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Introduction

In accordance with the City Council's direction at its September 14, 2004 meeting, we reviewed the City Manager's proposed reforms designed to address problems identified in our audit reports entitled "A Review Of The CUSP Request For Proposal Process" and "A Review Of The Request For Proposal For The New Civic Center Converged Network System." We conducted our review in accordance with generally accepted government auditing standards and limited our audit to the work specified in the Objectives, Scope, and Methodology section of this report.

The City Auditor thanks the City Manager's Office, the City Attorney's Office, and other City staff for their cooperation, input, and insight during the audit.

Background

Since June 2004, the City Auditor's Office has issued two reports on City-proposed procurements. Specifically, in June 2004, the City Auditor issued a report on the CUSP Request for Proposal (RFP) process. Although the report concluded that the CUSP RFP evaluation process was fair, objective, and accurate, the audit identified a number of problems with the RFP process. Accordingly, the report included 15 recommendations to improve the City's RFP process.

In August 2004, the City Attorney's Office and City Auditor's Office issued another report on the RFP process for the New Civic Center Converged Network System. Although this report concluded that overall the RFP evaluation process was fair, objective and accurate, it also concluded that the City was not in compliance with the San Jose Municipal Code requirements for standardization and identified several areas needing improvement throughout the RFP process, including non-disclosure agreements for non-compensated employees. Accordingly, the City Auditor's Office and the City Attorney's Office made six recommendations to address the problems that we identified in the report.

Subsequent to these two audit reports, the City Manager has proposed a number of reforms to address the issues identified in the reports, as well as other organizational reforms. For instance, the City Manager has proposed several organizational changes such as moving the Purchasing Division to the Finance Department and restructuring the reporting relationships

between City Service Areas and the City Manager's Office (CMO). In addition, the CMO has proposed and is in the process of implementing a number of changes to the City's RFP process.

The City Council, on September 14, 2004, directed the City Auditor's Office to perform a management audit of the City Manager's reforms and to report back within 30 days with comments and additional recommendations.

**Objectives, Scope,
And Methodology**

On September 14, 2004 the City Council directed the City Auditor to "...conduct a management audit, review and comment on the City Manager's reforms, and make any additional recommendations about how better management controls could prevent future problems..." In response to this directive, we reviewed the following matters related to the City Manager's recommended management reforms:

1. The status of fourteen audit recommendations from "A Review Of The CUSP Request For Proposal Process";
2. The status of six audit recommendations from "A Review Of The Request For Proposal For The New Civic Center Converged Network System";
3. Recommended management reforms related to such things as ethics training and organizational restructuring; and
4. Other recommended RFP improvement reforms.

In addition, we addressed the following questions regarding the responsibility of the City Attorney and City employees within the organization:

1. Who is the City Attorney's client?
2. What is the standard for the City Attorney going up the chain of command?
3. What is the standard for City employees going up the chain of command?

In reviewing these matters, we solicited input from the City Council regarding areas of concern. We also interviewed City staff that were integral in overseeing the implementation of

each of the 20 audit recommendations and various management reforms, including Senior Staff from the CMO, the Director of Aviation, the Director of Employee Services, the Director of Employee Relations, the Director of Finance, the acting Chief Information Officer, the acting Director of General Services, and members of the City Attorney's Office. We also interviewed representatives from various cities' procurement divisions and audit offices. Furthermore, we reviewed the San Jose City Charter, the San Jose Municipal Code, the City's Code of Ethics for Officials and Employees of the City of San Jose, the City's RFP Procedures Manual, the Purchasing Administrative Manual, the American Bar Association (ABA) Model Procurement Code, Government Technology Press' The Request for Proposal Handbook, various publications by the California League of Cities, and various procurement policies at the Federal and State level. Contained in this report are our comments on those City Manager-proposed reforms the Administration has finalized or nearly finalized as of November 24, 2004 and a status report on those reforms that the Administration is attempting to finalize.

