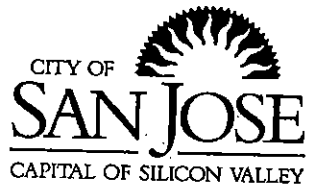
RD:MDC
10/26/06

Council Agenda: 10/31/06
Item: 3.7(c)



Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL

FROM: RICHARD DOYLE
City Attorney

SUBJECT: **HNVF CONTRACT EXHIBIT (background/TB checks)**

DATE: October 27, 2006

BACKGROUND

Some nonprofit organizations have expressed concern that the City is requiring in its HNVF grant agreements burdensome background checks of some of the organizations' employees and volunteers. These agreements also require TB testing of some employees. It is our understanding that the major concerns are the cost to comply and the time required to come into compliance.

Similar requirements to those in the exhibit have been included in the City's BEST contracts, although the new proposal would add FBI or equivalent national database background checks. City staff and the community are working together to provide suitable safeguards for protecting children and complying with state law in the context of criminal background checks of employees and volunteers, and TB testing for employees. To that end, the City anticipates having final contract provisions prepared no later than February 1, 2007. The City is also considering the budgetary concerns of the nonprofits.

ANALYSIS

1. Legal Requirements for Background Checks.

Penal Code section 11105.3 authorizes a nonprofit employer of persons who supervise or have disciplinary authority over children to obtain a criminal history background check from the Department of Justice. The City believes that background checks are the most effective method to ensure that employees and volunteers of nonprofit organizations under contract with the City who supervise or have disciplinary authority over any minor do not have criminal convictions for crimes specified in Public Resources Code Section 5164. This Code section prohibits the City from employing a person or retaining a volunteer in a position having **supervisory or disciplinary authority over any minor in a recreational setting**, if they have been convicted of specific Penal Code offenses. The statute allows no waiver of this requirement. Although this provision of the Public

Resources Code does not by its terms specifically apply to nongovernmental organizations, the City can require nonprofit organizations that contract with the City to provide recreational services for minors to disqualify prospective employees and volunteers who have criminal convictions for crimes that would disqualify such persons from direct employment with the City. Because a contractor is under contract with the City to provide services involving minors, our Office believes that the City, like many other jurisdictions in the state, should apply these provisions to parties with whom the City contracts to perform services. It is the responsibility of the nonprofit organization to determine who is serving in a supervisory or disciplinary role.

The Public Resources Code lists the Penal Code violations which are the subject of the background screening. In addition to DOJ background checks, the City is also requiring FBI, or equivalent national database, background checks. California DOJ background checks will reveal only California criminal convictions, potentially omitting criminal convictions in all other state jurisdictions. Thus the FBI or other equivalent national background check, in addition to the DOJ background checks, is the most effective method of verifying if a person has been convicted of one of the crimes of the nature listed in Public Resources Code.

Moreover, a Grand Jury report issued on April 8, 2003 recommended FBI background checks for volunteers who help the City run City recreational programs and who have direct supervisory responsibility over youth. In its March 11, 2005 response to the Grand Jury Report, the City accepted the recommendation to conduct FBI or equivalent national database checks in those instances.

2. Legal Requirements of TB tests.

The Public Resources Code section 5163, *et. seq.*, prohibits counties and cities from **employing** a person in connection with a park, playground or recreational center, or beach used for recreational purposes by a city or county, who will be in a position requiring contact with children, or as a food concessionaire, unless that person produces a certificate showing that within the last two years they have been examined and found to be free of communicable tuberculosis. The City has also determined, as with background checks, that because a contractor is under contract with the City to provide services, in these instances the requirements should apply to such organizations.

CONCLUSION

The City should require that organizations under contract with the City perform DOJ, and FBI or equivalent national database background checks, on grantee employees and volunteers who have supervisory or disciplinary authority over minors in a recreational setting. TB testing of employees who come into contact with minors or are food concessionaires is also required. These requirements arise from Public Resources Code sections 5164 and 5163 and Penal Code section 11105.3. Attached is the latest draft of the related contract requirements and related Penal Code offenses. The City is working with nonprofit organizations to enable compliance with State and City requirements.

