

Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Lee Price, MMC
City Clerk

SUBJECT: SEE BELOW

DATE: 10-08-09

SUBJECT: COMPETITION POLICY REVIEW – EVALUATING NEW SERVICE DELIVERY MODELS

RECOMMENDATION: As recommended by the Community and Economic Development Committee on September 28, 2009 and outlined in the attached memorandum submitted to the Community and Economic Development Committee:

- (a) Accept Report on Evaluation of Service Delivery Changes in the Proposed FY2009-10 Budget
- (b) Adoption a Resolution:
 - (1) Approving a new Council Policy entitled “Service Delivery Evaluation” establishing a decision making framework to evaluate service delivery models; and
 - (2) Revising Council Policy 0-29, the "Public Private Competition Policy"; and/or
 - (3) Consider revising the staff recommendations, as amended by the memorandum from Council Member Kalra, dated September 25, 2009, as modified by the Community and Economic Development Committee on September 28, 2009.

BACKGROUND

The Committee accepted the report and referred to the full Council for consideration on October 20, 2009, a resolution adopting the draft policy entitled “Service Delivery Evaluation” and the revising of Policy 0-29 “Public Private Competition Policy” as well as consideration of amendments proposed by Council Member Kalra in his memorandum dated September 28, 2009, as modified by the Committee:

- (1) Amend Step #1 of the draft Service Delivery Evaluation Policy by *changing the threshold* (for changes expected to result in addition, deletion, or reclassification of five (5) or more City full-time equivalent (FTE) positions) *to three (3) or more FTE positions.*

BACKGROUND (Cont'd.)

- (2) Amend Recommendation #10 of revised Council Policy 0-29 (Sunshine Requirements – Public Disclosure) to include a provision on the availability of information *drafted that creates protection for legitimate propriety information and information that serves no public purpose; requires the information that must be made available is identified upfront as a part of the request for proposal process, and only applies to new service delivery contracts developed under Council Policy 0-29.*
- (3) Modify language in revised Council Policy 0-29 (Evaluation of Breach of Contract in 3rd Tier Review) to specify what "documented evidence" related to a breach of contract will be reviewed and consider information only if there is unquestionable notice of a contractual dispute and allegation of breach. The Committee also deferred to a future Committee meeting discussion of the "Pay to Play" prohibition (campaign contribution restrictions).

ATTACHMENTS

- (1) Memorandum from Chief Deputy City Manager Ed Shikada to the Community and Economic Development Committee, dated August 13, 2009.
- (2) Supplemental memorandum from Chief Deputy City Manager Ed Shikada to the Community and Economic Development Committee, dated September 16, 2009.
- (3) Memorandum from City Attorney Richard Doyle to the Community and Economic Development Committee, dated September 25, 2009.
- (4) Memorandum from Council Member Kalra to the Community and Economic Development Committee, dated September 25, 2009.
- (5) Community and Economic Development Committee presentation on Competition Policy Overview – Evaluating Service Delivery, dated September 28, 2009.

CED Agenda: 08-24-09
Item No. 4d(2)(3)
deferred to: 9-28-09



Memorandum

TO: COMMUNITY AND ECONOMIC
DEVELOPMENT COMMITTEE

FROM: Edward K. Shikada

SUBJECT: SEE BELOW

DATE: 08-13-09

Approved

Date

8/13/09

SUBJECT: COMPETITION POLICY REVIEW – EVALUATING NEW SERVICE
DELIVERY MODELS

RECOMMENDATION

It is recommended that the Community and Economic Development Committee:

- 1) Accept this report on evaluation of service delivery changes in the proposed FY2009-10 Budget.
- 2) Agendize for City Council consideration adoption of a Resolution:
 - a. Approving a new Council Policy establishing a decision making framework to evaluate service delivery models.
 - b. Approving revised Policy 0-29 (Public Private Competition Policy) as further described in this memorandum.

OUTCOME

This report responds to Community and Economic Development Committee direction to evaluate recommendations for competition policy revisions. City Council approval of the proposed actions will revise City Council Policy 0-29 "Public Private Competition," as well as establish a new City Council Policy establishing a decision-making framework for evaluating service delivery models.

BACKGROUND

On March 12, 2009, the Community & Economic Development Committee (CED Committee) held a special meeting to discuss the City's policies related to contracting for services and to review and consider revisions to the City's Public-Private Competition Policy. Ten panel members participated in a roundtable discussion providing a variety of perspectives to the Committee on how the City's current competition policies are working, as well as the potential

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implications of proposed revisions. Roundtable participants represented labor, business, and non-profit community interests.

Following the panel discussion, the Committee approved retaining in committee the issue of revising the public private competition policy and directed staff to return to the Committee on April 27, 2009 for further discussion. At its meeting on April 27, 2009 the Committee approved staff's report outlining recommended actions to evaluate service delivery model changes in the Proposed Fiscal Year 2009-2010 Budget through a values based framework and to return to the Community & Economic Development Committee with recommendations in the fall. Council member Kalra further provided recommended changes to the competition policy in a memorandum dated April 27, 2009.

ANALYSIS

Based upon City Council direction to review the City's competition policies, staff began focused working group meetings in May 2009. Staff held five public meetings with the roundtable participants and other community stakeholders. While the initial focus of the City Council referral was the Public-Private Competition Policy (Council Policy 0-29), the roundtable discussion and preliminary staff analysis demonstrated that the issues of concern to stakeholders spanned a broader range than any single policy. The variety of interests and perspectives resulted in a focus on four functional work areas:

- A. Reviewing the proposed service delivery changes in the FY2009-10 Operating Budget in the context of the City's core values
- B. Developing a decision-making framework for service delivery evaluations
- C. Revising the City's Public-Private Competition Policy (Council Policy 0-29)
- D. Streamlining and simplifying the City's request for proposal process

At these meetings, a variety of themes emerged as important concerns and priorities from stakeholders related to City service delivery methods and decision making. This report provides an update on the proposed service delivery changes in the City's FY 2009-10 Operating Budget, outlines key components of staff's recommendations for a new Council Policy establishing a structured approach to evaluating and selecting among a variety of service delivery models, advances recommended revisions to the City's Competition Policy (Policy 0-29), and delineates recommendations for streamlining the procurement process. In instances where stakeholders held significantly different opinions on staff's recommendations, comments and staff responses may be found as footnotes and end notes.

A. Update on Proposed Service Delivery Changes in the FY2009-10 Operating Budget

Staff held its first focus group meeting with stakeholders on May 8, 2009. The purpose of the meeting was to establish a common understanding of four (4) alternative service delivery budget

proposals and a proposal to pilot a high performance team, and the planned steps to maximize alignment of new service models with San Jose values. Staff provided an overview of the proposals through the lens of the City's core values and provided an opportunity for initial stakeholder feedback on the decision-making framework and the anticipated steps forward. Stakeholders began to identify decision-making issues associated with the case studies, and the effect of potential policy changes.

Overall, staff found that our employee-developed values provided a very useful framework and should be a key factor in evaluating service delivery options. The following provides an update on the status of the proposed serviced delivery changes in the FY2009-2010 Operating Budget:

1. Acquisition of Maintenance, Repair and Operational Supplies

In accordance with Council direction, Finance issued a Request for Proposal (RFP) for the acquisition of maintenance, repair, and operational supplies in June. Several companies have expressed interest in the RFP by attendance of the non-mandatory pre-proposal conference in July and by submitting numerous questions regarding the RFP. Proposals in response to the RFP are due early September.

2. Retail, Food & Beverage Concessions at Happy Hollow Park and Zoo

City Manager's Office and PRNS management met with labor officials on July 21, 2009 to meet and confer on the proposed outsourcing of Food and Beverage, and Retail Services within the new Happy Hollow Park and Zoo. As a result, it was agreed that the City would proceed with steps to outsource Food and Beverage, and Retail services. The Requests for Proposals were issued on July 22, 2009, with a due date of Aug. 26, 2009. To date, a total of 17 vendors have registered through the BidSync system and viewed the announcement, with 9 of those downloading the entire application for Food and Beverage. A total of 41 have registered through the BidSync system and viewed the announcement for Retail Services, with 35 of those downloading the entire application. It is anticipated that the final selection of Food and Beverage, and Retail operators will be completed in November 2009.

This report to the CED Committee is consistent with Council direction, reporting on the outcome of meeting and conferring with the involved City bargaining unit. Release of an RFP was the next step in the procurement process and necessary based on the Happy Hollow construction schedule. The results of this RFP will be presented to the City Council for further consideration.

3. Real Estate Asset Management

This function moved from Public Works to General Services in the 2009-2010 operating budget. Real Estate Asset Management has a renewed focus on managing City real property assets as a whole, providing a centralized point for acquisitions and dispositions as well as lease and space management with a goal of ensuring that City-owned

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properties are used in a strategic and cost-effective manner that supports core City services.

In order to support this effort, staff is researching other jurisdictions to identify best practices and meaningful performance measures against which to benchmark. This work is expected to be completed by November, and will be reported to Council at that time. Staff has also completed a detailed breakdown of the non-personal budget, and non-personal funding has been increased. The proposed plan for these funds in FY2009-2010 is as follows:

**Proposed 2009-2010
Asset Management Non-personal Allocation**

Funding	\$565,000
Professional Services Includes broker services as a stand-alone for projects where staff resources are unavailable or where a broker may provide added value through contacts, knowledge of a particular market, or other expertise. Also includes consultant services (this will at least include a study of golf course operations in accordance with Council direction), appraisal services, and additional needs in conjunction with staff efforts on various projects, potentially including a historic study for former City Hall.	\$250,000
Marketing and Outreach Includes signage, fliers, and other expenses associated with staff efforts on community outreach on the possible disposal of parcels, marketing parcels for sale or lease, and other outreach activities needed for various asset management activities.	\$50,000
Property Maintenance Maintenance services for in-house or contract repairs to unoccupied City property.	\$105,000
Database Purchase of software for the implementation of a comprehensive real estate asset database. Also includes temporary services for data input needed for database.	\$130,000
Other Training, equipment, and supplies required to ensure staff has the appropriate resources necessary to productively address their work efforts.	\$30,000

Currently, Real Estate Asset Management has distributed the work of disposing of thirteen smaller surplus properties to both City staff and to private brokers. This work will assist the City in workload management as well as facilitate an assessment of the use of brokers for these services.

4. Proposal to Pilot High Performance Team Service Agreement for Sewer Line Cleaning Program

The Department of Transportation has initiated the preliminary steps to develop the Sewer Line Cleaning staff and the associated High Performance Service Agreement. Tasks underway this summer or set to begin this fall include:

- a. Training of maintenance staff on the business intelligence tools that were used during the Roadway Markings competition process.
- b. Assembling the baseline service and cost data.
- c. Development of a database that will automate the tracking of inventory, service requests, performance results, costs and productivity.
- d. Conducting benchmarking of best practices and work process improvement.

After completion of these tasks, the City Auditor will be engaged in verifying the validity of the performance and cost data clearing the way to develop the proposed Service Agreement in 2010 for inclusion in the 2010-2011 Proposed Budget.

B. Service Delivery Evaluation Policy

The City is responsible for regularly reviewing services provided to residents to ensure service delivery is as cost effective as possible. An extraordinarily difficult economic climate and the City's responsible actions to address the structural budget deficit have generated particular interest and discussion of how such reviews are conducted and decisions made to change service delivery methods, particularly when outsourcing services. It is within this context that service delivery options, including contracted services if and when cost effective, be considered.

In doing so, the City seeks to provide quality and timely services in the most cost effective manner, leverage the unique strengths of public, private, and nonprofit sectors in service delivery, and provide efficient and transparent decision-making process in delivering City services. With these goals in mind staff recommends that the City Council adopt a strategic approach to evaluating a variety of service delivery models including City employees, non-profit organizations, private enterprises, or other governmental agencies, as well as methods, such as Civil Service or contractual. Under the proposed decision-making framework the City will use an efficient and transparent process for evaluating service delivery methods, which:

1. applies consistent decision-making criteria;
2. ensures that stakeholders have the opportunity to provide input to decisions; and,
3. results in quality, cost effective services that leverage the unique strengths of public, private, and nonprofit sectors in service delivery.

Attachment A provides the proposed service delivery evaluation policy specifying the decision-making criteria by which service delivery models are evaluated and details the guidelines for implementation. The key elements of the implementation guidelines are as follows:

1. Identifying the proposed service delivery change subject to the evaluation process and establishing specific size thresholds to streamline the process for small service level changes and continuous improvement initiatives.
2. Conducting a business case analysis to determine the full cost for the City to deliver the service under one or more service delivery approaches.
3. Seeking input in carrying out the business case analysis from stakeholders, the general public, and bargaining units (as appropriate), applying decision-making criteria.
4. Seeking Council approval of any change in a service delivery model including the decision to subject a service to competition.
5. Proceeding to a request for proposal, managed competition, or other partnership agreement and ultimately an award of contract if applicable.
6. Presenting for Council approval results of procurement process and validating initial business case study. Meeting and conferring with affected City employee bargaining units as applicable.
7. Monitoring and evaluating the service model over the long-term to ensure quality and on-going cost competitiveness.

C. Revisions to the Public Private Competition Policy (Council Policy 0-29)

The CED Committee and roundtable discussion provided an excellent opportunity for Committee members and the Administration to hear from a variety of perspectives on the proposed revisions to the City's Public Private Competition Policy (Council Policy 0-29). Adopted in 1997, the Public Private Competition Policy sets forth a framework for selecting service units for competition, preparing staff to compete with the private sector, evaluating internal performance, then proceeding through a competitive selection process to determine whether a service should be provided in-house or by a contractor.

In order to evaluate service delivery models more broadly, the Administration is proposing adoption of a new Council Policy as described above. As such the proposed amendments to the Public Private Competition Policy (Policy 0-29) include revisions to: 1) align the current Competition Policy with the new Evaluation Service Delivery Policy, and; 2) address Councilmember Ash Kalra's proposed changes to the competition policy in his memorandum dated April 27, 2009.

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Attachment B provides a redline strikeout copy of the proposed revisions to the Competition Policy including footnotes cross referencing Councilmember Kalra's proposed revisions, and identifying areas now addressed in the proposed Service Delivery Evaluation Policy. Key revisions include:

1. The Service Delivery Evaluation Policy now sets forth the process and the decision making criteria to evaluate service delivery models including whether to select service to subject to competition. If it is determined that managed competition involving City employees and private contractors may be pursued as a result of this evaluation, the Public Private Competition Policy (Policy 0-29) will guide the competition process.
2. A Council decision to select services to subject to the competition process is proposed. In the current policy the City Manager, through an Administrative Work Plan, identifies services that will be subject to the competition process.
3. Revisions to ensure a level playing field and establish a competition process that does not favor or disadvantage any competitor in the process.

D. Recommended Revisions to City's Request for Proposal Process

In evaluating recommended revisions to the competition policy, stakeholders began to identify issues associated with the City's overall request for proposal process. Staff presented stakeholders with an overview of the major tenets of public procurement, the City's 2007 procurement reforms and successes to date, as well as work underway currently to revisit the 2007 reforms as part of the implementation of the City's ongoing Beyond Budget Cuts effort.

