



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: RICHARD DOYLE
City Attorney

SUBJECT: Local Preference on Procurement

DATE: October 30, 2003

RECOMMENDATION

Discussion and Direction on an Ordinance relating to a local preference in the procurement of contracts

BACKGROUND

In August 1993, the City Council adopted Resolution No. 64808 establishing a local preference policy. The policy is applicable to most general services and professional services contracts. As explained below, the policy does not apply to public works contracts, which are required by City Charter Section 1217 to be let to the lowest responsive bidder.

Local preference cannot be used in formal bids for public works in excess of \$100,000 because the City Charter requires that such contracts be awarded to the low bidder.

The current Local Preference Policy (copy attached) provides as follows:

In the case of the **purchases of goods**, the policy grants a credit of 1% of the purchase price to vendors who qualify as local vendors because they pay sales tax in the City of San Jose. This figure was chosen because this is the amount of the sales tax that San Jose received from purchases made from vendors who pay sales tax within San Jose.

RFP's for contracts for **general services or professional services** must include a statement notifying the proposers of the policy and how to claim it. Under the policy, a proposer who has an office within the City of San Jose can claim status as a Local Business Enterprise (LBE). In the event that two or more proposals are determined to be similarly advantageous to the City, the City Council may use LBE status as a factor in the award of the contract.

ANALYSIS

On September 16, 2003, the City Council directed the drafting of a Local Preference Ordinance. The draft Ordinance codifies and amends the existing Local Preference Policy. The amendments are possible because of several important changes that have occurred since San Jose's Local Preference Policy was adopted in 1993. First, the Charter was amended to eliminate

requirements for the acquisition of supplies, materials or equipment. Those purchases are now governed by ordinance only. The current purchasing ordinance requires formal bidding for purchases exceeding \$100,000. The second charter change was the increase in the bid limit for Public Works projects to \$100,000 as well.

These changes allow the City Council to establish a modified local preference policy to most City contracts except for Public Works contracts exceeding \$100,000 without a Charter amendment. Local preferences cannot be used in public works bids because the City Charter requires that such contracts be awarded to the low bidder.

Local Business Enterprises

Currently the City of San Jose uses two separate definitions for the application of a local preference, depending on the type of procurement.

Supplies, Materials and Equipment

The procedures for the purchases of supplies, materials, and equipment grant a credit equal to the amount of sales tax revenue received by the City as the result of the purchase. The proposed ordinance will define a "Local Vendor" is defined as " a vendor who is considered located in the City of San Jose for the purpose of determining the payment of sales tax revenue to the City on purchases within the Tax Code Area Number designated by the State Board of Equalization for the City of San Jose." The draft ordinance raises the credit received by those vendors who qualify as a "Local Vendor" from 1% to 2% of the cost bid in the determination of the lowest bid.

Services

The procedures for the procurement of General Services and Professional Services contain a definition of a "Local Business Enterprise" (LBE). An LBE is defined as:

"a business enterprise, including but not limited to a sole proprietorship, partnership, or corporation, which has a legitimate business presence in the City of San Jose. Evidence of legitimate business presence in San Jose shall include:

- a. Having a current San Jose business tax certificate; and
- b. Having either of the following types of offices operating legally within the City of San Jose:
 - i. The contractor's principal business office; or
 - ii. The contractor's regional, branch or satellite office with at least on full time employee located in San Jose."

The proposed Ordinance will codify these provisions into the San Jose Municipal Code. In RFP and Requests for Qualifications, which are the processes for the selection of General Services and professional consultant services contracts, price is not necessarily the overriding determinative factor. Therefore a preference based upon a percentage of the price may not achieve any real preference. The current policy provides that in the

case of substantially equivalent proposals, status as LBE can be a tie-breaker. The draft ordinance instead requires that LBE's be given a *5% point credit* in the evaluation of proposals.

Exceptions

The current Local Preference Policy does not apply to the following types of procurement:

- i. Procurements where legal constraints on the expenditure of funds prohibit the application of the policy.
- ii. Procurements on behalf of the San Jose-Santa Clara Water Pollution Control Plant.

The first exception addresses the fact that some funding sources would not allow for a local preference. Some airport funds and federal and state grant monies may not allow the City to use a local preference. The second exception resulted from a TPAC decision to not use a local preference, which only benefited City of San Jose businesses when the source of funds was from a wider geographic area.

