



Office of the City Auditor

**Report to the City Council
City of San José**

**OFFICE OF EQUALITY
ASSURANCE: INCREASED
WORKLOAD WARRANTS
REEVALUATION OF
RESOURCE NEEDS**

**Report 17-02
March 2017**

March 20, 2017

Honorable Mayor and Members
Of the City Council
200 East Santa Clara Street
San José, CA 95113

Office of Equality Assurance: Increased Workload Warrants Reevaluation of Resource Needs

The Office of Equality Assurance (OEA) implements, monitors, and administers the City's wage policies in addition to overseeing disadvantaged business enterprise (DBE) program responsibilities and Americans with Disabilities Act (ADA) compliance coordination. Because OEA has had its workload increase and may see further increases, reevaluation of the resources dedicated to these responsibilities is needed.

Finding I: Reallocation of Resources Can Help Ensure the Success of All Aspects of the Labor Compliance Program. OEA's current practice is to proactively enforce prevailing and living wage regulations. For City-funded construction projects, this involves manual staff review of every payroll record for every worker on a project. Payroll reviews have several components, including checking that workers have been paid the appropriate wages (through manually verifying wage rates), and verifying the accuracy of information in submitted payrolls (through site visits and review of supplemental documentation, such as inspector reports). Despite the importance of the latter, OEA cannot frequently go out to worksites because most of their time is dedicated to manually verifying wages to check if the appropriate rate has been paid. Automating wage calculations through a software solution could free staff time to conduct all key components of payroll reviews.

Moreover, OEA is responsible for ensuring labor compliance for other regulations in addition to prevailing and living wage: the Minimum Wage Ordinance, Wage Theft Prevention Policy, and Opportunity to Work Ordinance. OEA was budgeted two FTEs to handle the workload associated with the Minimum Wage Ordinance, but has been using them primarily for prevailing and living wage enforcement because there are currently a limited number of minimum wage complaints. Given the need to implement, administer, and enforce the Minimum Wage Ordinance, Wage Theft Prevention Policy, and Opportunity to Work Ordinance, the City should rededicate the two FTEs to these programs while also ensuring the prevailing and living wage compliance program has sufficient supervisory resources. In addition, OEA should develop a plan to conduct concerted and ongoing outreach to ensure the effectiveness of these citywide wage regulations.

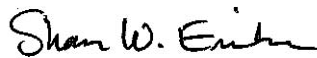
Finding 2: Documenting Policies and Procedures Can Ensure Continuity and Consistency. Though OEA processes involve multiple steps and communication between different parties, OEA has limited written policies or procedures. OEA can benefit from documenting processes to ensure consistency and continuity between staff. There are also several areas in which OEA should set written policies to guide staff decisions. Lastly, due to differences in departmental processes, some contracts that were procured through the Finance Purchasing division have not been monitored. To simplify the notification process, we recommend OEA begin tracking non-construction projects after Finance notifies them of the award.

Finding 3: Resource Constraints May Limit Future Contractor Outreach and the Local Hire/Apprentice Utilization Programs. In addition to its labor compliance program responsibilities, OEA oversees other City programs which add to its overall workload. The United States Department of Transportation requires the City to have a Disadvantaged Business Enterprise (DBE) Program in place to receive federal funding for certain construction projects. In addition to labor compliance activities described in Finding 1, the OEA Director is the City's liaison for this DBE program and for Americans with Disabilities Act compliance and coordination.

The City Council set Council Priorities to evaluate the possible expansion of DBE programs citywide (through a citywide contracting program) and development of a local hire/apprentice utilization program. To continue with the development of a City-wide contracting program that is race and gender neutral, consultants will be initiating additional research, engaging stakeholders and developing recommendations for an inclusive race and gender neutral contracting program. OEA has issued a Request for Information (RFI) for a labor market study to assess the development of a possible local hire/apprentice utilization program, and the City Council has referred the program to a newly created task force. As the City determines the future of these programs, it will need to assess the resources needed to complete new responsibilities.

This report includes 8 recommendations. We will present this report at the March 27, 2017 meeting of the Community and Economic Development Committee. We would like to thank the Department of Public Works' Office of Equality Assurance for their time and insight during the audit process. The Administration has reviewed this report and its response is shown on the yellow pages.

Respectfully submitted,



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City Auditor

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This report is also available online at www.sanjoseca.gov/audits.

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Introduction

The mission of the City Auditor's Office is to independently assess and report on City operations and services. The audit function is an essential element of San José's public accountability and our audits provide the City Council, City management, and the general public with independent and objective information regarding the economy, efficiency, and effectiveness of City operations and services.

In accordance with the City Auditor's fiscal year (FY) 2016-17 Audit Work Plan, we have completed an audit of Office of Equality Assurance. The objective of our audit was to review the administration and performance of the City's wage compliance and disadvantaged business enterprise efforts.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. We limited our work to those areas specified in the "Audit Objective, Scope, and Methodology" section of this report.

The Office of the City Auditor thanks the management and staff from the Department of Public Works' Office of Equality Assurance for their time, information, insight, and cooperation during the audit process.

Background

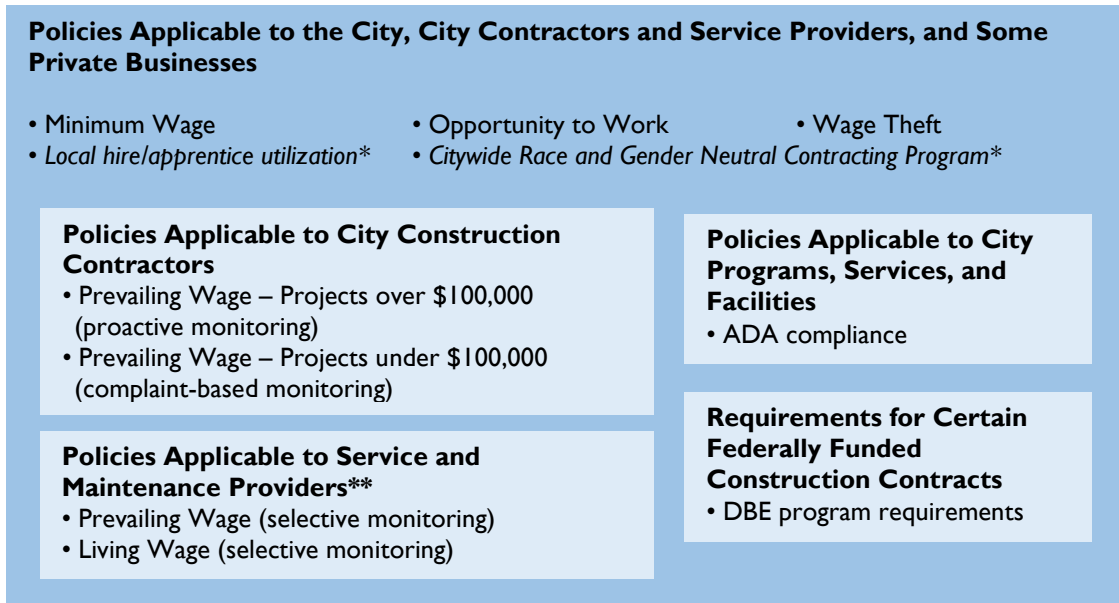
The City of San José (City) is subject to numerous labor policies that have been passed by City Council, approved by voters, or adopted due to requirements from the State of California. These include the Prevailing Wage Ordinance and Resolutions, Living Wage Policy, Minimum Wage Ordinance, Wage Theft Prevention Policy, and Opportunity to Work Ordinance (described later in Exhibit 4). The Office of Equality Assurance (OEA) implements, monitors, and administers these labor policies. OEA's goal is to ensure that San José businesses along with City contractors and vendors pay their employees the correct wage and benefit rates according to adopted policies.

In addition to its labor compliance function, OEA also has various other responsibilities, including enforcing compliance with the Americans with Disabilities Act (ADA) and administering the Disadvantaged Business Enterprises (DBE) program. In June 2015, the City Council prioritized wage theft prevention, local hire/apprentice utilization, and expansion of DBE programs (subsequently referred to as a Citywide race and gender neutral contracting program) as part of

the Council’s twice-yearly priority setting process. Finding 3 will discuss these additional responsibilities in more detail.

Exhibit I diagrams the policies and programs that OEA helps to administer.

Exhibit I: OEA Administers Various Policies and Compliance Programs



* The local hire/apprentice utilization and the citywide race and gender neutral contracting program have recently been added to OEA’s workload and have not yet been established.

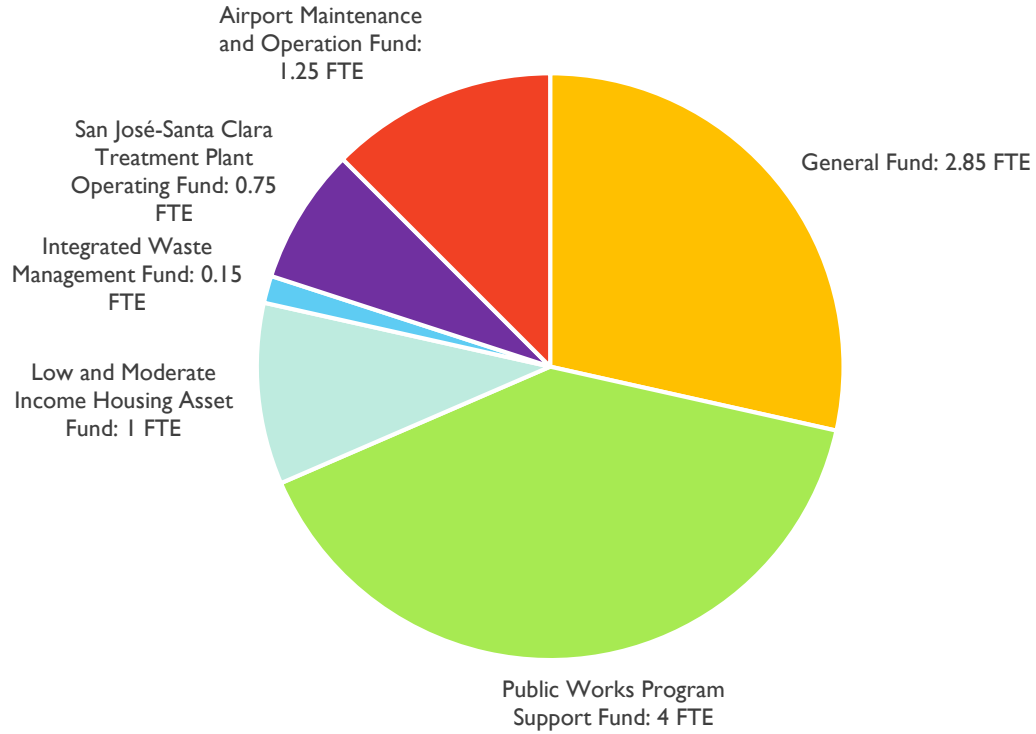
** Additionally, local and small business preferences and the Airport living wage may apply to these contracts but the programs are not overseen by OEA.

Staffing and Funding

OEA has been housed within the Department of Public Works since 2002. Before that time, it was part of the Office of the City Manager. In FY 2001-02, OEA had 17 authorized positions (of which 3 were dedicated to Fair Employment and Disability Access, now performed by the Office of Employee Relations). In FY 2016-17, OEA has an authorized staffing of 10 positions that are funded from various sources.¹ In FY 2015-16, OEA expenditures totaled \$1.3 million across six funds.

¹ OEA is budgeted within the Public Works Strategic Support core service.

