



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: David Sykes

**SUBJECT: POTENTIAL CITY CHARTER
AMENDMENT – CONSTRUCTION
CONTRACT PROCUREMENT**

DATE: July 27, 2018

RECOMMENDATION

- (a) Discussion and consideration of a Council-sponsored charter amendment for the November 6, 2018 statewide general election;
- (b) If Council wishes to proceed with a charter amendment, adopt a resolution of the City Council calling and giving notice, on its own motion, for a Special Municipal Election to be held on November 6, 2018, to submit to the electors of the City of San José the following charter amendment measure:

2018 Charter Amendment - Construction Contract Procurement Modernization

Shall the City of San José Charter be amended to: <ul style="list-style-type: none">• Prioritize selecting contractors on cost, but enable consideration of factors like experience and work quality;• Increase opportunities for small, local, and economically disadvantaged businesses to compete for contracts;• Modify the bidding threshold from \$100,000 to \$600,000, adjusted annually for inflation;• Lower the “design-build” contract threshold from \$5,000,000 to \$1,000,000; and• Allow modernization of public noticing?	YES	
	NO	

- (c) Council discussion and consideration of whether the full text of the proposed City measure should be printed in the November 6, 2018, Voter’s Sample Ballot, pursuant to Elections Code 12111, to be incorporated in the resolution calling the election;
- (d) Council discussion and consideration of whether to permit rebuttal arguments and authorize the City Council or any member or members of the City Council to submit a

rebuttal argument in favor of the City measure in the November 6, 2018, Voter's Sample Ballot, pursuant to Elections Code Section 9285, to be incorporated in the resolution calling the election;

- (e) Council discussion and consideration of whether to authorize the City Council or any member or members of the City Council to submit an argument in favor of the City measure on the November 6, 2018, Voter's Sample Ballot, pursuant to Elections Code Section 9282, to be incorporated in the resolution calling the election;
- (f) Council discussion and consideration of whether to direct the City Clerk to transmit a copy of the measure to the City Attorney to prepare an Impartial Analysis, pursuant to Elections Code Section 9280; and
- (g) Direct the City Clerk to take all actions necessary to place this measure for a November 6, 2018, Special Municipal Election.

OUTCOME

If the City Council approves this item, the Administration will place the approved language on the November 6, 2018 citywide ballot.

BACKGROUND

On June 26, 2018, the City Council accepted a staff report¹ and directed the City Manager and City Attorney to draft ballot language for a charter amendment that would streamline and update the major public works contract procurement requirements and procedures. The Council directed staff to return to Council no later than August 7, 2018 for consideration of the draft ballot measure.

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.

¹ June 26, 2018 staff report: <https://sanjose.legistar.com/View.ashx?M=F&ID=6311375&GUID=2DF61362-0584-44F3-8EB7-37DC93BF3AB1>

ANALYSIS

In general, the changes being proposed are the following:

- 1) Increasing the bidding threshold from \$100,000 to \$600,000
- 2) Best Value Contracting option;
- 3) Lowering the design build threshold from \$5 million to \$1 million;
- 4) Increasing opportunities for small, local, and disadvantaged businesses; and
- 5) Modernizing the public noticing rules in the City Charter.

Increasing the bidding threshold from \$100,000 to \$600,000

The City Charter provides strict rules for procuring public works contracts costing more than \$100,000. Such contracts must be procured through a formal bidding process and be awarded to the “lowest responsible bidder.” 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.

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. Procuring public works contracts for projects costing less than the threshold required for formal bidding can be accomplished by a project manager, does not require the multiple layers of procurement involved in the formal bidding process, and can be modified by ordinance. For public works contracts under the “formal bidding” threshold, the Municipal Code governs the procurement, 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 that contractors follow important City policies such as payment of prevailing wage.

Projects that cost \$100,000 or less 18 years ago (such as replacing playground equipment in a neighborhood park, rehabilitating a small sanitary sewer, or building a small section of sidewalk) now cost between two and three times more to build. Increasing the procurement threshold in the City Charter would allow for increased efficiency, cost savings, and local/small business participation in City Public Works projects. The increased local/small business participation would be possible given the simpler requirements for contractors to bid on minor public works projects. This would also bring San José in line with other similar sized jurisdictions such as San Francisco (\$600,000) and San Diego (\$500,000).