RICHARD DOYLE
City Attorney

By:_____
MARK DECASTRO
Senior Deputy City Attorney

Attachment

cc: Les White, City Manager

RD:MDC
10/20/06

EXHIBIT

EMPLOYEE/VOLUNTEER CLEARANCE VERIFICATION AND COMPLIANCE WITH THE CHILD ABUSE AND NEGLECT REPORTING ACT

If GRANTEE provides services involving minors, GRANTEE shall conduct a criminal background check through the database of the California Department of Justice as well as an FBI criminal database, or equivalent national database background check, if available, and approved by City, on each of its employees and volunteers who have supervisory or disciplinary authority over minors.

GRANTEE shall also comply with the provisions of the Child Abuse and Neglect Reporting Act, California Penal Code Section 11164 et. seq. Additionally, GRANTEE certifies the following:

1. Any and all personnel employed or retained by GRANTEE in conducting the operations of GRANTEE's program shall be qualified to perform the duties assigned to them by GRANTEE. GRANTEE agrees that GRANTEE shall not at any time allow its employees or volunteers to be in any position with supervisory or disciplinary authority over minors, if they have been convicted of any offense identified in California Public Resources Code Section 5164 (copy attached).

CITY and GRANTEE understand that results of background checks on minors may be confidential under state law. Therefore, all employees or volunteers must be at least 18 years of age if they are to be in a position having supervisory or disciplinary authority over any minor.

If GRANTEE intends to have employees or volunteers under the age of 18 providing services under this Agreement, GRANTEE must obtain City's prior consent, and GRANTEE shall ensure that none of its employees or volunteers under 18 years of age have any supervisory or disciplinary authority over any minor, as such term is used in California Public Resources Code Section 5164.

2. GRANTEE shall be responsible for ensuring that no person whether paid or not paid by GRANTEE shall be permitted to provide services unless appropriate background checks, including fingerprints, have been performed no more than two (2) years prior to the beginning of services under this Agreement and are updated on a biannual basis, and the person meets the standards set forth above. If requested by City, and to the extent allowed by law, GRANTEE shall promptly provide documentation listing each person that has provided or is providing services hereunder, and certifying that the GRANTEE has conducted the proper background check on such person or persons, and each of the named persons is legally permitted to perform the services described in this Agreement. Regardless of whether such documentation is requested or delivered

by GRANTEE, GRANTEE shall be solely responsible for compliance with the provisions of this Section.

3. That no person employed by GRANTEE shall be permitted to provide services requiring contact with children or providing food concessionaire services or other licensed concessionaire services in that area, unless GRANTEE has complied with the TB testing requirements set forth in Section 5163 of the California Public Resources Code (copy attached), verifying that the person or persons has provided evidence/verification of a negative TB skin test reading less than 2 (two) years old (if newly hired) or within 4 (four) years (if current employee) of the date of execution of this Agreement and every 4 years thereafter, if the term of this Agreement exceeds 4 years. For persons with a positive TB skin test reading, a physician's medical clearance must be obtained prior to services being provided as specified above. GRANTEE shall keep on file each "Certificate" of clearance for the persons described above, and shall also provide a copy of each Certificate to City. "Certificate" means a document signed by a licensed examining physician and surgeon or a notice from a public health agency or unit of the tuberculosis association which indicates freedom from active tuberculosis.

To the extent GRANTEE is prohibited from providing the City with a copy of a Certificate, please specify the reasons below. Notwithstanding the foregoing, GRANTEE certifies that it has the Certificates on file.

4. GRANTEE understands that if services are rendered on a school site, there may be additional requirements that may apply including without limitation, requirements under the California Education Code. GRANTEE acknowledges that it is GRANTEE's sole responsibility to comply with all applicable laws, regulations and licensing requirements in GRANTEE's provision of services hereunder.