Exhibit 2: OEA Is Funded by Several Sources (FY 2016-17)

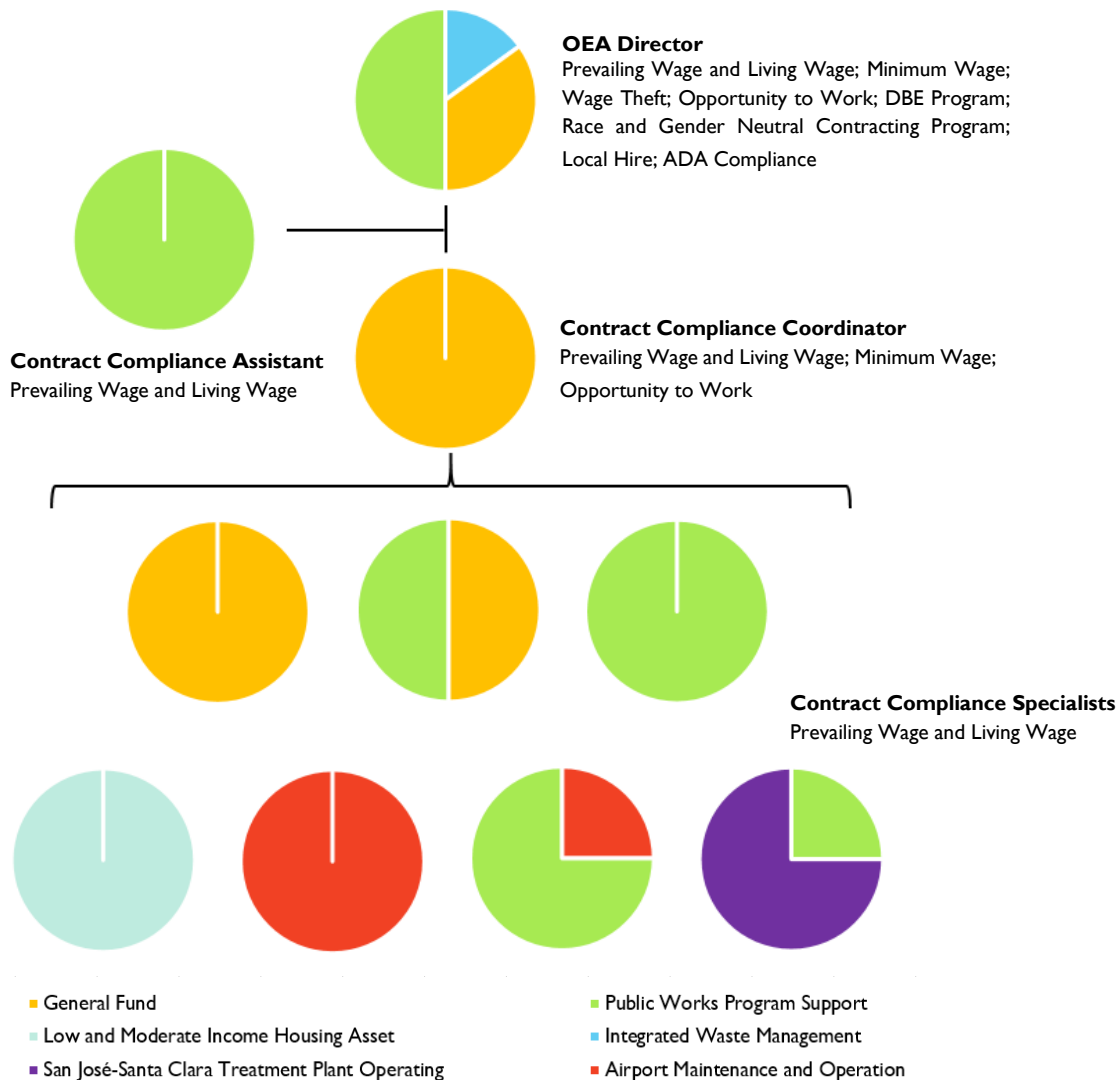


Source: Auditor summary of OEA staff funding information

Funding sources limit the types of projects staff can take on. For example, a position funded by the Low and Moderate Income Housing Asset Fund would be limited to reviewing housing contracts (discussed further below). Currently, there are two vacancies within OEA and one overstrength position.

Exhibit 3 shows OEA’s staffing by funding source and assignment.

Exhibit 3: OEA Staff Are Assigned to Different Activities and Are Funded by Various Sources



Source: Auditor summary of OEA staff funding information

Third Party Reviews of OEA

OEA’s work is periodically audited by various parties. The City of San José’s Single Audit Reports review OEA’s work on federally funded construction contracts. One issue previously identified was that contractors would sometimes be paid before OEA received contractor payrolls for review. OEA has since remedied this by requiring receipt of all payrolls linked to a contractor’s request for payment *before* any payment can be issued.

Additionally, the Federal Aviation Administration (FAA) conducted a compliance review of the Mineta San José International Airport's Disadvantaged Business Enterprise Program, for which OEA helps with outreach. The FAA identified issues with monitoring and enforcement, to which Airport submitted its response and plans for improvement (described later in Finding 3).

Audit Objective, Scope, and Methodology

The objective of the audit was to review the administration and performance of the City's wage compliance and disadvantaged business enterprise efforts. To understand the relevant management controls in place, we performed the following to achieve our audit objective:

- Interviewed staff from the Office of Equality Assurance, the Public Works Department, the Airport Department, the Office of the City Attorney, Office of Economic Development (OED), Office of Immigrant Affairs, and the Finance Department Purchasing Division to understand their work with OEA and their related workflow processes;
- Reviewed all available OEA policies, procedures, checklists, and flowcharts;
- Reviewed a sample of OEA projects without identified purchase orders and interviewed related Finance and department staff;
- Reviewed reports by external auditors or regulatory bodies to understand extent of audit/review work performed;
- Mapped processes involved in payroll reviews;
- Evaluated current outreach regarding wage compliance and local and small business contracting conducted by the City, including outreach conducted by OEA, Finance, and OED;
- Reviewed available information regarding the number of businesses and employees affected by OEA wage programs;
- Reviewed samples of minimum wage investigations, ADA compliance investigations, and DBE good faith efforts analysis;
- Reviewed a limited sample of prevailing and living wage projects to understand the work performed by OEA staff including manual wage reviews, use of enforcement tools, and communication with contractors; and
- Benchmarked San José's programs and processes to the City of Los Angeles, City of San Diego, City of Long Beach, City of Oakland, and the City and County of San Francisco.

To review the staff capacity to perform wage compliance and DBE efforts, we also reviewed the workload associated with other OEA responsibilities including ADA compliance and the recent local hire/apprentice utilization program. Additionally, our analysis of a Citywide race and gender neutral contracting program took into consideration a consultant study being planned to aid in the development of such program.

Finding I Reallocation of Resources Can Help Ensure the Success of All Aspects of the Labor Compliance Program

Summary

OEA's current practice is to proactively enforce prevailing and living wage regulations. For City-funded construction projects, this involves manual staff review of every payroll record for every worker on a project. Payroll reviews have several components, including checking that workers have been paid the appropriate wages (through manually verifying wage rates), and verifying the accuracy of information in submitted payrolls (through site visits and review of supplemental documentation, such as inspector reports). Despite the importance of the latter, OEA cannot frequently go out to worksites because most of their time is dedicated to manually verifying wages to check if the appropriate rate has been paid. Automating wage calculations through a software solution could free staff time to conduct all key components of payroll reviews.

Moreover, OEA is responsible for ensuring labor compliance for other regulations in addition to prevailing and living wage: the Minimum Wage Ordinance, Wage Theft Prevention Policy, and Opportunity to Work Ordinance. OEA was budgeted two FTEs to handle the workload associated with the Minimum Wage Ordinance, but has been using them primarily for prevailing and living wage enforcement because there are currently a limited number of minimum wage complaints. Given the need to implement, administer, and enforce the Minimum Wage Ordinance, Wage Theft Prevention Policy, and Opportunity to Work Ordinance, the City should rededicate the two FTEs to these programs while also ensuring the prevailing and living wage compliance program has sufficient supervisory resources. In addition, OEA should develop a plan to conduct concerted and ongoing outreach to ensure the effectiveness of these citywide wage regulations.

OEA Administers the City's Labor Compliance Regulations

OEA is responsible for administering several programs and initiatives in the City including several labor compliance policies:

- Prevailing Wage Ordinance and Resolutions;
- Living Wage Policy;
- Minimum Wage Ordinance;
- Wage Theft Prevention Policy; and
- Opportunity to Work Ordinance.

These regulations are summarized in Exhibit 4 on the following page.

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Exhibit 4: OEA Administers Multiple Labor Policies

PREVAILING WAGE	LIVING WAGE	MINIMUM WAGE	WAGE THEFT	OPPORTUNITY TO WORK
<p>What Required wage rates for workers on City contracts (e.g., construction, street sweeping) and affordable housing projects that receive City funding</p> <p>Hourly Rate Wage rates vary by craft</p> <p>Who is affected Employees of businesses contracting with the City for certain types of contracts over \$1,000</p> <p>Who set it The City first passed a resolution in 1988. The City passed an ordinance in 2014 pursuant to State requirements. The State sets the majority of wage rates.</p> <p>Enforcement approach Proactive: Review all construction payrolls and select service and maintenance payrolls; investigate complaints</p>	<p>What Required wage rates for certain types of City service and maintenance contracts (e.g., food service, custodial services)</p> <p>Hourly Rate \$20.14 with health benefits, \$21.39 without health benefits (for FY 2016-17)</p> <p>Who is affected Employees of businesses contracting with the City for certain types of contracts over \$20,000</p> <p>Who set it City Council first passed a resolution establishing a living wage in 1998.</p> <p>Enforcement approach Proactive: Review select payrolls; investigate complaints</p>	<p>What Lowest wage rate allowed to be paid to employees working at least 2 hours per week in San José</p> <p>Hourly Rate \$10.50 (for January 1, 2017 – June 30, 2017)</p> <p>Who is affected All employees working in San José at least 2 hours per week</p> <p>Who set it Voters approved a measure to increase the minimum wage in 2012. Since then, City Council approved a plan to increase the minimum wage to \$15 by 2019.</p> <p>Enforcement approach Complaint based</p>	<p>What Stealing of wages rightfully earned by employees</p> <p>Hourly Rate N/A</p> <p>Who is affected The City's policy affects businesses contracting with the City and Title 6 permittees (see Finding I)</p> <p>Who set it City Council passed a policy in 2016.</p> <p>Enforcement approach Complaint based</p>	<p>What Requirement that employers offer more hours to part-time employees before hiring more employees</p> <p>Hourly Rate N/A</p> <p>Who is affected All employees working in San José over 2 hours per week</p> <p>Who set it Voters approved an initiative ordinance in 2016.</p> <p>Enforcement approach Complaint based</p>

The bulk of OEA’s work involves reviewing whether employees of City contractors and vendors are being paid the correct prevailing or living wage,² and investigating complaints from minimum wage workers within San José to ensure that they are being paid the current minimum wage. According to the Department of Public Works, over the past ten years:

- 3,000 City contracts have been monitored by OEA staff;
- \$3.4 million have been recovered in back wages and paid to the 3,500 workers involved in prevailing and living wage violation cases; and
- \$2.1 million in liquidated damages³ resulting from wage violations have been assessed to 290 contractors.

The number and dollar value of prevailing or living wage violations can vary drastically from year to year depending on the nature of the City’s contracts.

Exhibit 5: Findings from Prevailing and Living Wage Investigations Can Vary Year to Year

	FY 2013-14	FY 2014-15	FY 2015-16
Violations	20	24	8
Affected Workers	95	112	18
Restitution	\$ 35,136	\$ 34,367	\$ 3,993
Liquidated Damages	\$ 78,048	\$ 91,742	\$ 11,979

Source: Auditor summary of OEA data

Since the Minimum Wage Ordinance came into effect in March 2013, OEA has received about 55 minimum wage complaints in San José, which resulted in 11 businesses being found to have violated the Minimum Wage Ordinance. The underpayment to workers in these cases totaled \$45,000. It should be emphasized, however, that even when a final wage theft judgment has been filed against an employer through lawsuit, the City and State of California do not have the collection powers to ensure that an employer will pay back all wages due to employees.

