



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: RICHARD DOYLE
CITY ATTORNEY

SUBJECT: Municipal Rose Garden
Maintenance Options Item 5.2

DATE: May 11, 2007

SUPPLEMENTAL

ISSUE

In addition to the information discussed by the Director of Parks, Recreation and Neighborhood Services in his Supplemental Memo dated May 15, 2007, the Council should be aware that City of San Jose Prevailing Wage and Living Wage policies would apply to certain options available to address the current service levels of the facility. If a proposed contract is subject to both policies the higher of the two wages will apply.

ANALYSIS

A. Living Wage Policy

Under the attached City Council Resolution 68900, contractors who are awarded certain City service and labor contracts are required to pay a minimum level of compensation to covered employees who work on these projects. Currently the policy covers contracts for the following services:

- 1.) Automotive repair and maintenance
- 2.) Facility and building maintenance
- 3.) Food services
- 4.) Janitorial and Custodial
- 5.) Landscaping;
- 6.) Laundry Services
- 7.) Office and Clerical (copier maintenance, facsimile maintenance, courier, mailing, photographic, printing, collections)

- 8.) Parking lot management
- 9.) Pest Control
- 10.) Operation, programming and maintenance of recreational facilities
- 11.) Security
- 12.) Shuttle Transportation
- 13.) Street Sweeping
- 14.) Towing
- 15.) Moving Services
- 16.) Fabrication and installation of City signs
- 17.) Maintenance of City owned equipment
- 18.) Any other service or labor determined by the Director of Equality Assurance to meet the intent of this Policy.

Living wages can be satisfied by the wages paid under a collective bargaining agreement between the Contractor and a recognized union representing employees who will perform services pursuant to the Agreement.

However, if the wage rates set forth in the collective bargaining agreement fall below the then current Living Wage Rate set by the City of San Jose, the required rate of pay shall be the Living Wage Rate, unless the collective bargaining agreement expressly provides that the agreement shall supersede the requirements of the Living Wage Policy.

If there is no collective bargaining agreement as described above, not less than the Living Wage Rate for contracts must be paid to covered employees performing work identified in the applicable wage determination issued by the City of San Jose's Office of Equality Assurance. The rates for contracts entered into after July 1, 2007 are as follows:

1. If health insurance benefits are provided, a wage of not less than Twelve Dollars and Sixty-Six Cents (\$12.66) per hour.
2. If health benefits are not provided, a wage of not less than Thirteen and Ninety-One Cents (\$13.91) per hour.

The Living Wage Policy also requires that for certain services the contractor will have to comply with employee retention and provide assurances for labor peace in the contract

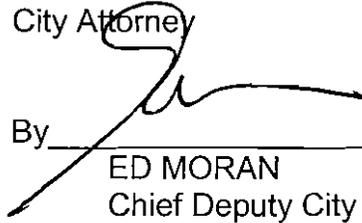
B. Prevailing Wage Policy

Under the attached City Council Resolution No. 61144, contractors for certain types of public works contracts, direct services to the public and City maintenance projects are required to pay prevailing wages to their employees who work on City projects.

Prevailing Wages can be satisfied by the wages paid under a collective bargaining agreement between the Contractor and a recognized union representing workers who perform services pursuant to this agreement; or if there is no collective bargaining agreement as described above, not less than the prevailing rate of per diem wages for the employee craft/classification as determined by the City of San Jose's Office of Equality Assurance.

RICHARD DOYLE
City Attorney

By



ED MORAN
Chief Deputy City Attorney

cc: Les White

RESOLUTION NO 68900

**A RESOLUTION OF THE COUNCIL OF THE
CITY OF SAN JOSE ADOPTING REVISIONS
TO THE LIVING WAGE POLICY**

WHEREAS, it is beneficial to the health and welfare of all citizens of San Jose that all workers are paid a wage which enables them to not live in poverty; and

WHEREAS, the City awards many contracts to employers to provide services to the public and the City government; and

WHEREAS, the City provides direct financial assistance to employers for the purpose of economic development and job growth; and

WHEREAS, many service employees in San Jose and their families live at or below the poverty line; and

WHEREAS, the payment of such inadequate compensation tends to negatively affect the quality of services to the City and the public by fostering high turnover and instability in the workplace; and

WHEREAS, the use of City funds to promote the creation of a livable wage will increase the ability of these employees to attain sustenance, decrease the amount of poverty and reduce the amount of taxpayer funded social services in San Jose; and