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Finding I

Review And Comments On The City Manager's Proposed Reforms

In accordance with the City Council's direction, we reviewed and commented on the City Manager's proposed reforms. Appendix B is a matrix that shows the proposed reforms, status, and the City Auditor's comments on the proposed reforms. As of November 24, 2004, the Administration has finalized or nearly finalized the following reforms:

1. Developed Procurement Process Integrity Guidelines (PPIG) for the Converged Network Request for Proposal (RFP);
2. Relocating the Purchasing Division (Purchasing) to the Finance Department;
3. Restructured the organizational reporting relationships; and
4. Agreed-on steps to improve communication and coordination between the City Manager's Office (CMO) and the City Attorney's Office (CAO).

We have one recommendation to assist the Administration in relocating the Purchasing to the Finance Department. In addition to the above reforms, the Administration is working on a number of other recommended reforms. The City Auditor's Office will continue to monitor and report on the Administration's progress in implementing these recommended reforms. We have also provided the Administration with an additional recommendation to assist them in implementing these reforms which are shown beginning on page 10.

**Procurement
Process Integrity
Guidelines For The
Converged
Network RFP**

The Administration provided a report to the City Council on November 4, 2004 regarding its proposed Procurement Process Integrity Guidelines (PPIG), which address communication protocols for the second Converged Network RFP. In response to this report, the City Auditor's Office provided additional comments, found in Appendix C, regarding the single point of contact for procurements as well as additional issues the Administration should consider for the PPIG for the New Converged Network RFP. The Administration addressed all but one of the concerns we raised. The one concern the Administration did not address dealt with appointing a single

point of contact throughout the RFP process. At its November 9, 2004 meeting, the City Council accepted the City Manager's PPIG, but did not address the City Auditor's concern regarding the single point of contact.

**Relocating The
Purchasing
Division To The
Finance
Department**

The CMO has proposed moving Purchasing from the Department of General Services (GSD) to the Finance Department. The September 21, 2004 Council Agenda contained a recommendation to amend the Municipal Code to reflect that purchasing functions will now be located in the Finance Department. According to the Administration, a centralized function for RFPs is proposed in which Purchasing will serve as the "lead" in RFPs, forming a team that includes the client department(s) that are soliciting services to be provided through the RFP. The CAO will be involved throughout the process itself.

The City Manager, as chief administrative officer, has the authority and responsibility to propose to the City Council any organizational changes that he deems necessary to improve the operation of San Jose City government. According to the City's Director of Finance, relocating Purchasing from the GSD to Finance will better match the financial nature of Purchasing with other similar functions in Finance that are dissimilar to the maintenance nature of GSD functions. However, in our opinion, the organizational placement of Purchasing was not causal to the issues that we identified in our CUSP or Converged Network RFP reports and relocating Purchasing from GSD to Finance will not in and of itself address any of those issues.

In his September 15, 2004 memorandum to the City Council regarding the relocation of Purchasing, the City Manager stated that the Administration had performed a survey and analysis of the organizational placement of the purchasing/procurement functions. The Administration found that "the purchasing/procurement function in a number of cities is often housed in Finance." We verified the information in the Administration's surveys that found that in almost half of the jurisdictions (16 of 34) the procurement function was located within the Finance department. Furthermore, we reviewed authoritative literature such as the ICMA's *Management Policies in Local Government Finance* and found that the procurement function can be located in different parts of the organization including Finance,

Administration, a General Services Department, a separate department, or some other department.

However, we should also note that transferring Purchasing to Finance poses a potential separation of duties issue because the Accounts Payable function is also located in the Finance Department. Accordingly, Finance needs to establish policies and procedures to ensure that the Purchasing function is adequately segregated from the Accounts Payable function.

