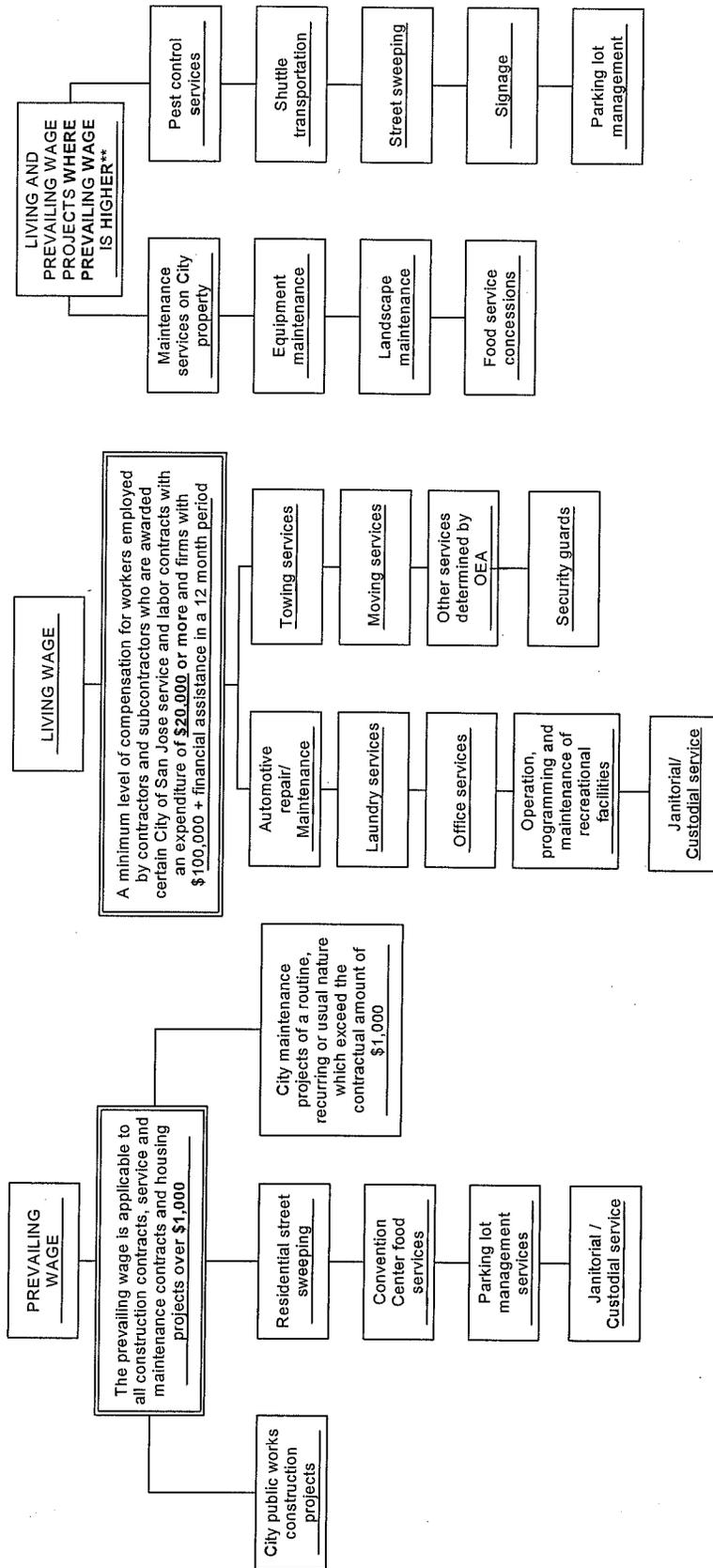
employed by contractors and subcontractors who are awarded certain City of San Jose service and labor contracts with an expenditure of \$20,000 or more and recipients who receive direct monetary financial assistance of \$100,000 or more.

*Certain Contracts
Fall Under The
Purview Of Both The
Living Wage And
The Prevailing Wage
Resolutions*

When the City Council passed the Living Wage Resolution in 1998, the OEA had determined that a vast majority of the contracts the City awards would still fall under the Prevailing Wage Resolution. As such, for any public works contract when the Prevailing Wage Resolution does not apply, then the Living Wage Resolution does. The OEA is to determine whether a contract falls under the Prevailing Wage Resolution or Living Wage Resolution.

Exhibit 1 shows the type of contracts that fall under the Prevailing Wage, Living Wage, and both Prevailing and Living Wage Resolutions.

Exhibit 1 Application Of Prevailing Wage And Living Wage Resolutions



Number of Contracts Reviewed In 2000-01
 Construction Contracts Prevailing Wage --- 1,136
 Service & Maintenance Prevailing Wage --- 480
 Living Wage --7

C O N T R A C T T Y P E

**Most projects are determined to be prevailing wage because in most instances prevailing wage is higher.

In addition, labor compliance staff is responsible for the following:

- conducting prevailing wage studies;
- determining classifications to be used on service and maintenance contracts;
- resolving labor violations and determining restitution owed;
- conducting City staff and contractor training on requirements;
- establishing disadvantaged business enterprise goals on federally-funded projects; and
- certifying businesses as Minority/Women/Disadvantaged Owned Business Enterprise (M/W/DBE)¹.

The Fair Employment and Disability Access (FEDA) core service is responsible for:

- ensuring equal opportunity and access by providing assistance and information;
- investigating and resolving City employees' complaints of discrimination and harassment;
- accessing complaints for applicants of employment and users of City services, programs and facilities;
- conducting training for City employees regarding the City's policies on discrimination and harassment; and
- staffing the Disability Advisory Commission and the Human Rights Commission.

**Proposition 209
Resulted In Key
OEA Program
Changes**

In 1996, California voters enacted Proposition 209 that prohibited discrimination against or giving preferential treatment to any individual or group in public employment, public education, or public contracting on the basis of color, race, sex, ethnicity, or national origin. As a result, the City closed its existing affirmative action program of monitoring and tracking City employees by gender and ethnic origin. Specifically, prior to the passage of Proposition 209, OEA

¹ Due to limited staffing in the Labor Compliance section, the OEA no longer does certifications of M/W/DBEs.

compared the City's workforce against the local labor market workforce. If a particular classified group was underutilized, OEA worked to correct this unbalance.

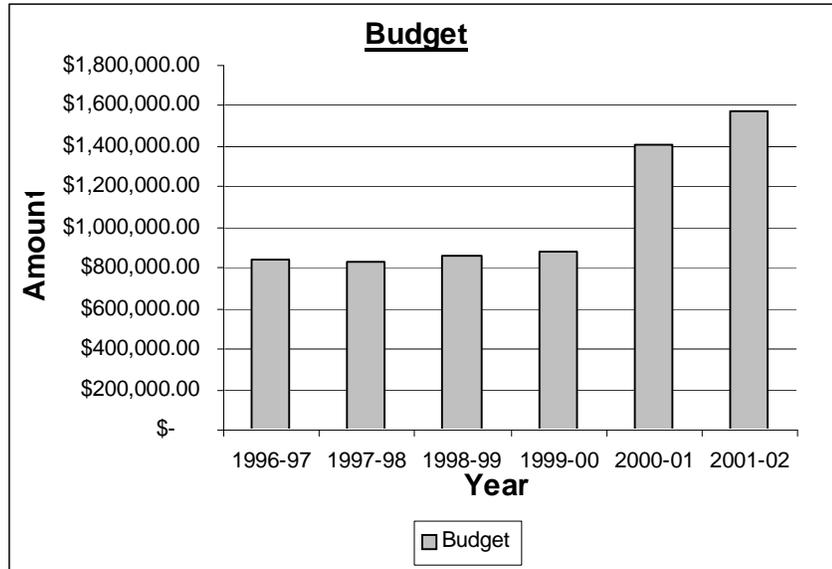
In November 1996, as a response to Proposition 209, the City revised the existing M/WBE program and the City instituted the Non-Discrimination/Non-Preferential Treatment Program. However, after a legal challenge, in 1998, the Santa Clara County Superior Court ruled that the City's revised sub-contractor program was unconstitutional and therefore, ordered the suspension of the program. Consequently, OEA redirected staff efforts to monitoring contractor compliance.

