



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Scott P. Johnson

**SUBJECT: IMPLEMENTATION OF
PROCUREMENT REFORMS**

DATE: January 25, 2007

Approved

Kay Winer

Date

1/26/07

REASON FOR SUPPLEMENTAL

To restate the recommendations from the original Council Memorandum, dated November 1, 2006 with the amendments to recommend a lower Council Appointee contract approval authority for services after discussions and input from the City Labor Alliance and an additional amendment to the Municipal Code regarding the reporting requirements for administratively awarded contracts as well as to transmit a copy of the Santa Clara County Civil Grand Jury Report titled "City of San José Procurement Policies, Procedures, and Practices" and Council's response to the Grand Jury report (Attachment A).

RECOMMENDATION

- (a) Acceptance of the administration's report on the implementation of approved Procurement Reforms as modified by this supplemental memorandum.
- (b) Adoption of a resolution approving Council Policy titled "Procurement and Contract Process Integrity and Conflicts of Interest".
- (c) Deferral of approval of an ordinance of the City of San José amending Chapters 4.04 and 4.12, and repealing Chapters 4.06 and 4.13 of Title 4 of the San José Municipal Code to increase administrative contract authority for purchase of supplies, materials, equipment, and services to \$1,000,000, to enact a protest procedure for purchases, and to amend, reorganize and consolidate various purchasing procedures with the amendment to previous Council direction to the City Attorney and City Manager to set the contract approval authority for services at \$250,000 and to amend San José Municipal Code Section 4.12.210 to change the reporting requirement for purchases from \$20,000 and above to \$100,000 and above.

ANALYSIS

As reported in the original Council Memorandum on the implementation of procurement reforms, dated November 1, 2006 (Attachment B) and as referenced in the memorandum from the City Attorney's Office, dated November 6, 2006 (Attachment C), in December 6, 2005, Council directed the City Manager and City Attorney to implement comprehensive procurement reforms based on recommendations from the Santa Clara County Civil Grand Jury On June 22, 2005, City Auditor recommendations, Management Reforms, and Best Practices in Public Procurement in the Procurement Reforms. The Reform package included revising applicable Municipal Code sections, formulating a Council Policy titled "Procurement and Contract Process Integrity and Conflicts of Interest", and reaching out to various stakeholders about the approved reforms. The procurement reforms were approved to enhance transparency, ensure consistency, streamline the procurement process, increase competition, and provide for a fair and open procurement environment.

During 2006 and January 2007, staff reached out to numerous stakeholders such as the Small Business Development Commission, the Treatment Plant Advisory Committee, and the Contracting-In Committee. After release of the original memorandum, dated November 1, 2006, staff met several times with the City Labor Alliance (CLA). After listening to the concerns of the CLA, the Administration recommends that the contract approval authority for purchase of goods and commodities remain at the recommended \$1 million, however the Administration recommends that contract approval authority be set at \$250,000 rather than the originally proposed \$1 million as directed by Council. Services will include professional services (Consultant agreements except for public works related contracting activities), non-professional services (e.g. landscape maintenance, janitorial, or security guard services), training, and IT-related services. If a contract provides for supplies, material, and equipment and includes a service component such as installation, repair, or maintenance, the \$250,000 contract approval authority will apply. If a contract provides for supplies, material, and equipment and delivery, which is an incidental service, the \$1 million contract approval authority will apply.

As discussed in the original memorandum, the established Contracting-In process will continue, whereby Human Resources signs off on a contracting-in review after consultation with the affected bargaining units. For Council's information, Attachment B outlines the current and the slightly modified administrative Contracting-In process after adoption of the contract approval authority of \$250,000 for services. At the last meeting with the CLA, bargaining units expressed concerns about the contracting-in process. Staff will continue to work with bargaining unit representatives to address their questions and concerns. The reforms to the procurement process outlined in this memorandum do not in any way change any existing obligation to Meet-and-Confer with a bargaining unit under applicable circumstances.

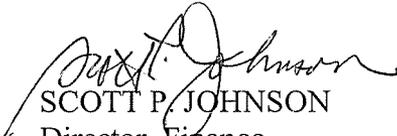
As part of the adoption of the comprehensive procurement reforms in December 2005, Council accepted staff's recommendation to report annually to Council on aggregate contract awards to small and local businesses in lieu of the current requirement of reporting purchases of supplies,

materials, and equipment and general services contracts in amounts between \$20,000 and \$100,000. To ensure consistency with recent actions taken regarding reporting of Public Work's construction contracts, staff recommends that Council direct the City Attorney to revise the draft ordinance to include an amendment to the reporting requirement of paragraph 4.12.210 for purchases of supplies, materials, equipment and services in amounts between \$20,000 and \$100,000 to between \$100,000 to \$250,000 for services and \$100,000 to \$1 million for supplies, materials, and equipment.

Since this Supplemental Memorandum only affects the third recommendation before the Council, staff recommends that Council proceed with approval of the report on Procurement Reforms as modified by this memorandum, as well as adoption of a resolution approving Council Policy titled "Procurement and Contract Process Integrity and Conflicts of Interest". Staff recommends further that Council approve the change in direction to draft the procurement ordinance amendments. Assuming Council accepts the recommendation of this Supplemental Report, the City Attorney will revise the draft ordinance to include the recommended changes and present it at a subsequent Council meeting.

COORDINATION

This memorandum was coordinated with the Office of Employee Relations and the City Attorney's Office.


SCOTT P. JOHNSON
Director, Finance

For questions please contact Walter C. Rossmann, Chief Purchasing Officer at (408) 535-7051.

Attachments:

- A. Santa Clara County Civil Grand Jury Report titled "City of San José Procurement Policies, Procedures, and Practices" and Council's response to the Grand Jury Report.
- B. Original Memorandum titled "Implementation of Procurement Reforms", dated November 1, 2006
- C. City Attorney Memorandum titled "Procurement Reform Ordinance", dated November 6, 2006
- D. Description of Contracting-In process



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Scott P. Johnson

SUBJECT: SEE BELOW

DATE: August 3, 2005

Approved

Kay Winer

Date

8/8/05

SUBJECT: RESPONSE TO THE SANTA CLARA COUNTY CIVIL GRAND JURY REPORT TITLED "CITY OF SAN JOSE PROCUREMENT POLICIES, PROCEDURES, AND PRACTICES" DATED JUNE 22, 2005

RECOMMENDATION

Acceptance of the City's response to the Santa Clara County Civil Grand Jury report titled "City of San José Procurement Policies, Procedures, and Practices" dated June 22, 2005.

BACKGROUND

On June 22, 2005, the Santa Clara County Civil Grand Jury issued a report titled "City of San José Procurement Policies, Procedures, and Practices." The report summarizes the findings and related recommendations of an inquiry into the City's procurement policies, procedures, and practices. Members of the Civil Grand Jury met with representatives of the City Manager's Office and the Finance Department to understand the City's procurement policies and related procedures and practices and to learn about steps taken to strengthen and improve existing procurement processes as outlined in the February 17 report to the Make Government Work Better Committee. In the February 17 report, staff updated the committee on the Conflict of Interest processes, the Standardization Ordinance, and potential changes to the City's Municipal Code regarding the procurement of material, supplies, equipment, and general and professional services.

ANALYSIS

The report from the Civil Grand Jury identified four findings and related recommendations. The City's response to the four recommendations is outlined below.

Civil Grand Jury Recommendation 1

Finance Purchasing should ensure that all relevant City, State and/or Federal requirements are adequately addressed in procurement policies and procedures, and should implement a formal

HONORABLE MAYOR AND CITY COUNCIL

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Subject: Response to the Santa Clara County Civil Grand Jury Report titled "City of San Jose Procurement Policies, Procedures, and Practices" dated June 22, 2005

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configuration control or change control process for the maintenance and revision of procurement manuals. Consideration should be given to using services of a professional consultant to assist in updating and revising the procurement manuals. Once policies and procedures are in place, all personnel involved in any procurement process should receive mandatory training on these policies and procedures, including periodic refresher training.

City's Response to Civil Grand Jury Recommendation 1

Finance agrees that relevant City, State and/or Federal requirements are to be addressed in procurement policies and procedures. The Finance Department is currently in the process of preparing a report proposing revisions to the City's Municipal Code as it pertains to the procurement of material, supplies, equipment, and services. These proposed revisions will be reviewed by the Making Government Work Better Committee during their next meeting and will be forwarded to the City Council for acceptance. Finance also agrees that a proper version control process of Purchasing Manuals needs to be implemented through integration of the Purchasing Manual into the City's Administrative Manual. The City's Administrative Manual is published on the City's Intranet site. To ensure implementation of this recommendation, the Finance Department filled the position of Chief Purchasing Officer in April 2005. After the alignment of the City's Purchasing Manuals with the Municipal Code, Finance will provide citywide training for personnel involved in the procurement process.

Civil Grand Jury Recommendation 2

The San José City Council should: (a) revise the Municipal Code to specify that excluding construction activities, Finance Purchasing is *fully* responsible for procurement of *all* supplies, materials, equipment, and general and professional services; and (b) assure that sufficient staffing, training, financial resources and information technology systems are provided to enable Finance Purchasing to carry out this expanded role. Finance Purchasing should be located closer to the City user departments to facilitate involvement in the day-to-day development and management of major contracts.

City's Response to Civil Grand Jury Recommendation 2

Finance agrees that Purchasing needs to oversee the procurement of all material, supplies, equipment and general and professional services with the exception of construction activities administered by other departments. Specific recommendations will be included in the report referenced in the response to Recommendation #1 that will be reviewed by the Making Government Work Better Committee. Effective August 22, Purchasing will be located at the New City Hall to ensure enhanced communication and cooperation with City Departments.

Civil Grand Jury Recommendation 3

Documentation standards in Procurement procedures should be strengthened. A checklist of key procurement records could be a useful way of identifying and organizing documents to be accumulated and included in the procurement file. It may be appropriate for the City Auditor to conduct a more complete assessment of the quality of existing procurement documentation in order to fully address deficiencies.

HONORABLE MAYOR AND CITY COUNCIL

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Subject: Response to the Santa Clara County Civil Grand Jury Report titled "City of San Jose Procurement Policies, Procedures, and Practices" dated June 22, 2005

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City's Response to Civil Grand Jury Recommendation 3

Finance agrees that documentation procedures in Procurement processes require strengthening. The aforementioned checklist is in development. After completion of the internal Purchasing manual, Finance will invite the City Auditor to review Purchasing's internal processes.

Civil Grand Jury Recommendation 4

Once appropriate steps are taken, the San Jose City Council should revise the San Jose Municipal Code to significantly increase the \$100,000 threshold for requiring Council approval. These steps would include revision of procurement policy and procedures manuals (Recommendation 1), provision of sufficient procurement staffing, training, financial resources and information technology systems (Recommendation 2), and institution of measures to manage conflict of interest and ensure prudent accountability. In the interim, consideration should be given to increasing the limit on contracting authority for procurement of equipment and materials when normal procedures are followed and the procurement budget has been appropriated.

City's Response to Civil Grand Jury Recommendation 4

Finance agrees with Recommendation 4 and will outline a proposal in the report to be presented to the Making Government Work Better Committee during their next meeting.

OUTCOME

Upon Council's approval of staff's responses to the Grand Jury report, staff will incorporate the action plans from each recommendation/response into the Finance Department's report to the Making Government Work Better (MGWB) Committee in September on the City's Procurement Practices which will be forwarded by the Committee to the City Council for approval. The recommended changes will require modifications to the City's purchasing policies and procedures and the City's Municipal Code that will reflect best practices in municipal procurement regulations and practices. After the revisions to the Municipal Code are approved by Council, Finance Purchasing will update citywide manuals and train City staff.

PUBLIC OUTREACH

Not applicable.

COORDINATION

This memorandum has been coordinated with the Public Works Department and the Offices of the City Attorney and City Manager.