We recommend that the Finance Department:

Recommendation #1

Establish policies and procedures to ensure that the Purchasing function is adequately segregated from the Accounts Payable function. (Priority 3)

**Restructured
Organizational
Reporting
Relationships**

In a September 13, 2004 memorandum to the City Council, the City Manager described a series of actions to be taken to strengthen the City organization. One of the management reforms described in the memorandum is a restructuring of the relationship between the City Manager’s Office and the City Service Areas (CSA) “to formalize a direct reporting relationship between each CSA and specific Deputy City Manager (DCM).” In an October 8, 2004 memorandum the City Manager further states that “The overarching goal of creating a direct reporting relationship between each CSA and a specific Deputy or Assistant City Manager (ACM) is to produce an organizational culture with clear accountability and lines of communication to the City Manager’s Office...” Moreover, the City Manager’s memorandum states “strengthening reporting relationships of CSA’s to Deputy City Managers is to ensure that policy issues and other important work projects are managed with the active assistance and involvement of the City Manager’s Office, and that potential issues or problems come to my attention at an early stage so that they can be resolved appropriately.”

To implement this reform, the City Manager has modified the reporting relationships to the Deputy City Managers. Specifically, the lead ACM or DCM for the City Service Area will be accountable for CSA performance and for final review and sign-off of procurements, such as RFPs and RFQs. In addition, the ACM or DCMs will now sign-off and be accountable for all City Council memorandums and other

documents related to their CSAs. In the past, the ACM or DCMs were assigned responsibility for reviewing all City Council memorandums for specific City Council meetings. Department directors will continue to report directly to the City Manager, although the DCMs will continue to work closely with the Department directors.

In evaluating the City Manager's changes to the reporting relationships, we acknowledge that the City Charter grants the City Manager the power to "...direct and supervise the administration of all departments, offices, and agencies of the City." Further, according to the City Charter, "The City Manager shall be the chief administrative officer of the City. He or she shall be responsible to the Council for the administration of City affairs placed in his or her charge by or under this Charter." Thus, the City Manager has the authority to establish the appropriate reporting relationships necessary for him to manage the City. According to the City Manager, "the formalization of a direct reporting relationship is a significant change designed to ensure that the City Manager's Office is aware of any significant issues and concerns at the earliest possible point." In our opinion, the City Manager's changes formalize the assignment of DCMs to CSAs and make DCMs more accountable for CSA performance and submittals to the City Council.

We should note that DCMs were involved in the Converged Network RFP process. Accordingly, we are not persuaded that the City Manager's changes, in and of themselves, would have precluded some of the alleged Converged Network RFP communication problems.

**Agreed-On Steps
To Improve
Communication
And Coordination
Between The City
Manager's Office
And The City
Attorney's Office**

On October 29, 2004 a meeting was held involving the management teams of the CAO and CMO. During this meeting the CAO and CMO discussed the following issues:

- The roles of both the CMO and CAO and how those roles relate to their relationships with the Mayor and City Council;
- How both the CMO and CAO can communicate with each other in order to best serve the Mayor and Council and the City/community;
- How both the CMO and CAO can integrate more effectively in order to work toward common goals; and

- How both the CMO and CAO can communicate in ways that foster mutual understanding, collaboration, appreciation, and trust.

The CMO and CAO agreed upon the following specific steps to improve communication:

- Raise issues early and keep top managers informed;
- Be candid, listen well, and talk with people directly about sensitive issues;
- Take advantage of the offices' close proximity in the new City Hall to build better informal relationships; and
- Develop a process to facilitate coordination on media inquiries.

Furthermore, the CMO and CAO agreed upon the following specific steps in order to improve upon the coordination of meetings between both offices:

- Include CAO staff in policy and business decisions by inviting them to participate in CSA meetings and
- Improve the scheduling and preparation process in order to improve the ability for both the CMO and CAO to be more fully-prepared for City Council meetings and Closed Session meetings.

The CMO and CAO both agree that their common goal is to provide better service to the City and Community as well as to the Mayor and City Council. To reach this goal, both the CMO and CAO have agreed to schedule future joint meetings in order to assess the success of the above-mentioned efforts and to identify other actions that would enhance communication and coordination between the two offices.

According to the California League of Cities publication Counsel and Council: A Guide For Building A Productive Employment Relationship (Counsel and Council), "effective communication between city officials, city staff, and the city attorney is critical to the smooth operation of the city. Early and frequent communication about proposed city action can avoid frustration on the part of everyone ..." In addition, Counsel and Council states that the "city attorney must be kept informed of the city's activities," meaning "that the city attorney receives complete information in a prompt manner." In our opinion, the results of the CMO's and CAO's

October 29, 2004 meeting is a good first step toward improving the communication and coordination between the two offices.