WHEREAS, many employers who provide contract services to the City or receive direct financial assistance do not provide health insurance to their employees which affects performance and absenteeism and has a negative impact to local and state health programs which can only be ameliorated by having employers providing reasonable health insurance to their employees; and

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WHEREAS, a City policy providing for a livable wage is consistent with other programs operated by the City to meet the employment and economic development needs of low wage workers; and

WHEREAS, it is the purpose of this policy to provide for a livable wage for workers employed by employers who are awarded service contracts or direct financial assistance by the City, and thus enhance the welfare of workers of San Jose; and

WHEREAS, the City has determined that certain revisions to the Policy are necessary to clarify the intent and application of the Living Wage Policy.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of San Jose that the City approves the following Living Wage Policy:

CITY OF SAN JOSE LIVING WAGE POLICY

I. LIVING WAGE POLICY

It is the policy of the City of San Jose that persons doing work on, for or on behalf of the City should be paid a living wage, be provided with or able to afford health insurance, have reasonable time off, not be subject to lay off merely because the City changes contractors and should work in an environment of labor peace.

A. Payment of Minimum Compensation to Employees

1. Wages

a. If health insurance benefits are provided, a wage of no less than Nine Dollars and Fifty Cents (\$9.50) per hour.

b. If health insurance benefits are not provided, a wage of no less than Ten Dollars and Seventy-Five Cents (\$10.75) per hour.

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c. These initial rates will be reviewed each year, no later than the 10th of February, to determine if any adjustment should be made based on any change as of December 31 of the previous year in the federal poverty level standard or the geographic cost of living differential used by the City in determining the initial wage adjustment. If either standard has changed the City shall recalibrate the wages using the original methodology with the new values. If neither standard has changed, the Consumer Price Index for all Urban Consumers in the San Francisco-Oakland-San Jose area (U. S. Department of Labor, Bureau of Labor Statistics) shall be reviewed. If the CPI has increased by at least 1 %, the wage rate shall be adjusted by the same percentage change in the CPI but not to exceed 3 %.

d. If the contract is subject to a prevailing wage requirement, the higher of the two wages shall apply.

e. Proof of the provision of such benefits must be submitted to the City with the executed contract or receipt of the City financial assistance to qualify for employees with health benefits.

B. Employee Retention Requirements

1. Application

The Employee Retention Requirements under this Policy will apply to contracts subject to this Policy which are over the amount of \$50,000 and provides for the continuation of a service currently provided by another contractor, including the following contracts:

a. Food Services

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- b. Janitorial and Custodial Services
- c. Shuttle transportation
- d. Parking lot management
- e. Street sweeping (citywide)
- f. Operation, programming and maintenance of recreational facilities
- g. Any other service or labor determined by the Director of Equality Assurance to meet the intent of this Policy

2. Retention Employee

Any person employed by the predecessor contractor or any subcontractor to the predecessor contractor who:

- a. provides direct labor or service on the City contract;
- b. is not an "exempt" employee under the Fair Labor Standards Act; and
- c. has been employed for at least the six (6) month period prior to the date of the new contract by the predecessor service contractor or subcontractor.

3. Employment

Employment shall be offered to all qualified retention employees.

- a. The new service contractor or subcontractor may deem a retention employee not to be qualified only if:

- (i) the employee has been convicted of a crime that is related to the job or to his or her job performance; or

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(ii) the contractor can demonstrate to the City that the employee presents a significant danger to customers, co-workers, or City staff.

b. The new service contractor or subcontractor may treat any of its current employees as retention employees for purposes of this Policy who, based on payroll records or other reliable evidence can be shown to the satisfaction of the Director of the Office of Equality Assurance:

(i) to have been employed for at least the six (6) month period prior to the date of the new contract by the contractor or subcontractor; and

(ii) would otherwise need to be terminated as a result of this program.

c. In the event that the service contractor or subcontractor does not have enough positions available for all qualified retention employees and its current eligible retention employees, the service contractor or subcontractor will hire the predecessor contractor's qualified retention employees and retain its current employees who are eligible for retention under this Policy by seniority within each employment classification. For any positions that become available during the initial ninety (90) day period of the new contract, the service contractor or subcontractor will hire qualified retention employees and rehire its current employees who are eligible for retention under this Policy by seniority within each employment classification.

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4. Retention

a. Qualified employees of the predecessor contractor may not be discharged without cause during the initial ninety (90) day period of their employment.

b. Each such qualified retention employee who receives a satisfactory performance evaluation at the end of the initial ninety (90) day period of employment will be offered continued employment under terms and conditions established by the contractor or subcontractor for all of its employees.

