

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING TITLE 27 OF THE SAN JOSE MUNICIPAL CODE AS FOLLOWS: (1) AMENDING SECTIONS 27.04.100, 27.06.070, AND 27.10.560 TO MAKE THE THRESHOLD AMOUNTS FOR MICRO CONTRACTS AND FOR THE DIRECTOR TO AWARD CERTAIN PUBLIC WORKS CONTRACTS SUBJECT TO THE INFLATION ADJUSTMENT PROCESS; (2) AMENDING SECTION 27.06.060 TO EXPAND THE REQUIRED EXPIRATION DATE OF THE PREQUALIFIED CONTRACTOR POOLS USED FOR THE COMPETITIVE WORK ORDER PROCUREMENT PROCESS FROM 12 MONTHS TO 24 MONTHS; (3) AMENDING SECTION 27.06.070 TO ADD ANOTHER BASIS FOR DETERMINING THE AWARD OF ON-CALL CONTRACTS TO REFLECT CURRENT PRACTICE; (4) AMENDING CHAPTERS 27.26 AND 27.28 TO MODIFY CERTAIN COMPENSATION AND DISPUTE RESOLUTION PROVISIONS TO ACCOMMODATE UPDATES TO STANDARD CONSTRUCTION CONTRACT PROVISIONS RELATING TO DELAY, CLAIMS AND COMPENSATION; (5) AMENDING SECTION 27.50.020 TO INCORPORATE THE REQUIREMENTS OF SECTION 27.50.030 AND TO CLARIFY CERTAIN REPORTING REQUIREMENTS TO BETTER SUPPORT OPEN AND TRANSPARENT GOVERNMENT PRACTICES; AND DELETING SECTION 27.50.030

WHEREAS, the San José City Council ("City Council") desires to amend Title 27 as set forth in the staff memorandum dated February 4, 2021; and

WHEREAS, pursuant to the provisions and requirements of the California Environmental Quality Act of 1970, together with related State CEQA Guidelines and Title 21 of the San José Municipal Code (collectively, "CEQA"), the Director of Planning, Building and Code Enforcement has determined that the provisions of this Ordinance do

not constitute a project, under File No. PP17-008 (Code or Policy change that involve no changes in the physical environment); and

WHEREAS, the City Council is the decision-making body for this Ordinance; and

WHEREAS, this City Council has reviewed and considered the "not a project" determination under CEQA prior to taking any approval actions on this Ordinance;

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

SECTION 1. Section 27.04.100 of Chapter 27.04 of Title 27 of the San José Municipal Code is hereby amended to read as follows:

27.04.100 Inflation Adjustments

A. ~~The purpose of this~~This Section ~~is to comply with the requirement of Section 1217(b) of the Charter of the City of San José to sets~~ forth the manner in which the City will adjust the following amounts for inflation: ~~the threshold amount used to define a Major Public Works Contract.~~

1. The threshold amount used to define a Major Public Works Contract, as required by Section 1217(b) of the Charter of the City of San José; and

2. All other amounts in this Title 27 that are to be adjusted for inflation, including the micro contract amount in Section 27.06.080 and the award authority amount in Section 27.10.560.

BA. For the purposes of this Section, "CCI" means one of the following:

1. The Construction Cost Index published by the Engineering News Record for the geographical area that includes the City of San José; or
2. If the Engineering News Record stops publishing CCI, such other index - as is selected by the Director of Public Works - that is publicly-published and measures the cost of construction in the geographical area that includes the City of San José.

CB. Every July 1, the Director of Public Works will adjust the threshold amount used to define a Major Public Works Contract in accordance with the following:

1. The Director of Public Works will determine the percentage increase or decrease in the CCI over the past year using the indices published most immediately preceding each July 1.
2. The Director of Public Works will multiply the threshold amount that is being adjusted by the percentage change calculated above in Section 27.04.100 CB.1, . Except for the threshold amount of micro contracts, the Director will round the resulting number up or down to the nearest ten thousand, and then adjust, if necessary, the threshold amount accordingly. For micro contracts, the Director will round the resulting number up or down to the nearest on one thousand, and then adjust, if necessary, the threshold amount accordingly.

DC. Each July 1, the Director of Public Works will post on the City's web site on a web page designated for such postings the applicable threshold amount used to define a Major Public Works Contract for the upcoming year.

