

City of Detroit


CITY COUNCIL

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TO: The Honorable President Pro-Tem
Gary Brown

FROM: David Whitaker, Director 
Research and Analysis Division Staff

DATE: April 21, 2010

RE: Questions Regarding Application of Privatization Ordinance

Pursuant to the March 17, 2010 inquiry from President Pro Tem Brown, the Research and Analysis Division (RAD) submits this response to specific questions as to the application of Chapter 18, Division 8 "Privatization of Certain City Services" of the City Code ("the ordinance").

QUESTION 1.

Under Section 18-5-103 of the ordinance, prior to solicitation of bids for proposed engagement of a vendor to provide contractual services, a comprehensive report is supposed to be submitted to Council.

- a. Under the ordinance does this language indicate that Council should receive a report for every contractual services contract?
- b. Does this language and the language of Section 18-5-104 indicate that bids for every contractual services contract cannot be solicited until City Council has reviewed the requisite report and given approval to solicit bids?

ANSWER

- a. There is no ambiguity in the codified language of Section 18-5-103. The language provides that "either the purchasing director or the director of the affected agency, department, board or commission or division shall prepare and submit a comprehensive report" and submit it to Council. Strictly construed the ordinance provides that the designated entity "*shall prepare and submit*" the report. However, Section 18-5-102,

provides a litany of exceptions to which the provisions of Division 8 does not apply such as contracts for goods and contracts for services from another governmental entity. (See Attached Section 18-5-102)

b. There is no ambiguity in the codified language of Section 18-5-104. The language provides that "No solicitation of bids...shall be circulated or published without prior approval of City Council after its review" of the comprehensive report required under Section 18-5-103. Strictly construed the ordinance is unequivocal that no solicitation of bids shall be circulated or published until the Council has given approval to do so after it has reviewed the required report. Again however, Section 18-5-102, provides exceptions to which the provisions of Division 8 does not apply. (See Attachment #1 Section 18-5-102)

QUESTION 2.

Section 18-5-104(b) of the ordinance states that the regular City employees who will be affected by the proposed service contract and their collective bargaining representatives shall be allowed to bid, and that any bid prepared by such affected employees shall be the last bid submitted after the employees and bargaining representatives have had an opportunity to view a list of all companies submitting bids. Would this opportunity to allow the employees to see who else is bidding before submitting their bid violate any state or federal competitive bidding laws?

ANSWER

RAD's review of federal and state laws relating to competitive bids does not reveal any inconsistency with Section 18-5-104(B) which provides in pertinent part:

Any bid prepared by such affected employees shall be the last bid submitted after the affected employees or the collective bargaining representative have had an opportunity to view a list of all companies submitting bids.

The federal and state statutory provisions reviewed by RAD¹ contained language regarding sealed bids being submitted and opened publicly at which time the bid proposals are subsequently evaluated. The essential components being that the contents of the bids are kept confidential until all bids are received. Under the ordinance, the employees are provided a list of the entities that submit bids for the contractual services. The content of the bidders proposals remain confidential. The employees are not provided any access to the contents of the other bidders proposals. The employees are afforded an opportunity to submit a bid on the contracted services after knowing what

¹ (1) Federal Acquisition Regulation; 48 CFR 1; (2) MCL 124.417 Competitive bids; procedure; written price quotations; procurement procedures; waiver; savings to be used for construction of bus shelter; (3) MCL 484.2252 Telecommunication services offered by public entity.

entities submitted bids. Thereafter the bids are publicly opened and subsequently evaluated.

QUESTION 3.

What entity or person makes the determination whether a contract for services will result in the privatization of a City service or services, and what section of Division 8 provides the answer?

ANSWER

There is no specific language that directly states that a particular entity will determine which contracts will result in privatization of services. However, in reviewing Division 8, it is RAD's belief that Section 18-5-108 provides language relative to what entity makes the determination of whether a contract will result in privatization.

Section 18-5-108:

The Finance Department, Purchasing Division, shall promulgate administrative rules and directives to implement the provision of this Division. Such rules and directives shall include a process for notifying the Detroit City Council that a proposed contract and solicitation for bids falls within the applicability of section 18-5-103 of this division.

