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**MEMORANDUM**

**TO:** Blake Konczal, Executive Director Fresno Regional  
Workforce Investment Board

**FROM:** Kenneth J. Price  
BAKER MANOCK & JENSEN, PC

**DATE:** August 8, 2012

**RE:** Legal Analysis of the "National Targeted Hiring Program"

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This memorandum analyzes the legal issues arising from the proposed National Targeted Hiring Program for recommendation to the California High Speed Rail Authority ("CHSRA").

**I**  
**NATIONAL TARGETED HIRING PROGRAM**

The Fresno Regional Workforce Investment Board and the Fresno Works Consortium designed the National Targeted Hiring Program for recommendation to the CHSRA.

The National Targeted Hiring Program establishes an obligation that forty percent (40%) of all construction work hours for the California High Speed Rail Project ("the CHSR Project") be performed by National Disadvantaged Workers. A minimum of ten percent (10%) of all construction work hours must be performed by National Targeted Workers with priority given to residents of National Extremely Disadvantaged Areas.

The class of National Targeted Workers is defined as an individual who is (1) residing in a National Extremely Economically Disadvantaged Area, or (2) residing in a National Economically Disadvantaged Area.

National Extremely Economically Disadvantaged Area is defined as a zip code that includes a census tract or portion thereof in which the median annual household income is less than \$27,500 per year, as measured and reported by the U.S. Census Bureau in the 2010 U.S. Census.

National Economically Disadvantaged Area is defined as a zip code that includes a census tract or portion thereof in which the median annual household income is less than \$40,000 per year.

For the ten percent (10%) hours requirement with priority to residents of National Extremely Disadvantaged Areas, contractors must attempt to hire residents from National Extremely Economically Disadvantaged Areas first and may only fulfill their hours requirements using residents from National Economically Disadvantaged Areas if there are none available from National Extremely Economically Disadvantaged Areas.

The National Targeted Workers Requirement also establishes an obligation that a minimum of twenty percent (20%) of construction work hours be performed by apprentices. However, the ratio of hours performed by apprentices to hours performed by journeyman in any individual craft shall not exceed the standards established by the applicable craft union's Division of Apprenticeship Standards.

Fifty percent (50%) of all apprenticeship hours shall be performed by National Disadvantaged Workers. National Disadvantaged Workers are defined as individuals who face barriers of employment, such as low income, homelessness, being a custodial single parent, receiving public assistance, lacking a GED or high school diploma, having a criminal record, suffering from chronic unemployment, suffering from chronic underemployment, emancipated from the foster care system, being a veteran of the Iraq/Afghanistan war, or being an apprentice with less than 15% of the required graduating apprenticeship hours in a program.

## II LEGAL ISSUES

The National Targeted Hiring Program was developed with conscious regard to legal issues arising from the U.S. Constitution and federal regulations pertaining to hiring preferences.

### A. THE PRIVILEGES AND IMMUNITIES CLAUSE

The Privileges and Immunities Clause of the U.S. Constitution 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 entity, such as CHSRA, may not discriminate against other persons on the basis of their state citizenship. The U.S. Supreme Court has struck down hiring preferences that discriminated against out-of-state residents. *See Hicklin v. Orbeck*, 437 U.S. 518 (1978).

The National Targeted Hiring Program withstands scrutiny under the Privileges and Immunities Clause because it establishes even-handed hiring requirements that are independent of state citizenship. The Privileges and Immunities Clause does not apply to the National Targeted Hiring Program because the program requires contractors to employ persons based on their residence in an economically disadvantaged area and not on their state of citizenship. An individual from an economically disadvantaged area in California is given the same treatment as an individual from an economically disadvantaged area in any other state.

## **B. FEDERAL HIRING REGULATIONS**

The National Targeted Hiring Program comports with federal regulations. The Common Grant Rule promulgated by the U.S. Department of Transportation prohibits *non-state grantees* from conducting procurements for public works projects using U.S. D.O.T. grant funds in a manner that imposes in-State or local geographical preferences. 49 C.F.R. § 18.36(c)(2). However, this prohibition does not apply to the Fresno Works National Targeted Hiring Program for two reasons.

First, as discussed above, the proposal does not impose in-State or local geographical preferences. The National Targeted Hiring Program treats all persons residing in National Economically Disadvantaged Areas and National Extremely Economically Disadvantaged Areas the same, regardless of their state of residence.

