

"BETTER BUSINESS ACT"

May 21, 2009

TO: Fresno City Council Members

FROM: Councilmember Lee Brand

Agenda Item

Consideration of Better Business Act to ensure uniform due diligence procedures for applicants seeking City financing assistance.

A. Introduction of amendment to Fresno Municipal Code Section 7-912 relating to uniform due diligence procedures for applicants seeking City financing assistance.

B. Adoption of Resolution No. ___ to improve City of Fresno Business practices/fiscal management regarding requests for financial assistance exceeding \$1,000,000.

Background

Fresno Municipal Code Section 7-912, Qualifications of Applicants for city Financing, (see attached amended ordinance) provides general guidelines for screening of applicants requesting financial assistance on private projects. A more detailed Comprehensive Economic Development Policy and Program was adopted by the Fresno City Council on May 12, 1987, and subsequently amended on June 26, 1990 (copy attached). This economic plan outlines the objectives, policies, strategies and functions the City will undertake to promote economic development. The amendment adopted on June 26, 1990, requires that a private applicant must complete a business plan to obtain City financial assistance.

Fresno Municipal Code Section 7-912 and the Economic Development Policy and Program only provide general guidelines and minimal criteria for selecting and evaluating private sector proposals for city financial assistance.

Since the inception of the City's economic development program over the past 20 years, there have been several high profile private projects that received financial assistance from the City. Some of these projects have resulted in the City absorbing substantial financial losses. The projects that did not succeed in the short term have tended to erode public confidence with elected officials and City government in general. Most importantly, they are costing city taxpayers money that could be better utilized to deliver improved municipal services.

It is essential that the City encourage economic development to expand our economic base, increase employment opportunities and generate long term sustainable revenues to support public services. It is important for the City to make investments and partner with the private

sector to achieve our economic goals. We must, however, have a mechanism in place that provides specific due diligence policies and procedures modeled after private sector best practices. We also must have specific implementation and oversight procedures to effectively monitor projects that are approved for financial assistance. Consistent with the Fresno City Charter, the City Manager or his/her designee shall be responsible for oversight.

The attached Resolution will provide specific policies and procedures to enhance our existing ordinance and economic development policy. The attached amended ordinance proposes to modify Fresno Municipal Code Section 7-912 to allow for implementation of the attached resolution. All future proposals by private sector applicants for direct/indirect assistance that exceed \$1,000,000 in actual or contingent liability will require a comprehensive, objective evaluation and, if approved, a stringent oversight policy to insure that taxpayer dollars are protected. A separate, parallel resolution for the Redevelopment Agency will also be examined.

Fiscal Impact

Adopting Resolution No. _____ could yield savings to the City of Fresno measured in the millions of dollars.

RESOLUTION NO. _____

RESOLUTION ESTABLISHING BETTER BUSINESS ACT TO ENSURE UNIFORM DUE DILIGENCE AND OVERSIGHT ON PRIVATE PROJECTS SEEKING PUBLIC FINANCIAL ASSISTANCE

WHEREAS, Municipal Code Section 7-912 provides general guidelines for screening of applicants requesting financial assistance on private projects; and

WHEREAS, on May 12, 1987, the City has adopted Comprehensive Economic Development Policy and Program, amended June 26, 1990, which outlines the objectives, policies, strategies, and functions the City will undertake to promote economic development; and

WHEREAS, the City has experienced mixed results from direct /indirect investments in private sector ventures over the past 20 years; and

WHEREAS, existing policies and procedures do not require a comprehensive evaluation and investigation before providing financial assistance to the private sector; and

WHEREAS, existing practices do not allow for adequate oversight and annual monitoring of private sector projects receiving financial assistance from the City.

NOW, THEREFORE, BE IT RESOLVED, BY THE COUNCIL OF THE CITY OF FRESNO, as follows:

DEFINITIONS

Section 1. Activation of Due Diligence Process

Any application, request or proposal for City direct/indirect assistance for a private project valued at, or which involves financial risk or exposure to the City exceeding \$1,000,000 will automatically trigger implementation of this resolution. Applications, requests or proposals for less than the \$1,000,000 threshold shall be at the City Council's discretion.

