



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Lee Wilcox
Matt Cano

**SUBJECT: POTENTIAL CITY CHARTER
AMENDMENTS**

DATE: June 14, 2018

Approved

Date

6/14/18

RECOMMENDATION

- (a) Review the results of a survey regarding a potential ballot measure to modernize the City Charter.
- (b) Direct the City Manager and City Attorney to draft ballot language and return to Council no later than August 7, 2018 for consideration of placing on the November 6, 2018 ballot a measure modernizing the City Charter with respect to removing the ability of the City Council to set their own salaries and limiting City Council salary increases to annual adjustments accounting only for inflation; streamlining construction contract procurement and updating the bidding process; and aligning the City Charter with state law regarding competing measures in Municipal Elections.

OUTCOME

If the City Council approves this item, the Administration will continue developing a ballot measure for the November 2018 citywide ballot that would modernize the City Charter with respect to Council salary setting, the City's construction contract procurement process, and placing competing measures on the City ballot.

BACKGROUND

Since 1965, the City of San José has been a charter city in accordance with state law. The City Charter functions as the City's constitution, determining how City government is organized. The City Charter may only be amended by a vote of the people of San José. Over the past year, Council has directed the City Manager and City Attorney to analyze several potential amendments to modernize the City Charter and to bring those amendments back to Council to consider placing the amendments on the November 6, 2018 citywide ballot. Proposed amendments included:

- Removing the Mayor and City Council from the process of setting their own salaries;
- Updating procurement processes and exploring the use of Best-Value Contracting; and
- Reviewing the City Charter to determine if there were other areas that are out-of-date or require “clean-up” or clarification.

In addition to conducting legal and policy analysis, the Administration included survey questions regarding Charter amendments in the two telephone surveys conducted to gauge voter interest in potential propositions on the November 6, 2018 citywide ballot. The goal was to better understand support for the individual elements of the proposed Charter amendment, and whether it would be feasible to join them collectively in an omnibus measure modernizing the City Charter.

The City’s survey partner, Fairbank, Maslin, Maullin, Metz & Associates (FM3), conducted the first telephone survey¹ with 781 San José voters who are likely to participate in the November 6, 2018 general election from April 26, 2018 through May 3, 2018. The second survey was conducted from June 2, 2018 through June 11, 2018 to assess voter willingness to support the potential omnibus Charter Amendment Ballot Measure. Such an amendment requires simple majority approval to pass.

This memorandum provides an update regarding the Administration’s efforts, including survey results, and recommendations for a Charter modernization item that could be placed on the November 6, 2018 citywide ballot.

ANALYSIS

Removing the Mayor and City Council from the Salary Setting Process

Sections 407 and 1001.1 of the San José City Charter (Charter) require that every two years the Salary Setting Commission, which is appointed by the Civil Service Commission, review and recommend appropriate compensation levels for the Mayor and City Council. The Commission forwards its recommendations to the Mayor and City Council, who make the final decision on whether to adopt the Salary Setting Commission’s recommendation for the Mayor’s and Councilmembers’ monthly salaries and benefits, or adopt some lesser amount.

On October 17, 2017, the City Council directed the City Attorney and City Manager to draft a Charter amendment that would remove the Mayor and Council from the decision-making process on approving their own salaries. The Council considered different policy alternatives that the Salary Setting Commission had put forward and ultimately selected the following alternative: Commencing July 1, 2019, the salaries of the Mayor and Council then in effect would be established as the base salary for purposes of future increases. The following year, on July 1, 2020 and annually on July 1 thereafter, the compensation of the Mayor and Council would

¹ The telephone survey was conducted in English, Spanish, and Vietnamese from April 26-May 3, 2018, and 781 registered voters were interviewed. The margin of sampling error is 3.6 percent.

automatically increase by a percentage equal to the percentage increase in the preceding April's 12-month rolling average of the Consumer Price Index-Urban (CPI-U), or successor index, for San Francisco-Oakland-San José, as determined by the United States Department of Labor, Bureau of Consumers, with the adjustment not exceeding 5% per year, nor resulting in a compensation decrease.

In the first survey, 74 percent of respondents said they would support a Charter amendment to remove the City Council from the process of setting their own salaries, freeze salaries to January 1, 2019, and cap annual salary adjustments to account for inflation.

Updating Procurement Processes

Existing Public Works Contracting Rules

The San José City Charter defines a public works project as any project for the construction, erection, improvement or demolition of any public building, street, bridge, sewer, water system, fire alarm system, electrical traffic control system, street lighting system, parking lot, park, or playground. The term does not include maintenance of any public works project or repairs incidental to such maintenance.

