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MEMORANDUM

TO: Hon. Commissioners of the Civil Service Commission
Sandra Eng, Executive Officer for the Civil Service Commission

FROM: Kate G. Kimberlin
Deputy City Attorney *Kate Kimberlin*

DATE: November 1, 2023

RE: Proposed Revised Policy of the Civil Service Commission on Personal Service Contracts

The Civil Service Commission maintains a public memorandum memorializing its Policy and Procedures on Personal Services Contracts (the "Policy"). The Commission last updated the Policy on November 5, 2014. On June 5 and August 21, 2023, the Commission considered various proposed updates to the Policy and asked our office to prepare an updated policy based on those discussions.

We prepared the attached draft amended Policy for your consideration based on your discussions and policy direction. We understand the goal of the proposed amendments is to maintain the Commission's oversight over the civil service merit system while removing unnecessary confusion and delays in City contracting. The proposed changes would also allow the City to more fully utilize the new technology available through the ServiceNow database.

Because we have updated the format of the Policy, it is not possible to provide a redline of the proposed changes. The majority of the Policy restates existing practice in a way that is intended to provide clarity and ensure consistent application. The proposed substantive changes are as follows:

1. Includes a statement of the law regarding the Commission's role in approving personal service contracts ("PSCs") (Section II);
2. Clarifies the analysis the Commission should undergo to determine whether a new class should be created to perform the work proposed to be contracted out (Section III(B));
3. Includes a list of types of transactions that do not require Commission approval (Section III(C)). Many of the items listed are in the existing Policy, but were not collected in a single section of the Policy. The proposed additions to the policy include transactions that cannot be performed by City employees, either now or in the future. The Commission is therefore empowered to issue a policy excluding these transactions from PSC review. The proposed new additions to the Policy are:
 - a. Contracts between the City and other government entities.
 - b. Grants under Administrative Code Chapter 21G (this is a new chapter of the Administrative Code not in existence in 2014 when the Commission adopted the current Policy).

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- c. Contracts for commodities subject to legal mandates, such as intellectual property laws, that require the use of non-City personnel, including proprietary SaaS (software as a service) licenses and other proprietary software or hardware where the City has no legal access to its code. Under this proposed amended Policy, there would be no further need for departments to seek future approval for the type of work described here in subsections (c) or (d).
 - d. Contracts for repair, maintenance, or similar services related to the purchase of software and equipment that must be performed by the manufacturer such as, for example, where such services cannot be completed by City employees without voiding the warranty. Professional services required to integrate software or other technology into City systems will still require PSC approval.
 - e. Delegated Department Purchasing (“Prop Q”) for one-time purchases of commodities or general services up to the dollar amount stated in Regulation 21.5(a) (currently \$10,000, including tax and shipping). This authority has existed since a voter-approved Charter amendment in November, 1993. The Office of Contract Administration oversees Prop Q purchasing. Prop Q may not be exercised to procure professional services, construction services, or to split orders exceeding \$10,000.
 - f. Contracts where state or Federal funding requirements specify use of non-City personnel;
 - g. Health Service System contracts for employee and retiree health benefits, which are excluded from the definition of “commodity” under Chapter 21 of the Administrative Code.
 - h. Contracts for services incidental to the purchase of goods, such as shipping or installation, valued up to \$10,000.
 - i. Contracts approved by the City Attorney for legal and litigation services or contracts entered into pursuant to settlement of legal proceedings.
4. Increases DHR’s authority to approve contracts up to \$200,000 (Section IV(A));
 5. Allows the notice and posting periods to run concurrently (Section IV(C));
 6. Removes the Annual Approval option for PSCs (Section V);
 7. Extends the time within which the first contract under an approved PSC must be executed from 12 to 18 months (Section V(B));
 8. Removes the 50% duration requirement for extensions of approved PSCs and replaces it with a requirement that PSCs up to or exceeding three years be returned to the Commission for approval (Section V(C)(4));
 9. Clarifies the procedure for Commission review of emergency contracts (Section VI);

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10. Requires departments to provide periodic reports for PSCs exceeding five years (Section VIII); and
11. Creates a standard set of information to be provided in periodic reports back to the Commission (Section VIII).

