

# ATTACHMENT A

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**TO:** Michele Beal Bagneris, Pasadena City Attorney  
Scott Rasmussen, Assistant City Attorney

**FROM:** Barbara R. Gadbois, Esq.

**DATE:** March 19, 2009

**MATTER:** City of Pasadena/Public Works –MTA Transit Project [0793.001]

**SUBJECT:** Responsibility Hearing Legal Framework and Analysis  
Metro Rapid Bus Transit Priority System  
Manuel Bros., Inc.

**CC:** Martin Pastucha, Director Public Works, Steven Wright,  
Nicholas G. Rodriguez, Esq.

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## **I. SUMMARY RESPONSE TO QUESTIONS POSED BY COUNCIL**

For federal-aid public works projects subject to the California Labor Code prevailing wage laws:

**A.** Contractors are not required by California statute or regulation to sign DAS 7 to request dispatch of apprentices from an apprenticeship committee. The failure of Manuel Bros., Inc. (“MBI”) to submit DAS 7 to the Electrical Training Institute for the 710 Mitigation project did not violate the law.

**B.** An apprenticeship committee may require contractors to sign DAS 7 as a condition to dispatching apprentices, and many committees do. Some apprenticeship committees, however, are willing to dispatch apprentices without receiving the DAS 7. MBI employed apprentice laborers on the 710 Mitigation project without the need to sign DAS 7.

**C.** A particular committee program may not accommodate part-time apprentice positions, however the law provides for both full-time and part-time apprenticeship programs. MBI’s request for part time apprentices from the Southern California Transportation Systems Electrical Joint Apprenticeship Committee for the 710 Mitigation project did not violate the law.

**D.** A contractor may not employ an apprentice to perform work for which the apprentice is not properly registered by the Division of Apprenticeship Standards.

# GIBBS, GIDEN, LOCHER & TURNER LLP

Michele Beal Bagneris, City Attorney  
March 19, 2009  
Page 2

E. A contractor may employ a qualified worker as either a laborer or electrician, provided the worker is paid the applicable journeyman prevailing wage rate for the work performed.

F. The City's options for action on the bids are:

1. Award the contract to Manuel Bros., Inc., as presented at the March 16, 2009 meeting,
2. Reject all bids and re-bid or abandon the Metro Rapid Bus project, or
3. Continue the item with formal written notice to MBI of a non-responsibility process to determine whether MBI is a responsible bidder, notify MBI of any evidence of non-responsibility and provide MBI an opportunity to rebut the evidence and provide evidence of its present responsibility to perform the work. If the City makes a final determination that MBI is not a responsible bidder, City may reject MBI's bid, make a determination that the second low bidder is a responsible bidder who submitted the lowest bid and reject all other bids.

## II. PREVAILING WAGE AND USE OF APPRENTICES RULES

### A. An Employer Is Not Legally Mandated to Execute Form DAS 7

Under the California prevailing wage statutes, only individuals who are in training under apprenticeship standards that have been approved by the Chief of the Division of Apprenticeship Standards ("DAS") and who are parties to written apprentice agreements are eligible to be employed at the apprentice wage rate on a public works project. (*Cal. Lab. Code* § 1777.5(c).) The employment and training of apprentices must be in accordance with either: (1) the apprenticeship standards and apprentice agreements under which he or she is training; or (2) the rules and regulations of the California Apprenticeship Council. (*Id.*) If an apprentice is not properly employed, he or she must be paid the journeyman rate.

Contractors who are not already approved to train by an applicable joint apprenticeship committee or unilateral committee must request the dispatch of required apprentices from one of the applicable Apprenticeship Committees whose geographic area of operation includes the site of the public work by giving the committee actual notice of at least 48 hours (excluding Saturdays, Sundays and holidays) before the date on which one or more apprentices are required. However, if a non-signatory contractor declines to abide by and comply with the terms of a local committee's standards, the Apprenticeship Committee shall not be required to dispatch apprentices to such contractor. Conversely, if in response to a written request an Apprenticeship Committee does not dispatch any apprentice to a contractor who has agreed to employ and train apprentices in accordance with either the Apprenticeship Committee's Standards or these