Stakeholders advanced the following recommendations to streamline and simplify the City's request for proposal.

1. Provide additional detail on quarterly Council reports which describes all contracts having a value of one hundred thousand dollars (\$100,000.00) or more that were entered into and executed by the city manager, city attorney, city clerk, and city auditor, in the preceding calendar quarter.
2. Amend the San Jose Municipal Code to raise the amount by which the purchase of goods or services could be made without a competitive procurement method from the current amount of \$10,000 to \$20,000.
3. Ensure the City Bidline site is user friendly for residents and businesses.
4. Streamline how businesses and non-profit agencies submit insurance requirements and permit electronic submittal and renewal of proof of insurance.
5. Establish electronic payment processing to allow direct deposits and direct payments to contractors and grantees.

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6. When business licenses are renewed, query their interest in learning more about doing business with the City.
7. Provide a frequently asked question and answer page on the City's website for the most common concerns from the vendor community.
8. Continue to periodically develop preferred vendor lists for frequently used services.
9. Continue consideration of strategies to support small businesses, such as leveraging economies of scale through insurance and bond pooling strategies.

Staff is also conducting an on-line business survey to seek further input on the City's procurement process. Utilizing the survey results, input from roundtable stakeholders and the City's internal busting bureaucracy effort, staff anticipates returning to the Public Safety, Finance, and Strategic Support Committee in September 2009 with recommendations to further streamline and simplify the City's procurement process.

Staff welcomes the recommendations generated by the stakeholder group. The majority of these recommendations will be implemented administratively and do not require Council action. For instance, through the implementation of the new Banking Services contract, staff plans to reach out to the non-profit and business community to implement electronic payment processing versus the issuance of paper checks. As a continued effort to streamline the acquisition of services, Finance is piloting a preferred vendor list for printing services and plans to expand this concept to other frequently used services.

Furthermore, given a general consensus among stakeholders that small businesses be given more support and tools to do business with the City, staff recommends follow-up action for further consultation with the Small Business Development Commission.

PUBLIC OUTREACH/INTEREST

- Criterion 1:** Requires Council action on the use of public funds equal to \$1 million or greater. (Required: Website Posting)
- Criterion 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)
- Criterion 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)

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The development of recommendations presented in this report have been coordinated with a broad range of community stakeholders, including representatives of several City employee organizations (CAMP, CEO, MEF, and OE3), the Silicon Valley Chamber of Commerce, the Silicon Valley Council of Nonprofits, and Working Partnerships USA.

COORDINATION

This memorandum and its recommendations have been coordinated with the following departments and offices: City Attorney, Employee Relations, Finance, General Services, Parks, Recreation, and Neighborhood Services, and Transportation.



EDWARD K. SHIKADA
Chief Deputy City Manager

For questions, contact Ed Shikada at 535-8190.

Attachment A

Recommended Policy on Service Delivery Evaluation

City of San José, California

COUNCIL POLICY

TITLE Service Delivery Evaluation	PAGE 1 of 4	POLICY NUMBER XX-XX
EFFECTIVE DATE	REVISED DATE	
APPROVED BY COUNCIL ACTION	[Click HERE and type Council Approval Actions]	

BACKGROUND

The City is responsible for regularly reviewing services provided to residents to ensure service delivery is as cost effective as possible. An extraordinarily difficult economic climate and the City's responsible actions to address the structural budget deficit have generated particular interest and discussion on how such reviews are conducted and decisions made to change service delivery methods, particularly when outsourcing services. During this challenging period, the City has benefited from substantial reductions in the costs of services as a result of compensation concessions by its public employees. "It is within this context that evaluations of service delivery resulting in contracted services, if and when cost effective, be undertaken.

Based upon City Council direction to review the City's competition policies, staff has worked with a group of stakeholders representing labor, business, and non-profit community interests. As a result of this consultation, staff has developed recommendations for a structured approach to evaluating and selecting among a variety of service delivery models. For the purpose of establishing a policy and consistency in practice, the term "Service Delivery Evaluation" is used here to broadly encompass the evaluation of a range of service providers, including City employees, non-profit organizations, private enterprises, or other governmental agencies for providing services to the Community on behalf of the City.

PURPOSE

The purpose of this policy is to provide a decision-making framework for evaluating a variety of service delivery models.

POLICY

It is the policy of the City of San Jose to use an efficient and transparent process for evaluating service delivery methods, which:

- applies consistent decision-making criteria;
- ensures that stakeholders have the opportunity to provide input to decisions; and,
- results in quality, cost effective services that leverage the unique strengths of public, private, and nonprofit sectors in service delivery.

Implementation

Step 1. Evaluations of existing service delivery may be undertaken at any time. The evaluations may result in changes among services currently provided in-house and those currently contracted out and new services. The City Manager shall consider recommendations for evaluations of existing service delivery from the City Council, City Attorney, City Auditor, department heads, bargaining unions, and the public and private sector. Concepts of service evaluations will be advanced prior to the formal annual budget process to the extent feasible, in order to maximize the opportunity to carefully consider the potential effects (positive and negative) of a proposed service delivery method change.

The City Manager will inform the Council early in the process of the service models undergoing a business case analysis. For proposals to be considered as part of the annual budget, Council will be informed no later than the "City Manager's Budget Request and Five Year Forecast and Revenue Projections for the General Fund and the Capital Improvement Program" submitted each year in February. Formal decisions to proceed with a service delivery change may be made at the time of the annual budget adoption, in order to ensure that resources are allocated accordingly.

The implementation process described in this Policy will only be applied to projects that meet specific size thresholds. Smaller service delivery changes may proceed (as prescribed under other rules and policies) using elements of this process when appropriate, but will not require the extensive process described below:

1. For the purposes of this Policy, a business case analysis will be undertaken to evaluate Service Delivery changes that are expected to result in the addition, deletion, or reclassification of five (5) or more City full-time equivalent (FTE) positions¹.
2. This process will not be applied to service eliminations due to budget cuts, episodic, one-time, or temporary work.²

Step 2. A business case analysis will be prepared to determine the full cost, including transition and management expenses, for the City to deliver an existing service differently.

Step 3. The business case analysis will be reviewed with stakeholders and made available to the general public. As applicable, the Administration will meet and confer with affected City employee bargaining units.

¹ Working Partnerships USA recommends that the service delivery evaluation process apply to changes that would impact three (3) or more FTE positions. Staff's intent is to establish a threshold that captures significant changes in service models and to ensure the potential for some return on investment given the high cost of conducting a managed competition process.

² Working partnerships USA recommends an exemption for emergency services. The necessity of City-provided emergency services is addressed in the City's Competition Policy (0-29). Staff is not proposing that such services be outsourced. At the same time, the policies do not preclude a third party provider for certain related services, such as the current medical transport service provided by a private company through the County or disaster recovery services provided by the American Red Cross.

TITLE Service Delivery Evaluation	PAGE 3 of 4	POLICY NUMBER
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This review will provide a preliminary Administration recommendation on the service delivery approach to be pursued and the applicability of Council Policy 0-29, Public Private Competition Policy, based upon the following decision-making criteria:

1. What is the potential impact on public employees currently providing the service and on the workforce in general with respect to issues such as workload, productivity, diversity, and availability of measures to mitigate negative impacts? Impacts will specifically be evaluated relative to the City's core values (Integrity * Innovation * Excellence * Collaboration * Respect * Celebration).
2. Is it practical for City staff to provide the proposed service (versus being precluded by proprietary, supply chain, or other factors)?
3. Is there limited market competition for the service or other reasons that the City directly providing the service would protect public interests from default or service interruption?
4. Is there currently a City staff unit capable of and interested in developing a managed competition proposal?
5. Is the workload sufficiently steady to support a permanent workforce (versus episodic)?
6. Is a City interest served by being a long term direct service provider, such as avoiding future costs?
7. Is the service model likely to improve the quality, customer satisfaction, and/or responsiveness for the same or lower cost, with particular focus on the General Fund?
8. Do local, state and federal laws, regulations, and funding guidelines restrict the method of service delivery, and if so can these restrictions be changed?
9. What risks to the City and public do the service delivery models present, and how would these risks be managed?
10. Is the City able to cost-effectively maintain the specialized skills, technology, and equipment needed for the service?
11. Does the service delivery model maximize the leveraging of prospective non-City resources (such as sponsorships and donations)?
12. Is there management and administrative capacity to support the in-house workforce or contract oversight needed?

Step 4. The decision to pursue changes to the existing service delivery model, including whether managed competition including City employees will be pursued, will be presented to the City Council for approval. This will include the allocation of resources (funding and personnel) to complete any required procurement process.

Step 5. The Administration will issue a request for proposal (or other procurement process) for service provider selection, managed competition, or other partnership agreements as applicable. The City's Public Private Competition Policy (Council Policy 0-29) will guide the managed competition process.

Step 6. The Administration will present for approval by the City Council results of the procurement process. In making its recommendations, the Administration will compare the proposed agreement to the business case analysis and either validate its preliminary recommendation or identify material differences. The Administration will consult with stakeholders in advance of presenting its recommendations to the City Council, including as applicable, meeting and conferring with affected City employee bargaining units.

Step 7. The City will monitor any resulting contract to ensure quality and ongoing cost competitiveness, with reporting and renewals consistent with other City rules and policies.

DEFINITIONS

Service delivery evaluation refers to the evaluation of a range of methods of delivering services to the public via City employees, non-profit organizations, private enterprises, or other governmental agencies for providing community services on behalf of the City.

Managed Competition refers to a process whereby City employees as well as other public and private entities may propose to deliver specific services over a specified period of time.

Attachment B

**Recommended Revisions to Policy on Public Private Competition
(Council Policy 0-29)**

CITY OF SAN JOSE, CALIFORNIA

CITY COUNCIL POLICY

TITLE Public Private Competition Policy	PAGE 1 of 18-10	POLICY NUMBER 0-29
EFFECTIVE DATE March 25, 1997	REVISED DATE	
APPROVED BY COUNCIL ACTION		March 25, 1997, Item 9d

BACKGROUND

Over the years, the role of government as a monopolistic provider of public services has evolved into a role as a partner with the private and non-profit sectors in the delivery of public services. Government has chosen to involve others in service delivery due to limited resources, increased demands, and to the recognition that partnerships can leverage the quality and cost-effectiveness of services delivered to the public. At the same time, government continues to deliver many services competitively in-house and also retains the responsibility for core services that require a certain level of government control and accountability.

With an overarching goal of providing quality services to the public in a cost-effective manner, the City of San Jose mirrors government-wide trends in service delivery. ~~In many cases, the City utilizes the private and non-profit sector to deliver City services, in accordance with existing Council Policy 0-24 which provides the context for the use of private contractors to deliver City services.~~ In addition, city employees continue to provide high quality, cost-effective services and to use Continuous Improvement practices to enhance the efficiency and cost-effectiveness of City services. Recognizing the value and quality performance of City employees, Council Policy 0-24-29 sets forth a preference for using City employees to deliver City services.

In San Jose and other government agencies, the delivery of public services by private firms has resulted typically from private competition processes, in recognition of the fact that competition challenges private firms to provide better services at lower costs. The current economic recession and the City's responsible actions to address the structural deficit necessitate that ~~More recently, governments have begun~~ the City to apply the concept of competition more broadly to determine the most cost-effective method for delivering City services. It is within this context that alternative service delivery options including ~~In applying the concept more broadly, governments are subjecting many more services to a competition process in which they, city employees themselves, are a competitor, if and when cost effective be considered.~~

In order to evaluate alternative changes to existing models to deliver services, the City has developed a new Policy to provide a decision-making framework for evaluating a variety of service delivery models, such as City employees, non-profit organizations, private enterprises, or other governmental agencies to identify the most cost effective method for delivering quality public services (Service Delivery Evaluation Policy XX). If it is determined that managed competition involving City employees and private contractors will be pursued as a result of the evaluation, this Public Private Competition Policy (Policy 0-29) will guide the competition process.

The underlying assumptions of this public-private competition process are that government should be competitive in cost and quality with the private sector and that competition provides an incentive to enhance quality and lower costs. ~~Assumptions of this public-private competition process are that government should be competitive in cost and quality with the private sector and that competition provides an incentive to enhance quality and lower costs.~~ To support the City's goal to deliver high quality services to the public in a cost-effective manner, San Jose seeks to ~~merge update~~ Council Policy 0-249 ~~into a new policy which to~~ applies the concept of ~~define the~~ competition process once a service has been selected for competition more broadly, while ~~continuing to retaining~~ the preference for city employees to deliver City services and other applicable services.

PURPOSE

The purpose of this policy is to set forth the goals and guiding principles for the public-private competition process, ~~criteria for selection of services for the competition process,~~ and guidelines for conducting a competition process.

POLICY

Overview

It is the policy of the City of San Jose to deliver quality services in the most cost-effective and efficient manner, within the context of other public policy goals and interests. In conjunction with Council Policy XX, Service Delivery Evaluation, ~~If~~ the City shall use a public-private competition process where ~~appropriate to~~ determine the most competitive service delivery method.

The public-private competition process shall consist of a competitive assessment (1) of the in-house service selected for competition prior to issuing requests for proposals (RFP) (2) and a managed competition process (3) during which RFPs are issued. In the competitive assessment, City employees providing the service shall be given an opportunity to implement readily achievable improvements, if necessary, prior to the decision to pursue managed competition. The City shall continue to deliver the service in-house if it is deemed competitive according to the measures set forth later in this

TITLE Public Private Competition Policy	PAGE 3 of 108	POLICY NUMBER 0-29
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policy. The public-private competition process shall be carried out in accordance with the goals ~~and~~, ~~guiding principles and criteria for selection~~ set forth in this policy.

A glossary of key terms used in this policy is included in Attachment A.

Goals of Competition

The overall goal of the competition process is to ensure competitive service delivery, regardless of which delivery method is selected ultimately. The goals of the competition process shall reflect the breadth of qualities necessary to be competitive and the broader public interest, rather than simply focus on costs. Accordingly, the goals of the competition process are to:

- Increase responsiveness to customers through flexible service delivery.
- Reduce costs and/or avoid costs.
- Increase efficiencies of service delivery.
- Improve and/or sustain quality and levels of service provided.
- Encourage creativity and innovation in the delivery of services.
- Identify opportunities to leverage resources.
- Ensure the City's mission and scope of services evolve with the changing environment.

Guiding Principles

The following principles shall guide the development and implementation of the public-private competition process.

Application of Competition Process: The premise of the public-private competition process is that competition in the marketplace produces value for customers and that either in-house or alternative service delivery methods may produce superior value for customers; therefore:

- The City may subject services that are currently provided in-house to the competition process.
- The City may subject services that are currently contracted out to the competition process.
- The City may also propose to provide services to other government agencies and, when it properly furthers an appropriate public purpose, and to the private sector.

