

# MEMORANDUM

Date: 21 MARCH 2012

To: Tom Fellenz, Esq. – Acting Chief Executive Officer of the California High Speed Rail Authority

From: Blake Konczal, Co-Chair Education Committee - Fresno Works Consortium

Re: Revised “Targeted Unemployed Worker” Hire Criteria and “First Source”  
Transparency Requirements Recommendations to the California High Speed Rail  
Authority

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## I. Recommendations

The Fresno Works Consortium, recommends that the California High Speed Rail Authority (CA-HSRA) consider for inclusion in its Request for Proposal for High Speed Rail construction the following “Targeted Unemployed Worker” hire criteria and “First Source” Transparency Requirements.

### A. Hiring Requirements

The following goals shall be achieved for the project:

1. **Ten (-10-) Percent of all project work hours shall be performed by “Targeted Unemployed Workers,”** where "Targeted Unemployed Workers" are defined as workers who: (1) are unemployed, and (2) reside in Targeted Employment Areas. "Targeted Employment Areas" are defined by the Code of Federal Regulations as "an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate." 8 C.F.R. § 204.6(e).
2. **A minimum of Twenty Five (-25-) Percent of all hours worked by Construction Apprentices shall be performed by Targeted Unemployed Workers.** An apprentice means any worker indentured in a bona fide construction apprenticeship program registered and approved by the State where said construction is to take place.

### B. Additional “*First Source*” Transparency Requirements

The Proposal also sets out "First Source" Transparency Requirements by which prime contractors chosen for the High Speed Rail construction and professional services contracts are required to notify the CA-HSRA of job openings. First Source Transparency Requirements to include:

- a. A mandate that contractors chosen through the public Request for Proposal process be required to share a roster of all job titles to be hired with approximate numbers within one month of contracting with the CA-HSRA.
- b. A mandate that chosen contractors also provide hiring criteria for the job titles referenced above in b.

- c. A mandate that to the extent that said jobs will be drawn from organized labor, that such hiring criteria also be reflective of union apprenticeship requirements.
- d. A further mandate that contractors specify how interested applicants may apply for positions; electronically, by US mail, by telefax, in person, etc. That in the instance that said contractors require an applicant to physically drop off an application, that there be at least one such drop off point within the multi-county, first phase, construction zone that stretches from Bakersfield to Madera.

### C. Other Requirements

1. **Targeted Unemployed Worker Schedule.** The Contractor(s) chosen by CA-HSRA shall develop a Targeted Unemployed Worker Schedule that establishes the hiring process and approximate timetable to be followed by the Contractor(s) and all sub-contractors for construction hiring to achieve the overall requirements of the Targeted Unemployed Worker Program. The Targeted Unemployed Worker Schedule shall provide the basis for the CA-HSRA monitoring of the project. The Targeted Unemployed Worker Schedule must be submitted to the CA-HSRA no less than thirty (30) days before construction begins, and shall be approved or disapproved by the CA-HSRA Chief Executive Officer (CEO) or designee within two weeks of submittal by the Contractor(s). The Contractor(s) shall not start construction without an approved Targeted Unemployed Worker Schedule.
2. **Targeted Unemployed Worker Orientation.** Before construction begins, the Contractor(s) shall contact the CA-HSRA to schedule a Targeted Unemployed Worker Orientation with its contractors. The purpose of this orientation is to help all contractors on the project understand the Targeted Unemployed Worker Program, Targeted Unemployed Worker Requirements, reporting requirements, role of the Referring Entities, and to have any other questions answered. The Targeted Unemployed Worker Orientation may take place concurrently with the pre-construction meeting, if applicable.
3. **Maximizing Apprentices.** The Contractor(s) and their sub-contractors shall use the maximum number of apprentices allowed by law.
4. **Coordination with unions.** The Contractor(s) and their sub-contractors that have an agreement with a construction union shall use the following procedures and shall inform each relevant union of these requirements:
  - a. The Contractor(s) and their sub-contractors shall give priority to Targeted Employment Area Residents and Disadvantaged Workers to the extent that this does not require a contractor or union to violate an existing construction labor contract.
  - b. The Contractor(s) and their sub-contractors shall sponsor any qualified Targeted Unemployed Worker as a first period apprentice and shall indicate this by sending a letter or form, as appropriate, to the relevant union or apprenticeship program expressing a commitment to