Michele Beal Bagneris, City Attorney  
March 19, 2009  
Page 3

regulations within 72 hours of such request (excluding Saturdays, Sundays and holidays) the contractor shall not be considered in violation of this section as a result of failure to employ apprentices for the remainder of the project, provided that the contractor made the request in enough time to meet the above-stated ratio. (8 Cal.Code Regs. § 230.1 (a).)<sup>1</sup>

As a requirement to dispatch apprentices, some apprenticeship committees require a non-signatory contractor to execute and submit form DAS 7. Other apprenticeship committees, however, are willing to dispatch apprentices without executing DAS 7. In any case, there is no legal requirement that the contractor executes and submits a DAS 7. To the contrary, any state action or administrative attempt to require a non-signatory contractor to execute a DAS 7 is preempted by the Employee Retirement Income Security Act ("ERISA"). (See, *Hydrostorage v. Northern California Boilermakers* (9th Cir. 1989) 891 F.2d 719; *Operating Engineers & Participating Employees Fund v. Weiss* (1990) 221 Cal.App.3d 867.)

**B. A Contractor May Not Employ an Apprentice to Perform Work for Which He or She is Not Properly Registered**

Under the California prevailing wage statutes, apprentices must be employed according to the ratio set by the apprenticeship program standards, but not less than a 1-to-5 hour ratio, measured against the number of journeyman hours worked by the contractor for that particular trade. (*Cal. Lab. Code* § 1777.5(g).) As set forth above, only individuals who are in training under apprenticeship standards that have been approved by the Chief of the DAS and who are parties to written apprentice agreements are eligible to be employed at the apprentice wage rate on a public works project. (*Cal. Lab. Code* § 1777.5(c).) Moreover, apprentices employed on public works can only be assigned to perform work of the craft or trade to which the apprentice is registered. (*Cal. Lab. Code* § 3098; 8 Cal.Code Regs. § 230.1 (c).)

With respect to MBI, it is alleged that the contractor hired a laborer to perform work that would fall within the prevailing wage determination for an electrician. It is unclear whether the worker claims that he was hired as an apprentice and that he was not registered within an electrician apprentice program, but it appears to be implied by the worker's and the union representative's statements. It is presumed that MBI will deny the allegation.

**C. Contractors Are not Prohibited From Employing Apprentices on a Part-Time Basis**

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<sup>1</sup> If an apprenticeship committee dispatches fewer apprentices than requested by the contractor, the contractor shall be considered to be in compliance if the contractor employs those apprentices dispatched, provided that, where there is more than one apprenticeship program able and willing to dispatch apprentices, a contractor who is not a participant in an apprenticeship program has requested dispatch from at least two committees. (8 Cal.Code Regs, § 230.1(a).)

GIBBS, GIDEN, LOCHER & TURNER LLP

Michele Beal Bagneris, City Attorney  
March 19, 2009  
Page 4

The following provisions of the California Labor Code and Code of Regulations indicate that part-time employment of apprentices is permitted, given the supervisory requirements and the 1 to 5 ratio of apprentice to journeyman hours required by Labor Code Section 1777.5(h):

Labor Code 1777.5(h) **This ratio of apprentice work to journeyman work shall apply during any day or portion of a day when any journeyman is employed at the jobsite** and shall be computed on the basis of the hours worked during the day by journeymen so employed. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week shall not be used to calculate the ratio. The contractor shall employ apprentices for the number of hours computed as above before the end of the contract or, in the case of a subcontractor, before the end of the subcontract. However, **the contractor shall endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the jobsite.** Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Chief of the Division of Apprenticeship Standards, upon application of an apprenticeship program, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

CCR 230.1 (c) Apprentices employed on public works can only be assigned to perform work of the craft or trade to which the apprentice is registered. Work of the craft or trade consists of job duties normally assigned to journeymen in the apprenticeable occupation. Where an employer employs apprentices under the rules and regulations of the California Apprenticeship Council, as set forth in Labor Code Section 1777.5(c)(2), **apprentices employed on public works must at all times work with or under the direct supervision of journeyman/men.** The on-the-job training shall be in accordance with the apprenticeship standards and apprenticeship agreement under which the apprentice is training, provided that a contractor shall not be subject to any financial or administrative obligations to a trust fund or employee benefit plan unless the contractor has so agreed.