Splitting or separating applications into components smaller than \$1,000,000 for the purpose of evading the provisions of this Resolution is prohibited. Splitting or separating shall mean and include reducing the amount of assistance to be provided by the City under circumstances where there is reasonable knowledge that further assistance will be additionally required. In instances where it is deemed to be to the benefit of the City to split or separate an application, the proposed splitting or separation shall be referred to the City Council for its findings and determination.

Section 2. Financial Assistance

City assistance includes any direct/indirect assistance/subsidy (other than federal/state funding sources which by their terms preclude implementation of this resolution), including the following or any combination of the following:

- Loans, including Section 108 and HOME fund loans;
- Grants;
- Below market value transfer of City real property/facilities and/or use rights;
- Guarantees;
- In-kind services;
- City fee reductions or waivers;
- Deferrals or abatement;
- Subsidized infrastructure or on-site/off-site improvements;
- Non-market concessions on ground or facility leases;
- Bonding capacity;
- Taxing/assessment authority;
- Revenue/tax share;
- Public /private joint ventures; and/or
- Development and Disposition Agreements.

Extensions or renewals of existing City assistance commitments that fall within this definition, that are not contractually bound by the original provisions, will be covered by the provisions of this resolution.

For the purposes of Exclusive Negotiating Agreements and Letters of Intention, sub sections 1, 3, and 5 of the Preliminary Evaluation Phase shall be performed and presented to the City Council for consideration.

This Resolution does not apply to projects that may receive direct/indirect assistance as a result of a city-initiated Request for Proposal process.

Section 3. Applicant

An applicant for assistance from the City for the purposes of this resolution shall be either a (1) wholly private sector, for profit, entity or a (2) wholly private sector, not for profit, entity. The entity can take the form of a sole proprietor, a general partnership, a limited partnership, a limited liability company or a corporation, or a combination thereof. The entity shall be referred to hereafter as "applicant."

Requests for financial assistance from other public agencies (i.e. public-public partnerships) will be evaluated independent from the Better Business Act.

DUE DILIGENCE POLICIES

Due diligence shall proceed on a two step process: (1) the Preliminary Evaluation Phase and (2) the Detailed Investigation Phase. The Preliminary Evaluation will determine if a proposed project requesting assistance from the City is fundamentally sound and whether it benefits the public interest to merit a more detailed investigation. A proposed project must successfully move past the five step process of the Preliminary Evaluation to proceed to the Detailed Investigation Phase.

In the event that fast tracking of a project is necessary due to federal and state funding requirements, the City Manager may direct that the Preliminary Evaluation and Detailed Investigation steps be combined and presented to the City Council as one package. It will require a super majority vote of the City Council per item number 17 in the Detailed Investigation Phase if both phases are combined.

I. Preliminary Evaluation Phase

Before an applicant's proposal requesting City financial assistance has advanced to the stage where it is reviewed by the City Council, it will go through the Preliminary Evaluation phase. In this phase, the following five questions must be addressed. The timeline for this phase shall not exceed 60 days from the date the City receives a complete application, request or proposal for assistance. It will be the responsibility of the applicant to provide any requested information to the City to help answer the questions.

The City Manager shall direct a staff review of the proposed project following the five areas outlined below. Each question and sub-sections must all be answered clearly with supporting information provided by applicant if appropriate. The City shall provide the applicant an estimate of the cost of staff time that will not be exceeded to conduct the preliminary evaluation. Applicant must consent, in writing, to pay for City billing of staff time before the evaluation will begin. The City, at its sole discretion, may reduce the billing fee for staff time.

Applicant should provide the following general information: The form of the organization and governing documents of the business entity that will be participating in the venture including the physical address, state of formation/incorporation, tax identification number, tax exemption determinations (as applicable), names of any subsidiaries, members, partners, principals, venturers, participants and a brief business description.

- 1. Does the project represent a valid public policy issue?**
 - a) Is the project consistent with the objectives and policies of the Comprehensive Economic Development Policy and Program?