The City shall continue to utilize Continuous Improvement practices to enhance in-house service delivery outside of this process. The City shall also continue to use the current private competitive bid procurement processes in which the City is not competing and/or other alternative delivery methods without utilizing the public-private competition process, in situations such as when the benefits to the City of Alternative service delivery are clear and/or delivery of the service is time-sensitive.

Employee Partnerships: Fair and respectful treatment of employees shall be a cornerstone of the public-private competition process. To achieve the participation and acceptance of City employees, the City shall involve employees and unions (3) throughout the development and implementation of the public-private competition process. The City shall establish appropriate structures to ensure on-going participation of the employees and unions, including, but not limited to, labor and management teams.

Employment Stability: The City's commitment to employment stability for City employees affected by the public-private competition process shall be dependent upon employee and union commitment to flexible redistribution of resources, such as alternative career paths, broadened class specifications, and other measures to allow employees to assume greater and/or different responsibilities in a cost-effective manner.

Consistency with Other City Policies, and Local, State and Federal Laws: The implementation of the competition process shall be consistent with other City policies and public policy goals, such as the small and local business preference policy, minority and women business enterprise policy, prevailing and living wage policies, community employment standards, and the non-retaliation policy. Employees of private contractors will may also have an obligation to meet the requirements of the State Whistleblower Protection Act, <http://www.bsa.ca.gov/hotline/protections>, and the City's Non-Retaliation Policy (Policy 1.1.4) <http://www.sanjoseca.gov/employeeRelations/fraudAudit.asp>.¹²

Furthermore, state law requires that some contractors disclose potential conflicts of interest by filing a statement of economic interest (Form 700) (Political Reform Act under Government Code §§ 81000 et seq.).

Level Playing Field: The competition process shall not favor or disadvantage any competitor in the process. The following principles shall apply:

- Request for Proposals (RFP) shall require competitors to provide prevailing wages (1) to their employees when it is deemed to be in the best interest of the City in obtaining the services requested.

¹ Kalra, 4/27/09 Recommendation 11. Whistleblower Protection

² Working Partnerships USA recommends a specific contract provision that violations of the Non-Retaliation Policy constitute a breach of contract. As noted in the annotated policy, local, state and federal laws provide the framework for addressing such circumstances. Staff does not recommend additional policy language requiring specific contract provisions. Most City contracts allow the City to terminate for convenience. Terminating for breach of a specific provision would require the City to be able to prove its case for breach rather than just terminating without a stated cause.

- The RFP evaluation process shall include the "Third Tier Review" in accordance with the City's Living Wage Policy. Specific for this policy Third Tier review shall also include the ~~of employment practices of private proposals, which includes~~ review of the City's and contractors' employee benefits, employee complaint procedures, compliance with state and federal workplace standards, and history of litigation related to breach of contract, or situations in which there is documented evidence of breach of contract.³ Information should be limited to information that is publicly available.
- Methods for comparing costs shall be reasonable and unambiguous, shall ensure objectivity and integrity of the data, and shall ensure that all direct and indirect (such as those costs which would be avoided if the service is not provided in-house) internal costs and gains associated with outside contracts, ~~the City's full cost of service including staff administration, and taxpayer funded pensions~~ are captured.⁴ Specifically it shall include: transition costs, monitoring and enforcement costs, effects on overhead costs, costs of training and equipment, and projections of future costs.⁵ ~~The cost methodology used to calculate in-house service costs shall consider both direct and appropriate indirect costs of the service, such as those costs which would be avoided if the service is not provided in-house.~~
- Performance standards, deliverables, and corresponding payment schedules shall be outlined in the RFP⁷ and quality measures shall be reasonable, quantifiable and unambiguous. Based on the nature of the service contracted for, the RFP will include disclosure of relevant contractor employment standards such as training, screening, and personal background checks.⁸
- Reasonable outreach efforts are to be made to secure a minimum of three proposals on RFPs. In instances where the outreach for a Request for Proposal results in less than three fully responsive proposals, the Administration will determine whether to proceed with the evaluation of the proposals. The Council

³ Kalra 4/27/09 Recommendations 1a, 1b, and 1c. Contractor Selection. Note that this review would be limited to instances of actual litigation given the potential subjectivity of allegations.

⁴ The San Jose Silicon Valley Chamber of Commerce recommends adding to the cost comparison the City's full cost of service including staff administration, and taxpayer funded pensions. This issue is addressed under the Service Delivery Evaluation Policy and the assessment of the decision to support a City workforce.

⁵ Kalra, 4/27/09 Recommendations 6a. Cost Comparisons

⁶ Working Partnerships USA recommends quantifying the costs associated with risk in conducting the cost comparison. The Service Delivery Policy includes an assessment of the risks of service delivery models. Costs associated with such expenses would further be factored into the proposals from private entities (see "Approach for Public Private Competition Process," page 10) and will be covered through insurance and indemnification requirements.

⁷ Kalra 4/27/09 Recommendations 2a. Contractor Performance

⁸ Kalra 4/27/09 Recommendation 3a. Contractor Employment Standards

report shall examine the situation to ascertain the reasons for the small number of responses, and to recommend whether corrective action should be taken.⁹

- All personnel records and other detailed information required of private sector competitive bid participants must be required of public sector bid participants.¹⁰

Internal Competitiveness: The City shall make every reasonable effort to enhance the ability of employees to compete successfully on an on-going basis. Actions to accomplish this objective shall include:

- Continuing to utilize Continuous Improvement practices to enhance in-house effectiveness and efficiency on an on-going basis.
- Providing competitiveness training to employees and unions, through a collaborative effort to define needs and select trainers. Training shall include components such as unit cost accounting, development of performance standards, benchmarking, preparation of Requests for Proposals, preparation of proposals, and general business principles.
- Involving internal support functions in competitiveness training and in competition processes for which their operations are a cost factor.
- Removing internal barriers to competitiveness, such as outdated or unnecessary procurement, legal, personnel, financial and other operational procedures.
- Providing alternative rewards (e.g., gainsharing, bonus programs, etc.) for successful employee efforts to reduce service costs and enhance service quality.

Competitive Assessment: Reflecting the preference for in-house service delivery, the competition process shall begin with a competitive assessment of the in-house service function prior to issuing requests for proposals. City employees providing the service shall be given an opportunity to develop and implement readily achievable efficiency and effectiveness improvements prior to the decision to pursue managed competition. Efficiency and effectiveness improvements shall include actions affecting both line staff and management, such as reducing management layers balanced with broadening class specifications to encompass other responsibilities.

In general, the City shall continue to deliver the service in-house in those cases where effectiveness and efficiency is equivalent to or greater than alternative means and

⁹ Kalra, 4/27/09 Recommendation 8. Minimum Number of Bidders

¹⁰ Working Partnerships USA recommends adding "all personnel records and other detailed information required of public sector bid participants must be required of private sector bid participants." Staff does not recommend this change as public agencies have greater public disclosure requirements than the private sector, and the provision may significantly discourage private sector competition.

where the potential savings for an outside service delivery are less than ten percent (10%) for the same level of service provided in-house, which is the general percentage used in business to account for the cost of contract administration and basic transition costs. Based on the recommendation of the competitive assessment team, the City Manager shall decide if the service will remain in-house or be subjected to managed competition. The decision to keep a service in-house shall be subject to City Council approval.¹¹

In situations involving currently contracted-out services and new services, a similar process will be used to determine if the City can deliver the service competitively. In this situation, the assessment will be based on the expected costs of the City providing the service rather than the actual costs. The assessment should also take into consideration the abilities of service delivery models that can create and sustain partnerships that would leverage the quality and cost-effectiveness of services delivered to the public.

Core Capacities and Resources:¹² As part of the decision-making process, the City shall consider the level of core capacities, if any, which should be maintained within the City to enable the City to compete for service delivery in the future and/or to provide the service in the event of a contractor default, changed circumstances, or future non-competitive proposals. Measures to maintain core capacities may include retaining a portion of the service in-house and/or maintaining comparable skills in other units of the City. Where City funds are invested in equipment, real property or other capital assets, the City shall identify appropriate measures to ensure the ability to resume operations in the case of default, changed circumstances, or future non-competitive proposals.¹³

In recognition of the importance of the quality and responsiveness of services that protect public health and safety, core public safety services, including sworn police patrol, fire, and disaster response would not be subject to competition. This policy in no way prevents the augmentation of City services by contractors in the case of a disaster or state of emergency.¹⁴

Long-Term Competitiveness: To ensure the delivery of competitive services to the public over the long-term, the City shall avoid actions that result in the creation of a "private monopoly" in which only one private firm is likely to be viewed as a tenable provider of a particular service. If the creation of a private monopoly is likely, the City

¹¹ A review will occur within the decision-making framework identified in Service Delivery Policy XX prior to selecting a service for competition.

¹² Kalra, 4/27/09 Recommendation 7. Maintenance of Minimum In-House Capacity (Core Capacity). As part of the decision making process the City must consider the level of core capacity, if any, should be maintained to enable the City to compete.

¹³ Working Partnerships USA recommends making explicit that the City shall maintain a core capacity to enable the City to compete for service delivery. This issue is addressed in the Service Delivery Evaluation Policy through the assessment of the competitive marketplace and the City Council's decision to proceed with either Competition Policy or third party procurement process.

¹⁴ Kalra, 4/27/09 Recommendation 9. Protection of Emergency Services.

shall consider contracting out only part of the service or not contracting out any of the service. The City shall also monitor contract costs over the long-term to ensure on-going cost competitiveness.

Fair and Reasonable Process: During the competition process, the City shall maintain high ethical standards and avoid any actual or perceived conflict of interest in selecting service providers. The City's existing Code of Ethics (SJMC 16.46.010) and the Procurement Integrity and Conflict of Interest Policy (Council Policy 0-35), and when developed, the Code of Professional Conduct Policy shall apply.

CRITERIA FOR SELECTION OF SERVICES FOR COMPETITION

As part of the annual Administrative Work Plan, the City Manager shall identify services that will be subjected to the public-private competition process and the target dates for completing the public-private competition process.¹⁵ ~~Services may include those currently provided in-house, those currently contracted out and new services. The City Manager shall solicit recommendations for services from the City Council, City Attorney, City Auditor, department heads and the unions. The City Manager shall utilize the following criteria to select services to subject to the competition process:¹⁶~~

- ~~-1. **Nature of Service:** The extent to which a service is a self-contained service or a component of a larger service delivery system; is a core versus an ancillary service; can be subdivided geographically, with respect to volume of work, or duration of work; and can be measured in terms of quantity, quality, and other performance standards.~~
- ~~-2. **Competitive Marketplace:** The availability of a competitive market for the service, in which providers have an interest in competing for the service and the ability to provide the service in terms of skill sets and resources.~~
- ~~-3. **Public Policy Acceptability:** The degree to which stakeholders accept the concept of competition and the possibility of alternative service delivery. Stakeholders can include the residents, users of the service, interest groups, public-employee unions, current providers of the service, whether provided in-house or by an outside entity, and/or public officials.~~
- ~~-4. **Cost Savings Potential:** The degree to which competition is likely to reduce or avoid future costs without compromising the quality of service.~~

¹⁵ Kalra, 4/27/09 Memorandum recommends revisions should include a requirement that this policy be utilized, to the greatest extent feasible, when any current City provided services are transitioned to an outside service provider. The current "draft" decision-making framework for service delivery evaluations recommends a Council decision to select services to subject to the competition process.

¹⁶ A review will occur based on established criteria within the decision-making framework identified in the Service Delivery Evaluation Policy XX prior to selecting a service for competition.

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- ~~5. **General and Enterprise Fund Enhancement:** The degree to which competition is likely to have a positive effect on the general fund or enterprise funds, as appropriate.~~
- ~~6. **Quality of Service:** The degree to which performance standards can be defined for the quality and level of service. The degree to which competition is likely to improve quality, customer satisfaction and/or responsiveness for the same or lower cost.~~
- ~~7. **Impact on Employees:** The potential effect on public employees currently providing the service and on the work force in general, with respect to issues such as work load, productivity, diversity, etc. availability of measures to mitigate negative impacts on employees.~~
- ~~8. **Legal Restrictions:** The extent to which local, state and federal laws, regulations, and funding guidelines restrict the method of service delivery or the competition process. The extent to which laws can be changed to accommodate competition and alternative service delivery.~~
- ~~9. **Risk:** The degree to which alternative service delivery presents risks to the City and the public in the case of defaults, breach of contracts, service interruption, costs overruns, and threats to the public safety, health and welfare.~~
- ~~10. **Resources:** The availability of government financial, human, technological, and capital assets to provide the service as compared to the resources of outside providers.~~
- ~~11. **Government Control:** The degree to which the City needs to exert control over the delivery of the service, can retain accountability for public funds, and has the ability to establish and maintain oversight of the service through adequate contract management.~~

APPROACH FOR PUBLIC-PRIVATE COMPETITION PROCESS

Following is the general approach for conducting the public-private competition process.

Competitive Assessment (1)

1. Select service for competition and identify target dates for completion in Administrative Work Plan.
2. Conduct competitive assessment of in-house service.
3. Implement effectiveness and efficiency improvements as needed.
4. Determine next step based on competitiveness of in-house service.

Managed Competition Process (if decision is made to continue the competition process)

1. Develop Request for Proposal (RFP)
2. Issue RFP
3. Conduct RFP process.
4. Select provider.
5. Conduct a financial analysis and risk assessment
6. Monitor performance and costs.

Competition Training

The training plan will be a collaborative effort with employees as called for in the "Employee Partnerships" principle. The City may seek assistance from consulting firms with hands-on experience in preparing employees for competition. A general training module will be available to all City employees. Specific skills needed to successfully participate in the competition process will be provided to employees participating in the competition process. The general and specific training modules will focus on the following general areas; however the modules will be customized based on an assessment of employee training needs.

1. Introduction to competition to discuss the need to be more competitive in this changing environment as well as increased awareness of possible ethical conflicts during the competition process.
2. Benchmarking to assess where we are and what we need to do to improve.
3. Flowcharting the service delivery process to understand how the current process works.
4. Data collection methodologies to collect relevant information on costs, performance measures and customer satisfaction.
5. Continuous Improvement principles, tools, and techniques for streamlining work processes and implementing improvements.
6. Writing effective RFPs.
7. Responding to RFPs.
8. Identifying and implementing opportunities for improvement.
9. Contract development and management.

EMPLOYMENT OPTIONS**Outside Contractor Employment**

In the event that managed competition results in the outside delivery of a service previously provided in-house, the City shall facilitate the transition of employees to the successful contractor, if the contractor and the employees elect to pursue this option. Contractors are not required to hire displaced employees. Actions to facilitate the

transition to private employment with the successful contractor shall include, but not be limited to:

Requiring outside contractors that create new jobs or have currently existing job vacancies to deliver a City service to first consider displaced city employees for new jobs.

Providing one-time incentives to employees that accept employment offers from the successful contractor.

"No-Lay-Off" Provision"

In the event that managed competition results in the outside delivery of a service previously provided in-house, the City shall provide any person displaced with other employment opportunities within the City to totally avoid the need for lay-offs. Appropriate lay-off procedures under the Memorandum of Agreement or Civil Service Rules shall apply. When the "bumping" procedures are used, City employment will be offered to affected employees.