The manner of procuring a public works project depends on the cost of the project.

The San José City Charter provides strict rules for procuring public works projects costing more than \$100,000. Such projects must be procured through a formal bidding process and be awarded to the "lowest responsible bidder." The lowest responsible bidder is the bidder that submits the lowest bid, and that has the trustworthiness, quality, fitness and capacity to satisfactorily perform the requirements of the proposed work. If the City determines a bidder is not responsible, then it must reject the bid. Rejecting a bid based on "responsibility" requires the City to give the bidder notice and the evidence upon which the City is basing its determination of "non-responsibility." It also requires the City to provide the opportunity for the bidder to submit evidence that it is responsible.

The formal bidding process requires significant documentation and staff involvement across many departments, including the Public Works procurement team, the Public Works Director's Office, the City Attorney's Office and the City Clerk's Office. The Charter's formal bidding process is rigid and requires publication of a request for bids in a newspaper of general circulation at least 10 days before the bid opening date.

The San José City Charter provides an alternative procurement process for public works projects costing more than \$5 million. For such projects, the City may negotiate and award a "design-build" contract – without having to award the contract to the lowest responsible bidder – if the City Council determines the "design-build" process would save money or result in faster project completion.

Projects costing less than \$100,000 are not governed by the Charter. For projects costing less than \$100,000, San José Municipal Code Section 14.04.500 allows for an informal bidding process to be used. The Director of Public Works must attempt to “solicit informal bids” from at least three “responsible” contractors and award the contract to the lowest bidder. This Minor Public Works process can be accomplished by a project manager and does not require the multiple layers of procurement involved in the formal bidding process. Importantly, the manner of procuring minor public works contracts can be modified by ordinance. As noted above, the Minor Public Works process is governed by the Municipal Code so, while the process does allow for informal bids, there are still appropriate checks and balance in place to ensure that competitive bids are received and contractors follow important City policies such as payment of prevailing wage.

In accordance with the Charter, projects over \$100,000 must go through a formal bidding process. This dollar threshold was increased from \$50,000 to \$100,000 when voters approved a November 2000 Charter Amendment. That amendment did not include an annual cost escalator to keep pace with inflation.

Best Value Contracting

Best Value procurement is a process for construction services whereby a contractor is selected on the basis of objective criteria to determine the best combination of price and qualifications. Criteria can include, but not be limited to, the following:

- Safety Record
- Past performance
- Labor compliance
- Demonstrated management competence
- Financial condition
- Relevant experience
- Project bid price
- Project Lifecycle costs (if a technical solution is sought along with price)

In California, the most relevant examples of Best Value contracting are within the University of California (UC) system and in the City and County of San Francisco, who utilizes the UC Guidelines. In both San Francisco and the University of California, Best Value contracting is considered a “tool in the toolbox” and not the exclusive method of procuring a contract.

The basic process for Best Value contracting is as follows:

- Step No. 1: The contract is publicly bid in much the same manner as required by the current Charter for public works projects costing more than \$100,000;
- Step No. 2: The bidder is evaluated based on certain, project-related qualifications, and the bidder is given a qualifications score; and

- Step No. 3: Using a fixed formula, the qualifications score is combined with the bid amount submitted by the bidder to determine the best-value bidder to whom the contract is awarded.

Importantly, the qualifications score must be determined without the raters knowing the bid amounts that each bidder submitted. The UC system determines a bidder's qualifications score as part of a prequalification process that precedes the public bid. San Francisco incorporates the "qualifications-scoring" process into the public bid. However, the bid amounts remain in unopened, sealed envelopes until the "qualifications-scoring" process has been completed.

In San Francisco, Best Value contracting may be used on any project with construction value anticipated to be over \$1.5 million. In the University of California system, it is allowed for projects over \$1 million. San Francisco uses Best Value contracting on specific projects that are time sensitive and must be completed by the target completion date.

Implemented in the above manner, Best Value contracting maintains the objectivity of the traditional "low bid" procurement process, and continues to use pricing as a significant factor in determining which bidder is awarded the contract, while more thoroughly allowing a bidder's qualifications to be taken into account.

According to staff's research, Best Value contracting provides jurisdictions with a contracting tool that can be utilized for more complicated or unique construction projects. While the City has had fewer such projects in recent years, if the City were to move forward with a general obligation bond, there might be several projects where the Best Value methodology could provide an additional tool for effectively bidding unique projects. This contracting option would be in addition to the traditional "low bid" and the "design build" options.