The language of Section 18-5-108 provides that the Finance Department, Purchasing Division shall include in the rules and directives promulgated, a process of notifying the Detroit City Council, that a proposed contract and solicitation for bids fall within the applicability of section 18-5-103. The required notification is a product of a determination that the proposed contract for services would result in privatization. If there were no notification, it would be because the proposed contract meets one of the exemptions contained in Subsection 102. It is therefore RAD's belief that Subsection 108 implies, that the Finance Department makes the determination.

QUESTION 4.

Please obtain and provide a copy of the administrative rules and directives promulgated by the Finance Department, Purchasing Division to implement the Ordinance.

ANSWER

The administrative rules promulgated by the Finance Department Purchasing Division are attached to this memo. (See Attachment #2)

QUESTION 5.

Does Section 18-5-106(2)b, of the ordinance mean that the Purchasing Director must provide a report to City Council on every contract for service providing the reasons for a waiver of the provisions of the ordinance or why the contract is not privatization of a City service?

ANSWER

RAD believes the reference is to Section 18-5-106, subsection B: *A waiver may be requested for the following reasons: (2) In cases where there is no emergency and, prior to solicitation of bids, a detailed report is submitted to the City Council that shall include; b) Reasons for which waiver is requested and an exemption should be granted, including why this is or is not a privatization of a City service.*

Section 18-5-106 does not apply unless a waiver is being requested. This section of the ordinance provides a mechanism and reasons for the purchasing director or the director of the affected agency to request a waiver of the procedures mandated by 18-5-103. The section is divided into two subsections. Subsection A addresses how the Purchasing Director or director of an agency can request a waiver. Subsection B addresses the reasons for the request, in cases of emergencies, and non-emergencies as outlined in Subsection (B)(1) and (B)(2) respectively.

If a waiver of the regular process is requested in a non-emergency situation, subsection (B)(2) indicates a waiver **may** be requested for the enumerated reasons listed as "a" through "f". It requires that a detailed report be submitted to Council before any bids are solicited. The report must include the reasons for requesting the waiver and why the proposed contracted service is or is not a privatization of City services.

This provision is applicable only to contracts subject to the privatization ordinance, and not those enumerated as **exempt** under section 18-5-102. In essence, the Purchasing Director can request a waiver to submitting the comprehensive detailed report required under Section 18-5-103 (applicable to all contracts except those listed in Section 18-5-102) but must explain why the request is being made, why the request should be granted, and why the contracted service is or is not privatization of City services.

QUESTION 6.

The City has several longstanding contracts in place that were first entered into prior to enactment of the ordinance, but amendments or change orders are presented to Council for approval after enactment of the ordinance. Also, sometimes a change order or amendment changes or adds to the scope of services of the original contract. In these circumstances, does the ordinance apply to the amendment, extension, change order or other modification of the contract?

ANSWER

This question relates to contracts entered into prior to the enactment of the ordinance as well as to contracts that were changed by amendment/change order. The subsequent application of the ordinance to these contracts will depend upon the modification made:

Change orders and amendments are submitted for a number of different purposes and therefore have to be evaluated on an individual basis. If a change order or amendment modifies the contract in a manner which, if standing alone as a separate contract, would trigger the application of the ordinance, then the change order or amendment should be subject to the provisions of the ordinance. With regard to extensions, they are generally utilized to extend a contract that has expired or is about to expire on its original terms. As such, extensions generally should be considered just as one would consider a new contract, which would be subject to the ordinance. An exception would be where the term "extension" is used interchangeably with an "option". Options are exercised pursuant to an existing contract. An existing contract with terms providing for an option has already been approved. The approval would have included the language providing for the option and what the option entails. The option, if exercised as stated in the contract would still have to be approved by Council; however, because the terms and conditions of the option have already been approved as part of the original contract, it would not be subject to reexamination under the ordinance.