5. Third Party Beneficiary

A retention employee shall have the right of a third party beneficiary under any service contract subject to this employee retention requirement.

C. Third Tier Review

All service or labor contracts subject to this Policy shall be required to undergo what is commonly referred to as "Third Tier Review". This is the process under which the City considers the proposer's history as an employer and working condition commitments in evaluating the proposals. All proposals will be required to address the following:

1. Compensated Days Off

The proposal shall describe the compensated days off per year, including holidays, sick leave, vacation, and personal leave.

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2. Employee Retention Requirements

The proposer will be required to provide requested information and documentation with regard to staffing needs under the contract and how many, if any, of its current employees would need to be considered for retention purposes.

3. Service Disruption /Labor Peace Provision

a. The Council hereby declares that, to the best of its ability, it intends to ensure that essential services and labor for which it contracts are provided efficiently and without interruption.

Therefore, it is necessary to avoid the potential of disruption by labor disputes.

b. Prior to the issuance of any request for proposals, including requests for qualifications, requests for quotes or requests for information (collectively referred to as , RFP), the Office of Equality Assurance shall determine the level of vulnerability of the proposed contract to service or labor disputes and the degree to which labor peace is essential to the proprietary interests of the City. The determination shall be based on considerations including but not limited to following factors:

(i) whether the service or labor is provided on a City site or a site which is important to the proprietary interests of the City; and

(ii) whether the service provider relies on a significant amount of public patronage; and

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(iii) the economic effect of any disruption on City expenditures or revenues; and

(iv) the effect of any disruption on the citizens, tourists and businesses in the community.

c. The Office of Equality Assurance shall consider the relationship between the extent to which the City is vulnerable from the effects of labor unrest and the type of assurances of protection against labor discord that need to be provided by the proposer.

d. The request for proposals shall include a provision requiring adequate assurances in light of the level of vulnerability in each request for proposals.

e. The City department awarding the contract shall provide a copy of each RFP to any person or entity who files a request for notification with the Director of the Office of Equality Assurance.

II. SERVICE AND LABOR CONTRACTS

The Living Wage Policy shall apply to service and labor contracts as follows:

A. Application

1. Service or Labor Contract

This policy applies to those contracts which:

- a. involve an expenditure in excess of Twenty Thousand Dollars (\$20,000):

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b. provide for the furnishing of services or labor to the City (as opposed to the purchase of goods or other property or the leasing of property) including the following services:

- 1.) Automotive repair and maintenance
- 2.) Facility and building maintenance
- 3.) Food services
- 4.) Janitorial and Custodial
- 5.) Landscaping;
- 6.) Laundry Services
- 7.) Office and Clerical (copier maintenance, facsimile maintenance, courier, mailing, photographic, printing, , collections)
- 8.) Parking lot management
- 9.) Pest Control
- 10.) Operation, programming and maintenance of recreational facilities
- 11.) Security
- 12.) Shuttle Transportation
- 13.) Street Sweeping
- 14.) Towing
- 15.) Moving Services
- 16.) Fabrication and installation of City signs
- 17.) Maintenance of City owned equipment
- 18.) Any other service or labor determined by the Director of Equality Assurance to meet the intent of this Policy.

2. Exemptions

a. Contracts under which federal or state regulations preclude its applicability;

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- b. Contracts which involve programs where the City shares management authority with other jurisdictions including but not limited to the San Jose Santa Clara Water Pollution Control Plan unless all participating agencies have a Living Wage Policy;
- c. Contracts which involve programs with special decision making procedures including but not limited to the City Retirement Boards and the Deferred Compensation Board;
- d. Contracts which are impacted by leases, bond covenants, grant restrictions, governmental regulations and the like shall be reviewed on a case by case basis and the policy included to the extent it is not constrained;
- e. Contracts which involve programs which do not primarily provide direct services to the City but have a franchise or contract to provide services to the residents or property owners of the City; and
- f. Contracts for professional services for specialized skills including but not limited to experts, consultants, auditors, engineers, attorneys, banking.
- g. Contracts where imposition of the policy is found by the Director of Equality Assurance to be likely to cause a hardship to small businesses.