Additionally, because of OEA’s expertise in labor compliance, the cities of Mountain View, Sunnyvale, Los Altos, Palo Alto, San Mateo, Cupertino, and Santa Clara have entered into agreements with the City to provide services for their respective minimum wage compliance programs. OEA serves as a consultant to each jurisdiction, answering inquiries regarding minimum wage regulations and conducting investigations

² Prevailing and living wage apply to various classifications as defined by the State and City resolutions. Certain service and maintenance classifications (e.g., food service) are covered by both prevailing wage and living wage. If both prevailing and living wage apply to a classification, employees must be paid the higher of the two. OEA is responsible for setting the prevailing wage rate for these service and maintenance jobs since the State does not set standard wages for them. This involves conducting wage surveys to determine an appropriate rate. Once a wage rate is set, increases to that rate are based on CPI. While OEA has not had to conduct a wage survey recently, OEA reports that such an undertaking would be a substantial amount of work.

³ Liquidated damages are paid to the City and reimburse the City fund through which the project was funded.

into minimum wage complaints. In the past two years, OEA has responded to around 10 inquiries and investigated around 10 complaints.

OEA's Current Process for Reviewing Prevailing Wage and Living Wage Payrolls Is Time Intensive

OEA's current practice is to proactively enforce prevailing and living wage regulations. For City-funded construction projects, this involves manual staff review of every payroll record for every worker on a project.⁴ This review process is time intensive, especially since there can be numerous subcontractors submitting payrolls for a single project.

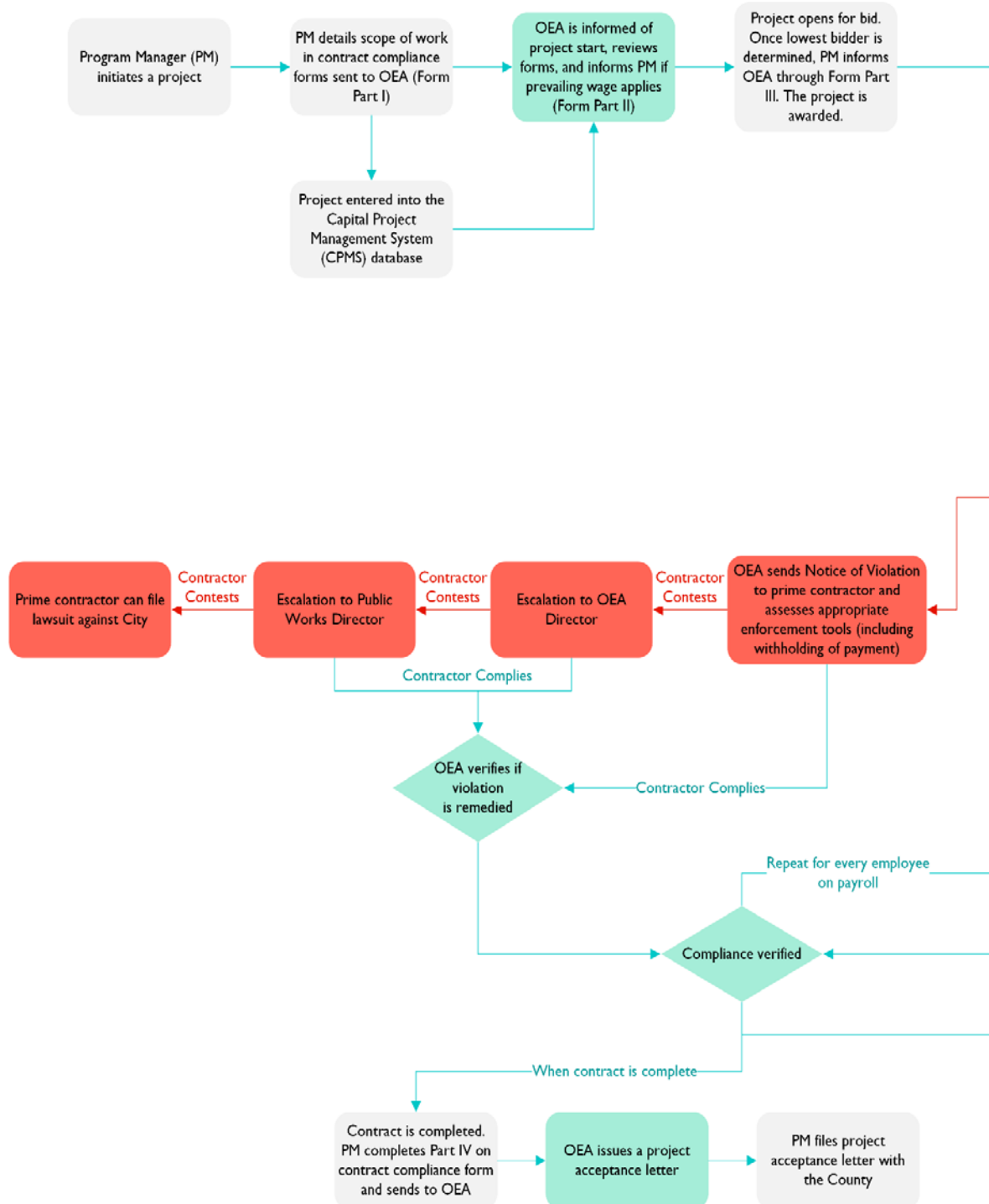
The review process differs depending on the type of contract being monitored. For example, affordable housing construction contracts and service and maintenance contracts where prevailing or living wage applies have different initiation processes and enforcement tools. However, the review of payroll itself is largely similar across contract types. Provided here is an example of prevailing wage construction contract review, which is relatively more straightforward than other contract review processes.

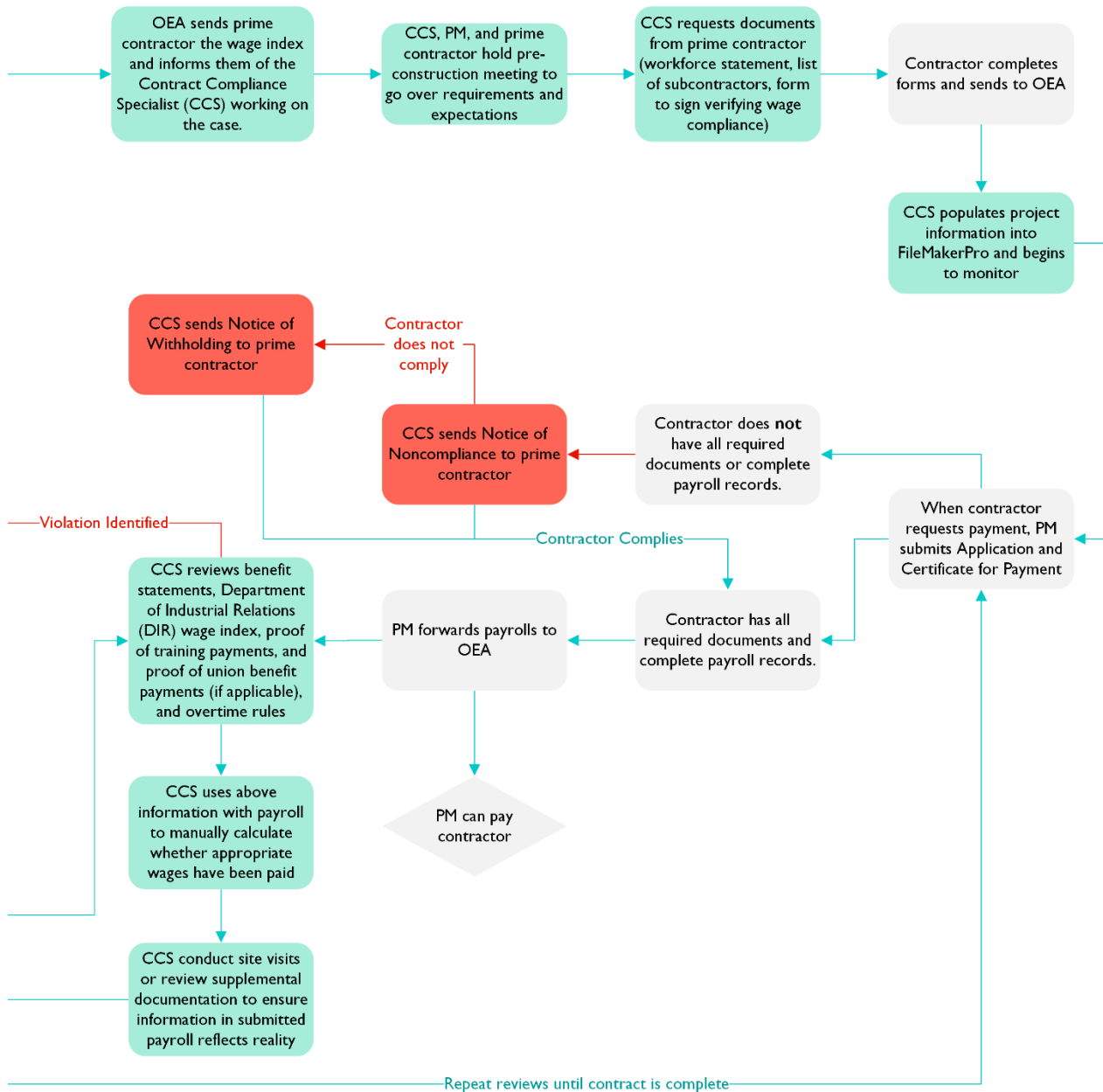
Prevailing Wage Payroll Review Process

Exhibit 6 illustrates the steps involved in a prevailing wage construction contract payroll review, described in further detail on the following pages.

⁴ As noted in Finding 2, OEA requires submission of Labor Compliance Documents, but does not proactively request payrolls for all service and maintenance contracts.

Exhibit 6: Prevailing Wage Payroll Review Process for City-Funded Construction Contracts





Project Initiation

As noted in the Background, OEA proactively monitors construction contracts over \$100,000 and performs complaint-based monitoring of construction contracts under \$100,000. OEA Contract Compliance Specialists (Specialists) determine the appropriate prevailing wages based on a Prevailing Wage Construction Compliance Report the project manager sends upon project initiation. After a contract is awarded that requires OEA monitoring, the Specialist, project manager, and contractor sit down for a pre-construction meeting, during which the Specialist explains every labor compliance requirement the contractor is subject to (i.e., sending labor compliance documents, payment of prevailing wage, submission of payrolls, etc.). The Specialist subsequently creates a file for the project and each contractor and subcontractor on OEA's internal database.

Review

To get paid for a City-funded construction project, the contractor must submit to the project manager all payrolls associated with the period of work the contractor is asking to be paid for. The project manager then forwards these payrolls to the assigned Specialist. Finally, the project manager fills out the date payroll reports were received and forwarded to OEA on a form ("Application and Certificate for Payment") for the contractor to receive payment.

In order to determine whether the correct wages have been paid to a worker, the Specialist must refer to several documents, including:

- Labor compliance documents: When a contract begins, all contractors must submit labor compliance documents. These include a fringe benefit statement (wages will differ depending on whether a contractor pays its employees benefits), a list of all subcontractors, and a list of all employees working on a project.
- Wage Index: The wages of employees on a project are tied to a specific wage index set by the State's Department of Industrial Relations. These are periodically updated.
- Overtime regulations: For public works projects, employees cannot work alternate schedules (e.g., a 4-10 schedule would not be allowed).
- Proof of training payments: A portion of employee wages goes to training costs. The Specialist must ensure that these costs have been deducted properly.
- Proof of union benefit payments: If a worker is unionized, the Specialist must ensure that union benefits have been paid.
- Inspector reports and sign-in sheets: These detail how many workers were on site in a given day, and also the type of work being done.

- Certified payroll: The payroll document will detail the regular hours and overtime hours worked per pay period by each employee, as well as the employee's craft classification.

Using these documents, the Specialist manually calculates the appropriate wage for each worker. Based on these calculations, the Specialist will go line-by-line to ensure that the appropriate wage has been paid to each worker for each pay period covered.

Specialists may periodically conduct unannounced site visits to interview workers and observe the number of workers on site and type of work being performed. Site visits help Specialists check whether the information in submitted payrolls reflects reality (discussed later in this Finding).

Enforcement Tools

Specialists have two main enforcement tools to ensure contractors are compliant with labor regulations.