Finally, while the questions posed relate to the ordinance itself, RAD notes that the Wayne County Circuit Court issued an injunctive order in July 2009 requiring specific adherence to the ordinance, stating in pertinent part:

IT IS ORDERED THAT the City of Detroit, including the City Council and its agents as defined by the ordinance are restrained from the violation of any of the provisions of Ordinance No. 13-04 entitled "Privatization of City Services" being Ordinance 18-5-100 et seq.

IT IS FURTHER ORDERED THAT this order remains enforceable for as long as Ordinance 18-5-100 et seq. remains in effect as written. This order no longer is enforceable if Ordinance 18-5-100 et seq. is repealed.

Taking into account the order of the Court, it is RAD's opinion that any contract for services derived from the Purchasing Division or any department or agency of the City, should be reviewed and signed off as **approved** by the Law Department as being compliant with the order of the Court, prior to being submitted to Council for approval.²

RAD hopes the answers submitted provide information and assistance in understanding the application of the ordinance.

² Even though the Finance Department, pursuant to Section 18-5-108, should make this determination as expressed in response to question #5 above, because the City could face additional, costly litigation if we were to even unwittingly violate the Court's order, this added step appears prudent.

ATTACHMENT #1

PRIVATIZATION OF CERTAIN CITY SERVICES ORDINANCE

- (3) The definition of 'additional services includes', but is not limited to, contractual services supplied when the City is reasonably unable, after documented good faith efforts, to fill existing positions within the classified service.

Services, expanded means an increase or supplement to services that:

- (1) Is already provided by regular City employees; and
- (2) Is not a replacement for existing governmental positions.

Services, replacement means the provision by a non-governmental entity of services to substitute in place of or displace or supplant one or more current City employees (s) or current governmental positions. Replacement services do not include services that are an addition to or expansion of services that are already provided by regular City employees, provided that such services do not displace regular City employees providing such services.

Substantially similar means materially comparable or alike, being the same in whole or in part.

Sec. 18-5-102. Applicability.

(A) The provisions established by this Division shall apply to all contracts entered into by the City with a non-governmental entity, with the exception of the following contracts:

- (1) Contracts solely for the purchase of goods by the City pursuant to Chapter 18, Article 5, of this Code, as amend; or
- (2) Contracts for the provision of services that are not substantially similar, in whole or in part, to services that are currently being provided by one or more regular City employees or that are covered under currently existing governmental positions; or
- (3) Contracts for the provision of services to the City of Detroit by a governmental entity; or
- (4) With the approval of the City Council, service contracts that are an addition or expansion to services provided by regular City employees, provided that such contract will not be a replacement for existing governmental positions.
- (5) Contracts entered into by the City for emergencies. Such emergencies shall be limited to those material, goods and service or construction necessary to satisfy the emergency need and the following conditions are met:

(a) The Mayor made a public declaration the situation is a emergency as defined in this ordinance under Section 18-5-101 and stated the facts and reasons for the declaration of an emergency in writing.

(b) The City Council passes a resolution to continue the emergency if it will last longer than three days.

(c) The Mayor submits those contracts for the emergency to the City Council for ratification by resolution by an affirmative vote of two-thirds of those members present at their next scheduled meeting.

- (B) Contracts entered into in a manner inconsistent with the City's procurement procedures by any person shall be voidable by the City.

PRIVATIZATION OF CERTAIN CITY SERVICES ORDINANCE

- (C) All contracts entered into by the City with a non-governmental entity, that are not specifically excepted in Subsection A of this Section shall be processed in accordance with the applicable provisions of Divisions 1 through 6 of this article, and Sections 18-5-100 through 18-5-110, as amended.
- (D) The provisions established by Section 18-5-103 of this Division shall apply at the time the Detroit City Council first receives notice of an agency's request to solicit a bid for a contract for the provision of City services by a non-governmental entity, and where the subject contractual services are substantially similar, in whole or in part, to services provided by one or more regular City employees.

Sec. 18-5-103. Procedure for Contracts for Services.