Budget

The OEA's total adopted budget for 2001-02 was about \$1.6 million. This was an increase of about 12 percent from the previous year's budget of \$1.4 million. This 12 percent increase was attributed to a one-time relocation expenditure. As shown in Exhibit 2 below, OEA's budget has increased significantly from about \$830,000 in 1996-97 to about \$1.6 million in 2001-02, or about 88 percent.

In 2002-03, the OEA's budget is about \$1.2 million. This 20 percent decrease is attributed to the reallocation of two positions from the FEDA section to the Office of Employee Relations and the elimination of the Disability Access Coordinator position.

Exhibit 2 Summary Of Office Of Equality Assurance's Budget 1996-97 To 2001-02



Source: Auditor analysis of OEA data.

Staffing

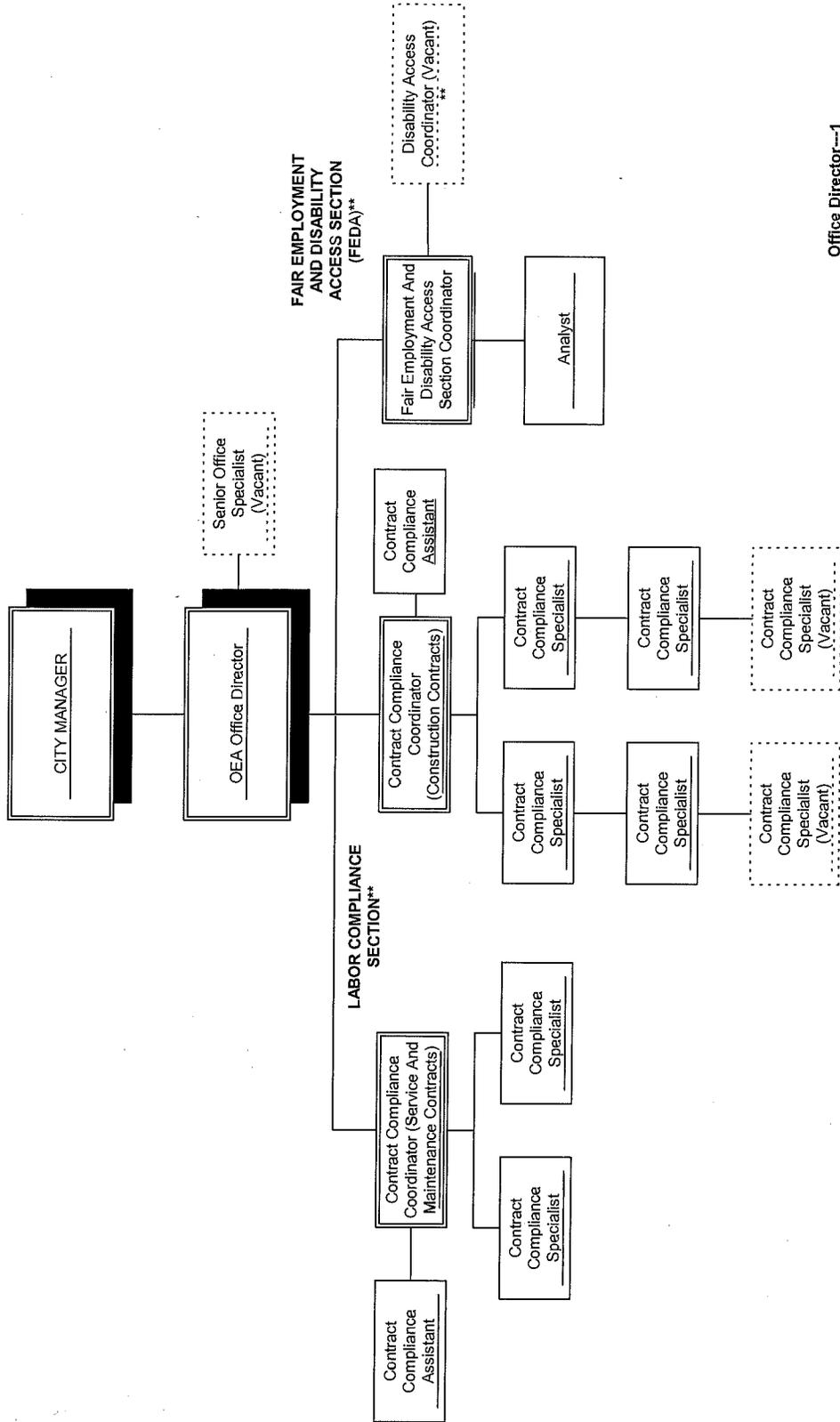
In 2001-02, the OEA had 17 authorized positions. Of the 17 positions, 12 were assigned to the Labor Compliance section and three to the Fair Employment and Disability Access section. Exhibit 3 shows the OEA's organization chart. Currently, in addition to a vacant Senior Office Specialist Position, the Labor Compliance section has two vacant positions and the Fair Employment and Disability Access section has one vacancy.²

Key OEA Functions Reassigned As A Result Of Reorganization

For 2002-03, the Administration proposed moving the OEA's labor compliance function to the Department of Public Works. Also, as part of its reorganization effort, the Administration proposed moving the staff from the FEDA section to the City Manager's Office in the Office of Employee Relations and the elimination of the Disability Access Coordinator position. The City Council approved these changes effective July 1, 2002.

² As per the proposed 2002-03 Operating Budget, the vacant position of the Disability Access Coordinator has been eliminated.

Exhibit 3 OEA Organization Chart



Office Director---1
 Assistants---2
 Senior Office Specialist---1
 Compliance Specialists---10
 FEDA Section---3
 Total Positions---17

** The position of the Disability Access Coordinator was eliminated as a result of a reorganization.

**Scope, Objective,
And Methodology**

The objective of the audit was to review the efficiency and effectiveness of the Office of Equality Assurance. We reviewed about 50 randomly selected contracts that the OEA monitored during 2001. We reviewed these contracts to determine if

- the OEA was effectively monitoring contractors for compliance with the City's Prevailing and Living Wage Resolutions and
- the contractors completed the compliance documents correctly and returned them in a timely manner to the OEA.

We also randomly selected 30 Purchase Orders that the Purchasing Division of the General Services Department (Purchasing) issued in 2001. We reviewed these Purchase Orders to determine if Purchasing staff had correctly identified the purchase as being subject to either the Prevailing Wage or Living Wage Resolutions and forwarded the identified Purchase Orders to the OEA. We also interviewed those OEA and Purchasing staff responsible for monitoring and executing the identified Purchase Orders.

We also surveyed labor compliance programs at the City of Los Angeles, the City of Sacramento, and the County of Sacramento.

In addition, we reviewed workload data in both the Labor Compliance and the Fair Employment and Disability Access sections to ensure that workload was distributed equitably and effectively.

Finally, we performed limited testing of the various computer reports and databases we used during our audit.