SECTION 2. Section 27.06.060 of Chapter 27.06 of Title 27 of the San José Municipal Code is hereby amended to read as follows:

27.06.060 Competitive Work Orders

As an alternative to the competitive procurement process in Section 27.06.050, the Director may procure Minor Public Works Projects as follows.

- A. The Director will enter into a contract with each member of a pool of Contractors that have been prequalified to perform Minor Public Works Projects involving a defined category of work. The contract will not include work for a specific Minor Public Works Project but will state how Contractors in the pool will compete for work orders to perform specific projects as they arise.

- B. The contract that the Director enters with each prequalified Contractor must include, at a minimum, the following:
 - 1. How Contractors will compete for work orders consistent with the request for quotes process in Section 27.06.050; and

 - 2. The general terms and conditions for performing the Minor Public Works Projects consistent with requirements set forth in 27.06.100.

- C. The amount of each work order issued pursuant to a contract cannot exceed the threshold amount of a Minor Public Works Contract.
- D. The Director will implement a process by which, at least once every twenty four (24)12 months, new Contractors can be prequalified to participate in an already established pool of Contractors.

SECTION 3. Section 27.06.070 of Chapter 27.06 of Title 27 of the San José Municipal Code is hereby amended to read as follows:

27.06.070 On-Call Contracts

- A. ~~For purposes of this provision,~~An "On-Call Contract" ~~means is~~ a City contract in which the specific maintenance or Public Works Project a Contractor will perform, and the compensation for such work, is not in the contract but is in negotiated work orders issued pursuant to the contract as the need for work arises.
- B. The Director will procure On-Call Contracts in one of the following ways:
 - 1. In the same manner as Major Public Works Contracts, except the low bidder will be based on ~~the lowest percentage markup; or either of the following:~~
 - a. The lowest percentage markup or
 - a-b. The lowest bid for an exemplary project when the procurement is based on unit prices as applied to an exemplary project.

2. In the same manner as the City procures Services under Chapter 4.12 of Title 4 of the San José Municipal Code, entitled "Procurement of Goods and Services."

~~C. The Director may use a work order issued pursuant to an On-Call Contract as an alternative means of procuring a Minor Public Works Project.~~

~~D.C.~~ The Director cannot use On-Call Contracts to procure Major Public Works Projects, and no work order issued pursuant to an On-Call Contract can exceed the threshold amount of a Minor Public Works Contract.

SECTION 4. Section 27.06.080 of Chapter 27.06 of Title 27 of the San José Municipal Code is hereby amended to read as follows:

27.06.080 Micro Contracts

Notwithstanding anything to the contrary in this Chapter 27.06, the Director may procure without any competitive process a Minor Public Works Contract that does not exceed \$10,000, as adjusted for inflation pursuant to Section ~~4.04.085~~27.04.100.

SECTION 5. Section 27.10.560 of Chapter 27.10 of Title 27 of the San José Municipal Code is hereby amended to read as follows:

27.10.560 Award Authority - Director

- A. The Director is authorized to award and execute a Major Public Works Contract under the following conditions:

1. The amount of the Major Public Works Contract is \$1,000,000 or less, exclusive of the amount of any bid alternates being awarded; and
 2. There is no unresolved bid protest that conforms to the requirements of Part 6 of this Chapter 27.10.
- B. The Director is authorized to award and execute a Major Public Works Contract under the following conditions:
1. The authority to award bid alternates, even if their cost would cause the Major Public Works Contract to exceed \$1,000,000;
 2. The authority to reject bid alternates; and
 3. The authority to establish a construction contingency in an amount consistent with Section 27.04.050.
- C. The Director's authority under this Section is subject to the limitation that the contract amount, plus the project delivery costs, plus the construction contingency must be less than or equal to the amount appropriated for the project.
- D. The Director's authority under this Section includes the authority to approve the plan or design associated with the Major Public Works Contract the Director awards and executes.
- E. The \$1,000,000 threshold amount in this Section is subject to adjustment for inflation in accordance with Section 27.04.100.

SECTION 6. Chapter 27.26 of Title 27 of the San José Municipal Code is hereby amended to read as follows:

CHAPTER 27.26
Compensation

Part 4
~~Progress Payments~~

27.26.010 Application of Chapter

This Chapter sets forth the requirements for payment of compensation in Public Works Contracts.

27.26.020 Conflict

To the extent they differ, this Chapter's provisions are intended to conflict with California Public Contract Code Sections ~~7100~~, 7101, 7107 and 20104.50, as those sections may be amended, and with any other section(s) of the California Public Contract Code addressing progress payments and retention.

