

RULE NO.: R161-17.14

NOTICE OF AMENDED RULE ADOPTION EFFECTIVE DATE: June 5, 2017

By: James R. Scarboro, CPCM, CPSM
Purchasing Officer, Purchasing Office

The Purchasing Office has adopted an amended version of a proposed rule. Notice of the proposed rule was posted on March 27, 2017. Public comment on the proposed rule was solicited in the March 27, 2017 notice. The adoption of a rule may be appealed to the City Manager in accordance with Section 1-2-10 of the City Code as explained below. This notice is issued under Chapter 1-2 of the City Code.

EFFECTIVE DATE OF ADOPTED RULE

The rule adopted by this notice is effective on June 5, 2017

TEXT OF PROPOSED AMENDED RULE

A copy of the complete text of the adopted rule is attached and is available for public inspection.

Copies may be purchased at the following locations at a cost of ten cents per page:

City of Austin Purchasing Office located at 124 W. 8th Street, 3rd Floor, Austin, Texas 78701.

Office of the City Clerk, City Hall, located at 301 West 2nd Street, Room 1120, Austin, Texas 78701.

BRIEF EXPLANATION OF PROPOSED AMENDED RULE

Rule R161-17.14: The proposed amended rule will adopt procedures to administer the City's Living Wage Program for non-construction contracts. The proposed rule sets forth the City's procedures to document living wage requirements and complaint processes. Once adopted, this rule will be published in the Vendor Connection section of Austin Finance Online, the City's financial portal on the Internet at:

https://www.austintexas.gov/financeonline/vendor_connection/index.cfm

Changes Made to Proposed Rule:

1) Section 1. Definitions

- a. Modified definitions for the following terms:
 - i. City Vehicles
 - ii. Contractor Employee

2) Section 3. Applicability

- a. Items reorganized to clarify definition of intent

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3) Section 4. Exempt

- a. Subsection E.
 - i. Added Emergency Contracts to list of exempt City contracts
- b. Subsection F.
 - i. Added language for purchases of goods and non-professional services from a Supplier are not subject to Living Wage.

4) Section 5. Living Wage amounts, changes and administration

- a. Subsection B.
 - i. Added language to clarify the inclusion of extension options

SUMMARY OF COMMENTS

The City's Purchasing Department received comments on the Notice of Proposed Rule, R161-17.14 during the public comment period. Below is a summary of comments received and City staff responses to those comments.

Comments on the proposed Living Wage rule were procedural in nature. Comments were neither for, nor against, the proposed rule.

A detailed matrix of commenters, comments received, and justifications can be found in Attachment 1.

AUTHORITY FOR ADOPTION OF RULE

The authority and procedure for the adoption of a rule to assist in the implementation, administration, or enforcement of a provision of City Code is established in Chapter 1-2 of the City Code. Further, City Council adopted Resolution No. 20160324-020 directing staff to promulgate rules for the implementation of the City's Living Wage policy.

APPEAL OF ADOPTED RULE TO CITY MANAGER

A person may appeal the adoption of a rule to the City Manager. **AN APPEAL MUST BE FILED WITH THE CITY CLERK NOT LATER THAN THE 30TH DAY AFTER THE DATE THIS NOTICE OF RULE ADOPTION IS POSTED. THE POSTING DATE IS NOTED AT THE TOP OF THIS NOTICE.** If the 30th day is a Saturday, Sunday, or official City holiday, an appeal may be filed on the next day which is not a Saturday, Sunday, or official City holiday.

An adopted rule may be appealed by filing a written statement with the City Clerk. A person who appeals a rule must (1) provide their name, mailing address, e-mail address and telephone number; (2) identify the rule being appealed; and (3) include a statement of specific reasons why the rule should be modified or withdrawn.

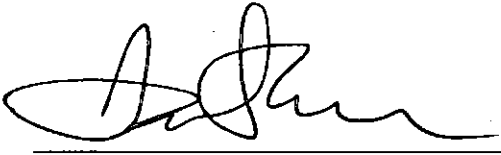
Notice that an appeal was filed will be posted by the City Clerk. A copy of the appeal will be provided to the Department, City Manager and City Council. An adopted rule will not be enforced pending the City Manager's decision. The City Manager may affirm, modify, or withdraw an adopted rule. If the City Manager does not act on an appeal on or before the 60th day after the date this Notice of Rule Adoption is posted, the rule is withdrawn. Notice of the City Manager's decision on an appeal will be posted by the City Clerk.