We look forward to discussing these proposed changes with you ahead of or at the upcoming November 6, 2023 Commission meeting.

Policy of the Civil Service Commission on Personal Service Contracts

I. Introduction

This memorandum shall serve as a comprehensive guide to the Civil Service Commission's ("Commission") policies on Personal Service Contracts ("PSCs"), as updated and adopted by the Commission at its meeting on _____. This memorandum shall supersede all previously-issued memoranda on PSCs.

The Commission previously delegated to the Department of Human Resources ("DHR") the authority to update and issue to departments instructions for PSC submissions, consistent with the Commission's policies. The Commission continues to delegate this authority and invites DHR to amend its PSC submission guidelines to correspond to this updated Policy.

The Commission has adopted a number of policies and procedures on PSCs over the years, including in 1994, 1996, 2007, 2013, and 2014. This update is intended to clarify the types of PSCs the Commission considers, the types of approval the Commission may grant, and to modify submission guidelines in recognition of changes in technology and Citywide processes.

Although the Commission is again updating its policies and procedures on PSCs, it is important to note that the Policy will continue to include the following critical components: a streamlined Commission approval process; notice requirements to ensure transparency and accountability; an appeal procedure to ensure merit system oversight; an approval option consistent with the City's budgetary time frames and process; and a list of compelling circumstances that may be considered in approving requests to contract out personal services.

II. Role of the Civil Service Commission in Approving PSCs

San Francisco's Charter mandates the Civil Service Commission "adopt rules, policies and procedures to carry out the civil service merit system." Consistent with this mandate and many years of judicial and legislative history in California, the Commission is authorized to set policy on the review of proposals to contract out work that could be performed by City employees. With DHR, the Commission reviews departmental proposals to determine whether the scope of work to be contracted out can or should be performed by civil service employees.

The Commission's role is distinguished from the roles of City departments, other commissions, and the Office of Contract Administration. *It is not the Commission's role to be involved in the selection of individual contractors or the cost of such services.* The role of the Commission is to determine whether contracting out is warranted. The selection of the individual contractor is done by City departments, with oversight and final decision-making authority exercised as appropriate by stakeholder departments vested with such authority.

If an existing civil service class of employees *could* perform the work a department proposes to contract out, the Commission may approve a request if the department demonstrates an exception is warranted. For example, the Commission may approve contracting out of services if there is only a short-term or intermittent need for the work. This memorandum sets out the criteria the Commission will consider to determine if the scope of services is appropriate for contracting out.

If there is no existing civil service class of employees that could perform the scope of work a department proposes to contract out, the Commission's role is to determine whether a new classification should be established to perform that type of work. If it is not presently feasible to do so, the Commission may grant continuing approval to contract out the work until or unless a new classification is established.

Where a department *must* contract out work to comply with legal mandates and where it is therefore *not* possible for a classification of City employees to perform the work *or* for a new class to be established, there is no requirement that the Commission review or approve the scope of work. This Policy aligns with current law and practice and this memorandum seeks to clarify examples of these types of contract to enable departments to clearly identify when Commission approval is required and when it is not.

III. Types of Personal Services That May Be Contracted Out

A. Services That Could Be Performed by an Existing Class but for Which There is a Compelling Reason to Contract Out

With some exceptions noted below, the Commission is responsible for reviewing the scope of services departments seek to contract out. If there is an existing civil service class that can perform the type of work required, departments must seek approval from the Commission. Departments seeking such approval must demonstrate a compelling basis to contract out. Examples of compelling factors that may be considered appropriate for contracting out include:

1. Immediately needed services to address unanticipated or transitional situations, or services needed to address urgent situations that do not rise to the level of an “emergency”;
2. Short-term or capital projects requiring diverse skills, expertise, and/or knowledge;
3. Services required on an as-needed, intermittent, or periodic basis (e.g., peaks in workload); or
4. Circumstances where there is a demonstrable potential conflict of interest (e.g., independent appraisals, audits, inspections, third party reviews and evaluations).