CCR 208 (b) For Apprentices In The Building And Construction Industry Employed On Public Works Projects:

For apprentices participating in approved apprenticeship programs in the building and construction industry, the wages and employer payments for employees benefits as defined in 8 C.C.R. §16000 for regular and overtime work while employed on public works projects within the meaning of Labor Code §1720 et seq. shall be the **per diem** wage rates for apprentices in the apprenticeable occupation as determined by the Director of Industrial Relations in the geographic area of the project.

### III. COMPETITIVE BIDDING RULES

#### A. General Purpose

Public Contract Code Section 100 sets forth State legislative findings for competitive bidding requirements, which include:

“(b) To ensure full compliance with competitive bidding statutes as a means of protecting the public from misuse of public funds.

(c) To provide all qualified bidders with a fair opportunity to enter the bidding process, thereby stimulating competition in a matter conducive to sound fiscal practices.

(d) To eliminate favoritism, fraud and corruption, in the award of public contracts.

The rationale for competitive bidding guides any bid protest analysis.

#### B. Award Cannot be Based on Unwritten Rules.

The California cases, *Monterey Mechanical Co. v. Sacramento Reg'l County Sanitation District* (1996) 44 Cal. App. 4<sup>th</sup> 1391 and *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal 4<sup>th</sup> 305, as well as the underlying appellate decision *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (1999) 69 Cal App. 4<sup>th</sup> 1458, make clear that City cannot impose qualification requirements on rules that are unwritten, unannounced and unknown to the low bidder at the time it submitted its bid.

#### C. Standards for Determining Bidder Responsibility

The term “responsible bidder” means a bidder who has demonstrated the attributes of character, integrity, reputation, judgment, experience and efficiency, as well as the financial resources, quality, fitness, capacity, and skill of the bidder to perform the contract. (Pasadena Municipal Code Sections 4.08.130, 4.08.131 and Public Contract Code Section 1103).

Cases and criteria addressing bidder responsibility for a *particular project* typically focus on *performance* issues involving the construction of the work or prior negative experience with the bidder. (See e.g., *Raymond v. Fresno Unified School District* (1954) 123 Cal. App. 2d 626,

# GIBBS, GIDEN, LOCHER & TURNER LLP

Michele Beal Bagneris, City Attorney  
March 19, 2009  
Page 6

poor workmanship on prior contract with District; Pasadena Municipal Code Section 4.08.130 (F) and (G), quality and timeliness of the bidder's performance on previous orders or contracts with the city, and litigation by the bidder on previous order or contracts with the City.

The Department of Industrial Relations ("DIR"), the State umbrella organization over the Division of Labor Standards Enforcement (adjudicates wage claims, investigates discrimination and public work complaints, and enforces Labor Code statutes and Industrial Welfare Commission orders) and the Division of Apprenticeship Standards (enforces apprenticeship requirement) has published guidelines and model forms for prequalification of contractors seeking to bid on public works projects. Prequalification procedures examine contractor responsibility before bid prices are submitted.

The DIR disqualifies contractors from bidding on projects only when a surety firm has completed a contract within the last five years, a contractor is currently debarred under Labor Code Section 1777.1 or 1777.7 or the contractor's firm or officers have been convicted of a crime involving the award, bidding or performance of a government contract (such as bid rigging or false claims). Under the DIR's model forms, contractors lose points but are not disqualified from bidding on a project if a contractor with average revenue less than \$50 million has had 3 or more prevailing wage or apprenticeship violations in the last five years.

The facts before the Council with respect to Manuel do not merit losing points under the DIR's prequalification model and are not grounds for disqualification from bidding under that model.

## **D. Relative Superiority Determinations are Prohibited**

Once bids are received, the City cannot engage in a relative superiority analysis and reject a low bidder in favor of a "better" qualified bidder. *City of Inglewood-Los Angeles County Civic Center Authority v. Superior Court* (1972) 7Cal. 3d 861.

## **IV. BID PROTEST PROCEDURES AND STANDARDS OF REVIEW**

### **A. Bidder Remedies**

#### **1. Writ of Mandate**

After an unsuccessful bidder has exhausted its administrative remedies, and is not satisfied with the public entity's decision, the bidder may seek a writ of mandate from the court and may seek injunctive relief. (See, e.g., *Rubino v. Lolli*, (1970) 10 Cal.App.3d 1059.) A disappointed bidder has no right to compel the acceptance of its bid or to prevent rejection of all bids. Even if a writ issues, the project may be rebid and the protester may lose the rebid.