On or before the 16th day after the City Clerk posts notice of the City Manager's decision, the City Manager may reconsider the decision on an appeal by providing written notice to the City Clerk and City Council. Not later than the 31st day after giving written notice of an intent to reconsider, the City Manager shall make a decision.

CERTIFICATION BY CITY ATTORNEY

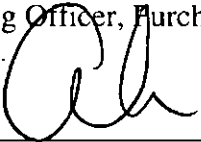
By signing this Notice of Rule Adoption of Rule R161-17.14, the City Attorney certifies that the City Attorney has reviewed the rule and finds that adoption of the rule is a valid exercise of administrative authority.

REVIEW AND APPROVED



James Scarboro, CPCM, CPSM
Purchasing Officer, Purchasing Office

Date: 6/2/17



Anne Morgan
City Attorney

Date: 6/5/17

Rule No.: R161-17.14: Enforcement of the City of Austin Living Wage for Non-Construction Contracts Effective June 5, 2017

This rule is adopted under the authority of City Code and the delegated authority of the Purchasing Officer.

1. Definitions.

- A. "City" means the City of Austin, Texas, a municipal corporation, home rule city and political subdivision, organized and existing under the laws of the State of Texas, acting through the City Manager and/or his/her designees, officers, agents, or employees.
- B. "City Property" means City owned or controlled real property, such as office buildings, water treatment plants, facilities, service centers, parks and all City streets. Property in this definition includes space rented or leased by the City for any municipal purpose, such as office or operational space. This definition specifically excludes City assets.
- C. "City Vehicles" means cars, trucks and other vehicles that are equipped to carry an operator or passenger.
- D. "Contractor" or "Prime Contractor" means an individual, firm or other entity contracted to provide non-construction services to the City under a City contract.
- E. "Contractor Employee" means a full-time, part-time, temporary or seasonal employee of a Prime Contractor or Subcontractor whom are directly assigned to the Contract.
- F. "Directly Assigned" means a Contractor Employee who provides non-construction services to the City under a contract between a Contractor and the City. Contractor Employees are considered to be directly assigned to a City contract under any of the following:
 - 1) Contractor Employee is named in the Contractor's contract with the City;
 - 2) Contractor Employee is named or is uniquely identified in a deliverables document from the Contractor; or
 - 3) Any other evidence that reasonably establishes the Contractor Employee's relationship to the Contractor's contract with the City.
- G. "Goods" means physical items sold to the City by the Contractor, such as bricks, paper, fuel, office supplies, tools, clothing, food, etc.
- H. "Living Wage" means the minimum hourly amount, in US dollars, that Contractors must pay to Contractor Employees, exclusive of fringe benefits or cash offsets to benefits, set by the City Council and amended annually.
- I. "Living Wage Program," also referred to as "Program" means Austin City Council Resolution No. 20160324-020, a resolution adopting a Living Wage policy to apply to City non-construction procurement agreements, and these Rules, or as may subsequently be amended.

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- J. "Non-construction Services" means work or labor performed by Contractor Employees that is not subject to chapter 2269 (Contracting and Delivery Procedures for Construction Projects) or chapter 2254 (Professional and Consulting Services) of the Texas Government Code.
- K. "Subcontractor" means any individual, firm or entity engaged by the Contractor (including Subcontractor to Sub-subcontractor regardless of tier) to perform any element of the contract between the City and the Contractor.

2. Reference statutes, ordinances, resolutions and policies.

- A. Austin City Council Resolution No. 20160324-020, a resolution adopting a Living Wage policy to apply to City non-construction procurement agreements, effective upon final publication of this rule.
- B. Texas Local Government Code, Chapter 252, Purchasing and Contracting Authority of Municipalities.
- C. Texas Local Government Code, Chapter 2269, Contracting and Delivery Procedures for Construction Projects.
- D. Texas Government Code, Chapter 2254, Professional and Consulting Services.

