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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

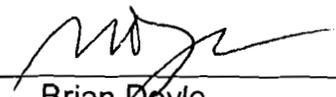
Not Applicable.

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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.

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

- 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;

- 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

- 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;

- 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.

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