These exceptions will be codified by the proposed Ordinance.

CONCLUSION

The draft ordinance responds to Council direction by modifying the existing local preference program, with two changes in how the preference is applied:

- For supplies, materials and equipment the preference is increased from 1% to 2%
- For services (RFP's and Quotes) the preference is changed from a tie-breaker to a 5% in *points* used in the evaluation.

RICHARD DOYLE
City Attorney

By: 

Brian Doyle
Senior Deputy City Attorney

cc: Del Borgsdorf

DRAFT

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY OF SAN JOSÉ AMENDING THE SAN JOSÉ MUNICIPAL CODE BY SECTIONS OF CHAPTER 4.12 OF TITLE 4 TO ESTABLISH A LOCAL PREFERENCE POLICY ON PROCUREMENT OF CONTRACTS

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSÉ:

SECTION 1. Section 4.12.117 of Chapter 4.12 of Title 4 of the San Jose Municipal Code is hereby amended to read as follows:

4.12.117 Low Bidder Determination - Criteria

The low bidder shall be determined based on the lowest total cost to the City, including but not limited to, the effect of :

- A. Trade discounts;
- B. Shipping costs, when included in the specifications;
- C. Life cycle costs, when included in the specifications;
- D. A credit of two percent (2%) of the cost bid by bidders meeting the definition of "Local Vendor" set forth in Section 4.12.118.

SECTION 2. Chapter 4.12 of Title 4 of the San Jose Municipal Code is hereby amended by adding a new section to be numbered and entitled and to read as follows:

4.12.118 Local Vendor

As used in this Chapter, "Local Vendor" means a vendor who is considered located in the City of San Jose for the purpose of determining the payment of sales tax revenue to the City on purchases within the Tax Code Area Number designated by the State Board of Equalization for the City of San Jose.

SECTION 3. Chapter 4.12 of Title 4 of the San Jose Municipal Code is hereby amended by adding a new section to be numbered and entitled and to read as follows:

4.12.119 Exceptions to Local Vendor preference

Application of the credit provided for in Subsection D of Section 4.12.117 shall not be made in the following procurements:

- A. Procurements where legal constraints on the expenditure of funds prohibit the application of the policy.
- B. Procurements on behalf of the San Jose-Santa Clara Water Pollution Control Plant.

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SECTION 4. Section 4.12.135 of Chapter 4.12 of Title 4 of the San Jose Municipal Code is hereby amended to read as follows:

4.12.135 Open Market Purchasing Procedure

- A. Open market purchases of supplies, materials and equipment which exceed Five Thousand Dollars (\$5000) shall, whenever practicable, be based on at least three price quotations and shall be awarded on the basis of the price quotation most advantageous to the City. Price quotations may be solicited by any reasonable means including but not limited to mail, telephone, fax, e-mail or posting on the City's web site for bids. A record of open market purchases and price quotations shall be maintained by the Director.
- B. In addition to the factors set out in Sections 4.12.115 and 4.12.117, the most advantageous price quotations to the City for an open market purchase shall be based on consideration of:
1. Quality and performance of the supplies, materials and equipment;
 2. Ability of the vendor to perform the transaction;
 3. Ability of the vendor to complete the transaction within the time specified;
 4. Quality of the vendor's performance on prior purchase by the City or others;
 5. Ability of the vendor to provide future maintenance, repair parts and service;
 6. Capacity and experience of the vendor;
 7. ~~The amount of sales tax revenue to be received by the City as a result of the purchase, as applicable pursuant to City Council policy;~~
 8. ~~Status of the vendor as a local vendor business enterprise, as applicable pursuant to City Council policy.~~
- C. If an award in excess of Five Thousand Dollars is made to a vendor other than the vendor submitting the lowest price quotation, written reasons for the award decision shall be prepared and will be kept as a part of the record of the transaction.
- D. Purchases which do not exceed Five Thousand Dollars may be made without price quotations, if such procedure is determined by the City Manager to be in the best interest of the City.