Finding I

Improvements Are Needed To Better Enforce The City's Prevailing Wage And Living Wage Resolutions

As part of the labor compliance function, the Office of Equality Assurance (OEA) monitors and enforces the Prevailing Wage and the Living Wage Resolutions. This involves reviewing City contracts and ensuring contractor compliance with the resolutions. We found that improvements were needed in certain aspects of the OEA's functions. Specifically we found:

- the number of contracts each contract compliance specialist monitored varied from 62 contracts a year to 310 contracts per year;
- OEA staff did not ensure compliance with the City's Prevailing Wage and Living Wage Resolutions in almost 58 percent of the service and maintenance cases we sampled;
- OEA staff did not consistently withhold payments from non-complying contractors and did not track the number of times the withholding of payment was used to compel contractors to provide requested documents;
- the OEA lacks formal withholding procedures and guidance to staff on enforcing the Prevailing and Living Wage Resolutions;
- Purchasing did not check off appropriate Prevailing and Living Wage boxes for 37 percent of the Purchase Orders we sampled; and
- the OEA does not impose financial penalties on contractors that fail to submit requested documents in a timely manner.

In our opinion, the OEA needs to review the workload among construction contract compliance specialists. The OEA also needs to develop procedures on Prevailing Wage and Living Wage Resolutions enforcement, to ensure that staff

- 1) consistently uses all available enforcement tools and
- 2) follows-up with those contractors who do not send in requested documents. Further, the City Attorney's Office should advise if and when the City should withhold payments to construction and service and maintenance contractors. In addition, the City Council should revisit and consider expanding the enforcement tools the Living Wage Policy

recommends to ensure that contractors comply with the resolutions. Additionally, Purchasing needs to develop a formal process to ensure that the OEA is consistently informed of all awarded contracts that are subject to the Prevailing Wage and Living Wage Resolutions. Further, the OEA should impose financial penalties on contractors who willfully or blatantly violate the City's Prevailing Wage or Living Wage Resolutions. Finally, the OEA should submit to the City Council an evaluation on the advantages and disadvantages of becoming a designated Labor Compliance Program.

The Number Of Contracts Each Contract Compliance Specialist Monitored Varied From 62 Contracts Per Year To 310 Contracts Per Year

The number of contracts the OEA assigns to individual contract compliance specialists greatly varies. Specifically, the number of contracts each contract compliance specialist monitored varied from 62 contracts a year to 310 contracts per year. The OEA divides the workload in two different ways. On the Construction side, the OEA assigns each contract compliance specialist to a division of a department. The contract compliance specialist then monitors all the contracts his or her assigned division awards.

On the Service and Maintenance side, the OEA divides the workload alphabetically. In addition, the contract compliance coordinator monitors the RFP contracts, performs the wage surveys, and also makes the CPI adjustments for certain living and prevailing wage classifications.

The following exhibits show the workload for the Construction and the Service and Maintenance sections in 2000-01.

Exhibit 4 OEA Construction Contracts Monitored In 2000-01

Construction Contracts		
Contract Compliance Specialist	Contracts Monitored In 2000-01	Percentage Of Total
A	310	27%
B	302	27%
C	237	21%
D	152	13%
E	75	7%
F	62	5%
<u>TOTAL</u>	<u>1138</u>	<u>100%</u>

Source: Auditor analysis of OEA data.

Exhibit 5 OEA Service And Maintenance Contracts Monitored In 2000-01³

Service And Maintenance Contracts		
Contract Compliance Specialist	Contracts Monitored In 2000-01	Percentage Of Total
G	181	37%
H	177	36%
I	128	26%
<u>TOTAL</u>	<u>486</u>	<u>100%</u>

Source: Auditor analysis of OEA data.

As Exhibit 4 shows, two of the six construction contract compliance specialists handled 54 percent of the total workload. In our opinion, this workload distribution could lead to delays in contract monitoring. For example, in our review of construction contracts we found that in one instance, the staff person with the highest workload received compliance documents from a contractor on April 11th, 2001, but could not review the documents until May 22nd, 2001---almost one month later. It should be noted that in most other instances contract compliance specialists did not enter the dates they received and reviewed the compliance documents from a contractor. As a result, neither we, nor OEA management, were able to determine how long it took contract compliance specialists to review compliance documents.

As shown in Exhibit 5 above, the Service and Maintenance section workload is more evenly distributed among the contract compliance specialists than the Construction section's workload. In our opinion, the OEA should review the distribution of workload among the construction contract compliance specialists. In addition, by requiring staff to record when they received and reviewed compliance documents, the OEA will be better able to assess each contract compliance specialist's ability to handle their assigned workload and measure their productivity.

³ It should be noted that the Service and Maintenance section's workload does not include the 600 or so Notices of Intent to Contract (NOI) the OEA reviews. An NOI provides a mechanism for departments to obtain OEA wage classification determinations to be included in bid or quote solicitations. City departments that wish to initiate Service and Maintenance purchases or contracts file an NOI with the OEA.

We recommend that the OEA:

Recommendation #1:

Review the workload among construction contract compliance specialists and require staff to document when they received and reviewed compliance documents. (Priority 3)

Service And Maintenance Staff Did Not Ensure Compliance With The City's Prevailing And Living Wage Resolutions In Almost 58 Percent Of The Service And Maintenance Cases We Sampled

We found that OEA staff did not ensure compliance with the City's Prevailing and Living Wage Resolutions in 58 percent of the service and maintenance contracts we sampled. In all these instances, the contractor did not provide the OEA with the documents it requested in order to ensure compliance with the Prevailing and Living Wage Resolutions.

The Labor Code requires contractors to file certain documents with the OEA. These include certified payrolls, fringe benefits statements and payroll reporting forms (for construction contracts). OEA policy specifies the number of days within which contractors have to return requested compliance documents. Contractors are required to return the requested compliance documents to the OEA within

- 5 days in the case of service and maintenance contracts and
- 10 days in the case of construction contracts.

OEA staff requires the compliance documents in order to verify whether contractors pay workers the required Prevailing Wage or Living Wage. It is important that contractors return requested documents to the OEA and that they do so in a timely manner. This is because some projects are of such short duration that they may be completed before contract compliance staff even receive the documents they need to ensure compliance with the Prevailing Wage and Living Wage Resolutions.

In addition, we found that, both construction and service and maintenance staff did not consistently document when contractors returned compliance documents. As a result, we were not able to determine how long it took contract compliance specialists to review compliance documents and whether contractors sent in compliance documents in a timely manner.

We recommend that the OEA:

Recommendation #2

Develop Prevailing and Living Wage Resolutions enforcement procedures including the requirement that staff document when contractors return requested compliance documents. (Priority 3)

Staff Did Not Consistently Withhold Payments From Non-Complying Contractors And Did Not Track The Number Of Times Payment Was Withheld From Non-Complying Contractors

We found no evidence that the contract compliance specialists assigned to service and maintenance contracts withheld payments from non-compliant contractors. Specifically, in our sample of 24 service and maintenance contracts, we saw no evidence that the contract compliance specialist had requested a department to withhold payments in those instances where contractors did not send in requested documents.

Withholding payments to a contractor is one of the enforcement tools available to staff to compel contractors to provide requested documents. According to the Labor Code, “*Any awarding body that enforces...shall provide notice of the withholding of contract payments to the contractor and subcontractor, as applicable.*”

Contractors routinely complied with requests for documents for construction contracts but not for service and maintenance contracts. According to the contract compliance coordinator, one of the reasons that construction contract contractors are more compliant is that construction contract compliance specialists use the withholding of payments to the contractor as an enforcement tool. In addition, contractors do not get paid unless a construction contract compliance specialist issues a memorandum regarding labor compliance. Conversely, according to the OEA Director, contract compliance specialists for service and maintenance contracts rarely request a department to withhold payment to a contractor if they fail to provide requested documents. According to a service and maintenance contract compliance specialist, she may request that a department withhold payment from a contractor if a contractor has repeatedly refused to provide requested documents. Another service and maintenance contract compliance specialist said that she once requested a department to withhold payment from a contractor that had a history of non-compliance and was found to be in violation. In addition, according to the contract compliance coordinator, the OEA

needs clarification from the City Attorney's Office on whether they can in fact use this enforcement tool for service and maintenance contracts.