B. Covered Employees

Any person employed by the contractor or any subcontractor, notwithstanding the location of the person, who:

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1. Is not a person who provides volunteer services, that are uncompensated except for reimbursement of expenses such as meals, parking or transportation;
2. Expends at least half of his or her time on work for the City;
3. Is at least eighteen (18) years of age;
4. Is not in training for the period of training specified under training standards approved by the City

III. FINANCIAL ASSISTANCE

The Policy shall apply to any City financial recipient, excluding any corporation organized under Sec. 501 (c) 3 and 6 of the United States Internal Revenue Code of 1954, who receives direct monetary financial assistance from the City in an amount of One Hundred Thousand Dollars (\$100,000) or more in any twelve (12) month period executed after the effective date of this policy. Conformance to this Policy shall be required throughout the term of the agreement.

This Policy does not apply to any person or entity who receives any indirect financial assistance including but not limited to tax credits, subsidies or rebates, bond financing, or loans.

A. Covered Employees

Any person employed by the City financial recipient or any subrecipient whose compensation is attributable to the City's financial assistance, who :

1. Is not a persons who provides volunteer services, that are uncompensated except for reimbursement of expenses such as meals, parking or transportation;

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2. Expend at least half of his or her time on work for the City;
3. Is at least eighteen (18) years of age;
4. Is not in training for the period of training specified under training standards approved by the City

IV. SUPERSESION BY COLLECTIVE BARGAINING AGREEMENT

Parties subject to this Policy may by collective bargaining agreement provide that such agreement shall supersede the requirements of this Policy.

V. ADMINISTRATION

The City's Department of Equality Assurance shall monitor compliance, including the investigation of claimed violations, and may promulgate additional regulations consistent with this Policy.

A. Reports

The Director of the Department of Equality Assurance shall file an annual report on compliance to the City Council.

B. Proposal and Contract Language

All City proposals, contracts and financial assistance agreements subject to this policy shall contain the following paragraph or substantially equivalent language:

The contract is subject to the City of San Jose Living Wage Policy and any implementing regulations. The Policy requires among other things, that unless specific exemptions apply, all employers, as defined, under

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service contracts and recipients of City financial assistance, as defined, shall provide payment of a minimum level of compensation to employees which includes the cost of health benefits. Failure to provide the Living Wage compensation may result in termination of the contract or debarment from future contracts. The service or labor contract shall include the employee retention requirements set forth in the Policy, if applicable.

C. Retention Program

1. To the extent the City is able to obtain the information, the City will provide the service contractor or subcontractor with a list of names, addresses, dates of hire, and employment classifications for all covered employees of the outgoing service contractor or subcontractor who are interested in continued employment.
2. Contracts entered into after the adoption of this Policy shall obligate the contractor or subcontractor to provide names of all qualified retention employees at end of contract:

D. Enforcement

The service contract or financial assistance agreement shall provide that if a violation of any provision of this Policy occurs and is not corrected after written notice, the City may, at its option, do any or all of the following:

1. Suspend and/or terminate the contract or financial assistance agreement for cause;
2. Require the employer to pay any amounts underpaid in violation of the required payments and City's administrative costs and liquidated

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damages. and in the case of financial assistance to refund any sums disbursed by the City.

3. Debar the contractor or subcontractor from future City contracts and/or deem the recipient ineligible for future financial assistance.

E. Coexistence with Any Other Employee Rights

This Policy shall not be construed to limit an employee's ability to bring any legal action for violation of any rights of the employee.

VI. EFFECTIVE DATE

A. Any contract for which any request for service or labor covered by this Policy is issued on or after November 17, 1998.

B. Any grant for which the application is received on or after November 17, 1998.

C. Any amendment or extension of a service or labor contract which modifies the provisions of that contract, other than the termination date of the Contract, executed after November 17, 1998.

ADOPTED this 8th day of June, 1999, by the following vote:

AYES:	CHAVEZ, DANDO, DIAZ, DIQUISTO, FISCALINI, LeZOTTE,
NOES:	MATTHEWS, POWERS, SHIRAKAWA, WOODY; GONZALES
ABSENT:	NONE



RON GONZALES, Mayor

ATTEST:



PATRICIA L. O'HEARN, City Clerk

RESOLUTION NO. 61144

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE APPROVING A POLICY WHICH REQUIRES THE PAYMENT OF PREVAILING WAGES IN DESIGNATED CITY PROJECTS AND SERVICES TO THE CITY

WHEREAS, ensuring equitable and sufficient wages for citizens of the City of San Jose is an essential goal; and

WHEREAS, a prevailing wage requirement in City construction contracts and other designated City contracts is important to protect City of San Jose job opportunities, stimulate the City's economy; and

WHEREAS, on October 11, 1988, the City Council of the City of San Jose adopted a prevailing wage policy by Resolution and recommended that the extension of prevailing wage requirements to other City projects and programs be studied,

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE:

SECTION 1. Prevailing Wage Policy of the City of San Jose

I. It is the Policy of the City of San Jose that in any contract hereinafter entered into under the circumstances set forth below shall provide that not less than the general prevailing wage of per diem wages as defined in the California Labor Code shall be required to be paid:

A. City public works construction projects funded in whole or in part by City funds, where work is performed pursuant to

any public works construction contract to which the City is a party.

