



# Memorandum

**TO:** COMMUNITY AND ECONOMIC  
DEVELOPMENT COMMITTEE

**FROM:** Councilmember Ash Kalra

**SUBJECT:** COMPETITION POLICY

**DATE:** April 27, 2009

Approved

*Ash Kalra*

Date

*4/27/09*

## RECOMMENDATION

Direct the City Manager and where applicable, the City Attorney, to make the following revisions to the Competition Policy or take other actions as specified below and return with a draft for City Council consideration within 30 days. 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.

Schedule a special meeting of the stakeholder group and City staff on May 8<sup>th</sup> to discuss the application of this policy to any outsourcing proposals included in the 09-10 Budget. Feedback from this meeting shall be provided to Council in upcoming Budget hearing/meetings.

### 1. Contractor Selection

- a. Codify existing City RFP practice by expanding Third Tier Review to include information regarding any prior examples of breach of contract, whether or not the breach produced litigation.
- b. Make explicit that the City shall consider a history of failing to comply with labor or environmental law, a history of breaches of contract, or a history of unethical business practices as grounds for rejecting a proposal.
- c. Re-affirm that under existing Council Policy 0-35 (Procurement and Contract Process Integrity and Conflict of Interest), any respondent submitting false information may result in disqualification from the procurement, as well as possible disbarment.

### 2. Contractor Performance

- a. Codify existing City contracting practice and the RFP procedures manual requirement to outline performance standards, deliverables and corresponding payment schedules.

### 3. Contractor Employment Standards

- a. Require for all new contracts, disclosure of the following for employees performing job functions related to the City contract:

- The length of continuous employment of current employees and rate of turnover by job classification,
- The minimum requirements for employees,
- The training to be provided to employees, and
- The screening process to assure employees have appropriate skills and personal backgrounds.

#### 4. Small Business Assistance

- a. Direct the City Manager to conduct a financial analysis on a payment performance bond program for small business contractors that would allow them to pay a competitive premium to the City to be insured under the City's self-insurance pool. City Staff shall schedule initial meetings with interested small businesses within 30 days to begin discussions on this issue.

#### 5. Pay-to-Play Regulations

- a. Assess 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 amend the Competition Policy in accordance with those models.

#### 6. Cost Comparisons

- a. Specify that the cost methodology of all costs and gains shall include: transition costs, monitoring and enforcement costs, effects on overhead costs, costs of training and equipment, projections of future costs, and costs associated with risk.

#### 7. Maintenance of minimum in-house capacity (Core capacity)

- a. Make explicit that the City shall maintain a core capacity to enable the City to compete for service delivery in the future or to provide service in case of contractor default in all cases in which the service relates to public health and safety, in which the service is essential to the maintenance of infrastructure or other City assets, or in which the absence of the service would expose the City or residents to risk of harm to persons or property.
- b. Outline the process under which City Staff can seek an exemption from this policy if the proposal is a change in business practice that will result in the intentional termination of delivery of a specific City service.

#### 8. Minimum Number of Bidders

- a. Specify that no contract will be issued unless the RFP produces a minimum of three fully responsive bids.
- b. Include in the policy the following exemptions:
  - In circumstances in which the RFP is directed to non-profit agencies and the service requires specific cultural competency or other specialized skills, a contract can be issued if there are less than three respondents.
  - If the City Manager documents that it is not feasible to secure three qualified respondents, the City Council may waive this requirement.

## 9. Protection of Emergency Services

- a. Indicate primary public safety services, including police, fire, disaster response, shall not be subject to the competition policy. In all applications of the competition policy, the City shall ensure that there will be no decrease in the quality and responsiveness of services that protect public health and safety.
- b. Clarify that this policy in no way prevents the augmentation of existing City services by contractors in the case of a disaster or state of emergency.

