

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: March 5, 2020
TO: Councilmember Scott Sherman
FROM: City Attorney
SUBJECT: Use of Community Projects, Programs and Services Funds to Design and Construct a Non-Standard Community Identification Sign

INTRODUCTION

The City Council may grant Community Projects, Programs and Services (CPPS) funds to public agencies and non-profit organizations (grantee) following an application process outlined in Council Policy 100-06 (CP 100-06). This memorandum addresses whether CPPS funds may be used to design and construct a non-standard community identification sign.¹

QUESTION PRESENTED

May CPPS be used to design and construct a non-standard community identification sign?

SHORT ANSWER

Yes, subject to certain limitations. CPPS funds may be used to reimburse a grantee for designing and constructing a sign on private property. If, however, the sign will be placed in the public right-of-way, Councilmembers may either amend an existing City project to include this work, or request that a new City project be created that includes the construction and installation of the sign. Finally, the Council may wish to work with the Mayor's office to create a process that is more amendable to the use of CPPS funds for public works projects.

¹ A non-standard community sign is a large, monument-style community identification sign that is typically located at the primary entrance to a community. The City of San Diego, through the Street Division, installs and maintains *standard*, post-mounted community identification signs, but not *non-standard* community identification signs. The Streets Division estimates it costs \$50,000 to design and construct a non-standard community sign.

DISCUSSION

CP 100-06 establishes guidelines for the annual appropriation and expenditure of Council funding for CPPS grants. As originally adopted, CP 100-06 only provided a process to allow transfer of CPPS funds to City departments to supplement or initiate City activities or projects. (CP 100-06, adopted by Resolution R-306903, on July 7, 2011 (attached as Exhibit A)). Shortly after its adoption, the City Council amended CP 100-06 to add the following categories of funding:

- (i) Capital Improvements;
- (ii) Goods, Supplies, Materials or Equipment; and
- (iii) Community Program or Project.

CP 100-06, adopted by Resolution R-307189, on December 8, 2011 (attached as Exhibit B).

Legislative history of CP 100-06 indicates that the capital improvements category refers to capital improvement projects on *private* property, and not public works.² Unlike private capital improvement projects, public works are subject to specific competitive bidding requirements under the San Diego City Charter (Charter) and San Diego Municipal Code (Municipal Code or SDMC), as well as prevailing wages.

I. THE USE OF CPPS FUNDS MUST COMPLY WITH CITY AND STATE CONTRACTING LAWS.

As stated above, CP 100-06 provides options to use CPPS funding for non-standard community signs, including constructing the sign on private property or funding a City project. If an existing City project does not exist, the City Council could request that a new one be created in the budget. However, funding a grantee for construction of a non-standard community sign in the public right-of-way requires compliance with public works laws.

A. Private Capital Improvements Versus Public Capital Improvements.

A private capital improvement involves work to private property or facilities that either enhance the private property value or prolong its useful life. Because a private capital improvement project is not located on, and does not involve public facilities, it is not a public work for

² See IBA report No. 11-36 (June 13, 2011); IBA report No. 11-23 (Apr. 15, 2011); CP 100-06, adopted by Resolution R-306903 (July 7, 2011).

purposes of competitive bidding and other Municipal Code requirements. An example of CPPS funds used for a private capital improvement is the building improvements to the San Diego LGBT Community Center that were funded in FY 2019 with CPPS funds.³

On the other hand, a capital improvement that is “for the construction, reconstruction or repair of *public* buildings, streets, utilities, and other public works,” is a public work as defined in the Municipal Code. SDMC § 22.3003. This includes construction, reconstruction, or repair in the right-of-way.⁴ Under Charter section 94, contracts for public works shall be competitively bid pursuant to rules established by ordinance of the City Council. The design and installation of a non-standard community identification sign in the public right-of-way is a public works project for purposes of the Charter, Municipal Code and state law.

B. A Public Works Project Triggers Multiple City and State Laws.

Any award of CPPS funds for a public improvement must comply with the public works contracting procedures outlined in the Municipal Code. *See* 2011 City Att’y MOL 144 (2011-08; July 5, 2011); 2016 City Att’y MOL 39 (2014-4; June 19, 2014). The City cannot circumvent the competitive process necessary for awarding a public works contract by contracting with a third party to handle it. 2011 City Att’y MOL 144 (2011-08; July 5, 2011); *Epstein v. Hollywood Entm’t Dist. II Bus. Improvement Dist.*, 87 Cal. App. 4th 862, 873 (2001).