B. The following direct services which are provided under contract to the City:

1. Residential Street Sweeping
2. - Convention Center Food Services
3. Parking Lot Management Services
4. Janitorial or Custodial Services

C. City maintenance projects of a routine, recurring or usual nature for the preservation, protection and keeping of City owned buildings, structures and ground facilities, where work is performed pursuant to contracts to which the City is a party and which exceed the contractual amount of \$1,000.00.

Section 2. Application

- A. This requirement shall apply to the employees of an employer including the general contractor, subcontractor or other contractor engaged by the general contractor in construction, alteration, demolition or repair work for construction projects designated in Section 1, above.
- B. This Policy shall not apply to construction on property owned by City Employee Retirement Systems.
- C. The City Council reserves its right to require the payment of prevailing wages on any City project or service provided to the City not expressly designated in this Policy.

- D. This Policy is not intended to create any power or duty in conflict with state or federal law or to diminish any rights or obligations established by state or federal law.
- E. This Policy shall not confer upon the City any power, not otherwise provided by law, to determine the legality of any collective bargaining agreement.
- F. This Policy is not intended to impose upon the City or its officers and employees, an obligation for breach of which the city or its officers and employees is liable in money damages to any person or entity who claims that such breach proximately caused injury.

Section 3. Implementation of Policy

- A. This Policy shall be implemented through the City's authority to contract with parties affected by adoption of this Resolution.
- B. Prevailing wage rates for employees covered by this Policy shall be those wage rates as established or published by the State Department of Industrial Relations.
- C. Contracts or agreements entered into by the City for the projects or services specified in Section 1 above shall include provisions relating to records, apprentices, notices and enforcement in accordance with the requirements of the California Labor Code.
- D. The City Manager shall develop a process and procedure for establishing prevailing wage rates where the State Department of Industrial Relations has not determined prevailing wage rates for applicable job classifications.
- E. The requirements of this Policy shall be included in any requests for proposals, requests for qualifications or

specifications for a project or service specified in Section 1, above. Where no request for proposal, request for qualifications or specifications are issued, potential contracting parties shall be notified of the prevailing wage rate at the first appropriate time but under no circumstance later than execution of a contract or agreement.

Section 4. Enforcement

- A. Nothing in this Resolution and Policy shall preclude enforcement by the State Department of Industrial Relations in the projects or services specified in Section 1, above.
- B. Every City contract or agreement to which this Policy applies shall contain provisions whereby the contracting party with the City may be deemed to be in breach of contract for failure to comply with the contractual requirements to pay prevailing wages in accordance with this Resolution. Such provisions shall also authorize the City to take all appropriate action including rescission of the contract or agreement, or to seek judicial relief for damages.
- C. In imposing on its contracting parties this Policy's requirements to pay prevailing wages, the City is not assuming, nor imposing on its officers and employees, an obligation for breach of which the City or its officers and employees is liable in money damages to any person who claims that such breach proximately caused injury.

Section 5. Applicability

- A. This Policy shall be applicable for all contracts and agreements for which requests for proposals, requests for qualifications or specifications contain the requirements of this Policy.

- B. All requests for proposals, requests for qualifications or specifications issued after the adoption of this Resolution shall contain the requirements of this Policy.
- C. This Policy is immediately effective for all contracts and agreements executed by a party after adoption of this Resolution and for which no request for proposal, request for qualifications or specifications are issued.
- D. This Policy shall supersede the Policy adopted by the City Council by Resolution on October 11, 1988.

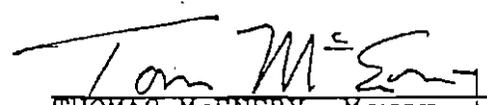
ADOPTED this 7th day of February, 1989, by the following vote:

AYES: ALVARADO, BEALL, HAMMER, HEAD, IANNI, LEWIS, SAUSEDO, STABILE, WILLIAMS; MCENERY

NOES: RYDEN

ABSENT: NONE

ATTEST:


THOMAS McENERY, Mayor


ANDREA MEMBRENO, City Clerk