Additional City Auditor Recommendation

As shown in Appendix B, there are several additional City Manager reforms which have not been finalized. The City Auditor's Office will continue to work with the Administration on these reforms and once the reforms are finalized we will provide final comment to the City Council. However, during the course of our review we have developed a recommendation for the Administration with respect to Project Staffing.

Project Staffing

To ensure appropriate staffing levels as the City moves forward with future complex and urgent RFPs, the model established for the second Converged Network RFP currently underway, will be utilized where staff capacity and/or experience may be limited. The model established for the second Converged Network RFP brings together staff resources from throughout the organization, onto a single team to assure high levels of expertise beyond the subject area of the purchase to include procurement, RFP writing, and administration support. With regard to the current effort to issue a new RFP, external technical resources will be utilized to offset limited staffing capacity. The criteria for triggering this approach will be specifically identified.

During our previous two procurement reviews, we found that appropriate staffing levels and time constraints were causal to the problems encountered on the CUSP RFP and the Converged Network RFP. To ensure that the appropriate staffing is available when needed, the Administration should develop a detailed project staffing plan for its complex RFP projects. The detailed project staffing plan should identify the required staff, their estimated time commitments, and when they will be needed for the project.

We recommend that the Administration:

Recommendation #2

Develop a detailed project staffing plan for its complex RFP projects that would identify the required staff, their estimated time commitments, and when they will be needed for the project. (Priority 3)

CONCLUSION

In accordance with the City Council's direction, we reviewed and commented on the City Manager's proposed reforms. As of November 24, 2004, the Administration has finalized four reforms related to the PPIG, the relocation of the Purchasing Division, revamping the organizational reporting relationship, and steps to work towards improved communication and coordination between the CMO and CAO. In addition to these reforms, the Administration has proposed a number of other reforms that have not yet been finalized. The City Auditor's Office will continue to monitor and report on the Administration's progress in implementing these reforms. Moreover, we have identified an additional recommendation to assist the administration in implementing these reforms.

RECOMMENDATIONS

We recommend that the Finance Department:

Recommendation #1 **Establish policies and procedures to ensure that the Purchasing function is adequately segregated from the Accounts Payable function. (Priority 3)**

We recommend that the Administration:

Recommendation #2 **Develop a detailed project staffing plan for its complex RFP projects that would identify the required staff, their estimated time commitments, and when they will be needed for the project. (Priority 3)**

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Finding II

City Auditor Response To City Council Questions

At its September 14, 2004 meeting, the City Council requested the City Auditor's Office to answer the following three questions:

1. Who is the City Attorney's client?
2. What is the standard for the City Attorney going up the chain of command?
3. What is the standard for City employees going up the chain of command?

The City Auditor's responses to these questions are:

- It is clear that the City Council is the City Attorney's primary client.
- The California Rules of Professional Conduct and the American Bar Association Model Rules of Professional Conduct have varying standards regarding an attorney's responsibility to report up the chain of command; and
- The City's current Code of Ethics encourages, but does not require, employees to report improper activities.

Who Is The City Attorney's Client?

Based upon our review of available authoritative sources and discussions with the CAO, it is clear that the City Council is the City Attorney's primary client.

To answer "Who is the City Attorney's client and what is the standard for the City Attorney going up the chain of command?" we referred to four recent publications: 1) a League of California Cities (League) publication entitled Counsel and Council: A Guide for Building a Productive Employment Relationship (Counsel and Council); 2) another League publication entitled Practicing Ethics: A Handbook for Municipal Lawyers (Handbook); 3) the California Rules of Professional Conduct (CRPC); and 4) the American Bar Association Model Rules of Professional Conduct. Due to the evolving role of city attorneys, the Counsel and Council publication asks the same question, "Who does the City Attorney represent? Is it a corporate "city" client? Are individual "public officials" clients? Is the "public" the client?"