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SECTION 5. Section 4.13.040 of Chapter 4.12 of Title 4 of the San Jose Municipal Code is hereby amended to read as follows:

4.13.040 General Services Contracting Procedure

- A. Formal bidding shall not be required for contracts or purchase orders for general services. Three competitive proposals shall be obtained, if practicable, on all contracts or purchase orders for general services with a payment amount exceeding Five Thousand Dollars (\$5,000).
- B. Proposals may be solicited by direct mail requests to prospective contractors or by telephone. A record of general services contracts and purchase orders and proposals shall be kept as part of the record of the transaction.
- C. Contracts or purchase orders for general services shall be made or awarded on the basis of the most advantageous proposal to the City.
- D. In determining the most advantageous proposal to the City, the following factors shall be considered:
 - 1. Cost to the city;
 - 2. Quality of the proposal;
 - 3. Capabilities and expertise of the contractor;
 - 4. Adherence to applicable City Council Policies;
 - 5. Status of the vendor as a Local Business Enterprise in accordance with Section 4.13.136, ~~as applicable pursuant to city council policy.~~
- E. Contracts or purchase orders which do not exceed Five Thousand Dollars may be made without competitive proposals, if such procedure is determined by the City Manager to be in the best interests of the City.
- F. If a contract or purchase order is made or awarded in excess of Five Thousand Dollars (\$5,000) to other than a contractor submitting the proposal containing the lowest price, written reasons for the award decision shall be prepared and shall be kept as part of the record of the transaction.

SECTION 6. Chapter 4.13 of Title 4 of the San Jose Municipal Code is hereby amended by adding a new section to be numbered and entitled and to read as follows:

4.13.136 Application of Status as Local Business Enterprise

Vendors who qualify as a Local Business Enterprise shall be given a credit equal to five percent (5%) of the total points used to determine the most advantageous proposal under Section 4.13.135.

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SECTION 7. Chapter 4.13 of Title 4 of the San Jose Municipal Code is hereby amended by adding a new section to be numbered and entitled and to read as follows:

4.13.137 Local Business Enterprise

As used in this Chapter, "Local Business Enterprise " means "a business enterprise, including but not limited to a sole proprietorship, partnership, or corporation, which has a legitimate business presence in the City of San Jose. Evidence of legitimate business presence in San Jose shall include:

- A. having a current San Jose business tax certificate; and
- B. having either of the following types of offices operating legally within the City of San Jose:
 - i. The contractor's principal business office; or
 - ii. The contractor's regional, branch or satellite office with at least on full time employee located in San Jose.

PASSED FOR PUBLICATION OF TITLE this ___ day of _____, 2003
by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

RON GONZALES
Mayor

ATTEST:

PATRICIA L. O' HEARN
City Clerk

RESOLUTION NO. 64808

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE ESTABLISHING A LOCAL PREFERENCE POLICY ON THE PROCUREMENT OF SUPPLIES, MATERIALS OR EQUIPMENT, ON GENERAL SERVICES AND PROFESSIONAL SERVICES.

WHEREAS, when acting as a market participant, the City of San Jose can implement purchasing policies that it deems favorable; and

WHEREAS, the City of San Jose supports and encourages the efforts of San Jose businesses; and

WHEREAS, adoption of a local preference policy would have beneficial economic effect on local businesses and on the City as a whole;

WHEREAS, on June 8, 1993, the City Council adopted local preference policy on procurements for Supplies, Materials and Equipment and for General Services.

WHEREAS, the City Council desires to revise the local preference policy to include procurements for Professional Services.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE:

Local Preference Policy of the City of San José

I. General Provisions.

It is the Policy of the City of San Jose to:

- A. Encourage business activity in San Jose through its activities as a market participant through active outreach to San Jose businesses in the solicitation of all City bids, proposals and quotations; and

B. Provide for a specific limited preference to local vendors in the evaluation of proposed contracts with the City on the procurement of:

1. Supplies, materials or equipment;
2. General Services; and
3. Professional Services.

II. Application.

Except as provided in Section III, this Policy shall be applied as follows:

A. Procurement of supplies, materials and equipment:

1. Formal bids In the determination of the lowest responsive bidder for formal bids, a credit equal to the amount of sales tax revenue received by the City as a result of the purchase from a San Jose Vendor shall be applied to the amount of each San Jose Vendor's bid. For the purpose of this subsection, "San Jose Vendor" means a vendor who is considered located in the City of San Jose for the purpose of determining the payment of sales tax revenue to the City on purchases within the Tax Code Area Number designated by the State Board of Equalization for the City of San Jose.
2. Tie bids If the calculation made under subsection 1 above results in an exact tie, the award of the matter shall be determined by the City Council pursuant to Section 4.12.100 of the Municipal Code.