- sponsor the Targeted Unemployed Worker in question (e.g. hiring the individual to enable his/her entry into an apprenticeship program).
- c. The Contractor(s) and their sub-contractors shall use a Craft Request Form provided by the CA-HSRA. The Contractor(s) shall send copies of all completed Craft Request Forms to the CA-HSRA. All copies of all Craft Request Forms submitted and/or received, including transmission verification documents that are date/time imprinted or a log of related faxes sent and received regarding Targeted Unemployed Worker Requirements shall be maintained and submitted to the CA-HSRA when requested.
  - d. If a project labor agreement is negotiated to cover this project, such an agreement shall include a provision requiring the parties to adhere to this Targeted Unemployed Worker Program. The Contractor(s) and their sub-contractors shall promptly notify the CA-HSRA of any union that fails or refuses to refer Targeted Unemployed Workers and/or Disadvantaged Workers for construction jobs on this project.
5. **Targeted Unemployed Worker Report.** The Contractor(s) shall report quarterly to the CA-HSRA on the progress of the Targeted Unemployed Worker Program in a format to be determined by the CA-HSRA. The report shall detail the number of Targeted Unemployed Workers that have been hired by all contractors; and in aggregate since the inception of the project. If requested by the CA-HSRA, the Contractor(s) shall be required to provide copies of payroll records to verify the Targeted Unemployed Worker Report. All Targeted Unemployed Worker Reports, the Targeted Unemployed Worker Schedule, and payroll records shall be sent to CA-HSRA.
6. **Monitoring** - CA-HSRA shall establish a contract compliance office with staff experienced in implementing hiring goals.
7. **Sanctions** – Contractors found by the CA-HSRA to be in non-compliance with Targeted Unemployed Worker hiring requirements or “First Source” Transparency Requirements may have their contracts terminated for such cause. All appropriate Requests for Qualification (RFQ), Requests for Proposal (RFP) and final CA-HSRA contract language shall include specific mention of this sanction provision. CA-HSRA will monitor Contractor compliance with these requirements on a quarterly basis. Contractor non-compliance may result in the withholding of further release of funding until compliance is met. Alternatively, contractors that comply with these requirements may be awarded points applicable to future CA-HSRA public procurements.

## II. Background

This memorandum presents a proposal (the "Proposal") designed to maximize the hiring of workers from areas of high unemployment on the California High Speed Rail project. The Proposal recognizes that one of the purposes of the High Speed Rail project is to provide short-term and long-term economic benefits in communities that have been acutely impacted by the Great Recession.

Therefore, the Proposal attempts to focus the employment benefits of the High Speed Rail project to those targeted communities by mandating

The Proposal also sets out a "First Source" Transparency requirements by which prime contractors selected for High Speed rail construction and professional services contracts are required to notify the California High Speed Rail Authority of job openings, especially entry-level job openings.

### A. Findings and Purpose

In an effort to achieve several public investment goals and to relieve the unemployment effects of the Great Recession, the federal government in 2009 enacted the American Recovery and Reinvestment Act ("ARRA"). The "Statement of Purposes" of ARRA, set forth in section 3 of the Act, include "preserv[ing] and creat[ing] jobs and promot[ing] economic recovery," "assist[ing] those most impacted by the recession," and "stabiliz[ing] State and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases." 123 Stat. 115-16 (2009). To accomplish the goal of "creat[ing] jobs," ARRA allocated funds for the High Speed Rail project in order to create jobs for "those most impacted by the recession."

Counties throughout the United States have registered unemployment rates significantly higher than the national rate. The national unemployment rate for July 2011 was 9.3%.

Many counties in California suffer from unemployment rates that are much higher than the national rate: Imperial (30.8%), Yuba (19.3%), Merced (18.7%), Colusa (18.4%), Sutter (18.2%), Alpine (18.1%), Fresno (16.7%), Tulare (16.6%), Kings (16.1%), Kern (15.5%), Madera (15.4%),

Counties in nearby states also suffer from staggeringly high unemployment: Yuma County, Arizona (30.0%), Santa Cruz County, Arizona (18.0%), Apache County, Arizona (17.4%), Lyon County, Nevada (17.4%), Nye County, Nevada (17.1%), and Mineral County, Nevada (14.7%).

### B. Proposal for Mandated Hiring of Unemployed Workers for High Speed Rail Projects

The Proposal sets mandates for the hiring and utilization of Targeted Unemployed Workers for High Speed Rail projects. "Targeted Unemployed Workers" are defined as workers who: (1) are unemployed and (2) reside in Targeted Employment Areas. "Targeted Employment Areas" are defined by the Code of Federal Regulations as "an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate." 8 C.F.R. § 204.6(e).

The Proposal also includes a "First Source" Transparency requirements where prime contractors would be mandated to maintain at least one physical office (and/or publically accessible web site?) for hiring purposes somewhere within the multi-county, first phase construction zone that stretches from Bakersfield to Madera along with other job notice requirements.

C. Legal Authority in support of the Proposal

The Proposal targets "those most impacted by the recession" and is therefore in accord with the explicit purposes of ARRA. Other hiring proposals adopted in connection with public works projects have been invalidated on constitutional or regulatory grounds because they provided illegal local hiring preferences. The Proposal was drafted with this background in mind and avoids the legal concerns raised by Targeted Unemployed Worker proposals.