Second, the Common Grant Rule only applies to non-state grantees; and CHSRA is a state grantee (the State of California). The Common Grant Rule expressly states that state grantees such as CHSRA need only "follow the same policies and procedures it uses for procurements from its non-Federal funds." 49 C.F.R. § 18.36(a). Accordingly, the Common Grant Rule only requires that CHSRA spend its U.S. D.O.T. grant funds in the same manner that it spends its non-federal grant funds. The U.S. D.O.T. confirmed that the Common Grant Rule's prohibition against in-state or local geographic preferences does not apply to CHSRA in a letter dated June 29, 2012 to Fresno Mayor Ashley Swearengin. A copy of the letter from U.S. D.O.T. Federal Railroad Administration to Mayor Ashley Swearengin is attached for your reference. In this letter, the Federal Railroad Administration stated that it "would respect the choices of CHSRA in adopting a variation of a targeted hiring program...."

Moreover, the Common Grant Rule imposes a mandate that non-State grantees "take all necessary affirmative steps to assure that ... labor surplus area firms are used when possible." 49 C.F.R. § 18.36(e)(1). Labor surplus areas are designated by the U.S. Department of Labor as areas with an "average unemployment rate ... at least 20 percent above the average unemployment rate..." *Labor Surplus Area*, U.S. Dept. of Labor Emp. & Training Admin. (last updated Jan. 7, 2010), <http://www.doleta.gov/Programs/laborsurplus02.cfm>. Although the CHSRA is not obligated to follow the labor surplus area utilization mandate in the Common Grant Rule because it is a State grantee, the National Targeted Hiring Program is nonetheless consistent with the Common Grant Rule's purpose and mandate by promoting the utilization of workers from National Economically Disadvantaged Areas.

## **C. STATE PROCUREMENT POLICIES AND PROCEDURES**

The Common Grant Rule requires that CHSRA, "follow the same policies and procedures it uses for procurements from its non-Federal funds" "[w]hen procuring property and services under a [U.S. D.O.T.] grant." 49 C.F.R. § 18.36(a). The U.S. D.O.T. mentioned this requirement when it stated that any hiring program adopted by CHSRA must be "consistent with the California state procurement policies and procedures that CHSRA uses in the expenditure of its non-Federal funds."

The National Targeted Hiring Program treats U.S. D.O.T. grant funds in the same manner as non-Federal funds. We have found no state or CHSRA procurement policy, procedure or regulation prohibiting the requirements set forth in the National Targeted Hiring Program.

### III PRIOR U.S. D.O.T. APPROVAL OF SIMILAR HIRING PROGRAM

The legality of the National Targeted Hiring Program is further evidenced by the U.S. D.O.T. Federal Transit Administration's prior approval of a similar hiring program included in a project labor agreement proposed by the Los Angeles County Metropolitan Transportation Authority ("LACMTA"). The LACMTA's project labor agreement included contractor requirements nearly identical to those proposed in the Fresno Works National Targeted Hiring Program.

On February 7, 2012, Dorval R. Carter, Jr. from the U.S. D.O.T. Federal Transit Administration wrote to LACMTA, stating:

My staff has reviewed both the draft PLA.... The provisions of the PLA covering federally-funded project set forth hiring preferences that are based on income and other factors, but are not geographically based.... We believe that the approach set forth in the draft PLA meets the requirement that grantees conduct federally assisted procurements using full and open competition.

We at FTA share your organization's goal of using federally funded projects ... to increase job opportunities for low income or unemployed individuals and look forward to working with you in this regard.

A copy of the letter from the U.S. D.O.T. to LACMTA is enclosed for your reference.

The U.S. D.O.T.'s June 29, 2012 letter to Mayor Swearingin referenced the LACMTA letter. The only distinction noted by the U.S. D.O.T. was that LACMTA is a local government entity governed by 49 C.F.R. § 18.36(b) through (i) while CHSRA is a state entity governed by section 18.36(a). As discussed above, this distinction only means that CHSRA must conduct procurements using its federal funds in the same manner that it conducts procurements using its non-federal funds.

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#### **IV CONCLUSION**

As discussed above, the Fresno Works National Targeted Hiring Program complies with the U.S. Constitution, federal and state statutes and regulations, as well as CHSRA policies. The U.S. D.O.T.'s June 29, 2012 letter confirms the legality of the proposal.

KJP:ahw  
Enclosures