- b) Do projects of this nature fall within the purview of the private sector?
 - c) Are community organizations other than the City more suited to sponsor or partner with this type of project?
 - d) Does the project benefit a special interest above the general interests of the public?
- 2. Does the business case appear to make financial sense, based on available information?**
- a) In general, does the project make financial sense given the current economic and industry conditions? What is the long term viability of the project? Has independent research been provided to support the project?
 - b) What is the requested assistance from the City and does the City have sufficient resources to assist the project? What is a reasonable estimation of the City's potential contribution in soft costs including personnel, legal, consultant/contractor, and other non-financial resources for the project? Given the costs to the City, what are the potential benefits? Is the project not feasible without City assistance? If not, why not?
 - c) Does the applicant have the tenure/control of the project site? Will demolition and/or relocation be required? Is there a high probability that an eminent domain action will be required by the City?
 - d) Is the proposed project plan consistent with existing City land use plans and policies including the 2025 General Plan?
 - e) Is the infrastructure in place to accommodate the proposed project?
- 3. Do the project proponents represent responsible partners for the City?**
- a) What is the track record of the applicant/principals with other projects in our community and other communities? Have these other projects been successful, i.e. have they achieved intended goals?
 - b) Who is the competition for the proposed project and should the City consider a competitive bidding process for the same or a similar project? Have other funding sources approved of the project proponents?
 - c) Will the project applicant accept the prescribed due diligence investigation requirements and will they agree to the prescribed oversight requirements?
- 4. Are the potential risks associated with a failure of the project acceptable when compared with the potential benefits?**
- a) What is the risk of loss to the City in the event of project failure including the impact on the general fund, the bond rating and other City resources?
 - b) Are there clear accountability measures for the project?
- 5. City Attorney Legal Review Questions**
- a) Has applicant been involved in litigation, defaulted on contracts, or been debarred from public projects?
 - b) Are applicants bondable/credit worthy? Any negative judgment history?

- c) What would be the financial liabilities with lenders, creditors, employees and or other parties?
- d) What is the potential legal liability from lawsuits from customers, suppliers, or the principals of the project?

Based on staff findings and recommendations, the City Manager will make a clear recommendation to the City Council as to whether the project should advance to the Investigative Phase. The City Council shall, at a regularly scheduled public meeting, vote on whether or not to move the project to the next phase. A majority vote by the City Council shall move the project forward.

II. Investigative Phase

Once approved, City staff will work with the applicant to begin the Investigative Phase. In the Investigative Phase, the City shall use outside consultants paid for by the applicant as necessary. The City will also bill for staff time required to conduct the Investigative Phase. Before any work commences by City staff and/or outside consultants on the Investigative Phase, City staff shall provide the applicant with a total estimate of the cost of staff time and outside consultant expenses that will not be exceeded in order to complete the Investigative Phase. Applicant must consent, in writing, to pay for City billing of staff time and outside consultants before the Investigative Phase will begin.

The timeline for the Investigative Phase shall not exceed 120 days from Council approval of Preliminary Evaluation Phase, unless City, at its sole discretion, elects to extend the period. Applicant bears full responsibility to provide all required documents on a timely basis. When the investigation is complete, City staff shall present their findings to the City Manager who will formulate a clear recommendation to be presented to the City Council in a regularly scheduled public session. All documents provided by the applicant to the City staff shall be available to the City Council.

The Investigative Phase shall examine the following financial, legal, business, regulatory, and legislative items:

1. General Information

- a) The names, resumes and contact information of executive personnel and principal stockholders/members/partners of the business entity. References shall also be provided for review.
- b) The names and contact information of all board of director members, partners and principals.
- c) All principals or partners must either (1) provide a current personal financial statement verified by a Certified Public Accountant and Federal tax returns for the past three years verified by a Certified Public Accountant or (2) provide a report from a third party legal representative who has reviewed the principal/partner records that verifies the financial strength and position of the individuals.

2. Business Plan

- a) A three year business plan on the proposed project including:
 - The use of City proceeds;
 - Forecasts of monthly income statements, balance sheets, and cash flow projections for the next three years including assumptions upon which the forecasts are based; and
 - A timeline for achieving project and financial goals and making debt service and operational payments.
- b) The projections in the business plan will be independently verified for the net economic impact on our community (see "City Manager's Report" below).