As recognized in California, “statutes and ordinances that authorize or require competitive bidding in the letting of public contracts ordinarily serve the purpose ‘of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable.’” *Eel River Disposal and Res. Recovery Inc. v. Cnty.*, 221 Cal. App. 4th 209, 232 (2013). A private third party may not share the City’s interest in inviting competition and in getting the best work at the lowest price possible, thereby protecting the City’s coffers. 2011 City Att’y MOL 144 (2011-08; July 5, 2011).

Public works projects must comply with the competitive bidding process outlined in the Municipal Code. A major public works project (\$1,000,000 or more) must be advertised and awarded to the lowest responsible and reliable bidder. SDMC § 22.3107(a)(4). A minor public works project (less than \$500,000) must be awarded through a different competitive process pursuant to Chapter 2, Article 2, Division 36 of the Municipal Code. SDMC § 22.3107(c).

³ However, it is important to note that this work may be considered a public work for the purpose of requiring the payment of prevailing wages. The California Labor Code definition of a “public work,” used to determine the applicability of prevailing wages, does not have a requirement that the work be done on public property. There are exceptions to this definition within the California Labor Code, but they need to be analyzed on a case-by-case basis.

⁴ Public works includes beautification projects in the right-of-way, such as decorative signs or paint. *See* Cal. Pub. Cont. Code § 20161 (defining “public project” to include the erection, improvement, painting, or repair of public buildings; work in or about waterways to protect against overflow; street or sewer work; and furnishing supplies and materials for any such projects). However, public works does not include maintenance activities, such as cleaning and upkeep.

In addition to the competitive processes that must be followed, there are several other legal requirements that must be included in the contract, such as performance and payment bond provisions, insurance requirements, non-discrimination language, and all the required prevailing wage language as well. Cal. Civ. Code § 9550 and SDMC § 22.3005, SDMC § 22.3512, Cal. Lab. Code §§ 1720-43. Further, all bidders must be prequalified with the City and registered with the Department of Industrial Relations to be eligible to bid on public works projects. *See* SDMC § 22.3004(b) and Cal. Lab. Code § 1725.5.

Here, a CPPS grantee would need to comply with the City's competitive procedures and the City's mandatory contractual terms and conditions to enter into and perform a Public Works contract. Since the current Council Policy does not outline a process to ensure compliance with these rules, the Council, working with the Mayor's office, may wish to explore options for developing a process to ensure compliance with legal requirements for public works. Our Office is available to assist with that process.

C. CPPS Contracts May Be Used to Purchase Goods or Services.

CPPS grants are typically awarded to fund goods and services contracts, so long as the grant funds are used following the City's competitive bidding process, which include exceptions for certain types of contracts. For instance, CPPS grants used for "services" contracts may be awarded to a non-profit organization without a competitive process. *See* SDMC § 22.3210; SDMC § 22.3208(g). A "service" contract is defined by the Municipal Code as "a contract to provide assistance, labor or maintenance. A contract for services does not include consultant contracts, contracts for goods, or *public works contracts*." SDMC § 22.3003(emphasis added).⁵

While CPPS funds may be used for goods and services, it is not proper to fund a portion of a Public Works project that includes a goods or services component. For example, it would be permissible to fund a community event pursuant to CP 100-06 to commemorate the completion of a non-standard community sign, but it is not appropriate to fund the actual building of the sign or the materials used to build the sign, such as the wood, screws, and paint. *See* Cal. Pub. Cont. Code § 20163 (it is unlawful to split or separate into smaller work orders or projects any public work of the purposes of evading competitive bidding).

⁵ There is also an exception to competitive bidding for goods and service contracts under \$25,000 pursuant to Municipal Code section 22.3208(a).

CONCLUSION

Although the CPPS grant program does not currently allow the award of a public works contract to a grantee, Councilmembers have other options, such as building the non-standard community identification sign on private property or augmenting funding for City projects. The City could also develop a program to ensure that grantees meet competitive bidding requirements and all other state and local laws for public works.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/Catherine C. Morrison
Catherine C. Morrison
Deputy City Attorney

By /s/Christina L. Rae
Christina L. Rae
Deputy City Attorney

CCM:jvg

MS-2020-6

Doc. No.: 2343311

cc: Honorable Mayor Kevin Faulconer
Aimee Faucett, Chief of Staff
City Councilmembers
Andrea Tevlin, Independent Budget Analyst
Kris Michell, Chief Operating Officer
Jeff Sturak, Assistant Chief Operating Officer

EXHIBIT A

CITY OF SAN DIEGO, CALIFORNIA
COUNCIL POLICY

SUBJECT: CITY COUNCIL FUNDING OF COMMUNITY PROJECTS,
PROGRAMS AND SERVICES
POLICY NO.: XXX-XX
EFFECTIVE DATE:

PURPOSE:

It is the purpose of this policy to establish guidelines for the annual appropriation and expenditure of funding for each City Council Office for community projects, programs and services to be expended at the discretion of each Councilmember during the fiscal year.

