

DRAFT

ORDINANCE NO.

**AN UNCODIFIED ORDINANCE OF THE CITY OF
SAN JOSE AUTHORIZING USE OF ALTERNATIVE
PROJECT DELIVERY METHODS AND ESTABLISHING
CERTAIN REQUIREMENTS FOR PROCUREMENTS AND
CONTRACTS RELATED TO THE PROPOSED AIRPORT
TRANSIT CONNECTOR PROJECT**

WHEREAS, the City of San José (the "City") is proposing to construct a transit solution referred to as the Airport Transit Connector Project (the "AC Project") that will connect passengers directly from the Diridon Station to Terminal B of the San José International Airport ("SJC") and that may include an intra-terminal connection; and

WHEREAS, the proposed AC Project is expected to increase local mobility options and transit ridership, reduce vehicle miles traveled and greenhouse gas emissions, and improve transit congestion in the area as well as air quality throughout the region; and

WHEREAS, Section 1217(c)(2) of the City Charter provides that, as a procurement alternative for Major Public Works Contracts over \$1,000,000, the City may negotiate and award a Design-Build Contract without formal public bidding if the City Council finds that such a contract would save money or result in faster project completion, and the process for competitively selecting a design-build contractor, and for negotiating and awarding a Design-Build Contract, will be set forth by ordinance of the City Council; and

WHEREAS, Chapter 27.14 of the San Jose Municipal Code sets forth the requirements for procuring, negotiating and awarding a Design-Build Contract under Section 1217(c)(2) of the City Charter (collectively, the "Requirements"); and

WHEREAS, the purpose of this Ordinance is to provide an additional method pursuant to Charter Section 1217(c)(2) to authorize the use of an alternative method for procuring

contracts between the City and any successful contractors for pre-construction services, design, construction, finance, operations and maintenance, and related services for the proposed AC Project; and

WHEREAS, because the proposed AC Project is highly specialized and technically complex, it is advisable for the City to have the flexibility to use alternative procurement, contracting and financing methods in order to achieve on-time completion, achieve lifecycle cost efficiencies and leverage innovation; and

WHEREAS, the City may utilize contractor-provided financing as part of its use of alternative project delivery methods to, among other things, facilitate cost and risk sharing between the City and its private partners, and promote high quality performance; and

WHEREAS, the City Council desires to authorize the City to use alternative methods to procure and contract for the proposed AC Project if such project is otherwise approved to proceed; and

WHEREAS, the use of this alternative method to procure and contract is restricted to the proposed AC Project and, therefore, not a general ordinance in force required to be codified pursuant to Section 606 of the City Charter; 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. PP File No. PP17-008, General Procedure & Policy Making resulting in no changes to the physical environment; and

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

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

WHEREAS, during the preconstruction period, the City will conduct environmental review under CEQA and may be required to conduct environmental review in accordance with the National Environmental Policy Act ("NEPA"); and

WHEREAS, this Ordinance shall not be construed as an approval of the AC Project. Rather, this Ordinance simply puts in place a procedure to continue to develop, study, and design the AC Project together with a private developer, and, if the AC Project is approved following environmental review, to implement and deliver the AC Project. No approval of the AC Project will occur until all applicable environmental approvals are obtained. The AC Project will continue to develop as further studies are conducted, and the City retains absolute discretion to (a) require modifications to the proposed AC Project and/or implementation of specific measures to mitigate significant adverse environmental impacts; (b) select feasible alternatives that avoid significant adverse environmental impacts of the proposed AC Project, including the "no project" alternative; (c) reject all or part of the proposed AC Project if the economic and social benefits of the proposed AC Project do not outweigh otherwise unavoidable significant adverse environmental impacts of the AC Project; (d) approve the proposed AC Project upon a finding that the economic and social benefits of the proposed AC Project outweigh otherwise unavoidable significant adverse environmental impact of the proposed AC Project; and (e) deny the proposed AC Project;

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

SECTION 1. General Findings. The City Council hereby finds that the procedures to procure, negotiate and award a contract for the proposed AC Project described in this Ordinance are authorized under Section 1217(c)(2) of the Charter of the City of San José.