## 10. Sunshine Requirements – Public Disclosure

- a. The goal of the application of sunshine requirements to an outsourcing contract shall be that the public does not lose access to documents or information that it would have if the service were provided by public employees.
- b. No service provider will be required to disclose information or documents other than those directly related to the contract with the City and the employees who perform that contract.
- c. Within the limits noted above, public access should be granted to any contract produced or collected under a contract entered into by the City to the same extent as if the records were maintained by the City in accordance with the California Public Records Act of San José Sunshine policies.

## 11. Whistleblower Protection

- a. Indicate all RFPs shall re-affirm the respondents obligation to meet the requirements of the State Whistleblower Protection Act and the City's Non-Retaliation Policy (Policy 1.1.4). Copies of both documents shall be included with all RFPs.
- b. Specify that in addition to State penalties, violation of the State Whistleblower Protection Act or the City's Non-Retaliation Policy may result in a breach of contract.

## 12. Monitoring of Contracts

- a. Design all RFPs to:
  - Include performance standards that increase the ease of meeting the following requirements: reporting not less than annually, the extent to which the contractor has achieved the specific quantity and standard of quality of the subject services under the contract, including the extent to which the contractor has achieved its commitments regarding screening, qualifications, and training of employees.
  - Ensure that any reporting system minimize the amount of paperwork and extensive narrative. For example, a Sprinkler Maintenance RFP would specify inspection on a monthly basis. In this case, a photo copy of the service record would satisfy the reporting requirements.
  - Not less than annually, require the contractor to submit to the City copies of annual financial audits.
  - Exempt from additional monitoring, non-profits who receive allocations from existing City Board or Commissions that can exercise oversight, such as the Arts Commission, CDBG Committee and HNVF Committee.
  - Design a "Preferred Contractor" status that allows an existing City contractor with a history of three years of clean monitoring reports to be eligible to reduce monitoring.

- Include in all contracts language that provides the City with reasonable access through representatives of the contractor to facilities, records and employees to determine compliance with these monitoring provision, as well as all terms of the contracts.

### 13. Community Responsiveness Hearings

- a. On an annual basis, the Public Safety, Finance, and Strategic Support Committee shall hold a public hearing at which San José community members will have the opportunity to provide input regarding the performance of service contractors. As a result of this testimony, the Committee may direct staff to evaluate specific issues and report back at regularly scheduled meetings of the Committee.
- b. If a non-profit receives allocations through an existing board, committee or commission, that body may choose to incorporate this hearing into an existing meeting, in-lieu of participation in the Public Safety, Finance, and Strategic Support Committee.

14. Create an appropriate fee structure to be assessed on contracts in order to cover the City costs of contract audits. The fee level should take into account the amount awarded and the impact on potential bidders. Non-profits would be exempt.

15. Within 30 days, begin scheduling meetings with interested small businesses and non-profits stakeholders to assess methods for encouraging the use of local small businesses and non-profits as subcontractors.

### ANALYSIS

The aforementioned recommendations are an effort to create a competition policy that allows for confidence in the process through which the City seeks to create better efficiencies in service delivery. Amendments to the original draft which was presented to the stakeholder group have taken into account feedback from all corners. The goal of the amendments is to create a policy which:

1. Codifies existing City practices into the policy;
2. Allows for more discretion by the City Manager in presenting facts which would require exemptions to the policy;
3. Helps to put focus on a cumbersome RFP process which we can now turn our attention to as a prohibitive factor in contracting with the City;
4. Allows for greater certainty of the quality of services provided by contractors;
5. Creates more sunshine without overly burdening private sector contractors or violating inherent confidentiality necessary in personnel matters or company proprietary records;
6. Limits the effect on small businesses and non-profits; and,
7. Ultimately, helps our staff become leaner and more efficient in delivering City services while allowing the City Manager to seek reasonable changes in our business practices.

The goal of this policy is to have a concrete, systemic manner in which efforts to review the effectiveness of contracting out services can be done with a goal of delivering better, more efficient services to the community. We want to be able to do this without unintentionally creating greater risks or limiting our capacity to perform core City functions forever.

