COUNCIL AGENDA: 1/27/09
ITEM: 3.5a

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL

FROM: Councilmember Nora Campos
Councilmember Nancy Pyle
Councilmember Rose Herrera
Councilmember Ash Kalra

SUBJECT: COMPETITION POLICY

DATE: January 9, 2009

Approved Nora Campos Ash Kalra Date 1/9/2009
Rose Herrera Nancy Pyle KS.

RECOMMENDATION:

1. Accept staff's report and direct staff to return to Council in 30 days with recommendations for adding the below proposals to our existing Competition Policy:
   a. Contractor selection:
      Third-tier Review should be expanded to include information regarding any prior examples of breach of contract whether or not the breach produced litigation. A history of failing to comply with labor or environmental law, a history of breaches of contract, or a history of unethical business practices shall be grounds for rejecting a proposal. Submitting false information under third-tier Review shall also be grounds for rejecting a proposal.
   b. Contractor performance:
      RFPs shall include a detailed statement of the performance standard under which the contract will be evaluated and the specific performance level required of the contractor.
   c. Contractor employee standards:
      RFPs will require 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.
   d. Small business assistance:
      The City will establish a payment performance bond program for small business contractors which would allow them to pay a competitive premium to the city and be insured under the city's self-insurance pool.
   e. Pay-to-play regulations:
      No contractor responding to an RFP shall make a contribution to the campaigns of City of San José 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.
   f. Cost comparisons:
      The cost methodology shall specifically 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.
   g. Maintenance of minimum in-house capacity:

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.

h. Minimum number of bidders:

No contract will be issued unless the RFP produces a minimum of three fully-responsive bids.

i. Protection of emergency services:

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.

j. Sunshine requirements / public disclosure:

Public access is to be granted to any record produced or collected under a contract entered into by the City to the same extent as if the record were maintained by the City and subject to the California Public Records Act and San Jose Sunshine policies.

k. Whistleblower protection:

No person shall discriminate or retaliate against an employee of a private contractor because that employee in good faith: engaged in disclosure of information relating to services provided by the contractor pursuant to a privatization contract; advocated on behalf of service recipients with respect to services provided by the contractor; initiated, cooperated or otherwise participated in an investigation or proceeding of any governmental entity relating to the services provided pursuant to a privatization contract.

l. Monitoring of contracts:

Not less than annually, the private contractor shall submit a report for city and public review detailing 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. Submission of false information will constitute grounds for contract termination.

Not less than annually, contractor will submit to city copies of annual financial audits. Contract language will provide the city with reasonable access through representatives of the contractor to facilities, records and employees to determine compliance with these monitoring provisions as well as all terms of the contract.

m. Community responsiveness hearings:

On a semi-annual basis, the Public Safety, Finance, and Strategic Support Committee shall hold a public hearing at which San Jose 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.

2. Ask the City Attorney to return to Council in 30 days with the following:
   a. an analysis indicating any situations (either in current policy or in proposed policies in the Structural Deficit Reduction plan) in which work can be transitioned from city employees to external vendors without requiring the application of the competition policy; and
   b. recommendations on language that would assure the competition policy is universally applied to *all* such transitions.

BACKGROUND:

The City cannot be content to accept a baseline for outsourced work that is below the standards of the community. We have too frequently entered into contracts with little oversight, questionable accountability systems, a lack of community involvement and sub-standard employment standards. The application of tax dollars under such circumstances is not acceptable. The recommendations in this memo will help craft a competition policy that includes open and transparent processes, encourages good quality jobs, and ensures opportunities for public feedback whenever appropriate.

In this difficult fiscal situation, the need for more robust standards for the use of city funds is obvious. We cannot outsource our way out of our current problems, particularly if scarce funds invested in outside vendors are spent in ways that fail to provide the public with clear, enforceable performance benchmarks.

The City's competition policy must provide an important bulwark against unqualified responses to the City's RFP process. It should also be an effective tool for screening out applicants wholly unfit to partner with the City to provide services to the community. Perhaps most importantly, however, by strengthening key components in our competition policy, we can ensure the highest possible return on investment for the City and its residents.

These recommendations derive from a broad assessment of successful policies across the country. The City of Flagstaff, Arizona has robust language providing a much higher level of third-tier review than our City currently employs. Wisconsin's state government establishes strict performance standards, including a justification of need that consists of a description of the services to be performed, a list of any items to be delivered, and complete schedules and timetables. The state of Maryland requires a detailed cost comparison, tracking many metrics, before certain contracts are issued. These and other governmental organizations, responding to problems that have arisen in their own jurisdictions, have developed solutions to the unique challenges of contracted work. We can learn from their examples. And, by adopting the recommendations above, we will ensure that the City does not make the same costly mistakes.