It is not the City’s intent to use this increase to break larger projects up into smaller projects for the sole reason of getting them under this threshold as this would negate the time and cost savings achieved by using a more expedited bidding process and would also be prohibited under the City Charter. Additionally, City staff is prohibited from breaking larger projects into smaller ones to avoid the formal bidding process.

In addition, the proposed charter language change provides for an annual inflation escalator to be applied to the bidding threshold. This will ensure that the dollar amount keeps pace with inflation, specifically inflation within the construction industry. This should ensure that, in the future, the City does not face the same problem it does today with a procurement limit that has not been updated for 18 years despite dramatic inflation within the construction industry.

Lowering the design build threshold from \$5 million to \$1 million to allow more flexibility to use this procurement method on smaller projects

The San José City Charter provides an alternative procurement process for public works contracts 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.

Reducing the design-build threshold from \$5 million to \$1 million is expected to create several benefits to the City. First, it aligns the City threshold with the State of California design-build authority for local agencies (Public Contracts Code Section 22162), which will reduce confusion among bidders regarding different jurisdictions and threshold amounts. Second, and more importantly, it will allow the City the option to apply the benefits of design-build project delivery to projects between \$1 million and \$5 million that would have otherwise had to use the low-bid design-bid-build approach. This is very beneficial for projects such as medium-sized pump stations, airport projects, wastewater treatment facilities, and building project renovations, where having a single (design-build) entity can optimize features, performance, price, and schedule.

Best Value Contracting (BVC)

The current formal bidding process involves selecting a contractor based exclusively on the lowest price. Unlike that process, BVC involves selecting a contractor on the basis of objective criteria to determine the best combination of price and qualifications. Allowing this as a procurement option for major public works contracts on complicated projects would provide staff with a valuable “tool in the toolbox.”

The BVC procurement process is similar to the City’s traditional formal bidding process for major public works contracts. Bids are solicited in substantially the same manner, and contractors submit to the City sealed bids with a price proposal – just as they do under the current process.

The difference is that bidders also submit experience and qualifications information to the City. The experience and qualifications information is evaluated by a panel, and the panel gives each bidder a “qualifications score” based on objective criteria. Importantly, the pricing information remains sealed until the panel completes its evaluation and scoring of the bidders. This ensures the panel’s evaluations are not influenced by the pricing information.

Ultimately, the BVC procurement process involves the application of a formula in which the pricing information and qualifications score are used to select the contractor that will provide the best combination of price and qualifications.

On projects such as street repaving where the conditions are well known and there are several qualified contractors competing for work, the BVC process likely would not be necessary. However, on projects such as rehabilitating the storm water conveyance system (where contractors frequently must adapt in the field to new unknown conditions), having a selection process that looks at contractor experience, performance, and compliance would help ensure the overall performance of the project. While this procurement process does take more time at the front-end than the traditional “low bid” process, when used appropriately, it is intended to save time on a project as it would increase the likelihood that on complicated projects the contractor most equipped to deliver the project is selected.

Small and Disadvantaged Businesses

As reported to the Community and Economic Development Committee on June 25, 2018, the Department of Public Works is in the process of evaluating options to implement a Disadvantaged Business Enterprise (DBE) Program throughout the City. This program will consist of a combination of outreach and process improvements to ensure that local, small, and economically disadvantaged businesses are provided greater opportunities to participate in the City’s Public Works procurement processes.

Currently, under the “formal bidding” threshold contained in the Municipal Code, the City can provide otherwise legal preferences to local, small, or DBE businesses. This is because the Municipal Code does not have the same limitations of the City Charter bidding requirements.

Where formal bidding is required under the Charter, the City is unable to provide any preferences to local, small or DBE businesses – even those that are otherwise legal – in the absence of express charter authority. This is because the charter’s “low bid” requirements limit the factor that can be considered in public bidding. The proposed ballot measure language would address this problem by creating express authority to consider other factors for programs that support the use of small, local, and disadvantaged businesses.

Modernize Public Noticing for Construction Contracts

The City Charter’s public works contract procurement requirements include other provisions that need to updating and modernizing. One such provision is the requirement 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.