3. Applicability.

The Program requirements shall be included in City expenditure and revenue generating contracts where all of the following apply:

- 1) Contract is predominantly for non-construction services performed on City Property or on City Vehicles.
- 2) Contract results from a formal competitive solicitation, procedurally compliant with section 252.021 of the Texas Local Government Code;
- 3) Contract requires authorization by City Council in accordance with Article VII, Finance, Section 15 (Purchase Procedure) of the City Charter; and
- 4) The Program shall apply to directly assigned Contractor Employees of the Prime Contractor and all tiers of subcontracting.

4. Exempt.

The Program shall not include the following types of City contracts:

- A. Construction Contracts;
- B. Interlocal Government Agreements;

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- C. Cooperative Contracts;
 - D. Sole Source Contracts;
 - E. Emergency Contracts;
 - F. Contracts for purchases of goods and non-professional services considered to be ancillary to the purchases of goods. For the purposes of these rules, a business entity that only supplies goods (bricks, paper, fuel, office supplies, tools, clothing, food, etc.,) and such transportation services as may be incident to delivering those goods to City Property (including the use of common carriers) is considered a Supplier, and is not subject to the City's living wage provisions.
 - G. Contracts for the sale of City Property or Goods;
 - H. Contracts using federal or other funds where application of the Program is prohibited;
 - I. Contracts exempted by City Council; or
 - J. Contracts that result from or include collective bargaining agreements.
- 5. Living Wage amounts, changes and administration.**
- A. When executing a new contract that is subject to the Program, staff shall apply the Living Wage amount applicable at the time the contract is executed.
 - B. As the living wage amount may change from time to time, the living wage amount that was applicable at the time the contract was awarded will remain the same throughout the term of the contract including extension options.
 - C. The Purchasing Office, shall administer the City's Living Wage Program, including all solicitation instructions, contract clauses, administrative complaint review and program reporting.
- 6. Complaints.**
- A. The Purchasing Officer is authorized to hear and resolve complaints regarding a Contractor's compliance with the Living Wage Program, including referring a complaint to an independent hearing officer as necessary as determined by the Purchasing Officer in his/her sole discretion.
 - B. A Contractor Employee may file a complaint against the Contractor where all the following apply:
 - 1) Complaint must be made by the Contractor Employee or their duly authorized representative;
 - 2) Complaint is against the Contractor that employed or retained the Contractor Employee or within the tier of subcontractors;
 - 3) Contractor's City contract must have included Program requirements; and

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- 4) Complaint must be limited to the specific work that was performed by the Contractor Employee under the Contractor's City contract.
- C. In order to be a timely complaint, it shall be submitted to the Purchasing Officer or to his or her designee, within one (1) year of the date the Contractor was alleged to have violated the Program.
- D. To be considered, timely complaints must be made in writing and at a minimum include the following:
 - 1) The Contractor Employee's name and/or the name of their duly authorized representative if one is used;
 - 2) The Contractor Employee's contact information to include, but not limited to: mailing address, e-mail address, telephone number, and signature; and,
 - 3) A detailed statement of the Contractor's alleged violations of their City contract's Living Wage Program, including all supporting documentation demonstrating these violations.
- E. The Purchasing Officer's decision regarding the complaint shall be final and there are no appeals.

7. Violations.

Contractors found to have violated the requirements of the City's Living Wage Program during the term of their contract with the City, shall be subject to:

- A. Remedies set forth in their City contract, up to and including contract termination;
- B. Negative impact on submissions of future City solicitations and possibly denial of award of a contract;
- C. Probation, suspension or debarment as applicable in accordance with the City's Probation, Suspension and Debarment policies;
- D. Damages, including compensating Contractor's Employees the amount(s) found to be owed to these individuals under the City Contract; and/or,
- E. City pursuing all options available under the law.

