THE CITY OF SAN DIEGO

OFFICE OF THE INDEPENDENT BUDGET ANALYST REPORT

Date Issued: June 28, 2010 **IBA Report Number:** 10-60

Rules Committee Agenda Date: June 30, 2010

Item Number: Item 3

Review of Proposed Ballot Measures for the November 2010 Election

OVERVIEW

At the June 16, 2010 Committee on Rules, Open Government, and Intergovernmental Relations (Rules Committee), nine citizen-proposed ballot measures were docketed for discussion. Due to items on the June 16th docket running long, three ballot measures submitted by Jason Everitt were continued to the June 30, 2010 Rules Committee meeting for discussion. The following is the IBA's preliminary review of the three proposed measures including our observations and possible questions for Committee consideration. It is important to note that these observations are based on our interpretation of the measures and the impacts could change based on more clarification of sections of the proposed language by Mr. Everitt or the City Attorney's Office.

FISCAL/POLICY DISCUSSION

Taxpayer Right-to-Know – Private Contracting

On March 20, 2009 our office released report number 09-22 titled "PRA Requirements for Outside Contractors" (See Attachment A). This report was released in response to a September 24, 2009 request by the Budget and Finance Committee to provide information on whether disclosure requirements of the Public Records Act (PRA) should be extended or applied to private contractors. Specifically, the request included the following: to include stakeholders in the discussion; for the IBA to provide further analysis regarding how other cities address this issue; and for the Mayor's Office to

provide further financial analysis regarding impacts to the City. This report was presented to the Rules Committee on March 25, 2009 and no action was taken.

In our report we included a discussion of the possible fiscal impacts for Committee member consideration. These possible fiscal impacts were developed after having meetings with representatives from the contracting industry. In addition to the fiscal impacts, we also provided questions for Committee consideration. A summary of the fiscal impacts and questions from our 09-22 Report are summarized below.

Fiscal Impacts to Consider

- One concern raised by the industry is the unknown cost to contractors of responding to PRA requests. Because it is difficult to predict what types of requests (and the number) that would be initiated, the total time spent on responding would not be known. If the contractor bears the responsibility for the cost, this becomes an additional cost that the contractor must incur. And, it may not be possible for bids to include an estimate of these costs and still remain competitive. The unknown cost may deter a contractor from bidding on a City contract. This could also potentially raise the cost of providing a specific service (as there would be fewer bidders for the city to choose from).

- Another potential fiscal impact would be if, over time, added costs were passed on to the City through an increase in bidders' cost proposals. This possibility needs to be evaluated particularly in these difficult fiscal times.

- Currently, a PRA request regarding contracting work is disseminated through the Administration Department to the Purchasing and Contracting Department and it is this Department that responds to the request. If additional information is needed that the Department cannot provide, the contractor is contacted by the City and the request for the information is made. However, if through this legislation the number or extent of disclosure requests increase, additional administrative staff may be required.

- Another significant concern raised was the potential disclosure of proprietary information. Because submitting a bid is a competitive process, private contractors who are obligated to respond to PRA requests may be subject to disclosure of this information, potentially into the hands of a competitor. Theoretically, this threat may drive down the number of contractors that bid on city contracts and for the same reason explained above, may impact the cost of this service to the City.

Questions to Consider

- Will the City or contractors absorb the cost of responding to PRA requests? Clarification by the City Attorney may be necessary, and may be helpful to include in the ballot measure language.

- Will additional administrative staff be needed in the Administration and/or Purchasing and Contracting Department for monitoring and enforcement?

- How much and what type of disclosure is currently required of contractors? Before entering into an agreement, the Purchasing and Contracting Department requires contractors to complete (and sign under penalty of perjury) a Contract Standards Questionnaire providing useful financial contractor information, contract performance history and compliance records. Should this type of disclosure be adequate?

Reforming Managed Competition to Require Fair and Open Competition
This proposed ballot measure would amend the City Charter to define Managed Competition as the competition between city departments and independent contractors, and to require Managed Competition on all contracts over $250,000 annually, with city forces being required to compete with independent contractors on public works contracts. It should be noted that this proposal is subject to meet and confer and the City is currently in extensive negotiations with labor on the City's current Managed Competition program and a resolution is expected soon.

Also, this proposal as written could increase costs to the City due to the requirement that every contract over $250,000 be subject to managed competition, requiring employee bid teams to be assembled for every such service. Finally, this measure would expand the definition of managed competition in Proposition C to define it as competition between city departments and independent contractors. This definition could result in restricting the Mayor's ability to pursue alternative methods for pursuing cost savings and efficiencies.