3. Open market purchases In evaluation of quotes for purchases of supplies, materials or equipment received not pursuant to formal bidding procedures, determining the most advantageous price quotation to the City shall include application of the San Jose Vendor Credit as described in subsection 1 above.

B. Procurement of General Services and Professional Services:

1. Consideration as a Local Business Enterprise In the determining the most advantageous proposal or price quotation to the City in the procurement of General Services or Professional Services, the status of the contractor as a Local Business Enterprise shall be considered. For the purpose of this subsection, "Local Business Enterprise" means a business enterprise, including but not limited to a sole proprietorship, partnership, or corporation, which has a legitimate business presence in the City of San Jose. Evidence of legitimate business presence in San Jose shall include:
 - a. Having a current San Jose business tax certificate;
and
 - b. Having either of the following types of offices operating legally within the City of San Jose:
 - i. the contractor's principal business office; or
 - ii. the contractor's regional, branch or satellite office with at least one full time employee located in San Jose.
2. Evaluation of Local Business Enterprise In the determination of the most advantageous proposal or most

advantageous price quotation, consideration of performance and price shall take precedence over status as a Local Business Enterprise.

- a. With regard to evaluation of proposals received in response to Requests For Proposals for General Services, status as a Local Business Enterprise will be considered as a factor if there are reasonably similarly advantageous proposals after considerations of technical performance and cost have been evaluated.
- b. With regard to evaluation of quotes for services on open market purchases and open purchase orders, the status of Local Business Enterprise will be evaluated by applying a 1% credit to the cost quote for Local Business Enterprises.
- c. With regard to evaluation of proposals received in response to requests for proposals or requests for qualifications for Professional Services, status as a Local Business Enterprise will be considered as a factor, if there are reasonably similarly advantageous proposals after considerations of professional expertise, technical performance and cost have been evaluated.

III. Exceptions.

This Policy shall not apply to the following types of procurements:

- A. Procurements where legal constraints on the expenditure of funds prohibit the application of a local preference policy.

B. Procurements on behalf of the San Jose-Santa Clara Water Pollution Control Plant.

IV. Implementation.

This Policy shall be implemented as follows:

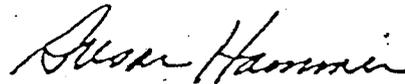
- A. This Policy shall be effective for all procurements which are solicited on or after August 3, 1993.
- B. The City Manager shall cause all solicitations for procurements subject to this Policy to contain a notification to the recipients that a Local Preference Policy is available together with sufficient information about how to claim a preference.
- C. It shall be the burden of the person submitting a bid, quotation or proposal to provide sufficient information to claim the preference. All such information shall be submitted together with the bid, quotation or proposal.

ADOPTED this 3rd day of August, 1993, by the following vote:

AYES: BEALL, COLE, FERNANDES, FISCALINI, HEAD,
JOHNSON, POWERS, SHIRAKAWA; HAMMER

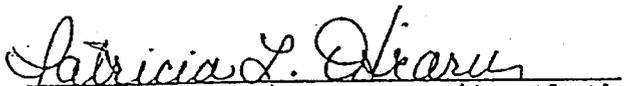
NOES: NONE

ABSENT: ALVARADO, PANDORI



SUSAN HAMMER, Mayor

ATTEST:



PATRICIA L. O'HEARN, City Clerk

CITY OF SAN JOSÉ - MEMORANDUM

TO: ALL DEPARTMENTAL ATTORNEYS
AND ELLEN DONNELLY

FROM: BRIAN DOYLE
Deputy City Attorney

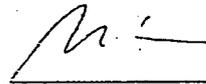
SUBJECT: Revised Local Preference
Policy

DATE: August 9, 1993

APPROVED

DATE

Attached is a copy of the City Council Resolution adopting the revised Local Preference Policy, which now covers professional services as well as General Services contracts. The General Services Department will be distributing a memo to senior staff advising them of the recent revisions with regard to procurements.



BRIAN DOYLE
Deputy City Attorney