27.26.030 ~~Payment Application~~Standard Contract Provisions

~~The Contractor is responsible for submitting a progress payment application that complies with the requirements of, and includes the information and supporting documents required by, the Public Works Contract.~~

~~A. In accordance Section 27.04.020, entitled "Administrative Implementation", the Director of Public Works will establish standard provisions for Public Works~~

Contracts relating to all aspects of compensation, including progress payments, retention, final payment and appropriate withholdings from any such payments.

B. The standard compensation provisions established by the Director of Public Works must be consistent with the requirements this Chapter.

27.26.040 Release of Claims

~~A. The Director may include requirements in a Public Works Contract making a progress payment contingent on the Contractor providing a release of all claims related to the progress payment.~~

~~B. Requirements for a release under Subsection A of this Section 27.26.040 must allow the Contractor to exclude from the release disputed claim(s) if the Contractor:~~

~~1. States with specificity the basis of each disputed claim;~~

~~2. States the approximate amount of each disputed claim; and~~

~~3. Complies with any other contractual requirements related to asserting such a claim.~~

27.26.50 Deductions

~~A. The Director may include requirements in a Public Works Contract for withholding the following amounts from any progress payment: disputed amounts, retention, any other withholdings or deductions allowed under State law~~

~~(such as for stop payment notices), and any other withholdings the Director determines are appropriate.~~

~~B. The Director must include as part of the progress payment written notice of any amounts withheld and the basis for withholding such amounts.~~

27.26.0460 Timing Progress Payments

~~The City's performance standard for making progress payments as part of a Public Works Contract is 30 Calendar Days after the Director receives a progress payment application that complies with Section 27.26.030 of this Chapter 27.26.~~

~~Public Works Contracts will include standard provisions for progress payments consistent with this Section 27.26.040.~~

~~A. The City will review and act on progress payment requests submitted by a Contractor as soon as is practicable.~~

~~B. The City will endeavor to notify a Contractor on or before seven (7) Calendar Days after receiving a progress payment request if the request is not proper or otherwise does not comply with the requirements of the Public Works Contract. The City's notification will be in writing and will identify any deficiencies in the progress payment request.~~

~~C. The City will endeavor to make progress payments of undisputed amounts within thirty (30) Calendar Days of the Contractor's submission of a properly completed progress payment request that complies with the requirements of the Public Works Contract.~~

D. The City will not be liable for interest or other charges or costs if it fails to meet any of the times set forth in this Section 27.26.040.

E. There is no requirement to include in Public Works Contracts a copy or summary of California Contract Code Section 20104.60.

27.26.0570 Extra Compensation

A. ~~The Director, in the Director's discretion, may include provisions in a~~ Public Works Contract may include standard provisions for the payment of extra compensation to the Contractor for cost reduction changes in the plans and specifications made pursuant to a proposal submitted by the Contractor.

B. Any provisions included pursuant to Subsection A of this Section 27.26.0570 must provide for the Contractor and ~~Director-City~~ to negotiate the amount of extra compensation, provided that the extra compensation cannot exceed ~~50-fifty~~ percent (50%) of the net savings in construction ~~costs as determined by the Director.~~

**Part 2
Retention**

27.26.0680 Retention Amount

A. Public Works Contracts will include appropriate provisions for the withholding of retention from payments made by the City of the Contractor.

~~A.B.~~ In accordance with California Public Contract Code Section 7201, as it may be amended, ~~a~~Public Works Contracts will not require retention to exceed ~~5~~ five percent (5%) of a progress payment or total retention to exceed ~~5~~ five percent (5%) of the contract price unless:

~~A.~~ 1. Before the procurement, the ~~Director~~ City makes a written finding that the improvement being constructed is substantially complex and therefore requires a higher retention than ~~5~~ five percent (5%); and

~~B.~~ 2. The ~~Director~~ City includes in the procurement documents details explaining the basis for the finding and the actual retention amount.

C. In accordance with California Public Contract Code Section 22300, as it may be amended, Public Works Contracts will allow a Contractor to substitute securities for retention or to require the City to pay retention directly to an escrow agent.

D. Subject to the City's right to make withholdings in accordance with Section 27.26.070, Public Works Contracts will require the release of retention to the Contractor following substantial completion of the work but not later than sixty (60) Calendar Days following the acceptance of the completed work by the City:

1. Nothing in this Subsection D precludes a Public Works Contract that expressly provides for the City's acceptance of one or more portions of work before substantial completion of the entire project from expressly providing for the earlier release of retention related to the portion(s) of work accepted.