This is a non-exhaustive list of potential reasons a department may seek Commission approval to contract out services that might otherwise be performed by a current class of civil service employees. Departments should endeavor to provide the Commission with any relevant information to allow it to determine whether a compelling reason exists that warrants contracting out. In particular, departments should consider whether it is possible to hire additional City employees to perform the needed work or should explain why additional hiring is not feasible or possible.

B. Services That Cannot Be Performed by an Existing Class

Where there is no current class of civil service employees with the duties and responsibilities needed to perform the work a department is seeking to contract out, the Commission’s responsibility is to determine whether it is both advisable *and* feasible to establish a new class. Factors the Commission may consider in determining whether to establish a new class include, but are not limited to:

1. Whether the services are short-term, non-repetitive, or so specialized and unique that they could not be appropriately performed by City personnel;
2. Whether the services require resources the City lacks, such as facilities or equipment that must be run by a specially trained operator;
3. Whether regulatory or legal requirements preclude the use of an existing classification of City employees to perform the work; or
4. Whether future funding is so uncertain that creating a new class to complete the necessary work is not advisable.

In cases where the Commission determines it is not currently advisable to establish a new classification of City employees to perform the needed work, the Commission may grant continuing approval (described in more detail below).

C. Contracts That Do Not Require Commission Approval

There are a variety of service contracts that do *not* require Commission approval or review, either because there is a law or regulation that expressly exempts them from Commission review, there is a past policy decision by the Commission exempting the contracted service, or the personal services cannot otherwise be performed by City employees, either now or in the future. Based on the cited legal authorities and as a matter of policy, the Commission finds that the following types of contracts do not require Commission approval:

1. Public works contracts under Chapter 6 of the Administrative Code that are not for professional services;
2. Grants under Administrative Code Chapter 21G;
3. Contracts between the City and other government entities;
4. Proposition J contracts based on the Board of Supervisors' annual approval (Charter § 10.104-15);
5. Contracts for commodities subject to legal mandates, such as intellectual property laws, that require the use of non-City personnel, including proprietary SaaS (software as a service) licenses and other proprietary software or hardware where the City has no legal access to its code;
6. Contracts for repair, maintenance, or similar services related to the purchase of software and equipment that must be performed by the manufacturer such as, for example, where such services cannot be completed by City employees without voiding the warranty;
7. Delegated Department Purchasing ("Prop Q") for one-time purchases of commodities or general services up to the dollar amount stated in Regulation 21.5(a) (currently \$10,000, including tax and shipping) (*see* Admin. Code § 21.03(a));
8. Contracts where state or Federal funding requirements specify use of non-City personnel;
9. Contracts for health and human welfare services where a City board or commission, the City Administrator, Controller, or the Mayor has determined that contracting is the most effective way to provide services (2014 CSC Policy on PSCs);
10. Contracts where the Retirement Board has determined that contracting is the most effective way to deliver investment management and actuarial services (2014 CSC Policy on PSCs);
11. Health Service System contracts for employee and retiree health benefits;
12. Contracts for services incidental to the purchase of goods, such as shipping or installation, valued up to \$10,000; and
13. Contracts approved by the City Attorney for legal and litigation services or contracts entered into pursuant to settlement of legal proceedings.

These contracts may still be subject to oversight by departments or their commissions as well as the Office of Contract Administration, but they are not subject to Commission oversight.

IV. DHR's Role in Approval of PSCs

A. Contracts That Are Delegated to DHR for Review ("Expedited PSCs")

DHR receives all requests for PSCs and modifications to previously approved PSCs and then posts and forwards to the Commission requests for PSCs in excess of \$200,000 or that otherwise require Commission approval under this Policy or applicable memorandum of understanding with a labor union.

Departmental misuse of Expedited PSCs is prohibited. For example, a department may not use multiple PSCs for the same scope of services that cumulatively exceed \$200,000. Expedited PSCs where funding is added so that the total exceeds \$200,000 and requests to modify and approved Expedited PSC so that the amount exceeds \$200,000 must also be approved by the Commission.

B. PSC Database

Each City department that regularly utilizes PSCs must designate a departmental PSC coordinator. The PSC coordinator must work with DHR to ensure that all PSCs contracts are properly entered into the PSC Database. DHR is responsible for maintaining the database and establishing procedures for data entry. Departments are responsible for entering into the database all requests to contract out and all PSCs. The PSC Database will be used to ensure timely and adequate notice to the public and labor unions of requests to contract out and allow the Commission to audit overall City PSC contracting to ensure the integrity of the civil service system.