People's Right-to-Vote – Development Subsidies
On June 17, 2010 the IBA received a memorandum from Councilmember DeMaio requesting analysis on the "People's Right to Vote" ballot measure that was presented at the Rules Committee on June 16, 2010. The proposed ballot would require "that any proposed use of City financial assistance for a Major Commercial Development Project be submitted for approval by the voters of the City of San Diego, and that an election regarding the same be held only after all relevant documents have been disclosed."

Councilmember DeMaio requested the IBA to provide a list of all "Major Commercial Development Projects" since 1995-including an identification of the lead developer- who

have received "City Financial Assistance" of $500,000 or more that would have been subject to this proposal had it been part of the City Charter at the time.

In response to this request our office contacted staff at the Centre City Development Corporation (CCDC), Southeastern Economic Development Corporation (SEDC), the Redevelopment Agency, Housing Commission, and Mayor's Office of Economic Growth Services. We discussed with staff the ballot proposal including the different types of City Financial Assistance language that is included in the ballot and sent both the ballot proposal and Councilmember DeMaio's June 17, 2010 memo for their review.

Attached to this report are the responses that were provided to our office of projects that would be subject to this measure (See Attachment B). We would like to note however, that this information is preliminary and further clarification of the ballot proposal may be needed. An example of language that needs further clarification is in Section 3(V), under the definitions for "City Financial Assistance." The language in the measure states:

> "The construction of, or the funding of the construction of, public improvements including but not limited to sidewalks, roadways, landscaping, parking facilities, piers, restrooms, or other structures worth in total more than $500,000, one of the principal beneficiaries of which may be a Major Commercial Development Project. A Major Commercial Development Project will be deemed one of the principal beneficiaries of improvements if there is a significant possibility that these improvements will be used or enjoyed at least as often by persons connected to the development as by the general public....The City shall not refuse to put improvements before voters on the ground that a commercial development will not be one of the principal beneficiaries unless the City has first obtained a report from experts independent of the City and of persons connected to the development showing the lack of significant possibility described above."

Infrastructure improvements including deferred maintenance projects are provided by the City annually based on City-wide priorities regardless of who the beneficiary may be. A point of clarification that the IBA would suggest is whether this measure would apply to infrastructure improvement projects including deferred maintenance that are in proximity to a Major Commercial Development project that is under development, construction, renovation, or expansion. In addition, "significant possibility" should also be more clearly defined.

Other items for consideration include the possible delays to projects as the City waits on an independent report to be completed on the determination of principal beneficiaries and also for an election to put the project on the ballot. Depending on the timing of the report and election, projects could be delayed months if not years. One other item for consideration includes the cost for placing each project on the ballot. Currently the City Clerk is estimating that the cost for a five-page measure is $250,000.

CONCLUSION

This report provides a review of the three proposed measures presented by Jason Everitt. This report includes our preliminary observations and possible questions for Committee consideration. It is important to note that these observations are based on our interpretation of the measures and the impacts could change based on more clarification of sections of the proposed language by Mr. Everitt or the City Attorney's Office.

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Attachment A- IBA Report Number 09-22, "PRA Requirements for Outside Contractors"

Attachment B- Table: "Major Commercial Development Projects that have Received City Financial Assistance as per People's-Right-to-Vote Ballot Measure"

OFFICE OF THE INDEPENDENT BUDGET ANALYST REPORT

Date Issued: March 20, 2009 **IBA Report Number:** 09-22

Rules Committee Date: March 25, 2009

Item Number: 3

PRA Requirements for Outside Contractors

OVERVIEW

On March 6th, 2009 Councilmember Frye issued a memo requesting the Council President docket the matter of Public Records Act (PRA) requirements for outside contractors for discussion at the Rules Committee.

The issue was first heard at a July 28th, 2008 City Council Meeting as an Amendment to the Managed Competition and Business Process Reengineering Ordinances (Item number 151). In considering this, the City Council also discussed monitoring of performance standards as it relates to private contractors. A motion was passed that directed the City Attorney to come back with recommendations about the appropriate disclosure requirements for private interests that obtain contracts.

On September 24th, 2008 the Budget and Finance Committee meeting discussed Item number 4 regarding the City's Contractor Ordinance. The City Attorney's Office provided a possible amendment to the Municipal Code that would require disclosure of contractor documents through the PRA and recommended its adoption by the City Council. There was no action taken on this item, but the committee made the following requests: to include Stakeholders in the discussion; for the IBA to provide further analysis regarding how other cities address this issue; and for the Mayor's Office to provide further financial analysis regarding impacts to the City.