2. The untimely release of retention will not be subject to interest, attorney's fees or costs.

27.26.090 Decreasing Retention Amount

~~The Director will include reasonable requirements in Public Works Contracts for decreasing the amount of retention based on the progress of construction.~~

27.26.100 Securities/Escrow

~~In accordance with California Public Contract Code Section 22300, as it may be amended, a Public Works Contract will allow a Contractor to substitute securities for retention or to require the City to pay retention directly to an escrow agent.~~

27.26.110 Release of Retention

~~The Director will release retention to the Contractor in accordance with Part 3 of this Chapter 27.26.~~

27.26.120 Interest/Attorney's Fees

~~The interest and attorney's fees and costs provisions in California Public Contract Code Section 7107, as it may be amended, for untimely release of retention are not applicable to Public Works Contracts.~~

Part 3
Proposed Final Accounting

27.26.130 Requirement

~~The Public Works Contract will require the City to provide the Contractor with a proposed final accounting consistent with the requirements of this Part 3.~~

27.26.140 Contents

~~The proposed final accounting will be a proposed final financial statement of any compensation the City owes the Contractor and any moneys the Contractor owes the City. It must address the following financial elements as they exist at the time the accounting is prepared:~~

- ~~A. The original amount of the Public Works Contract;~~
- ~~B. Compensation adjustments;~~
- ~~C. Payments made by the City to the Contractor;~~
- ~~D. Payments owing to the Contractor by the City at the time of the proposed final accounting;~~
- ~~E. The retention balance amount and the amount of retention, if any, that the City will release to the Contractor after any withholdings; and~~
- ~~F. Any withholdings permitted in accordance with Section 27.26.160 of this Chapter 27.26.~~

27.26.150 Timing

~~The Public Works Contract will include time requirements for issuance of the proposed final accounting consistent with the following requirements:~~

~~A. Not any earlier than issuance of a certificate of substantial completion; and~~

~~B. Not any later than promptly following the City's final acceptance of the Public Works Project.~~

27.26.16070 Permissible Withholds

~~Notwithstanding anything to the contrary in this Title 27, the Public Works Contract will include requirements for the withholding of any of the following amounts from any moneys due and owing the Contractor, including retention. Public Works Contracts will include appropriate provisions, consistent with this Section 27.26.070, regarding the City's withholding of amounts from any moneys due and owing the Contractor, including the release of retention, a progress payment and a final payment. Such provisions may include withholding any of the following amounts.~~

~~A. One hundred fifty percent of the cost to complete any unfinished work, including outstanding punch list work, work not approved or accepted in accordance with the plans and specifications, unfinished or unsubmitted as-built drawings, warranties, and other project-related documents, or any other outstanding work required by the Public Works Contract. Up to one hundred and fifty percent (150%) of the estimated cost for the City to complete any unfinished work or any other outstanding Contractor obligations in the Public Works Contract.~~

1. The City will calculate the withholding based on an estimate of the cost for the City to complete unfinished work, including the City's administrative costs of contracting with another entity to perform the work.
 2. If the Contractor completes unfinished work for which the City has withheld money, the City will release to the Contractor the moneys withheld for such work.
- B. Up to the amount of any third-party claim filed against the City based on any damage to property or Person caused by the Contractor. If no third-party claim has been filed, up to one~~One~~ hundred fifty percent (150%) of the estimated amount of any liability to the City for any damage to property or Person caused by the Contractor. Once the City's actual liability is determined, the ~~Director~~City will release to the Contractor any excess moneys withheld for such liability.
- C. ~~Liquidated damages and any other amounts that may be imposed by the Director in accordance with the Public Works Contract.~~The amount of liquidated damages incurred and that will be incurred in the future, based on the City's reasonable estimate. Once the final amount of liquidated damages owed is determined, the City will release any excess amounts withheld.
- D. Sufficient amounts to ~~satisfy pay the claims stated in~~ any outstanding stop payment notices, to provide for the City's reasonable cost of any litigation pursuant to the stop payment notice, and to otherwise comply with any ~~law~~ obligation regarding stop payment notices.
- E. The amount or estimated amount of any penalties, fines, charges, or assessments imposed, or likely to be imposed, by a public entity (including the City) or regulatory agency based on ~~resulting from~~ the Contractor's violation of

any applicable law, statute, regulation, permit or other requirement ~~imposed by the City or a public entity having jurisdiction over the Public Works Project.~~

F. Any credits to which the City is entitled under the Public Works Contract.

G. Up to ~~150~~ one hundred and fifty percent (150%) of the amount involved in any dispute between the City and the Contractor.