"No Lay-Off" means no separation from City employment, unless the employee is hired by the successful contractor or chooses lay-off in-lieu of internal placement. If the employee remains with the City, the employee will not experience a reduction in current pay, although the employee may be transferred, assigned to a different classification, have salary Y-rated, or have other opportunities for employment. The no lay-off provision shall not apply in situations other than reductions in positions resulting from the public-private competition process.

In addition to the obligations in the Civil Service Rules and the City's Memoranda of Agreement, the City shall mitigate the impacts of the change in service delivery with actions including, but not limited to, the following:

- Notifying the unions, the Office of Employee Relations, and the Department of Human resources (HRD) of the impending competition process.
- Committing to full partnerships with the employees and unions and meeting and conferring with unions as the sole representative of the employees, as appropriate in accordance with state statute.
- Banking appropriate vacancies to prepare for the impending competition.
- Identifying opportunities for moving displaced personnel into other City positions with comparable benefits and salary levels without compromising current job standards.

- Assisting employees in transition by offering training and cross-training.
- In the event an affected employee elects not to accept a position within the City, the employee shall separate from City employment within 30 days and the City shall provide outplacement support services for the employee for 60 days following separation from the City.

Meet and Confer Provision

For purposes of this policy, the meet and confer process shall incorporate the following principles:

- The process shall consider the competing interests of other stakeholders beyond the affected employees.
- Flexibility in redistribution of resources is necessary to guarantee employment protection.
- The process shall attempt to coordinate solutions city-wide, not just in one bargaining unit.

(1) See Attachment A "Glossary" for definition of term

(2) Requests for Qualifications (RFQs) and Requests for Information (RFI) may also be a part of the managed competition process.

(3) "Unions" and "bargaining units" are used interchangeably throughout this policy.

Attachments:

A. Glossary of Terms

B. ~~Public Private Competition Policy Implementation Plan~~

C. ~~Policy Development Teams~~

Kalra, 4/27/09 Recommendations (not addressed above)

Recommendation 4.a. Small Business Assistance

This recommendation was discussed by the Small Business Development Commission during Fiscal Year 2007/08. The estimated cost to implement this recommendation was \$250,000. The program was not further developed absent the funding needed to implement the program. Staff recommends no change to Policy 0-29 at this time related to this issue.

Recommendation 5.a. Pay-to-Play Regulations

The Attorney's Office is: 1) assessing existing policies in California cities that restrict contractors responding to an RFP from making a contribution to the campaigns of candidates or elected officials, and 2) evaluating potential restrictions on the City's ability to legally restrict contributions due to constitutional rights, and will report their conclusions directly to the City Council. The Council could consider voluntary compliance or disclosure by Council members and Council candidates.

Recommendation 10. Sunshine Requirements – Public Disclosure

Records that any vendor transmits to the City already are public records. The Sunshine Reform Task Force considered a similar proposal and the Council will be evaluating the final recommendation in the context of the work of the Non-Profit Strategic Engagement Platform. Staff has added a policy statement recommends no change to Policy 0-29 at this time related to this issue. Working Partnerships USA and CAMP representatives recommend ensuring that the policy reflects the principle that the public does not lose access to information because a service has been outsourced.

Recommendation 12. Monitoring of Contracts

The City acknowledges that there are several areas where overall improvements to contract management and oversight of the City's agreements with service providers should be pursued. The City believes that this issue is best addressed by comprehensively increasing the management capacity through training and employing best contract monitoring practices and is planning to develop a contract administration training. Staff recommends no change to Policy 0-29 at this time related to this issue.

Recommendation 13. Community Responsiveness Hearings

The City is adding a Whistleblower icon on the City's Purchasing Bidline to provide the public and employees with an opportunity to provide input on the performance of service contractors. Staff recommends no change to Policy 0-29 at this time related to this issue. Working Partnerships USA is concerned that: 1) the purchasing Bidline is not the obvious or intuitive choice for members of the public who are unhappy with the level of service they're getting from a contractor, and 2) to be effective, the online system must be publicized and accessible, and staff must be assigned to respond to citizen input regarding inadequate performance. While staff agrees that all opportunities for community feedback on City services should be encouraged, this is a resource and programmatic issue that is beyond the scope of whether the service is provided by a public or private entity.

Recommendation 14. Fee Structure for Audits

Staff recommends that administrative assessments to cover costs of audits be evaluated and negotiated on a case-by-case basis taking into account the amount of the

award and impact on potential bidders. Staff recommends no change to Policy 0-29 at this time related to this issue.

Recommendation 15. Encouraging Use if Small Business

The City currently has several programs, services and policies in place on behalf of disadvantaged and small businesses to encourage greater participation in City contracts and to increase greater overall economic vitality for businesses such as a: Small Business Development Commission, financial assistance, tax incentives, entrepreneur assistance, workforce & training, local preference policy, and small ambassador program. There was a general consensus among stakeholders that small businesses given more support and tools to do business with the City. Staff recommends no change to Policy 0-29 at this time related to this issue but recommends follow-up action for further consultation with the Small Business Development Commission.

ATTACHMENT A
GLOSSARY OF TERMS

The following definitions shall apply within this policy and to related actions:

Alternative ~~s~~Service delivery evaluation refers to an evaluation of a range of methods of delivering services to the public via in-house City employees, outside public employees, by non-profit organizations, or by private individuals or enterprises, or other governmental agencies for providing community services on behalf of the City.

Competitive Assessment refers to a process used to determine the competitiveness of in-house delivery of a particular service. A competitive assessment team conducts the assessment including identification of costs and performance measures, comparisons to industry standards, and development of benchmarks. The department providing the service subsequently implements readily achievable improvements in effectiveness and efficiency.

Contracting out refers to the City entering into an agreement with a private firm, other governmental agency or non-profit organization, to manage a public program, provide a service or construct a public project with public funds.

Managed Competition refers to is a process whereby City employees as well as other both public and private entities may propose bid for the right to deliver specific services over a specified period of time.

Prevailing Wage refers to the California Labor Code definition, which defines prevailing wages as the basic hourly rate being paid to a majority of workers engaged in a particular classification within a given area. If there is no single rate being paid to the majority, then the prevailing wage is defined as the single rate being paid to the greatest number of workers in the given classification. Prevailing wage includes per diem payments for fringe benefits such as health, pension, vacation and travel time.

Privatization refers to a broad range of arrangements through which public services are delivered in whole or in part by the private sector.

Public-private Competition is a process whereby the City determines the optimum method for delivering public services. The process includes a competitive assessment of in-house delivery of the service. If the decision is made to issue a request for proposals, the city participates in a managed competition process. Public-private competition is distinguished from "private competition wherein the City is not a competitor.

ATTACHMENT B

PUBLIC-PRIVATE COMPETITION POLICY IMPLEMENTATION PLAN

This plan provides the general framework and direction for implementing the Public-Private Competition Policy for the pilot projects through June 1998 and on an on-going basis. Based on an evaluation of the process used for the pilot projects, on-going implementation strategies may be refined. This plan includes tasks needed to be done to implement the Public-Private Competition Policy, a framework for an on-going support structure, budget, and a work plan identifying major implementation milestones.

TASKS

Although the following tasks are described in sequence, many of the tasks will be carried out concurrently for both the pilot project and for on-going purposes.

I. ON-GOING COMPETITION PROCESS

A. Competition Training

The training plan will be a collaborative effort with employees as called for in the "Employee Partnerships" principle. The City will seek assistance from consulting firms with hands-on experience in preparing employees for competition. We will work closely with the consulting firm to develop customized training programs for City of San Jose employees. We will also consider train-the-trainer program for City employees to become more self-reliant as competition continues in the future.

A general training module will be available to all City employees, similar to that provided on customer service and sexual harassment. Specific skills needed to successfully participate in the competition process will be provided to employees actually participating in the competition process. The general and specific training modules will focus on the following general areas; however the modules will be customized based on an assessment of employee training needs.

Introduction to competition to discuss the need to be more competitive in this changing environment as well as increased awareness of possible ethical conflicts during the competition process.

Benchmarking to assess where we are and what we need to do to improve.

Flowcharting the service delivery process to understand how the current process works.

Data collection methodologies to collect relevant information on costs, performance measures and customer satisfaction.

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— ~~Continuous Improvement principles, tools, and techniques for streamlining work processes and implementing improvements.~~

— ~~Writing effective RFPs.~~

— ~~Responding to RFPs.~~

— ~~Identifying and implementing opportunities for improvement.~~

— ~~Contract development and management.~~

B. Development of Implementation tools

— ~~An Organizational Effectiveness Unit (see Support Structure) will develop the tools necessary to implement the Policy based on information gathered from other cities. These tools may be refined based on the evaluation of the pilot projects. Tools include, but are not limited to:~~

— ~~Service selection matrix.~~

— ~~Cost methodology.~~

— ~~Competitive assessment format.~~

— ~~Evaluation criteria.~~

— ~~Program manual.~~

C. Competitive Assessment

— ~~A multi-disciplinary Competitive Assessment team (see Support Structure) will conduct a competitive assessment of the services selected for competition. The Competitive Assessment Team will document the competitive assessment and present the results to the a Competition Steering team include in-house employees representing labor unions, City Manager's Office, Budget Office, Finance Department, Human Resources Department, and other appropriate operating departments. (see Support Structure) and the City Manager. The assessment will include, but not be limited to:~~

— ~~Evaluation of the mission and goals of program to ensure that they are still appropriate in this changing environment.~~

— ~~Customer analysis to identify the customers, their needs, and their satisfaction with the service.~~

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- Development of a flowchart of the service delivery process to understand how the current process works in order to identify areas for improvements.
- Identification of actual costs for providing the service. This may include the use of performance based budgeting, activity based costing, and avoidable cost methodology.
- Assessment of current performance measures on efficiency, effectiveness, and customer satisfaction.
- Benchmarking with other similar operations to assess current performance.
- Identification of areas for improvement and implementation of improvements to become more competitive.

D. Employment Stability Framework:

- The City and union will develop a framework and implementation plan for providing flexibility in the placement of employees as called for in the principle of "Employment Stability."

E. Evaluation Plan

- The Competition Steering Committee will develop a plan to evaluate the results of the competition process on an on-going basis.

F. Communication Plan

- The Competition Steering Committee will develop a plan for on-going communication with employees, union, the public, the media, businesses and other public institutions.

G. Employee and Service Transition Plans

- Employee and service transition plans will be completed for each service that proceeds to managed competition. The employee transition plan will be completed prior to managed competition and the service transition plan will be completed if the RFP results in the change of a service delivery method.

II. PILOT PROJECT

A. Overview of Pilot Project

- Three services currently provided in-house and three services currently contracted out or otherwise not provided by the City will be identified for the public-private competition process. At least one service from each category will

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~~proceed to managed competition (issuance of a Request for Proposal). By June 30, 1998, the results of the managed competition will be presented to the Council.~~

~~— B. Selection of Services~~

~~The City Manager's Office will ask the City Council, Council Appointees, Department Directors and unions for suggestions regarding services to undergo the competition process. Employees may offer suggestions through their Department Directors or directly to the City Manager. Six services will be selected based on the criteria for selecting services for competition described in the Policy.~~

~~— C. Competitive Assessment~~

~~For purposes of the pilot project, a competitive assessment will be conducted on the six services selected for competition within the time constraints required to complete the RFP process by June 30, 1998. One service in each category will proceed to managed competition, regardless of the outcome of the competitive assessment. This step differs from the on going process, in which a service may remain in-house without proceeding to the RFP process depending on the results of the competitive assessment.~~

~~— D. Employee Transition Plan~~

~~The Human Resources Department with assistance from the City Manager's Office will develop a transition plan to prepare for the placement of any affected employees in the event an outside contractor is the successful bidder on the pilot project RFPs. The plan will incorporate the "Employment Stability" principle and the no lay-off provision.~~

~~— E. Managed Competition~~

~~One service currently provided in-house and one service currently contracted out will proceed to the "Managed Competition" process. The Managed Competition process will include the following steps:~~

~~— An RFP Development Team will develop the RFPs.~~

~~— A separate team of City employees providing the selected service or expected to provide the service will develop a response to the RFP.~~

~~— An RFP Evaluation Team, comprised of core staff developing the RFP and outside experts, will evaluate all responses to the RFP and forward the results to the Competition Steering team and the Advisory Council for feedback before forwarding the recommendations to the City Manager.~~

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~~— The results of the RFP will be presented to the City Council for a decision.~~

~~— F. Service Transition Plan~~

~~— If the RFP results in a change in the service delivery method (either contracted-out or contracted-in), the affected department with assistance from the City Manager's Office will develop a service transition plan to ensure the delivery of service will not be interrupted.~~

~~— G. Monitoring the Provider Performance~~

~~— After the contract is awarded to either an outside contractor or City employees, the contract will be monitored to ensure that the performance standards specified in the contract are met.~~

~~— H. Evaluation of Pilot Projects~~

~~— The Competition Steering team will evaluate the results of the pilot projects and make necessary changes before City-wide implementation.~~

SUPPORT STRUCTURE

~~— The following support structure is recommended to implement the Public-Private Competition Policy:~~

~~On-Going Teams:~~

~~— Competition Advisory Council'~~

~~— The existing Competition Advisory Council will remain in place for the duration of the pilot project to monitor consistency with the Policy and to provide feedback on its implementation. Replacements will be sought for any existing members not able to continue to serve on this Council.~~

~~— Competition Steering Team~~

~~— The Competition Steering Team will provide on-going oversight and direction for the public-private competition process. The Steering Team will include in-house employees representing labor unions, City Manager's Office, Budget Office, Finance Department, Human Resources Department, and other appropriate operating departments.~~

~~— Staff Support Unit~~

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~~Staff consisting of one Assistant to the City Manager and two Executive Assistants, will provide day to day administration of the competition program; other New Realities projects such as Zero Based Budgeting and Performance-Based Budgeting, and other special projects. A union representative on a paid six-month leave of absence will work with the Unit. Some of the responsibilities of this unit include:~~

~~Develop tools needed for competition process, including a service selection matrix, a competitive assessment format, cost methodology, evaluation criteria, and a program manual.~~

~~Provide assistance in conducting the Competitive Assessment.~~

~~Facilitate the identification and implementation of improvements to help employees to become more competitive.~~

~~Assist selected department to develop RFPs.~~

~~Assist City employees to respond to RFPs.~~

~~Develop agendas, prepare reports, and facilitate meetings of the Advisory Council, the Competition Steering Team, and various employee teams.~~

~~Conduct research of other cities to share information and learn from their experiences.~~

~~Assist Human Resources Department in training City employees in competition and related subjects.~~

~~Ad Hoc Operational Competition Teams~~

~~In addition to the above groups, other teams will be established by the City Manager on an ad hoc basis for the duration of specific competition efforts. Members of these teams will include employees from affected departments and staff members from labor, Budget Office, Human Resources, Finance, and other City departments as appropriate. Consultants will participate in the teams as needed.~~

~~Competitive Assessment Team~~

~~This team will be responsible for conducting the competitive assessment and assisting employees to implement improvements.~~

~~RFP Teams~~

~~Development and Evaluation~~

City of San Jose, CA

~~These teams will be responsible for developing the RFP for a specific service and evaluating the responses to the RFP. Consultants may assist employees to develop the RFP and evaluate RFP responses. While the same staff from the operating department and other departments may participate on both teams, the evaluation team may include outside experts not participating in the development of the RFP. Following evaluation, the recommendation will be forwarded to the Competition Steering committee and the City Manager.~~

~~Response~~

~~This in-house team will prepare responses to an RFP. Consultants and Staff members from other City Departments may provide assistance. The response team will operate completely independent of the staff developing the RFP to ensure the integrity and fairness of the competition process.~~

BUDGET

Following is the one-time and on-going budget for implementation of the Public-Private Competition Policy and other New Realities initiatives.