In our opinion, service and maintenance contract compliance specialists should use the withholding of payment tool to compel contractors to send in requested documents when it is consistent with City policy. In addition, the City Attorney's Office should advise if and when the OEA can withhold payments to service and maintenance contractors.

We recommend that the City Attorney's Office:

Recommendation #3

Advise if and when the City should withhold payments to construction and service and maintenance contractors. (Priority 3)

The Living Wage Resolution Does Not Specify Withholding Payments To Non-Compliant Contractors As An Enforcement Tool

As far as the Living Wage Resolution is concerned, the resolution does not specifically provide staff with the ability to withhold payments to non-compliant contractors. While the Living Wage Resolution does provide the OEA with other enforcement tools besides the withholding of payments, it can not use any of these other enforcement tools before a contractor has been paid. According to the Living Wage Resolution, "if a violation of any provision of this Policy occurs and is not corrected after written notice, the City may, at its option, do any or all of the following:

1. *Suspend and/or terminate the contract or financial assistance agreement for cause;*
2. *Require the employer to pay any amounts underpaid in violation of the required payments and City's administrative costs and liquidated damages, and in the case of financial assistance, to refund any sums disbursed by the City;*
3. *Debar the contractor or subcontractor from future City contracts and/or deem the recipient ineligible for future financial assistance."*

In our opinion, the City Council should revisit its Living Wage Resolution and consider specifying the withholding of payments to contractors as a means to compel contractors to comply with OEA requests for documents.

We recommend that the City Council:

Recommendation #4

Revisit its Living Wage Resolution and consider specifying the withholding of payments to contractors as a means to compel contractors to comply with OEA requests for documents. (Priority 3)

The OEA Does Not Have Any Procedures On Withholding Payments To Non-Compliant Contractors

The OEA does not have any policies regarding when to withhold payments from non-compliant contractors. According to the construction compliance coordinator, staff requests the Division to retain 10 percent of the total contract amount in case the contractor does not provide requested documents. However, we could not find any policies and procedures on how staff should use this enforcement tool. According to the contract compliance coordinator, the California Labor Code is the City's withholding policy. However, we found that even though the California Labor Code provides for the withholding of payment as an enforcement tool, it does not specify how much of the total contract should be withheld.

According to the contract compliance staff in the other jurisdictions we contacted, their contractors routinely send in compliance documents in a timely manner. Each jurisdiction we contacted stated that their high level of contractor compliance was due to their aggressive use of withholding payment to non-compliant contractors. According to a staff person at the County of Sacramento, they withhold payments if contractors do not send in compliance documents within five days after they are due. As a result, according to the Sacramento County staff, contractors almost always send in compliance documents in a timely manner.

We also found that the OEA does not keep track of the number of times that they used the withholding of payments as an enforcement tool. According to a contract compliance specialist, the only way to get that information would be to look

at the actual contract files. This would entail reviewing 1,600 construction and service and maintenance contracts in 2000-01 alone.

In our opinion, the OEA should maintain records of when and against whom they used the withholding tool. This would allow the OEA to track the number of times contract compliance specialists had to withhold payments from non-compliant contractors and whether certain contractors were habitually non-compliant. Further, the OEA should develop a policy on how to implement this section of the Labor Code in order to ensure that staff treats all contractors fairly and consistently.

We recommend that the OEA:

Recommendation #5

Develop Prevailing Wage and Living Wage Resolutions enforcement procedures including the use of withholding payments to non-compliant contractors and tracking the number of times the withholding of payments was used as an enforcement tool. (Priority 3)

Purchasing Did Not Check Off Appropriate Prevailing And Living Wage Boxes For 37 Percent Of The Purchase Orders We Sampled

We found that Purchasing did not consistently identify Purchase Orders that were subject to the Prevailing and Living Wage Resolutions. In addition, Purchasing forwarded these Purchase Orders to the OEA either in an untimely manner or not at all. As a result, the OEA's ability to enforce the Prevailing Wage and Living Wage Resolutions for these Purchase Orders was impaired.

We randomly selected 30 of 330 Notices of Intent (NOIs) that the OEA reviewed from February 2001 to December 2001. As was noted on page 13, departments get OEA wage classification determinations by filing an NOI with the OEA for bid or quote solicitations. After the OEA finishes its wage classification determination on the NOIs, the departments send a purchase requisition to Purchasing through FMS. Once Purchasing awards a contract, it completes a Purchase Order. Every Purchase Order form has Prevailing and Living Wage boxes on it that Purchasing Buyers should check off if the project falls under one of the Resolutions. If a Buyer checks the Prevailing Wage or Living Wage box on the Purchase Order then the clerical staff knows to send a copy to the OEA for compliance follow up. As such, it is very important that Buyers

check off the Prevailing and Living Wage boxes if it is appropriate to do so. We tracked the Purchase Orders for the projects related to the 30 NOIs we sampled and reviewed the Purchase Orders for completeness with respect to the Prevailing and Living Wage Resolutions.

We found that in 11 of the 30 Purchase Orders we sampled (37 percent), Purchasing had failed to properly check off the Prevailing and Living Wage boxes on the Purchase Orders. As a result, Purchasing might not have forwarded as many as 37 percent of our sampled Purchase Orders to the OEA for subsequent enforcement of the Prevailing and Living Wage Resolutions.

It should be noted that, when we followed-up on the projects where Purchasing had not checked the Prevailing Wage and Living Wage boxes on the Purchase Order, we found that the OEA had in fact reviewed all these projects. We then asked the contract compliance coordinator how the OEA reviewed these projects without Purchasing forwarding copies of the Purchase Orders to the OEA. The contract compliance coordinator told us that the OEA proactively follows up with departments on all projects once the OEA makes wage classification determinations. Specifically, the OEA follows up with the awarding department to determine whether the department awarded the contract and provide the vendor name or the Purchase Order number. In 2000-01, the OEA's follow-up process identified that Purchasing had not properly forwarded 162 out of 633 Purchase Orders (26 percent) to the OEA for subsequent Prevailing or Living Wage review. According to the contract compliance coordinator, the OEA sent letters to awarding departments to determine the contract awarding status of these 162 Purchase Orders.

In addition, Purchasing's clerical staff sometimes detect that buyers have failed to properly check off the Prevailing Wage or the Living Wage box on the Purchase Order. When this happens the clerical staff take the initiative to send the Purchase Order to the OEA. However, this only occurs when Purchasing's clerical staff is sufficiently experienced and knowledgeable.

According to Purchasing, it is now informally advising its buyers of the importance of checking off the appropriate Prevailing Wage or Living Wage box on Purchase Orders and forwarding it to the OEA. In our opinion, Purchasing needs to

formally inform its buyers of the importance of checking off the Prevailing Wage and Living Wage boxes on Purchase Orders and forwarding those Purchase Orders to the OEA for Prevailing and Living Wage Resolutions review and enforcement.

We recommend that Purchasing:

Recommendation #6

Formally inform its Buyers of the importance of checking off Prevailing and Living Wage boxes on Purchase Orders and forwarding those Purchase Orders to the OEA for Prevailing and Living Wage Resolutions review and enforcement. (Priority 3)

OEA Does Not Impose Financial Penalties On Contractors That Failed To Submit Requested Documents In A Timely Manner

We also found that OEA staff never imposes penalties on contractors for failure to send in requested documents. According to contract compliance specialists, they sometimes have to resort to making multiple phone calls to contractors in order to get them to comply with the initial request for documents.