3. Financial Information

- a) A current financial statement and balance sheet.
- b) Financial statements for the past three years, including (if applicable) annual and quarterly reports to shareholders. Financial reports should be audited if available.
- c) A schedule of any contingent liabilities and obligations not appearing on the balance sheets, including threatened claims, leases, guarantees, letters of credit, unfunded pension, or deferred payments.
- d) A list of banking and credit relationships of the applicant including the name of financial institutions, description of outstanding debts and loan commitments, interest rates and credit terms.
- e) Verified Federal tax returns for the past three years.

4. Personal Guarantees

Personal guarantees by the applicant principals, members or partners of any for profit venture seeking financial assistance from the City may be required as determined by the City Manager's recommendation and with the City Council making the final decision. No one single item will determine whether or not personal guarantees are required. Several factors will be evaluated and measured to determine the level of risk to the City including the following criteria:

- a) The financial strength of the business entity applying for direct/indirect City assistance as defined in Section II.5 below.
- b) The net equity (definition described in Section II.11 below) brought into the project, as determined by City staff review of applicant information, and the risk of the City investment. Equity participation by applicant should meet a recommended threshold of 50% of amount of any direct City financial assistance requested to avoid personal guarantees.
- c) The nature and amount of collateralized assets provided by applicant or applicant's principals, partners or members, if requested by the City.

- d) The nature and amount of assistance requested and if such assistance has inherent benefit to the City (e.g. infrastructure improvements) regardless of the final outcome of proposed project.
- e) Applicants that take the form of a standalone LLC or a special purpose entity with minimal assets shall receive the highest degree of scrutiny.
- f) The total value of direct/indirect assistance and the projected duration of the City's commitment.

Applicants who do not qualify for waiver of personal guarantees are subject to the following:

- a) The principals or partners of any private, for profit, business entity including but not limited to all corporate structures shall be required to personally guarantee any loans, leases or other assistance documents.
- b) In the event there is a change in principals or partners, the City has discretion to approve a release of a guarantor from his/her obligations and accept a replacement guarantee document or other security. The proposed replacement principal, member, or partner must submit the required financial documents and be approved by the City in its sole discretion before the original principal or partner is released from liability. All such documents shall contain full recourse actions against the principals in the event of a default or breach of contract.
- c) The City may require security for the personal guarantees and/or that the guarantees be unrestricted and irrevocable.

5. Waiver of Personal Guarantees and Personal Financial Information

Waivers for personal guarantees and personal financial information will be granted under the following conditions:

- a) Applicants have a verified net worth in excess of 10 times the guarantee amount and current assets five times the guarantee amount and an equity participation of at least 50% of the requested direct/indirect financial assistance from the City.
- b) Applicants provide necessary documents for an annual review. Applicant must continue to meet the threshold requirements on an annual basis or the waiver is dropped and personal guarantees must be provided.
- c) City may accept alternate security or performance bonds in lieu of having the principals or partners provide personal financial information or personally guarantee loans, leases, or other assistance documents. The alternate security must be maintained the entire length of assistance or until the City obligation is retired.
- d) For private, not-for-profit business entities, personal guarantees will not be required of board members.

6. Use of Consultants

As discussed above, the City may use, at their discretion, consultants to assist in the Investigative Phase. For example, financial consultants may assist in the evaluation of the proposed business plan, examination of financial documents, and sensitivity analysis to examine financial performance and the City's exposure to financial risk. Legal consultants may assist the City Attorney in reviewing liability issues, regulatory and legislative issues. As outlined in Section II.16 below, the City Manager's final report will include an economic impact study, which will be conducted by an outside consultant. Copies of all consulting reports shall be available to the City Council.

Before the City engages consultant(s) and commences work, City staff will provide applicant a complete list of consulting work to be completed, including an **Economic Impact Study**, if required, and an estimate of costs not to exceed a specified amount. Applicant must consent, in writing, to the scope of consulting work and agree to pay for costs. The City, at its sole discretion, may reduce consulting fees.

7. Insurance

Applicant must provide a certificate of a liability insurance policy with a limit at an amount acceptable by the City. The City shall be named as an additional insured. Applicant must also provide certificate of insurance for workers compensation insurance and, if applicable, errors and omissions insurance with limits set at an amount acceptable to the City. Insurers must be acceptable to the City and admitted in California.