CITY PROPOSED RULE FOR LIVING WAGE REQUIREMENTS - COMMENTS

	Commenter	Question/Comment	Written (Y/N)	Section Reference	Recommendations/ Justifications
1.	Patti Edwards, Aviation	Will the Living Wage Rule (LW) apply to contract renewals and extensions?	N	5. Living Wage amounts, changes, and administration	Rules will apply throughout term of contract. Please see new definition of "renewals & extensions". 5B.
2.		Is non-compliance grounds for terminating a contract?	N	7. Violations	Staff has reviewed the recommendation regarding detailing vendor sanctions in the rules, and finds that Section 7 of the rules sufficiently addresses the City's intentions
3.	Urcha Dunbar, Fleet	Will we include the following language in the LW: "Entire term including options"?	Y	5. Living Wage amounts, changes, and administration A.	See section 5, subsection B.
4.		Will we include the following language in the LW: "Equipment and generators"? Stipulating that equipment means city property not covered under the term "Vehicles".	Y	1. Definitions C.	Remove "and other self propelled".
5.		Employee designations for contractor-employees include; full-time, part-time, seasonal, apprentice and intern. Will LW apply to all designations?	Y	1. Definitions E.	"Who are directly assigned to the contractor" "Contracts that meet the requirements listed in sec 3"
6.	Gloria Esparza, Fleet	Does LW apply to "rental contracts" for vehicles and equipment?	Y	1. Definitions	Creating Above/Below Line Matrix
7.		Fleet contracts for vehicles can include "fuel testing"	Y	1. Definitions B.	

CITY PROPOSED RULE FOR LIVING WAGE REQUIREMENTS - COMMENTS

	Commenter	Question/Comment	Written (Y/N)	Section Reference	Recommendations/Justifications
8.	Patti Edwards, Aviation	How does LW relate to non-solicited airline contracts? Airport permits do not require council approval. Need a clearer definition of "council-approved contracts".	N	3Applicability A(3).	See definition of "Authorization from City Council"
9.		Are comments anonymous?	N	Notice.	Comments are not anonymous.
10.	Gloria Esparza, Fleet	Clarification on LW "Violations". Section 7, parts B and C. What is the difference? How long would "probation" last?	Y	7. Violations B and C.	See Section 7 - Violation & Standard probationary terms.
11.		Clarification on LW "Violations". Section 7, part D. is FLSA governing Damages?	Y	7. Violations D.	Requires further review. For Cyrenthia Ellis
12	Urcha Dunbar, Fleet	Are sole source contracts exempt?	Y	4. Exempt, D.	Sole Source contracts are exempt because they are not competitive.
13		Clarification on LW "Complaints". Section 6, part C. Why are we providing a 1 year window to submit a complaint?	N	6. Complaints C.	Recommended by LW Task Force to leave it at 1 year.
14		How does the 1 year window to submit a complaint affect short term contracts that span 1 year or less?	N	6. Complaints C.	Complaints must be submitted within one year or before end of contract, whichever comes first.
15		Will we remove quarterly employee certifications? What about the cycle for employee certification documents?	N		Suggestion: Once rules are adopted, submit contract modification to buyer and vendor moving certification schedule to annually.

CITY PROPOSED RULE FOR LIVING WAGE REQUIREMENTS - COMMENTS

	Commenter	Question/Comment	Written (Y/N)	Section Reference	Recommendations/Justifications
16		This will make it harder to monitor compliance with DA contractors.	Y		Follow up by Cyrenthia Ellis
17		On laundry contracts, no employees are DA	Y	3. Applicability, 1	
18	Patti Edwards, Aviation	Fleet and Aviation should have a meeting with Purchasing.	Y		We've met. 4/24/17, 4/27/17.
19	Urcha Dunbar, Fleet	The employee who receives invoices is not the employee who is monitoring LW.	N		Reccomend that process w/in departments may need to be revised.
20	Susana Carbajal, Aviation	LW does not specify that the three prong requirement applies to both revenue and expenditure contracts.	N	3. Applicability C.	See new definition of "Revenue/Expenditure" (L and M) and reorganized sec 3.
21		"Revenue generating" is defined differently in each department; cost recovery, administrative fee and revenue generating.	N	3. Applicability C.	See new definition of "Revenue/Expenditure" (L and M) and reorganized sec 3.
22	Alan Fish, NHCD	Is the Austin Housing Finance Corporation bound by the LW?	N	3. Applicability A.	Yes. AHFC Director has advised.
23	Patti Edwards, Aviation	What is the definition of "revenue generating contracts" under Section 3.C.?	Y	3. Applicability C.	See new definition of "Revenue/Expenditure" (L and M) and reorganized sec 3.
24		Must all 3 requirements under Section 3.A be met (non-construction services, competitive solicitation, and City Council authorization) for an "expenditure contract" or "revenue generating contract" under 3.C. to apply the Living Wage Program?	Y	3. Applicability A and C.	See new definition of "Revenue/Expenditure" (L and M) and reorganized sec 3.