According to the California Labor Code,⁴ *“The contractor or subcontractor shall have 10 days in which to comply subsequent to receipt of a written notice requesting the records (...). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars (\$25) for each calendar day, or portion thereof for each worker until strict compliance is effectuated. (...) A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.”* Under the above Labor Code citation, if a contractor with 50 employees sends the requested documents to the OEA 10 days late, the OEA could fine the contractor \$12,500 in penalties.

According to the OEA Director, the OEA has never imposed penalties on contractors. In our opinion, the OEA should use all available tools, including penalties, to compel contractors to comply with the City's Prevailing Wage and Living Wage Resolutions in a timely manner. According to one of the jurisdictions we surveyed, they impose penalties on contractors

⁴ Applicable only to Prevailing Wage contracts.

when they deem a violation to be willful. Similarly, a staff person at another jurisdiction, told us that they aggressively penalize contractors when they delay sending in compliance documents or do not pay workers the proper wage amount. We also noted that the City of Los Angeles assessed contractors more than \$1 million in fines, penalties and restitution in 2001-02⁵. However, this same staff person added that those contractors that the City of Los Angeles fines routinely sue the City, albeit unsuccessfully.

We recommend that the OEA:

Recommendation #7

Impose financial penalties on contractors who willfully or blatantly violate the City’s Prevailing Wage or Living Wage Resolutions. (Priority 2)

The OEA Should Evaluate Becoming A Designated Labor Compliance Program In Order To Effectively Enforce The Resolutions And Retain Fines And Penalties Collected

The Labor Compliance Program (LCP) is a designation the Director of the California Division of Labor Standards Enforcement (DLSE) grants. Currently, any fines and penalties the OEA assesses would go to the State of California. The LCP designation would allow the OEA to keep all the fines and penalties that they collect from non-compliant contractors. In order to attain a LCP designation, the OEA would need City Council approval to apply to the Director of the Division of Labor Standards Enforcement for LCP designation. If the City is designated as LCP, the awarding body would not require the payment of the general prevailing wage rate for any public works projects of \$25,000⁶ or less when the project is for construction work, or for any public works project of \$15,000 or less when the project is for alteration, demolition, repair, or maintenance work.

The OEA Would Have To Undergo An Initial Approval Process In Order To Be Designated A LCP

The OEA would have to apply to the DLSE for LCP designation. The Director of the DLSE would require an awarding body to submit evidence of its ability to operate a LCP.

⁵ In 2000-01, the City of Los Angeles assessed about \$600,000 in penalties alone of which it collected about \$200,000.

⁶ Without the LCP designation, any construction contract of \$1,000 or more is subject to the Prevailing Wage Resolution.

The Director of the DLSE would review the application for the following:

- the experience and training of the awarding body's personnel on public works labor compliance issues;
- the average number of public works contracts the awarding body annually administers;
- the awarding body's record of taking cognizance of the Labor Code and of withholding in the preceding five years;
- the availability of legal support for the LCP;
- the availability and quality of a manual outlining the responsibilities and procedures of the LCP to the awarding body; and
- the method by which the awarding body will transmit notice to the Labor Commissioner of willful violations.

The initial approval lasts for 11 continuous months after which the OEA may apply to the Director of the DLSE for final approval. In addition, the OEA would have to submit to the Director an annual report of the operation of its LCP within 60 days after the close of the City's fiscal year.

The advantage of the LCP designation for the City is that whatever penalties it collects from contractors would be deposited into the City's General Fund.

Possible disadvantages of the LCP designation is that it may have administrative costs associated with it and, according to the OEA Director, the City Attorney's Office is concerned that the City could be sued if the OEA started assessing fines and penalties.

*Other Jurisdictions
Aggressively Enforce
The Prevailing Wage
Resolution By
Withholding
Payments And
Imposing Penalties*

We surveyed the City of Los Angeles, the County of Sacramento, and the City of Sacramento. According to these other jurisdictions, they aggressively enforce the Prevailing Wage laws by withholding payments from contractors that do not comply with requests for documents and when necessary imposing fines and penalties. As was noted earlier, one of the jurisdictions we surveyed assessed contractors more than \$1 million in fines, penalties, and restitution in 2001-02.

In our opinion, the OEA should submit to the City Council an evaluation of the advantages and disadvantages of becoming a designated Labor Compliance Program.

We recommend that the OEA:

Recommendation #8

Submit to the City Council an evaluation of the advantages and disadvantages of becoming a designated Labor Compliance Program. (Priority 3)

CONCLUSION

We found that improvements are needed to ensure that the OEA properly enforces the Prevailing Wage and Living Wage Resolutions. We found that (1) Workload varies significantly among contract compliance specialists; (2) OEA staff did not ensure compliance with the City’s Prevailing Wage and Living Wage Resolutions in almost 58 percent of the service and maintenance cases we sampled; (3) OEA staff did not consistently withhold payments from non-complying contractors and did not track the number of times the withholding of payment was used to compel contractors to provide requested documents; (4) the OEA lacks formal procedures and guidance to staff on enforcing the Prevailing and Living Wage Resolutions; (5) Purchasing did not check off appropriate Prevailing and Living Wage boxes for 37 percent of the Purchase Orders we sampled; and (6) the OEA does not impose financial penalties on non-compliant contractors. In our opinion, the OEA needs to review the workload among contract compliance specialists. In addition, the OEA needs to develop procedures on Prevailing Wage and Living Wage Resolutions enforcement that are consistent with City policy to ensure that staff consistently uses all available enforcement tools and follows-up with those contractors who do not return requested documents. Further, the City Attorney’s Office should advise if and when the City should withhold payments to construction and service and maintenance contractors. In addition, the City Council should revisit and consider expanding the enforcement tools the Living Wage Policy recommends to ensure that contractors comply with the Resolutions. Further, Purchasing needs to develop a formal process to ensure that the OEA is consistently informed of all awarded contracts that are subject to the Prevailing Wage and Living Wage Resolutions. Additionally, the OEA should impose financial penalties on contractors who willfully and blatantly violate the City’s Prevailing Wage or Living Wage Resolutions. Finally, the

OEA should submit to the City Council an evaluation of the advantages and disadvantages of becoming a designated Labor Compliance Program.

RECOMMENDATIONS

We recommend that the OEA:

Recommendation #1 Review the workload among construction contract compliance specialists and require staff to document when they received and reviewed compliance documents. (Priority 3)

Recommendation #2 Develop Prevailing and Living Wage Resolutions enforcement procedures including the requirement that staff document when contractors return requested compliance documents. (Priority 3)

In addition, we recommend that the City Attorney's Office:

Recommendation #3 Advise if and when the City should withhold payments to construction and service and maintenance contractors. (Priority 3)

We also recommend that the City Council:

Recommendation #4 Revisit its Living Wage Resolution and consider specifying the withholding of payments to contractors as a means to compel contractors to comply with OEA requests for documents. (Priority 3)

We also recommend that the OEA:

Recommendation #5 Develop Prevailing Wage and Living Wage Resolutions enforcement procedures including the use of withholding payments to non-compliant contractors and tracking the number of times the withholding of payments was used as an enforcement tool. (Priority 3)

Moreover, we recommend that Purchasing:

Recommendation #6 **Formally inform its Buyers of the importance of checking off Prevailing and Living Wage boxes on Purchase Orders and forwarding those Purchase Orders to the OEA for Prevailing and Living Wage Resolutions review and enforcement. (Priority 3)**

Further, we recommend that the OEA:

Recommendation #7 **Impose financial penalties on contractors who willfully or blatantly violate the City's Prevailing Wage or Living Wage Resolutions. (Priority 2)**

Recommendation #8 **Submit to the City Council an evaluation of the advantages and disadvantages of becoming a designated Labor Compliance Program. (Priority 3)**

Finding II

There Appears To Be Insufficient Workload To Justify Current Fair Employment And Disability Access Staffing

The Fair Employment and Disability Access (FEDA) staff is responsible for implementing the City's employment policies.⁷ In order to do so, Fair Employment and Disability Access staff investigate and resolve (1) City employee and applicant complaints of harassment and discrimination for employment and (2) disability access complaints that users of City services file. During our review of the FEDA section we found that:

- the OEA investigates an average of 38 harassment and discrimination cases yearly;
- the current FEDA section workload is insufficient to justify three staff persons;
- the OEA overstated the number of hours that staff spent training City employees; and
- in 2002-03 the Administration moved the FEDA to the Office of Employee Relations in the City Manager's Office.