<u>Description</u>	<u>No. of Positions</u>	<u>Annual Cost</u>	<u>One Time</u>
1. Staff Support Unit			
— Assistant to the City Manger	1.0	\$ 80,450	
— Executive Assistant	2.0	\$110,365	
— Non-Personal		\$ 3,500	\$ 14,700
2. Competition Training:			
— Training assessment, Train the Trainer program, training for pilot projects			\$100,000
Total	3.0	\$194,300	\$114,700

Additional Costs:

3. RFP Development

4. RFP Response

~~These costs will depend on the size of the operation number of employees, scope and complexities of the service. Request for resources will be presented to the City council after the selection of service for competition is completed.~~

FY 1996-97 Resources Required:

— Staff Support Unit	\$ 50,000
— (For May and June and for computers, printer, office furniture, etc.)	
— Competition Training	\$ 40,000

City of San Jose, CA

Total FY 96-97 \$ 90,000

IMPLEMENTATION WORK PLAN

Key Task	Responsible Group	Finish Date
1. Council adoption of the Policy — 3/25/97	City Council	
2. City Manager establishes competition committees and asks City Council, Council Appointees, Department Directors and union for suggestions for services to enter competition	City Manager	
3. Recommend services for competition to the City Manager	Competition Steering Team	
4. Council approval of service selection	City Council	5/5/97
5. Develop Competition Training — 6/30/97	Competition Steering Team/HR	
6. Develop the Employment Stability Framework with Labor Unions — 9/30/97	Administration and Unions	
7. Conduct the competitive assessment — 12/30/97	Competitive Assessment Team	
8. Present results of the competitive assessment to the Steering Team, the Advisory Council, and the City Manager — 1/30/98	Competitive Assessment Team	
9. Develop the Employee Transition Plan if required — 2/30/98	Human Resources	
10. Develop Request for Proposals — 3/30/98	RFP Development Team	

City of San Jose, CA

- 11. Respond to the RFP RFP Response Team
— 4/30/98
- 12. Evaluate Responses to RFPs RFP Evaluation Team
— 5/30/98
- 13. Select the provider City Council
— 6/30/98
- 14. Develop the Service Transition Plan Impacted Department
— 8/30/98
- 15. Monitor the provider performance Impacted Department — On-
going
- 16. Evaluate the results of the pilots Competition Steering
— 9/30/98
Team

**ATTACHMENT C
POLICY DEVELOPMENT TEAMS**

Advisory Council

- Lynn Boland, Manager.....Employee
Relations
- Tim Callahan, Metal Fabrication Specialist..... OE3/General Services
Administration
- Robert Cushing, Code Enforcement Supervisor..CAMP/Planning Building & Code
Enforcement
- Amy Dean, Executive Director.....South Bay Labor
Council
- Debra Figone, Assistant City Manager.....City Manager's
Office
- Ed Flemate, Maintenance Supervisor.....AMSP/Streets &
Traffic
- Lou Garcia, DirectorEnvironmental
Services
- Carl Guardino, President.....Santa Clara County Manufacturing
Group
- Brad Imamura, Code Enforcement Inspector II.....MEF/Planning Building & Code
Enforcement
- Lisa Irvine, Competition Program Manager.....City of San
Diego
- Nancy Johnson, Director.....Convention Arts and
Entertainment

City of San Jose, CA

Jim Koch, Professor Management.....Santa Clara
University
Deborah Powell, Staff Technician.....CEO/Human
Resources
Ray Fritz, Chief Financial
Officer.....Clarify, Inc.
Jacqueline C. Simon, Chairperson.....MWDBD
Committee
Nona Tobin, Director.....Human
Resources

Labor Management Committee

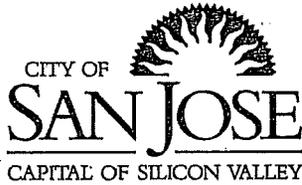
Lynn Boland, Manager.....Employee
Relations
Dan Estrada, Building Inspector.....ABMEI/Planning Building & Code
Enforcement
Debra Figone, Assistant City Manager.....City Manager's
Office
Brad Imamura, Code Enforcement Inspector II.....MEF/Planning Building & Code
Enforcement
Nancy Johnson, Director.....Convention, Arts and
Entertainment
Kirk Pennington, Electrician.....IBEW/Streets and
Traffic
Deborah Powell, Staff Technician.....CEO/Human
Resources

Consultant

Bob Brownstein, Budget Director.....Mayor's
Office

Facilitators

John Dam, Deputy Director.....Human
Resources
Pamela Stone Jacobs, Telecommunications Director.....City
Manager's Office
Sherry Langbein, Senior Executive Assistant.....City Manager's
Office



Memorandum

TO: COMMUNITY AND ECONOMIC
DEVELOPMENT COMMITTEE

FROM: Edward K. Shikada

SUBJECT: SEE BELOW

DATE: 09-16-09

Approved

Date

9/16/09

SUPPLEMENTAL

**SUBJECT: COMPETITION POLICY REVIEW – EVALUATING NEW SERVICE
DELIVERY MODELS**

REASON FOR SUPPLEMENTAL

As directed by the CED Committee, this memorandum responds to the August 21, 2009 request for additional information from Working Partnerships USA.

BACKGROUND

On August 13, 2009, staff issued a memorandum recommending that the Community and Economic Development (CED) Committee accept its report on the evaluation of service delivery changes in the proposed FY2009-10 Budget, and to agendize for City Council consideration: 1) adoption of a new Council Policy establishing a decision making framework to evaluate service delivery models, and 2) approval of a revised Policy 0-29 (Public Private Competition Policy). On August 21, 2009, Working Partnerships USA submitted a letter to the CED Committee requesting additional information on staff's recommendations (see Attachment A). At its meeting on August 24, 2009, the CED Committee deferred discussion of staff's recommendations and directed staff to respond to the questions raised in the Working Partnerships letter.

Staff held a follow-up meeting with stakeholders on September 11, 2009 to discuss staff's final recommendations and preliminary response to questions and comments raised by Working Partnerships and other stakeholders. Staff also received a letter on September 9, 2009 from the San Jose Silicon Valley Chamber of Commerce with comments and responses to the Working Partnership's letter (see attachment B).

September 16, 2009

Subject: Evaluating New Service Delivery Models

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ANALYSIS

The following paragraphs respond individually to the issues raised by restating each question, followed by a staff response.

Working Partnerships USA question 1: With regard to the whistleblower and non-retaliation issues, staff states violators will be subject to "appropriate sanctions." What specifically are these sanctions and how will they serve to deter retaliation against whistleblowers?

Staff Response: The Office of Equality Assurance handles complaints regarding wage compliance issues, providing a City office to register a complaint. In addition, the prevailing wage provisions in City contracts include a requirement that the contractor comply with the Labor Code. It specifically states that the "City will monitor Developer's compliance with the Labor Code requirements." Private employer retaliation is covered by the False Claim act. The City would review any such claim or refer any such complaint to the appropriate state agency. Section 1102.5. (a) of the Labor Code states: "An employer may not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. (b) An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." There are specific laws that provide specific processes for such claims. The reference to the State Whistleblower Act is a state law that provides a process for state employees to file complaints. In addition there are numerous provisions of state law that protect workers who have claimed misconduct against them such as in the area of complaints about wages and overtime and worker compensation claims. Most of these non-retaliation provisions provide for enforcement directly by the affected worker.

The City Non-Retaliation Policy is a City regulation that provides a process for City employees and contractors to file complaints. Most City contracts provide for the City to have the right to terminate at its convenience or for a default under the contract. If the City Council would like to make protections for whistleblowers more explicit, the City's Non-Retaliation Policy (Policy 1.1.4) could be amended to state that appropriate sanctions may include termination of a contract.

Working Partnerships USA question 2: The City assumes various risks and liabilities when it outsources services to private contractors. How will the City assess the cost of assuming these risks and how will the City include these costs in its comparison in the Competition Policy?

Staff Response: The decision making criteria in the proposed service delivery evaluation policy requires the Administration to review risks to the City and public that a new service delivery model may present, and to address how these risks would be managed. The review of risks will

September 16, 2009

Subject: Evaluating New Service Delivery Models

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include qualitative as well as quantifiable factors where applicable. Based on the specific nature of the service being evaluated, this review entails evaluating factors such as market competition, timeliness of service, citizen sensitivity, costs to transition the service, and management complexity. Considering the consequences and likelihood of each issue, staff will recommend how best to manage risks.

It should also be noted that evaluating risks is a critical component of assessing service delivery by City forces as well as contractor provided services, since City-provided services also involve risk. Given that the City is largely self insured, City-provided services often do not have the insurance, indemnification, workers compensation, and related protections typically provided through contractual services. The long term commitment of resources to the training and development, as well as performance, compensation, and protections for City employees also involves inherent risks and liabilities.

Working Partnerships USA question 3: Staff proposes to include the cost of public employee pensions when it analyzes the economic impact of outsourcing. However, pension cost estimates vary dramatically depending on actuarial analysis and stock market dynamics. How will the City determine pension costs for inclusion in its economic analysis of outsourcing either under the Service Delivery Policy or the Competition Policy?

Staff Response: The proposed inclusion of pension costs is not intended to reflect a new estimate; this reflects current practice whenever "fully loaded" (salary plus benefits) costs are estimated for new staff. Each Retirement Board has retained an actuarial consultant to calculate pension costs and contribution rates for City employees. These rates are specific to the City's demographic membership and reflect expectations of salaries, benefit levels, investment returns, and other assumptions. Currently, the rates are updated every two years. The cost estimates are based on the negotiated benefit levels, salary increases, mortality, and investment returns by employee groups. The actuary would typically perform the calculation for every person covered by the City.

When conducting a service delivery evaluation the City would prepare cost estimates as described above for the employee provided service using the best information available. The City would similarly expect the cost proposed by an alternative service delivery provider to include all costs borne by the employer plus a profit margin. The City would not, however, typically be responsible for changes in private employers' pension costs.

Working Partnerships USA question 4: Given the current policy draft's recommendation to include public pensions in the service delivery analysis, it is equitable to also include the cost benefits to contractor employees that are borne by taxpayers (e.g., health services, EITC, energy subsidies, and food stamps). How will the City incorporate these costs into its economic analysis of outsourcing?

September 16, 2009

Subject: Evaluating New Service Delivery Models

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Staff Response: The service delivery evaluation does not attempt to quantify social service costs for contractor employees. The City has in place progressive policies such as Prevailing Wage and Living Wage to help ensure sufficient wages and benefits for employees of contractors, in order to minimize reliance on taxpayer funded social services. In addition, service and labor contracts subject to the City's Living Wage Policy and the Public Private Competition policy are 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 and includes review of employee benefits, and compliance with state and federal workplace standards.

Working Partnerships USA question 5: The elimination of core capacity to perform essential city services would expose the City to the risk of losing the ability to provide those services in an emergency and the risk of losing control of the costs of providing those services. In evaluating the option to outsource municipal services how will the City assess the need to maintain minimum capacities to provide essential services?

Staff Response: In recognition of the importance of the quality and responsiveness of services that protect public health and safety, the Competition Policy specifies that core public safety services, including sworn police patrol, fire, and disaster response would not be subject to competition. Beyond basic emergency response services, the definition of core capacities and services is a highly subjective undertaking and one that the City Council has expressed some interest in exploring. The Administration anticipates that this analysis will consider such factors as the nature of the service, availability and capabilities of other service providers including other agencies and non-profits, and the cost to maintain needed skills and equipment in order to backfill a service interruption, or restore city-provided services.

Working Partnerships USA question 6: In regard to Councilmember Kalra's recommendation to ensure the public not lose access to information or documents in outsourcing if the information would be available had the services been delivered by public employees, the staff has said it would be difficult to provide the public with direct access. However, direct access is not necessary to affirm this principle. City contracts can specify the data that is likely to be the subject of public inquiry – and request that data in the outsourcing contract. Further, City contracts can include a general clause, enunciating the principle of no loss of access and requiring that the vendor respond to City requests for records that are induced by a citizen PRA request to the City. What contract language can be utilized in this manner to protect the public's access to information under Sunshine and Public Records law?

Staff Response: It is not the intent of the Administration to use contracted services to either limit nor expand the availability of information in response to a public records request. Staff has noted that records that any vendor transmits to the City already are public records. The City's standard contract language requires contractors to maintain all reports, documents or other materials related to the charges for services and the performance under the agreement for a minimum of three (3) years. Records must be made available for inspection or audit upon

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written request by the City. In addition, based on the nature of the service, the City evaluates whether additional information is needed and if a business need is established may designate specific records to be made available to the City under a contract.

Working Partnerships further objected to the recommended language that "all personnel records required of private sector competitive bid participants must be required of public sector bid participants." Recognizing that this could be interpreted in various ways, staff believes this language could be deleted.

Working Partnerships USA question 7: City staff calls for "best practices" in monitoring City contractors, but has not responded to requests for a description of these best practices. What are the "best practices" for contract monitoring referred to in this policy?

Staff Response: There are several areas where the Administration is working to improve overall contract management and oversight of the City's agreements with service providers. The City believes that this issue is best addressed by comprehensively increasing the management capacity through on-going training and employing best contract monitoring practices. The Administration provides best practices on contract monitoring to employees on the City's intranet site within its administrative guidelines for conducting requests for proposals (see Attachment C). This online tool provides employees with guidance on contract development, oversight, monitoring and evaluation of contract compliance and program implementation. In addition, the Human Resources and Finance Department conduct training twice annually on contract formation and contract management. The contract management course covers the management and monitoring of contracts including such areas as: contract development & planning deliverables, reporting tools, performance measures, monitoring techniques, communications, oversight of financial responsibilities, and payment processing and documentation. A special training will also be held in October for staff that manages contracts with non-profits.

Working Partnerships USA question 8: City staff has proposed that an icon on the bidline website (a site scarcely known to the general public) would provide the public with an adequate opportunity to comment on the performance of City contractors. What other options for obtaining community input would better enable the public to comment on contractor performance?