The analysis set forth below outlines the legal concerns raised by Targeted Unemployed Worker proposals and outlines how the Proposal avoids those concerns. Targeted Unemployed Worker proposals have been invalidated (A) under the Privileges and Immunities Clause because they discriminate on the basis of state citizenship, and (B) under federal U.S. Department of Transportation ("US DOT") regulations because they provide prohibited local geographic preferences. Here, the Proposal does not discriminate on the basis of state citizenship and does not provide prohibited local geographic preferences.

1. **The Proposal avoids scrutiny under the privileges and immunities clause**

The Privileges and Immunities Clause prohibits a state from "abridg[ing] the privileges and immunities of citizens of the United States." U.S. Const. amend. XIV, § 1, cl. 2. In other words, a state may not discriminate against persons based on their state citizenship. Local hiring preferences have been declared unconstitutional under the Privileges and Immunities Clause because they discriminate against out-of-state residents. For example, in *Hicklin v. Orbeck*, 437 U.S. 518 (1978), the U.S. Supreme Court struck down Alaska's local hiring preference because it required contractors to hire qualified Alaskans in preference over nonresidents.

The Privileges and Immunities analysis does not apply to the Proposal because there is no differential treatment of persons based on their state citizenship. The proposal requires contractors to employ persons based on their unemployment status and on the economic state of their community of residence. Thus, an unemployed worker from a disadvantaged community in Arizona is given the same preference as an unemployed worker from a disadvantaged community in California.

2. **The Proposal avoids scrutiny under federal regulations prohibiting local geographical preferences**

The Proposal also avoids the regulatory challenges faced by Targeted Unemployed Worker proposals. The United States Department of Transportation generally has prohibited the use of Targeted Unemployed Worker requirements on transportation projects with federal dollars. Public works projects funded by grants from the U.S. Department of Transportation must

comply with Title 49, section 18.36 of the Code of Federal Regulations. Paragraph (c)(2) of the regulation states that "[g]rantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals." The Federal Transit Administration recently provided guidance to the San Francisco Municipal Transportation Agency (SFMTA) that paragraph (c)(2) prohibited SFMTA's attempt to include Targeted Unemployed Worker provisions in its contracts for the construction of the Central Subway Project.

The Proposal does not impose in-State or local geographical preferences. As discussed previously, the preferences provided under the Proposal are independent of locality: an unemployed local worker receives the same preference as an unemployed non-local worker.

Moreover, even if the Proposal could be characterized as a Targeted Unemployed Worker policy, the Proposal would not run afoul of the regulations because the regulations expressly exclude state agencies from this prohibition. Paragraph (a) of Title 49, section 18.36, which precedes paragraph (c)(2) (the paragraph relied on by the US DOT), sets forth the requirements for procurements done by States. It states that "[o]ther grantees and subgrantees will follow paragraphs (b) through (i) in this section." 49 C.F.R. § 18.36(a) (emphasis added). Accordingly, the implication is that a state is *not* required to follow paragraphs (b) through (i), which includes the prohibition against local geographic preference set forth in paragraph (c)(2). A state does not fall within the category of "other grantees and subgrantees." The High Speed Rail Authority is a division of the State. Accordingly, the Proposal is immune from scrutiny under the federal regulations prohibiting local geographical preferences.<sup>1</sup>

The express language of ARRA states that one of the purposes of the High Speed Rail funds is "to create jobs" and "to assist those most impacted by the recession," 123 Stat. 115-16 (2009), which is precisely what the Proposal aims to do. "Those most impacted by the recession" would include persons in Targeted Employment Areas which suffer from chronic high employment.

Based on the above language, High Speed Rail is a "case where applicable Federal statutes expressly mandate or encourage geographical preferences." Accordingly, the Proposal is safely in conformity with applicable US DOT regulations.

### III. CONCLUSION

The Proposal promotes the fundamental goals which justified the California High Speed Rail project. The Proposal advances ARRA's stated goals of creating jobs and assisting those most impacted by the recession by providing valuable job training for unemployed or inexperienced workers and opens a path to quality jobs for disadvantaged workers without advanced degrees. The Proposal further targets the most economically depressed communities throughout the nation by requiring contractors to provide job opportunities to residents of these disadvantaged

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<sup>1</sup> This interpretation was adopted by at least one federal district court in *A-G-E Corp. v. U.S.*, 753 F. Supp. 836, 851 (D.S.D. 1990), which interpreted a different, but identical, federal regulation (43 C.F.R. § 12.76).

communities. Accordingly, the economic stimulus "assist[s] those most impacted by the recession," and is in consistent with federal laws and regulations.

Effective adoption and implementation of a reasonable Targeted Unemployed Worker requirement during the initial construction of the one hundred and forty (-140-) mile stretch of the high speed rail route will set the stage for the successful implementation of additional Targeted Unemployed Worker programs when the High Speed Rail Maintenance Facility is constructed and permanent jobs become available.

#### **IV. CONTACT**

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