SECTION 2. Exemption from the Requirements. Based on the foregoing, the City Council hereby exempts from the Requirements any procurements and contracts that may be required in connection with the AC Project, provided that the procedures and requirements set forth herein are implemented with respect to such procurements and contracts.

SECTION 3. Title

This Ordinance shall be known as the “Airport Transit Connector Procurement Ordinance.”

SECTION 4. Airport Transit Connector Project

In 2000, Santa Clara County passed Measure A, which established a thirty (30)-year half-cent sales tax to support transit projects which included the Airport Connector. Additionally, the Metropolitan Transportation Commission adopted the Plan Bay Area 2050 which identifies the AC Project as a priority project to further advance regional climate and resiliency goals. The City of San José seeks to enhance local transportation infrastructure to advance the City's climate and resiliency goals and accommodate continued growth.

The AC Project is a transit solution that would operate between SJC Terminal B and Diridon Station and other commercial corridors located within City limits. The AC

Project may include an optional segment connecting SJC Terminal B with Terminal A and parking facilities at SJC. The AC Project should advance local and regional sustainability goals and create a scalable transit service that enables future linkage of major sites within the City and other major sites in the Bay Area. The AC Project would integrate with the urban environment and catalyze human-scale activation in the network by attracting users to walk, bike, and use transit to access stops throughout the network.

SECTION 5. Requirements

Contracts between the City and the successful contractors for pre-construction development services, design, construction, finance, operations and maintenance, and related services for the AC Project may be procured in accordance with this Ordinance if:

- A. The Major Public Works Contract exceeds \$1,000,000; and
- B. At or before contract award, the City Council makes a finding that the delivery of the project by design-build would save money or result in faster completion.

SECTION 6. Procurement Method

- A. The procurement process for the AC Project will progress as follows:
 - 1. The City will prepare and issue a request for proposals. The request for proposals will include, but need not be limited to, the following elements:
 - a. The criteria the City will evaluate when reviewing submittals;

- b. The relative weight of such criteria in the evaluation process; and
 - c. The factors the City will consider in making its award determination for one or more proposers.
- 2. The procurement process may include a request for clarification process, pre-proposal meetings and/or interviews with individual proposers that conflicts with the procurement and contract process protocol found in City Council Resolution No. 77135. In such an instance, the process will be narrowly constructed to meet the specific needs of this procurement and will be clearly explained in the request for proposals.
- 3. The proposals will be evaluated by using only the criteria and selection procedures specifically identified in the request for proposals, which will include, but need not be limited to, experience and qualifications, review and assessment of design and architectural, technical and financial components, previews of proposer solutions, revised proposals, contract price, and best and final offers.
- 4. The award of the contract for development and/or delivery of the AC Project will be made to the responsible party whose proposal is determined by the City to have offered the best value to the public based on the criteria identified in the request for proposals.
- 5. The City reserves the right to request proposal revisions and hold discussions and negotiations with responsive proposers and will specify in the request for proposals applicable procedures to ensure that any discussions and negotiations are conducted in good faith.

- B. In connection with any procurement or contract under this Ordinance, the City shall have discretion to utilize some or all of its standard procurement procedures and policies.
- C. Any procurement and award of any contract pursuant to this Ordinance will comply with applicable law and the City shall implement such procurement policies or procedures as required under applicable law.

SECTION 7. Project Delivery Method

With respect to any contract procured under this Ordinance, the City may utilize alternative project delivery methods, including, but not limited to, design-build, design-build-maintain, design-build-finance-maintain, design-build-operate-maintain, design-build-finance-operate-maintain, build-operate-transfer, concession arrangements, predevelopment agreements or other early contractor involvement models, early works agreements, and other forms of alternative project delivery, or any combination of any such methods.

