



THE CITY OF SAN DIEGO

---

## OFFICE OF THE INDEPENDENT BUDGET ANALYST REPORT

---

**Date Issued:** September 19, 2012

**IBA Report Number:** 12-38

**City Council Docket Date:** September 25, 2012

**Item Number:** 334

---

# Preliminary Statement of Work for Storm Water Facilities Operations & Maintenance

## OVERVIEW

As mandated by City Charter Section 117(c), the City Council is responsible for ensuring that no service quality degradation will occur as a result of the managed competition process.

According to the Managed Competition Guide adopted October 12, 2010, the City Council's role in the managed competition process includes review and approval of the Preliminary Statement of Work (PSOW) before the competition can move forward, as well as approval in the event an outside provider is selected.

Council approval of the PSOW is an important step in the process as it provides Council the opportunity to review service level requirements prior to issuance of the Request for Proposal (RFP). The PSOW describes the scope of the services being procured as well as existing workload requirements and selected performance standards. Once approved, the PSOW will form the foundation for the Statement of Work (SOW) that will be developed and included in the RFP. Service levels cannot change between the PSOW as approved by Council and the final SOW. A detailed summary of the managed competition process and a description of PSOW and final SOW components are provided in IBA Report 10-90, "Preliminary Statement of Work for Publishing Services".

On September 25, 2012, City Council will be requested to review and approve the PSOW for Storm Water Facilities Operations & Maintenance (SWO&M). Councilmembers will also be asked to waive Council Policy 300-07 in order to allow consultant services requiring professional licensure to be included as part of this process and evaluated based upon managed competition evaluation criteria. This is the first PSOW since IBA recommendations in Report 12-01REV, "Managed Competition Process Improvements", were approved by Council on February 28, 2012. In this report, our office recommended managed competition process improvements to assist the Council and IBA in future reviews of PSOW's. These improvements include:

1. Request staff to provide a three-year history, as reasonably available, for all performance measures specified in the PSOW's.
2. Request staff to provide a three-year budget history, as reasonably available, for the managed competition function under consideration.
3. Ensure that a corresponding service level is provided for each service area described in the PSOW.
4. If current services are performing below budgeted expectations, anomalies that could be causing this should be evaluated (e.g. hiring freezes; unusually high vacancies; major equipment breakdowns) when defining existing service levels.
5. For all functions involved in managed competition, include in the proposed and final budget documents all performance measures that were specified in the PSOW/RFP and data for the prior year, current year and next year's targets.

The Business Office has sufficiently responded to these recommendations. Staff has included a three-year history of all reasonably available performance measures for each service area described in the SWO&M PSOW, communicated to our office that they will include the performance measures in proposed and final budget documents, and have provided our office with the available three year budget history.

The original SWO&M PSOW, released on July 25, 2012 and reviewed at the Rules Committee meeting on August 1, 2012, has since been revised. Following the Committee meeting, additional input was sought from the affected labor organizations, and staff released a revised PSOW on September 6, 2012. Though there are many similarities, the analysis provided in this report will refer to the recently released revised PSOW.

Current in-scope activities incorporated in the SWO&M PSOW include:

- Operations & Maintenance Activities
- Spoils Management
- Environmental Permitting – excluding direct reporting to or interaction with regulatory agencies
- Emergency and Storm Patrol Duties
- Administrative/Customer Service/Coordination
- Municipal Permit Inspections
- Additional Services - including providing City departments with personnel and equipment in emergency situations

Although these activities are listed as in-scope for this managed competition, it should be noted that Charter Section 94 limits these activities to operations and maintenance work, and excludes all repair or replacement of public Storm Water facilities. Charter Section 94 requires that selection of contracts for the repair or replacement of public facilities must only consider the lowest reliable bidder, excluding other qualifications. This is in conflict with the managed competition process which considers other factors aside from solely price, such as efficiency, service quality, and the public interest. Because the managed competition provision in the City Charter (Section 117(c)) allows the City to hire private firms to provide "City services",

maintenance and operational activities may be included in the scope of work outlined by this PSOW.

Specific work that is excluded from this managed competition due to Charter Section 94 limitations include:

- Repair or replacement of mechanical/electrical components of storm water pump stations and tide gates
- Repair or replacement of storm drain structure and pipe infrastructure
- Repair or replacement of open channel drainage facilities to restore carrying capacity

This report addresses issues raised at the August 1, 2012 Rules Committee meeting including the City's liability for regulation non-compliance in the event an outside service provider is selected for this managed competition contract; how emergency and storm patrol duties will be handled in the event a private vendor is used; information on waiving Council Policy 300-07 and CEQA concerns; and information on the process by which Council may alter service levels and request additional resources necessary to meet forthcoming new Storm Water regulations expected later this fiscal year.