Staff Response: The City provides a variety of opportunities for City staff and the public to provide feedback to the City on the performance of City contractors. The mechanisms are contract specific and developed in an overall contract monitoring strategy depending on the nature of the service and the performance objectives.

For example, General Services seeks feedback on its facility maintenance and fleet services via a customer survey posted on the intranet site for both in house and contract work. General Services also proactively solicits feedback by emailing a survey link to individuals who call in a

COMMUNITY AND ECONOMIC DEVELOPMENT COMMITTEE

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service request. Another example is Parks, Recreation and Neighborhood Service's monitoring strategy for vendor contracts at community centers citywide. Customer surveys to City of San Jose residents and other users are conducted quarterly to assess satisfaction with programs and services provided through these vendors. The Department of Transportation also conducts a quarterly survey of customers who use parking services and facilities.

The staff proposal to add an icon on the bidline web-site is one additional method that will provide a user friendly mechanism to comment on the performance of contractors. The combination of efforts already in place and those specific to individual efforts that may develop as a need in the service delivery evaluation similar to the example included above, provide multiple opportunities for public input to performance.

COORDINATION

This supplemental memorandum has been coordinated with the following departments and offices: City Attorney, General Services, Parks, Recreation, and Neighborhood Services, and Transportation.



for EDWARD K. SHIKADA
Chief Deputy City Manager

For questions, contact Ed Shikada at 535-8190.

Attachment A

Working Partnerships USA
August 21, 2009 Letter

WORKING PARTNERSHIPS USA

The Honorable Rose Herrera
The Honorable Ash Kalra
The Honorable Sam Liccardo
The Honorable Nancy Pyle, Chair
Community and Economic Development Committee
San Jose City Council
200 E. Santa Clara St.
San Jose, CA 95113

August 21, 2009

Dear Chairperson Pyle and Councilmembers Herrera, Kalra and Liccardo:

Thank you very much for your leadership on the revisions of the competition policy. We appreciate the opportunity to have participated in the stakeholder process. Much has been accomplished with staff and stakeholders working collaboratively. However, there remain several key issues that require additional information from staff before the best policy decisions can be made.

We request you to direct staff to provide you and interested stakeholders with responses to the following questions:

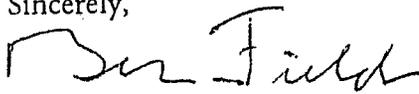
- 1) With regard to the whistleblower and non-retaliation issues, staff states violators will be subject to "appropriate sanctions". **What specifically are these appropriate sanctions and how will they serve to deter retaliation against whistleblowers?**
- 2) The City assumes various risks and liabilities when it outsources services to private contractors. **How will the City assess the cost of assuming these risks and how will the City include these costs in its cost comparisons in the Competition Policy?**
- 3) Staff proposes to include the cost of public employee pensions when it analyzes the economic impact of outsourcing. However, pension cost estimates vary dramatically depending on actuarial analysis and stock market dynamics. **How will the City determine pension costs for inclusion in its economic analysis of outsourcing, either under the Service Delivery Policy or the Competition Policy?**



- 4) Given the current policy draft's recommendation to include public pensions in the service delivery analysis, it is equitable to also include the cost of benefits to contractor employees that are borne by taxpayers (e.g. health services, EITC, energy subsidies, and food stamps). **How will the City incorporate these costs into its economic analysis of outsourcing?**
- 5) The elimination of the core capacity to perform essential city services would expose the City to the risk of losing the ability to provide those services in an emergency and the risk of losing control of the costs of providing those services. **In evaluating the option to outsource municipal services how will the City assess the need to maintain minimum capacities to provide essential services?**
- 6) In regard to Councilmember Kalra's recommendation to ensure the public not lose access to information or documents in outsourcing if the information would be available had the service been delivered by public employees, the staff has said it would be difficult to provide the public with direct access. However, direct access is not necessary to affirm this principle. City contracts can specify the data that is likely to be the subject of public inquiry – and request that data in the outsourcing contract. Further, city contracts can include a general clause, enunciating the principle of no loss of access and requiring that the vendor respond to City requests for records that are induced by a citizen PRA request to the City. **What contract language can be utilized in this manner to protect the public's access to information under Sunshine and Public Records law?**
- 7) City staff calls for "best practices" in monitoring city contractors, but has not responded to requests for a description of these best practices. **What are the "best practices" for contract monitoring referred to in the policy?**
- 8) City staff has proposed that an icon on the bidline website (a site scarcely known to the general public) would provide the public with an adequate opportunity to comment on the performance of city contractors. **What other options for obtaining community input would better enable the public to comment on contractor performance?**

Thank you for working with staff to obtain responses to these important questions. We are hopeful that with this information, we can work together to craft a responsible policy.

Sincerely,



Ben Field
Chief of Staff

Attachment B

San Jose Silicon Valley Chamber of Commerce
September 9, 2009 Letter



CHAMBER OF
COMMERCE

8 September 2009

Mr. Ed Shikada, Deputy City Manager
City of San Jose
200 East Santa Clara Street, 17th Floor
San Jose CA 95113

Re: Alternative Service Delivery Methods, Competition Policy O-29 and WPA Letter dated 21 August 2009

Dear Ed,

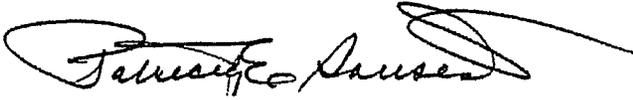
In reviewing the Working Partnerships Letter to the Community and Economic Development Committee dated 21 August 2009 the SJSV Chamber of Commerce has the following comments relative to items number 3, 4, 5, and 6 included in the WPA letter.

1. Item #3 – Pension Costs for private sector employees will not be a factor as the city/taxpayers will not be assuming any additional pension obligations by contracting out – all pension costs will be borne by the private sector vendor contracting with the city.
2. Item #4 – Private sector businesses currently pay State and Federal Income Taxes, Business Property Taxes, Property Taxes, FICA plus a Medicare Tax, SDI, State Unemployment Taxes, Business License Taxes etc. These taxes are for the greater public health, welfare and public purpose use of public services at all levels of government for their past, present and future employees at the local, state and federal levels of government. For the city to place the burden of “computing” the dollar amount of all taxes paid by the private sector would appear to be a redundant and time consuming process that does not change the fact that legal, private sector businesses are already mandated to pay for the services raised in the WPA letter vs. relying on the public to provide these services. However, it should be noted that the services noted in the WPA letter are provided regardless of whether the city contracts with private sector employers to provide public services and products.
3. Item #5 – The purpose of contracting out is to manage cost escalation providing services through competition. The city will still maintain core services. As the Chamber has consistently stated, the city and council need to identify and prioritize the core services the city provides which would then facilitate the identification of those services and/or products best suited for being submitted for Alternative Delivery and/or competitive outsourcing.
4. Item #6 – It appears the WPA letter is requesting as a condition of doing business with the City of San Jose that any private sector business who engages in the Competition process through Policy O-29 be required to agree to be subject to the Public Records Act. While the suggestion offered by the WPA is to limit those areas of PRA access through the contractual dictates of a city contract, to mandate PRA access to any financial or personnel aspect of a private business beyond what is publicly available will dramatically diminish the opportunity for the private sector to participate in the competitive bid process with the city.

The goal of coordinating the revised Alternative Service Delivery, RFP and Competition Policy is to reduce costs while providing requisite timely and quality city services. To include PRA requirements, qualified private sector participants will not engage and the City's efforts to achieve long term structural cost savings will not be achieved through the Alternative Service Delivery and Competition Bid Policy processes. The Chamber wants to be very clear, any attempt to require a private vendor to be subject to the RPA would appear to be an effort to make the competitive process so onerous would not want to bid and should not be tolerated by the administration or council.

In closing, the Chamber again wants to express their appreciation for the opportunity to participate in this effort with all stakeholders as coordinated by the City Managers offices.

Sincerely,

A handwritten signature in black ink, appearing to read "Patricia E. Sausedo". The signature is fluid and cursive, with a large initial "P" and a long, sweeping underline.

Patricia E. Sausedo, VP Public Policy & Communication
San Jose Silicon Valley Chamber of Commerce
101 West Santa Clara Street
San Jose, CA 95113

Cc: Mayor Reed & CED Committee

Attachment C

Contract Monitoring Best Practices

Request for Proposals

An Online Manual for City Employees

Contract Management

- RFP Home
- Code of Ethics
- City Policies
- Who Does What
- The Right Tool
- Conduct an RFP
- High Profile RFP
- Protests
- Contract Approval
- Contract Mgmt
- FAQ

Glossary Quick Links

[Contact Us](#)

Contract Management

Upon completion of the contract execution phase, the "Contract Management" phase of the contract administration process begins. Contract administration is the responsibility of the City Department managing the contract and starts with a well developed and executed contract that defines realistic monitoring provisions. This section provides general guidelines to ensure your contract is properly managed.

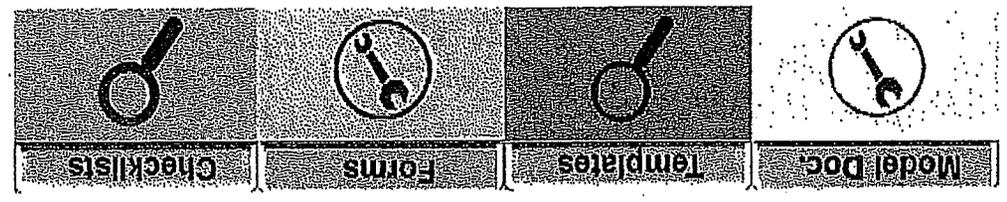
In this Section you will find:

- [Setting Up the Master Contract File](#)
- [Conducting the Start-up Conference](#)
- [Monitoring Performance](#)
- [Dealing with Poor Performance](#)
- [Requests for Payment](#)
- [Monitoring Contract Expiration Dates](#)

The contract management phase begins following execution of the contract and continues until the City obtains and pays for all services or products that are contemplated by the contract.

Key tasks performed by the Department (or designated contract management staff) in the contract management phase include:

- Developing a master contract file.
- Conducting a start-up conference.
- Monitoring performance to ensure that the contractor's obligations have been fulfilled.
- Reviewing contractor payment requests, monitoring contract expiration dates and dates by which



options must be exercised, and determining if contract amendments are needed.

Depending on the type and size of the contract being managed, the following guidelines may be considered during the contract management phase.

Setting-up the Master Contract File

Setting Up the Master File

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The master contract file is the primary reference point for the contract administrator and should contain all contract documents. For each contract, a contract file should be maintained by the contract administrator.

The following records must be retained:

1. Proposal
2. Proposal Evaluation Summary
3. Council Memorandum Seeking Award of Contract (if applicable)
4. Council Resolution (if applicable)
5. CMO Transmittal Form (if applicable)
6. Form 149-7 Notification of Contract Being Processed
7. Executed Contract
8. Contract Amendments
9. Contract Renewal documents
10. Bonding Documents (if applicable)
11. Licenses and Permits (if required)
12. Performance Document Deliverables (such as correspondence, evaluations, and reports submitted by the contractor)
13. Payment Requests and Copies of Invoices (unless kept separately in the departmental Accounts Payable section).
14. Record of contractor's performance (evaluation forms created for this purpose).
15. Any other correspondence and documentation related to the management of the contract.

Documents should be kept in compliance with each Department's approved Records Retention Schedule. In the event Departments' Records Retention Schedules do not address the length of time required to retain contract documents, records must be retained for five years after the expiration or termination of a contract.

Click here for [Approved Records Retention Schedule](#).

Conducting Start-up Conference

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For complex contracts or contracts involving large dollar amounts, it may be helpful for the Department to conduct a meeting of City staff from the Department prior to the commencement of work by the contractor. This is especially true if the staff responsible for management of the contract is different from the staff responsible for negotiating the terms of the contract. During this meeting, the following may occur:

- Definition of the roles of the staff assigned to manage the contract.
- Discussion of the procedures to be used for contract monitoring.
- Answer any questions that the contract administrator may have regarding the contract.
- Contract start-up and implementation

Also, for complex contracts or contracts involving large dollar amounts, it may also be helpful if the contract administrator meets with the contractor in order to review the terms of the contract. Please keep in mind that no changes to the contract's provisions can occur once the City and the contractor have signed the contract unless there is a formal amendment approved by the City Council or City Manager, as may be appropriate. Consult the City Attorney's Office if any issues regarding the contract's provisions are identified during this meeting.

Monitoring Performance

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Contractor performance should be monitored during the life of the contract. The key to effective contract monitoring is to identify and address all problems promptly.

Service Delivery

The following service delivery areas should be considered while monitoring the contract:

- Quality-- Does the contractor's performance meet the performance standard specified in the contract? In instances where the contractor is providing a service for a specified group of people, such as City employees or the general public, you may consider evaluating customer satisfaction through customer surveys or interviews regarding contract services. However, please note that the contractor cannot be held to a quality standard that exceeds the standard specified in the contract.

- Timeliness – Monitor delivery schedules to prevent or minimize lapses in service.
- Productivity – Monitor productivity requirements to ensure that the contract's minimum standards are met.

Contract Monitoring Tools

In order to assist the departmental contract administrator in monitoring a contractor's performance, the contract may require the contractor to provide information regarding the contractor's performance.

When developing the terms of the contract, it is important to consider the types of monitoring tools that will be helpful in monitoring the contractor's performance. The contractor cannot be required to provide a status report if it is not specified in the contract as a contract requirement.

Dealing with Poor Performance

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It is important to seek prompt and fair resolution of all problems or potential problems with the contractor. If there is unsatisfactory or non-performance of a contractor, follow the Department's internal procedures for informing the appropriate supervisor. Also, review the contract's provisions regarding the City's rights and obligations in situations where the contractor fails to provide satisfactory performance of the contract's terms. Contact the City Attorney's Office for advice on what action, if any, should be taken.

Please note that depending on the severity of the performance issue, City staff may first wish to notify the contractor through less formal means such as a meeting at the project site or through a telephone call. A summary of these informal steps including date, time, and gist of the conversation, shall be noted in the contract file. If these informal steps are not effective or if the contractor's failure to perform is a significant violation of the terms of the contract, then consult the City Attorney's Office regarding the appropriate action to be taken.

Note: Be wary of using e-mail to communicate with a contractor. E-mail should never be used to declare a contract in breach or to otherwise discuss liability issues.

Requests for Payment

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All requests for payment should be reviewed to ensure that items or hours charged match the contract prices and accurately reflect what was received. Do not authorize payment if you have not received satisfactory performance (see Dealing with Poor Performance section above).

Monitoring Contract Expiration Dates

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Pay particular attention to contract expiration dates. Renewal contracts should be processed in time in accordance with contract provisions to take effect before the contract expires. Allow enough time for the re-soliciting of an expiring contract including RFP process, contract development, City Attorney's Office review, review and signature by the contractor, obtaining the signature of the City Attorney's Office and the appropriate City official.