Michele Beal Bagneris, City Attorney  
March 19, 2009  
Page 7

The rationale behind this limitation is that the contracting officer or director of the public has the power to reject all bids (See Pasadena Municipal Code Section 4.08.120). Therefore no right exists in another contractor to compel acceptance of a bid even by writ of mandate. Thus, a court can only enjoin or vacate the illegal award of a contract. Although this relief is limited, it can be quite disruptive. If a writ of mandate is issued, it will, at a minimum require the public agency to rebid the project and if construction has already begun, may result in stoppage of work as well.

## 2. Monetary Damages

While most of the financial risk of an illegally awarded contract falls on the contractor, there are also some limited financial risks to the public agency. A disappointed bidder can assert a claim against a public agency, but only if based in contract or on a promissory estoppel theory and not on a tort theory. The rationale behind the rule is that the award of a contract entails the exercise of discretion and public entities are immune from tort liability arising out of the exercise of discretion. *Swinerton & Walberg Co. v. City of Inglewood – L.A. County Civic Center Authority* (1974) 40 Cal.App.3d 98.

The California Supreme Court in *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transit Authority* (2000) 23 Cal.4th 305 permitted a low bidder recover who successfully asserted a promissory estoppel claim to recover the expenses it actually incurred in participating in the bidding process, that is, its bid preparation and bid bonding costs, bid protest costs, but not the bidder's potential profits or attorneys' fees in pursuing an action against the public entity.

## 3. Injunctive Relief

In addition to a writ of mandate, a contractor may seek a temporary restraining order or a preliminary injunction. Indeed, this may be the only way for a contractor to prevent the award of a contract after the public agency has announced its intent to award, but has not yet awarded a contract.

### **B. Judicial Review of Bid Protests**

The majority of the California bid protest cases have expressed the view that a writ of mandate will be granted if the contract award constitutes an abuse of a public agency's discretion. *Old Town Dev. Corp. v. Urban Renewal Agency*, (1967) 249 Cal.App.2d 313.

A writ of mandate is issued "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station" (C.C.P. § 1085) upon the petition of "the party beneficially interested" (C.C.P. § 1086). Thus, the court has the power to issue a writ of mandate to vacate or prevent the illegal award of a contract by a public agency. Since the evaluation of bid proposals by a public agency involves the agency's exercise of discretion, a writ of mandate can be issued only if the court finds that the public agency abused its discretion



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Michele Beal Bagneris, City Attorney

March 19, 2009

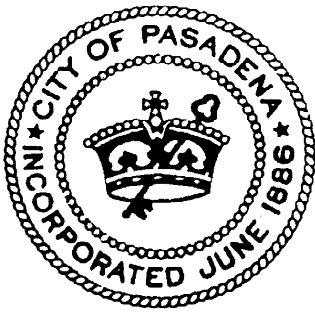
Page 8

in awarding the contract or in the bidding process. *Taylor Bus Service, Inc. v. San Diego Bid Documents. of Education* (1987) 195 Cal.App.3d 1331, 1340.

An appellate court's review of the award of a public contract is to determine whether its findings and actions are supported by "substantial evidence". The court's review is limited to an examination of the proceedings to determine whether the agency's actions were arbitrary, capricious, entirely lacking in evidentiary support or whether it failed to follow proper procedure or provide proper notice. *Taylor Bus Service, Inc. v. San Diego Bid Documents. of Education* (1987) 195 Cal.App.3d 1331, 1340. There is a presumption that the agency's actions were supported by substantial evidence and the petitioner has the burden of proving otherwise. The court does not re-weigh the evidence and must view it in the light most favorable to the agency's actions, indulging all reasonable inferences in support of those actions. *Ghilloti Construction Co. v. City of Richmond*, (1996) 45 Cal.App.4th 897.