Since the September Committee meeting, this matter has been moved to the Rules Committee as part of the City Council Governance Report, which was released by Councilmember Frye and Councilmember DeMaio on November 13th, 2008. It is outlined in section 3.3, "Enhance Oversight of City Contracting." It should be noted that

"while Councilmember Frye supports this recommendation; [Councilmember] DeMaio would like to propose a more narrow scope of disclosure."

POLICY DISCUSSION

Our office contacted the City Attorney and the Mayor's office to discuss next steps in carrying out the direction given by the Budget Committee. In both cases, it was indicated that no additional work would be done on this item. To the extent possible, our office attempted to gather relevant data to report back to either a Council Committee or the City Council at a later date.

Comparison Methodology

In conducting our research of comparing disclosure requirements of other local governments, we examined a total of ten municipalities. Included are the seven most populous cities in California, the County of San Diego and also two smaller cities in California that have enacted "Sunshine" laws, which are laws created by local governments that provide greater rights of access for the public outside of the State California Public Records Act (CPRA). Coincidentally, many of the seven most populous cities also enacted "Sunshine" laws. The researched municipalities are:

1. County of San Diego
2. Los Angeles
3. San Jose
4. San Francisco*
5. Long Beach
6. Fresno
7. Sacramento
8. Oakland*
9. Milpitas*
10. Benicia*

*Municipalities that have also enacted "Sunshine" laws

For comparison purposes, our office also analyzed the State of Georgia. The state government enacted this legislation in the 1970's and it is currently referred to as the "Sunshine" Law. The Law includes an Open Meetings Act and an Open Records Act (ORA). The ORA portion is comparable to California's PRA however Georgia's legislation requires disclosure by the private sector.

The review process of all municipalities included analyzing various documents such as council policies, municipal codes, and "Sunshine" laws where applicable. We also spoke to municipal staff from the Clerk and/or Attorney offices.

California Public Records Act

Because many municipalities follow the CPRA and do not enact legislation of their own, it is important to review disclosure requirements outlined in this legislation.

Private, non-profit corporations and entities that receive public funds are generally not subject to disclosure via a Public Records Act request. An exception includes private corporations or entities that are:

> "Created by an elected legislative body to exercise authority that may lawfully be delegated by the elected governing body or receive funds from a local agency and have as a board member at least one member of the legislative body of the local agency appointed to the governing body of the private entity, by the legislative body of the local agency, as a full voting member. Cal.Gov't Code §54952 (c) (1)."

Alternatively, the State of Georgia's Open Records Act *includes* private contractors as an entity required to disclose records. For comparison purposes, the section of this Act (which also applies to the state's Open Meetings Act) is provided below:

> "The Acts also apply to private entities to which public function have been transferred by an agency or which receives substantial funding or resources from an agency in performance of a task (in such instance, only the records and meetings related to that task are open). An agency may not transfer records to a private entity to avoid disclosure, and, if public records are transferred to private parties, that private person or entity is subject to the provisions of the Open Meetings."

"Sunshine" Laws

Although state law governs access rights at the local level, cities and counties are free to enact ordinances that provide greater rights of access than state laws provide. As described in the previous section, these local laws providing extra rights are often referred to as "Sunshine" laws.

According to the California First Amendment Coalition, a not-for-profit, nonpartisan, program that promotes "freedom of expression and the people's right to know," there are seven local governments in California that have enacted such laws. These municipalities include: Benicia, Contra Costa County, Milpitas, Oakland, Riverside, San Francisco and Vallejo. It is important to note that each of these ordinances vary significantly in their individual methods for strengthening local public access rights.

Comparison Results of Researched Municipalities

After reviewing each municipality, it was found that either the CPRA was followed and therefore, no further requirements for private entity disclosure were created, or a

"Sunshine" law was enacted. However, after reviewing the "Sunshine" laws for each applicable municipality and speaking with staff from various City Attorney offices, nothing was found in these laws that extended this particular subject of disclosure requirements.

FISCAL DISCUSSION

Fiscal Impacts to Consider

Another area that our office attempted to analyze was potential fiscal impacts to the city if this requirement were mandatory. In exploring this matter, our office scheduled an informational meeting with representatives from the contracting industry. The entities that were present include the: Engineering and General Contractors Association, Associated General Contractors of America, National Electrical Contractors Association, Hazard Construction Company, and Perry and Shaw Inc. Below are some points that were raised.