CITY PROPOSED RULE FOR LIVING WAGE REQUIREMENTS - COMMENTS

	Commenter	Question/Comment	Written (Y/N)	Section Reference	Recommendations/Justifications
25		Would Companies that pay a fee based on the City fee schedule, which is approved by Council annually, be required to comply?	Y	4. Exempt	Does not apply, see applicability.
26		Will the Purchasing Officer hear and resolve complaints regarding contracts pertaining to the Aviation Department?	Y	6. Complaints A and E	Refer to Purchasing Officer.
27		Does the Purchasing Officer have the authority to refer a complaint related to the Aviation Department to anyone else other than an independent hearing officer?	Y	6. Complaints A and E	Refer to Purchasing Officer.
28	Chris Von Dohlen, Managing Director, Scott Airport Parking, LLC	<p>On March 4, 2014, the City of Austin ("City") and Scott Airport Parking, LLC ("SAP") entered into a Lease And Development Agreement (the "Lease") . In summary, the Lease authorizes and obligates SAP to lease certain</p> <p>(1) The opening paragraph of Page 1 under NOTICE OF PROPOSED RULE provides: "The Purchasing Office of the Financial Services Department proposes to adopt the following rule for the enforcement of the City of Austin's Living Wage requirements in City contracts after <u>April 28, 2017</u>." The <u>underlining</u> is added by me for emphasis. Thus, we suggest that section "4. Exempt" be amended to make it clear that the proposed rule does not apply to contracts entered into prior to the effective date of the rule.</p> <p>(2) Because of contracts like the Lease which may involve phases and options, we suggest the rule be amended to clarify that the rule will not apply to any provision (e.g. like an option, extension, renewal or amendment) or the exercise of a right provided for in a contract that has an original effective date prior to the effective date of the rule.</p>	Y	4. Exempt.	5/3/17 - Item (2) cannot respond at this time. 4/21/17 - Section "4. Exempt" be amended to make it clear that the proposed rule does not apply to contracts entered into prior to the effective date of the rule. See proposed revisions. See new definition of "Revenue/Expenditure".
29	Danielle Lord	Why/how is this going to be applied to Revenue contracts? If contract is revenue neutral, there is no invoice and reimbursement received. How would we go about monitoring?	?	3. Applicability C.	See new definition of "Revenue/Expenditure" (L and M) and reorganized sec 3. Recommend using eCAPRIS and adding LW Deliverables.

CITY PROPOSED RULE FOR LIVING WAGE REQUIREMENTS - COMMENTS

	Commenter	Question/Comment	Written (Y/N)	Section Reference	Recommendations/Justifications
30		Add "Emergency Contracts" to Exempt	?	4. Exempt.	See proposed revisions. Sec 4, Part E.
31	Heather Bailey	Please clarify whether the proposed rule as drafted is intended, or will be sought to be applied, to persons seeking to obtain a permit to operate an off-airport business pursuant to Section 13-1-161 of the Austin City Code.	Y	3. Applicability C.	See new definition of "Revenue/Expenditure" (L and M) and reorganized sec 3. See above/below line matrix.
32	Brian Sullivan, Assoc. General Council, Texas Hotel & Lodging Association	Does this proposed rule apply only to contracts exceeding \$50,000? Based upon Section 3(A)(2) ("Applicability") found on Page 4 of the attached PDF, it seems to me that this proposed rule could only apply when a city contract exceeds \$50,000 as part of a formal competitive solicitation compliant with Tex. Loc. Govt. Code Section 252.021(a):	Y	3. Applicability A(3).	\$58,000 or more, Sec 3(A)(3). Adding Definitions Sec O.
33		In the event that the City of Austin entered into a contract with a hotel located in Austin, would that hotel's employees/subcontractors, etc. have to be compensated in a manner that complies with the living wage requirements in City contracts (ex. banquet servers in a meeting space)? NOTE: If answer to the above is "yes," do you have any helpful reference material that I can share with an Austin hotel detailing for the hotel what those wage requirements are?	Y	3. Applicability A(1).	Excluded under Sec 3(A)(1)