SECTION 8. Contracting

- A. Except to the extent otherwise required under applicable law, the City may include in all contracts entered into under this Ordinance any provision that the City determines is necessary or appropriate. Examples of such provisions include, but are not limited to, the following:
 - 1. Provisions addressing the allocation and management of project risks including without limitation design, construction, geotechnical, delay or schedule, permitting, governmental approvals, change of law, change in

utility costs, operations and maintenance, force majeure, inflation and financing risks.

2. During the preconstruction services period or predevelopment phase, provisions providing for the conduct of feasibility and validation studies, preliminary engineering and other predevelopment services and for the negotiation, agreement and execution by the contractor of an agreement to develop the AC Project.
3. Provisions providing that the City may pay the contractor by making periodic payments to the contractor through the term of the contract or any portion thereof. Such payments may include: performance-based availability payments, milestone, progress, minimum revenue guarantee payments, substantial completion or final acceptance payments; payments for costs related to design, construction, financing, operations and maintenance; minimum revenue guarantees; payments for costs incurred from utilities, land acquisition, and any other project development costs; and a rate of return on the contractor's investment the City determines to be appropriate.
4. Provisions providing that the contractor shall be entitled to charge and retain fares from passengers utilizing the AC Project. Such provisions may include minimum revenue guarantees from the City, sharing of revenue by the contractor above a certain threshold and/or procedures for the setting of fares.
5. Provisions providing that the City may make downward adjustments to payments owing to the contractor where the contractor fails to achieve

performance specifications or otherwise fails to comply with its obligations under the contract.

6. Provisions requiring that either the City or the contractor provide the utilities required during construction and operation of the AC Project.
7. Dispute resolution provisions pursuant to Chapter 27.28 of the San José Municipal Code.
8. Provisions addressing the City's requirements for operations, maintenance, renewal, rehabilitation, reequipping, use and change in use of the AC Project, and provisions allocating performance obligations between the contractor and the City with respect to such requirements.
9. Provisions addressing flexibility to expand the AC Project beyond Diridon Station to SJC.
10. Provisions providing for compensation to the contractor upon early termination of the contract, including, but not limited to, termination by the City for its convenience, or termination by default of either the City or the contractor. Compensation on termination amounts and formulas shall be as determined by the City in its discretion.
11. Provisions specifying events of default and remedies available to the contractor and the City.
12. Provisions setting forth the technical standards and specifications with which the contractor must comply, including, but not limited to, performance standards and output specifications, together with provisions

allowing the City to enforce, amend or waive such technical standards and specifications.

13. Provisions requiring that the contractor obtain and maintain insurance with such coverages and deductibles as determined by the City to be appropriate in its discretion.
 14. Provisions regarding the maintenance and auditing of the contractor's books and records.
 15. Provisions requiring the contractor to waive certain rights and benefits conferred by Public Contract Code Section 7104, to the extent that it may be inconsistent with any provision of the contract.
 16. Any other provisions required under applicable local, State or federal law.
- B. Any contract awarded pursuant to this Ordinance will comply with applicable law.

SECTION 9. Award Authority

The authority to award a contract procured in accordance with this Ordinance is reserved to Council.

SECTION 10. Funding and Financing

- A. The City may utilize any lawful source of funding and financing, or combination thereof, for the development, design, construction, operations, maintenance, and renewal of the AC Project. The City is hereby authorized to do all or any of the following:

