



# Memorandum

**TO:** CITY COUNCIL

**FROM:** Mayor Sam Liccardo

**SUBJECT:** SEE BELOW

**DATE:** April 3, 2018

**APPROVED:**

**DATE:** 4-3-18

**SUBJECT:** PRIVATE DEVELOPMENT WORKFORCE STANDARDS/COMMUNITY WORKFORCE AGREEMENTS ON PUBLIC PROJECTS

**RECOMMENDATION:**

1. Adopt the recommendations set forth in my March 16, 2018 Memorandum and March 21, 2018 Supplemental Memorandum, to be effective upon the formal acceptance of an agreement by all parties of the substance of the terms described therein. That agreement will be effectuated by the signatures of the designated representatives of the South Bay Labor Council, Working Partnerships USA, the Building Trades Council of Santa Clara and San Benito Counties, and the individual Mechanical, Electrical, Plumbing, and Sprinkler Fitters (MEPS) unions, and myself.
2. Bond Measure
  - a. Accept Recommendation #2 of Councilmember Rocha's memorandum, but direct the City's consultant to assess through polling our residents' willingness to support an aggregate bond amount in a range that incorporates amounts of less than \$300 million, and up to and including approximately \$500 million, to provide the Council with the clearest picture of its options.
  - b. Return to Council to provide input needed to shape a proposed list of projects for priority funding under any capital bond measure on the November 2018 ballot. Return to Council to discuss the legal requirements of such lists for a capital bond measure, and whether that list should or could enable sufficient flexibility to allow future Councils to identify the most important and urgent priorities as circumstances change, particularly as technologies and circumstances change concerning emergency preparedness, resilience, and public safety.
  - c. Accept Recommendation #1 Councilmember Rocha's memorandum regarding rehabilitation of failed streets, but
    - i. remain within the legal limitations governing the usage of bond proceeds for street rehabilitation or replacement, and
    - ii. allow Staff the flexibility to identify clusters of failing streets— including those at higher than 25 PCI— that most cost-effectively utilize scarce bond proceeds to improve the greatest mileage of streets benefitting the most residents

Direct Staff to return to Council for a discussion of all of the highest-priority capital construction and replacement needs, including but not limited to fire stations needed in slower-response areas, a police training center, and emergency communications infrastructure.

3. “Lowest Bidder” Requirement

Return to Council with a Staff report discussing the advantages and drawbacks of the “lowest responsible bidder” provisions of the City Charter, at a date prior to the Council’s consideration of a ballot measure. The discussion should include a description of those instances in which “lowest responsible bidder” mandates in the City Charter have handcuffed the Council, ultimately resulting in costing taxpayers millions in unnecessary expenditures from overruns and poor performance.

**DISCUSSION:**

I appreciate many of the concerns raised by my colleagues, and I seek to address them with the Direction and Discussion in this memorandum.

**Project Labor Agreements (PLA’s) and Community Workforce Agreements (CWA’s)**

I have not changed in my concern about the additional cost that PLA’s can add to public works projects, and the effect they might have in undermining fair competition from “open shop” firms where prevailing wages are already required, as here. However, elements of this contemplated agreement have mitigated several of my concerns. For example, while Councilmember Khamis quotes from my 2017 memorandum pointing to the problems of raising costs for “road repaving” and “park rehabilitation,” the contemplated agreement explicitly excludes capital maintenance and repair projects such as these. He also urges that we exempt subcontracts of less than \$250,000 from the universe of public works subjected to a CWA, to ensure adequate opportunity for smaller firms. Yet the \$3 million threshold largely addresses this concern: a review of City construction contracts since 2012 reveals that about 90% —or 328 out of 364 projects—of all City public works contracts would not be subjected to CWA’s under the threshold in the proposed agreement.

Moreover, it remains indisputable that the construction industry locally suffers from a severe shortage of skilled labor. The industry has not solved this problem by itself. Paradoxically, many able-bodied young people could have an opportunity to secure a path to a rewarding career, but lack opportunities for apprenticeships and training that CWA’s seek to address. With this settlement, we seek to address both problems.

**“Lowest Responsible Bidder” versus “Best Value”**

Councilmember Khamis’ assertions regarding threats of “cronyism” appear driven by some misunderstanding of the settlement terms. There is no proposal for the City to dispense of competitive bidding, nor of sealed bids. The proposed modification merely ensures that we’re using the right criteria by which we assess competitors in the market, and I would expect that bid price would remain the most prominent factor in the City’s selection of a contractor on a public works project.

Why would we consider including other factors beyond cost? I appreciate that my colleagues have not benefited from —or better, suffered through—of some of the worst aspects of “lowest responsible bidder” (LRB) procurement experience during San Jose’s “Decade of Investment,” although enough have endured breakdowns in our City Hall elevators to get a glimpse of the problem. In my tenure on the Council, we endured roughly \$9 million in overruns and delays for a “low bid” police substation, and the approximately \$ 2.6 million in

overruns for LRB Environmental Innovation Center, for example. We had public and closed-session debates about low-bid contractors with very problematic histories, but the Council was instructed that we were confined by the LRB provisions of the Charter to either reject all bids (in the face of imminently expiring grant deadlines and rapidly escalating construction costs), or to go forward with the lowest bidder. Even when we saw the problems coming, we were handcuffed, as revealed by one December 2013 Staff memorandum on the EIC, “At the time the city awarded the construction contract, staff expressed concerns about the ability of [Applegate] to timely complete the work; however, staff could not have anticipated that a little over two years later [Applegate] would abandon the job and declare bankruptcy.” Well before I joined the Council, City Hall was beset with similar tales of woe constructing such projects as the animal shelter, the Rep, and the Tech, complete with details about bankrupt contractors and contractor negligence.

When faced with using the limited tool available for nonperforming contractors—seeking debarment of the contractor or litigation—Councils have often declined to do so, citing the extensive cost, delay, and the difficulties of achieving timely settlement while a still-unfinished project becomes more financially burdensome with each incomplete day. In short, we cannot rely on the “nuclear options” of litigation or debarment to enforce contractor performance—we save far more time and money by ensuring that we have quality contractors at the front end. Doing so requires the flexibility to inject criteria based on such issues as past performance, records of overruns, financial stability, and life-cycle costs of construction, handcuffing us to the detriment of our taxpayers.

During Mayor Chuck Reed’s administration, the City recognized the limitations of LRB, so Mayor Reed and the Council took a measure to the ballot to amend the Charter to insert provisions to allow for design-build bidding and contracting. The voters overwhelmingly approved that change, enabling our use of design-build approaches for the airport and Convention Center. That approach only makes sense, however, for very large projects, and design-build isn’t the most appropriate approach on many simple projects.

As stated by a December 2017 report by the California Office of the Legislative Analyst, “... LRB [Lowest Responsible Bidder] can sometimes be an inflexible approach when features or quality of a desired good or service are hard to define or the up-front price does not reflect the longer-term costs. These limitations have led some state agencies to request authority to consider other factors in addition to price.” Even if one were focused wholly on saving taxpayer cost, LRB has proven limiting, because some different variations of construction can have different many life-cycle costs—reflecting such factors as the costs of maintenance, capital replacement, energy consumption, and operations—not adequately captured by a simple up-front bid price. Narrowly confining one’s view of a capital investment to the bid price in some cases can be penny-wise, but pound-foolish.