- Notice of Noncompliance: Contractors must submit labor compliance documents and certified payroll records to enable accurate payroll review. If documents are not provided, the Specialist may issue a Notice of Noncompliance. Additionally, according to the California Labor Code, the City can assess penalties of \$100 per day per worker for every day the payrolls are late.⁵
- Notice of Violation: If a Specialist finds that a contractor has not paid workers correctly, a Notice of Violation is issued. Contractors are required to pay any back wages to workers, as well as certain penalties. Prior to 2014, the penalty came in the form of liquidated damages in the amount of three times the total restitution owed to workers for all City projects.⁶ After 2014, penalties were set in accordance with the California Labor Code for public works projects. Penalties vary based on the cooperation and history of compliance of a contractor; contractors can be charged between \$40 and \$200 per day per worker.

As much as possible, Specialists attempt to resolve issues informally by communicating with contractors rather than resorting to these enforcement tools (discussed further in Finding 2).

⁵ The penalties for late submittal of payroll records for City housing project contracts was changed to a flat rate of \$500 per week in April 2016, provided no wage violations are found in the late payroll records. Prior to that time, liquidated damages for late submittal of payrolls on City housing project contracts was \$250 a day.

⁶ For prevailing wage projects that are not public works projects under the California Labor Code, treble restitution in liquidated damages still applies.

Appeals Process

If a contractor receives a Notice of Violation but does not agree with the determination, they can appeal the decision to the OEA Director within 10 days. The contractor is given the opportunity to submit any additional documentation they feel will rectify the violation found by a Specialist. The OEA Director then reviews all the documentation at hand and either upholds the determination or repeals or modifies the violation. If the determination is upheld, the contractor has one final opportunity to appeal the decision to the Director of Public Works. If the Director of Public Works upholds the decision, the contractor may choose to file a law suit against the City if they still contest the determination.

Project Close

The Specialist will continue to review every payroll that comes in until the project comes to a close.⁷ Upon project closing, the project manager will complete the final part of the contract compliance form, which allows OEA to issue a project acceptance letter. OEA stops monitoring the contract after this point.

A Majority of Staff Time Is Dedicated to Reviewing Payrolls for Prevailing and Living Wage Contracts

The majority of OEA staff time is dedicated to meet the workload created by this manual review process. Contractors submit payroll records whenever they send in an application for payment, and Specialists review payrolls on an ongoing basis until a project is closed. Seven out of ten staff (Contract Compliance Specialists) are dedicated to prevailing wage and living wage enforcement, and the bulk of their time is spent reviewing payrolls. Moreover, out of the remaining three staff, the Contract Compliance Assistant primarily works on prevailing and living wage enforcement, the Contract Compliance Coordinator oversees the work of the Specialists, and the OEA Director becomes responsible for conducting payroll reviews should a contractor contest a Specialist's initial violation determination.

OEA Staff Have Payroll Record Review Backlogs

Specialists review payrolls as they are submitted alongside contractors' periodic requests for payment. This pacing normally allows Specialists to review payrolls within 30 days of receiving them.⁸ However, Specialists monitor multiple contracts at a time—sometimes up to 40. Additionally, this queue can be disrupted if a contractor submits all their payrolls at project close rather than in regular intervals throughout

⁷ If a violation is found at the end of a project when all monthly payments to the contractor have been made, OEA may direct the project manager to withhold the retention amount specified in the contract until the violation is resolved.

⁸ The State's Department of Industrial Relations Division of Labor Standards Enforcement provides guidance that certified payrolls should be reviewed within 30 days after receipt.

the project timeline. If this happens, a Specialist would be forced to put all other payroll reviews on hold to go through these submissions before the project closes.

Contractors may also submit payrolls that do not accurately reflect the number or classification of employees working on a project. If a Specialist catches this late in a project, they may have to go back and review that contractors' prior payrolls to ensure they are accurate. This also places the review of other payrolls on hold.

OEA Should Automate Its Payroll Record Review Process to Free Staff Time for Other Key Prevailing and Living Wage Enforcement Responsibilities

A payroll review has several components, including checking that workers have been paid the appropriate wages (based on craft, hours worked, benefits, etc.), and verifying the accuracy of information in submitted payrolls. While the former ensures that stated wages are correct, the latter ensures that what is stated in the payrolls reflects reality. Staff have experienced cases where an employee is being underpaid but is excluded from payroll records, or where the number of employees working on site is misreported. Staff also advise that there are instances where an employee is working in one craft (e.g., electrician) but is recorded in payroll records working in a different craft (e.g., laborer) as a way to pay that employee a lower wage. These violations cannot be gleaned from checking wages alone.

To catch such violations, staff conduct unannounced site visits and review various documents that give them more insight as to what workers are actually doing on site. On site visits, staff interview workers about their compensation and work conditions, and can check the number of workers and type of work they are doing. OEA staff can arrive at similar conclusions by reading inspector logs or sign-in sheets, but site visits are preferred as a more direct check.

Despite the importance of site visits as the most direct way to ensure the accuracy of payroll records, OEA staff estimate that such visits can only be conducted once a month, during which only two to three project sites are visited. Staff dealing with a backlog of payrolls to review have even less time to go on site visits. For example, one staff person we interviewed with a backlog of over 20 payrolls had not been able to go out on site in several months. In comparison, the City of Oakland's Division of Contracts and Compliance has a "Field Technician" assigned to conduct site visits every day.

Automated Payroll Reviews

Other jurisdictions have automated the wage calculation step in their payroll review process. For example, the cities of Oakland and Long Beach use a web-based program called LCPtracker. All contractors are required to enter their payroll directly into LCPtracker, which will subsequently check the contractors' payroll entries against the

wages employees must be paid.⁹ Since the wage calculations are automated, staff save time by focusing on the payrolls that are flagged as having wage violations, rather than having to manually check if every worker's wages are correct in every payroll. Oakland in particular switched over to this software to manage workload after the division overseeing contracts and compliance was cut by 11 positions. The City of Los Angeles uses a similar in-house software tool to conduct automated reviews. Staff time is spent conducting investigations into errors the program identifies.

If OEA were to implement a similar software solution to automate prevailing and living wage payroll reviews, staff would not have to spend time manually calculating and checking the appropriate wages line-by-line. Instead, their time could be refocused to conducting investigations into violations identified by the software, and reviewing the accuracy of stated payroll information (through site visits and review of supplemental documentation) from contractors that are deemed more "risky" than others (e.g., a contractor with a history of wage violations).

Recommendation #1: To better administer the prevailing and living wage compliance programs, the Office of Equality Assurance should:

- a) Procure a software solution to automate payroll review to free up staff time for other responsibilities (e.g., site visits, review of supplemental documentation);**
- b) Adopt a risk-based strategy for conducting site visits and reviewing supplemental documentation to efficiently verify the accuracy of information in submitted payrolls; and**
- c) Ensure the program has sufficient supervisory resources following the implementation of Recommendation #3.**

Staff Should Be Rededicated to Administer Labor Compliance Programs Beyond Prevailing and Living Wage

OEA is responsible for ensuring labor compliance for other regulations in addition to prevailing and living wage: the Minimum Wage Ordinance, Wage Theft Prevention Policy, and Opportunity to Work Ordinance. However, current resources are not deployed to staff these functions adequately.

Minimum Wage Ordinance

In November 2012, voters approved a minimum wage ordinance that set the City's minimum wage level higher than the State of California's. OEA staff report that the Council direction was to enforce the ordinance through a complaint-based program.

⁹ LCPtracker is connected to the State of California's wage rate database and is automatically updated when a new or updated wage index comes into effect.

OEA has been responsible for reviewing any complaints about minimum wage violations since the ordinance went into effect in March 2013.

Because complaint-based programs rely on workers to be educated about their rights and available courses of action should they experience minimum wage violations, outreach to workers and employers about their rights and responsibilities is crucial. Reports by the National Employment Law Project and the UCLA and UC Berkeley Centers for Labor Research and Education echo the importance of outreach and education to employees and employers about minimum wage compliance.¹⁰ ¹¹ Examples of different types of outreach cited in these reports include contracting with community groups to conduct targeted outreach and education, as well as publicizing enforcement actions to increase the deterrent effect of enforcement.

OEA partners with other City staff (e.g., the Office of Economic Development via Business Owner Space), community organizations, and nonprofits to disseminate information about minimum wage compliance. Outreach has usually been conducted when a new law or wage increase goes into effect, for example in 2013 when the City implemented the Minimum Wage Ordinance. These partnerships help OEA inform employers and employees about their rights and responsibilities.

While partnering with other agencies to conduct outreach for minimum wage is a positive effort, there is room for more concerted and ongoing outreach. The UCLA and UC Berkeley Centers for Labor Research and Education estimate that in any given week, 11 to 12 percent of minimum wage workers experience minimum wage violations. In San José, this could amount to around 10,000 workers. However, in the past three years, OEA only received around 55 complaints, not all of which resulted in violations being found.

Ongoing outreach could help ensure that workers paid below minimum wage are aware of their rights and their ability to file a complaint to OEA. For example, OEA could conduct outreach on a more ongoing basis, not only when wage increases are set to go into effect, and could elaborate on different ways minimum wage can be violated outside of simple underpayment (e.g., not providing rest or meal breaks).

Expanding outreach is critical, especially as minimum wage rates continue to increase. In November 2016, San José City Council approved changes to the Minimum Wage Ordinance that set minimum wage levels on a track to increase to \$15 by 2019. Staff subsequently proposed an outreach plan to message the minimum wage increase to employers and employees, which was adopted by Council in December 2016. As wages rise, OEA expects more minimum wage violation complaints to come in as employers adjust to the increases.

¹⁰ [“The Top 5 Enforcement Tools for Local Minimum Wage Laws,” National Employment Law Project.](#)

¹¹ [“Enforcing City Minimum Wage Laws in California: Best Practices and City-State Partnerships,” UCLA Center for Labor Research and Education and UC Berkeley Center for Labor Research and Education.](#)

As discussed in the Background, OEA contracts with other jurisdictions to provide minimum wage enforcement services. Some of these jurisdictions, such as Mountain View and Sunnyvale, have adopted similar minimum wage increase schedules.

Exhibit 7: Other Jurisdictions’ Minimum Wage Levels Are Set to Increase to \$15

	San José	Mountain View	Sunnyvale
January 2017	\$10.50	\$13.00	\$13.00
July 2017	\$12.00	--	--
January 2018	\$13.50	\$15.00	\$15.00
January 2019	\$15.00	(Increase based on CPI)	(Increase based on CPI)

Source: Auditor summary of jurisdiction minimum wage postings

Due to these increases, OEA may have to review more complaints from employees in the jurisdictions that it contracts with.

In FY 2013-14, 2.5 full-time equivalent (FTE) positions were added to OEA “to address the workload associated with the City’s new Minimum Wage Ordinance.” In particular, these staff were to “alert businesses and their employees of the change [in minimum wage], develop policies and procedures, and provide public and business education outreach.” Staff were also tasked with “managing the ongoing operation of the program by actively reviewing and investigating all Minimum Wage Ordinance related complaints and other compliance related issues.” In FY 2014-15, the City eliminated a vacant 0.5 FTE position that was part of the prior fiscal year’s staff addition, noting that

Prior to the implementation of the Minimum Wage Ordinance, the Department projected the number of complaints and amount of staff time necessary to answer questions, investigate, and resolve complaints. However, based on actual experience, the two full-time positions that support this program are able to fully administer the program and this part-time position is not necessary.

In our review, we found that although 2.0 FTEs were added to administer the Minimum Wage Ordinance, only a portion of one FTE (Contract Compliance Coordinator) is actively working on its enforcement because there are currently a limited number of minimum wage complaints. Because the Coordinator is also responsible for managing prevailing wage and living wage enforcement staff, he is not fully dedicated to administering the minimum wage ordinance. Moreover, although the Coordinator reviews and investigates all minimum wage complaints, he is unable to conduct ongoing outreach. The remaining FTE is performing prevailing and living wage responsibilities.

Wage Theft Prevention Policy

In June 2015, San José City Council set wage theft prevention as its top Council Priority for FY 2015-16, and designated OEA as the unit to lead this effort. Wage theft is the crime of stealing earned wage from workers, and occurs whenever an employer fails to pay its workers the wages to which they are legally entitled.¹² This can happen in various ways, including:

- Paying workers less than the legally required minimum wage;
- Failing to pay the applicable overtime rate;
- Forcing workers to work “off the clock”; and
- Denying workers required meal and rest periods.