HONORABLE MAYOR AND CITY COUNCIL

August 3, 2005

Subject: Response to the Santa Clara County Civil Grand Jury Report titled "City of San Jose Procurement Policies, Procedures, and Practices" dated June 22, 2005

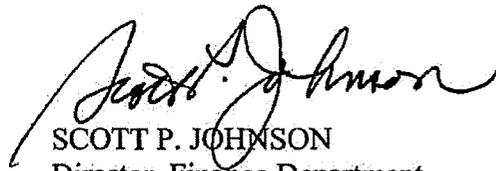
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COST IMPLICATIONS

Not applicable.

CEQA

Not a project.


SCOTT P. JOHNSON
Director, Finance Department





June 22, 2005

Honorable Ron Gonzales
Mayor
City of San Jose
801 North First Street
Room 600
San Jose, CA 95110

Dear Mayor Gonzales and Members of the City Council:

The 2004-2005 Santa Clara County Civil Grand Jury is transmitting to you its Final Report, **City of San Jose Procurement Policies, Procedures, and Practices**.

California Penal Code § 933(c) requires that a governing body of the particular public agency or department which has been the subject of a Grand Jury final report shall respond within **90 days** to the Presiding Judge of the Superior Court on the findings and recommendations pertaining to matters under the control of the governing body. California Penal Code § 933.05 contains guidelines for responses to Grand Jury findings and recommendations and is attached to this letter.

PLEASE NOTE:

1. As stated in Penal Code § 933.05(a), attached, you are required to "Agree" or "Disagree" with each APPLICABLE Finding(s) 1, 2A, 2B, 3 & 4. *If you disagree, in whole or part, you must include an explanation of the reasons you disagree.*
2. As stated in Penal Code § 933.05(b), attached, you are required to respond to each APPLICABLE Recommendation(s) 1, 2, 3 & 4, *with one of four possible actions.*

Your comments are due in the office of the Honorable Alden E. Danner, Presiding Judge, Santa Clara County Superior Court, 191 North First Street, San Jose, CA 95113, no later than **Friday, September 23, 2005**.

Copies of all responses shall be placed on file with the Clerk of the Court.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael A. Smith".

MICHAEL A. SMITH
Foreperson
2004-2005 Civil Grand Jury

MAS:dsa
Enclosures (2)

California Penal Code Section 933.05, in relevant part:

933.05. (a) For purposes of subdivision (b) of Section 933, as to each grand jury finding, the responding person or entity shall indicate one of the following:

(1) The respondent agrees with the finding.

(2) The respondent disagrees wholly or partially with the finding, in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons therefor.

(b) For purposes of subdivision (b) of Section 933, as to each grand jury recommendation, the responding person or entity shall report one of the following actions:

(1) The recommendation has been implemented, with a summary regarding the implemented action.

(2) The recommendation has not yet been implemented, but will be implemented in the future, with a time frame for implementation.

(3) The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a time frame for the matter to be prepared for discussion by the officer or head of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This timeframe shall not exceed six months from the date of publication of the grand jury report.

(4) The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefor.



**2004-2005 SANTA CLARA COUNTY
CIVIL GRAND JURY REPORT**

FILED

JUN 22 2005

KIRI TORRE
Chief Executive Officer
Superior Court of CA County of Santa Clara
BY D. ALDYCKI DEPUTY

**CITY OF SAN JOSE PROCUREMENT POLICIES,
PROCEDURES, AND PRACTICES**

Summary

Following the disclosure of problems in several recent City of San Jose (City) technology projects, the 2004-2005 Santa Clara County Civil Grand Jury (Grand Jury) inquired into City procurement policies, procedures and practices. This inquiry, conducted over several months, included interviews with the City Manager and with key management personnel of the City Finance Department (Finance) and of the City General Services Department, Purchasing Division (GS Purchasing). It also included a review of procurement policies and procedures, and the evaluation of files for eight major procurements.

This report addresses procurement of supplies, materials, equipment and general services by GS Purchasing, and procurement of professional services by authorized City departments. It does not address procurement of construction activities by the City Department of Public Works, which, by state law, operates under a different set of requirements, policies and procedures.

In this report, the Grand Jury uses the term "procurement" for the full range of processes involved in acquiring goods and services for an enterprise. Similar terms include "purchasing", "provisioning", "sourcing", and "supply management".

The Grand Jury investigation resulted in five findings and four recommendations. The findings are summarized as follows:

- GS Purchasing has developed procurement policy and procedures manuals, but the manuals appear to be maintained and revised in an informal manner. Further, the manuals do not appear to fully address all relevant areas of the procurement process nor all requirements mandated by the San Jose Municipal Code and by state and federal law.
- The City has both centralized and decentralized procurement processes. GS Purchasing is responsible for procuring supplies, materials, equipment and general services. However, individual City departments handle procurement of professional services, without any required participation of GS Purchasing personnel or compliance with current GS Purchasing procedures. Substantial risks may be incurred by not having professional procurement personnel involvement or oversight in all procurement processes.
- GS Purchasing personnel appear to focus primarily on processing purchase orders and do not fully function as procurement professionals who are actively involved throughout the process from identification of a need to final delivery of,

and payment for, a product or service. They appear to become involved in the contract management phase of procurement only when they become aware of a problem. The current geographic remoteness of the GS Purchasing group may deter its routine involvement in many procurement processes.

- Procurement files maintained by individual City departments for professional services contracts appear to be poorly documented and maintained. Files maintained by GS Purchasing for procurement of supplies, materials, equipment and general services are more complete, but there appear to be inadequate standards for the contents and organization of procurement files.
- The San Jose Municipal Code limits the contracting authority of the City Manager, City Council (Council) appointees and certain City department heads to \$100,000 with contracts above that limit requiring approval by the Council. This threshold for Council approval is low in comparison with other large cities and counties in California. Requiring Council approval of relatively small contracts increases costs and adds delays to the procurement process, with little discernible benefit. Routine approval of such contracts is typically granted as part of a single motion to approve, without discussion, the "Consent Calendar" on the Council agenda.

Background

City GS Purchasing and other City departments authorized to procure professional services collectively spend over \$200 million each year for products and services, excluding construction activities. The Department of Public Works is responsible for the procurement of construction activities, and operates under its own set of state-mandated requirements, policies and procedures.

Some key objectives of a typical municipal government procurement organization are to:

- Make certain that the city receives the best value, in terms of quality and price, obtainable for each tax dollar spent;
- Promote free, open competition and equal opportunity for all vendors who seek to conduct business with the city;
- Ensure prudent and open accountability for procurement actions taken;
- Guarantee that small businesses, and those that are disadvantaged, female, and/or minority-owned have equal opportunity to participate in city contracts;
- Monitor vendor performance to ensure reliability and financial viability;
- Ensure compliance with city, state and federal laws; and
- Keep abreast of current developments in the field of purchasing, prices, market conditions, and new products.

Several recent, high-visibility, multi-million-dollar City technology projects have encountered significant problems, resulting in unanticipated costs, project delays, adverse personnel actions and a public perception that the City government is unable to successfully execute technology projects.

A memorandum dated January 21, 2005 from the Mayor and two council members to City Council stated, "As we depend more and more on advancing technology to deliver quality and efficient services to our residents, we must have strong confidence in the process and results of our purchases of technology. Recently, however, the City has experienced significant difficulties in several recent high profile technology projects, including CUSP [an integrated utility billing, Customer Service and Performance management system], converged network [integrated communications services for the New Civic Center], and the police computer assisted dispatch system. These difficulties point to the need for checks and balances, standard procedures and guidelines, and effective management and policy oversight that will ensure that appropriate due diligence has occurred before City Council considers a major purchase of technology."

During an initial interview with the City Manager, Director of Finance and other selected department heads, the Grand Jury was told that several steps were already being taken to strengthen and improve the procurement process. Specifically, the City Manager indicated that: (1) GS Purchasing was being reassigned to Finance; (2) a search was underway to fill the newly created position of Deputy Director/Chief Purchasing Officer reporting to the Director of Finance; and (3) GS Purchasing personnel would be moving from their current, remote location on Senter Road to the New Civic Center, allowing them easier access to other city departments; and facilitating more direct oversight by Finance.

Discussion

PROCUREMENT POLICIES AND PROCEDURES

Procurement policy and procedures manuals are necessary to facilitate the consistent and orderly implementation and use of applicable procedures by all members of an organization involved in procurement activities. A detailed and comprehensive procurement manual defines how the organization complies with applicable legal requirements and best business practices during the entire procurement process, and specifies the responsibilities of procurement personnel. Responsibility for City procurement of supplies, materials, equipment and general services (excluding construction activities) is centralized under GS Purchasing, which has developed a series of policies and procedures to comply with the San Jose Municipal Code. However, responsibility for procurement of professional services is decentralized, with each City department procuring professional services to address its own needs. Procedures for the procurement of professional services are not specifically set forth by GS Purchasing, and City Departments are not required by the San Jose Municipal Code to have formal written procedures or guidelines for the procurement of professional services.

During the initial interview with the City Manager and Director of Finance, the Grand Jury requested copies of current procurement policy and procedures manuals used by GS Purchasing. Difficulties encountered by the Grand Jury in obtaining copies of current

manuals suggest a lack of an adequate process for the control and distribution of GS Purchasing manuals.

The Grand Jury ultimately reviewed the following manuals: (1) The City of San Jose Purchasing Administrative Manual; (2) the City of San Jose Purchasing Guide; and (3) the City of San Jose Request for Proposal Procedures Manual. Before reviewing these documents, the Grand Jury was told by the manager of GS Purchasing that both the Purchasing Administrative Manual and the Request for Proposal Procedures Manual were "undergoing substantial updating and revisions". The Grand Jury noted that these manuals were being revised in an informal manner, and not in accordance with any formal change control process.

The Grand Jury met with management of Finance and GS Purchasing on several occasions to discuss concerns related to GS Purchasing manuals. It is not the intent or purpose of the Grand Jury to perform a detailed technical review of these documents. However, it was noted that the three procurement manuals reviewed did not appear to address all relevant areas of the procurement process uniformly, nor did the manuals address all applicable requirements mandated by the San Jose Municipal Code and by state and federal law. It was not uncommon to note that policies were found for which there were no associated implementing procedures. Two examples are the management of possible vendor conflict in supplying information for Requests for Proposals and the procurement of recycled products. Deficiencies related to the Purchasing Administrative Manual were previously identified by the City Auditor who, in 1986, recommended that GS Purchasing should "develop a comprehensive written procedures manual on the purchasing process". It appears that, to some degree, a problem still exists nearly twenty years later.

PROCUREMENT PRACTICES

The Grand Jury reviewed eight major procurements, each of which had a value exceeding \$1 million and involved complex technology, professional services, or commodities. Five of the eight procurements were for professional services and were performed by user departments, specifically the Environmental Services, Finance, and Information Technology Departments. The remaining three procurements were performed by GS Purchasing. The procurement files provided to the Grand Jury were evaluated as a minimum standard for completeness according to the following criteria:

- Purchase Requisition (or authorization to purchase);
- Specification or Scope of Work to be performed;
- Vendor/Contractor List (if competitive) or sole source justification if not;
- Buyer's worksheet for determining lowest responsive bidder;
- Department recommendation for award;
- City Council authorization memorandum;
- Review and approval by GS Purchasing Manager and Director of General Services;

- City Attorney approval;
- Copy of purchase order/contract;
- Type of purchase order or contract identified, e.g., Firm Fixed Price, Time & Materials, Cost plus Fixed Fee, etc.;
- Evidence of invoice(s) payment;
- Request For Proposal/Quote/Qualification; and
- Winning bidder's proposal.

The five procurement files for professional services were found by the Grand Jury to be incomplete, inconsistent and in disarray. Most of these files consisted of sets of documents assembled in no specific or logical order and were bound by paper clips or rubber bands. The absence of key procurement documents and vendor correspondence in these major procurement files also raised significant concerns.

The three procurement files prepared by GS Purchasing tended to be more complete and better organized than those prepared by user organizations for professional services. However, there still appeared to be no uniform standards for the contents and organization of the files.

All eight procurement files were inconsistent in the information they contained. The Grand Jury found it very difficult to determine what service or product was being procured, who was bidding, what service or product was being delivered, what the acceptance testing criteria and procedures were, and how payment was to be made to the vendor(s).