One concern was the unknown cost to contractors of responding to PRA requests. Because it is difficult to predict what types of requests (and the number) that would be initiated, the total time spent on responding would not be known. If the contractor bears the responsibility for the cost, this becomes an additional cost that the contractor must incur. And, it may not be possible for bids to include an estimate of these costs and still remain competitive. The unknown cost may deter a contractor from bidding on a city contract. This could also potentially raise the cost of providing a specific service (as there would be fewer bidders for the city to choose from). Another potential fiscal impact would be if, over time, added costs were passed on to the City through an increase in bidders' cost proposals. This possibility needs to be evaluated particularly in these difficult fiscal times.

Currently, a PRA request regarding contracting work is disseminated through the Administration Department to the Purchasing and Contracting Department and it is this Department that responds to the request. If additional information is needed that the Department cannot provide, the contractor is contacted by the City and the request for the information is made. However, if through this legislation the number or extent of disclosure requests increase, additional administrative staff may be required. According to the performance measures from the FY 2009 adopted budget, the Administration Department processed 129 requests in FY2008 and anticipates processing a total of 250 in FY2009, which may provide context to this discussion.

Another significant concern raised was the potential disclosure of proprietary information. Because submitting a bid is a competitive process, private contractors who are obligated to respond to PRA requests may be subject to disclosure of this information, potentially into the hands of a competitor. Theoretically, this threat may drive down the

number of contractors that bid on city contracts and for the same reason explained above, may impact the cost of this service to the City.

CONCLUSION

The IBA is not providing a recommendation as to whether disclosure requirements of the Public Records Act should be extended or applied to private contractors. The purpose of this report is to provide additional information as requested by the Budget Committee.

In summary, our research found no other municipalities in California that enacted this type of disclosure requirement; however, attempts have been made by many local governments to increase public access rights to its citizens.

Our office would like to provide questions to consider regarding fiscal impacts:

- Will the City or contractors absorb the cost of responding to PRA requests? Clarification by the City Attorney may be necessary, and may be helpful to include in the amendment language.

- Will additional administrative staff be needed in the Administration and/or Purchasing and Contracting Department for monitoring and enforcement?

- How much and what type of disclosure is currently required of contractors? Before entering into an agreement, the Purchasing and Contracting Department requires contractors to complete (and sign under penalty of perjury) a Contract Standards Questionnaire providing useful financial contractor information, contract performance history and compliance records. Should this type of disclosure be adequate?

Additional discussion should be thoughtfully undertaken between all stakeholders before any decisions are made.

[SIGNED]

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APPROVED: Andrea Tevlin
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Attachment:
City Attorney Report – Proposed Amendment

Major Commercial Development Projects that have Received City Financial Assistance as per People's-Right-to-Vote Ballot Measure: 1995 to Present

Attachment B

Responding Agency	Project Name	Developer
SEDC*		
	Figi Graphics	Figi Graphics
	Southcrest Park Plaza	Virgil Gordon
	Imperial Marketplace	Pacific Development Partners
	Harbro/The Old Globe Theatre	HarBro Construction/Taylor Construction
	Market Creek Plaza	Jacobs Center for Neighborhood Innovation
CCDC		
	East Village Square-Right Field Block-Parcel 4	East Village Square, LLC
	Walker School/Owl Drug Building	Street Retail West 8, LP
City Redevelopment Agency		
	Mercado Del Barrio	Shea Properties
	Chuey's Restaurant	Luis Garcia "Doing Business As" (DBA) Chuey's Restaurants
	City Heights Square	Price Charities DBA City Heights Reality LLC
	City Heights Urban Village	Price Charities DBA San Diego Revitalization Corp & William Jones DBA City Link DBA Urban Village Commercial LLC
	Regional Trans Center	Pearson Ford DBA RTC-LLP
	Metro Career Ctr	Price Charities DBA San Diego Revitalization Corp
	Historic Preservation	Property owner-David Chau
	College Grove Renovation	WalMart Real Estate Business Trust
	Linda Vista-Shopping Center North	MRW Development
	Linda Vista-Shopping Center South	MRW Development
	Liberty Station	McMillin Companies
	The Village at Marina Vista	William Jones DBA CityLink
	Lafayette Hotel	Hampstead Lafayette Hotel, LLC
	North Park Theater	Bud Fischer DBA North Park Theatre LLC
	North Park Garage	Bud Fischer
	Bodhi Animal Hospital	BODHIBO, LLC
	Plaza de Las Americas	Land Grant Dev
Mayor's Office of Economic Growth Services		
	Project Mercury-Phase II	Sony Electronics, Inc.
	NADII/NIFGI Campus	Novartis AG

*SEDC indicated that records over 3 years old are located off-site and therefore, one or two additional projects were not included on list