Is it some combination of all of these?” The publication notes that the California courts have not provided much guidance on this subject. However, it also notes that the courts have made it clear that ethical standards of the profession govern government lawyers. In California, these standards are contained in the CRPC.

The CRPC defines an attorney’s role and responsibilities. Specifically, the CRPC states

“In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.”

Similarly, Counsel and Council states in response to the question, “Who is the client” that “the client is the city—the municipal corporation as a whole.” Further, Counsel and Council, the Handbook, and the CRPC provide clarification as to “who is the city?” Specifically, Counsel and Council states “In general terms, the city attorney takes direction from the majority of the city council.” Under the CRPC “an individual council member or other city official is not the client.” The City Attorney agrees that “the Mayor and City Council are the [city attorney’s] primary client.”

What Is The Standard For The City Attorney Going Up The Chain Of Command?

According to the League’s Handbook, “When a city attorney learns that the conduct of a city official or employee is or may be a violation of law that may be ‘reasonably imputed to the organization’ or is ‘likely to result in substantial injury to the organization,’ State Bar rules expressly authorize, (but do not require), the city attorney to take the matter to the ‘highest internal authority within the organization’.” Specifically, the CRPC reads “If a member acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in the Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code 6068, subdivision (e), the member may take such actions as appear to the member to be in the best lawful interest . . .” to include among others:

“ (1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or

(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.”

In contrast to the CRPC, the ABA Model Rules of Professional Conduct Section 1.13 (b) requires the reporting of such behavior whenever the attorney believes it is in the best interest of the client to do so. According to the Handbook, the State Bar is contemplating a change to also require reporting of such behavior when it is in the best interest of the client to do so.

According to the City Attorney, he and his office consider it to be their duty to report such matters up the chain of command to the City Manager, and if still unresolved, to the City Council by way of a memorandum. There has not been an occurrence in which it was the opinion of the City Attorney that the conduct of a City official or employee was clearly in violation of law and was required to be elevated to the City Council to prevent such violation. However, the City Attorney has informed the City Auditor that it is not at all unusual for the City Attorney to elevate legal concerns to the City Council when the City Attorney believes a particular course of conduct being pursued by City staff creates significant exposure to the City. Such memorandums are generally Attorney/Client communications, which are not discussed in this report, but of which the Council is aware.

According to the City Attorney, there has never been any doubt in his mind that his primary client is and his ultimate responsibility is to the City Council.

The City Attorney did not report any problems with the Converged Network RFP because, according to the City Attorney, his office “was not aware of the level of Cisco involvement in the creation of the Converged Network RFP and believed the standardization issue was resolved in April 2004, based on representations from the IT Director that we had standardized on Cisco routers and switches in 1999, and that the only telephony equipment that would work was the Cisco equipment. We did not know that the standardization issue was not resolved nor that Cisco was heavily involved in the creation

of the RFP until the July audit/investigation. Had these issues been known at the time the RFP was going to Council, it would not have gone forward (we would not have signed off on the Council memo) or Council would have been separately advised of the issue by my Office.”

What Is The Standard For City Employees Going Up The Chain Of Command?

The City's CODE OF ETHICS FOR OFFICIALS AND EMPLOYEES OF THE CITY OF SAN JOSE (Code of Ethics), which was last revised in 1991, addresses employee responsibilities for the reporting of improper activities. Specifically, the Code of Ethics reads as follows: “Persons in the City service are strongly encouraged to fulfill their own moral obligations to the City by disclosing to the extent not expressly prohibited by law, improper governmental activities within their knowledge. No officer or employee of the City shall directly or indirectly use or attempt to use the authority or influence of such officer or employee for the purpose of intimidating, threatening, coercing, commanding, or influencing any person with the intent of interfering with that person's duty to disclose such improper activity.”

In regards to employees' responsibility for reporting improper activities, the City's Code of Ethics allows for, and even encourages employees to report improper activities. However, the policy does not require them to come forward. Our review of other jurisdictions found similar statements of policy on this issue; however, several other jurisdictions' policies establish a higher employee reporting standard than the City's Code of Ethics. For example, the City of Seattle's Municipal Code allows, but does not require employees to report. Specifically, their Municipal Code states “Every City employee shall have the right to report, in good faith and in accordance with this subchapter, to a City official, another government official or a member of the public, information concerning an improper governmental action.”