CITY PROPOSED RULE FOR LIVING WAGE REQUIREMENTS - COMMENTS

	Commenter	Question/Comment	Written (Y/N)	Section Reference	Recommendations/Justifications
34	Chris Richards, General Manager, Aircraft Service International Group	My company is sub-contracted by the airline consortium to manage the fuel facility at the Austin Bergstrom International airport. The consortium has a lease with the airport for the facility. Would the proposed living wage rule apply to my company as the consortium only has a lease with the airport for the property and are not actually a vendor of the city and we are sub-contracted by the airline consortium? If the rule would apply to my company what is the living wage rate going to be set at as we could not find any information on this?	Y	3. Applicability C.	See new definition of "Revenue/Expenditure" (L and M) and reorganized sec 3. See above/below line matrix.
	Nikelle Meade, Husch Blackwell LLP, on behalf of Enterprise Holding, Inc.	By this email, we are submitting comments to the above-referenced proposed rule on behalf of Enterprise Holdings, Inc. (EHI), which is a tenant of and concessionaire at Austin-Bergstrom International Airport (ABIA). It is our analysis of the proposed rule that it does not subject Enterprise Holdings, Inc., to the proposed Living Wage laws and that the Austin's Living Wage laws do not apply to the employees of tenants or concessionaires such as EHI, because EHI employees are not employed in connection with a covered project or service, and we request clarification of same. Austin City Council ("Council") approved the Living Wage ordinances and resolutions to benefit people employed to work on a project or to provide a service typically associated with municipal projects and services. EHI does not perform or provide any such work or service. Rather, EHI has a concession agreement with the City to operate its car rental business, and car rental services are not a project or service typically associated with municipal governments. The rental of cars by private citizens from private companies does not aid the City in accomplishing the purposes for which municipalities exist under State law.			

CITY PROPOSED RULE FOR LIVING WAGE REQUIREMENTS - COMMENTS

	Commenter	Question/Comment	Written (Y/N)	Section Reference	Recommendations/Justifications
35		<p>In addition, our assessment that the Austin Living Wage laws do not apply to EHI is buttressed by a plain language reading of the following ordinances and resolutions. Because the scope of people covered by the relevant laws has broadened over time, you will find the most recent and expansive resolution first in the list below.</p> <p><u>Resolution No. 201603224-020 (March 24, 2016)</u> This resolution is inapplicable to EHI because EHI is not a contractor or subcontractor, and because EHI's employees are not responsible for working on city-owned vehicles and other property. This resolution was the result of an earlier resolution, which directed the City Manager to "provide policy options . . . to ensure the City's . . . contractors and sub-contractors are included in the City's living wage policies if their contracts are competitively solicited by the City and if the employees are working on City property or City vehicles." Thus, the scope of the resolution was limited to "contractors and sub-contractors," and EHI, while it has an agreement with the City, is not a contractor or sub-contractor. Rather, it is a tenant and concessionaire.</p> <p>In addition, the resolution covers employees who are "working on City property or City vehicles." If that phrase did not include "or City vehicles," the resolution might conceivably apply to anyone earning wages while on City property. But, such a reading would lead to illogical results, and would mean that the Living Wage laws apply, for example, to a personal assistant who is at the airport to accompany an employer on her flight. Moreover, the "working on City property or City vehicles" implies that the resolution applies to people who are working on property or vehicles in the sense of repairing, restoring, or improving the City's physical property, including City-owned vehicles. Thus, EHI is outside the scope of all provisions within this resolution.</p>	Y	3. Applicability C.	Adam will confirm with Susana Carbajal that these contracts are not competitively bid. See Section 3 applicability.