Various studies have shown that wage theft is a widespread problem, especially for women, undocumented immigrants, and immigrants in general. A report by the National Employment Law Project that surveyed over 4,300 workers across New York City, Los Angeles, and Chicago found that in the week prior to taking the survey:

- 26 percent of respondents were paid less than minimum wage;
- 76 percent of respondents who worked overtime were not paid the correct overtime rate;
- 70 percent of respondents who came in early and/or stayed past their shift were not paid for these “off the clock” hours; and
- 69 percent of respondents who were entitled to at least one meal break received no break at all, had their break shortened, were interrupted by their employer, or worked during the break.¹³

To address wage theft, OEA was directed to draft a policy that would:

- A) *Revise contract and RFP requirements to protect the City from contracting services from businesses with unpaid wage theft judgments.*
- B) *Authorize Departments that issue licenses or permits to deny, suspend, or revoke licenses and permits to businesses with unpaid wage theft judgments.*
- C) *Provide any other readily available information on the issue of wage theft.*

Council adopted a Wage Theft Prevention Policy on May 24, 2016; the policy went into effect on July 1, 2016.¹⁴ In addition to requiring all City contracts to include wage theft prevention language, the policy stipulates the following:

As a part of any City solicitation for supplies, materials, goods and/or services, a potential contractor shall fully complete a “Bid

¹² Wage theft can occur to both minimum wage workers and those earning higher than the minimum wage.

¹³ [“Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities,” National Law Employment Project.](#)

¹⁴ <http://www.sanjoseca.gov/DocumentCenter/View/62047>.

Certification”... The Certification requires each potential contractor to disclose whether the contractor has been found by a court or final administrative action of an investigatory government agency to have violated federal, state or local wage and hour laws within the past five (5) years from the date of the submitted bid or proposal...

*The City **shall** disqualify a potential contractor... if the potential contractor has been found... to have violated applicable wage and hour laws on more than one (1) occasion or has one (1) unpaid wage judgment.*

*The City, at its sole discretion [i.e., OEA], **may** disqualify a potential contractor based on one (1) disclosed satisfied judgment...*

*Inaccurate or incomplete disclosures constitute a violation of the City’s Wage Theft Prevention Policy and **may** result in immediate disqualification from the City solicitation and contracting process or immediate termination of any contract with the City.*

Additionally, businesses with Title 6 permits¹⁵ with wage theft judgments can have their permits denied, suspended, or revoked:

If the City receives complaints about Title 6 permittees regarding wage theft, the Office of Equality Assurance shall work with the City Attorney’s Office and the department responsible for issuance of the permit or license to investigate the complaint to determine denial, suspension, or revocation of the permit or license until the wage judgment is satisfied.

Since the policy went into effect in June 2016, the City has not received any wage theft judgment disclosures from potential contractors in City solicitations,¹⁶ nor have any complaints regarding wage theft been received for Title 6 businesses. However, due to its limited staffing in this area, the City has not conducted targeted outreach to Title 6 businesses or their employees.¹⁷

Furthermore, the responsibilities outlined by the policy that were added to OEA’s workload (i.e., determining whether a potential contractor with one disclosed satisfied judgment should be disqualified, as well as wage theft investigations for Title 6

¹⁵ Businesses that hold Title 6 permits as required by the Municipal Code include auto body repair shops, gasoline service stations, massage businesses, and tow-car businesses, among others.

¹⁶ The Wage Theft Prevention Policy does not apply to any public works contracts as defined in City Charter Section 1217.

¹⁷ Because the Wage Theft Prevention Policy does not apply to any other businesses outside of Title 6 permittees and those contracting with the City, wage theft could be occurring in businesses not covered by the policy without OEA’s knowledge. Complaints against employers not under the policy would be directed to the State Labor Commission.

permittees) could be a substantial undertaking. In particular, a disqualification determination for a potential contractor would involve OEA staff to evaluate:

- (i) the amount of the judgment or final administrative decision;*
- (ii) the number of employees impacted by the prior violations; (iii) the size of the company and history of compliance with wage and hour laws; and (iv) the impact to the City; and (v) other factors that may be appropriate.*

Currently, only part of an FTE has been assigned to assume these responsibilities; the person responsible, the OEA Director, splits her time between numerous other responsibilities.

Opportunity to Work Ordinance

In November 2016, voters approved a new measure (Measure E, or Opportunity to Work) that requires employers of 36 or more employees to offer additional work hours to existing qualified part-time employees before hiring new employees or contractors.¹⁸ The proposed resolution that went to voters outlined OEA's responsibilities in developing and enforcing the Opportunity to Work program. These include:

- Publishing notices of employee rights to be posted in workplaces;
- Creating guidelines for the implementation of the ordinance;
- Receiving and investigating any reported violations;
- Enforcing adherence to the resolution by issuing appropriate fines, fees, or civil penalties; and
- Evaluating whether businesses are eligible to receive hardship exemptions.¹⁹

In preparation for the policy going into effect in March 2017, OEA drafted FAQ guidelines and is planning to outreach to employees and employers to inform them about their rights and responsibilities.²⁰

OEA estimates that the Opportunity to Work ordinance will cover about 1,200 businesses representing thousands of workers. Despite this expected coverage, the two staff in OEA implementing the Opportunity to Work Ordinance (OEA Director

¹⁸ This requirement can be waived through a collective bargaining agreement. Welfare-to-Work participants can also opt out of the Opportunity to Work requirements. The City is also authorized to enforce and grant hardship exemptions from the ordinance.

¹⁹ Hardship exemptions last for a period of one year, after which a business would have to apply for an extension through OEA.

²⁰ <https://www.sanjoseca.gov/index.aspx?NID=5360>.

and Contract Compliance Coordinator) are primarily responsible for other OEA functions, resulting in only a portion of one FTE responsible for Opportunity to Work.

San José Is Thinly Staffed to Meet Additional Workload Demands

The OEA Director oversees the enforcement of the Wage Theft Prevention policy, and the contract Compliance Coordinator is primarily responsible for administering the Minimum Wage Ordinance. Both the Director and the Coordinator are handling the implementation and enforcement of the Opportunity to Work Ordinance. However, they are both responsible for numerous other duties, including the management of staff reviewing prevailing and living wage regulations and other programs and initiatives discussed in Finding 3. As such, their time is not fully dedicated to administering these citywide labor regulations.

Although the City added 2.0 FTEs (Coordinator and Specialist) to address the workload associated with the Minimum Wage Ordinance, the Coordinator currently handles responsibilities outside of minimum wage enforcement as described above, and the Specialist performs prevailing and living wage compliance enforcement. By rededicating the 2.0 FTE to minimum wage enforcement and assigning them to develop and implement the wage theft and Opportunity to Work regulations, the City would help ensure that these programs are adequately staffed and enforced.

Enforcing these programs should involve more concerted and ongoing outreach, especially since all three have complaint-driven components. As evidenced by the reports cited above, issues like wage theft (including violations of minimum wage) may be widespread. Programs to prevent wage violations that are complaint-based rely on employers knowing their responsibilities and employees knowing their rights. While OEA does conduct outreach regarding wage regulations that affect workers citywide, more can be done to ensure that violations are being reported and investigated.

Other jurisdictions have proportionately more staff than San José. For example, where San José has 10 positions for labor compliance, Los Angeles has 26 positions for labor compliance (primarily prevailing wage and project labor agreements, such as local hire) and six positions for equal employment opportunities enforcement (including living wage). Oakland has a total of 15 staff in its Contracts and Compliance Division that handle wage compliance, contractor outreach, and the city's local employment program. Los Angeles and Oakland have mid-level management and/or dedicated staff to oversee the unit's different responsibilities.

Recommendation #2: The Office of Equality Assurance should develop a plan to conduct concerted and ongoing outreach to employees and employers about wage compliance, maximizing its current network with City departments, nonprofits, and community organizations.

Recommendation #3: The Office of Equality Assurance should rededicate the 2.0 FTE originally budgeted to administer the Minimum Wage Ordinance. These staff should also aid with the implementation, administration, and enforcement of the City's Wage Theft Prevention Policy and Opportunity to Work Ordinance.

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Finding 2 Documenting Policies and Procedures Can Ensure Continuity and Consistency

Summary

Though OEA processes involve multiple steps and communication between different parties, OEA has limited written policies or procedures. OEA can benefit from documenting processes to ensure consistency and continuity between staff. There also are several areas in which OEA should set written policies to guide staff decisions. Lastly, due to differences in departmental processes, some contracts that were procured through the Finance Purchasing division have not been monitored. To simplify the notification process, we recommend OEA begin tracking non-construction projects after Finance notifies them of the award.

Documentation Can Ensure Consistency of Complex OEA Processes

OEA staff are responsible for carrying out complex processes involving multiple steps that require communication with other departments, outside contractors, and supervisors or directors. To ensure that contractors are treated consistently by OEA staff, it is important that staff follow similar procedures. However, current documentation of OEA procedures is limited.

For prevailing wage on construction projects, OEA maintains a checklist of documents that may be required to complete a review as well as a list of the labor law requirements. Additionally, staff may use the State's Department of Industrial Relations' (DIR) Division of Labor Standards Enforcement (DLSE) Public Works manual as a reference. For example, if contractors or other staff question OEA's decisions or methods, staff use the DLSE Public Works manual to explain their rationale. However, while the manual provides useful guidelines for monitoring prevailing wage that would be applicable to all jurisdictions, OEA does not have day-to-day internal procedures for activities such as storing information (whether in a database or hard copy), documenting work for internal files, conducting important meetings, communicating results, and using enforcement tools.

For service and maintenance contracts, staff have a flowchart that provides an overview of service and maintenance contract handling. Service and maintenance contracts generally are procured by the Finance Purchasing division; the flowchart shows necessary communications between project managers and Purchasing staff. However, OEA should document more detailed

instructions on how the communication and review should be conducted, similar to guidelines for prevailing wage on construction projects described previously.

Minimum wage compliance, ADA complaint investigations, and DBE program responsibilities do not have documented internal procedures.²¹ Creating procedures for minimum wage compliance, ADA complaint investigations, and DBE program responsibilities is particularly important in light of potential staff turnover. With documented procedures, OEA can limit differential treatment of contractors between staff and when new staff are hired. San Diego, for example, provides staff with detailed procedures to guide staff activities, including day-to-day processes and timelines for enforcement action.

Recommendation #4: To ensure continuity and consistency in practices, the Office of Equality Assurance should document the processes involved in:

- a. **Determining wage requirements for a prevailing or living wage project and notifying Finance of the wage determination;**
- b. **Receiving purchase order information from Finance and sending documents to contractors for living wage projects;**
- c. **Conducting pre-construction meetings and sending documents to contractors for prevailing wage projects;**
- d. **Performing prevailing wage and living wage payroll reviews, including how to determine the wage rate based on labor compliance documents and how to review inspector logs;**
- e. **Escalating enforcement when labor compliance documents are not received, such as sending notices of noncompliance and withholding of payment (see Recommendation #5);**
- f. **Calculating restitution for prevailing, living, and minimum wage, and notifying required parties of violations;**
- g. **Completing the director review of violation appeals;**
- h. **Closing a project after completion;**
- i. **Conducting a minimum wage review;**
- j. **Conducting outreach for race-neutral disadvantaged business enterprise (DBE) projects and evaluating DBE good faith efforts for race-conscious projects; and**
- k. **Completing an Americans with Disabilities Act complaint investigation.**

²¹ For discussion of ADA and DBE program responsibilities, see Finding 3.

OEA Could Benefit from Establishing Written Policies in Certain Areas

Beyond documentation of staff procedures, OEA staff should determine and document policies in some areas.

Timeline for Payroll Reviews

As described earlier, backlogs of payrolls can accrue. The current goal is to meet the standard set by the State Department of Industrial Relations' Division of Labor Standards Enforcement Public Works manual to review payrolls within 30 days after receipt. This helps minimize the time that employees might be incorrectly paid.