Similarly, the University of California's Policy on Reporting and Investigating Allegations of Suspected Improper Governmental Activities (Whistleblower Policy) does not require persons to report. Specifically, the University's policy states “Any person may report allegations of suspected improper governmental activities.”

On the other hand, other jurisdictions from different branches of government have implemented policies that require

employees to report improper activities. For instance, in 1990, President George Bush signed Executive Order 12731, which required, as a condition of federal employment, that every federal employee disclose waste, fraud, and abuse of authority within their agencies. Specifically, the Executive Order stated the following: “Public service is a trust requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain.” “Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.”

Other local jurisdictions’ fraud policies require employees to report improper activities. For instance, the City of Toronto Corporate Fraud Policy states “Any employee who has knowledge of an occurrence of irregular conduct, or has reason to suspect that a fraud has occurred, shall immediately notify his/her supervisor. If the employee has reason to believe that the employee’s supervisor may be involved, the employee shall immediately notify their Commissioner and the City Auditor.”

Requiring an employee to disclose improper activities is consistent with the Governmental Accountability Project (GAP) recommendations for effective whistleblowing laws. The GAP, which is a non-profit, nonpartisan public interest law firm that specializes in whistleblower protection, has developed a checklist for effective whistleblower protection laws. With regards to disclosing an illegality, the GAP checklist states that the whistleblower law should contain a provision for a “Duty to disclose an illegality. This provision helps switch the whistleblowing context from a personal initiative for conflict, to a public service duty to bear witness.”

An August 22, 2003 memorandum from Mayor Gonzales recommended “that a Blue Ribbon Task Force be established to review outstanding issues relating to the ethics ordinances...” During December 2004, the Blue Ribbon Task Force (Task Force) is scheduled to review the Code of Ethics. Therefore, due to the varying standards regarding an employee’s duty to report improper activities, we recommend that the San Jose City Council refer to the City’s Task Force for discussion and consideration, amending the Code of Ethics regarding an employee’s duty to report improper activities.

We recommend that the San Jose City Council:

Recommendation #3

Refer to the City's Blue Ribbon Task Force for discussion and consideration, amending the Code of Ethics regarding an employee's duty to report improper activities. (Priority 3)

In response to direction from the City Council, the City has taken steps to inform employees about the options available to them for reporting any inappropriate activities. Specifically, the City has informed employees about "safe spaces" where employees can feel comfortable raising issues and voicing concerns. To assist them in locating these resources, the Office of Employee Relations has updated its intranet website to provide employees with information about the options that are available for reporting concerns, filing complaints, and raising questions. The revised website may be used to obtain information about who to contact regarding various types of issues, including but not limited to harassment and discrimination, workplace violence, ethical issues, violations of City rules or policies, substance abuse, and theft. Additionally, employees can visit the website to obtain a copy of a Memorandum of Agreement to locate a policy in the City Policy Manual, or to review the City's Code of Ethics.

To further foster an environment where employees can feel comfortable raising issues and voicing concerns, the City Auditor's Office is working with the Office of Employee Relations to establish a hotline. We have conducted a survey of the ten largest cities in California and other jurisdictions throughout the United States and Canada. We will be conducting additional research to determine the best program for the City of San Jose. The City Auditor's Office and the Office of Employee Relations will report back to the Rules Committee in January 2005.

CONCLUSION

We have responded to three questions raised by the City Council at their September 14, 2004 meeting and determined that the City Attorney's client is the City Council acting on behalf of the City. In addition, we found that the CRPC and the ABA have varying standards regarding an attorney's responsibility to report up the chain of command. Furthermore, the City's current Code of Ethics encourages but does not require employees to report improper activities.

RECOMMENDATIONS

We recommend that the City Attorney:

Recommendation #3 **Refer to the City’s Blue Ribbon Task Force for discussion and consideration, amending the Code of Ethics regarding an employee’s duty to report improper activities. (Priority 3)**

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