## FISCAL/POLICY DISCUSSION

### *PSOW Service Levels*

#### New Permit Requirements and Potential Impacts

Storm Water regulations are updated and revised on an ongoing basis. Currently, the Master Permit and the Municipal Storm Water Permit are expected to be issued in October of 2012 and spring of 2013, respectively. When this item was heard at the Rules Committee in August, considerable discussion took place regarding these new Storm Water permits which will likely impact the Storm Water Division's service demands and regulatory requirements. As stated in the PSOW, the new permits are expected to impact service levels for 22 of the 33 performance measures outlined. Although language in the PSOW states that the service provider must adhere to federal, State, and local regulations as they now exist or as they are amended, a substantial change in requirements could result in the need for additional resources. Should this be the case, questions have been raised as to how timely budget adjustments could be made to address a need for new resources subsequent to the award of the SWO&M managed competition contract.

Mayoral staff has responded, if it is determined that additional resources are needed after receiving the new permits, this could be addressed by the Council during the annual budget process. Staff does not anticipate that permit changes implemented mid-year will require new resources before FY 2014, citing the department's ability to shift resources between activities in the interim, and the one year grace period for compliance after the Municipal Storm Water Permit's approval by the San Diego Regional Water Quality Control Board.

If the Council determines that there *is* an immediate need for additional Storm Water resources in order to comply with new regulatory requirements the Council could exercise their authority under the Mid-Year Budget Process which takes place in February. The Mid-Year Budget Ordinance gives Council the authority to allocate up to \$5.0 million of a mid-year surplus that has been identified and proposed for use by the Mayor. Alternatively, if no surplus exists and regulatory compliance for new Storm Water requirements is at risk, the City Council could work

with the Mayor to bring forward a recommendation to utilize the Appropriated Reserve for this purpose. A Mayoral recommendation and City Council approval are required to access both the Appropriated and Unallocated Reserves.

The anticipated issuance of new permits in October 2012 and spring of 2013 has also raised a bigger issue regarding the timing of the Storm Water managed competition and whether the process should wait until the new permits are issued and the impacts are known. Mayoral staff has responded that Storm Water staff is adept at adjusting to changing requirements, and that the new permit requirements are not a reason to delay the managed competition process. They are also confident any new resource needs can be addressed in the FY 2014 budget process. Delaying the managed competition process until new permits are issued would result in a Request for Proposal (RFP) which would accurately represent new regulatory requirements. However, this would also delay the opportunity for potential cost savings. We concur with moving forward at this time given an understanding contract costs may need to be adjusted in the future.

It should be noted that all RFP's for managed competition processes contemplate the potential for revising service levels following contract award by including an "Additional Services" section. This section outlines the process to be undertaken in the event the City desires the managed competition service provider (whether private vendor or City employees) to perform other services or provide increased levels of service beyond the requirements of the original RFP. Also, if service levels are to be changed, the City must determine if employee organizations are impacted and whether there is a duty to negotiate the impact of these changes with the affected employee organizations. The Managed Competition Guide, which was negotiated between the City and its employee organizations, does not address the issue of increasing service levels during the managed competition contract period. This issue should be included as a part of any future negotiations on the Guide.

#### Service Level Fluctuation

As previously noted, this is the first PSOW since the implementation of the managed competition process improvements outlined in IBA Report 12-01REV. This PSOW includes three years of service level data for 31 of the 33 performance measures included. Upon review of the service level data for these measures, and clarification yearly fluctuations by Storm Water staff, it can be determined that some of the performance measures are inherently variable and unpredictable from year to year. The yearly fluctuation may occur for a variety of reasons, including the ability to obtain appropriate permits to initiate work; the type of equipment used or needed (i.e. mechanized vs. manual) to perform required tasks; the varying types of locations where duties are performed; and the severity of the weather. Due to the fact that these performance measures vary, it is difficult to specifically quantify these performance measures at any one point in time. As a result, some of these performance measures for FY 2012 are an unreliable benchmark for what level of service should be provided.

Similar to the issue regarding new permit impacts on service levels, the Council may utilize the same processes to address increased workloads that may occur if a service level for FY 2012 does not accurately capture the level of service that should be provided.

### ***City Liability***

In addition to the Municipal Storm Water Permit and the Master Permit, the Storm Water division must comply with a variety of other permits, regulations, and mandates as posed by differing regulatory bodies and operational guidelines. In the event an outside provider is awarded the managed competition contract, the City remains ultimately liable for any non-compliance with these federal, State and local regulations.

Although the City will be ultimately responsible in this situation, the Business Office has conveyed that the City employs risk reduction strategies when work is performed by independent contractors. In this case, the outside provider would be required to indemnify the City and hold the City harmless for errors made. Additionally, the outside provider would also be required to provide insurance meeting the City's requirements and name the City as an additional insured. Through these strategies, the City may have an increased opportunity to recover any costs incurred by first giving the contractor an opportunity to remediate the non-compliance and pay any associated penalties or fines, deduct the amount of the penalty or fine from the contractor's compensation, or seek payment through the contractor's insurance.