Prior to solicitation of bids for a proposed engagement of a vendor to provide contractual services, either the purchasing director or the director of the affected agency, department, board or commission or division shall prepare and submit, a comprehensive report detailing the need for such services to the City council. This report shall include:

- (1) Comprehensive written estimates of the total current direct and indirect costs to the City for providing the subject services in the most cost efficient manner;
- (2) A statement as to whether the proposed contract may result in a reduction of the employment of either City employees or City residents, including reduction of jobs from full-time to part-time or from permanent to temporary or seasonal, and an estimate of the number of jobs affected by such reduction;
- (3) A description of differences in work rules and management practices of non-governmental person or entities who are capable of providing subject services and the work rules and management practices of regular city employees who currently provide the subject services, including differences in work rules and management practices that may impact legal and constitutional protections currently afforded regular City employees;
- (4) An analysis of the social, economic, cost and need benefits, including a description of any and all reasonably determined positive or negative effects and/or impacts the proposed contract will have upon the public's access to, receipt, delivery and quality of the subject services;
- (5) An analysis of whether reduced compensation for benefits provided to employees performing the subject services is reasonably likely to affect the demand for public assistance or social services;
- (6) An analysis of the social, economic, cost and needs benefits, including a description of any and all reasonably determined positive or negative effects and/or impacts the proposed contract may have upon the city's accountability to the City residents for the subject services or ability to resume delivery of services in the event of the vendor's inability, refusal, default or other failure to provide the subject services; and
- (7) An analysis of the proposed contract shall be required from the offices of the Auditor General and the Ombudsman of the City of Detroit.

Sec. 18-5-104. City Council Approval of Solicitation of Bids.

- (A) No solicitation of bids, including request for proposals, quotes or qualifications shall be circulated or otherwise published without prior approval of the City council after its review of the comprehensive written report required under Section 18-5-103.

ATTACHMENT #2

August 1, 2005

Finance Directive #151

TO: ALL BOARDS, COMMISSIONS, DEPARTMENT HEADS, CITY COUNCIL
MEMBERS AND THE CITY CLERK

RE: Administrative Rules for Implementation of Privatization Ordinance

Section 18-5-108 of the 1984 Detroit City Code requires the Finance Department, Purchasing Division to promulgate administrative rules and directives to implement the Privatization Ordinance, which comprises Chapter 18, Article V, Division 7, of the 1984 Detroit City Code, *Privatization of Certain City Services*. The following Administrative Rules are applicable to all City contracts:

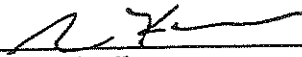
ADMINISTRATIVE RULES FOR PRIVATIZATION ORDINANCE

1. Prior to submitting a solicitation, i.e., Request for Proposal (RFP) Request for Quotation (RFQ), Request for Qualifications (RFQQ), or Request for Information (RFI), a department(s) must complete "Statement Concerning Applicability of Privatization Ordinance." The *Statement Concerning Applicability of Privatization Ordinance* form is attached.
2. Where the "Statement Concerning Applicability of Privatization Ordinance" indicates that pursuant to Section 18-5-102 of the City Code, a proposed contract is exempt from the provisions of the Privatization Ordinance, the department(s) submitting the proposed contract shall provide a copy of the Statement Concerning Applicability of Privatization Ordinance to the Purchasing Director and to all bargaining units providing substantially similar services to the department(s), as defined in Section 18-5-101 of the 1984 Detroit City Code (City Code). The Purchasing Director shall submit an "Affirmation of Purchasing Director (Exemption)" to the Detroit City Council. The *Affirmation of Purchasing Director (Exemption)* form is attached.
3. Where the "Statement Concerning Applicability of Privatization Ordinance" indicates that pursuant to Section 18-5-102 of the City Code, the provisions of the Privatization Ordinance are applicable to the proposed contract, the department(s) submitting the proposed contract shall provide a copy of the Statement Concerning Applicability of Privatization Ordinance to the Purchasing Director and to the Director of the Labor Relations Division of the Human Resources Department to provide notice to the bargaining units affected, and the Purchasing Director shall submit an "Affirmation of Purchasing Director: Privatization Contract" to the Detroit City Council. The *Affirmation of Purchasing Director: Privatization Contract* form is attached.