Creating timelines for important steps in payroll reviews can prevent contractors from submitting numerous incorrect payrolls before an error is found. OEA should create a policy that specifies when payroll reviews must be completed, based on when the payroll was submitted, and what situations allow for staff to exceed those timelines or when additional staff should be assigned to the payroll reviews.

Elevation of Enforcement Procedures

When dealing with either noncompliance with documentation requirements or wage violations, Contract Compliance Specialists appear to have some discretion regarding when to elevate a situation from informal enforcement to formal enforcement. We noted that Specialists try to work with contractors through emails before sending out formal notices of noncompliance or notices of violation.

Trying an informal approach before escalating enforcement helps foster relationships between OEA staff and contractors and allows OEA to try to gain compliance without having to escalate beyond what might be necessary.

However, OEA does not have a clear policy regarding how long a Specialist should, or can, try an informal approach before beginning to use the formal process. This could lead to inconsistent treatment of contractors.

Selection Criteria for Service and Maintenance Payroll Review

For all contracts, OEA requires the submission of labor compliance documents containing the wage rates and fringe benefits of employees working on the contract. However, OEA does not request payroll records whenever payment is requested for all service and maintenance contracts. OEA applies criteria to determine whether a contract warrants review of all payrolls or whether payrolls should be spot-checked. If employees are represented by a collective bargaining unit, the contract is long-term with regular work performed for the

City, and there have not been issues identified in the past, OEA may decide to only request payrolls on occasion. Contracts such as the custodial contract for City Hall or the recycling haulers fall under this category. Regardless of the payroll submission requirements, OEA will request all information if a complaint is made.

While this approach is logical, OEA does not have written criteria specifying when service and maintenance payrolls will be required. Because OEA is deciding to monitor contracts with differing levels of scrutiny, staff should be clear on how that decision is made.

Review of Prevailing Wage Agreements

OEA policy is to track prevailing wage agreements over a specified dollar value. The Notice of Intent to Contract form for service and maintenance agreements indicates that OEA need only be notified of service and maintenance contracts over a set dollar value (though prevailing wage applies for any contract over \$1,000). However, OEA staff report that departments may set their own limits that dictate when OEA would have to be notified of an intent to contract.

This could lead to inconsistent treatment of contractors. Though OEA staff report receiving no complaints²² on smaller dollar value contracts, in our opinion, OEA should set a policy City-wide policy for the minimum value of a contract that requires departments to notify OEA.

Recommendation #5: To avoid inconsistencies in the treatment of contractors, the Office of Equality Assurance (OEA) should document staff's decision-making criteria for:

- a. Timelines for payroll review process;**
- b. Escalation of enforcement and appropriate use of enforcement tools;**
- c. When payrolls are to be requested for service and maintenance projects; and**
- d. The minimum value of a contract at which OEA must be notified.**

²² OEA staff would investigate any complaint on a City contract with wage requirements, regardless of the dollar value.

OEA Calculates Penalties or Liquidated Damages for Period Covered Under Notice of Violation

Contractors are required to submit payroll records when they request payment from the City. OEA staff then review these payrolls and alert contractors if there is a violation. Contractors have the right to appeal the violation to the OEA Director if they disagree with OEA staff decisions. If contractors are continuing work on City projects, theoretically, they should continue to submit payroll records if they are requesting payment. However, if the contractor disputes that there is an error in the prevailing wage, it is likely that the payrolls submitted after the violation is noted would continue to have that violation until the appeal is decided.

It is our understanding that OEA calculates liquidated damages or penalties based on the time period covered in the notice of violation, regardless of whether violations may continue to occur after the notice of violation is sent out. In doing so, they limit the accrual of liquidated damages or penalties during the appeals process. In some cases, OEA staff may instruct contractors not to submit payrolls after they begin an appeal.

This could result in a substantial decrease in potential payments because both liquidated damages (for non-public works prevailing wage projects) and penalties (for public works projects under the California Labor Code) can accrue into large sums of money.²³ OEA staff note that this situation is likely to occur very infrequently.

However, the City's ordinance and resolution do not limit the accrual of liquidated damages or penalties to only the period covered by the initial notice of violation. Similarly, it is unclear whether OEA can or should instruct contractors to stop submitting payrolls during an appeal.

Recommendation #6: To ensure appropriate and uniform application of the City's formal enforcement mechanisms, the Office of Equality Assurance should:

- a. Work with the City Attorney's Office to clarify its policy that penalties or liquidated damages should be assessed on all payrolls with wage violations on City-funded projects,**

²³ The City's liquidated damages policy states that in the event of a breach of prevailing wage the Contractor is to pay to the City as liquidated damages the sum of three times the difference between the actual amount of wages paid and the amount of wages that should have been paid. The California Labor Code, which stipulates the penalties for public works projects, allows the City to charge up to \$200 each day for each worker who was underpaid. If the contractor made a good faith mistake and corrected the error promptly and voluntarily, the City can charge not less than \$40 a day in penalties for each worker. If the contractor has been assessed penalties in the previous three years for failing to pay prevailing wages, the minimum penalty is \$80 each day for each worker. If the City's compliance officer determines that the underpayment was willful, then the minimum penalty is \$120 each day for each worker.

**regardless of the timing of submission or Notice of Violation;
and**

- b. Require that payrolls should be submitted whenever a contractor requests a payment.**

Differences in Processes Have Resulted in Some Unmonitored Purchase Orders

For service and maintenance contracts that require labor compliance, OEA coordinates with other departments and the Finance Department's Purchasing Division.

Under the current process, project managers notify OEA if a project is initiated that may require prevailing or living wage to be paid. This notification is done through submittal of the Notice of Intent to Contract form. OEA makes a wage determination—deciding what wage rate or classification, if any, applies to the work performed for the project—and alerts both the project manager and the Finance Purchasing division of the wage requirement and the OEA project number. OEA then creates a hard-copy file folder with the wage information and project number to prepare for an incoming project.

Purchasing buyers are also trained to identify projects that might require OEA monitoring, regardless of whether the project manager was aware of a possible requirement. Finance staff are provided a chart to assist in determining what wage policy applies to a bid and what attachments to include with the bid. This chart was last updated in the year 2000. Assuming a project moves forward, buyers complete a bid and finalize a contract or a purchase order (PO). The OEA project number is entered into a text field in the Financial Management System (FMS) to alert the distribution staff that OEA should be notified of the completed agreement. FMS does not allow for automatic notification of OEA when an agreement is completed that requires OEA monitoring.

Current Process Could Be Simplified to Reduce Errors

Differences in processes between departments appear to be causing confusion and missing information. OEA tracks contracts related to specific projects, based on what project managers refer to them. Finance Purchasing, however, may combine purchase orders for several projects together to procure services more efficiently or effectively. Though both processes may work successfully in isolation, when the two processes interact, contracts can slip through the cracks. In our review of several project files, we found contracts associated with projects OEA had previously determined were subject to wage requirements which were not being monitored. We found seven purchase orders that were correctly identified as requiring prevailing or living wage and that had been

appropriately sent to OEA.²⁴ However, OEA was not monitoring six of these purchase orders because they had difficulties matching the POs to the original projects for which OEA had made determinations. In several cases, Finance used an OEA number on a PO that did not directly correspond to the initial project OEA had referred to them.

To simplify the process, OEA staff suggest that the initial notification to OEA could be eliminated. Finance Purchasing staff, who are already trained to identify any projects going out for bid that may require prevailing or living wage enforcement, can ensure that bids have standard language about wage requirements where applicable. An up-to-date wage policy determination chart provided to Purchasing staff and available on the intranet for use by project managers can ensure that resources are available for City staff to make appropriate decisions regarding the applicability of wage policies. Included on a wage policy determination chart should be the guidance that OEA staff are available to provide advice to department project managers or Purchasing staff if there are questions or concerns. OEA can begin tracking a project after Finance notifies them of the award.

Recommendation #7: To simplify the contract notification process and reduce errors, the Office of Equality Assurance (OEA) should:

- a. Provide up-to-date written guidance for Finance Department and City staff to assist them in making wage policy determinations, including that OEA staff are available to provide advice upon request;**
- b. No longer require a formal notice of intent to contract form at the initiation of a project; and**
- c. Begin tracking projects upon receipt of completed agreements from the Finance Department.**

²⁴ At the time of our observation in January 2017, OEA had 136 files that had never been matched with a purchase order, dating back to 2013-14. 46 of these files were for projects scheduled for 2016-17 that may not yet have been initiated. For projects in 2015-16, we identified 42 OEA files that were not matched with POs; OEA monitored 220 projects that fiscal year. We took a sample of eight OEA project files to identify whether the project had been completed, or if there was an explanation for why OEA was not monitoring any PO. We found matching POs for six of these projects, resulting in seven POs that OEA should have monitored or should be monitoring. OEA has followed up with all purchase orders that were identified in the sample. OEA either found that they had received notification or Purchasing provided evidence that they had notified OEA of each of the seven POs.

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Finding 3 Resource Constraints May Limit Future Contractor Outreach and the Local Hire/Apprentice Utilization Programs

Summary

In addition to its labor compliance program responsibilities, OEA oversees other City programs which add to its overall workload. The United States Department of Transportation requires the City to have a Disadvantaged Business Enterprise (DBE) Program in place to receive federal funding for certain construction projects. In addition to labor compliance activities described in Finding 1, the OEA Director is the City's liaison for this DBE program and for Americans with Disabilities Act compliance and coordination.

The City Council set Council Priorities to evaluate the possible expansion of DBE programs citywide (through a citywide contracting program) and development of a local hire/apprentice utilization program. To continue with the development of a City-wide contracting program that is race and gender neutral, consultants will be initiating additional research, engaging stakeholders and developing recommendations for an inclusive race and gender neutral contracting program. OEA has issued a Request for Information (RFI) for a labor market study to assess the development of a possible local hire/apprentice utilization program, and the City Council has referred the program to a newly created task force. As the City determines the future of these programs, it will need to assess the resources needed to complete new responsibilities.

The City Currently Has Limited Scope DBE Programs and Plans to Develop a Contractor Outreach Program

The US Department of Transportation (US DOT) provides funding for construction of transportation projects initiated by state and local governments, public transit, and airport agencies. To receive US DOT funding, local agencies must comply with federal requirements for DBE programs.²⁵ The primary objective of the DBE program is to level the playing field by providing small businesses owned and controlled by socially and economically disadvantaged individuals a fair opportunity to compete for federally funded transportation contracts.

²⁵ For more information, see: <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise>.

The City is a recipient of US DOT Federal Airport Administration (FAA) funding at the Norman Y. Mineta International Airport (SJC) and is a sub-recipient of US DOT Federal Highway Administration (FHWA) funds from Caltrans. Therefore, as described below, projects receiving any FHWA funding must comply with Caltrans DBE requirements.

For all DBE projects, the OEA Director is the designated DBE liaison officer.

Federal Aviation Administration Funded Projects

The City's US DOT/FAA DBE program at SJC is race-neutral. Under FAA regulations, the City is required to submit an updated DBE participation plan goal every three years that incorporates anticipated new opportunities, potential DBE participation, and new percentage goal for DBE participation. The City contracts with a consultant to set the three-year goal and related DBE program.²⁶

The City is responsible for conducting outreach to DBE contractors to try and reach the DBE participation goal. OEA reports that most of the projects completed during this time period were airfield paving projects and there were a small number of DBE-certified paving, striping and electrical contractors.²⁷

The FAA conducted a compliance review for SJC for FY 2015. The review included compliance concerns²⁸ and due dates for corrective action. SJC staff provided a response to these concerns with corrective action steps.

Caltrans/Federal Highway Administration Funded Projects

Unlike at SJC, the City is not the direct recipient of federal funding from the FHWA. Instead, Caltrans receives the federal funding and distributes it to local jurisdictions. As such, the City must comply with Caltrans requirements regarding DBE goals.

The State conducted a disparity study and determined that a race-conscious program was warranted. This involves a set DBE participation goal and required compliance or good faith efforts to comply with the goal. To comply, the City

²⁶ The goal is determined by assessing the type of work that a specific project would entail and evaluating the number of DBE contractors that are qualified to perform such work in the surrounding areas. An overall goal is calculated based on all the projects included in the three-year period. Factors that affect DBE participation include limited availability of DBEs due to the type and nature of the projects.