The Grand Jury found limited participation in the procurement process by personnel in GS Purchasing. Even for those procurements performed by GS Purchasing, personnel appeared to focus primarily on processing purchase orders, with little evidence of overall procurement management and follow-up. During discussions with the Grand Jury, Finance and GS Purchasing management asserted that, due to the limited resources available, GS Purchasing personnel could not perform day-to-day procurement management of major contracts. Rather, they performed procurement management on an "exception" basis as problems arose or were identified. Substantial risks (e.g. costly litigation, inadequate technical standards, higher costs, delays in delivery and installation, and the product or services not meeting the business user's requirements) may be incurred by not having professional procurement personnel involvement or oversight in all procurement processes.

In addition to this evaluation of eight sample procurement files, the Grand Jury has issued a separate report on the problematic procurement and implementation of the San Jose Police Department Computer Aided Dispatch System, entitled "Problems Implementing the San Jose Police Computer Aided Dispatch System".

PROCUREMENT APPROVAL AUTHORIZATION AND ACCOUNTABILITY

The Grand Jury also observed that the San Jose Municipal Code limits the contracting authority of the City Manager, Council appointees, and certain City Department heads to \$100,000, with contracts above that limit requiring approval by the Council. Requiring

Council approval of relatively small contracts increases costs and adds delays (e.g., preparation, review and approval of Council Memos) to the procurement process, with little discernible benefit. Routine approval of such contracts is typically granted as part of a single motion to adopt, without discussion, all items listed on the "Consent Calendar" of the Council agenda.

The \$100,000 procurement approval authority is low in comparison with other major cities. A survey of cities and counties in California and Arizona by the California Association of Public Purchasing Officers found that major cities and counties generally had a much higher threshold for council or board approval, particularly for procurement of equipment and materials when normal procedures had been followed and budget had been appropriated. Some of the cities and counties that require either no council or board approval or a threshold of at least \$1 million before approval is required under these circumstances include: Santa Clara County, Sacramento County, City and County of San Francisco, San Diego County, City of Los Angeles, City of Merced, City of Oxnard, City of San Diego and City of Ventura. While ranked as the eleventh largest municipality in the United States, San Jose's threshold for Council approval ranks with those of smaller California cities.

The Grand Jury believes that strict adherence to City policies and procedures is central to accountability and all personnel involved in procurement actions must be trained to understand and comply with governing policies and procedures. Full documentation of procurement actions taken must be created and preserved for subsequent financial and performance audits. And finally, full disclosure of all conflicts of interest relevant to any procurement must be made and considered by appropriate management and legal authorities.

Conclusions

The importance of the procurement function to the overall financial and operational success of the City of San Jose cannot be overemphasized. Obtaining goods and services through prudent procurement practices adds to the success of an organization by ensuring that correct, quality products are received at competitive prices. The following Findings and Recommendations do not address procurement of construction activities by the City Department of Public Works.

Finding 1

GS Purchasing has developed procurement policy and procedures manuals, but the manuals appear to be maintained and revised in an informal manner. Further, the manuals do not appear to fully address all relevant areas of the procurement process nor all applicable requirements mandated by the San Jose Municipal Code and by state and federal law.

Recommendation 1

GS Purchasing should ensure that all relevant City, state and/or federal requirements are adequately addressed in procurement policies and procedures, and should implement a formal configuration control or change control process for the maintenance and revision of procurement manuals. Consideration should be given to using the services of a professional consultant to assist in updating and revising the procurement manuals. Once policies and procedures are in place, all personnel involved in any procurement process should receive mandatory training on these policies and procedures, including periodic refresher training.

Finding 2A

The San Jose Municipal Code authorizes both centralized and decentralized processes for procurement. GS Purchasing is responsible for procuring supplies, materials, equipment and general services. However, individual City departments handle procurement of professional services, without any required participation of GS Purchasing personnel or compliance with current GS Purchasing procedures. Substantial risks (e.g. costly litigation, inadequate technical standards, higher costs, delays in delivery and installation, and the product or services not meeting the business user's requirements) may be incurred by not having professional procurement personnel involvement or oversight in all procurement processes.

Finding 2B

GS Purchasing personnel appear to focus primarily on processing purchase orders, and do not fully function as procurement professionals who are actively involved throughout the procurement process from identification of a need to final delivery of, and payment for, a product or service. They appear to become involved in the contract management phase of procurement only when they become aware of a problem. The current geographic remoteness of the GS Purchasing group may deter its routine involvement in many procurement processes.

Recommendation 2

The San Jose City Council should: (a) revise the Municipal Code to specify that, excluding construction activities, GS Purchasing is *fully* responsible for procurement of *all* supplies, materials, equipment, and general and professional services; and (b) assure that sufficient staffing, training, financial resources and information technology systems are provided to enable GS Purchasing to carry out this expanded role. GS Purchasing should be located closer to the City user departments to facilitate involvement in the day-to-day development and management of major contracts.

Finding 3

The Grand Jury evaluated a sample of eight procurement cases. Procurement files for five of these cases were managed by individual City departments for procurement of professional services. They appear to be poorly documented and maintained. Files for the other three cases were managed by GS Purchasing for procurement of supplies, materials, equipment and general services. These are more complete, but there appear to be inadequate standards for the contents and organization of procurement files.

Recommendation 3

Documentation standards in Procurement procedures should be strengthened. A checklist of key procurement records could be a useful way of identifying and organizing documents to be accumulated and included in a procurement file. It may be appropriate for the City Auditor to conduct a more complete assessment of the quality of existing procurement documentation in order to fully address deficiencies.

Finding 4

The San Jose Municipal Code limits the contracting authority of the City Manager, City Council appointees and certain City department heads to \$100,000, with contracts above \$100,000 requiring approval by the Council. This threshold for Council approval is low in comparison with other large cities and counties in California. Requiring Council approval of relatively small contracts increases costs and adds delays (e.g., preparation, review and approval of Council Memos) to the procurement process, with little discernible benefit. Routine approval of such contracts is typically granted as part of a single motion to adopt, without discussion, the "Consent Calendar" on the Council agenda.

Recommendation 4

Once appropriate steps are taken, the San Jose City Council should revise the San Jose Municipal Code to significantly increase the \$100,000 threshold for requiring Council approval. These steps would include revision of procurement policy and procedures manuals (Recommendation 1), provision of sufficient procurement staffing, training, financial resources and information technology systems (Recommendation 2), and institution of measures to manage conflict of interest and ensure prudent accountability. In the interim, consideration should be given to increasing the limit on contracting authority for procurement of equipment and materials when normal procedures are followed and the procurement budget has been appropriated.

PASSED and ADOPTED by the Santa Clara County Civil Grand Jury on this 9th day of June, 2005.



Michael A. Smith
Foreperson

References

Documents

1. City of San Jose City Auditor's Report 86-21– A Performance Audit of Purchasing Operations, 26 Aug. 1986.
2. City of San Jose City Auditor's Report 91-10 – An Audit of the City's Formal Bidding Process Administered by the General Services Department/Purchasing Division, 15 Oct. 1991.
3. City of San Jose City Auditor's Report 04-05 – A Review of the CUSP Request for Proposal Process, 25 June 2004.
4. City of San Jose City Auditor's Report 04-06 – A Review of the Request for Proposal for the New Civic Center Converged Network System, 8 Aug. 2004.
5. City of San Jose Memorandum: Municipal Code Amendments Regarding Contract Authority, 3 May 2001.
6. City of San Jose, Office of the City Attorney/Office of the City Auditor, Report 04-06, A Review of the Request for Proposal for the New Civic Center Converged Network System, Aug. 2004.
7. City of San Jose Meeting Agenda: "Procurement Meeting...", 26 Aug. 2004 – with the following documents as attachments:
 - City of San Jose General Services – Purchasing Division (undated).
 - "General Services – Purchasing "The Purchasing Puzzle", PowerPoint Presentation of 26 Aug. 2004.
 - City of San Jose Purchasing Guide (Nov. 1997, Revised Dec. 2002).
 - Contract Administration and Management Guidelines.
 - Specifications Writing Handbook – Department of General Services, Revised 1 April 2003.
8. City of San Jose Memorandum: Contract for New Civic Center Communications/Data Technology, 3 Aug. 2004.
9. City of San Jose Memorandum: Converged Network RFP, 20 Aug. 2004.
10. City of San Jose Memorandum: Cisco "Standardization", 20 Aug. 2004.
11. City of San Jose Memorandum: Investigation Summary Converged Network RFP, 3 Sept. 2004.
12. City of San Jose Memorandum: Investigation Summary into Alleged Misconduct of City Staff Regarding the Converged Network for the New Civic Center Request for Proposals, 3 Sept. 2004.
13. City of San Jose Memorandum: Council Investigations Pursuant to Charter Section 416, 10 Sept. 2004.

Documents – (cont'd.)

14. City of San Jose Memorandum: Report on Technical and Procurement Services for the New City Hall Converged Network Request for Proposals (RFP), 7 Oct. 2004.
15. City of San Jose Memorandum: Request for Proposals & Conflict of Interest, 14 Oct. 2004.
16. Letter: City of San Jose Procurement Process, Director of Finance, 19 Oct. 2004 – with the following documents as attachments:
 - City of San Jose Request for Proposal Procedures Manual, 25 July 1995.
 - City of San Jose Purchasing Administrative Manual, 15 Sept. 2001.
 - City of San Jose Department of Public Works Bid Documents, 23 Sept. 2003 & various dates.
17. City of San Jose Memorandum: Request for Proposals & Conflict of Interest, 14 Oct. 2004.
18. City of San Jose Memorandum: Procurement Strategy for the New City Hall Converged Network, 12 Nov. 2004.
19. Supplemental Report: Independent Investigation Regarding the Request for Proposals Related to the Converged Network for the New San Jose Civic Center, Hanson Bridgett/Marcos Vlahos Budy LLP, 11 Jan. 2005.
20. City of San Jose Memorandum: Converged Network and RFP process, 21 Jan. 2005.
21. City of San Jose Memorandum: Status Report on Request for Proposal Procedures, 9 Feb. 2005.
22. City of San Jose Fiscal/Budget Contacts, Revised 8 Feb. 2005.
23. City of San Jose Procurement Files for Eight Purchase Orders Greater than \$1 Million, 1 July 2000 through 19 April 2005.
24. Email: Purchasing Documentation, Purchasing Manager, 30 Nov. 2004, 5:04PM – with the following documents as attachments:
 - City of San Jose Purchasing Administrative Manual – GS Purchasing Manager, Revised Feb. 2003.
 - City of San Jose Purchasing Guide (Nov. 1997, Revised Dec. 2002).
 - City of San Jose Request for Proposal Procedures Manual, (undated).
25. Email: RE: Procurement Data, Deputy Director of Finance, 11 Feb. 2005, 9:20AM - with the following document as an attachment:
 - Computer-Generated Report of Purchase Orders Greater than \$1Million, 1 July 2000 through 30 June 2004.

Documents – (cont'd.)

26. Email: Information Request, Deputy Director of Finance, 13 April 2005, 4:47PM – with the following documents as attachments:
 - Purchasing Organization Chart – FY 04-05, 13 April 2005.
 - City of San Jose Retention Schedule – General Services, 5 April 2005.
27. Email: FW: Increasing Approval Authority for Procurement Contracts, Chief Purchasing Officer, 4 May 2005, 8:00AM.
28. Email: RE: Increasing Approval Authority for Procurement Contracts, Chief Purchasing Officer, 11 May 2005, 12:34PM – with the following document as an attachment:
 - Council Board Approval Limits by Agency –Thresholds Survey for CAPPO, 6 Feb. 2004.
29. Report by the 2004-2005 Santa Clara County Civil Grand Jury, “Problems Implementing the San Jose Police Computer Aided Dispatch System,” June 2005.