8. Construction, Performance and Fidelity Bonds

Depending on the nature of the proposal for assistance and other mitigating circumstances, the City may request a bond(s) by applicant for sureties acceptable to the City. The performance bond shall be maintained for a period of time deemed appropriate by the City and based on the level of risk to the City.

9. Real Property

Any real property that is either transferred by the City or will be used as security for a guarantee or collateral for assistance by the City shall have an MAI appraisal, phase one environmental report and preliminary title report completed prior to the Council approval of the project. These documents shall be made available to the City Council. Costs of a preliminary title report, a phase one environmental report, and a GIS review of surrounding property uses, zoning, and adjoining property owners shall be negotiated between applicant and City. City shall obtain title insurance on any real property pledged as collateral. City shall ensure that applicant grants City a priority position on real property offered as security. Applicant shall cause the subordination of all liens on real property offered as security to City, including existing construction work on property.

10. Leases

Tenant /capital improvements related to facilities/property that a for profit applicant will lease from the City exceeding \$1,000,000 shall be secured by any of or a combination of the following methods:

- a) Personal guarantees, bonds, or acceptable alternative security by the principals.
- b) Collateralized by real property of applicant or its principals.
- c) Funds pledged in applicant's bank account.
- d) Waived through the provisions of items number 4 and 5 above.

11. Applicant Equity Examination

A thorough review and investigation shall be conducted to ascertain and value the applicants proposed equity participation into a proposed project. Hard costs including equity in real property, including land and improvements, leasehold improvements, capital equipment, inventory, and other assets shall be carefully examined and appraised. Verified, soft costs including development fees, consulting, engineering, architectural, accounting, and legal work related to proposed project shall be considered as part of applicant's equity participation. This examination shall insure that the applicant is not inflating the value of equity participation. Special attention shall be given to ascertain how much equity value is attributed to developer fees, management fees, profit and overhead.

12. Regulatory and Legislative Review

The specific policies of this resolution shall not preclude or supersede any applicable state or federal laws including those requiring examination of records/due diligence or oversight relative to the specific purposes of a proposed project. The investigative phase shall carefully examine the proposed project plan and insure that there are no conflicts with applicable law. The project plan and operation must conform to all appropriate local, state and federal regulations. The City's investigative review is for the benefit of the City only and shall not be relied upon by or relieve the applicant of its project obligations and responsibilities.

13. Indemnification

To the maximum extent permitted by law, applicant shall indemnify, defend, protect and hold harmless City and each of its officers, officials, employees, agents, and volunteers from and against all claims.

14. Project Funding

Approved projects shall include a complete scope, a schedule for performance and funding including detailed proposed timeline for disbursement of funds and/or other financial assistance as defined in Section 2. A list of conditions of funding shall also be included. No material changes shall be allowed without the written approval of the City. A contract drafted by the City Attorney's Office, which will be signed by both parties, shall outline all conditions.

15. City Attorney Report

The City Attorney's Office shall prepare a written report regarding their legal review, including any recommendations, of the proposed project to the City Council. The report will be included with the City Manager's Report and presented to the City Council.

16. City Manager Report

The City Manager's Office shall prepare a final, written report summarizing their findings based on an analysis of all documents submitted by applicant. The report will include a compilation of all the information compiled on the project and a clear recommendation to the City Council on approving or rejecting the request for direct/indirect assistance. Specific items that should be included in this final report include:

- a) The report should contain a fiscal impact section that specifically discusses the project impact on the general fund and, if applicable, the impact on the bond debt and rating.
- b) The findings of the economic impact study, including:
 - The number of jobs created by the project and whether they are net new jobs or jobs created at the expense of existing business;
 - Whether the project generate new economic activity or simply relocate economic activity from one area of the City to benefit another area of the City;
 - Whether the project brings a net fiscal benefit to a particular area of the City or to the City as a whole; and
 - The projected net gain to the City on sales tax, property tax or other revenues.
- c) An overall risk assessment of the project to the City based on a scale of 1 to 10.
- d) A recommended level of ongoing oversight.