Departments may submit proposed PSCs for approval as soon as the need arises and prior to the award of any contract. Departments should submit one request for a specific service regardless of the number of vendors that may ultimately fulfill that service. Departments must also specify within the PSC Database what duration they are requesting for the PSC approval (e.g., one year, 18 months, three years, etc.). Where the duration sought is greater than five years, the department should include the date(s) it expects to report back to the Commission, as set forth in Section VIII below. Departments should expect to report back no less than every five years.

When submitting a PSC request, departments should keep in mind the purpose of the Commission's review. Background material and information must be included to clearly and sufficiently describe the specific personal service to be provided. It is crucial to clearly and adequately explain why City employees cannot perform the services being requested in the PSC. Departments should also remember that, in the interest of transparency, the description of the scope of work to be performed should be clear and specific so that a member of the public can understand what service will be contracted out.

C. Notice and Posting

Departments are required to notify affected labor unions of a department's request for a new or modified PSC in compliance with the applicable memorandum of understanding. DHR is responsible for creating and maintaining policies and practices to ensure unions are given timely and adequate notice under the terms of those agreements. Departments must comply with those procedures and practices. A copy or other proof of the notice from the department to the applicable union(s) must be included with any submission to the Commission for approval of a PSC.

DHR is also responsible for posting requests for new or modified PSCs on its website for seven calendar days. The posting must include at least the PSC number, the estimated amount, the scope of work to be considered, and the estimated duration. The posting period may run concurrently with the notice period for unions. Where a PSC application is modified subsequent to posting, the modified posting must be available to the public for at least seven calendar days.

V. Approval of PSC Requests

A. Types of Commission Approval

1. Continuing Approval

Continuing approval is granted by the Commission when the work to be contracted out cannot currently be completed by an existing class of City employees and it is not currently feasible to establish a new class to do the work. Continuing approval is valid until revoked by the Commission.

Unless otherwise authorized by the Commission, in the event that the Commission revokes its continuing approval for a PSC, a department may not execute on any new contracts under that PSC approval, nor may a department increase the duration or amount of, or expand upon, the scope of personal services contracted out under any contracts executed under that PSC approval. Revoking a continuing approval shall not terminate contracts executed under that PSC approval or otherwise modify the City's existing contractual obligations.

2. Regular Approval

The Commission will grant regular approvals for PSCs where continuing approvals do not apply. The Commission may place conditions on its approval, such as requiring periodic reporting from the department or reducing the requested duration of the contract.

B. Duration of Approval

The first contract under an approved PSC must be executed within 18 months from the date the Commission approves the PSC request. If the department still wishes to contract out personal services but fails to contract within the 18-month period, the department must submit a new request for PSC approval. Such requests must include a copy of the previously approved PSC and an explanation as to why the department was unable to execute a contract under the PSC within the 18-month deadline.

C. Modifications to Commission Approval

A department may only contract out personal services for the duration, amount, type, and scope of services specified in the approved PSC. Departments are required to submit a request to modify the PSC when the circumstances of the original request change. The following are changes that require Commission approval. All other changes may be submitted to DHR for approval.

1. Changes to the type or scope of service provided under a PSC approved by the Commission;
2. Changes in legal requirements for contracting under a PSC approved by the Commission;
3. Increases over 50% of the Regular PSC contract amount last approved by the Commission or the Expedited PSC contract amount if the requested increase amount will exceed the \$200,000 DHR threshold; or
4. Extensions beyond the estimated term approved by the Commission where the duration of the amended PSC will be three years or longer.

D. Retroactive Requests for Extensions

The Commission recognizes that there may be rare circumstances when a PSC for an active contract must unexpectedly be extended for a period of time without enough notice for the department to request the Commission's approval to modify the duration prior to its expiration. In such event, departments may submit to the Commission's Executive Director a retroactive request to extend the duration of the PSC's expiration. Such requests must include an

explanation as to why the department was unable to timely request the modification prior to expiration.