CITY PROPOSED RULE FOR LIVING WAGE REQUIREMENTS - COMMENTS

	Commenter	Question/Comment	Written (Y/N)	Section Reference	Recommendations/Justifications
		<p><u>Ordinance No. 030508-031 (March 24, 2016)</u> This ordinance is inapplicable because it only amended Ordinance No. 030508-031, which concerns wages to be paid on City projects, and a tenant providing rental car services is not a city project.</p> <p><u>Ordinance No. 20160324-015 (March 24, 2016)</u> This ordinance is inapplicable because it only applies to City public improvement projects, and a rental car business is not a public improvement project.</p> <p><u>Resolution No. 20150618-091 (June 18, 2015)</u> This resolution is inapplicable because it only directed the City Manager to provide policy options regarding application of the Living Wage laws to non-construction contractors and subcontractors. It resulted in the passage of the first resolution listed above,</p> <p><u>Resolution No. 20150521-023 (May 25, 2015)</u> This resolution is inapplicable because it directed the City Manager to review the Living Wage Task Force recommendations and to increase City employee minimum wage. It did not stipulate to which categories of employees the Living Wage laws would apply.</p> <p><u>Resolution No. 20141016-035 (October 16, 2014)</u> This resolution is inapplicable because it merely established the Living Wage Task Force. It did not stipulate to which categories of employees the Living Wage laws apply.</p>			

CITY PROPOSED RULE FOR LIVING WAGE REQUIREMENTS - COMMENTS

	Commenter	Question/Comment	Written (Y/N)	Section Reference	Recommendations/Justifications
36	Robert J. DeLucia, VP Labor & Employment and General Counsel for Airlines for America (A4A), and Len Sloper, Executive Director for Airline Service Provider Association (ASPA).	<p>As the principal trade and service organization for the U.S. scheduled airline industry, Airlines for America ("A4A") appreciates the opportunity to respond to the City of Austin's notice of proposed rule R.1616-17.14 ("NPR") (March 27, 2017) seeking public comments on the applicability of the City's Living Wage Policy for City Contractors. A4A's member carriers include most of the airlines that provide passenger and cargo service at Austin-Bergstrom International Airport ("AUS").</p> <p>Joining in and co-signing our position statement is the Airline Service Providers Association ("ASPA") a trade association composed of eighteen companies providing services to and on behalf of airlines. These Airline Service Provider ("ASP") companies provide a variety of services to airlines and our customers, including baggage and cargo handling, passenger ticketing and check-in, aircraft cleaning and fueling, and assistance to passengers who need wheelchair and other special accommodations. The services provided by ASP employees mirror those provided by airline employees.</p> <p>On its face, the city's Living Wage Policy clearly does not apply to airlines and ASPs operating at Austin Airport. The City is neither "purchasing" nor "procuring" goods or services from the airlines or ASPs. Airlines and ASPs are not parties with the city of Austin to the solicitation contracts covered by Austin City Council Resolution No. 20160324-020 (March 24, 2016):</p> <ul style="list-style-type: none"> • Contracts competitively and formally solicited by the City and/or subject to award by the City Council. • Contracts for work or services solicited by the City to be performed on City property. <p>Stating the obvious – the City of Austin does not solicit nor do the airlines bid for any work with the City. Airlines do not competitively bid for contracts to provide services to the City. To the contrary, the city of Austin neither pays money to nor does it obtain money from the airlines operating at AUS.</p> <p>Ordinarily, A4A would not have filed comments in response to the NPR as none of the categories of contractual relationships cited in the NPR apply to our lease and permits at AUS. However, Austin Airport authorities did circulate the NPR to tenants on April 9, noting that the "proposed rules as written may apply to contracts entered in with the Department of Aviation." (emphasis supplied) Accordingly, in an abundance of caution, A4A and ASPA will offer the following comments demonstrating that they cannot be subject to</p>	Y		