### ***Emergency Services and Storm Patrol Duties***

Emergency services and storm patrol duties are included in this PSOW as part of the in scope activities. During the Rules Committee meeting, the issue was raised as to how emergency situations, such as flooding, will be handled in the event an outside vendor is selected for this managed competition contract. Specifically, there was discussion of how Storm Water staff's institutional knowledge will be retained and transferred to a private vendor. Staff has stated that if this were to occur, key continuing government organization staff would be retained including a Project Manager and other managerial staff, as well as Pollution Prevention staff. Due to Charter Section 94, some SWO&M staff will remain to perform repair and replacement affiliated work, resulting in the retention of additional experienced staff and their institutional knowledge. Additionally, employees whose positions would be eliminated by managed competition would remain active for 90 days. Departmental staff would ensure the transfer of any key operational knowledge during the transition to the outside vendor, were this the case.

The PSOW includes specific expectations requiring that emergency services are provided 24 hours a day, 7 days a week, the need for continuity of operating and assisting in recovery efforts when needed during emergency situations, and requires in the "Additional Services" section that personnel and equipment must be provided to other City departments in emergency situations. Four performance measures (#21, #22, #24 & #32) have also been included that speak to this emergency service concern, requiring that emergency related work is completed 100% of the time.

Business Office staff maintain that it is not uncommon for the City to bid contracts out that include emergency services. Previously, the emergency services and storm patrol activities were part of the SOW for Street Sweeping in a previous managed competition. Other City departments use private vendors for emergency type services as well. All of the City's emergency medical services are performed by private vendors which include about 108,000 dispatches per year. Additionally, Public Utilities, Fire-Rescue, the Environmental Services Department (ESD), and other City departments use a citywide hazmat contract managed by ESD.

### ***Early Termination of Contracts***

The City currently has existing contracts with private vendors for some of the in-scope activities. During our initial review of the SWO&M PSOW, the IBA asked the Business Office to address the possibility of any fiscal impacts due to the early termination of these existing contracts. Staff expressed that there will be little to no impact, citing that all of the recent Storm Water contracts include “termination for convenience” clauses. These clauses allow the City to terminate existing contracts without incurring costs other than what the contractors are due for services rendered. Some of the “termination for convenience” clauses in City contracts include a provision for “wind down” or other cost considerations once a contract is terminated. Staff has conveyed that most “wind down” costs are associated with construction types of contracts, which are not included in this PSOW due to Charter Section 94 limitations. Staff has also reviewed the related contracts and stated they do not contain any provisions for “wind down” or other cost considerations.

### ***Other Issues***

#### Waiving Council Policy 300-07

The Council will be asked to waive Council Policy 300-07 in order to allow consultant services that require professional licensure be included in the PSOW and evaluated on the basis of costs and other factors, consistent with managed competition evaluation criteria. This Council Policy requires that consultant services requiring professional licensure must be awarded to the “highest qualified” consultant. This is in conflict with managed competition evaluation criteria which considers other factors including price, efficiency, service quality, and the public interest. In order for these types of consultant services to remain part of the in-scope activities, Council would have to waive Council Policy 300-07. In the event that Council decides to not waive this policy, these specific consultant services would not be included in the PSOW scope of work, and not undergo the managed competition process. If this becomes the case, staff has expressed that it does not affect a large portion of the consultant services included in the PSOW, since not all of them require professional licensure.

#### CEQA Violation Concerns

During the Rules Committee meeting, some Committee members expressed concern regarding CEQA violations, due to the fact that an environmental review of potential impacts has not yet been conducted. Staff maintains that moving forward with the approval of the PSOW would not cause an issue at this time, citing that according to CEQA Guidelines section 15004, authorization of the PSOW is not the appropriate time to conduct environmental review since it is not yet defined as a “project” under CEQA. At the Committee meeting, the City Attorney’s Office explained that they cannot yet determine if this project would be in violation until the City receives bids for these in-scope activities. At the time of the Committee meeting, the City Attorney’s Office was comfortable with moving forward with the PSOW and the managed competition process for this function.

## **CONCLUSION**

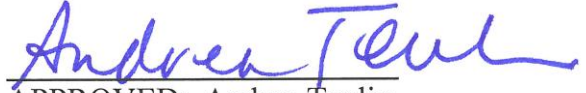
As part of the managed competition process the City Council must approve the PSOW for SWO&M before a final SOW and RFP can be issued. At the August 1, 2012 Rules Committee meeting, several issues were raised which are addressed in this report.

Delaying the managed competition process until new permits are issued would result in a RFP which would accurately represent new regulatory requirements. However, this would also delay the opportunity for potential cost savings. Upon review of the PSOW, including service level data for the outlined performance measures and information provided by staff, the IBA recommends Council approval of the Storm Water Facilities Operations and Maintenance PSOW at this time given an understanding contract costs and service levels may need to be adjusted in the future.



---

Nicole Nelson  
Research Analyst



---

APPROVED: Andrea Tevlin  
Independent Budget Analyst