VI. Emergency Procedures

Where the Mayor has declared an emergency under Charter Section 3.100(14), or there is an emergency under Section 6.60 or 21.15 of the Administrative Code, the Commission recognizes it may not be possible for departments to seek pre-approval from the Commission for all PSCs that might otherwise be performed by City employees. Departments seeking to contract for personal services on an emergency basis should nevertheless endeavor to obtain pre-approval whenever possible.

In these circumstances, departments should contact the Commission's Executive Director as soon as possible. The Executive Director is authorized to approve PSCs or, where possible, to convene an emergency meeting of the Commission. In any event, for any PSCs executed during an emergency, within 30 days of execution of any agreement, the contracting department should report to the Executive Director any agreement that would have otherwise required approval by the Commission to the Commission.

VII. Protests and Appeals

A. Expedited PSCs

Protests of approved Expedited PSCs must be directed to the Human Resources Director no later than the close of business on the fifth business day after posting and noticing the PSC approval. In the absence of any timely protest, an Expedited PSC becomes final on the close of the fifth business day of posting.

The Human Resources Director is authorized to resolve protests on Expedited PSCs. The Human Resources Director's decision may be appealed to the Commission, provided such appeal is received by the Executive Officer by close of business on the fifth business day following the postmarked mailing/email date of notification of the Human Resource Director's action. Such appeals will generally be heard at the Commission's next regularly scheduled meeting on the Regular Agenda.

B. Regular and Continuing PSCs

An appeal of a posted proposed Regular or Continuing PSC may be appealed to the Commission, provided such appeal is received by the Executive Officer by close of business of the fifth business day after posting. Timely appeals will generally be considered by the Commission at its next regularly scheduled meeting on the Regular Agenda. Where there is an appeal or other objection to a Regular PSC, departments are required to have representatives present (in person or remotely) to respond to questions or provide clarification. If a department representative is not available, the Commission may choose to postpone consideration of the PSC to a later meeting.

C. Ratification Agenda

The Ratification Agenda is used exclusively for expediting the processing of uncontested proposed PSCs and will precede the Consent Agenda on the Commission's calendar. Although they may provide public comment on a proposed PSC, individuals seeking to sever a proposed PSC from the Ratification Agenda must provide adequate justification to the Commission for their request and why they did not timely protest or appeal the item when they had an opportunity to do so.

The Commission recommends that a department representative attend the Commission meeting at which the department's request for PSC approval will be heard on the ratification agenda in order to answer any questions the Commission may have regarding that PSC. Whenever possible, the Commission encourages department personnel to appear remotely to

maximize efficiency. Failure to appear or sufficiently respond to the Commission's questions may result in postponement or denial of the PSC.

VIII. Reporting Requirements

Departments are required to submit information to DHR regarding the names, contracts, amounts and durations for all personal service contracts issued under an approved PSC at the time those contracts are processed for award. DHR, in turn, is required to submit that information for all PSCs awarded during the preceding year to the Commission. The reports are public records.

Departments are also required to submit to the Commission annual reports for all PSCs with continuing approval. Departments that have obtained approvals for durations exceeding five years must report back every five years unless the Commission has approved an alternate reporting period.¹ Reports to the Commission should list the following information:

1. The contracts executed under the PSC since the last report;
2. The types of services acquired under the approved PSC since the last report;
3. The amounts of the contracts executed under the PSC since the last report;
4. The duration of the contracts executed under the PSC since the last report;
5. Whether there have been any new classifications created that could perform the work or whether any such efforts are underway; and
6. The identities of any potentially affected unions.

Departments must provide these reports to the Commission no later than August 1 for the prior fiscal year. Once received, the Executive Officer will place the reports on the Consent Agenda for the following Commission meeting and forward a copy to any affected union(s). The reports are public records.

Departments must also notify any affected union(s) each time a Request for Proposal ("RFP")/Request for Quote ("RFQ") is issued for a contract under the authority of a PSC with continuing approval, and provide the affected union(s) with a link to or copy of that RFP/RFQ.

¹ Departments are currently required to submit their own reports to the Commission. When the ServiceNow database is fully operational, DHR or OCA is authorized to submit Citywide reports.