Interviews

1. GS Purchasing Manager, 26 Aug. 2004.
2. City Manager, Finance Director, Interim General Services Director, and Personnel Director, 7 Oct. 2004.
3. Finance Director and GS Purchasing Manager, 29 Nov. 2004.
4. Finance Director, City of San Jose Deputy Director of Finance , Interim Purchasing Manager, and Senior Purchasing Agent, 11 April 2005.
5. Deputy Director of GS Purchasing, Consultant to Deputy Director of GS Purchasing, and Senior Purchasing Agent, 19 April 2005.

Meetings

1. City of San Jose City Council Meeting, 14 Sept. 2004.



Memorandum

**TO: HONORABLE MAYOR AND
CITY COUNCIL**

FROM: Scott P. Johnson

**SUBJECT: IMPLEMENTATION OF
PROCUREMENT REFORMS**

DATE: November 1, 2006

Approved

Kay Winer

Date

11/6/06

RECOMMENDATION

1. Accept the report on the implementation of approved Procurement Reforms.
2. Adoption of a resolution approving Council Policy titled "Procurement and Contract Process Integrity and Conflicts of Interest"

OUTCOME

Through adoption of this set of procurement reforms, the legal framework for the procurement of supplies, materials, equipment, and services will provide for increased transparency, consistency, fairness, and openness and streamline procurement processes.

EXECUTIVE SUMMARY

This memorandum responds to the Council's approval of comprehensive Procurement Reforms on December 6, 2005 and the direction to the City Manager and City Attorney to implement such reforms. The approved procurement reforms include an increase in the Council Appointees contract approval authority from \$100,000 to \$1 million, revamping of the Municipal Code governing the procurement of supplies, materials, equipment, and services to ensure consistency, transparency, and openness, and the centralization of professional services.

BACKGROUND

On June 22, 2005, the Santa Clara County Civil Grand Jury issued a report titled "City of San José Procurement Policies, Procedures, and Practices." In this report, the Civil Grand Jury outlined four recommendations. Staff agreed with the four recommendations and incorporated the recommendations as well as applicable City Auditor recommendations, the October 2004

Management Reforms, and Best Practices in Public Procurement in the Procurement Reforms presented to Council on December 6, 2005.

On December 6, 2005, Council directed the City Manager and City Attorney to implement comprehensive procurement reforms which included revising applicable Municipal Code sections, formulating a Council Policy titled "Procurement and Contract Process Integrity and Conflicts of Interest", and reaching out to various stakeholders about the approved reforms. The procurement reforms were approved to enhance transparency, ensure consistency, streamline the procurement process, increase competition, and provide for a fair and open procurement environment.

On December 13, Council directed the City Manager and City Attorney as part of the Mayor's Biennial Ethics Review to include all elements of the Procurement Process Integrity Guidelines adopted by Council on November 9, 2004 in the aforementioned Council Policy and to apply the policy to all competitive processes.

ANALYSIS

This section provides a discussion on the Council approved Procurement Reforms and recommends the adoption of a new Council Policy, titled "Procurement and Contract Process Integrity and Conflicts of Interest."

Procurement Reforms

The discussion below summarizes outreach to stakeholders, changes in the application of the Local and Small Business Preference for procurements on behalf of the San José – Santa Clara Water Pollution Control Plant, and a status report on the implementation of Council approved Procurement Reforms.

Outreach to Stakeholders

Between February and August 2006, staff met with the Small Business Development Commission, the Treatment Plant Advisory Commission, and the Contracting-In Committee.

As directed by Council, Finance staff met with the Small Business Development Commission. In the March 2006 meeting, the commission welcomed the reform package and asked to review the package in detail until the April meeting. In April 2006, the commission recommended approval of the reform package. The Commission was very encouraged by the fact that Finance was recommending streamlining the interaction with the vendor community through an e-procurement tool and by the proposal to shorten the procurement cycle while increasing the transparency of the procurement process.

In February 2006, Finance presented the reform package to the Technical Advisory Committee (TAC), the staff committee for the Treatment Plant Advisory Committee. At the February meeting, TAC expressed concern about receiving information on award of contracts for professional services with a contract value between \$100,000 and \$1 million. Based on the input received, Finance and ESD proposed at the March TAC meeting that TPAC receive a monthly report of ongoing and awarded procurements for supplies, materials, equipment and services. In June, Finance proposed to the TAC that it recommend including the use of the local and small business preference to contracts awarded on behalf of the San José – Santa Clara Water Pollution Control Plant. The current Municipal Code specifically excludes the application of the preferences (Section 4.06.050.B). Based on TAC's recommendation, in June 2006 Finance reported on the discussion of comprehensive procurement reforms and the recommendation to apply the City's Local and Small Business Preference to procurements for the Water Pollution Control Plant. Following TPAC's acceptance of the report in August 2006, Finance returned to TPAC for approval of the City of San Jose Procurement Reforms including the application of the City's Local and Small Business Preference to procurements for the Water Pollution Control Plant. The item was approved unanimously by the Committee. Upon Council approval of the ordinance implementing the procurement reforms, Finance and ESD will establish internal procedures for the monthly reporting of procurement activity for the Water Pollution Control Plant.

In May 2006, Finance presented the procurement reform package to the City's Contracting-In Committee, which consists of City staff and representatives from the bargaining units. Initially, the Committee voiced concerns about the increase in City Manager approval authority from \$100,000 to \$1,000,000. As described in the October 20 information memorandum from the City Manager to the Council, the Contracting-In process was developed in 2004 by an interdepartmental task force in consultation with labor representatives. The program's goals are to maintain service delivery performance, maximize budget resources, provide uniformity and consistency in decision making, and facilitate opportunities to retain City employees impacted by position reductions due to budgetary or realignment issues. The contracting-in process requires that departmental staff analyze services that have been, or are proposed to be, contracted out. Currently, any proposed contract service for \$100,000 or above is subject to Contracting-In review.

To address the Committee's concerns, the contracting-in process will continue as established with the Performance Development Manager, Human Resources Department, signing off on the contracting-in process after consultation with affected bargaining units prior to contract award by the Director of Finance. If any bargaining unit believes that a particular service with a contract value between \$100,000 and \$1 million should be contracted in versus provided through a contractor and City staff differs in that opinion, the bargaining unit representatives may request Council approval of that contract by submitting such a request to the Director of Finance. The request shall state the reasons for the request and any substantiating facts for contracting-in of that service. Upon receipt of the request from representatives of bargaining units, the Director of Finance will agendize the award of contract at the next possible Council meeting.

Application of the Local and Small Business Preference

As discussed above, at the August 10, 2006 meeting, the Treatment Plant Advisory Committee agreed to the application of the City's local and small business preference to procurements on behalf of the San José – Santa Clara Water Pollution Control Plant.

Additionally, as directed by Council through acceptance of the procurement reforms, staff will report annually, in summary form, on contract awards to local and small businesses.

Status Report on Implementation of Procurement Reforms

The section below summarizes the status of the various efforts to implement the Council approved Procurement Reforms such as the changes to the applicable Municipal Code Sections, the forthcoming web-based Request for Proposal manual, centralization of contracting for professional services, the publication of the City policy titled "Source Selection Plan", and the status of the RFP for an e-procurement system.

1. Changes to the Municipal Code governing Procurement of Supplies, Material, Equipment and Services: As directed in December 2005, in close cooperation with the City Attorney's Office, staff is proposing a revision of the Municipal Code sections governing the procurement of Supplies, Material, Equipment, and Services. The accompanying memorandum from the City Attorney describes the changes to the various Municipal Code sections. With the adoption of these changes, the Municipal Code governing procurement will be streamlined, be more transparent, and allow for a protest process for unsuccessful bidders and interested parties.
2. Request for Proposal Manual: After receiving input and addressing concerns with various stakeholders about Council approved Procurement Reforms, staff embarked on the implementation of these reforms. In May 2006, the City Manager's Office dedicated a staff person part-time to work with Finance in the development of a web-based Request for Proposal manual. As of the date of this Report, the online manual was 75% finished. The manual will address over 20 audit recommendations and incorporate the October 2004 Management Reforms. Specifically, the manual provides enhanced review through the City Manager's, City Attorney's, and City Auditor's Office for complex RFPs. Based on established criteria, the City Manager's Office determines whether an RFP is complex enough to require the additional review by the City Auditor's Office. To ensure proper usage of the manual citywide, each department will designate a "Certified Contract Specialist," trained by Finance, who will provide guidance in the development and evaluation of RFPs. In the course of its development the manual has been reviewed by

representatives from several departments, the City Attorney's Office, and the City Auditor's Office.

3. Centralization of contracting of Professional Services: Through the 2006-2007 budget process, Council approved the addition of two staff members in Finance/Purchasing to oversee the contracting process for professional services. The addition of two staff members will allow Finance to provide guidance and assistance to all City departments in the procurement of professional services. Additionally, all protests for award of contract will be heard by the Director of Finance, delegated to the City's Chief Purchasing Officer, to ensure transparency and openness. Through subsequent budget proposals, Finance intends to strengthen the centralization of professional services as intended by the Santa Clara County Civil Grand Jury recommendation.
4. City Policy titled "Source Selection Plan": As directed by Council in December 2005, in February 2006, the Administration published a City Policy titled "Source Selection Plan," which provides for a comprehensive planning tool for procurements above \$1 million.
5. Implementation of an E-Procurement System: Through the 2006-2007 budget process, Council approved the funds for a hosted e-procurement system. The e-procurement system will enhance the interaction between the City and the City's vendor community by allowing vendors to register online for contracting opportunities, receiving email notification of contracting opportunities based on the vendor's profile, and online bidding. Staff developed the Request for Proposal (RFP) for the hosted application and submitted approval for issuance of the RFP to the Information Technology Planning Board (ITPB). ITPB will hear the item during the November meeting. As part of the hosted solution, Finance intends to publish all contract awards on the Internet to enhance openness in government contracting.
6. Contract Award Process for Contracts with a Value up to \$1 million: To ensure compliance with all applicable rules and regulations including CEQA, Living and Prevailing Wage, and Contracting-In, Finance has been developing a Contract Award Check List. Only after the responsible staff member for the contract certifies that all municipal code requirements and Council Policies were followed as outlined on the checklist, will the contract be sent to the City Attorney's Office for approval as to form and to the Director of Finance, or as delegated to the City's Chief Purchasing Officer, for execution on behalf of the City.

Council Policy titled “Procurement and Contract Process Integrity and Conflicts of Interest”

As directed by Council, staff developed the Council policy titled “Procurement and Contract Process Integrity and Conflict of Interest” (see Attachment 1). The policy outlines the communication protocol between potential respondents and/or respondents to a City solicitation and the City throughout the solicitation process from issuance of solicitation until award of contract, the respondents’ code of conduct, the confidentiality requirement throughout the evaluation process, and a conflict of interest process for staff members or outside parties (compensated and uncompensated) for the development of specifications and the evaluation of responses. To implement the Council Policy, staff will develop and publish a City Policy which contains specific Conflict of Interest questionnaires utilized to assess a potential conflict of interest and describe applicable processes. The City policy will be reviewed by the City Auditor’s and City Attorney’s Office prior to publication. The policy also outlines the process for identification and allegations of Conflict of Interest and Misconduct. Any information indicating a possible Conflict of Interest shall be reported to the Procurement Contact, who will confer with the City Attorney’s Office. Any allegations of misconduct received under any circumstances can be reported to any office, including the offices of elected officials.

POLICY ALTERNATIVES

Not applicable.

PUBLIC OUTREACH/INTEREST

- ✓ **Criteria 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- ✓ **Criteria 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- Criteria 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

This item meets Criteria 1 and 2. The memorandum was posted on the City’s website prior to consideration by Council. Additionally, the memorandum was emailed to the Chair of the Small Business Development Commission and members of the Contracting-In committee.

As discussed previously, to ensure appropriate outreach to various stakeholders, the Council approved Procurement Reforms were presented to the Treatment Plant Advisory Committee, the Small Business Development Commission, and the Contracting-In Committee.

COORDINATION

This project recommendation has been coordinated with the City Attorney's Office, the City Auditor's Office, and the City Manager's Office.

FISCAL POLICY ALIGNMENT

This Council item is consistent with Council approved General Budget Principle, "We must continue to streamline, innovate, and simplify operations so that we can deliver services at a higher quality level, with better flexibility, at a lower cost."