CITY PROPOSED RULE FOR LIVING WAGE REQUIREMENTS - COMMENTS

	Commenter	Question/Comment	Written (Y/N)	Section Reference	Recommendations/Justifications
37		<p>1. <u>Airlines and ASPs are not city "contractors" nor do they provide "services" to the City of Austin.</u></p> <p>The NPR defines city "contractors" as a "firm or other entity contracted to provide Non-Construction Services to the City under a City Contract." The only definition of "services" in the NPR reads: "means work or labor performed by Contractor employees." Airlines and ASPs do not fit under the scope of these definitions of "services" or "contractor."</p> <p>Rather, as at all airports, none of the services provided by airlines and ASPs at AUS are provided to the City of Austin. Rather, the services provided by airlines and our ASPs at airports are for our Passengers and Shippers. The services provided at AUS are governed by contracts between the airlines and their passenger and /or ASPs.</p> <p>The definitions section of the standard Use and Lease Agreement at AUS reflects the reality that the airlines operating at AUS are there to provide services to passengers and shippers. The definition section of the Use and Lease Agreement does not reference any services by an airline to the city:</p> <ul style="list-style-type: none"> • Air Carrier Service means Airline's' business of a scheduled air carrier...to engage in the business of commercial air transportation of persons, property, cargo and mail. (emphasis supplied). 	Y	3. Applicability C.	See Section 3 Applicability

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38		<p>2. <u>Financial: City of Austin does not provide funds to and cannot obtain funds from AUS.</u></p> <p>In accordance with federal aviation laws, and consistent with nationwide airport financing practices, all revenues generated at AUS (such as landing fees, concession rentals) must be expended at the airport. There are no net profits that are passed on to the city by the airlines operating at AUS; nor are there any net losses that the city must subsidize. Overall, the Austin city treasury neither gains nor losses revenue from AUS.</p> <p>As a self-sustaining enterprise, AUS' legal and financial relationships with its tenants and permit holders are not in the nature of the revenue generating or depleting contracts that the City's Procurement Departments has the authority to regulate.</p> <p>Further, any claim by the City of Austin that it is obtaining revenue from AUS operations would constitute an unlawful revenue diversion in violation of the Anti-Revenue Diversion Provision of the Federal Aviation Act, 49 U.S.C. section 47133(a). Any fees generated at AUS can only be expended for the capital or operating costs of the Airport.</p>	Y	3. Applicability C.	See Section 3 Applicability

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39		<p><u>3. Other legal and policy considerations.</u> Aside from the limitations on the City's regulatory authority and federal airport funding restrictions referenced above, application of the Living Wage Policy to airlines and ASPs would potentially violate other federal laws and be an unwise economic policy.</p> <ul style="list-style-type: none"> • Increase airport costs per enplaned passenger. Higher labor costs would inevitably translate into higher costs per enplanement making AUS less competitive with other Texas airports. • Airline Deregulation Act Preemption. It is well established that a state or local regulation will be preempted by the Airline Deregulation Act ("ADA") when it is "related to" air carrier "services." <i>Morales v Trans World Airlines, Inc.</i>, 504 U.S. 374, 390 (1992). The Supreme Court has held that the "related to" language in the ADA's preemption provision has a "broad scope" and an "expansive sweep." <i>Morales</i>, 504 U.S. at 390. To the extent that the city of Austin might seek to impose wage requirements on "services" provided by or to airlines at AUS, those actions would be preempted under the ADA. • Federal labor law. Exemption section 4.I of the NPR states that an exemption from the Living Wage Policy extends to "Contracts that result from or include Collective Bargaining Agreements." It is unclear what contracts that section is referring to. Many airlines operating at AUS have collective bargaining agreements. Regardless of the intent of the language, the potential violation of federal labor law is clear. Under both the Railway Labor Act (which governs airline labor relations) and the National Labor Relations Act, airports, and local governments cannot discriminate by subjecting non-union employers to terms and conditions different from those imposed on employers that are unionized. • Use and Lease Agreement term. It is our understanding that the term of the current Use and Lease agreement for most airlines at AUS does not expire until some point in 2020. For other carriers whose terms may expire earlier, they would need to be treated the same as carriers whose lease expire in 2020. In the interim, no Living Wage Policy could be imposed on either the airlines or the ASPs as the resulting costs 	Y	3. Applicability C.	See Section 3 Applicability

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40		<p>4. <u>Further proceedings.</u></p> <p>For all the above reasons, A4A and ASPA submit that the Living Wage Policy cannot legally, and should not on policy considerations, be applied to airlines and ASPs by the City of Austin.</p> <p>However, if the city should proceed to consider imposition of the Living Wage Policy on airlines and/or ASPs, we respectfully request that a formal hearing be convened to discuss the proposal.</p>	Y	3. Applicability C.	See Section 3 Applicability