One court has taken it one step further, even holding that a charter city's award of a contract and its decision to reject protests were legislative actions requiring an exercise of discretion guided by consideration of the public welfare. The court identified a judicial reluctance to inquire into legislative thought processes and concluded that once exercised, legislative discretion is, absent special circumstances, not subject to judicial control and supervision. As a consequence, the steps to be undertaken, the method selected, and the decision reached in the course thereof by the City, in the absence of fraudulent or arbitrary action, would not be interfered with by the courts. The decision of the legislative body is to be evaluated on its face, without an inquiry into the underlying motive or thought processes of the legislature. (See, *Mike Moore's 24-Hour Towing v. City of San Diego* (1996) 45 Cal.App. 4th 1294).

# **ATTACHMENT B**



# Agenda Report

**TO:** CITY COUNCIL

**DATE:** March 16, 2009

**FROM:** CITY MANAGER

**SUBJECT:** CONTRACT AWARD TO MANUEL BROTHERS, INC., A QUANTA SERVICES COMPANY, FOR THE INSTALLATION OF THE METRO RAPID BUS TRANSIT PRIORITY SYSTEM ON COLORADO BOULEVARD FROM THE WEST CITY LIMIT TO HILL AVENUE, FOR AN AMOUNT NOT TO EXCEED \$ 455,000

## **RECOMMENDATION:**

It is recommended that the City Council:

1. Acknowledge the project to be categorically exempt under Section 21084 of the California Environmental Quality Act (CEQA) in accordance with Article 19, Section 15301 (Class 1), subsection (c) of the Resources Agency of California Guidelines (minor alterations involving negligible expansion of use beyond that previously existing) pursuant to the findings of the Secretary of the Resources Agency, and authorize the City Manager to execute and the City Clerk to file a Notice of Exemption for the project with the Los Angeles County Clerk; and
2. Accept the bid dated January 28, 2009, submitted by Manuel Bros., Inc., a Quanta Services Company, in response to the Specifications for the Installation of the Metro Rapid Bus Transit Priority System on Colorado Boulevard from the West City Limit to Hill Avenue, reject all other bids received, and authorize the City Manager to enter into such contract as is required for an amount not to exceed \$ 455,000.

## **BACKGROUND:**

In 2006, the City of Pasadena and the Los Angeles County Metropolitan Transportation Authority (METRO) signed a Memorandum of Understanding (MOU) for the implementation of the Metro Rapid Bus Transit Priority System in the City of Pasadena. The Metro Rapid Bus Program, currently operating in the City of Los

Angeles, is a high capacity transit system providing more frequent services with fewer stops within all transit arterials it covers. Based on vehicular detection technology, the Metro Rapid Bus Transit Priority System works as a three-way automated communication and feedback system among the bus, the traffic signal network where such bus is traveling and a sophisticated algorithm residing within the ATSAC Center in the City of Los Angeles to produce a balanced traffic signal synchronization between the Metro bus and all vehicular traffic flow within an arterial. The results are increased transit efficiency and enhanced coordination of vehicular flows through a traffic corridor. Through the METRO, both the City of Los Angeles and the City of Pasadena will share the benefits from this service. In Pasadena, this service will be provided along Colorado Boulevard from the westerly City limits to Hill Avenue.

This work includes the installation of street light luminaires, pull boxes, fiber optic cable, fiber optic communication equipment, traffic signal cabinets, transit bus loop detectors, conduit and conductors.

The Department of Public Works prepared specifications for this project and bids were received on January 28, 2009.

This project was advertised in the Pasadena Star News on January 8, 2009. In addition, the Notice Inviting Bids was published in five trade publications and on two websites. Bid packets were obtained by 26 contractors, 12 of whom submitted bids for the project.

The following bids were received:

	<u>Bidder</u>	<u>Amount</u>
1.	Manuel Bros., Inc., a Quanta Services Co., Grass Valley	\$ 395,777.77
2.	Lincoln Pacific Builders, Baldwin Park	\$ 480,000.00
3.	Dynalectric (KDC Inc. dba), Los Alamitos	\$ 481,352.00
4.	California Professional Engineering, Inc., South El Monte	\$ 508,857.00
5.	Christopher Morales, Inc., City of Industry	\$ 519,777.00
6.	Comet Electric, Inc., Canoga Park	\$ 523,000.00
7.	Pro Tech Engineering, Inc.,	\$ 555,000.00
8.	CSI Electrical Contractors, Inc., Santa Fe Springs	\$ 556,581.00
9.	C.T.&F., Inc, Bell Gardens	\$ 565,749.00
10.	Terno, La Mirada	\$ 597,230.00
11.	Steiny and Company, Baldwin Park	\$ 624,320.00
12.	Freeway Electric, Riverside	\$ 649,173.00
	Engineer's Estimate	\$ 503,000.00

