


**MEMORANDUM**

October 15, 2018

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney 

SUBJECT: Bill 6-18, Contracts – Labor Peace Agreements – Displaced Service Workers – Amendments

PURPOSE: **Action-Addendum** – Council roll call vote required

Procurement Director Cheri Branson and Department of Environmental Protection Director Patty Bubar submitted a memorandum today to the Council explaining their concerns with Bill 6-18, Contracts – Labor Peace Agreement – Displace Service Workers – Amendments. See ©1.

This packet contains:  
October 15 Branson and Bubar Memorandum

Circle #  
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MEMORANDUM

October 15, 2018

TO: Hans Reimer, President  
Montgomery County Council

FROM: Cherri Branson, Director *Cherri Branson*  
Department of Procurement

Patty Bubar, Acting Director *Patty Bubar*  
Department of Environmental Protection

SUBJECT: Bill 6-18, Contracts—Labor Peace Agreement—Displaced Service Workers—  
Amendments

We write concerning Bill 6-18, Contracts—Labor Peace Agreement—Displaced Service Workers—Amendments, sponsored by Lead Sponsors Councilmembers Elrich and Hucker and Co-Sponsors Rice and Council Vice President Navarro, introduced on March 6, 2018. County Executive Leggett expressed concerns regarding the bill's mandatory automatic price increase in his memo dated September 13, 2018. The most recent work session and the discussion at Full Council on October 2, 2018, raised several remaining areas of concern and confusion surrounding the bill.

As noted during the October 2<sup>nd</sup> Council session, if enacted, the bill would apply only to County contracts for trash hauling and recycling services. Therefore, to help provide context to the discussion of the current bill, it is appropriate to provide a short synopsis of the County's efforts to ensure fairness to employees of trash haulers and recyclers, following the labor strikes affecting those services in 2013 and 2014.

I. **Applicability of the Wage Requirement Law to Trash Haulers and Recyclers**

In 2016, the Council passed and the Executive signed Bill 43-15, which amended the Wage Requirements Law ("WRL"). The WRL requires a County contractor that provides services to the County ("covered employer") to pay its worker ("covered employee") a required wage amount. The WRL also includes other provisions, including requirements related to the contractor demonstrating compliance with the law (e.g. keeping and submitting documents, and payroll record reporting).

The WRL previously included an exception to permit the covered employer to pay a covered employee a wage rate that was lower than the required WRL amount if that wage rate was established in a bona fide Collective Bargaining Agreement ("CBA") between the covered employer



and covered employee. Bill 43-15 removed that exception. Specifically, the modifications to the WRL contained in Bill 43-15 had the following effect:

- For a contract entered before Bill 43-15, but for which no CBA existed before Bill 43-15, the WRL wage rate applies;
- For a contract entered before Bill 43-15, and for which a CBA with a lower wage rate existed before Bill 43-15 and is still in effect, the lower CBA wage rate applies;
- For a contract entered before Bill 43-15, with a CBA with a lower wage rate, the WRL applies if the CBA expires during the pendency of the contract;
- For a contract entered after 43-15, WRL applies.

**In a nutshell, Bill 43-15 requires trash haulers and recyclers to pay at least the WRL unless a CBA that is in effect mandates a lower rate of pay.**

## II. Highlights of Bill 43-15

Several changes were made in Bill 43-15 that are relevant to the points being considered in Bill 6-18. As described in the packet provided to the Council when Bill 43-15 was being considered, upon enactment, Bill 43-15 as amended would:

- remove the exemption in the living wage law for employees subject to a collective bargaining agreement;
- specify that the wage required to be paid to a contractor's employees is based on gross pay;
- prohibit contractors from deducting amounts from an employee's paycheck for items necessary for the employee to perform the functions of the job; allow the County to recover costs for performing an audit as a result of the enforcement action; and
- require quarterly (as opposed to bi-weekly) submission of payroll records.

## III. Enforcement of the Wage Requirement Law

Bill 43-15 requires the Office of Procurement to determine compliance with the Wage Requirements Law (hereinafter WRL but also known as the "living wage law) by changing the permissible method of calculation of wages to assure WRL compliance from those employers who pay a daily wage instead of an hourly wage. This change in methodology was designed specifically to assure that the County could determine WRL compliance among the trash hauling and recycling vendors. Allowing the Office of Procurement to review the payrolls of this class of vendors and employ an industry-specific method of calculation (by dividing the amount paid to the employees each pay period by the number of hours worked each pay period) permitted a clear and accurate tabulation of the wages paid the employees of trash haulers and recyclers. **The County is required to ensure that**

the payrolls reflect such payments. Additionally, if the WRL applies, the annual WRL increase - based on a cost of living analysis required under county law - is received by all employees who work on a county service contract.