H. Any amount to cover the City's nullification, in whole or in part, of a previous payment based on subsequently discovered evidence.

I. The amount of any actual or estimated penalty, fine, assessment or payment deficiency resulting from an actual or alleged labor violation.

G-J. Any other amounts that the Director of Public Works determines should be included.

27.26.170 Response

~~A. The Public Works Contract will provide requirements for the Contractor to submit written objections to the proposed final accounting and a Statement of Claims in accordance with Part 5 of Chapter 27.28.~~

~~B. The Public Works Contract will not require the Contractor to respond to the proposed final accounting any sooner than 30 Calendar Days following the date upon which the City sent the proposed final accounting to the Contractor.~~

Part 4
Final Accounting

27.26.180 Final Accounting

The Public Works Contract will require the City to provide the Contractor with a final accounting consistent with the requirements of this Part 4.

A.26.190 Content

A. The final accounting will be a final financial statement of any compensation the City owes the Contractor and any moneys the Contractor owes the City.

B. The final accounting will include adjustments to the proposed final accounting based on the following:

1. Contractor's completion of any outstanding work since the issuance of the proposed final accounting;
2. City payments since the issuance of the proposed final accounting;
3. Any objection or claims raised by the Contractor that the City determines are meritorious; and
4. Any other financial changes since issuance of the proposed final accounting.

~~C. The final accounting will include the City's response to any objections and Statement of Claims submitted by the Contractor in response to the proposed final accounting.~~

~~**27.26.200 Timing**~~

~~The Public Works Contract will provide requirements for the City to issue the final accounting following a Contractor's response to the proposed final accounting or following the time within which the Contractor should have submitted a response to the proposed final accounting if the Contractor does not timely respond.~~

~~**27.26.210 Undisputed Amounts**~~

~~The Public Works Contract will include requirements for the City to promptly pay any amounts determined by the City in the final accounting to be due the Contractor.~~

~~**27.26.220 Disputes**~~

~~The Public Works Contract will provide for the City and Contractor to resolve any disputes over the final accounting in accordance with Chapter 27.28 of this Title 27.~~

SECTION 7. Chapter 27.28 of Title 27 of the San José Municipal Code is hereby amended to read as follows:

**CHAPTER 27.28
Dispute Resolution**

Part 1 Application

27.28.010 Application of Chapter

This Chapter sets forth the dispute avoidance and resolution requirements for Public Works Contracts.

27.28.020 Alternative Resolution Procedures Conflict

~~Notwithstanding anything to the contrary in this Chapter 27.28, the City and Contractor may at any time mutually agree in writing to forego the dispute resolution procedures in this Chapter and to seek resolution of a dispute through other methods, including litigation. The provisions of this Chapter are intended to conflict with Section 9204 and Article 1.5 of Chapter 1 of Part 3 of the California Public Contract Code (starting with Section 20104), as those Sections may be amended, and with any other Section(s) of the Public Contract Code that address Claims and the resolution of Claims.~~

27.28.030 Conflict Standard Contract Provisions

~~The provisions of this Chapter are intended to conflict with Section 9204 and Article 1.5 of Chapter 1 of Part 3 of the California Public Contract Code (starting with Section 20104), as those sections may be amended, and with any other section(s) of the Public Contract Code that address Claims and the resolution of Claims.~~

~~A. In accordance Section 27.04.020, entitled "Administrative Implementation", the Director of Public Works will establish standard provisions for Public Works Contracts relating to dispute resolution, including provisions relating to the~~

process for a Contractor to submit Claims and a Statement of Claims (as those terms are defined in this Chapter).

B. The standard provisions for dispute resolution established by the Director of Public Works must be consistent with the requirements this Chapter.

27.28.031 Alternative Resolution Procedures

Public Works Contracts will allow the City and Contractor to mutually agree in writing to forego the dispute resolution procedures in this Chapter and to seek resolution of a dispute through other methods, including litigation.

Part 2 Definitions

27.28.040 Definitions

The definitions in this Part 2 govern the application and interpretation of this Chapter.