COST IMPLICATIONS

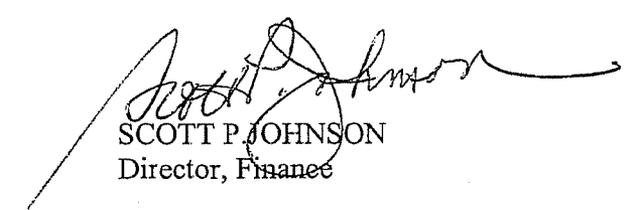
Not applicable.

BUDGET REFERENCE

Not applicable.

CEQA

Not a project.



SCOTT P. JOHNSON
Director, Finance

For questions please contact Walter C. Rossmann, Chief Purchasing Officer at (408) 535-7051.

City of San José, California

COUNCIL POLICY

TITLE: PROCUREMENT AND CONTRACT PROCESS INTEGRITY AND CONFLICT OF INTEREST	PAGE 1 of 4	POLICY NUMBER
	EFFECTIVE DATE	REVISED DATE

APPROVED BY COUNCIL ACTION ON

Background

On December 13, Council directed the City Manager and City Attorney as part of the Mayor's Biennial Ethics Review to develop this Council Policy which includes all elements of the Procurement Process Integrity Guidelines adopted by Council on November 9, 2004 and apply this policy to all competitive processes.

Purpose

The purpose of this policy is:

1. to ensure integrity in the procurement and contract processes;
2. to educate City employees, consultants, uncompensated outside parties, and any person involved in the decision to award a contract about potential Conflicts of Interests; and
3. to establish guidelines for procedural screening of Conflicts of Interests.

Policy

It is the policy of the City of San Jose to provide a fair opportunity to participants in competitive processes for the award of City contracts by promulgating integrity and removal of Conflicts of Interests through the inclusion of the following components in all competitive solicitations. Procurement and contract activities are defined as but not limited to specification development, preparation and issuance of solicitations, evaluation of solicitations and submissions, and other evaluations which lead to an award of a City contract.

I. Communication Protocol:

This section describes the characteristics of appropriate communication between respondents and the City during various phases of a solicitation.

TITLE: PROCUREMENT AND CONTRACT PROCESS INTEGRITY AND CONFLICT OF INTEREST	PAGE 2 of 4	POLICY NUMBER
	EFFECTIVE DATE	REVISED DATE
APPROVED BY COUNCIL ACTION ON		

A. After Issuance of Solicitations and prior to Submission deadline for Solicitations:

After issuance of solicitations, all contact between prospective respondents and the City must be directed to the Procurement Contact designated in the solicitation. City staff, elected officials, and consultants will refer all inquiries to the Procurement Contact.

All requests for clarification, objections to the structure, content, or distribution of a solicitation, or other inquiries must be made in writing and the City shall answer to these clarifications, objections, and inquiries in writing via addenda to the solicitation.

B. After Submission Deadline of Solicitations and prior to Issuance of a Notice of Intended Award:

After the submission deadline of solicitations, all contact regarding the procurement between respondents and the City and participants in the evaluation process, who are not City employees, must be directed to the Procurement Contact designated in the solicitation. City staff, elected officials, and consultants will refer all inquiries to the Procurement Contact.

D. After Issuance of a Notice of Intended Award:

The City will issue a Notice of Intended Award to all respondents including the basis for selection and instructions for filing a protest. All respondents shall follow the procedures for protest as indicated in the solicitation document. During the protest period, City staff, elected officials, and consultants will refer all inquiries to the Protest Hearing Officer identified in the solicitation document.

II. Respondent’s Code of Conduct

By submitting a response to a City solicitation, respondents agree to adhere to this Policy and are individually and solely responsible for ensuring compliance with this policy on behalf of the respondent’s employees, agents, consultants, lobbyists, or other parties or individuals engaged for purposes of developing or supporting a response.

In addition to adhering to the various sections of the policy, respondents may not

- collude, directly or indirectly, among themselves in regard to the amount, terms or conditions of a solicitation;
- influence any City staff member or evaluation team member throughout the solicitation process, including the development of specifications; and

TITLE: PROCUREMENT AND CONTRACT PROCESS INTEGRITY AND CONFLICT OF INTEREST	PAGE 3 of 4	POLICY NUMBER
	EFFECTIVE DATE	REVISED DATE
APPROVED BY COUNCIL ACTION ON		

- submit incorrect information in the response to a solicitation or misrepresent or fail to disclose material facts during the evaluation process.

Any evidence that indicates that a Respondent has failed to adhere with any section of this policy may result in the respondent's disqualification from the procurement as well as possible debarment.

III. Confidentiality during Evaluation Process

City staff, consultants, and outside evaluators, who are participants in the evaluation process are required to sign a Confidentiality Agreement, which binds the participants not to share any information about responses received and the evaluation process until the City issues a Notice of Intended Award.

IV. Conflict of Interest

Per the General Rule with Respect to Conflicts of Interest, as outlined in the City Policy 2.01, "Code of Ethics", City elected officials, appointed officials, their staffs, and City employees are expected to avoid any conflicts of interest. Further, employees should avoid the appearance of conflicts of interest in order to ensure that City decisions are made in an independent and impartial manner.

In general, Council Appointees shall take measures to ensure that the City avoid any conflict of interests in procurement processes of City contracts. Specifically, these measures include that

1. professional procurement and contracting staff, including buyers, managers, department heads, members of the City Attorneys office and others who regularly participate in the making of contracts on behalf of the City to disclose relevant financial interest as required by State Law and by City Policy and to annually review those statements in conjunction with this Policy and other ethical standards.
2. persons who may not be regularly involved in City procurements to review this Policy and other ethical standards and to elicit such information from them to enable the City to determine if the person's participation would create a conflict of interest. Such persons shall include, but are not limited to:
 - a. authors of specifications
 - b. paid and unpaid evaluators
 - c. paid and unpaid consultants who assist in the procurement process
3. the person managing the procurement shall discuss any potential conflict of interest identified with the City Attorney's Office and document the resulting determination, and take appropriate action including, but not limited to, removal of an employee,

TITLE: PROCUREMENT AND CONTRACT PROCESS INTEGRITY AND CONFLICT OF INTEREST	PAGE 4 of 4	POLICY NUMBER
	EFFECTIVE DATE	REVISED DATE
APPROVED BY COUNCIL ACTION ON		

consultant, or outside uncompensated party from the procurement activity or cancellation of a solicitation.

4. the City Manager, in consultation with the City Auditor and City Attorney, publish an administrative policy outlining the procedural elements of this Council policy.

This Policy is intended to set a balance between careful adherence to good procurement and contracting principles together with thorough examination of potential conflicts of interest against an undue burden on the participants in procurement and contracting processes. By establishing the following exceptions to the procedures to be administered by the City Manager, it is not intended to suggest that there is a lesser requirement with regard to ethical standards, but rather a need to have a less burdensome process with regard to certain procurements and contracting activities. The following competitive processes are not subject to procedural requirements as administered by the City Manager:

1. Any contracting activity with an estimated value less than \$100,000.
2. Disposition of goods as described in the Municipal Code Section 4.16.
3. Award of grants by the City with a value below \$10,000.

V. Allegations of Conflict of Interest

Prior to the solicitation release up to award of contract, any allegations of Conflict of Interest by a City employee, consultant, or other participant in the pre-solicitation and solicitation process shall be reported to the Procurement Contact. The Procurement Contact shall investigate the alleged conflict of interest in consultation with the City Attorney's Office and document the resulting determination.

VI. Allegations of Misconduct

At any time during a solicitation process, any misconduct by a City employee, consultant, or other participant in the pre-solicitation and solicitation process, shall be reported to the City's Chief Purchasing Officer. The Chief Purchasing Officer shall investigate the alleged misconduct, in consultation with the City Attorney's Office and others as appropriate. Nothing in this Policy is intended to prohibit anyone from communicating with the City Manager's Office, the City Attorney's Office, the City Auditor's Office, or the Mayor or any City Council Member about any alleged misconduct.



RECEIVED
San Jose City Clerk

2006 NOV -7 A 9:18

Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: Procurement Reform Ordinance **DATE:** 11/06/2006

RECOMMENDATION

Approval of an Ordinance amending Chapters 4.04, 4.12, and repealing Chapters 4.06 and 4.13 of Title 4 of the San Jose Municipal Code to increase administrative contract authority for purchase of supplies, materials, equipment and services to \$1,000,000, to enact a protest procedure for purchases, and to amend, reorganize and consolidate various purchasing procedures.

OUTCOME

1. To reduce the time and administrative burden for routine purchases below One Million Dollars.
2. To provide concise and consistent guidance on purchasing procedures to the public, to the business community and to City staff.

BACKGROUND

On December 6, 2005 under item 3.6, City Council directed the City Attorney to draft an ordinance amending the Municipal Code as outlined in the reports to the Making Government Work Better Committee, including:

- (1) Revising the standardization/brand name provisions;
- (2) Adopting formal protest procedures;
- (3) Centralizing of procurement responsibility for professional services (except for construction related activities) to the Director of Finance;
- (4) Increasing the City Manager's contract award authority to \$1,000,000, and authority to waive minor irregularities and informalities in the procurement process; to act on tied bids, and, if no bids are received; to re-advertise for the same requirement or acquire the goods or services.

In response to this direction the City Attorney's Office had numerous meetings and discussions with Finance Department staff on the proposed revisions with respect to inconsistencies in practice and suggestions for improvement to the Municipal Code provisions. In addition, as noted in the memorandum from Finance on this topic, staff had discussions with various stakeholder groups, including the Treatment Plant Advisory Committee and the Small Business Development Commission as well as the Contracting-In Committee. The preparation of the proposed ordinance has taken much of this input into account.

ANALYSIS

The proposed Ordinance, a copy of which is attached, will increase levels of authority with respect to various aspects of City contracting for purchases of supplies, materials, equipment and services. The following is a Summary of the changes under proposed ordinance.

Final Authority	Under \$100,000	\$100,000 - \$1,000,000	Over 1,000,000
Initiation of Procurement	<i>Administration</i>	<i>Administration</i>	<i>Administration</i>
Waiver of Minor Irregularities	<i>Administration</i>	<i>Administration</i>	<i>Administration</i>
Rejection of all Bids / Proposals	<i>Administration</i>	<i>Administration</i>	<i>Administration</i>
Award of Contracts	<i>Administration</i>	<i>Administration</i>	<i>City Council</i>
Appeals of Protests	<i>Administration</i>	<i>City Council</i>	<i>City Council</i>

The details of these changes are described below.

Contract Authority

Chapter 4.04 of the Municipal Code sets forth the authority of the City Manager and other Council Appointees (City Attorney, City Auditor, and City Clerk) to enter into contracts on behalf of the City without City Council approval.

The proposed ordinance makes the following changes to Chapter 4.04:

- Contract limits for all Council Appointees is increased from \$100,000 to \$1,000,000. The Council Appointees included in this are the City Manager, City Attorney, City Auditor and the City Clerk.

- Clearly defines the term “having a maximum value of ...” to include not just money, but goods and other tangible and intangible property and services and clarifies that the value of a contract applies to both the value received by the City as well as value provided by the City as a contract obligation.
- Corrects a clerical error in Section 4.04.020 B to change the authority for entering into contracts for tenant improvements when the City is acting as a lessee (not as a lessor).

Local/Small Business Enterprises

The City Council added Chapter 4.06 to the Municipal Code to provide a preference in procurements to Local Business Enterprises and Small Business Enterprises. The Proposed Ordinance moves these provisions to Chapter 4.12 and makes a few additional changes described below.

A Local Business Enterprise is a business that has a current San José business tax certificate; and a principal business office; or regional, branch or satellite office with at least one full-time employee located in the County of Santa Clara.

A Small Business Enterprise is a Local Business Enterprise that has thirty-five or fewer total employees. The only substantive change to the provisions was to add the following language to the definition:

With respect to bids or proposals submitted by partnerships or joint ventures, the number of employees for purposes of qualifying as a small business enterprise shall be determined by the total number of employees of each of the members of the partnership or joint venture combined.