If passed, Bill 6-18 may bring about the payment of a wage rate in excess of the WRL to employees of vendors who have trash hauling and recycling contracts with the county. If a wage rate higher than the WRL is the result, it should be noted that county enforcement actions could not be used to assure the increased wage rate. Without additional changes there would be no way to compel an employer to comply with a wage higher than the WRL except by adding additional terms to the contracting process.

#### IV. Labor Peace Agreements and CBA

The current discussion of Bill 6-18, seems to assume the necessity of labor peace agreements as the only way to lessen the likelihood of strikes in providing the services. The County currently does not have any labor peace agreements. It should be noted that no strikes have occurred in this class of contracts since 2014. Moreover, employees of other County contractors have not engaged in strikes.

It should be noted that only one of the three trash hauling and recycling companies that currently hold county contracts operate under a CBA. That CBA was executed without the benefit of a labor peace agreement. Given these facts and the protections provided under 43-15, no need seems to exist to use a labor peace agreement as a mechanism to ensure an absence of a labor strike or service interruption or to create an atmosphere in which negotiations to obtain a CBA can occur.

#### V. Effect of Bill 6-18 on Contract Costs

Discussion during work sessions has compared employees of contractor trash haulers and recyclers to county employees in a represented class who receive a 2.1% annual increase. Council members have stated that the most recent WRL increase was approximately 2%. However, over the course of a decade, the average WRL increase has been approximately 1.4% (see chart at <https://www.montgomerycountymd.gov/PRO/Resources/Files/ke-Living%20Wage%20Rate%20History.pdf>).

Therefore, the amount of potential increase which may be necessitated by the automatic mandatory price increase at the discussed 2 percent level is significantly more than the average living wage increase. Additionally, the cost of the increase should be viewed as the likely difference between the average WRL increase and the cost of living increase provided to similarly situated County employees.

It appears that this legislation would permit a vendor to receive two cost increases during a year. The bill mandates a mandatory automatic price increase associated with wages. However, as noted during the full Council session on Bill 6-18, the bill does not ensure that the vendor will pay increased wages or otherwise pass on the increased payments to the employees.

Additionally, the bill does not prevent the vendor from receiving other price increases based on other factors. Currently, vendors are eligible for a reimbursement for additional unforeseen expenses incurred under the general terms and conditions of every contract. The

average cost increase sought by vendors in recent years has been approximately 2%. Therefore, if vendors are allowed to seek the cost increase while receiving the automatic mandatory increase, the true costs of this class of contracts will increase greatly over the next few years because this bill would permit one class of vendors to seek an increase before any additional expenses have been incurred and seek an increase after expenses have been incurred. Moreover, while a 2.1% increase received by County employees in this wage category is a subject of a Collective Bargaining Agreement, this bill does not set forth any legal underpinning or legislative finding to support the linkage between a wage increase received by County employees and a wage increase received by employees of a private sector company.

#### VI. Effect on Competition

The size and scope of the Montgomery County refuse and recycling collection service areas are large (approximately 20,000 homes each). Prospective contractors bidding on these contracts must invest millions of dollars in capital for equipment and labor. The number of prospective bidders that have access to these capital requirements for these contracts is limited. A recent solicitation for Area 3 resulted in only three contractors submitting proposals. Out of the three contractors, only one has a CBA. If Bill 6-18 had been in effect during the open period of this solicitation, it is likely that only the vendor with a current CBA would have sought to bid. Factors which limit the pool of bidders also limit competition and may increase prices.

The passage of Bill 6-18 may further deter potential new contractors from responding to future contracts because of the requirement to enter into a labor peace agreement due to the uncertainty and presumed costs of implementing and maintaining such an agreement. Therefore, this bill may have the unintended consequence of reducing bidders for these contracts to only those who already have a CBA.

Further, this bill presents a practical hurdle for any potential bidder without a CBA to determine the pricing contained in its pricing proposal and may lead to unsustainable contract pricing—requiring increases beyond the current average.

Additionally, it should be noted that there are other factors affecting this industry that should be considered—a shortage of skilled drivers, an increase in demand for collection services, environmental concerns, etc. The uncertainty of these market forces may discourage vendors from seeking contracts like those offered by the County—multi-year contracts with strict requirements for equipment, periodic facility and equipment inspections and liquidated damages for performance deficiencies. Yet, ensuring delivery of a vital governmental service requires that these provisions remain in our contracts. Without multiple offerors, the county's collection contracts will cease to be competitive, and the costs to the residents of the county will only increase.

c: Marlene Michaelson, Executive Director, Montgomery County Council  
Robert Drummer, Senior Legislative Attorney  
Bonnie Kirkland, Assistant Chief Administrative Officer