17. Confidentiality of Applicant Information

The City will protect confidential information (e.g. proprietary information) consistent with applicable law.

18. Super Majority Vote

The City Council will make a final vote based on the City Manager's recommendation and a review of the results of the Investigative Phase of the process. A City Council vote on matters in which the City is providing over \$1,000,000 in direct/indirect assistance to a private sector applicant will require a super majority of five votes to pass.

19. Transparency

All information provided by applicant shall, consistent with applicable law, be available for public viewing at the City's website and also in the City Clerk's office.

20. Fiscal Management Workshop for City Council

There shall be at least one meeting set aside each year for a workshop for City Council members, presented by City staff, to discuss fiscal management including, but not limited to, municipal financing and bonding, the budgetary process, and the fundamentals of evaluating proposed projects including economic impact analysis.

21. Three Year Review

One year from the passage of this resolution and for the following two years, the City Council shall meet at regularly scheduled public session to evaluate the provisions of this resolution. The City Council will determine if any modifications are necessary based on the actual experience in the previous year in reviewing and processing applications for City financial assistance exceeding \$1,000,000.

III. IMPLEMENTATION AND OVERSIGHT POLICIES

The City Manager's Office shall have the responsibility to provide oversight on all approved projects that are receiving assistance from the City. The City Manager or his/her designee will be responsible to oversee and evaluate the implementation of the project and monitor its performance on an annual basis. The oversight procedures include the following:

1. Insurance

Each year the applicant shall renew with the City, on the anniversary date of the City commitment, a certificate of insurance naming the City as an additional insured for liability insurance, a certificate of workers compensation insurance, and, if applicable, a certificate of insurance for errors and omissions insurance on the terms identified in the due diligence policies above. In the event applicant fails to provide required certificates of insurance, the City may place a policy on behalf of the applicant and applicant shall bear the full cost of such insurance.

2. Access to Records

Applicant shall permit City to examine and inspect all books and records. Applicant shall also provide annual certified financial records.

3. Independent Audit

The City may, at its discretion, require an independent audit performed each year on approved project financial records. If no adverse findings are found then City shall pay for the cost of the audit. If adverse findings are found, then the applicant will pay the cost of the audit. In addition to a review of financial data, the audit may also evaluate progress on original goals and benchmarks identified by applicant. An audit that determines there are serious financial concerns with applicant's project can cause the City to accelerate the terms of the financial assistance and retire the debt.

4. Monitoring Disbursement of Funds

All approved project financial assistance disbursements shall follow a banking model with progress payments based on percentage of work completed or other relevant criteria based on the nature of financial assistance. Monitoring activities shall include but not be limited to

physical inspections of project sites to examine work completed, properly securing appropriate lien releases, and other oversight work as deemed necessary and appropriate for the project and the type of financial assistance offered.

5. Encumbrances on Property

Applicant shall obtain prior written approval from City before securing any additional loans on real property in which City has a secured interest or transferring such property.

6. Access to Lender Information

Applicant shall consent to allow City access to and review of all records submitted to applicant's bank for underwriting purposes and to authorize bank to provide quarterly or annual reports.

7. Loan Extensions

In the event applicant seeks to extend the term of a note secured by real property, City must obtain an endorsement to its title policy and other investigations to make sure the property is free of liens or any other items that may cloud title to real property.

8. Receivership

In the event an annual audit discloses material financial problems with applicant's project City shall have the right to petition the court to place a rents/profits receiver on applicant's project to provide day to day management until such time that applicant has sufficient financial resources and has found remedies to correct deficiencies discovered in a performance audit.

9. Report to City Council

The City Manager's Office, in coordination with the City Attorney's office, shall report annually to the City Council on status and progress of all private sector projects receiving direct/indirect assistance from the City exceeding \$1,000,000 and applicant's adherence to contractual obligations. The report to the City Council shall include a matrix of all agreements with private sector projects, including the lead City staff person in each project.

10. Transparency

Consistent with applicable law, the results of all audits on projects receiving more than \$1,000,000 in City financial assistance shall be available to the public on the City's website. Written reports shall also be available to the public in the City Clerk's office.

11. Effective Date

This resolution shall take effect upon its adoption.