²⁷ For federal fiscal years (FFYs) 2014-2016, the race-neutral DBE goal was 14.5 percent. SJC's consultant analysis recommended a goal of 7.25 percent. After discussion with stakeholders, the City Council adopted the goal of 14.5 percent. DBE participation was 0 percent in FFY 2014, 1.5 percent in FFY 2015, and 8.1 percent in FFY 2016. Per the federal requirements, SJC provided an explanation to the FAA why the DBE goals were not met. The FFY 2017-19 DBE participation goal is 6.3 percent.

²⁸ Concerns mainly regarded monitoring and enforcement provisions, including: timeliness and availability of DBE goal and methodology report, compliance with documentation requirements, extent of monitoring to ensure work was completed by DBEs as stated, and reviews to ensure timely payments to DBE contractors.

requires contractors to conduct good faith outreach to DBE-certified subcontractors (unlike at SJC, where the City conducts the outreach). If a low bidder does not meet the DBE participation goal, the City must evaluate the good faith efforts and determine whether the bidder should be disqualified or if they did conduct outreach in good faith.

OEA's Role in DBE

The OEA Director's responsibilities as the DBE liaison differ between FAA-funded projects at the Airport and Caltrans FHWA-funded projects in the rest of the City. For DBE projects at SJC, the OEA Director coordinates with Airport staff to ensure sufficient outreach is performed when initiating a project. This involves contacting contractors on Caltrans' DBE databases, emailing contractors through Bidsync (the City's bidding software), and emailing the minority Chambers of Commerce. For Caltrans FHWA-funded projects, the OEA Director is responsible for establishing project-specific DBE goals, evaluating good-faith efforts or reviewing plans to meet DBE goals for contractors bidding on a project. If the OEA Director determines that the goal was not met and good-faith efforts were not sufficient, she can recommend the bidder be disqualified.

City Council Priority Regarding DBE Expansion Has Been Assigned to OEA

In June 2015, the City Council adopted a Council Priority to "explore expanding [the] existing DBE program beyond [the] Airport to other City departments and contracts." Though there are limitations on the expansion of DBE programs,²⁹ OEA reported that developing and implementing a program that is race and gender neutral is allowable. OEA has conducted an RFQ for consultants to develop a contractor outreach program and possibly conduct any subsequent outreach. OEA expects to provide the City Council with a status report in June 2017 which would include potential options for how the City might develop such a program.

Decisions regarding the future of a City-wide race and gender neutral contracting program, including the appropriate staffing and level of outreach feasible, are expected to follow completion of the consultant review.

²⁹ Article I, Section 31 of the California constitution (Proposition 209) forbids the State or any local agency in California from discriminating on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, or public contracting.

The City Is Expanding Programs to Promote Local Hire

The City currently has a local and small business preference for projects that are not construction contracts. City suppliers can receive preference for being either a local business enterprise (LBE) or a small business enterprise (SBE). These preferences are evaluated as part of the bidding or proposal process and do not currently fall under OEA's responsibility.

To qualify as a local business enterprise, a supplier must have a current San José business tax certificate and have an office in Santa Clara County with at least one employee. If these requirements are met, the supplier is granted either 2.5 percent of cost on a price determinative award (awarded to the low bidder) or 5 percent of the total points on a points determinative award ("best value").

To qualify as a small business enterprise, a supplier must first qualify as a local business enterprise. Additionally, the supplier must have fewer than 35 employees regardless of where the employees are located. If these requirements are met, the supplier is granted either an additional 2.5 percent of cost on a price determinative award or an additional 5 percent of the total points on a points determinative award.

There is no local or small business preference for construction projects. The City Charter specifies that public construction projects over \$100,000 are to be let to the lowest responsible bidder after notice.

City Council Priority Regarding Local Hire/Apprentice Utilization Has Been Assigned to OEA

In addition to evaluation of a citywide contracting program that is race and gender neutral, in June 2015 the City Council adopted a Council Priority regarding a local hire/local business/apprentice utilization³⁰ program with the direction to "create policies encouraging hire of local workers and contracting of local and small businesses."³¹ Like with a possible race and gender neutral contracting program, this Council Priority was added to OEA's responsibilities.

As detailed in a January 20, 2017 memorandum to the City Council, the local hire/apprentice utilization program includes:

- 1) a good faith local hire ordinance for private development;

³⁰ Apprenticeship combines training on the job with school instruction, primarily in skilled trades such as carpentry, pipefitting, sheet metal, and HVAC. The California Department of Industrial Relations' Division of Apprenticeship Standards creates apprenticeship opportunities, which are operated under agreements by labor and/or management in accordance with State and Federal laws.

³¹ As stated in Finding I, the City Council set wage theft as Council Priority #1 at the same time. This priority was also assigned to OEA.

- 2) an apprenticeship hire ordinance;
- 3) a policy requiring standard area wages for the development of public land that is sold, leased or swapped; and
- 4) a targeted hire policy for public construction.

Staff determined that before moving forward with the program, conducting a local market study was warranted to appropriately characterize the situation and determine whether a local hire program could be recommended and justified. To this end, staff issued a Request for Information (RFI) on January 20, 2017 to the work2future³² Board's pre-qualified labor market and planning consultant pool.

The local hire/apprentice utilization program was progressing through the City Council's Community and Economic Development Committee. In December 2016 the City Council directed that its newly established Community Workforce Agreement/Project Labor Agreement Task Force should take up the program. It is expected that the Task Force will culminate with a report in June 2017.

Similar to a City-wide race and gender neutral contracting program, decisions regarding appropriate staffing and program design will need to be made following the labor market study and the results of the Task Force report.

Other Jurisdictions Have Contractor Outreach and Local and Small Business Programs with Dedicated Staff

Both Oakland and Los Angeles have contractor outreach programs with dedicated staffing. These programs may differ from any developed in San José due to differing program goals and city charter requirements. However, Oakland and Los Angeles's resource allocation and staffing can provide guidance to the City when developing race and gender neutral contracting program and administering a potential local hire initiative.

Oakland contract compliance officers conduct outreach to small and local businesses. When a department conducts outreach for a good or service, the contract compliance officers will send the responsible department staff a list of local and small businesses that must be outreached to. These businesses are from a city database of certified³³ local and small firms. Moreover, staff share

³² Work2future addresses the workforce and economic development needs of the San José area in collaboration with small and large businesses, education institutions, and community-based organizations. It is housed within the City's Office of Economic Development.

³³ Other jurisdictions may run specific certification programs for firms, unlike San José.

information about local and small business preference during pre-bid and pre-proposal meetings, as well as at chambers of commerce meetings.

Oakland also has dedicated staff to oversee the city's local employment program, although compliance officers help them prepare notices with information on local employment. The staff dedicated to overseeing the program rely heavily on Oakland's payroll review software, LCPtracker, to monitor compliance.

Los Angeles has robust Minority Business Enterprise (MBE)/Women Business Enterprise (WBE)/Other Business Enterprise (OBE) certification and outreach, local and small business certification, and local business certification programs. Contractors are required to outreach to MBE/WBE/OBEs during the bid process. The prime contractor must consider all bids submitted. If a subcontractor submits a bid to the prime contractor, the prime must provide a reason for denying the subcontractor if it was the lowest bid. At the end of a project, staff assess whether the prime contractor followed through on the inclusion of specified subcontractors that was stated in the bid. Los Angeles has also had efforts to tailor some projects for smaller businesses by dividing large projects into small work orders with capped dollar values.

Los Angeles has four certification staff and they added two more positions when they began performing local business certifications in conjunction with their local hire initiative. They have six staff and one consultant to handle MBE/WBE/OBE good faith evaluation efforts.

OEA Director Handles DBE, Development of Contractor Outreach Program, and Local Hire/Apprentice Utilization Initiative

Currently, all Contract Compliance Specialists work on prevailing wage and living wage. The Contract Compliance Coordinator oversees Specialists' work and conducts minimum wage investigations.

The OEA Director is responsible for current DBE efforts, the development of the Citywide race and gender neutral contracting program, and the local hire/apprentice utilization initiative in addition to performing reviews for prevailing, living, and minimum wage and responding to ADA complaints (discussed later in this Finding).

The current reliance on the OEA Director to perform these numerous functions warrants reassessment due to increased workload. Additionally, any potential staff turnover leaves the City vulnerable to significant loss of institutional knowledge.

OEA Is Also Responsible for Americans with Disabilities Act Compliance for City Services, Programs, and Facilities

The Americans with Disabilities Act (ADA) requires public entities of 50 or more employees to designate at least one employee to coordinate compliance with ADA requirements, including to investigate complaints of noncompliance.

The City has designated the OEA Director to be the ADA coordinator. Other OEA staff have not been involved in reviewing ADA complaints. Due to workload and staffing, the OEA Director currently just investigates complaints and does not perform proactive training. The OEA Director estimates that there are fewer than ten complaints a year.

In the past, there was an ADA Coordinator whose sole duties were to ensure ADA compliance throughout the City. The ADA Coordinator would work with department ADA liaisons to conduct complaint investigations and train staff on ADA requirements.

The City of San Diego has an Office of ADA Compliance and Accessibility to ensure that all City facilities, activities, benefits, programs, and services are accessible to people with disabilities. The office has five staff, including an ADA coordinator and a citywide ADA compliance officer. In FY 2014-15, the office reported receiving 172 complaints.

The City of Los Angeles has a Department on Disability which is responsible for developing policies and programs to improve the quality of life for persons with disabilities, guiding the city into full ADA compliance, and providing ADA compliance training for City departments and private entities. The 2016-17 department budget includes 22 authorized staff and nearly \$1 million for ADA compliance.

While reviewing OEA's overall staffing and responsibilities, the City has an opportunity to reassess the resources devoted to ADA compliance responsibilities and to what extent the City should provide ADA compliance services beyond complaint investigations.

Recommendation #8: Once the City Council determines the desired scope of the City-wide contracting program, the local hire/apprentice utilization program, and Americans with Disabilities Act compliance program, the City should assign the resources needed to perform these responsibilities.

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Conclusion

The Office of Equality Assurance (OEA) implements, monitors, and administers the City's wage policies in addition to overseeing disadvantaged business enterprise program responsibilities and Americans with Disabilities Act compliance coordination. The current resources allocated to these functions are not sufficient to cover all OEA's responsibilities. The Administration should reevaluate resource needs in light of recent and potentially upcoming workload increases. Moreover, processes and policies must be set to ensure consistency and continuity within OEA.

RECOMMENDATIONS

Recommendation #1: To better administer the prevailing and living wage compliance programs, the Office of Equality Assurance should:

- a. Procure a software solution to automate payroll review to free up staff time for other responsibilities (e.g., site visits, review of supplemental documentation);
- b. Adopt a risk-based strategy for conducting site visits and reviewing supplemental documentation to efficiently verify the accuracy of information in submitted payrolls; and
- c. Ensure the program has sufficient supervisory resources following the implementation of Recommendation #3.

Recommendation #2: The Office of Equality Assurance should develop a plan to conduct concerted and ongoing outreach to employees and employers about wage compliance, maximizing its current network with City departments, nonprofits, and community organizations.

Recommendation #3: The Office of Equality Assurance should rededicate the 2.0 FTE originally budgeted to administer the Minimum Wage Ordinance. These staff should also aid with the implementation, administration, and enforcement of the City's Wage Theft Prevention Policy and Opportunity to Work Ordinance.

Recommendation #4: To ensure continuity and consistency in practices, the Office of Equality Assurance should document the processes involved in:

- a. Determining wage requirements for a prevailing or living wage project and notifying Finance of the wage determination;
- b. Receiving purchase order information from Finance and sending documents to contractors for living wage projects;
- c. Conducting pre-construction meetings and sending documents to contractors for prevailing wage projects;
- d. Performing prevailing wage and living wage payroll reviews, including how to determine the

- wage rate based on labor compliance documents and how to review inspector logs;
- e. Escalating enforcement when labor compliance documents are not received, such as sending notices of noncompliance and withholding of payment (see Recommendation #5);
- f. Calculating restitution for prevailing, living, and minimum wage, and notifying required parties of violations;
- g. Completing the director review of violation appeals;
- h. Closing a project after completion;
- i. Conducting a minimum wage review;
- j. Conducting outreach for race-neutral disadvantaged business enterprise (DBE) projects and evaluating DBE good faith efforts for race-conscious projects; and
- k. Completing an Americans with Disabilities Act complaint investigation.

