



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Matt Loesch

**SUBJECT: WAGE THEFT PREVENTION
POLICY REVISION**

DATE: March 6, 2023

Approved

Date

3/16/23

RECOMMENDATION

- (a) Adopt a resolution to approve amendments to Council Policy 0-44, Wage Theft Prevention Policy, revising mandatory disqualification from procurement, removing the exemption for City of San José public works projects, and exempting from mandatory disqualification future procurements for janitorial services or security guard services if the proposer can demonstrate the ability to comply with certain labor requirements including wages, hours, working conditions, and a grievance process to address wage claims, and make other clarifying changes.
- (b) Accept staff recommendation to exempt proposers to the City's Banking Services Request for Proposal from the mandatory disqualification provisions of Council Policy 0-44 to ensure the City ability to compete for qualified banking services providers.

SUMMARY AND OUTCOME

The current City of San José (City) Wage Theft Prevention Policy (0-44) (Policy) has a limited impact due to implementation challenges regarding review of bidder wage theft history and overly broad criteria for mandatory disqualification. Staff reviewed available data sources and recommends a revised set of policy criteria for a measurable, verifiable, and enforceable policy with thorough, consistent implementation across all purchasing departments.

Approval of the revised Policy provides consistency and focus enforcement of mandatory disqualifications on habitual wage theft violators while providing for the necessary flexibility to procure critical City services and worker protections.

In an effort to better align the Policy language and mechanisms with the goals of (1) disincentivizing wage theft across all industries and incentivizing the payment of wage theft judgments and (2) allowing the City to conduct essential business operations without regularly waiving the Policy, staff presents a set of changes and an implementation plan.

If accepted, the changes revise the conditions of mandatory disqualification to better fit data availability and implementation goals while expanding the Policy scope to include public works construction.

BACKGROUND

The Policy requires potential contractors that have submitted a formal or informal bid or proposal to provide supplies, materials, goods, and/or services to the City to disclose any past wage theft violations. Companies with wage theft history face mandatory disqualification if they have two or more wage theft violations in the last five years or one unpaid wage theft judgment. If a company has only one violation in the last five years, it faces discretionary disqualification under the Policy. Because the current Policy utilizes a very broad definition of wage theft across all disqualification circumstances and relies solely on bidder disclosures to assess wage theft history, its implementation and enforcement have been limited and inconsistent.

City public works projects are exempt from the current Policy, in large part because contractors with unpaid wage theft judgments are prevented from bidding on public projects by the Department of Industrial Relations Public Works Contractor Registration and the California Contractors State License Board.

On February 4, 2020, staff presented an update on policy revision efforts to the City Council in the effort to clarify Policy terms and mechanisms.¹ This report examined relevant federal, state, and local wage theft enforcement processes and noted limited data availability as a significant barrier to active review of bidder violation history. Given this challenge, the report established parameters for a revised definition of wage theft, moving towards a Policy that was measurable, verifiable, and enforceable.

Staff research and stakeholder input have highlighted shortcomings in the State's Wage Theft enforcement capacity. While the Labor Commissioner's Wage Claim Adjudication process and Bureau of Field Enforcement enable workers to earn wage judgments in their favor, a dearth of supportive resources leaves workers largely on their own to collect those wages after a judgment has been issued.² By contrast, the U.S. Department of Labor and the City Office of Equality Assurance do not close a wage theft case until all back wages have been collected on behalf of the employee(s).

Civil Wage and Penalty Assessments are a final administrative decision by the Labor Commissioner's Office, Public Works Unit that a violation of applicable labor laws occurred on a public works project or contract. Because the City and State share a significant overlap in their

¹ Council Priority #16 – Wage Theft Prevention Policy Update

<https://sanjose.legistar.com/View.ashx?M=F&ID=8033253&GUID=7ABA0B1C-4FEB-4FBF-A25D-46644D0915C6>

² See “[Unpaid Wages: A Waiting Game](#),” from CalMatters and “[Hollow Victories: The Crisis in Collecting Unpaid Wages for California's Workers](#),” from the National Employment Law Project and the UCLA Labor Center

respective public works contractor pools, these findings are crucial in evaluating a potential bidder's wage theft history for public works procurements.

In 2022, the California Labor Commissioner's Office released a Judgment Search Portal. This prompted staff to conduct the largest review of wage theft violation history across federal, state, and local records to-date. Based on this analysis, staff presents a set of revisions to the Policy with two key goals in mind. The primary goal is to disincentivize wage theft across multiple industries by eliminating bad actors from bid consideration and incentivizing payment of outstanding judgments. The secondary goal is to allow the City to provide crucial services on an expedient timeline by providing a measurable and verifiable definition of wage theft for mandatory exclusions from City procurement processes.

ANALYSIS

In light of the research noted in the Background of this memorandum, the current Policy casts too wide a net in advancing its primary goal. Though it remains crucial to eliminate bad actors from bid consideration, the disqualification circumstance of more than one paid violation in the last five years is apt to incorrectly categorize companies as bad actors. This disqualification circumstance also poses a risk to critical City operations. This occurs when all qualified bidders for a critical City service face mandatory disqualification as a result of one or more paid judgments in the last five years. This circumstance was central in City Council's decision to reject all proposals for its Banking Services request for proposals in March 2019.³

Furthermore, the scope of the current definition of wage theft limits the market of potential qualified proposers that can contract with the City and places the City at a disadvantage with other public agencies to secure services and goods at a competitive and cost-effective rate. Lastly, consistent enforcement has been difficult due to over-reliance on self-reporting.