1. Require the contractor to arrange for all or a portion of the financing required for the AC Project and the City may elect in its discretion to participate with the contractor in any gains realized through the refinancing of the AC Project, as determined by the City in its discretion.
2. Pursue and apply for, and accept from the United States, any state, or any of their respective agencies, or from any regional or local governmental entity, such funds and credit assistance as are available to it for carrying out the purposes of this Ordinance, whether the funds are made available by grant, loan, guaranty, line of credit or other financing arrangement, and pursue and apply for such funds and credit assistance to the extent necessary to support the contractor's use of such mechanisms to arrange for all or a portion of the financing required for the AC Project.
3. Enter into such arrangements and other agreements with the United States, any state, or any of their respective agencies, or with any state, regional or local governmental entity, as may be necessary, proper, and convenient for carrying out the purposes of this Ordinance.
4. Accept from any source any grant, donation, gift, pledge, or other form of conveyance of land, money, other real or personal property, or other valuable thing made to the City for carrying out the purposes of this Ordinance.
5. Impose and collect fees, rents and charges from users of the AC Project, either directly or through a contractor, as well as other project-generated revenue streams (including, but not limited to, advertising, corporate sponsorships, retail concessions, joint use, joint development, tax-

increment and land value capture, and telecommunications and fiber optic technology). The City or contractor, as applicable, may increase such fees, rents and charges and use lawful measures to enforce such fees, rents and charges and/or authorize a contractor or another public entity to impose, collect, increase and enforce such fees, rents and charges to the same extent as available to the City. The use, application and sharing of such fees, rents, charges and revenue streams by the City or the contractor shall be as determined by the City in its discretion.

6. Consider and adopt other alternative strategies for increasing AC Project revenues to reduce long term AC Project costs payable by City or its assignee.
7. Utilize any other lawful source of funding and financing, or combination thereof, that the City determines is necessary or appropriate.
8. In any agreement for the AC Project which involves the use of any funds furnished, given, or loaned by the government of the United States or the State of California, all laws, rules, and regulations of the government of the United States or the State of California or of any of their agencies, relative to the performance of the services under the agreement and the conditions under which the services are to be performed, shall prevail over the requirements of this Ordinance when such laws, rules, or regulations are in conflict with or otherwise preempt the requirements of this Ordinance.

SECTION 11. Prohibited Conflicts of Interest and Improper Conduct

- A. A Person that substantially participated in the preparation of the procurement documents for a Design-Build Contract cannot be part of any responding Person or team.
- B. The prohibition in Subsection A of this Section 11 does not apply to a Person that prepared a foundational report or study, such as a master plan, soils report, or environmental clearance document, that is used by another Person to prepare the design requirements for a Design-Build Contract.
- C. In addition to the prohibition in Subsection A of this Section 11, the City has chosen to adopt federal rules regarding organizational conflicts of interest for any procurement pursuant to this Ordinance. Under the federal rules, a prohibited conflict of interest exists when, because of other activities, relationships, or contracts, a firm is or may be unable to render impartial, objective assistance or advice to the City or a firm's objectivity in performing the contract work is or might be otherwise impaired; a firm would receive an unfair competitive advantage; or, a firm has been involved in establishing the ground rules for the procurement, resulting in biased ground rules (whether actual or perceived). Failure to comply with the federal requirements in any respect, including the failure to disclose any actual, perceived or potential conflict of interest, will constitute a basis for the City to disqualify a contractor from participation in any solicitation.

SECTION 12. Single Proposal

- A. No Person, team, or member of such Person or team can participate in the submission of more than one (1) proposal.

- B. Nothing herein prohibits subcontractors from participating as a subcontractor in more than one (1) proposal.

SECTION 13. Permissible Communications

- A. Until the Director makes a recommendation to the Council regarding award of a Contract procured under this Ordinance, communications regarding the procurement must be to the City employee(s) designated in the solicitation to receive communications.
- B. Subsection A of this Section 13 does not prohibit communicating with the Council or any other Person in the City regarding an alleged failure of a City employee to follow the procurement procedures, or any alleged misconduct or impropriety of a City employee related to the procurement.

SECTION 14. Disqualification

The City will disqualify from further consideration a Person or team that violates Sections 11 through 13 of this Ordinance.

PASSED FOR PUBLICATION of title this _____ day of _____, 2022, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

SAM LICCARDO
Mayor

ATTEST:

TONI J. TABER, CMC
City Clerk