In our opinion, the Office of Employee Relations should reassess the Fair Employment and Disability Access workload and if necessary reassign the analyst to other responsibilities. In addition, the Office of Employee Relations should accurately record the hours its staff spends providing training.

The OEA Investigates An Average Of 38 Harassment And Discrimination Cases Yearly

We found that the OEA investigated an average of 38 harassment and discrimination cases per year during the past four years. This amounts to an average of about three cases per month. Exhibit 6 summarizes the OEA's investigations of harassment and discrimination during 1998-99, 1999-00, 2000-01, and 2001-02.

⁷ Equal Employment Opportunity Plan and Program.

Exhibit 6 Summary Of OEA Investigations Of Harassment And Discrimination During 1998-99 Through 2002

Fiscal Year	1998-99	1999-00	2000-01	2001-02	Average
Average Number Of Monthly Complaints	3	2	3	5	<u>3</u>
Total Number Of Complaints	31	23	36	63	<u>38</u>

Source: Auditor analysis of OEA data.

As Exhibit 6 shows, the number of complaints filed ranged from a low of 23 complaints in 1999-00 to a high of 63 for 2001-02. This means that three staff persons would each investigate an average of about one case a month. In addition, according to the FEDEA coordinator, the number of complaints in 2001-02 was unusually high and the number of complaints is usually 30 to 35 cases per year.

Employees File Complaints Of Harassment And Discrimination In Three Different Ways

An employee can approach an issue of discrimination by filing a complaint with (1) the Equal Employment Opportunities Commission (EEOC); (2) the Disability and Fair Employment and Housing Commission (DFEH) or; (3) the OEA. The EEOC and the DFEH are independent agencies that investigate complaints of harassment and discrimination. When an employee complains directly to these outside agencies, the EEOC or the DFEH sends a letter to the OEA informing them of the complaint and that an investigation has been initiated. In these instances, the OEA's role is as the liaison between the complainer, the department involved, and the outside agencies.

However, often an employee files a complaint directly with the OEA. These are administrative complaints. Staff reviews these complaints to ensure that they fall under the scope of their oversight. Usually this is done within 30 days of receiving a complaint. The OEA reviews complaints on a priority basis. For example, a sexual harassment complaint would be reviewed immediately. OEA staff interview the complainer, the accused, and any witnesses. If staff finds cause for the complaint, it makes recommendations. The OEA puts the results of the investigation into a confidential report and sends a copy of the report to the City Attorney's Office and the City Manager's Office.

The FEDA Section Conducts Disability Access Investigations On A Complaint Basis

A goal of the FEDA section is to ensure that all City departments provide adequate access to City services, programs, and facilities for persons with disabilities. Until recently, the FEDA section had a Disability Access Coordinator. The Disability Access Coordinator conducted disability access investigations which are on a complaint basis.

The FEDA Section's Workload Is Insufficient To Justify Two Staff Persons

Only one⁸ FEDA section staff person conducted investigations in 2000-01. We estimate that this one staff person spent an average of about 50 hours a month investigating complaints of harassment and discrimination. This equates to only a third of a year's worth of staff time (or 1/3 of an FTE).

According to the OEA Director, this staff person spent the remaining hours in 2000-01 doing research on recent court decisions, preparing reports on investigation results, and preparing to conduct training sessions. In our opinion, this estimated workload demonstrates that one staff person is more than sufficient to effectively perform the OEA investigations of harassment and discrimination.

In 2001-02, the FEDA section had three authorized positions the FEDA Coordinator, the Disability Access Coordinator and an Analyst. Of the three positions, the positions of the Disability Access Coordinator and the Analyst were vacant. In 2001-02, the OEA hired an analyst to fill the vacant analyst position. All three positions were supposed to investigate cases of harassment and discrimination.

In 2002-03 The Administration Moved The FEDA Section To The Office Of Employee Relations

For 2002-03, as a result of an OEA reorganization, the Administration moved the staff from the FEDA section to the City Manager's Office (Office of Employee Relations). In addition, the City Manager's Office proposed and the City Council approved the elimination of the Disability Access Coordinator position. According to the proposed budget, *"Moving the Fair Employment and Disability Access Core Service to the Office of Employee Relations will improve coordination of efforts on employee investigations and complaint resolution, which are currently handled by both Offices. Transferring the Labor Compliance Core Service to*

⁸ The OEA Director spent 15 hours investigating one case.

Public Works will provide greater coordination and support to the current efforts of ensuring Equality Assurance in labor compliance.”

Estimated Annual Cost Of The Two FEDA Positions Is \$181,970

As stated above, the FEDA section does not support two positions. We found that the estimated costs for the two positions are \$181,971. Exhibit 7 gives the salary breakdown of the two positions.

Exhibit 7 Salary Breakdown Of Two FEDA Positions

Section Positions	Salary
FEDA Coordinator	\$103,153
Analyst II	\$78,817
Total	<u>\$181,970</u>

Source: OEA.

In our opinion, the Office of Employee Relations should evaluate the workload of the FEDA section and consider reassigning the analyst to other responsibilities. This would ensure that the City uses its resources in a cost effective and efficient manner.

We recommend that the Office of Employee Relations:

Recommendation #9

Reassess the Fair Employment and Disability Access workload and if necessary reassign the analyst to other responsibilities. (Priority 3)

OEA Overstated The Number Of Hours That Its Staff Spent Training City Employees

The FEDA section reports on the number of hours that staff devoted to training as part of its performance and resource overview. The training the FEDA conducts covers various aspects of the City policy on harassment and discrimination. The training that the FEDA section conducts is either department-requested or OEA-suggested.

We found that the OEA overstated the hours its staff spent training City employees by over 2000 percent or 528 hours. Specifically, we found that OEA staff conducted 14 training sessions in 2000-01 for a total of 26 hours. However, we found

that OEA staff incorrectly multiplied the actual training hours by the number of persons attending the training seminar to obtain the number of training hours. In other words, if staff spent 2 hours conducting a training seminar for 20 people, the OEA would have reported that its staff spent 40 hours training City employees. Instead, the OEA should have reported that its staff spent 2 hours training City employees and that City employees received 40 hours of training. Exhibit 8 compares the training hours the OEA calculated and the actual number of hours its staff spent training City employees in 2000-01.