Annual funding levels are subject to budget priorities as established by the City Council each year.

POLICY:

It is the policy of the City Council that:

1. Proposed funding levels for annual allocations for Community Projects, Programs and Services for each Council Office will be included each year in the Mayor's Proposed Budget.
2. Proposed funding levels for Community Projects, Programs and Services for each Council Office for the following fiscal year will may be initially determined based on estimated savings to be achieved related to the administration of each Council Office by the current fiscal year-end.
3. Variances in actual savings from budgeted amounts may result in recommendations from the Mayor to the Council to revise appropriations to reflect actual savings, as a mid-year budget adjustment, depending on financial circumstances, and prior year results for the General Fund and reserves.
4. Funding for Community Projects, Programs and Services may be expended for any government purpose.

5. Funding for Community Projects, Programs and Services can be used to supplement the appropriations of any existing General Fund activity or a new activity that would typically be supported by the City's General Fund.
6. Funding requests to supplement City Departmental expenses or existing capital improvement projects ~~can~~ shall be made of the Chief Financial Officer.
7. Community Projects, Programs and Services funding should be considered a one-time resource, and planned uses should be one-time in nature, to avoid service interruptions or employee impacts if funding is discontinued.
8. Community Projects, Programs and Services funding is not permitted to be utilized for administrative expenses related to the Council Office.
9. Upon request of the respective Councilmember, available appropriations in non-personnel expense accounts in the Council Office administrative budget may be reallocated to supplement the funding level of the Community Projects, Programs and Services account within the current fiscal year.
10. Unexpended "Community Projects, Programs and Services" funds will not be considered in the savings estimates when determining the amounts for addition to the following year's budget.
11. Establishment of a new capital project must be done by Council resolution.

HISTORY:

EXHIBIT B

CITY OF SAN DIEGO, CALIFORNIA
COUNCIL POLICY

CURRENT

SUBJECT: CITY COUNCIL FUNDING OF COMMUNITY PROJECTS,
PROGRAMS AND SERVICES
POLICY NO.: 100-06
EFFECTIVE DATE: December 8, 2011

PURPOSE:

It is the purpose of this policy to establish guidelines and uniform eligibility requirements for the annual appropriation and expenditure of funding for each City Council Office for community projects, programs and services to be expended at the discretion of each Councilmember during the fiscal year.

Annual funding levels are subject to budget priorities as established by the City Council each year.

POLICY:

It is the policy of the City Council that:

1. Proposed funding levels for annual allocations for Community Projects, Programs and Services for each Council Office will be included each year in the Mayor's Proposed Budget.
2. Proposed funding levels for Community Projects, Programs and Services for each Council Office for the following fiscal year may be initially determined based on estimated savings to be achieved related to the administration of each Council Office by the current fiscal year-end.
3. Variances in actual savings from budgeted amounts may result in recommendations from the Mayor to the Council to revise appropriations to reflect actual savings, as a mid-year budget adjustment, depending on financial circumstances, and prior year results for the General Fund and reserves.
4. Funding for Community Projects, Programs and Services may be provided to City Departments, Public Agencies, and to Non-Profit community organizations, for one-time community, social, environmental, cultural or recreational needs which serve a lawful public purpose.

CITY OF SAN DIEGO, CALIFORNIA
COUNCIL POLICY

CURRENT

5. Funding for Community Projects, Programs and Services can be used to supplement the appropriations of any existing General Fund activity or a new activity that would typically be supported by the City's General Fund.
6. Funds are not permitted to be used for food, beverages, and travel. Funds shall not be used for any private purpose, political, religious, or fundraising activities.
7. Funding requests to supplement City Departmental expenses or existing capital improvement projects shall be made of the Chief Financial Officer.
8. Community Projects, Programs and Services funding should be considered a one-time resource, and planned uses should be one-time in nature, to avoid service interruptions or employee impacts if funding is discontinued.
9. Community Projects, Programs and Services funding is not permitted to be utilized for administrative expenses related to the Council District.
10. Upon request of the respective Councilmember, available appropriations in non-personnel expense accounts in the Council Office administrative budget may be reallocated to supplement the departmental funding level of the Community Projects, Programs and Services account within the current fiscal year.
11. Unexpended Community Projects, Programs and Services funds will not be considered in the savings estimates when determining the amounts for addition to the following year's budget.
12. Establishment of a new City capital project must be done by Council resolution.
13. The allocation of funding under this Policy shall be posted on the City Website, including the amount of funding, the Council District from which funds are allocated, the project for which funds will be used, and the name of the recipient of funding.