The purpose of this additional language is to make it clear that if more than one business enterprise makes a proposal jointly that the total number of employees of the two enterprises is combined to determine if the proposer(s) meets San Jose’s definition of SBE.

The Treatment Plant Advisory Committee has also recommended that the exception of WPCP purchases from the City’s Preference Policy be eliminated. The proposed Ordinance incorporates this change.

The following is a summary as to which contracts the Local Business Preference and the Small Business Preference are applicable and the amount of the preference that is generally applicable:¹

Type of Contract	Local Business Preference	Small Business Preference
Purchase of supplies, materials and equipment	2.5%	2.5%
Contracts for services including professional services	5%	5%
Contracts for information technology	5%	5%

The following contracts are **exempt** from the Local Business Preference and Small Business Preference:

1. Public works construction contracts,
2. Grant agreements,
3. Agreements for the design, fabrication or installation of works of art, or
4. Leases, licenses or other interests in real property.

Contracts for Supplies, Materials, Equipment and Services

Chapter 4.12 governed the purchase of supplies materials and equipment, and Chapter 4.13 governed the procurement of services. The proposed Ordinance eliminates obsolete or repetitive provisions and consolidates the relevant provisions of Chapter 4.13 into Chapter 4.12 so that all of the procurement provisions for both goods and services are now in Chapter 4.12. The definition of services now includes professional services so that the new procurement rules also apply to consultant contracts.

¹ Before issuing a solicitation for a procurement a decision is made as to whether the award should be price determinative or not. For bids and other price determinative procurements there is a preference of 2½ % for LBE's and 2½% for SBE's. The preferences for procurements where price is not the determinative factor are set at 5%.

Proposed restructured Chapter 4.12 sets forth the following Procurement Processes:

Contract type	Procedure
Goods, materials or services less than \$10,000	No competition required
Goods, materials or services between \$10,000 and \$100,000	Request for Quote process
Services in excess of \$100,000	Request for Proposal Process
Goods and materials in excess of \$100,000	Formal Bid

The proposed Ordinance does not change the existing requirement that formal bids must be let to the lowest responsible and responsive bidder. Contracts solicited through Requests for Quotes and Requests for Proposals are awarded to the most advantageous quote or proposal. Under these procedures, which the City already uses, the award is based on the evaluation factors which are announced in the City's solicitation and are not automatically given to the bidder with the lowest cost proposal.

Exceptions to the competitive procurement requirements of the proposed Ordinance are limited to the following:

- **Emergency Purchases** - In case of a public emergency involving the threatening of lives, property or welfare of the people of the City or the property of the City, the City Manager may issue contracts without a competitive procurement. Contracts having a value over One Million Dollars entered into under this Section shall be presented to City Council for ratification at the next possible meeting after the occurrence of the emergency.
- **Public Agencies Purchases** -- These types of purchases include:
 1. Agreements for the purchase of supplies, materials or equipment or services directly from another public agency; or
 2. Joint purchasing agreements entered into by the City and one or more public agencies wherein the city is included as a potential purchaser under a competitive procurement process engaged in pursuant to the joint agreement; or
 3. Direct purchases from vendors on terms obtained pursuant to competitive procurement processes which substantially comply with the City's procurement procedures and name the City of San José either specifically or categorically as a third party beneficiary of the bidding process.
- **Sole Source Purchases** - The City may make purchases of such supplies materials or equipment which can be obtained from only one vendor or manufacturer.

- **Unique Services Purchases** - The City may initiate a procurement for unique professional or other services where an unusual or unique situation exists that makes the application of the requirements for competitive procurement of a services agreement contrary to the public interest. Any special procurement under this section must be procured with such competition as is practicable under the circumstance. A written determination of the basis for the procurement and for the selection of the particular contractor must be kept as part of the procurement file.

Protest procedures

The proposed Ordinance also codifies the administrative protest procedures which have been in use for the past two years. The protest procedures require that any vendor wishing to protest the award of a contract must raise the grounds for protest with the Purchasing Division. The Chief Purchasing Officer will resolve the protest. Only after following these procedures would an appeal to City Council be allowed.

Brand name purchases

The proposed Ordinance contains a new section regarding the use of a brand name followed by "or equal" in a procurement specification. Such a specification allows a bidder to submit an alternate equivalent product to the one named. The City is allowed to require a sample to be submitted and to be tested and to examine any test data that the bidder may have.

Notices to vendor community

The proposed Ordinance contains the following requirements for procurement notices:

- Notices for bids or requests for proposals shall be published in one or both of the following manners:
 1. In a newspaper of general circulation in the City, at least once, not less than at least ten days before the date set for opening bids; or
 2. As a posting on the City's web site on a web page designated for such postings for a period of time which the Director deems reasonable.
- Responses to requests for quotes may be solicited by any reasonable means including but not limited to mail, telephone, fax, e-mail or posting on the City's website.

Administrative rejection of all bids

Currently, if a procurement results in responses that are unacceptable, the approval to reject all bids or proposals is brought to the City Council. Under the proposed Ordinance the Administration will have the authority to reject all bids or proposals. However a bidder would have the right to appeal the Administration's decision to the City Council.

Responsibility for conducting procurement procedures

The proposed Ordinance contains a new term, "Procurement Authority," which is defined as "the City Manager, Council Appointee, Director of Finance or such other person who has been duly authorized to procure a contract in accordance with the provisions of this Title." As described in the accompanying memorandum from the Administration, the Purchasing Division will now process or assist with most professional services agreements many of which had previously been procured directly by staff in other departments or by the City Manager's Office. The new Code sections make it clear that the City Manager and other Council Appointees still have authority to conduct procurements, but they will be required to follow the common set of procedures set forth in Chapter 4.12.

Professional Architectural, Engineering and Environmental Services

Procurements for the professional services of private architectural, landscape architectural, engineering, environmental, land surveying, or construction management firms are not subject to the procedures of the proposed Ordinance. Procurements for these types of contracts are conducted under a Qualifications based process approved by City Council on December 7, 2004 in Resolution No. 72413. Contracts for these services with a value of \$100,000 or more are subject to City Council approval. These contracts are subject to the Local Business Enterprise and Small Business Enterprise preferences.

Effective Date

Assuming that the proposed Ordinance is approved by the City Council and is finally adopted on December 5, 2006, it will become effective on January 4, 2007.

POLICY ALTERNATIVES

Not applicable.

PUBLIC OUTREACH/INTEREST

- ✓ **Criteria 1:** Requires Council action on the use of public funds equal to \$1 million or greater.
(Required: Website Posting—early distribution)
- Criteria 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City.
(Required: E-mail and Website Posting)
- Criteria 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

This item will be posted on the City's Council Agenda Website for the November 21, 2006 Council Meeting.

COORDINATION

This recommendation was coordinated with the Treatment Plant Advisory Committee (TPAC.) At TPAC's recommendation staff has agreed to implement the following administrative practices to ensure that TAC and TPAC will continue to be involved in the review of professional service contracts for the Treatment Plant that are valued at more than \$100,000:

- provide a monthly report to staff of the technical advisory committee to TPAC concerning procurements which in development by the City; and
- include a report in each TPAC packet on contracts above \$100,000 that have been awarded by the City manger or Director of Finance since the last TPAC meeting.

BUDGET REFERENCE

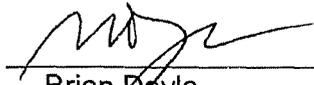
Not Applicable.

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CEQA

Not Applicable.

RICHARD DOYLE
City Attorney

By 

Brian Doyle
Sr. Deputy City Attorney

cc: Les White

For questions please contact Brian Doyle, Senior Deputy City Attorney, 408-585-1908.

PROPOSED

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING CHAPTERS 4.04, 4.12, AND REPEALING CHAPTERS 4.06 AND 4.13 OF TITLE 4 OF THE SAN JOSE MUNICIPAL CODE TO INCREASE ADMINISTRATIVE CONTRACT AUTHORITY FOR PURCHASE OF SUPPLIES, MATERIALS, EQUIPMENT AND SERVICES TO \$1,000,000, TO ENACT A PROTEST PROCEDURE FOR PURCHASES, AND TO AMEND, REORGANIZE AND CONSOLIDATE VARIOUS PURCHASING PROCEDURES

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

SECTION 1. Section 4.04.010 of Chapter 4.04 of Title 4 of the San Jose Municipal Code is hereby amended to read as follows:

4.04.010 Scope of Contract Authority

- A. The term "Contract," for the purpose of this Chapter, shall include, but not be limited to:
 - 1. Agreements for the construction of public works projects;
 - 2. Agreements for the lease or purchase of supplies, materials and equipment;
 - 3. Leases and other agreements for the use of real property;
 - 4. Agreements for professional services;
 - 5. Agreements for personal services, including agreements with independent contractors and employees;
 - 6. Agreements relating to the grant of funds by the City and to the City; and
 - 7. Agreements to sponsor a City event, activity or public facility where the sponsor provides financial support to the City, which may be in the form of money, goods, personal property, or in-kind services and in exchange, the sponsor receives more substantial recognition from the City than a nominal acknowledgement of the financial support.

- B. The term "Contract," for the purpose of this Chapter, except as provided in Section 4.04.025, shall not include:
 - 1. Agreements for the transfer of title to or substantial permanent interest in real property, including:
 - a. Grant deeds;
 - b. Quit claim deeds; and

PROPOSED

- c. Easements.
- 2. Agreements for the donation of personal property by the City.
- C. The term "having a maximum value of" means the contract obligations involve the transfer to or from the City of money, goods, tangible or intangible personal property or an interest in real property having a dollar value in the amount stated.

SECTION 2. Section 4.04.020 of Chapter 4.04 of Title 4 of the San Jose Municipal Code is hereby amended to read as follows:

4.04.020 Contract Authority of the City Manager

- A. The City Manager is authorized to enter into and execute for and on behalf of the City of San José, without the prior approval of the City Council, any Contract, for which:
 - 1. Moneys have been appropriated; and
 - 2. There is an unexpended and unencumbered balance of such appropriation sufficient to pay the expense of the contract; and
 - 3. The total monetary value expended or received by the City does not exceed the amount listed below with respect to the type of contract:
 - a. Emergency purchases pursuant to Section 4.12.220 regardless of the amount expended; or
 - b. Agreements for the lease or purchase of supplies materials and equipment or for services, other than professional services of private architectural, landscape architectural, engineering, environmental, land surveying, or construction management firms, having a maximum value of One Million Dollars.
 - c. All other types of contracts having a maximum value of One Hundred Thousand Dollars.
- B. In addition, the City Manager is authorized to enter into and execute for and on behalf of the City of San José, without the prior approval of the City Council the following:
 - 1. Any Contract for the payment of fees imposed on the developer of a residential project pursuant to Chapter 14.25 or Chapter 19.38 of this Code;
 - 2. One or more amendments to a lease, where City is a lessee, for the purpose of undertaking a cumulative total of no more than one hundred thousand dollars in improvements to the leased property over the term of the lease, including option periods;

PROPOSED

- 3. Tenant estoppel certificates on behalf of the City, where City is a tenant or subtenant under an existing lease.

- C. No provision of this Chapter is intended to limit the authority of the City Manager or any Council Appointee from seeking approval of a specific action by the City Council, nor is it intended to limit the authority of the City Council to place limitations on the City Manager's or other Council Appointee's authority with respect to entering into specific contracts.

SECTION 3. Section 4.04.030 of Chapter 4.04 of Title 4 of the San Jose Municipal Code is hereby amended to read as follows:

4.04.030 Contract Authority of the City Attorney

In addition to the authority specifically granted pursuant to Chapter 4.24 of this Title, the City Attorney is hereby authorized to enter into and execute for and on behalf of the City, without the prior approval of the City Council, any contract:

- A. Whose object or purpose is related to the activities or functions of the Office of City Attorney; and
- B. Which is not required by any applicable law to be let to the lowest responsible bidder; and
- C. Which provides for payment of money by the City; and
- D. Which has a maximum value of One Million Dollars; and
- E. For which moneys have been appropriated and for which there is an unexpended and unencumbered balance of such appropriation sufficient to pay the expense of the contract.