Exhibit 8 Comparison Of OEA To City Auditor-Calculated Staff Training Hours For 2000-01

Date	OEA Methodology For Estimating Total Training Hours For 2000-01			Auditor Estimate Of Training Hours	Difference
	Number Of Hours	Number Of Persons Attending The Training	Total Number Of Training Hours		
7/20/00	1.5	40	60	1.5	58.5
9/12/00	1	25	25	1	24
10/10/00	3.5	25	87.5	3.5	84
10/13/00	1	30	30	1	29
11/14/00	3.5	7	24.5	3.5	21
1/22/01	1.5	39	58.5	1.5	57
3/29/01	2	30	60	2	58
4/6/01	2	29	58	2	56
4/17/01	2	35	70	2	68
5/17/01	1	1	1	1	0
5/17/01	1.5	6	9	1.5	7.5
5/18/01	1.5	3	4.5	1.5	3
5/22/01	2	15	30	2	28
6/14/01	2	18	38	2	34
TOTAL	<u>26</u>	<u>303</u>	<u>554</u>	<u>26</u>	<u>528</u>

Source: Auditor analysis of OEA data.

As shown in Exhibit 8, by multiplying the number of training hours by the number of attendees, the OEA calculated that its staff spent 554 hours on training City employees in 2000-01 an overstatement of 2000 percent. In our opinion, the OEA should have reported that its staff spent 26 hours training City employees and that City employees received 528 hours of harassment and discrimination training in 2000-01.

We recommend that the Office of Employee Relations:

Recommendation #10

Accurately record and report the hours its staff spends training City employees and the hours of harassment and discrimination training City employees receive. (Priority 3)

CONCLUSION

Our review revealed that the FEDA section does not have sufficient workload to support two positions. We also found that the OEA overstated the hours its staff spent training City employees by 2000 percent. In our opinion, the Office of Employee Relations should reassess the Fair Employment and Disability Access section workload and if necessary reassign the analyst to other responsibilities. In addition, the Office of Employee Relations should accurately record and report the hours its staff spends training City employees and the hours of harassment and discrimination training City employees receive.

RECOMMENDATIONS

Finally, we recommend that the Office of Employee Relations:

Recommendation #9 Reassess the Fair Employment and Disability Access workload and if necessary reassign the analyst to other responsibilities. (Priority 3)

Recommendation #10 Accurately record and report the hours its staff spends training City employees and the hours of harassment and discrimination training City employees receive. (Priority 3)



RECEIVED
 SEP 19 2002
 CITY AUDITOR

Memorandum

TO: Gerald Silva

FROM: Nina S. Grayson

**SUBJECT: RESPONSE TO AUDIT -
 OFFICE OF EQUALITY ASSURANCE**

DATE: September 19, 2002

Approved

Date

9-19-02

BACKGROUND

Thank you for providing the Office of Equality Assurance the opportunity to review the final draft report entitled, *An Audit of the City of San Jose's Office of Equality Assurance*. We, in coordination with the City Manager's Office/Office of Employee Relations and the General Services Department, are pleased to provide the formal response to the Auditor's ten recommendations. The recommendation specific to the City Attorney's Office will be provided separately.

The Office of Equality Assurance has a dedicated and experienced staff that deserves recognition for its commitment to educating employers, protecting employees' rights, investigating and resolving harassment and discrimination complaints and training City staff on various City policies.

Our Office accomplishments highlight the quality and volume of work performed.

	FY 2000-2001	FY 2001-2002
Labor Compliance		
Number of contracts monitored	1623	1789
Number of classification determinations issued to City departments	838	832
Total number of contractors found violating wage requirements	52	96
✓ Construction projects	40	67
✓ Service & Maintenance projects	12	29
Number of workers underpaid on City and Redevelopment Agency projects	320	710
Amount of wages recovered/paid to workers (Restitution)	\$411,969.87	\$576,984.51

	FY 2000-2001	FY 2001-2002
EEO and Disability Access		
Total number of administrative complaints investigated	20	54
✓ Harassment	7	32
✓ Discrimination	13	22
Number of complaints substantiated		
✓ Harassment	1	3
✓ Discrimination	0	0
Number of complaints filed with outside agencies		
✓ EEOC	9	4
✓ DFEH	8	5
Number of training sessions held	14	22
Number of City staff attending training sessions	303	619
Number of training hours provided	26	34

RECOMMENDATION RESPONSES

RECOMMENDATION 1 – That OEA review the workload among construction contract compliance specialists and require staff to document when they received and reviewed compliance documents. (Priority 3)

OEA Response – OEA generally concurs with recommendation.

Workload among Construction Contract Compliance Specialists

The workload variance cited is attributable to staffing level and the difference in the type of projects.

The Construction Team has 8 authorized positions: 1 Contract Compliance Coordinator; 6 Contract Compliance Specialists; and 1 Contract Compliance Assistant. For the period of time audited, July 1, 2000 to June 30, 2001, 3 Construction Team staff members were carrying the majority of the monitoring workload. 2 Contract Compliance Specialists were new City employees (hired in April and June 2001), 1 Contract Compliance Specialist was on leave until mid-July 2001 and 2 Contract Compliance Specialists positions were being advertised and recruited until the hiring freeze was instituted. These 2 positions remain vacant. Currently, the workload is more evenly disbursed.

The type of project also has an impact on the workload of a Contract Compliance Specialist. Housing and Redevelopment Agency housing projects typically have 30 to 50 subcontractors per project. Even though the total number of housing and Redevelopment Agency housing projects is less than the total number of all other construction projects, the number of contractors to monitor is greater.

Review of Contractor Documents by Construction Contract Compliance Specialists

A new procedure has been developed to ensure that OEA's database reflects the date of receipt of construction compliance reports and the date these reports are reviewed.

RECOMMENDATION 2 – That OEA develop Prevailing and Living Wage Resolutions enforcement procedures including the requirement that staff document when contractors return requested compliance documents. (Priority 3)

OEA Response – OEA generally concurs with recommendation.

Compliance Achieved – Service and Maintenance Contracts

For the period of time audited, July 1, 2000 to June 30, 2001, the Service and Maintenance Team was not fully staffed. Only 2 of the 4 authorized positions were filled for the entire fiscal year due to limited office space. Once the Office relocated to 4 North 2nd Street in late October 2000, full staffing was achieved by late January 2001. With limited staffing, 42 percent compliance was considered reasonable.

For Fiscal Year 2001-2002, compliance on service and maintenance contracts was 65 percent, a 23 percent improvement over Fiscal Year 2000-2001. For Fiscal Year 2002-03, our target is 80 percent compliance.

Document when Contractors Provide Required Documents

This will be accomplished by the procedural change described in our response to Recommendation 1.

RECOMMENDATION 4 – That the City Council revisit its Living Wage Resolution and consider specifying the withholding of payments to contractors as a means to compel contractors to comply with OEA requests for documents. (Priority 3)

OEA Response - OEA concurs with recommendation.

The Living Wage Policy currently identifies the enforcement tools as:

The service contract or financial assistance agreement shall provide that if a violation of any provision of this Policy occurs and is not corrected after written notice, the City may at its option, do any or all of the following:

- 1. Suspend and/or terminate the contract or financial assistance agreement for cause;*
- 2. Require the employer to pay any amounts underpaid in violation of the required payments and City's administrative costs and liquidated damages, and in the case of financial assistance to refund any sums disbursed by the City;*
- 3. Debar the contractor or subcontractor from future City contracts and/or deem the recipient ineligible for future financial assistance.*

In our draft Living Wage Report submitted to the City Manager’s Office earlier this year, OEA has recommended to add the ability to “withhold monies from progress payments and/or final payment until compliance is effectuated.” We believe this fourth tool will enable staff to bring contractors into compliance without taking the drastic measure to suspend, terminate or debar.