PROCEDURE TO AWARD FUNDS TO PUBLIC AGENCIES OR NON-PROFIT ORGANIZATIONS:

1. Funding allocations for public agencies or non-profit organizations
 - a. Types of Funding for Public Agencies or Non-Profit Organizations:

CITY OF SAN DIEGO, CALIFORNIA
COUNCIL POLICY

CURRENT

- i. Capital Improvements: Funds may be awarded to pay for items or services needed to design, process and build capital improvements, including materials; contracted labor; contracted consultant and professional services. Capital improvements are defined to include the construction or acquisition of buildings and recreational facilities, or other community improvements, such as landscaping, maintenance, or other work designed to improve, enhance or extend the useful life of a facility.
 - ii. Goods, Supplies, Materials, or Equipment: Funds may be awarded to purchase, create, install, remove, maintain and repair these tangible items, so long as it serves a lawful public purpose.
 - iii. Community Program or Project: Funds may be awarded for one-time community, social, environmental, cultural, or recreational needs, so long as it serves a lawful public purpose.
 - b. Each Council District shall recommend funding recipients based on its review of application materials and supporting documentation from all applicants who have complied with the requirements herein, including the requirements in the application.
 - c. Funding awarded to public agencies or non-profit or tax exempt organizations under this program may only be done by resolution of the City Council.
 - d. Council Offices are encouraged to group recommended allocations for approval at City Council.
 - e. Council Office should encourage applicants to seek matching funds outside of the Community Projects, Programs and Services funding. The availability of matching funds is to be considered by the District when considering an application for funding.
2. Funding Eligibility: To be eligible for Community Projects, Programs and Services funding, each organization must:
 - a. Be a public agency or legally recognized tax-exempt and/or not for profit status entity.

CITY OF SAN DIEGO, CALIFORNIA
COUNCIL POLICY

CURRENT

- b. Be financially solvent, and submit the most current Internal Revenue Service [IRS] Form 990 at time of application. Public agencies are not required to provide Form 990.
 - c. Disclose all sources of funding to organization; including all funding for the specific project request. Private funding may be listed as "Private Funding". The source of private funds does not have to be identified. Public agencies must disclose all sources of funding only as it relates to the specific project request.
 - d. Enter into an Agreement with the City that specifies the responsibilities of the organization with respect to the use of funds awarded, and stipulating that all expenses shall be documented pursuant to the Agreement.
 - e. Acknowledge that all documents related to the funding request, including application materials, agreement and expenditure documentation are a matter of public record and as such, may be provided to members of the public.
 - f. Recognize that submission of an application for funding does not guarantee in any way that an organization will receive funding.
3. Application: Each organization requesting funding must submit the standard Community Projects, Program and Services Application to the Council District from which it requests funds.
- a. The application and supporting documentation must comply with all requirements herein and those enumerated in the application and its instructions.
 - b. A request for funding and subsequent allocation may not be less than \$1500.
 - c. Applicants must adequately describe the project and how it will benefit the community.
 - d. Applicant organizations must notify Council Districts if they have submitted multiple funding requests for the same project, or for any other project, from any other Council District.
 - e. Applicant organizations must disclose all prior funding received from the City in the last three years, including a brief project description, amount of funds received and the source of funding.

CITY OF SAN DIEGO, CALIFORNIA
COUNCIL POLICY

CURRENT

- f. A Council District may not ask for less documentation than what is required under this Council Policy, the standard Application, and the Application Instructions, but may ask for more documentation at its discretion.
 - g. An organization may not apply to receive funding for an event or program which has already occurred, nor any capital improvements, goods, supplies, materials or equipment which have already been purchased.
4. Execution of Funding Agreement:
- a. Funds will only be provided on a reimbursement basis. Funds will not be reimbursed without the documentation required under the agreement.
 - b. Organizations must submit required reimbursement documentation within sixty days of expenditure, and no later than thirty days after the end of the City's fiscal year.
 - c. If an organization is delinquent in providing required documentation under the Community Projects, Programs and Services program, or any other City program, funding will not be guaranteed.
 - d. Funding is awarded by fiscal year only. Expenditures must occur in the fiscal year in which funds are awarded. Requests for reimbursement for expenditures made outside of the fiscal year in which funding is allocated will not be processed.
 - e. The Agreements under this program will be administered by the Mayor or designee, with assistance from Council Administration.
 - f. If the recipient organization chooses to give written recognition for the funding received, it shall recognize the City of San Diego, not individual Council Members and not individual Council Districts.

HISTORY:

“City Council Funding of Community Projects,
Programs and Services”

Adopted by Resolution R-306903 - 07/7/2011

Amended by Resolution R-307189 - 12/08/2011