



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: David Sykes, City Manager
Nora Frimann, City Attorney

SUBJECT: Proposed Ordinance
Amending Title 27

DATE: February 4, 2021

COUNCIL DISTRICT: Citywide

RECOMMENDATION

Approve an ordinance that continues the process of modernizing, streamlining, and clarifying the public works contracting process by amending certain chapters and sections of 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 the inflation adjustment process already in Title 27;
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 and delete certain compensation and dispute resolution provisions to accommodate updates to 29-year-old standard construction contract provisions relating to delay, claims and compensation;
5. Amending Section 27.50.020 to incorporate the reporting requirements in Section 27.50.030 and to clarify certain reporting requirements to better support open and transparent government practices; and
6. Deleting Section 27.50.030, which is being incorporated into amended Section 27.50.020.

OUTCOME

The proposed ordinance would implement changes to Title 27 of the San Jose Municipal Code that further modernize, streamline, and clarify numerous public works procurement and reporting requirements. It would also allow support the timely implementation of important updates to outdated standard construction contract provisions related to delay, claims and compensation.

BACKGROUND

On September 10, 2019, the City replaced the portions of Title 14 of the San Jose Municipal Code relating to the procurement of public works contracts with a new Title 27. The primary purpose of Title 27 was to modernize, streamline and update the requirements applicable to the procurement of public works projects.

On September 15, 2020, the City Council adopted a “clean-up” ordinance that added an inflation adjustment provision applicable to the threshold amount for Major Public Works Contracts and clarified the purpose of the Director’s approval of bid documents.

The current proposed “clean-up” ordinance is more extensive, continuing the process of modernizing, streamlining, and clarifying the public works procurement process.

ANALYSIS

Many of the proposed changes are purely technical and non-substantive, or of little significance. The following describes the more significant proposed changes.

1. **Inflation Adjustment:** The City Charter requires the City to annually adjust for inflation the \$600,000 threshold amount for defining a Major Public Works Contract. The previous “clean-up” ordinance added Section 27.04.100, an inflation adjustment provision.
 - Title 27 already requires adjusting for inflation the \$10,000 threshold amount for micro contracts. The proposed ordinance would expressly require the inflation adjustment to occur as set forth in Section 27.04.100.
 - The Director of Public Works is authorized to award construction contracts that are \$1,000,000 or less if the contract is procured by public bidding and there are not bid protests. Currently, the \$1,000,000 amount is not subject to adjustment for inflation. Moreover, the \$1,000,000 was established when the threshold for defining a Major Public Works Contract was \$100,000.

Given the increase to \$600,000 of the threshold amount for defining a Major Public Works Contract and the move towards adjusting thresholds for inflation, the proposed ordinance would make the \$1,000,000 amount subject to the inflation adjustment set forth in Section 27.04.100. This increase will allow more projects to go from bid to award at a faster rate.

2. **On-Call Contracts:** In an on-call contract the specific work 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. Title 27 currently states that such contracts are awarded based on the lowest markup.

The procurement of some on-call contracts is based on unit prices as applied to an example project. The proposed ordinance adds that in such a procurement the contract is awarded based in the lowest bid for the example project.

3. **Competitive Work Orders:** Public Works recently developed and implemented a competitive work order procurement process. The process involves contracting with a prequalified pool of contractors for a specific type of work and then having an abbreviated process for obtaining competitive pricing from those contractors for a specific item of work. Title 27 currently limits the existence of the pool to 12 months, at which time a new pool must be created.

Based on the experience of Public Works to date, a “pool” life of more than 12 months would significantly increase the effectiveness of this procurement. Moreover, the procurement of these pools involves significant City resources that could be reduced with a longer “pool” life. Accordingly, the proposed amendment would change the 12-month life of the “pool” to 24 months.

4. **Compensation and Dispute Resolution:** The standard contract provisions used by the City in most of its construction contracts are from 1992. City staff is modernizing and updating these provisions – with the most critical provisions being given priority. As a result, City staff is implementing new standard contract provisions relating to delay, claims and compensation.

The proposed ordinance would make changes to ensure consistency between Title 27 and the updated compensation and claims contract provisions. Many of the proposed ordinance changes involve deleting the detail of sections that are more appropriate for placement in the contract provisions, making changes so that these sections of Title 27 are not in conflict with the contract provisions, and clarifying the authority of the Director of Public Works to implement the contract provisions. Other changes are simply technical, such as re-organizing sections and replacing the reference to “Director” with “City.”

5. **Reporting Requirement:** City staff is committed to open and transparent practices. Accordingly, the proposed ordinance clarifies the reporting requirements in Title 27 by: **(a)** being more specific about the information that needs to be reported to the public and to Council, and **(b)** clarifying that all departments procuring or performing construction work during the bi-annual reporting period must provide the City Manager with the specified information.

CONCLUSION

Public Works and the City Attorney's Office continue to find ways to modernize, streamline, and clarify the public works contracting process. The proposed ordinance would implement changes to Title 27, making process improvements to the way in which the City handles public works procurement, reporting, delay, claims and compensation.

EVALUATION AND FOLLOW-UP

Staff will continue to monitor and evaluate ways to amend Title 27 to further improve the public works procurement process.

CLIMATE SMART SAN JOSE

The recommendation in this memo has no effect on Climate Smart San José energy, water, or mobility goals.

PUBLIC OUTREACH

This memorandum will be posted on the City's Council Agenda website for the March 2, 2021, Council Meeting.

COORDINATION

Both Public Works and the City Attorney's Office have participated in the drafting of this memorandum.

COMMISSION RECOMMENDATION/INPUT

No commission recommendation or input is associated with this action.

FISCAL/POLICY ALIGNMENT

The proposed recommendation has no fiscal impact.

CEQA

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



By: _____ for _____ 2/19/2021
David Sykes Date
City Manager

NORA FRIMANN
City Attorney

By: /s/ Glenn Schwarzbach
Glenn Schwarzbach
Sr. Deputy City Attorney

For questions please contact Matt Loesch, Assistant Director of Public Works,
(408) 975-7381