The lowest responsive bid received, which was submitted by Manuel Bros., Inc. (MBI), was 21.3 percent lower than the Engineer's Estimate. After the bid results were released listing MBI as the low bidder, the International Brotherhood of Electrical Workers (IBEW) began an inquiry into the status of the prior MBI contract with the City. The last contract awarded to MBI was on August 13, 2007, for the State Route 710 Mitigation Traffic Control and Monitoring System-Intelligent Transportation Systems project (710 Mitigation), in an amount not to exceed \$5,000,000. Based on comments received on August 2007, regarding apprenticeship program requirements and how the City will enforce the use of apprentices when the lowest bidder is a nonunion contractor, the City Council approved the award of the contract with the condition that specific apprenticeship requirements and "good faith efforts" are included in the contract. The following approved conditions were incorporated into the "Requirements for Use of Apprentices and Good Faith Efforts" portion of the contract:

- 1) The Contractor is required to notify all applicable apprenticeship committees in applicable crafts or trades within the geographic region of the project site and submit a request to dispatch apprentices from an apprenticeship committee.
- 2) If an apprenticeship committee fails to dispatch any apprentices or dispatches fewer than the Contractor requested, the Contractor shall make further requests from at least two (2) additional apprenticeship committees, provided there is more than one apprenticeship committee available for the applicable craft or trade within the geographic region of the project site.
- 3) If an apprenticeship committee fails to dispatch any apprentices or dispatches fewer than requested, the Contractor has a continuing obligation to make written requests from ALL apprenticeship committees within the geographic region of the project site for the applicable craft or trade every three (3) months until either sufficient apprentices are employed or 70% of the work of the project is completed, as determined by the City.

Another condition of the contract addressed the ratio of apprentices to journeymen. The condition allows the contractor to comply with the ratio stipulated in the apprenticeship standards under which the Joint Apprenticeship Committee operates, but the ratio shall not be less than one hour of apprenticeship work for every five hours of labor performed by a journeyman, except as otherwise provided in the California Labor Code. The condition dictates how this ratio is to be calculated. Staff has reviewed contract compliance and contractor performance for the 710 Mitigation project and has determined that Manuel Bros., Inc., has met all the conditions and requirements of that contract. In addition, Manuel Bros., Inc., was found to be a responsible contractor in completing all field improvements on schedule and within the budget amount for the project.

As a result, it is recommended that Manuel Bros., Inc., be awarded a contract for this project as they are the lowest responsive and responsible bidder, and that the other bids be rejected. The proposed contract with Manuel Bros., Inc., fully complies with the Competitive Bidding and Living Wage Ordinances. The Contractor has indicated that the award of this contract will result in no new hires to his present workforce.

The contract will be set up as follows:

Base Bid	\$ 395,777.77
Contingency Allowance	<u>\$ 59,222.23</u>
Contract "Not to Exceed" Amount	\$ 455,000.00

It is anticipated that work will begin in March and be completed in June 2009.

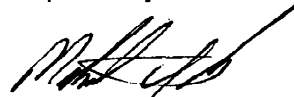
Compliance with the Mobility Element of the 2004 General Plan was previously approved with the adoption of the FY 2009-2014 Capital Improvement Program (page 5.21).

Under the State Guidelines for the Implementation of the California Environmental Quality Act (CEQA), this project is categorically exempt since the work consists of minor alterations involving negligible expansion of use beyond that previously existing. Therefore, it is recommended that a Notice of Exemption be filed with the Los Angeles County Clerk.

**FISCAL IMPACT:**

Funds for this project are available in the FY 2009-2014 Capital Improvement Program, Budget Account No. 75508, Metro Rapid Bus Priority System.

Respectfully submitted,



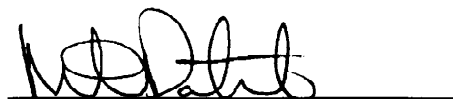
MICHAEL J. BECK  
City Manager

Prepared by:



Bonnie L. Hopkins  
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Approved by:



Martin Pastucha, Director  
Department of Public Works