4. For each contract for services solicited by the City on an emergency basis^{VH} under Section 18-5-102 of the City Code, the Mayor shall submit an "Emergency Exemption" form to the Detroit City Council. The *Emergency Exemption* form is attached.

5. To seek a waiver under Section 18-5-107 of the 1984 City Code, *City Council approval of a waiver*, with respect to any contract for services to which Section 18-5-103 applies, the Purchasing Director must submit a "Request for Waiver (Privatization Ordinance)" form to the Detroit City Council. The *Request for Waiver (Privatization Ordinance)* form is attached.

These Administrative Rules for Privatization Contracts are effective as of the date of this Directive.



Sean K. Werdlow,
Chief Financial Officer/Finance Director

Attachment

F:\JenWork\Finance Directive #150 - Administrative Rules for Implementation of Privatization Ordinance

EMERGENCY EXEMPTION

Date

In accordance with Section 18-5-5 of the Detroit City Code An "Emergency Exemption" is being exercised by the Purchasing Director. The City Council is hereby notified of the following Procurement

Contract # _____ which is for the purchase of _____
_____ for the _____ department.

☐ Public exigency requires the immediate delivery of the articles or services named above.

☐ A threat exists to the public health, welfare, or safety and prior and prior approval of the City Council is impossible or impractical.

The procurement contract shall be submitted to the City Council for approval within four weeks of this date. _____. No payment on this contract is authorized or will be paid pursuant to this contract, amendment, renewal, or extension without approval of the City Council.

Authorized by Audrey P. Jackson, Purchasing Director

CITY OF DETROIT
HUMAN RESOURCES DEPARTMENT
LABOR RELATIONS DIVISION

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August 1, 2005

Labor Relations Directive No. 05-1

**TO: ALL CITY AGENCIES, DEPARTMENTS, CITY COUNCIL MEMBERS,
AND THE CITY CLERK**

RE: Implementation of Privatization Ordinance

This Directive is issued in conjunction with Finance Directive No. 151, *Administrative Rules for Implementation of Privatization Ordinance*, dated August 1, 2005.

In accord with Finance Directive No. 151, a department(s) must complete a "Statement Concerning Applicability of Privatization Ordinance" prior to submitting a solicitation, i.e., Request for Proposal (RFP) Request for Quotation (RFQ), Request for Qualifications (RFQQ), or Request for Information (RFI).

If the Statement Concerning Applicability of Privatization Ordinance indicates that the provisions of Section 18-5-103 of the 1984 Detroit City Code, the "Privatization Ordinance," apply to the proposed contract, the department(s) shall submit a copy of the Statement to the Purchasing Director and to the Director of the Labor Relations Division of the Human Resources Department.

The Labor Relations Division will provide notice to the list of affected collective bargaining units.



Roger N. Cheek
Labor Relations Director

cc: Mayor Kwame M. Kilpatrick
Sean Werdlow, Chief Financial Officer

KWAME M. KILPATRICK, MAYOR

STATEMENT CONCERNING APPLICABILITY OF PRIVATIZATION ORDINANCE

Prior to submitting a Solicitation, Request for Proposal, Request for Quotation, Request for Qualifications the following form must be completed and submitted to the Purchasing Director. All applicable paragraphs should be checked. In the event that none of the first four paragraphs apply, only the last paragraph should be checked.

With regard to attached proposed Solicitation # _____, the following apply:

- ° The proposed solicitation is solely for the purchase of goods by the City. The goods proposed for purchase are:

The proposed solicitation is for the provision of services¹ that are not substantially similar,² in whole or in part, to services that are currently being provided by one or more regular City employees³ or that are covered under currently existing governmental positions.⁴ The services proposed for purchase are:

¹ "Services" means services covered by City employees that are: (1) already provided by regular City employees; or, (2) are consistent with existing governmental positions.

² "Substantially similar" means materially comparable or alike, being the same in whole or in part.