Recommended Policy Revisions

Based on current data availability and operational constraints, staff proposes the following revisions to the Policy and its implementation.

Mandatory Disqualification

To better align Policy goals and impact, the circumstances of mandatory disqualification may be limited to only cases where the California Labor Commissioner has produced either three or more final judgments or decisions in the last three years, or the company has one or more unpaid judgments. Bidders would be allowed to provide additional documentation showing that all judgments have been paid prior to the date of bid submission.

³ March 19, 2019 Council Meeting memoranda and related documents on the Banking Services Request for Proposals: <https://sanjose.legistar.com/LegislationDetail.aspx?ID=3877371&GUID=6A09AD2A-3CF6-4C89-AB22-05AD03EFA07E&Options=&Search=>

Mandatory Disclosure and Discretionary Disqualification

Staff is not recommending any change to the potential contractor's current obligation to disclose all judgments and decisions relating to wage and hour violations. Since the judgments and decisions are not limited to California Labor Commission decisions and the City does not have a reliable method to proactively search and confirm the different sources of judgments and decisions – the decision on whether to recommend discretionary disqualification of a potential contractor will be based on information that may come to light from third parties through the procurement including the protest process.

Public Works

This update aims to better integrate the Policy with existing labor compliance staffing and mechanisms within the Department of Public Works. As such, if the above changes are accepted, the Policy exemption for public works construction projects will be removed. Based on available data, this change will not materially reduce the pool of qualified bidders for public works construction projects.

Janitorial and Security Services

Workers in the janitorial services and security guard services industry experience a pattern of wage theft, and the low-wage nature of these jobs means that workers are less likely to pursue remedies when underpayments occur.⁴ To prevent wage theft in these service areas in City agreements, proposed contractors bidding on janitorial services and security guard services who have a history of wage theft will not be automatically disqualified from procurement when they can demonstrate how they will comply with labor requirements including wages, hours, working conditions and provide employees with a wage theft grievance process. Proposed contractors may rely on provisions in a collective bargaining agreement or other documentation.

Banking Services

Comprehensive banking services are critical to financial operations of the City, including but not limited to, vendor payments, payroll transactions, debt payments, and revenue collections. Finance Department issued a request for proposal in May 2018 consisting of four packages; each package was evaluated separately, with intent to award each package to the highest scoring proposer. Two firms, JP Morgan and Wells Fargo, were ranked the highest through standard assessments. JP Morgan disclosed no final court judgments or administrative action on its commercial banking line and 20 wage and hour judgements its other lines of business, all paid and satisfied. Wells Fargo did not disclose any wage and hour violations in its proposal, however, staff uncovered 10 final judgments via a Public Records Act request to the California Labor Commissioner's Office.

Large banking institutions are required to meet the City's banking services needs due to the level of banking services and collateralization mandated by state law. Qualified proposers typically operate numerous retail branches across the country, whereby disputes over wages or

⁴ Janitorial and Security Guard Services have 67% and 69% rates of unpaid judgments, respectively and are listed as "Low Wage, High Violation Industries" by the U.S. Dept. of Labor: <https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries>

commissions have occurred. Staff has identified a low probability that a new request for proposal will produce different results.

As an alternative to rejecting all proposals and extending current agreements, staff recommends proposers to the City's Banking Services Request for Proposal be exempt from the provisions related to automatic disqualification as qualified proposer.

Expected Impact

An analysis of the violation history of all City bidders from the last two years suggests that the revised disqualification conditions are unlikely to materially reduce the pool of qualified bidders. The analysis highlighted several companies with significant accumulated paid violations, and yet, the bidder pools should remain satisfactory for price competitiveness.

Implementation Support and Resources

There will be a 90-day start-up period after City Council has approved the Policy revisions during which staff will finalize internal mechanisms, processes, and responsibilities. Self-disclosures of all final judgments decisions and orders in the prior five years will be required for all formal and informal bids or proposals to provide supplies, materials, goods, and/or services to the City, including consulting service agreements.

Staff will prioritize developing a consistent, expedient methodology to identify and assess any California Labor Commissioner's Office judgments and decisions as part of the procurement process. The administration will incorporate review of additional data sources as they become available and may request necessary staffing resources to support this effort in the future.

EVALUATION AND FOLLOW-UP

The Office of Equality Assurance will continue to monitor Policy implementation, working closely with the Finance Department and Public Works Construction and Services Procurement to verify and assess bid disclosures.

COORDINATION

This memorandum was developed in coordination with the Finance Department, City Attorney's Office, and City Manager's Office of Administration, Policy, and Intergovernmental Relations.

PUBLIC OUTREACH

This memorandum will be posted on the City's Council Agenda website for the March 28, 2023 City Council meeting.

During the development of this recommendation, City staff met with representatives from the Santa Clara County Wage Theft Coalition, Working Partnerships USA, and the Santa Clara and San Benito Counties Building Trades Council. Additional support was provided by the U.S. Department of Labor, Wage, and Hour Division; the California Labor Commissioner's Office; the Santa Clara County Office of Labor Standards Enforcement; and the San Francisco Office of Labor Standards Enforcement.

COMMISSION RECOMMENDATION AND INPUT

No commission recommendation or input is associated with this action.

CEQA

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

PUBLIC SUBSIDY REPORTING

This item does not include a public subsidy as defined in section 53083 or 53083.1 of the California Government Code or the City's Open Government Resolution.

/s/
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For questions, please contact Chris Hickey, Division Manager, Office of Equality Assurance, at Christopher.hickey@sanjoseca.gov