The City Council's expressed desire to add an additional tool stems from a few negative experiences in the past with contractors who met the minimum qualifications for bidding on a project (or met the "responsibleness" criteria) and provided the lowest bid, yet were unable to successfully execute on the project. For example, in May 2011, the City awarded a contract for the construction of the Environmental Innovation Center to the lowest responsible bidder who ended up having staff walk off the job and ultimately filed for bankruptcy. This was a complex and unique project, in which the City might have benefited from the Best Value procurement process.

One disadvantage of Best Value contracting is that project delivery may take more time because the City must conduct an additional evaluation process to determine each bidder's qualification score. The process also requires more staff time on the front end to prepare the bid documents that will include the evaluation process and scoring. Additionally, the qualifications and scoring process could increase the chances of contractor protests.

In short, Best Value contracting provides an objective way to combine price and qualifications to determine the low bidder/best value bidder. Despite some disadvantages, staff from San Francisco indicates that Best Value contracting has increased the likelihood of receiving more responsive bids from higher caliber bidders, which in turn, results in a smooth construction process that adheres to the project schedule and minimizes disputes. Accordingly, it can be argued that this approach saves time and money at the back end when contractors are more reliable and can be vetted more thoroughly, particularly with complicated projects.

Increasing the “Minor Public Works Contract” limit

Currently, any project valued at more than \$100,000 has to be formally bid and awarded to the lowest responsible bidder. The Municipal Code defines anything under \$100,000 as a “Minor Public Works Contract.” As previously mentioned, this number hasn’t changed since November 2000 and is not adjusted annually based on inflation. The City of San José is part of a consortium of large California Cities who share best practices and benchmark data on delivery of public works projects. The below table provides the threshold at which each of these San Francisco and San Diego defines minor public works contracts:

City	Threshold	Comments
San Francisco	\$600,000	Defined by Municipal Code and increased by CPI
San Diego	\$500,000	Defined by Municipal Code

Projects that were defined as minor decades ago (such as replacing playground equipment in a neighborhood park) now cost well over \$100,000. Staff analysis has concluded that increasing the current threshold will save time and money on completing capital projects as well as make it easier for small and local businesses to participate in Public Works projects.

Following are key benefits of increasing this dollar amount:

- On average, the formal “lowest responsible bidder” process is estimated to save a project between one to three months’ time, reducing project costs and speeding up project delivery;
- According to the 2018 City of San José Small Business Opportunity and Inclusion Project consultant report (to be presented to the Community and Economic Development Committee on June 25, 2018), increasing this dollar threshold will enhance opportunities for small businesses and preference can be provided for local and small businesses;
- Allowing future changes to the procurement process for minor public works to be enacted by ordinance instead of charter amendment will increase flexibility and allow the City to respond to a changing marketplace; and

- The procurement process will be streamlined for a significant number of City contracts while still maintaining price competition.

Increasing this dollar threshold in the City Charter would allow for increased efficiency, cost savings, and local/small business participation in City Public Works projects.

Additionally, some additional Charter changes under consideration for Public Works projects include:

- The City Charter requires that bids be published in a “newspaper of general circulation in the City.” Given the advent of technology to notify bidders, removing the requirement to advertise in a newspaper would create efficiencies in the process and allow additional time to be spent on more successful avenues to generate bid interest, as well as saving money currently spent on such advertisements.
- The current Charter threshold for using the design-build procurement option is \$5 million. State law now allows for this option to be used for projects valued at \$1 million or more. Amending the Charter to align with State law would reduce the design-build threshold from \$5 million to \$1 million. This change would provide the City with an additional tool that can be used for complicated projects between \$1 million and \$5 million. A good recent example of a project that would likely have benefited from this was the Lake Cunningham Bike Park. With a construction contract value at \$2.2 million, design build was not an option. However, this was a very unique project and it would likely have benefited from a process where the designer and the builder were the same entity so design changes could have more readily occurred during the construction process.

In conclusion, the Administration recommends placing the following Charter amendments related to Public Works procurement on the November 6, 2018 citywide ballot:

- 1) Minor project limit: Increase the minor project limit from \$100,000 to \$600,000 to be more consistent with other jurisdictions, save time and money on smaller projects, and enhance the opportunities for small and local business participation.
- 2) Best Value Contracting: Proceed with Best Value contracting as a “tool in the toolbox” for staff to use on complicated projects. Provide further information on this alternative to the City Council on August 7, 2018.
- 3) Advertising Bid Opportunities: Replace the requirement to advertise projects in a local newspaper of general circulation with a requirement for advertising a project by newspaper or other means that adequately informs the general contracting community of the solicitation; and
- 4) Other: Decrease the design build limit from \$5 million to \$1 million in alignment with State law. If Mayor and City Council preliminarily support this reduction, staff will present additional analysis to support this recommendation at the August 7, 2018 City Council meeting.