SECTION 4. Section 4.04.040 of Chapter 4.04 of Title 4 of the San Jose Municipal Code is hereby amended to read as follows:

4.04.040 Contract Authority of the City Clerk

The City Clerk is hereby authorized to enter into and execute for and on behalf of the City, without the prior approval of the City Council, any contract:

- A. Whose object or purpose is related to the activities or functions of the Office of City Clerk; and
- B. Which is not required by any applicable law to be let to the lowest responsible bidder; and
- C. Which provides for payment of money by the City; and
- D. Which has a maximum value of One Million Dollars; and

PROPOSED

- E. For which moneys have been appropriated and for which there is an unexpended and unencumbered balance of such appropriation sufficient to pay the expense of the contract.

SECTION 5. Section 4.04.050 of Chapter 4.04 of Title 4 of the San Jose Municipal Code is hereby amended to read as follows:

4.04.050 Contract Authority of the City Auditor

The City Auditor is hereby authorized to enter into and execute for and on behalf of the City, without the prior approval of the City Council, any contract:

- A. Whose object or purpose is related to the activities or functions of the Office of City Auditor; and
- B. Which is not required by any applicable law to be let to the lowest responsible bidder; and
- C. Which provides for payment of money by the City; and
- D. Which has a maximum value of One Million Dollars; and
- E. For which moneys have been appropriated and for which there is an unexpended and unencumbered balance of such appropriation sufficient to pay the expense of the contract.

SECTION 6. Section 4.04.060 of Chapter 4.04 of Title 4 of the San Jose Municipal Code is hereby amended to read as follows:

4.04.060 Procedure

- A. All contracts, except for authorized purchases through use of a City credit card, having a maximum value of Five Hundred Dollars shall be in writing;
- B. All contracts which are required to be in writing shall be approved as to form by the City Attorney prior to execution by the City.
- C. Upon execution of any contract entered into pursuant to this Chapter, an executed original of the contract shall be filed with the City Clerk's Office.

SECTION 7. Chapter 4.06 of Title 4 of the San Jose Municipal Code is hereby repealed in its entirety.

SECTION 8. Chapter 4.12 of Title 4 of the San Jose Municipal Code is hereby amended to read as follows:

**Chapter 4.12
PROCUREMENTS OF GOODS AND SERVICES**

**Part 1
DEFINITIONS**

4.12.001 Definitions

The definitions set forth in this Part shall govern the application and interpretation of this Chapter.

4.12.005 Bidder

"Bidder" means a person who submits a response to a competitive City solicitation.

4.12.010 City

"City" means the City of San Jose acting through the City Council, the City Manager, the Director of Finance or such other person who is authorized under this Code or duly designated to procure and execute contracts on behalf of the City.

4.12.015 City Manager

"City Manager" means the City Manager or his or her designee.

4.12.020 Director

"Director" shall mean the Director of Finance or his or her designee, or such other Director designated by the City Manager to administer this Chapter.

4.12.025 Formal Bidding

"Formal bidding" shall mean bidding conducted pursuant to the procedure set forth in Section 4.12.310B.

4.12.030 Local Business Enterprise

"Local Business Enterprise" means a business enterprise, including but not limited to a sole proprietorship, partnership, or corporation, which has a legitimate business presence in the County of Santa Clara, California. Evidence of legitimate business presence in San José shall include:

- A. Having a current San José business tax certificate; and

B. Having either of the following types of offices operating legally within the County of Santa Clara:

1. The contractor's principal business office; or
2. The contractor's regional, branch or satellite office with at least one full-time employee located in the County of Santa Clara.

4.12.035 Procurement Authority

"Procurement Authority" means the City Manager, Council Appointee, Director of Finance or such other person who has been duly authorized to procure a contract in accordance with the provisions of this Title.

4.12.040 Purchase

A "purchase" means the acquisition of those supplies, materials, equipment, or service bought in a single transaction from a single vendor.

4.12.045 Response

Response means a bid, proposal, quote, statement of qualification or other communication offered in response to a City solicitation.

4.12.050 Responsible

Responsible means a bidder's quality, fitness and capacity to perform the particular requirements of the proposed work, including the standards of responsibility set forth in Sections 4.10.200 through 4.10.220 of this Title.

4.12.055 Responsive

Responsive means a bidder's compliance with the solicitation instructions.

4.12.060 Services

A. Services means:

1. Any work performed or services rendered by an independent contractor, with or without the furnishing of materials, to do the following:
 - a. Maintenance or nonstructural repair of City buildings, structures or improvements, which does not require engineering plans, specifications or design, including but not limited to unscheduled replacement of broken window panes, fire extinguisher maintenance, minor roof repairs, elevator maintenance, custodial services and pest control;
 - b. Repair, modification, and maintenance of City equipment and software;

- c. Cleaning, analysis, testing, moving, removal or disposal (otherwise than by sale) of city materials, supplies and equipment;
 - d. Replanting, care, or maintenance of public grounds, including but not limited to trees, shrubbery, flowers and lawns, which does not require engineering plans, specifications or designs;
 - e. Provide temporary personnel services; or
 - f. Provide other miscellaneous services to facilitate department operations.
 - g. Perform repair, demolition or other work required to abate nuisances pursuant to this Code.
 - h. Install and implement information technology projects.
 - i. Perform technical or professional services other than other than professional services of private architectural, landscape architectural, engineering, environmental, land surveying, or construction management firms.
2. Software Licensing and Maintenance.
 3. Leasing or rental of personal property for use by the City.
- B. Services shall not include:
1. Any public works project as defined in Section 14.04.140 of the San José Municipal Code, or any purchases of materials, supplies or equipment;
 2. Services performed under a grant agreement between the City and a grantee of a City program;
 3. Services for the design, fabrication or installation of a work of art;
 4. Services performed under a concession agreement between the City and a licensee or permittee on City property.

4.12.065 Small Business Enterprise

As used in this title, "Small Business Enterprise" means a Local Business Enterprise that has thirty-five or fewer total employees. With respect to bids or proposals submitted by partnerships or joint ventures, the number of employees for purposes of qualifying as a Small Business Enterprise shall be determined by the total number of employees of each of the members of the partnership or joint venture combined.

4.12.070 Solicitation

Solicitation means a request for bids, proposals, quotes, qualifications or other document in furtherance of a City procurement of goods or services.

Part 2
SCOPE AND AUTHORITY

4.12.110 Scope of Chapter

- A. The provisions of this Chapter shall be applicable to the following types of contracts:
1. Contracts for the purchases of supplies, materials and equipment,
 2. Contracts for Services.
 3. Contracts for information technology.
- B. The provisions of this Chapter shall not be applicable to:
1. Public works construction contracts,
 2. Grant agreements,
 3. Agreements for the design, fabrication or installation of works of art, or
 4. Leases, licenses or other interests in real property.
- C. The provisions of Section 4.12.320 shall be applicable to professional services of private architectural, landscape architectural, engineering, environmental, land surveying, or construction management firms

4.12.120 Director of Finance - Powers and Duties

Unless and except as may be otherwise provided elsewhere in this Code, the Director shall be responsible for the procurement and provision of supplies, materials and equipment and procurement of contracts for services for the City. In particular, but not by way of limitation, the Director shall have the following specific powers and duties:

- A. Take the necessary action to ensure that the City will receive the needed quality and quantity of supplies, materials and equipment at least expense to the City;
- B. Negotiate and recommend execution of contracts for the purchase of supplies, materials and equipment and for the performance of services;
- C. Discourage uniform bidding and endeavor to obtain as full and open competition as possible on all purchases;
- D. Keep informed of current developments in the field of purchasing prices, market conditions and new products;

PROPOSED

- E. Prepare and recommend to the City Manager rules governing the purchase of supplies, materials and equipment and services for the City;
- F. Prescribe and maintain forms as are reasonably needed to implement this Chapter;
- G. In those situations requiring the publication of notice inviting bids, the Director shall cause such notices to be published without first obtaining the consent of the City Council thereto;
- H. Execute contracts and purchase orders for supplies, materials or equipment and for services when authorized by the City Manager;
- I. Hear and decide protests of procurement decisions as set forth in this Chapter.

Part 3
PROCUREMENT PROCEDURES

4.12.210 Selection of Procurement Method

The City shall where practicable engage in competitive procurement. The Procuring Authority shall use the following methods of procurement under the circumstances described below:

- A. Purchases which are estimated not to exceed ten thousand dollars may be made without a competitive procurement method.
- B. Request for Quotes process shall be used for purchases with an estimated value between \$10,000 and \$100,000.
- C. Request for Proposal process shall be used for purchases of Services with an estimated value of more than \$100,000.
- D. Formal Bidding process shall be used for purchases of Supplies, materials and equipment with an estimated value of more than \$100,000, or for services when the Director determines that it is in the best interest of the City to do so.

4.12.215 Procurements Where Competitive Methods Are Not Practicable

The City is not required to engage in competitive procurement under the following circumstances:

- A. Emergency Purchases pursuant to Section 4.12.220
- B. Public Agencies Purchases pursuant to Section 4.12.225.
- C. Sole Source Purchases pursuant to Section 4.12.230.

- D. Unique Services Purchases pursuant to Section 4.12.235.

4.12.220 Emergency Purchases

In case of a public emergency involving the threatening of lives, property or welfare of the people of the City or the property of the City, the Procuring Authority may purchase supplies, materials or equipment without a competitive procurement, and may contract for services which the Procuring Authority deems necessary for the purpose of meeting such emergency. Contracts having a value over One Million Dollars entered into under this Section shall be presented to City Council for ratification at the next possible meeting after the occurrence of the emergency.

For the purpose of meeting such emergency, the Procuring Authority may expend any unencumbered moneys in the emergency reserve fund, notwithstanding the fact that such moneys may not have been appropriated for such purpose, to the extent that other moneys have not been appropriated or are otherwise unavailable therefor.

4.12.225 Public Agencies Purchases

The Procuring Authority may without observing the competitive procurement requirements prescribed by this Chapter:

- A. Purchase or acquire any supplies, materials or equipment or services from any public or governmental body or agency; or
- B. Contract with any "public agency" (as said term is defined in subsection (b) of Section 800 of the Charter) for the purchase or acquisition by such public agency for or on behalf of the City of any supplies, materials or equipment or services under the following circumstances;
 - 1. Agreements for the purchase of supplies, materials or equipment or services directly from another public agency; or
 - 2. Joint purchasing agreements entered into by the City and one or more public agencies wherein the city is included as a potential purchaser under a competitive procurement process engaged in pursuant to the joint agreement; or
 - 3. Direct purchases from vendors on terms obtained pursuant to competitive procurement processes which substantially comply with the City's procurement procedures and name the City of San José either specifically or categorically as a third party beneficiary of the bidding process.

4.12.230 Sole Source Purchases

The Procuring Authority may make purchases of such supplies materials or equipment which can be obtained from only one vendor or manufacturer.

4.12.235 Unique Services Purchases

The Procuring Authority may initiate a procurement for unique professional or other services where the Procuring Authority determines that an unusual or unique situation exists that make the application of the requirements for competitive procurement of a services agreement contrary to the public interest. Any special procurement under this section shall be made with such competition as is practicable under the circumstance. A written determination of the basis for the procurement and for the selection of the particular contractor shall be included by the Procuring Authority in the Department files.