Survey Results

Fairbank, Maslin, Maullin, Metz & Associates (FM3), the City's contracted survey research consultants, conducted a second public opinion survey from July 11, 2018 to July 19, 2018 to assess voter willingness to support a Charter Amendment Ballot Measure.

The ballot language tested read:

“Shall the City of San Jose’s Charter be amended to:

- *Prioritize selecting contractors based on cost, but enable factors like experience and work quality to be considered;*
- *Allow more opportunities for small, local, and economically disadvantaged businesses to compete for city construction contracts;*
- *Modify the bidding threshold from 100,000 dollars to 600,000 dollars, adjusted annually for inflation;*
- *Lower the “design-build” contract threshold from 5 million dollars to 1 million dollars;*
and
- *Allow modernization of public noticing for construction contracts?*

A Charter amendment must be approved by a majority of the voters voting on the item (50 percent + 1 vote). Sixty-one percent of the survey respondents said they would support this measure, while 25 percent responded “no,” leaving a fair amount, 14 percent, undecided. Given the large number of undecided voters clearly view this measure with some uncertainty. However, the City, through the “Impartial Analysis” and “Arguments” in favor can better educate voters on this measure. Based on the results, the Administration recommendations utilizing the same ballot language if the Council places on the November 6, 2018 citywide ballot.

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 and June 26, 2018.

PUBLIC OUTREACH

On behalf of the City, FM3 Research conducted three 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 August 7, 2018.

COORDINATION

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

COMMISSION RECOMMENDATION/INPUT

No commission recommendation or input is associated with this action.

COST SUMMARY/IMPLICATIONS

For the November 2018 ballot, there are run-off elections for two City Council Districts (estimated cost of \$74,000) as well as potential ballot measures under City Council consideration, including this measure. The first ballot measure is the most expensive as it covers the fixed costs of mailing ballot books to all voters as well as absentee/mail ballots to voters who request them. Assuming the general obligation bond measure is the first ballot measure at an estimated cost of \$1.15 million to \$1.28 million, the incremental cost of placing this proposed Charter Amendment on the ballot ranges from \$455,000 to \$648,000, depending on the information included on the ballot. The ballot will include text describing the measure, the City Attorney’s Impartial Analysis, and arguments for and against the measure. The City Council can decide between a summary of the text (1 page) or the full text (estimated at 8 pages) of the measure and whether to include rebuttal arguments.

Following is a breakdown of these required costs as well as the optional costs:

Item	Measure Cost
Base Cost	\$374,000
Impartial Analysis (one page)	\$20,000
Arguments (one page per argument)	\$39,000
Summary text (one page)	\$22,000
Total Cost with Required Elements	\$455,000
Rebuttals (one page per argument)—optional	\$38,000
Full text (additional 7 pages)—optional	\$155,000
Total Cost with Optional Items	\$648,000

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The total estimated cost for the election will depend on the number of measures the City Council places on the ballot, the information included on the ballot, and the two run-off elections.

<u>Potential Costs</u>	<u>Range</u>
Run-off election only	\$74,000
Run-off election + 1 ballot measure	\$1,227,000 to \$1,354,000
Run-off election + 2 ballot measures	\$1,682,000 to \$1,936,000
Run-off election + 3 ballot measures	\$2,137,000 to \$2,584,000
Run-off election + 4 ballot measures	\$2,592,000 to \$3,166,000

The 2018-2019 Elections and Ballot Measures appropriation totals \$1,856,000. In addition, there is a remaining balance of \$350,000 in this appropriation from 2017-2018 that will be recommended to be rebudgeted as part of the 2017-2018 Annual Report, which will bring the appropriation to \$2,206,000. If necessary, recommended budget actions would be brought forward as part of the 2017-2018 Annual Report to address any funding gap. It is important to note that the election costs are estimates only and will be revised based on the final fee schedule from the County Registrar of Voters and actual registration levels.

CEQA

Statutorily Exempt, File No. PP17-001, CEQA Guidelines Section 15262, Feasibility and Planning Studies Feasibility and Planning Studies with no commitment to future actions.



David Sykes
City Manager

For questions, please contact Lee Wilcox, Chief of Staff, at (408) 535-4873 or Matt Cano, Director of Public Works, at (408) 535-8300.