In the survey conducted April 26-May 3, 2018, 54 percent of respondents stated that they would support a Charter amendment to streamline the City's construction contract procurement process, ensure fair evaluations and ensure cost while requiring consideration for experience and work quality. It is important to note, one in six (or 16 percent) of respondents were undecided. This is likely due to the complexity of the measure.

Clean-Up and Clarification City Charter Amendments

On October 17, 2017, as part of the Mayor and City Council Salary-Setting direct, the Council directed the City Manager to solicit any other "clean-up" or "clarification" items requiring Charter amendments to conserve City General Fund dollars' expenditures on the ballot measures. The Administration has identified three potential amendments to the Charter. Two of them, increasing the "minor Public Works Contract limit and modernizing communication requirements for procurement projects are discussed above. The third potential "clean up" item would be to amend the Charter to align with California state law related to competing ballot measures in municipal election.

Under California law, the city council of a general law city, (a city without a charter and regulated by State law), may submit any ordinance to the voters including an alternative ordinance that conflicts with a voter-sponsored initiative on the same ballot². If both measures pass, the measure that received the highest number of affirmative votes controls³.

However, this rule does not apply to the San José City Council. Under Section 1603 of the City Charter, when a voter-sponsored initiative proposing an ordinance qualifies for the ballot and the Council submits it to the voters, the Council may not submit an alternative ordinance at the same time. Removing this Charter limitation would align the City Charter with State law and allow the City Council to propose an alternative ordinance to compete with a voter-sponsored initiative on the same ballot. In the event both measures passed, the measure that received the highest number of affirmative votes would go into effect.

Conclusion and Next Steps

Per Council's direction, the Administration developed an omnibus City Charter measure that included the salary setting item, the procurement items, and the amendment to allow competing ballot measures. The Administration and FM3 developed and conducted a second public opinion survey from June 2, 2018 through June 11, 2018 to assess voter willingness to support an omnibus Charter Amendment Ballot Measure, which requires a simple majority approval to pass.

² California Election Code §§ 9221, 9222.

³ California Constitution, art. II, § 10(b), Elec. Code § 9221.

The ballot language tested read:

“Shall the City of San José amend its City Charter to:

- *Remove the ability of the City Council to set their salaries, with increases limited to annual adjustments accounting only for inflation;*
- *Streamline the City’s construction contact procurement by only requiring projects totaling more than 600 thousand dollars to be competitively bid and ensuring the City evaluates cost, experience, and work quality—allowing opportunities for small business; and*
- *Align the City Charter with state law regarding competing measures in Municipal Elections.”*

Fifty-eight percent of the respondents said they would support this measure, while 30 percent responded “no,” leaving a large portion of 12 percent undecided. The question was followed by short, more specific questions or ideas, to ascertain concepts and language to help drive greater support and assist with developing a recommended ballot measure for Council consideration on August 7, 2018

Based on the survey results, the Administration recommends the Council direct the City Manager to further refine and develop an omnibus ballot measure for City Charter changes and come forward on August 7, 2018 with final language. The omnibus measure is politically viable and will also save the City money, versus putting several separate measures on the ballot. During July 2018, the Administration will continue to refine the language, including additional survey work in partnership with FM3 and the City Attorney’s Office.

EVALUATION AND FOLLOW-UP

This item addresses Council direction given in the 2018-2019 Mayor’s March Budget Message, as well as subsequent direction provided on April 3, 2018.

PUBLIC OUTREACH

On behalf of the City, FM3 Research conducted two public opinion surveys of registered voters living in San José. Polling was conducted in English, Spanish, and Vietnamese. In addition, this memorandum will be placed on the City’s agenda website for June 26, 2018.

COORDINATION

This memorandum has been coordinated with the City Attorney’s Office.

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COMMISSION RECOMMENDATION/INPUT

On October 4, 2017, the Council Salary Setting Commission recommended two policy options for removing the Mayor and Council from their salary decisions, both would require City Charter amendments. Based on the direction outlined in the memorandum, the Administration has further developed the Commission and Council direction for Council consideration on August 7, 2018.

CEQA

Not a Project, File No. PP17-008, General Procedure & Policy Making resulting in no changes to the physical environment.

/s/
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/s/
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Director of Public Works

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