27.28.050 Claim

"Claim" means a dispute between the City and a Contractor over any of the following:

- A. The time for completing the Public Works Project;
- B. The payment of money or damages arising from work performed by a Contractor or a subcontractor; or

C. The performance of work shown or contemplated in the Public Works Contract ~~;~~
of

~~D. An amount the payment of which is disputed by the City.~~

27.28.060 Dispute Review Board

"Dispute Review Board" means a panel of three (3) independent individuals established to provide non-binding recommendations regarding the resolution of a Claim.

27.28.070 Facilitated Dispute Resolution

"Facilitated Dispute Resolution" means an informal, non-binding dispute resolution process in which the City and a Contractor meet with a trained, neutral facilitator in an effort to reach a mutually agreeable resolution to a Claim.

27.28.080 Notice of Potential Claim

"Notice of Potential Claim" means a written notice provided by a Contractor to the City identifying one or more potential Claims and otherwise meeting the requirements of Part 4 of this Chapter 27.28.

27.28.090 Partnering

A. "Partnering" is the development of team-based relationships between a Contractor and the City in which:

1. Trust and open communications are encouraged and expected from participants;

2. Parties address and resolve issues and problems promptly and at the lowest possible level;
 3. Parties seek to develop solutions that are agreeable and meet the needs of everyone involved;
 4. All parties have identified common goals for the partnerships and at the same time are aware of and respect each other's goals and values; and
 5. Parties seek input from each other in an effort to find better solutions for the problems and issues at hand, thus creating synergy in the relationship that fosters cooperation and improves the productivity of the partnership.
- B. "Partnering" does not denote a legal relationship of agency, partnership, or joint venture between the City and a Contractor.

27.28.100 Statement of Claims

"Statement of Claims" means a written statement provided by a Contractor to the ~~Director~~City asserting one or more Claims and otherwise meeting the requirements of Part 5 of this Chapter 27.28.

Part 3 Partnering

27.28.110 General Practice

The City will incorporate Partnering into the administration of its Public Works Contracts.

27.28.120 Partnering Workshop

- A. For Major Public Works Contracts exceeding one million dollars (\$1,000,000), the City and Contractor will engage in at least one (1) pre-construction workshop to mutually develop a Partnering strategy.
- B. The City and Contractor will engage in the Partnering workshop at a mutually agreed upon time promptly following contract award.

27.28.130 Facilitated Partnering

- A. For Major Public Works Contracts in the amount of ten million dollars (\$10,000,000) or more, an independent facilitator must conduct the pre-construction Partnering workshop required by Section 27.28.120.
- B. For Major Public Works Contracts in the amount of one million dollars (\$1,000,000) or more but less than ten million dollars (\$10,000,000), the Contractor has the option, upon reasonable notice to the City, of having an independent facilitator conduct the pre-construction Partnering workshop required by Section 27.28.120.

27.28.140 Additional Partnering Workshops

The City and Contractor may agree to engage in additional Partnering workshops beyond the one required by Section 27.28.120 and may agree to have an independent facilitator conduct any additional Partnering workshops.

27.28.150 Selecting a Facilitator

The City and Contractor will mutually agree on a facilitator for any Partnering workshop that will have an independent facilitator.

27.28.160 Costs

~~The Director will include appropriate provisions in the~~ Major Public Works Contracts will include appropriate provisions providing for the City and Contractor to share equally the costs of Partnering workshops.

Part 4

Notice of Potential Claim

27.28.170 Early Resolution

The ~~City's intent is that the City and Contractor raise and, if possible, resolve~~ Claims process in Public Works Contracts will focus on identifying and resolving disputes as early as possible.

27.28.180 Notice of Potential Claim

The Contractor must submit to the ~~Director~~ City a Notice of Potential Claim no later than fifteen (15) Calendar Working Days after the event, occurrence or other cause giving rise to a potential Claim.

27.28.190 Content

A Notice of Potential Claim must include at least the following information:

- A. The contractual and factual basis of the potential Claim; and
- B. ~~All documentation reasonably needed for the Director to evaluate the potential Claim, or a statement of why such documentation is not available and when the Contractor expects it to be available.~~ A good faith estimate of the cost and/or time impact to which Contractor believes it may be entitled based on reasonably available information.

27.28.200 Pass-Through Claims

- A. Public Works Contracts will prohibit a Person furnishing labor, materials and/or equipment under contract to the Contractor from submitting ~~cannot submit a potential~~ Claim directly to the City.
- B. The Public Works Contract will allow the Contractor to pass through a ~~potential~~ Claim from a Person furnishing labor, materials and/or equipment under contract to the Contractor only if the Contractor certifies in the Notice of Potential Claim that the Contractor reviewed the ~~potential~~ Claim and reasonably concluded the ~~potential~~ Claim has merit.