5. Without limitation of any other provision contained in this Agreement or in this **EXHIBIT** , GRANTEE shall have until February 1, 2007 to obtain the FBI criminal database or equivalent national database background check, if available, pursuant to the provisions contained in this Exhibit. In no event, however, shall GRANTEE hire employees or volunteers for supervisory or disciplinary authority over minors who have been convicted of any offense identified in California Public Resources Code Sections 5164. GRANTEE shall fully indemnify, defend and hold harmless CITY for any such hiring.

I, the GRANTEE by signing below verify that I have read and agree to the above:

_____

Signature Date

_____

(Please print or type name of organization)

Reasons for not providing TB Certificates: _____

_____

RD:MDC
10/20/06

CALIFORNIA PUBLIC RESOURCES CODE SECTION 5164

5164. (a) (1) A county or city or city and county or special district shall not hire a person for employment, or hire a volunteer to perform services, at a county or city or city and county or special district operated park, playground, recreational center, or beach used for recreational purposes, in a position having supervisory or disciplinary authority over any minor, if that person has been convicted of any offense specified in paragraph (2). (2) (A) Violations or attempted violations of Section 220, 261.5, 262, 273a, 273d, or 273.5 of the Penal **Code**, or any sex offense listed in Section 290 of the Penal **Code**, except for the offense specified in subdivision (d) of Section 243.4 of the Penal **Code**. (B) Any felony or misdemeanor conviction specified in subparagraph(C) within 10 years of the date of the employer's request. (C) Any felony conviction that is over 10 years old, if the subject of the request was incarcerated within 10 years of the employer's request, for a violation or attempted violation of any of the offenses specified in Chapter 3 (commencing with Section 207) of Title 8 of Part 1 of the Penal **Code**, Section 211 or 215 of the Penal **Code**, wherein it is charged and proved that the defendant personally used a deadly or dangerous weapon, as provided in subdivision (b) of Section 12022 of the Penal **Code**, in the commission of that offense, Section 217.1 of the Penal **Code**, Section 236 of the Penal **Code**, any of the offenses specified in Chapter 9 (commencing with Section 240) of Title 8 of Part 1 of the Penal **Code**, or any of the offenses specified in subdivision (c) of Section 667.5 of the Penal **Code**, provided that no record of a misdemeanor conviction shall be transmitted to the requester unless the subject of the request has a total of three or more misdemeanor convictions, or a combined total of three or more misdemeanor and felony convictions, for violations listed in this section within the 10-year period immediately preceding the employer's request or has been incarcerated for any of those convictions within the preceding 10 years. (b) (1) To give effect to this section, a county or city or city and county or special district shall require each such prospective employee or volunteer to complete an application that inquires as to whether or not that individual has been convicted of any offense specified in subdivision (a). The county or city or city and county or special district shall screen, pursuant to Section 11105.3 of the Penal **Code**, any such prospective employee or volunteer, having supervisory or disciplinary authority over any minor, for that person's criminal background. (2) Any local agency requests for Department of Justice records pursuant to this subdivision shall include the prospective employee's or volunteer's fingerprints, which may be taken by the local agency, and any other data specified by the Department of Justice. The request shall be made on a form approved by the Department of Justice. No fee shall be charged to the local agency for requesting the records of a prospective volunteer pursuant to this subdivision.

Violations of, attempted violations of, or crimes under, Penal Code Sections referred to in Public Resources Code Section 5164:

220 – Assault with intent to commit mayhem, rape, sodomy, oral copulation
Burglary involving assault with intent to commit rape, sodomy, oral copulation

261.5 – unlawful sexual intercourse, not spouse of perpetrator

262 -- Rape of spouse of perpetrator

273a -- Consideration received/paid for placement for adoption or for consent to adoption of a child, except fees paid for a licenses adoption /social service agency, etc.

273d -- Parent receiving financial benefit involving multiple undisclosed prospective adopting families or in connection with maternity-connected medical expenses in return for child placement

273.5 – Domestic violence (corporal injury resulting in a traumatic condition)

290 --- Sex offenses

207-- Kidnapping

211 – Robbery

215 – Carjacking

12022 – Armed felony

217.1 -- Assault upon a public official

236 – False imprisonment

240 - Assault

667.5 – Violent felonies