



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).

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

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?

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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

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

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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.

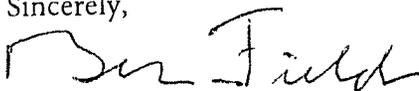
We request you to direct staff to provide you and interested stakeholders with responses to the following questions:

- 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,

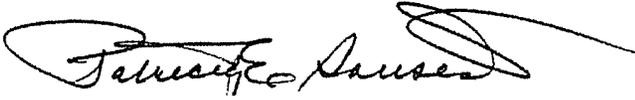
In reviewing the Working Partnerships Letter to the Community and Economic Development Committee dated 21 August 2009 the SJSV Chamber of Commerce has the following comments relative to items number 3, 4, 5, and 6 included in the WPA letter.

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 loop at the beginning and a long, sweeping tail that extends to the right.

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](#)

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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.

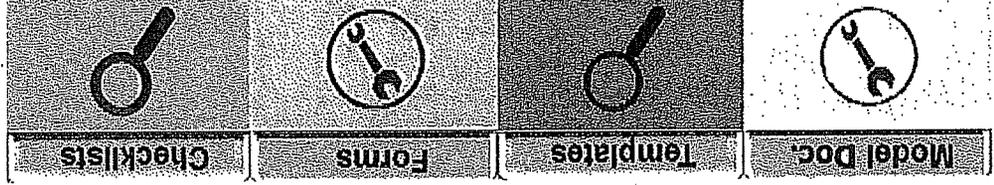
In this Section you will find:

- [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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