27.28.210 Failure to Submit

A Contractor is not entitled to additional compensation or an extension of time based on any Claim for which the Contractor does not submit a ~~proper and timely~~ Notice of

Potential Claim in accordance with the requirements in the Public Works Contract~~Part 4 of this Chapter 27.28.~~

27.28.220 Response Pursuing a Claim

~~The Director will provide a written response to a Notice of Potential Claim stating whether the City accepts all or part of the potential Claim, disagrees with all or part of the potential Claim, or lacks sufficient information to fully evaluate the potential Claim. Public Works Contracts will set forth requirements for a Contractor that has properly submitted a Notice of Claim to pursue that Claim.~~

27.28.230 Additional Dispute Resolution

~~Public Works Contracts may~~ The Director is authorized to include in a Public Works Contract provisions for dispute resolution during the progress of the construction in addition to those contained in this Chapter 27.28.

**Part 5
Statement of Claim**

27.28.240 Statement of Claims

Public Works Contracts will include procedures for ~~the Contractor to~~ will submit to the Director ~~City~~ a Statement of Claims ~~in accordance with Section 27.26.170 of Chapter 27.26.~~

27.28.250 Contents

A Statement of Claims must include at least the following information:

- A. Each Claim, separately stated and identified, that the Contractor is asserting against the City, along with the contractual and factual basis and amount of the Claim;
- B. For each Claim, all documentation reasonably needed for the ~~Director~~City to evaluate and determine the merits of the Claim; and
- C. A Contractor certification that the Claims and all information provided in the Statement of Claims are accurate and true to the best of Contractor's knowledge.

27.28.260 Precluded Claims

A. The Contractor is precluded from ~~pursuing including~~ any of the following in a Statement of Claims:

- 1. A dispute for which the Contractor failed to comply with any requirements in the Public Works Contract for pursuing the Claim, including the submission of submit a Notice of Potential Claim as required by Part 4 of this Chapter 27.28; and
- 4-2. Any pass-through Claim arising from a Person or entity that furnished labor, materials and/or equipment under contract to the Contractor unless the Contractor complies with the certification requirement in Section 27.28.200.

B. The Contractor is precluded from pursuing any of the following:

1. Any dispute not included in the Contractor's Statement of Claims;
and

2. Any dispute included in the Statement of Claims for which the Contractor fails to provide sufficient~~enough~~ documentation for the ~~Director~~City to evaluate and determine ~~the its~~ merits; ~~and~~

~~A. Any pass-through Claim arising from a Person or entity that furnished labor, materials and/or equipment under contract to the Contractor unless the Contractor complies with the certification requirement in Section 27.28.200.~~

27.28.270 Response to Statement of Claims

A. Public Works Contracts will require the City to ~~The Director will~~ respond, in writing, to a Statement of Claims by indicating whether:

1. A Claim, in whole or in part, is disputed and the basis of any such dispute;
or
2. The Contractor provided insufficient information to determine the validity of the Claims.

B. The Public Works Contract will require the City to ~~Director will seek the appropriate authorization to~~ pay the Contractor the amount of any Claims, or portions of Claims, not in dispute.

A.28.280 Dispute Resolution Process

- A. Within fifteen (15) Calendar Days of the Director's-City's response to a Statement of Claims, the Contractor may, in the Contractor's discretion, request a settlement conference in accordance with Part 6 of this Chapter 27.28.

- B. If the Contractor requests a settlement conference and the settlement conference does not result in the resolution of the disputed Claims, the Contractor may, in the Contractor's discretion, request facilitated dispute resolution in accordance with Parts 7 and 8 of this Chapter 27.28.

**Part 6
Settlement Conference**

27.28.290 Settlement Conference

The purpose of a settlement conference is to try informally to resolve disputed Claim(s) in a manner acceptable to both parties.

27.28.300 Timing

The Director-City will conduct a settlement conference promptly following a Contractor's request for the conference.

27.28.310 Documents

- A. The Contractor and Director-City may mutually agree to exchange documents setting forth their respective positions on the disputed Claim(s).

- B. If the Contractor and ~~Director~~City agree to exchange documents, they will mutually agree on a time for the exchange that is sufficiently before the settlement conference to allow all parties to adequately consider the documents.

27.28.320 Procedures

The ~~Director~~City will conduct the settlement conference informally, with both sides being able to present their respective issues.