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Memorandum

TO: COMMUNITY AND
ECONOMIC DEVELOPMENT
COMMITTEE

FROM: RICHARD DOYLE
City Attorney

SUBJECT: Assessment of Other
California Cities that Restrict
Contractors From Making
Contributions and
Constitutional Analysis of the
City's Ability to Restrict
Contributions from
Contractors

DATE: September 25, 2009

BACKGROUND

On January 13 and 27, 2009, the City Council discussed a proposal from Councilmembers Nora Campos, Nancy Pyle, Rose Herrera and Ash Kalra to review and consider additions to the Council's Public-Private Competition Policy. After these discussions, the Council directed staff to conduct outreach to stakeholders and facilitate a special Community and Economic Development Committee meeting.

Among other things, the City Attorney's Office was directed to analyze the following recommendation on a "pay-to-play" regulation:

No contractor responding to an RFP shall make a contribution to the campaigns of City of San Jose candidates or elected officials who will approve the contract from the period in which the RFP is issued until 6 months after a contract has been awarded.

The CED Committee held meetings on March 12 and April 27, 2009. The Attorney's Office noted additional analysis was needed on the City's ability to legally restrict such contributions and advised that the Council could consider voluntary compliance or disclosure.

In addition, in a memo dated April 27, 2009, Councilmember Kalra recommended assessing the existing policies in California cities that restrict contractors responding to an RFP from making a contribution to the campaigns of candidates or elected officials who will approve the contract from the period in which the RFP is issued until 6 months after a contract has been awarded and amending the Competition Policy in accordance with those models.

ANALYSIS

1. Assessment of Other California Cities that Restrict Contractors from Making Contributions

The San Francisco Campaign and Governmental Conduct Code contains a prohibition on contributions from potential contractors to government officials whenever the contract has a total anticipated value of \$50,000 or more. See § 1.126, Attachment 1. The prohibition lasts from the start of negotiations until either the end of negotiations or six months have passed from the date of contract approval. *Id.*

The Oakland Campaign Reform Act contains a similar prohibition on contractor contributions. See § 3.12.140, Attachment 2. Potential contractors are not allowed to make contributions to city officials "at any time between commencement of negotiations and either one hundred eight (180) days after the completion of, or the termination of, negotiations" for a contract. *Id.*

We also reviewed the campaign finance ordinances of the cities of Los Angeles, San Diego, Sacramento and Long Beach and did not find any other provisions restricting contributions from contractors.

2. Constitutional Analysis of the City's Ability to Restrict Contributions from Contractors

Restrictions on campaign contributions may impinge on First Amendment rights. To pass Constitutional muster, the restrictions must satisfy the general requirements set forth by the United States Supreme Court.

The U.S. Supreme Court has held that "contribution ... limitations operate in an area of the most fundamental First Amendment activities", and such limitations "impinge on protected associational freedoms." *Buckley v. Valeo*, 424 U.S. 1, 14 & 22 (1976). Burdens on contributions may only be sustained if the State demonstrates "a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Id.* at 25. The Supreme Court affirmed the *Buckley* standard of review in *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000). As set forth in the *Nixon*, the test for determining the validity of the amount of a limitation is whether the limit is "so low as to impede the ability of candidates to amass the resources necessary for effective advocacy." *Id.* at 397. A limit on contributions "need not be analyzed exclusively in terms of the right of association or the right of expression. The two rights over-lap and blend; to limit the right of association places an impermissible restraint on the right of expression." *Citizens Against Rent Control v. City of Berkeley*, 554 U.S. 290, 299 (1981).

a. California Decisions

When limits on contributions are not closely drawn, courts find them to be unconstitutional. For example, the California Supreme Court struck down a provision of the Political Reform Act in *Fair Political Practices Comm'n v. Sup. Ct.*, 25 Cal.3d 33, 45 (1979). In that case, the Court held that a total ban of all contributions by any lobbyist was not a "closely drawn" restriction and, consequently, violated the challengers' First Amendment rights of freedom of speech and association.

However, a new version of the same law was upheld in 2001. In *Institute of Governmental Advocates v. Fair Political Practices Commission*, 164 F. Supp. 2d 1183 (E.D. Cal. 2001), the court ruled on a facial challenge to the constitutionality of the provision that prohibits a direct contribution by a lobbyist to an elected state officer or candidate for elected state office, if the lobbyist is registered to lobby the governmental agency for which the officeholder works or for which the candidate seeks election.

The plaintiffs did not dispute that there is a sufficiently important state interest and the court did not closely analyze the state interest involved in the law. The plaintiffs only challenged that the means were not closely drawn to serve the State's interest. The court cited *Buckley* for the proposition that "the prevention of corruption and the appearance of corruption" is a constitutionally sufficient justification for a limit on contributions. Plaintiffs argued that the law was too similar to the one struck down in 1979 and urged the court to strike the law for the same reasons.

The court, however, found sufficient differences between the two provisions. Under the law, lobbyists are not banned from making all contributions; they are only prohibited from making contributions if the lobbyist is registered to lobby the office for which the candidate seeks election. That is, the ban only applies to those persons the lobbyist will be paid to lobby. Moreover, since the 1979 decision, the definition of lobbyist in the Political Reform Act has been narrowed, so the new law is more targeted than its predecessor. Furthermore, the "total" ban is acceptable because there is no evidence that candidates would be unable to seek office without the contributions. The lack of a time limitation on the ban was acceptable because legislators are, in effect, always "in session" because even when on recess, they are still considering new laws.

b. Similar Cases in Other Jurisdictions

In *Green Party of Conn. v. Garfield*, 590 F.Supp.2d 288. (D. Conn. 2008), a Connecticut District Court rejected constitutional challenges to a state law which banned contributions from contractors to elected officials. The Connecticut Campaign Finance Reform Act banned contractors with state contracts from contributing to, or soliciting contributions on behalf of, candidates for state office. The Green Party alleged the law violated its members' First Amendment rights. The court rejected the argument, emphasizing the importance of preventing the perception of corruption, as well as actual corruption, as a sufficiently important state interest to support contribution limits. *Id.* at

303. Accordingly, where the state can demonstrate that there is a perception of corruption among public officials, particularly when presented in conjunction with highly publicized episodes of actual corruption, it can successfully meet its burden of providing that it had a sufficiently important interest in enacting contribution limits. *Id.* at 304.

The court in *Green Party* reviewed polls and empirical evidence showing that a perception of corruption existed in the state. The court reasoned that because contractors derive significant income from state contracting jobs, with "any amount of money given from the very people whose livelihood depends on currying favor with policy makers and elected officials, the public trust in the system begins to erode." *Id.* at 308.

In contrast to the *Green Party* court in Connecticut, the New Jersey Supreme Court in *In re Earle Asphalt Company*, 198 N.J. 143 (N.J. 2009) glossed over the need for an empirical record when evaluating the constitutionality of campaign contribution ban challenged by state contractors. In that case, the court noted that the U.S. Supreme Court has not addressed the constitutionality of a statute that imposes targeted limitations upon political contributions by a class of contributors considered to pose a particularly serious threat to the government's interest in preventing "the actuality and appearance of corruption resulting from large individual financial contributions." *Id.* at 923 (citing *Buckley* at 26).

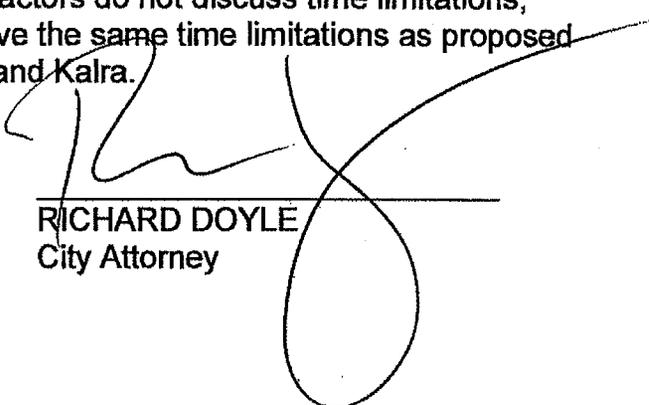
In evaluating a ban on contractor campaign contributions, the *Earle Asphalt* court was swayed by the substantial discretion enjoyed by state officials in awarding contracts and that the ban would not unduly prevent officials from amassing the necessary funds to effectively run for office. The court did not identify any actual cases of corruption nor did it cite any polls indicating a perception of corruption. Instead, the court cited the campaign law's findings and declarations which merely stated that "[t]here exists the perception"

This approach was also taken by the D.C. Circuit when it considered the constitutionality of an SEC rule prohibiting contributions by municipal securities professionals to those public officials from whom they obtained business. *Blount v. SEC* 61 F.3d 938 (D.C.Cir.1995). The court dismissed the lack of evidence demonstrating that pay to play practices were actually prevalent in the municipal bond business. The court stated that contributions "self-evidently create a conflict of interest in state and local officials who have power over municipal securities contracts and a risk that they will award the contracts on the basis of benefit to their campaign chests rather than to the governmental entity." *Id.* at 944-45. The court concluded that "[a]lthough the record contains only allegations, no smoking gun is needed where . . . the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic." *Id.* at 945.

CONCLUSION

The City can place limitations on campaign contributions by contractors. While some courts have accepted lawmaker's findings or have been sufficiently persuaded by the mere likelihood of pay to play schemes, other courts have considered empirical evidence of actual corruption.

With respect to the time limitations, courts have considered total bans by lobbyists to be acceptable because legislators are always considering new legislation. The decisions considering limits on contributions from contractors do not discuss time limitations; however, two other major California cities have the same time limitations as proposed by Councilmembers Campos, Pyle, Herrera and Kalra.



RICHARD DOYLE
City Attorney

Attachments 1 and 2

cc: Honorable Mayor and City Council

Attachment 1

City and County of San Francisco Campaign and Governmental Conduct Code

SEC. 1.126. CONTRIBUTION LIMITS--CONTRACTORS DOING BUSINESS WITH THE CITY.

(a) Definitions. For purposes of this Section, the following words and phrases shall mean:

(1) "Person who contracts with" includes any party or prospective party to a contract, as well any member of that party's board of directors, its chairperson, chief executive officer, chief financial officer, chief operating officer, any person with an ownership interest of more than 20 percent in the party, any subcontractor listed in a bid or contract, and any committee, as defined by this Chapter that is sponsored or controlled by the party, provided that the provisions of Section 1.114 of this Chapter governing aggregation of affiliated entity contributions shall apply only to the party or prospective party to the contract.

(2) "Contract" means any agreement or contract, including any amendment or modification to an agreement or contract, with the City and County of San Francisco, a state agency on whose board an appointee of a City elective officer serves, the San Francisco Unified School District, or the San Francisco Community College District for:

- (A) the rendition of personal services,
- (B) the furnishing of any material, supplies or equipment,
- (C) the sale or lease of any land or building, or
- (D) a grant, loan or loan guarantee.

(3) "Board on which an individual serves" means the board to which the officer was elected and any other board on which the elected officer serves.

(b) Prohibition on contribution. No person who contracts with the City and County of San Francisco, a state agency on whose board an appointee of a City elective officer serves, the San Francisco Unified School District or the San Francisco Community College District,

(1) Shall make any contribution to:

- (A) An individual holding a City elective office if the contract must be approved by such individual, the board on which that individual serves or a state agency on whose board an appointee of that individual serves;
- (B) A candidate for the office held by such individual; or

(C) A committee controlled by such individual or candidate

(2) Whenever the agreement or contract has a total anticipated or actual value of \$50,000.00 or more, or a combination or series of such agreements or contracts approved by that same individual or board have a value of \$50,000.00 or more in a fiscal year of the City and County

(3) At any time from the commencement of negotiations for such contract until.

(A) The termination of negotiations for such contract; or

(B) Six months have elapsed from the date the contract is approved

(c) Prohibition on receipt of contribution. No individual holding City elective office or committee controlled by such an individual shall solicit or accept any contribution prohibited by subsection (b) at any time from the formal submission of the contract to the individual until the termination of negotiations for the contract or six months have elapsed from the date the contract is approved. For the purpose of this subsection, a contract is formally submitted to the Board of Supervisors at the time of the introduction of a resolution to approve the contract.

(d) Forfeiture of contribution. In addition to any other penalty, each committee that receives a contribution prohibited by subsection (c) shall pay promptly the amount received or deposited to the City and County of San Francisco and deliver the payment to the Ethics Commission for deposit in the General Fund of the City and County; provided that the Commission may provide for the waiver or reduction of the forfeiture.

(e) Notification.

(1) Prospective Parties to Contracts. Any prospective party to a contract with the City and County of San Francisco, a state agency on whose board an appointee of a City elective officer serves, the San Francisco Unified School District or the San Francisco Community College District shall inform each person described in Subsection (a)(1) of the prohibition in Subsection (b) by the commencement of negotiations for such contract.

(2) Individuals Who Hold City Elective Office. Every individual who holds a City elective office shall, within five business days of the approval of a contract by the officer, a board on which the officer sits or a board of a state agency on which an appointee of the officer sits, notify the Ethics Commission, on a form adopted by the Commission, of each contract approved by the individual, the board on which the individual serves or the board of a state agency on which an appointee of the officer sits. An individual who holds a City elective office need not file the form required by this subsection if the Clerk or Secretary of a Board on which the individual serves or a Board of a State agency on which an appointee of the officer serves has filed the form on behalf of the board.

Attachment 1

(Added by Ord. 71-00, File No. 000358, App. 4/28/2000; amended by Proposition O, 11/7/2000; Ord. 141-03, File No. 030034, App. 6/27/2003; Ord. 228-06, File No. 060501, App. 9/14/2006; Amended by Proposition H, 6/3/2008)

(Derivation: Former Administrative Code Section 16.510-2; added by Proposition N, 11/7/95)

Attachment 2

Oakland Campaign Reform Act

3.12.140 Contractors doing business with the city of Oakland, the Oakland Redevelopment Agency or the Oakland Unified School District prohibited from making contributions.

A. No person who contracts or proposes to contract with or who amends or proposes to amend such a contract with the city for the rendition of services, for the furnishing of any material, supplies, commodities or equipment to the city or for selling any land or building to the city or for purchasing any land or building from the city whenever the value of such transaction would require approval by the City Council shall make any contribution to the Mayor, a candidate for Mayor, a City Councilmember, a candidate for City Council, the City Attorney, a candidate for City Attorney, the City Auditor, a candidate for City Auditor, or committee controlled by such officeholder or candidate at any time between commencement of negotiations and either one hundred eighty (180) days after the completion of, or the termination of, negotiations for such contract.

B. No person who contracts or proposes to contract with or who amends or proposes to amend such a contract with the Redevelopment Agency for the rendition of services, for the furnishing of any material, supplies, commodities or equipment to the Redevelopment Agency or for selling any land or building to the Redevelopment Agency or for purchasing any land or building from the Redevelopment Agency, whenever the value of such transaction would require approval by the Redevelopment Agency, shall make any contribution to the Mayor, a candidate for Mayor, a City Councilmember, a candidate for City Council, the City Attorney, a candidate for City Attorney, the City Auditor, a candidate for City Auditor, or committee controlled by such officeholder or candidate at any time between commencement of negotiations and either one hundred eighty (180) days after the completion of, or the termination of, negotiations for such contract.