4.12.240 Specifications Limiting Procurements to a Single Manufacturer or Brand

- A. Except as provided in Subsection B below, no specifications for the procurement of supplies, materials or equipment shall be written in a manner that limits the purchase to a single manufacturer or brand name product. A specification may contain a brand name if the specification is followed by the words "or equal" under circumstances where it is reasonably possible for equivalency to be demonstrated.
- B. The provisions of Subsection A shall not apply if the Director has determined in writing, with specific findings therefor, that a particular product may be specifically designated by reason of one or more of the following purposes:
1. In order to acquire a specific product(s) for the purpose of conducting a field test or experiment to determine the product's suitability for use by the city.
 2. When it is required for proper operation or function to match other products with respect to the repair or expansion or completion of a system or program already in use by the city, including, but not limited to, technology purchases required to achieve interoperability with existing hardware, software, systems or programs.
 3. In order to obtain a necessary item that is available only from one source and which is purchased in accordance with Section 4.12.230 of this Code.
 4. In order to make an emergency purchase pursuant to Section 4.12.220 of this Code.
 5. In order to achieve significant cost savings based upon consideration of the following cost factors:
 - a. Timeliness and quality of installation, repair and maintenance;
 - b. Quality of user training;
 - c. Supplies and replacement parts;
 - d. Modification of existing equipment, materials or systems;
 - e. Future upgrades and updates;

- f. Estimated amount and cost of reasonably foreseeable future purchases of equipment that would be required to be compatible or functional with the product which is the subject of the standardization determination.
 - g. Administrative costs.
- C. The Director's written decision shall state the facts reviewed in arriving at the decision, the reasons for the decision, the period of time for which it is valid for making purchases and under what conditions it must be reviewed for possible revision. A copy of the Director's decision shall be attached to any report to the City Council seeking approval of a purchase under this Section.
- D. Nothing in this Section shall prohibit the inclusion in specifications of an industry standard with regard to performance that can be met by more than one product or manufacturer.
- E. Purchases of equipment, materials or supplies shall not be segregated or conducted in any manner for the purpose of avoiding the requirements of this Section.
- F. The Director shall establish written administrative procedures to carry out the provisions of this section.

4.12.245 Use of "Or Equals" in Specifications, and Testing of "Equals"

- A. Any reference to a specific Brand Name followed by the term "or equal" in specifications is illustrative only. A reference to a Brand Name or equal describes a component best meeting the specific operational, design, performance, maintenance, quality, and reliability requirements of the City.
- B. A bidder may offer an equivalent ("or equal") in response to a Brand Name or equal reference. When an "or equal" is offered, the City may test and evaluate the product prior to award of the contract.
- C. At bidder's expense, bidder bears sole responsibility for providing any information, test data or document required by the City to fully evaluate the acceptability of the "or equal." At bidder's expense, this full evaluation may require independent testing, including destructive testing, at qualified test facilities.
- D. If the City rejects a response or part of a response containing any "or equal," the Director shall determine the decision in writing.

4.12.250 Insurance and Bonds

- A. The Director is authorized to require vendors to provide insurance and surety bonds for contracts. Where required, the bidder shall submit insurance or surety bonds, or both, acceptable to the City.

- B. All responses to solicitations shall include such Bidders' security as is required by the solicitation documents and shall be presented under sealed cover. If the successful Bidder fails to execute the contract within the time specified in the notice inviting bids or in the specifications referred to therein, the Bidders' security may be declared forfeited by the Director to the City, and any bonds so forfeited may be prosecuted and collected and the amount of the security paid into the general fund. Unsuccessful Bidders shall be entitled to return of their Bidders' security. The form and amount of such security shall be described in the notice inviting responses or in the specifications referred to therein.
- C. To secure faithful performance of the contract, the Director is authorized to require security in the form of cash, cashier's check, certified checks, or corporate faithful performance bonds, in such amount as the Director shall deem reasonably necessary to protect the best interests of the City. If the Director requires such security, the form and amount thereof shall be described in the notice inviting responses or in the specifications referred to therein. The Director need not require such security if the Director does not deem such to be reasonably necessary to protect the best interest of the City, or if the Director believes the interests of the City are best served by not requiring the same.

4.12.260 Procurement Notices

- A. Notices inviting response to City procurements shall include a general description of items or services to be purchased and shall identify the place where the proposal form, specifications and other contract documents may be obtained, and the time and place where responses will be received and where bids will be opened, if applicable.
- B. The notice inviting responses to bids or requests for proposals shall be published in one or both of the following manners:
 - 1. In a newspaper of general circulation in the City, at least once, not less than at least ten days before the date set for opening bids; or
 - 2. As a posting on the City's web site on a web page designated for such postings for a period of time which the Procuring Authority deems reasonable.
- C. Responses to requests for quotes may be solicited by any reasonable means including but not limited to mail, telephone, fax, e-mail or posting on the City's web on a web page designated for such postings.

4.12.270 Formal Bids Procedure

Sealed bids shall be submitted to the Office of the Purchasing Division at the time specified in the procurement notice. At the time and place prescribed in the said notice, the Director or the Director's authorized representative shall publicly open said bids and declare the aggregate bid of each bidder. The Director shall examine the bids and prepare a written report and recommendation.

Part 4
AWARD OF CONTRACTS

4.12.310 Award Factors

A. The Procurement Authority shall award the contract in accordance with the award factors and respective weights outlined in the solicitation. The award decision shall be documented and available to public inspection. A copy of the Notice of Intended Award shall be sent to each Bidder.

B. Award Factors for Formal Bids.

Purchases requiring formal bidding shall be awarded to the lowest responsible and responsive Bidder after Notice in accordance with Section 4.12.260. The low bidder shall be determined based on the lowest total cost to the City including, but not limited to, the effect of:

1. Trade discounts;
2. Shipping costs;
3. Life cycle costs;
4. Operating efficiency;
5. Maintenance Cost;
6. Application of the preferences provided for in Section 4.12.320;
7. If two or more bids received are for the same amount and are the lowest bids, the City may accept whichever one it chooses or have the award determined by lot.

C. Award Factors for Quotes and Proposals.

Purchases not requiring formal bidding shall be awarded to the bidder who has submitted the most advantageous quote or proposal in accordance with the applicable provisions of this Chapter. In addition to the factors set out in Subsection B, the most advantageous quote or proposal shall be determined based on but not limited to:

1. Quality of the proposal;
2. Capabilities and expertise of the bidder;
3. Adherence to applicable City Council policies;
4. Ability of the vendor to provide future maintenance, repair parts and service;
5. Application of the preferences provided for in Section 4.12.320.

4.12.320 Application of Preference in Award of Contracts

- A. Prior to the issuance of a solicitation, the Purchasing Authority shall make a determination of whether price shall be the determinative factor in the award of the solicitation.
- B. For solicitations where price has been chosen as the determinative factor, the preferences granted under this Chapter shall be applied as follows:
 - 1. Bidders who qualify as a local business shall be given a credit of two and one-half percent of the cost bid; and
 - 2. Bidders who qualify as a small business shall be given a credit of two and one-half percent of the cost bid.
- C. For solicitations where price has not been chosen as the determinative factor the preferences granted under this Chapter shall be applied as follows:
 - 1. Bidders who qualify as a local business enterprise shall be given a credit equal to five percent of the total points used to determine the most advantageous quote or proposal.
 - 2. Bidders who qualify as a small business enterprise shall be given a credit equal to five percent of the total points used to determine the most advantageous quote or proposal.

4.12.330 Exceptions to the Application of Preferences

Application of the preferences for Local Business Enterprises and Small Business Enterprises shall not be made in the following procurements:

- A. Procurements where legal constraints on the expenditure of funds prohibit the application of the preference.
- B. Grant Programs.

4.12.340 Informalities or Minor Irregularities

The City shall have the right to waive any informalities or minor irregularities in bids or bidding.

4.12.350 Rejection of Responses

The City may reject any or all responses received. If all responses are rejected, the Procurement Authority may in his or her discretion re-notice the solicitation or negotiate and execute with a vendor for the goods or services without further solicitation under the following circumstances:

- A. For solicitations for contracts with a value in excess of \$100,000 seek approval from the City Council; or
- B. For solicitations for contracts with a value less than \$100,000, upon documentation of the reasons for such a decision and notice to all person who submitted responses to the solicitation.

**Part 5
PROTEST PROCEDURES**

4.12.410 Right to Protest

Any interested party may file a protest regarding the procurement decisions authorized under this Chapter.

4.12.420 Notice of Decision

After a decision regarding a procurement having a value over \$10,000 has been made, the Director shall send a Notice of Intended Award to all persons who submitted a response to a City solicitation.

4.12.430 Time to File Notice

All protests must be filed in writing with the Director within 10 calendar days after the sending of the Notice of Intended Award.

4.12.440 Form of Protest

All protests shall be in writing and shall state the grounds for the protest as well as all of the facts relevant to the protest. All protests shall be filed in accordance with the instructions contained in the solicitation which is the subject of the protest.

4.12.450 Director's Decision

The Director shall issue a written decision on the protest. The Director may base the decision on the written protest alone or may informally gather evidence from the person filing the protest or other any other person having relevant information. For procurements having a value of less than \$100,000, the Director's decision shall be final.

4.12.460 Appeal of Decision

For procurements having a value of \$100,000 or more, an appeal to the City Council of the Director's decision may be filed. All such appeals must be in writing, and shall be filed with the City Clerk within 10 calendar days of the sending of the Director's decision.

**Part 6
GENERAL PROVISIONS**

4.12.510 Requisitions - Appropriations prerequisite

No officer or employee of the City shall requisition or order any supplies, materials, or equipment or services, other than those purchased in compliance with City's Petty Cash or Procurement Card policies, except through the Director. No such officer or employee shall request the requisition or order any supplies, materials or equipment unless there exists an unencumbered balance of an appropriation or appropriations, available for such purpose, against or which the requisition or purchase may be charged.

4.12.520 Splitting of Purchases or Contracts

No officer or employee of the City shall split or separate a purchase of supplies, materials or equipment or a contract or purchase order for services for the purpose of evading the provisions of this Chapter. The acquisition of supplies, materials and equipment should normally be made as a single purchase, when the need has been identified for multiples of items, related items, or similar items, which are ordinarily available from the same vendor or manufacturer.

4.12.530 Appropriation Balance Necessary

No purchase of supplies, materials, or equipment or contract or purchase order for services shall be entered into unless there is an unexpended and unencumbered appropriation balance sufficient to pay the amount required by such purchase or contract or purchase order, except for an emergency purchase pursuant to Section 4.12.220.

SECTION 9. Chapter 4.13 of Title 4 of the San Jose Municipal Code is hereby repealed in its entirety.

RD:BLD
11/06/06

PROPOSED

PASSED FOR PUBLICATION of title this _____ day of _____, 2006, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

RON GONZALES
Mayor

ATTEST:

LEE PRICE, MMC
City Clerk

Contracting-In Process Comparison

The table below describes the proposed process for Contracting-In with a \$250,000 contract approval authority for services. For contracts with a value above \$250,000, the current process will continue.

For facilitate comparison to the current process, the first column of the table below outlines the current Contracting-In process. The changes in the proposed process are bolded.

Current Process with \$100K Contract Approval Authority for Services	Proposed Process with \$250,000 Contract Approval Authority for Services
1. Department submits applicable Contracting-In forms to Human Resources prior to Council Meeting.	1. Department submits applicable Contracting-In forms to Human Resources, when departments submit a purchase requisition to Purchasing. Purchasing will <u>not</u> start the processing of a requisition without a submitted Contracting-In form.
2. Contracting-In form is reviewed for completeness and submitted to the affected bargaining units.	2. Contracting-In form is reviewed for completeness and submitted to the affected bargaining units.
3. If necessary, discussions are initiated between applicable Department representatives and affected Bargaining Units addressing concerns of loss of contracting-in opportunities.	3. If necessary, discussions are initiated between applicable Department representatives and affected Bargaining Units.
4. For concurrence, Human Resources signs the Contracting-In form and forwards to Finance.	4. For concurrence, Human Resources signs the Contracting-In form and forwards to Finance.
5. If discussions do not lead to concurrence, bargaining units may present their case at the appropriate Council Meeting.	5. If discussions do not lead to concurrence, bargaining units may request, in writing, that the Director of Finance agendize the contract award to present loss of contracting-in opportunities at the appropriate Council Meeting. The Director of Finance will agendize the contract award.
6. Human Resources matches processed Contracting-In forms with applicable Council Agenda.	6. Finance will publish all contract awards for services between \$100,000 and \$250,000 monthly in the rears on the Council Agenda.
	7. Human Resources will match processed Contracting-In forms with applicable Council Agenda.