RECOMMENDATION 5 – That OEA develop Prevailing Wage and Living Wage Resolutions enforcement procedures including the use of withholding payments to non-compliant contractors and tracking the number of times the withholding of payments was used as an enforcement tool. (Priority 3)

OEA Response – OEA concurs with recommendation.

When contractors have not provided the required documents or when there are prevailing wage violations, construction staff requests the Project Manager and the Finance Department to withhold the final 10 percent retention until compliance is effectuated. Withholding of the final 10 percent retention generally ensures full compliance.

Recently, on a very limited pilot basis, construction staff has requested the Project Manager and Finance Department to withhold 10 percent of the progress payment on two projects until the required documents were received. Withholding 10 percent of the progress payments proved mixed. On the first project, the documents were immediately received once the contractor was notified of the partial withholding of the progress payment. On the second project, the withholding of 10 percent of the progress payment has not been successful; the documents have not been received.

Once the City Attorney’s Office provides written advice on withholding, OEA will develop written procedures to withhold progress payments on non-compliant contractors and track the results through a new quality performance measure.

RECOMMENDATION 6 – That Purchasing formally inform its Buyers of the importance of checking off Prevailing and Living Wage boxes on Purchase Orders and forwarding those Purchase Orders to the OEA for Prevailing and Living Wage Resolutions review and enforcement. (Priority 3)

General Services Department Response – General Services concurs with recommendation.

The General Services Department has formally informed Buyers of the importance of checking off the Prevailing Wage/Living Wage boxes on the Purchase Order and forwarding those purchase orders to OEA for prevailing wage and living wage monitoring and enforcement. Written procedures have been developed and distributed to all Procurement staff, in addition to discussing at staff meetings. It is now required to write the OEA# in the text of the purchase order. Also, another level of review and approval, at the Purchasing Manager and/or Agent level, has been implemented to detect any omissions to the process. As one last check, clerical staff also reviews the purchase orders to ensure the process has been completed.

RECOMMENDATION 7 – That OEA impose financial penalties on contractors who willfully or blatantly violate the City’s Prevailing Wage or Living Wage Resolutions. (Priority 2)

OEA Response – OEA generally concurs with recommendation.

The California Labor Code allows for the assessment of penalties when: (1) a contractor fails to comply with a request for documents within 10 days and (2) a contractor does not pay its workers the stipulated prevailing wage rates. The Director of the California Department of Industrial Relations shall determine the amount of the penalty to be assessed based on consideration of both of the following: (1) whether the failure of the contractor or subcontractor to pay the correct wage rates was a good faith mistake and, if so, the error was promptly and voluntarily corrected upon being brought to the attention of the contractor or subcontractor and (2) whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

The City of Los Angeles imposes penalties on contractors when they violate wage requirements. For Fiscal Year 2000-2001, \$979,163,82 was owed to workers, but only \$395,535.94 was collected and disbursed to affected workers.

On the other hand, OEA has not requested the Industrial Relations Director to assess penalties. We have not done so because our highest priority and effort is getting the employees their restitution as quickly as possible. Over the past two fiscal years, OEA’s record for wages recovered and paid to workers is remarkable -- 148 contractors found violating wage requirements and \$988,954.38 in restitution paid to 1,030 affected workers.

When appropriate, OEA will request the Industrial Relations Director to assess penalties on non-compliant contractors. We will track the number of assessments requested and the number and amount of penalties assessed in the Activity & Workload Highlights of the budget document.

RECOMMENDATION 8 – That OEA submit to the City Council an evaluation of the advantages and disadvantages of becoming a designated Labor Compliance Program. (Priority 3)

OEA Response – OEA concurs with recommendation.

The Office of Equality Assurance is currently reviewing the requirements for a Labor Compliance Program as well as other possible administrative actions and remedies.

RECOMMENDATION 9 – That OER reassess the Fair Employment and Disability Access workload and if necessary reassign the analyst to other responsibilities. (Priority 3)

OER Response - OER concurs with recommendation.

With the recent reorganization of the fair employment and disability access function to the Office of Employee Relations, the responsibilities of the two staff members reassigned from the Office of Equality Assurance are now incorporated in the broader responsibilities of the Office. This

will result in staff assuming other responsibilities in Employee Relations while continuing to provide fair employment and disability access service. This will maximize the utilization of resources and increase efficiency in the fair employment and disability access function as well as in the other Office of Employee Relations program areas.

RECOMMENDATION 10 – That OER accurately record and report the hours its staff spends training City employees and the hours of harassment and discrimination training City employees receive. (Priority 3)

OER Response - OER concurs with recommendation.

A record-keeping methodology to achieve the results contained in this recommendation is in place in the Office of Employee Relations.

CONCLUSION

We are pleased the Auditor's Report found no major areas of concern in OEA's program. We look forward to continue building upon our well-respected and successful program through the improvements recommended.



Nina S. Grayson
Director, Office of Equality Assurance
Public Works Department



APPENDIX A

DEFINITIONS OF PRIORITY 1, 2, AND 3 AUDIT RECOMMENDATIONS

The City of San Jose's City Administration Manual (CAM) defines the classification scheme applicable to audit recommendations and the appropriate corrective actions as follows:

Priority Class¹	Description	Implementation Category	Implementation Action³
1	Fraud or serious violations are being committed, significant fiscal or equivalent non-fiscal losses are occurring. ²	Priority	Immediate
2	A potential for incurring significant fiscal or equivalent fiscal or equivalent non-fiscal losses exists. ²	Priority	Within 60 days
3	Operation or administrative process will be improved.	General	60 days to one year

¹ The City Auditor is responsible for assigning audit recommendation priority class numbers. A recommendation which clearly fits the description for more than one priority class shall be assigned the higher number. **(CAM 196.4)**

² For an audit recommendation to be considered related to a significant fiscal loss, it will usually be necessary for an actual loss of \$25,000 or more to be involved or for a potential loss (including unrealized revenue increases) of \$50,000 to be involved. Equivalent non-fiscal losses would include, but not be limited to, omission or commission of acts by or on behalf of the City which would be likely to expose the City to adverse criticism in the eyes of its citizens.
(CAM 196.4)

³ The implementation time frame indicated for each priority class is intended as a guideline for establishing implementation target dates. While prioritizing recommendations is the responsibility of the City Auditor, determining implementation dates is the responsibility of the City Administration.
(CAM 196.4)

APPENDIX B

The California Labor Code Provides Additional Enforcement Tools For Non-Compliant Contractors

- *Contractors¹ and/or subcontractors that are found to have willfully falsified payroll reports (Statements of Compliance) may be subject to civil or criminal prosecution. Penalties may be imposed of \$1,000 and/or one year in prison for each false statement (Section 1001 of Title 18 and Section 231 of Title 31 of the United States Code).*

Payment Less Than The Stipulated Rate—Penalty²

- *The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars (\$50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done (...) by him or her or by any subcontractor under him or her. The amount of this penalty shall be determined by the Labor Commissioner (...). The Labor Code further states that, A mistake, inadvertence or neglect in failing to pay the correct rate of the prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. (emphasis added).*

¹ Making Davis-Bacon Work--- A Contractors Guide to Prevailing Wage Requirements For Federally-Assisted Construction Projects

² California Labor Code Sections 1720-1861

Violation Of Chapter With Intent to Defraud---Ineligibility to Bid on Contract

- *Whenever a contractor or subcontractor performing a public works project pursuant to this chapter, except Section 1777.5, is found by the Labor Commissioner to be in violation of this chapter with intent to defraud, the contractor or subcontractor..... shall be ineligible for a period of not less than one year or more than three years to do either of the following*
 1. *Bid on or be awarded a contract for a public works project.*
 2. *Perform work as a subcontractor on a public works project.*