Recommendation #5: To avoid inconsistencies in the treatment of contractors, the Office of Equality Assurance (OEA) should document staff's decision-making criteria for:

- a. Timelines for payroll review process;
- b. Escalation of enforcement and appropriate use of enforcement tools;
- c. When payrolls are to be requested for service and maintenance projects; and
- d. The minimum value of a contract at which OEA must be notified.

Recommendation #6: To ensure appropriate and uniform application of the City's formal enforcement mechanisms, the Office of Equality Assurance should:

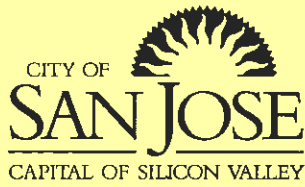
- a. Work with the City Attorney's Office to clarify its policy that penalties or liquidated damages should be assessed on all payrolls with wage violations on City-funded projects, regardless of the timing of submission or Notice of Violation; and
- b. Require that payrolls should be submitted whenever a contract requests a payment.

Recommendation #7: To simplify the contract notification process and reduce errors, the Office of Equality Assurance (OEA) should:

- a. Provide up-to-date written guidance for Finance Department and City staff to assist them in making wage policy determinations, including that OEA staff are available to provide advice upon request;
- b. No longer require a formal notice of intent to contract form at the initiation of a project; and
- c. Begin tracking projects upon receipt of completed agreements from the Finance Department.

Recommendation #8: Once the City Council determines the desired scope of the City-wide contracting program, the local hire/apprentice utilization program, and Americans with Disabilities Act compliance program, the City should assign the resources needed to perform these responsibilities.

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Memorandum

TO: SHARON W. ERICKSON

FROM: Barry Ng

**SUBJECT: AUDIT RESPONSE – OFFICE OF
EQUALITY ASSURANCE**

DATE: March 17, 2017

Approved

Date

BACKGROUND

This memorandum responds to the recently completed audit of the Office of Equality Assurance. We appreciate the professionalism of the City Auditor's Office and their taking the time to gain insight, understanding and appreciation for the complexity of the Office's work. We commend their efforts to provide recommendations supporting the Office of Equality Assurance and are pleased that the Auditor's Report found no major areas of concern. We look forward to implementing the Auditor's recommendations and building upon our well-respected program.

The Office of Equality Assurance is charged with the responsibility of administering, implementing and enforcing a complex set of wage policies and regulations, administering and implementing all aspects of the City's DBE Program, and City-wide compliance with the Americans with Disability Act and Section 504 of the Rehabilitation Act that apply to City policies, facilities and programs. It is a small but mighty staff with a relatively flat organizational structure. The staff is comprised of a group of dedicated individuals who are passionate and perform an enormous amount of work and who are committed to educating the contracting community, protecting employees' rights and investigating and resolving complaints in a timely manner.

Consistent with other priority- setting processes, the Council adopted a new framework for the Administration's response to Audit recommendations in May of 2015. As with other priority processes, the green, yellow and red light system is utilized to convey the Administration's operational readiness to undertake workload demands. Green items are either in the departments existing workplan or work already underway. Yellow items will take more than 40 hours of additional work including research and policy/ordinance development. In addition, yellow items are reviewed to determine alignment with department workplans, magnitude of effort, departmental capacity, and other relevant prioritized issues. Red indicates the item is not recommended or feasible (e.g., the item violates existing federal or state law, contradicts established Council policy or does not lie within the City's jurisdictional authority). The Administration's response to each of the Audit Report's eight recommendations is presented below employing the green, yellow and red light system.

In summary, the Administration concurs with the majority of the Auditor’s recommendations. Six recommendations are categorized as “green” and three are categorized as “yellow.”

RECOMMENDATIONS AND RESPONSES

Recommendation #1 - To better administer the prevailing and living wage compliance programs the Office of Equality Assurance should:

- a. Procure a software solution to automate payroll review to free up staff time for other responsibilities;**
- b. Adopt a risk-based strategy for conducting site visits and reviewing supplemental documentation to efficiently verify the accuracy of information in submitted payrolls;**
- c. Ensure the program has sufficient supervisory resources following the implementation of Recommendation #3.**

Administration Response: The Administration concurs with this recommendation.

- a. The Department agrees that a certified payroll and workforce reporting software solution be analyzed as well as the cost. A software solution has the potential to increase efficiency and cloud-based data storage has the potential for removing the need for storing immense amounts of paper reports and allows for easy location and access of important documents. Should the City Council approve a Local Hire Program in the future, workforce reporting software will be a must.
- b. The Department agrees with a risk-based strategy and will develop strategies and guidelines for risk-based site visits and reviewing of supplemental documentation.
- c. The Department agrees that sufficient supervisory resources are needed and will be developing a staffing plan to address analytical and supervisory support.

Green – a. & b. The Public Works Department will analyze and bring forward a certified payroll and workforce reporting software solution as well as develop strategies and guidelines for risk-based site visits and reviewing of supplemental documentation.

Target Date for Completion: 9 - 12 months

Yellow – c. Any position addition proposals will be evaluated by the Administration as part of the annual and mid-year budget processes. This evaluation will take into consideration the budgetary outlook of the Public Works Capital Support fund as well as other relevant funds.

Recommendation #2: The Office of Equality Assurance should develop a plan to conduct concerted and ongoing outreach to employees and employers about wage compliance, maximizing its current network with City departments, nonprofits, and community organizations.

Administration Response: The Administration generally concurs with this recommendation.

The Office of Equality Assurance currently provides outreach to contractors and employees in regards to prevailing and living wage contracts. Staff perform outreach to the contracting community through pre-construction meetings and employees through site visits. For Minimum Wage, Wage Theft and Opportunity to Work, OEA currently does not perform continuous outreach or proactive enforcement. However, OEA conducted numerous informational meetings with interested stakeholders including chambers of commerce, neighborhood business associations, the Silicon Valley Council of Non-Profits, specific business associations such as those serving restaurants, contractors, building management industries, work2future job training vendors and payroll services providers, San Jose State University, community colleges, high schools, South Bay Labor Council, Working Partnerships and the Santa Clara & San Benito Counties Building & Construction Trades Council and the Katherine & George Alexander Community Law Center. The Department will work with various organizations to get the word out regarding the City's policies and employees' rights.

Green – The Office of Equality Assurance will continue to make contact with various organizations regarding the City's policies and employees' rights.

Target Date for Completion: On-going and continuous

Recommendation #3 – The Office of Equality Assurance should rededicate the 2.0 FTE originally budgeted to administer the Minimum Wage Ordinance. These staff should also aid with the implementation, administration, and enforcement of the City's Wage Theft Prevention Policy and Opportunity to Work Ordinance.

Administration Response: The Administration generally concurs with this recommendation.

As with the Minimum Wage Ordinance implementation, OEA has been conservative with estimating staffing for the Wage Theft Prevention Policy and the Opportunity to Work Ordinance. Once more experience is gained on the resource impacts on the new programs, the Department will review and adjust staffing levels.

Yellow - Upon review of the number of complaints and investigations on the Wage Theft Prevention Policy and Opportunity to Work Ordinance, OEA will review and reallocate Minimum Wage staff.

Target Date of Completion: 9 - 12 months

Recommendation #4 – To ensure continuity and consistency in practices, the Office of Equality Assurance should document the processes involved in:

- a. **Determining wage requirements for a prevailing or living wage project and notifying Finance of the wage determination;**
- b. **Receiving purchase order information from Finance and sending documents to contractors for living wage projects;**
- c. **Conducting pre-construction meetings and sending documents to contractors for prevailing wage projects;**

- d. **Performing prevailing wage and living wage payroll reviews, including how to determine the wage rate based on labor compliance documents and how to review inspector logs;**
- e. **Escalating enforcement when labor compliance documents are not received, such as sending notices of noncompliance and withholding payment (see Recommendation #7);**
- f. **Calculating restitution for prevailing, living; and minimum wage, and notifying required parties of violations;**
- g. **Completing the director review of violation appeals;**
- h. **Closing a project after completion;**
- i. **Conducting a minimum wage review;**
- j. **Conducting outreach for race-neutral disadvantaged business enterprise (DBE) projects and evaluating DBE good faith efforts for race-conscious projects; and**
- k. **Completing an Americans with Disabilities Act complaint investigation.**

Administration Response: The Administration concurs with this recommendation. Consistency is paramount for the Office of Equality Assurance. While the Office of Equality Assurance has numerous rules and regulations, it is helpful to have these rules, regulations and processes documented in a single document.

Green – The Office of Equality Assurance will fully implement this recommendation

Target date for completion: 6 - 12 months

Recommendation #5 – To avoid inconsistencies in the treatment of contractors, the Office of Equality Assurance should document staff’s decision-making criteria for:

- a. **Timelines for payroll review process;**
- b. **Escalation of enforcement and appropriate use of enforcement tools;**
- c. **When payrolls are to be requested for service and maintenance projects; and**
- d. **The minimum value of a contract at which OEA must be notified.**

Administration Response: The Administration concurs with this recommendation.

Green – The Office of Equality Assurance will fully implement this recommendation. Consistency is paramount for the Office of Equality Assurance. While the Office of Equality Assurance has numerous rules and regulations, it is helpful to have these rules, regulations and processes documented in a single document.

Target Date for Completion: 6 – 12 months

Recommendation #6 – To ensure appropriate and uniform application of the City’s formal enforcement mechanisms, the Office of Equality Assurance should:

- a. **Work with the City Attorney’s Office to clarify its policy that penalties or liquidated damages should be assessed on all payrolls with wage violations on City-funded projects, regardless of the timing of submission or Notice of Violation; and**

b. Require that payrolls should be submitted whenever a contractor requests a payment.
Administration Response: The Administration generally concurs with this recommendation.

Green – The Office of Equality Assurance will fully implement this recommendation.

Target Date of Completion: 6 -12 months

Recommendation #7 – To simplify the contract notification process and reduce errors, the Office of Equality Assurance should:

- a. **Provide up-to-date written guidance for Finance Department and City staff to assist them in making wage policy determinations, including that OEA staff are available to provide advice upon request;**
- b. **No longer require a formal notice of intent to contract form at the initiation of a project; and**
- c. **Begin tracking projects upon receipt of completed agreements from the Finance Department.**

Administration Response: The Administration concurs with this recommendation.

The Notice of Intent to Contract was originally required as a means to assist the contracting community by identifying the specific classification(s) required on a City service and maintenance contract. Providing classification determinations is time consuming and takes time away from monitoring service and maintenance contracts. Additionally, service and maintenance contractors should, after nineteen years, be aware of the classifications required for the identified scope of work. During the solicitation process, if a potential contractor has a question regarding the classification, he/she can submit the question through BidSync and Office of Equality Assurance staff will respond accordingly.

Green – The Office of Equality Assurance has already begun the conversation with the Finance Department/Purchasing Division regarding the elimination of the Notice of Intent to Contract.

Target Date for Completion: 6 months

Recommendation #8 – Once the City Council determines the desired scope of the City-wide contracting program, the local hire/apprentice utilization program and Americans with Disabilities Act compliance program, the City should assign the resources needed to perform these responsibilities.

Administration Response: The Administration concurs with this recommendation.

Yellow - As part of the recommendations that will come forward regarding a City-wide contracting program and a local hire/apprentice utilization program, resources and funding for the potential programs will be identified. For the ADA compliance program, further analysis is needed. Any position addition proposal will be evaluated by the Administration as part of the

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March 17, 2017
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annual and mid-year budget processes. This evaluation will take into consideration the organizational placement as well as the budgetary outlook of the General Fund.

Target Date for Completion: To be determined.

This memo has been coordinated with the City Manager's Office and the City Attorney's Office.

/s/
Barry Ng
Director of Public Works

For questions, please contact Barry Ng, Public Works Director, at 408-535-8477.