C. No person who contracts or proposes to contract with or who amends or proposes to amend such a contract with the Oakland School District, for the rendition of services, for the furnishing of any material, supplies, commodities or equipment to the School District or for selling any land or building to the School District or for purchasing any land or building from the School District whenever the value of such transaction would require approval the School Board, shall make any contribution to a School Board member, candidate for School Board Directors or committee controlled by such officeholder or candidate at any time between commencement of negotiations and either one hundred eighty (180) days after the completion of, or the termination of, negotiations for such contract.

D. "Services" means and includes labor, professional services, consulting services, or a combination of services and materials, supplies, commodities and equipment which shall include public works projects.

Attachment 2

E. For contributions to city officers other than School Board Directors, transactions that require approval by the City Council or Redevelopment Agency include but are not limited to:

1. Contracts for the procurement of services that are professional or consulting services exceeding fifteen thousand dollars (\$15,000.00).
2. Contracts for the procurement of services exceeding fifty thousand dollars (\$50,000.00), other than contracts for professional or consulting services.
3. Contracts for the furnishing of any materials, supplies, commodities or equipment exceeding fifty thousand dollars (\$50,000.00).
4. Contracts for the sale of any building or land to or from the city or the Redevelopment Agency.
5. Amendments to contracts described in subsections (E)(1), (2), (3), and (4) of this section.

F. For contributions to School Board Directors, transactions that require approval by the School Board include but are not limited to:

1. Professional services and consulting contracts exceeding twenty-five thousand dollars (\$25,000.00), including personal service agreements.
2. Contracts requiring School Board approval under Public Contract Code Section 20111.
3. Construction contracts exceeding twenty-five thousand dollars (\$25,000.00) whether or not they are subject to the provisions of the Public Contract Code.
4. Contracts for the sale of any building or land to or from the School District.
5. Amendments to contracts described in subsections (F)(1), (2), (3), and (4) of this section.

G. "Commencement of negotiations" for city contracts occurs when a contractor or contractor's agent formally submits a bid, proposal, qualifications or contract amendment to any elected or appointed city officer or employee or when any elected or appointed city officer or employee formally proposes submission of a bid, proposal, qualifications or contract amendment from a contractor or contractor's agent.

H. "Commencement of negotiations" for Redevelopment Agency contracts occurs when a contractor or contractor's agent formally submits a bid, proposal, qualifications or contract amendment to any elected or appointed Redevelopment Agency officer or employee or when any elected or appointed Redevelopment Agency officer or

Attachment 2

employee formally proposes submission of a bid, proposal, qualifications or contract amendment from a contractor or contractor's agent.

I. "Commencement of negotiations" for Oakland School District contracts occurs when a contractor or contractor's agent formally submits a bid, proposal, qualifications or contract amendment to any elected or appointed School District officer or employee or when any elected or appointed School District officer or employee formally proposes submission of a bid, proposal, qualifications or contract amendment from a contractor or contractor's agent.

J. "Commencement of negotiations" does not include unsolicited receipt of proposal or contract information or documents related to them, requests to be placed on mailing lists or routine inquiries for information about a particular contract, request for proposal or any information or documents relating to them or attendance at an informational meeting.

K. "Completion of negotiations" occurs when the city, the Redevelopment Agency or the School District executes the contract or amendment.

L. "Termination of negotiations" occurs when the contract or amendment is not awarded to the contractor or when the contractor files a written withdrawal from the negotiations, which is accepted by an appointed or elected City officer, Redevelopment Agency officer, City employee or Redevelopment Agency employee or an appointed or elected School District officer or employee.

M. The Oakland City Manager shall be responsible for implementing procedures for City of Oakland and Redevelopment Agency contracts to ensure contractor compliance with the Oakland Campaign Reform Act. A proposed or current contractor must sign and date the following statement at the time the contractor formally submits a bid, proposal, qualifications or contract amendment:

The Oakland Campaign Reform Act limits campaign contributions and prohibits contributions from contractors doing business with the City of Oakland, the Oakland Redevelopment Agency or the Oakland Unified School District during specified time periods. Violators are subject to civil and criminal penalties.

I have read Oakland Municipal Code Chapter 3.12, including section 3.12.140, the contractor provisions of the Oakland Campaign Reform Act, and certify that I/we have not knowingly, nor will I/we make contributions prohibited by the Act.

Business Name _____

Date _____

Signature _____

The signed and dated statement must be received and filed by the City Clerk at the same time the proposal is submitted. Contracts may not be awarded to any contractors

Attachment 2

who have not signed this certification. The City Clerk shall keep an updated list of current contractors available for inspection.

N. The Oakland Superintendent of Schools shall be responsible for implementing procedures for Oakland School District contracts to ensure contractor compliance with the Oakland Campaign Reform Act. A proposed or current contractor must sign and date the following statement at the time the contractor formally submits a bid, proposal, qualifications or contract amendment:

The Oakland Campaign Reform Act limits campaign contributions and prohibits contributions from contractors doing business with the City of Oakland, the Oakland Redevelopment Agency or the Oakland Unified School District during specified time periods. Violators are subject to civil and criminal penalties.

I have read Oakland Municipal Code Chapter 3.12, including section 3.12.140, the contractor provisions of the Oakland Campaign Reform Act, and certify that I/we have not knowingly, nor will I/we make contributions prohibited by the Act.

Business Name _____

Date _____

Signature _____

The signed and dated statement must be received and filed with the School District at the same time the proposal is submitted. Contracts may not be awarded to any contractors who have not signed this certification. The School District shall keep an updated list of current contractors available for inspection.

O. A person who contracts with the City, the Redevelopment Agency or the School District for the rendition of services, for the furnishing of any material, supplies, commodities or equipment to the City, the Redevelopment Agency or the School District, or for selling any land or building to the City, the Redevelopment Agency or the School District or for purchasing any land or building from the Redevelopment Agency or the School District, whenever the value of such transaction would require approval by the City Council, the Redevelopment Agency or the School Board, and who violates subsection A of this section, shall be subject to the enforcement provisions of Article VII of this Act.

P. Elected city officeholders, candidates for city office and their controlled committees shall include a notice on all campaign fundraising materials equivalent to eight point roman boldface type, which shall be in a color or print which contrasts with the background so as to be easily legible, and in a printed or drawn box and set apart from any other printed matter. The notice shall consist of the following statement:

The Oakland Campaign Reform Act limits campaign contributions by all persons (OMC §§ 3.12.050 and 3.12.060) and prohibits contributions during specified time periods from contractors doing business with the City of Oakland, the

Attachment 2

Oakland Redevelopment Agency or the Oakland Unified School District (OMC § 3.12.140, paragraphs A., B., and C.).

(Ord. 12158 (part), 1999)



CED: 9-28-09
ITEM: D3

Memorandum

TO: COMMUNITY & ECONOMIC
DEVELOPMENT COMMITTEE

FROM: Councilmember Ash Kalra

SUBJECT: SEE BELOW

DATE: September 25, 2009

Approved

Date

9/25/09

**SUBJECT: COMPETITION POLICY REVIEW - EVALUATING NEW SERVICE
DELIVERY MODELS**

RECOMMENDATION

- 1. Service Delivery Policy Implementation**
Amend the staff recommendation of requiring a business case analysis when there is an impact on five (5) or more City full-time equivalent (FTE) positions to requiring an analysis when the amount of public funds in question is \$300,000 or greater.
- 2. Sunshine Requirements**
Amend the staff recommendation to include a provision on availability of information. Contracted services should not result in the loss of access to information. The public should have access to the same type of information of a service provided to them, whether the service is provided in-house or through a private contractor. This should not be interpreted as to allow for full, open access to a private entities' financial and personnel records. Only the records relevant to the procured contract should be accessible. A specific exemption should apply to reports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose. Additionally, non-profits should be exempt from this requirement with the exception of an overriding governmental need for the records (i.e. public safety).
- 3. Public Feedback**
The Competition Policy should include language specifying that "Each contract shall include a contract specific mechanism to obtain information from residents who are impacted by the services." The mechanism can be determined by staff and tailored to the type of service being provided. Additionally, the results of the feedback should be made public and shall be evaluated and responded to by staff.

4. **Monitoring**
The Competition Policy should include language specifying, "The City will identify contract management best practices within six months of approval of the Competition Policy. These best practices shall be implemented in the monitoring of all contracts and annually reviewed and revised when necessary."
5. **Costs to Taxpayers from Low Wage Work**
This should be included as part of the Service Delivery Evaluation business case analysis. Staff can determine the best way to incorporate this evaluation as part of the analysis.
6. **Breach of Contract in 3rd Tier Review**
The portion of Footnote 3 on page 5 of the proposed Competition Policy should be amended by removing the portion of the note which limits the review of breaches of contracts strictly to actual litigation.
7. **Whistleblower Provisions**
Direct staff to incorporate into the City's Non-Retaliation Policy (Policy 1.1.4) specificity which includes termination of a contract as a potential sanction.
8. **Methods for Comparing Costs**
Direct staff to add to the second paragraph on page 5 to the list of specific factors to take into account when comparing costs: "the costs of qualitative and/or quantitative risks."

DISCUSSION:

Over the past several months, there has been a tremendous amount of interest in the process we have undertaken in amending our public private competition policy. I want to give my sincere thanks to the work that City staff has put into the outreach coordination, preparation and revision of said policy. The aforementioned recommendations incorporate some of the original principles laid out in a memorandum I previously submitted dated 4/27/09. I appreciate the efforts of the staff to incorporate or respond to the numerous recommendations I put forth. I also want to thank the individuals from the business, labor and non-profit community who invested considerable time and offered valuable opinions on the proposed policy amendment. The outcome of this policy will hopefully improve the quality of services offered by our city employees. Also, I hope it clearly sets out the circumstances in which seeking outside purveyors of these services may prove to be mutually beneficial and practically applied.

The following offers a brief comment on each of the recommendations set forth in this memorandum:

Service Delivery Policy Implementation

For some time, there has been a back and forth between staff and Working Partnerships USA (WPUSA) on whether an appropriate threshold to trigger this policy should be 3 or 5 FTE's. It is

more relevant to look at this policy by the amount of public funds considered rather, than the number of FTE's, which may speak to a wide range of potential economic impacts.

Sunshine Requirements

It should be clear that by asking for a provision which allows for public access to the records of those who would provide contracted services, it is not seeking all records of a private entity. However, when using public funds, the public should not be limited in their access to records relevant to the use of those funds. This is not a unique provision. Many other government agencies use such language to ensure that the public is not denied access they would otherwise be entitled to if the service was provided by the governmental agency. For example, the State of Florida requires that contractors "keep and maintain the public records that ordinarily and necessarily would be required by the state agency in order to perform the service or activity." North Dakota follows a rule which states that because the open records law covers "organizations or agencies supported in whole or in part by public funds, or expending public funds," such organizations are covered by the law.

However, in respecting the nature of some private entities, an exemption is included to protect reports which would give any advantage to competitors, as is the rule in Iowa. Also, given the onerous degree of rules which govern non-profits, they shall provide information if there is an overarching governmental interest. For example, a contract which would require the care of children or other sensitive populations may fall under this exception.

Public Feedback

There should be some method to obtain public feedback. Rather than requiring public hearings or any other rigid format, staff should be able to come up with an appropriate method to obtain comments or concerns based upon the nature of the service provided and any other relevant factors.

Monitoring

The City staff continues to strive for effective delivery of services. Part of this should include how we best apply new policies. To that end, six months should allow for ample time to come up with best practiced models for contract management.

Costs to taxpayers from Low Wage Work

It is understandable that staff would recommend against an analysis which attempts to determine impacts of low wage work on the city and community. However, it is an important enough factor that some consideration, even if it involves best estimates, should be part of the process of a business case analysis.

Breach of Contract in 3rd Tier Review

Litigation is not the only method of substantiating a history of breaches of contract. Documented evidence may exist outside of the legal arena and should be included in the RFP evaluation process.

Whistleblower Provisions

Staff makes the prudent recommendation to work within existing policies when considering whistleblower protections as it applies to the formation of a competition policy. Therefore an amendment to add specificity to our existent City Non-Retaliation Policy, as suggested by staff in the most recent supplemental memorandum, appears to be the most logical course of action.

Methods for Comparing Costs

Understanding the concerns staff has regarding the evaluation of quantitative risks associated when comparing costs, a qualitative assessment may be more plausible at times. This recommendation leaves it up to the discretion of the staff to use quantitative, qualitative, or at times both forms of risk assessment.



**Competition Policy Review -
Evaluating Service Delivery**

September 28, 2009

City of San José
City Manager's Office



Background

1. Based on six stakeholder meetings, staff developed 3 part recommendation to address Council direction to review competitive policies using 2009-10 case studies:
 - develop a new policy to guide service delivery evaluations, including decision on when the Public-Private Competition Policy 0-29 would be applied;
 - revise the Public-Private Competition Policy 0-29; and,
 - streamline and simplify the City's Request for Proposals process.

Service Delivery Evaluation Policy

**(What we
are trying to
achieve)**

Use an efficient and transparent process for evaluating service delivery models which:

- 1. Applies consistent decision-making criteria.**
- 2. Ensures stakeholders have opportunity to provide input to decisions.**
- 3. Results in cost effective services that leverage unique strengths of public, private, and non-profit sectors in service delivery.**

Major issues outlined in original proposed revisions addressed through three part strategy.

Competition Policy primarily revised to:

1. Add provisions to ensure level playing field.
2. Expand contractor requirements when competing against a City operation.
3. Move selection of services subject to managed competition to the new Service Delivery Evaluation policy.

Revised Public-Private Competition Policy 0-29

DRAFT

Slide 4

Staff Recommendations

1. Accept this report

2. Agendize for City Council consideration
adoption of:

- Proposed new Council Policy establishing a decision making framework to evaluate service delivery models.
- Revised Council Policy 0-29 (Public Private Competition Policy)

Acknowledgement of Stakeholders Engaged in Developing Recommendations

1. Albert Balagso, Parks, Recreation & Neighborhood Services
2. Bob Brownstein, Working Partnerships USA
3. Yolanda Cruz, Municipal Employees' Federation
4. Pat Dando, San Jose Silicon Valley Chamber of Commerce
5. Linda Dittes, Municipal Employees' Federation
6. Gay Gale, City Association of Management Personnel
7. Patricia Gardner, Silicon Valley Council of Nonprofits
8. Leslee Hamilton, Friends of the Guadalupe
9. Elisa Koff-Ginsborg, Working Partnerships USA
8. Peter Jensen, General Services Dept
9. Matt Morley, General Services Dept
10. Jim Ortbal, Dept of Transportation
11. Bill Pope, International Union of Operating Engineers
12. Walter Rossmann, Finance Dept/Budget Office
13. Jim/Suzanne Salata, Garden City Construction
14. Pat Sausedo, San Jose Silicon Valley Chamber of Commerce
15. John Tang, San Jose Water Company
16. Clark Williams, Silicon Valley Council of Nonprofits