Part 7 Facilitated Dispute Resolution

27.28.330 Facilitated Dispute Resolution

If the Contractor requests a settlement conference in accordance with Part 6 of this Chapter 27.28 and the settlement conference does not resolve all the Claims, the Contractor may request the parties meet with a trained, neutral facilitator in an effort to reach a mutually agreeable resolution of the disputed Claim(s).

27.28.340 Informal Process

- A. Facilitated dispute resolution will be informal and non-binding, with each party having an opportunity to present its position and supporting information.
- B. Recommendations resulting from facilitated dispute resolution are not admissible in court in any subsequent litigation.

27.28.350 Selection and Scheduling

The ~~Director-City~~ and Contractor will mutually agree on the scheduling of facilitated dispute resolution and the selection of a person to act as the facilitator.

27.28.360 Costs

The ~~Director-Public Works Contract~~ will include appropriate provisions ~~in the Public Works Contract~~ providing for the City and Contractor to share equally the costs of facilitated dispute resolution.

Part 8 Dispute Review Board

27.28.370 Purpose

The purpose of a dispute review board is to provide a non-binding recommendation as to the resolution of a disputed Claim that could not be resolved by means of the settlement conference conducted in accordance with Part 6 of this Chapter 27.28.

27.28.380 Requirement

- A. The ~~Director-City~~ and Contractor will establish a dispute review board before construction starts and have the board available through construction if the Major Public Works Contract is in the amount of ten million dollars (\$10,000,000) or more, and the Director determines the work is sufficiently complex to warrant the cost of such a board.

- B. If the Major Public Works Contract is in the amount of one million dollars (\$1,000,000) or more but less than ten million dollars (\$10,000,000), the Director-City or Contractor may request, at any time before project completion, the establishment of a dispute review board.

27.28.390 Selection of Board Members

The members of a dispute review board will be selected as follows: the Director-City will select a member, the Contractor will select a member and those two (2) members will select a third member.

27.28.400 Board Member Impartiality

No member serving on a dispute review board can have any relationship with the City, Contractor or the construction project that would prevent that member from performing his or her duties in an impartial and fair manner.

27.28.410 Non-Binding

- A. The dispute review board is an advisory body that issues non-binding recommendations.
- B. The recommendations of the dispute review board are not admissible in court in any subsequent litigation.

27.28.420 Costs

The ~~Director-Major Public Works Contract~~ will include appropriate provisions ~~in the Major Public Works Contract~~ providing for the City and Contractor to share equally all costs associated with a dispute review board.

SECTION 8. Section 27.50.020 of Chapter 27.50 of Title 27 of the San José Municipal Code is hereby amended to read as follows:

27.50.020 Director's Report Reporting Requirement

~~The Director will provide to the City Manager on at least a bi-annual basis, as specified by the City Manager, a report setting forth all Public Works Contracts, work orders, change orders, permits and other related documents needed to implement a Public Works Project that the Director executed pursuant to this Title 27 since the last report.~~

- A. The City Manager will prepare a bi-annual report consistent with the requirements of this Section 27.50.020. The City Manager will make the report public on the City's official website and provide the Council with a copy of the report.
- B. Each department that procured or performed a Public Works Project meeting both of the following requirements must bi-annually provide to the City Manager the report described in Subsection C.
 1. The procurement or performance of the Public Works Project involved the exercise of authority granted by this Title 27 and the exercise of such authority was not approved by the City Council.

2. The procurement or performance of the Public Works Project occurred during the period covered by the bi-annual report.

C. The bi-annual report must include the following information about each Public Works Project.

1. The name of the project, and the name of the Public Works Contract, work order or other document authorizing the work.

2. A general description of the scope of work.

3. The amounts paid and/or payable by the City.

4. Any change orders executed, including the amount paid and/or payable by the City or the amount of any credit, the scope of the change order and the reason for the change order.

5. Any permits and other documents relating to the work that were approved or executed pursuant to this Title 27.

6. For a Public Works Project performed by City employees, the written determination required by Section 27.48.030 that the cost of constructing the project, excluding the cost of materials, supplies and equipment, is not more than the threshold amount of a Minor Public Works Contract.

SECTION 9. Section 27.50.030 of Chapter 27.50 of Title 27 of the San José Municipal Code is hereby repealed.

ADOPTED this _____ day of _____, 2021, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

SAM LICCARDO
Mayor

ATTEST:

TONI TABER, CMC
City Clerk