³ "Regular City employee" means an employee within the classified service as defined by Section 6-517 of the 1997 Detroit City Charter. Section 6-517 of the City Charter defines classified service to consist of all employment in the City service except elective officers; persons holding appointments under the Charter; persons employed to make or conduct a temporary or special inquiry, investigation, or examination on behalf of the City; or, others that are exempted by the Charter. The definition of Regular City employee also does not include the personal staffs of the office of the Mayor of the City of Detroit, or the Detroit City Council, or the Divisions of the Detroit City Council.

⁴ "Existing governmental position" means a position in the classified service of the City that: (1) is included in the City's current fiscal year budget or any amendments thereto; and (2) was held by a regular City employee within the five (5) years immediately preceding the current fiscal year.

The proposed solicitation is for the provision of services to the City of Detroit by the following governmental⁵ entity: _____

The proposed solicitation is for the addition⁶ or expansion⁷ to services⁸ provided by regular City employees.⁹ The services proposed do not involve the replacement¹⁰ of existing governmental positions.¹¹ The covered services fit into the general category (s) of _____

None of the above paragraphs apply to the proposed solicitation.
(A comprehensive report described in Section 18-5-103 of the 1984 City of Detroit Code will be required prior to solicitation of bids.)

⁵ "Governmental entity" means the United States of America and its states, and any of their subdivisions.

⁶ "Additional services" means: (1) services that are intended to be provided by existing governmental positions; and (2) are services which: (a) are not currently being provided by one or more regular City employee(s); and (b) the provision by contract of which does not result in the replacement of regular City employees. (3) The definition of additional services includes, but is not limited to, contractual services supplied when the City is reasonably unable, after documented good faith efforts, to fill existing positions within the classified service.

⁷ "Expanded services" means an increase or supplement to services that: (1) are already provided by regular City employees, and (2) are not a replacement for existing governmental positions. See footnote 4 for a definition of "existing governmental positions."

⁸ See footnote 1 for a definition of "services."

⁹ See footnote 3 for a definition of "regular City employee."

¹⁰ "Replacement services" means the provision by a non-governmental entity of services to substitute in place of or displace or supplant one or more current City employee(s) or current governmental positions. Replacement services do not include services that are an addition to or expansion of services that are already provided by regular City employees, provided that such services do not displace regular City employees providing such services. "Non-governmental entity" means an entity that is neither the United States of America, nor its states nor any of their political subdivisions.

¹¹ See footnote 4 for a definition of "existing governmental position."

AFFIRMATION OF PURCHASING DIRECTOR (EXEMPTION)

The attached contract is exempt from Section 18-5-103 of the 1984 City of Detroit Code for one or more of the following reasons (check all that apply):

- The attached contract is solely for the purchase of goods by the City. Such goods fit into the general category (s) of

The attached contract is for the provision of services that are not substantially similar, in whole or in part, to services that are currently being provided by one or more regular City employees.

The attached contract is for the provision of services that are not Described under currently existing governmental positions. The covered services fit into the general category(s) of _____

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- The attached contract is for the provision of services to the City of Detroit by the following governmental entity: _____

The attached contract is an addition or expansion to services provided by regular City employees. The contract is not a replacement for existing governmental positions. The covered services fit into the general category (s) of

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EMERGENCY EXEMPTION

The attached contract(s) is/are exempt from the provisions of Section 18-5-103 of the 1984 City of Detroit Code. The following circumstances apply:

- ° A public declaration has been made by the Mayor's Office that a special emergency exists, and the facts and reasons for the declaration of an emergency have been made in writing (copy attached). An "emergency" is defined in 18-5-101.
- ° A resolution has been passed by City Council to continue the emergency, as it will last longer than three days.
- ° The contracts concerning the emergency are attached and are submitted to the Council for ratification by resolution, by an affirmative vote of two-thirds of those members present, at the next scheduled meeting on _____.

AFFIRMATION OF PURCHASING DIRECTOR: PRIVATIZATION CONTRACT

None of the exceptions to Section 18-5-102 of the 1984 City of Detroit Code apply to the attached contract. The contract is therefore not exempt from Section 18-5-103 of the 1984 City of Detroit Code.