



OFFICE OF THE CITY COUNCIL

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TO: Rules Committee Members
Garrett Dennis, Rules Vice Chair
Michael Boylan
Matt Carlucci
Randy DeFoor
Sam Newby
Ju'Coby Pittman

CC: City Council Members
Jason Gabriel, Esq., Office of General Counsel
Peggy Sidman, Esq., Office of General Counsel

FROM: Brenda Priestly Jackson, Rules Chair

RE: 20210202 CM Priestly Jackson Legislative Recommendations from the Special Investigatory Committee (SIC) on JEA Matters

Honorable Rules Committee members, for your consideration I am sharing the Legislative Recommendations from the Special Investigatory Committee (SIC) on JEA Matters. Please review the attached items and be prepared to share at the next Rules Committee meeting on Wednesday, February 17, 2021, if there are any items you would like to have the Rules Committee address via legislation for further discussion.

BPJ/kh

VIII. Legislative recommendations.

Beginning in November 2019 and continuing into 2020, Council Member Michael Boylan led a series of fact-finding workshops related to the future of JEA. Following those workshops, CM Boylan introduced ordinance 2020-419 co-sponsored by members of the Committee and other Council Members, to amend portions of Article 21 of the Charter of the City of Jacksonville to address issues regarding the structure, management and any proposed sale or reorganization of JEA.

Most significantly, the Committee endorses Council Member Boylan's Ordinance 2020-419.¹³⁵

The following are additional legislative recommendations resulting from the Committee's investigation:

1. Procurement.

The City Council should consider legislation to address these procurement issues:

A. requiring all or material City procurement documents, including solicitations, notices of intent to award and procurement contracts, be posted on a publicly accessible website;

B. prohibiting or limiting the outsourcing of procurement responsibilities to third parties;¹³⁶

C. clarifying or limiting section 126.313(a), Jacksonville Code of Ordinances;¹³⁷

¹³⁵ The Committee understands that Council Members Ferraro and Salem are preparing additional legislation regarding the procurement process and executive compensation issues, respectively, but the Committee has not considered and therefore makes no recommendation regarding those additional legislative initiatives.

¹³⁶ When asked in his interview by the Committee why PFM and not the City received bidders' responses to the City's December 2017 privatization RFP, Alan Howard testified, "I would speculate there was an effort to shield the responses from . . . Florida sunshine laws and open reference laws."

¹³⁷ In his February 21, 2018 email, Council Auditor Kyle Billy said Greg Pease, the chief of the City's Procurement Division, told Mr. Billy that section 126.313, Jacksonville Code of Ordinances, allowed the City Finance Department to issue the RFP without going through the City's Procurement Division. That process contributed to the concealment of the RFP from the City Council and the Office of the Council Auditor. In any event, Section 126.313(a) states, "Any procurement under this Section *shall* include as much competition *as practically possible* under the

D. prohibiting or limiting any part of the Consolidated Government from using (“piggybacking” off) another contract or procurement process to avoid initiation of a separate procurement procedure (JEA Procurement Code Article 3-115 and 3-116);¹³⁸

E. clarifying prohibited *ex parte* communications to avoid future arguments that the City Council cannot have discussions about or legislate regarding procurement matters; and

F. prohibiting *ex parte* communications among (i) parts of the Consolidated Government participating in a procurement and (ii) procurement respondents and their affiliates, including their subsidiaries and parents.¹³⁹

2. Investigative authority.

The City Council should consider legislation to address these issues regarding the Council’s authority to investigate legislative issues:

A. Future Council investigatory committees and their independent counsel should have, as does the Office of Inspector General, unrestricted access to the records of the consolidated government, including records regarding monies paid to and services rendered by contractors and subcontractors to any part of the consolidated government.¹⁴⁰

circumstances, and *shall* include procedures necessary to ensure compliance with the requirement to procure the *highest* quality in financial services at the *greatest* economic value to the City” (emphasis added). The RFP—which was not published for all potential respondents to see and did not receive input from the City Council, the Council Auditor or the public—violated those requirements.

¹³⁸ Evidence obtained by the Committee shows JEA attempted to piggyback on existing procurement processes to avoid transparency on at least two material occasions: (i) the City’s December 2017 privatization RFP, which leadership from the City and JEA used to explore privatizing JEA, and (ii) JEA’s contract with ADP, through which JEA’s senior leadership intended to outsource senior employee payroll to conceal PUP payout information. Michael Weinstein testified that “in government, you can always piggyback on any government contract anywhere. . . .”

¹³⁹ The Committee found evidence representatives of FPL, an affiliate of the ITN respondent NextEra, communicated with JEA representatives during the purported Cone of Silence.

¹⁴⁰ Section 602.303(d), Jacksonville Code of Ordinances, states the Office of Inspector General shall “[r]eceive full and unrestricted access to the records of any and all officials and employees, contractors, including their subcontractors and lower tier subcontractors, of any office, agency, department, or part of the entire consolidated government and other parties doing business with any office, agency, department, or part of the entire consolidated

B. Future Council investigatory committees and their independent counsel should function wholly independent of the Office of General Counsel.

C. The Council should clarify the process by which a committee may subpoena documents and testimony from witnesses regarding the subject matter of any legislative investigation, including the penalties for noncompliance. - d.

D. In January 2020, following a report by the Office of Inspector General, City Council President Scott Wilson directed the City to create a policy for retaining text messages sent to City Council members. The Council should expand the scope of President Wilson's directive and implement a City-wide public records policy that addresses preservation, collection and production of public records on personal mobile devices for all City employees, including JEA. The Council should also consider imposing fines or other penalties in excess of the \$500 fine provided by Florida's Public Records Act, to discourage the non-compliance the Committee discovered in its investigation.

3. Compensation programs.

The City Council should consider legislation to address these compensation issues:

A. Council approval should be required for any retention program or similar compensation initiative.¹⁴¹

B. Unless approved by the Council, compensation adjustments for any part of the Consolidated Government should be approved by a reputable

government or receiving funds from any office, agency, department, or part of the entire consolidated government[.]”

¹⁴¹ Such programs may affect net proceeds obtained by the City from any JEA privatization. Consequently, the Council should have the opportunity to consider whether the agreements appropriately balance competing public interests (e.g., maximizing net sale proceeds and protecting employees of Jacksonville's consolidated government). As an example, Kyle Billy estimated in a December 3, 2019 memorandum that the retention program authorized at the July 2019 JEA Board meeting would have caused the senior leadership to receive, if terminated, more than \$18 million, excluding PUP payments.

compensation expert and should not exceed the compensation programs of similarly situated municipal authorities.¹⁴²

C. The Boards of independent authorities should be informed of the expected cost and value of proposed compensation adjustments or programs.

4. Ethics and transparency.

The City Council should consider legislation to enhance the Jacksonville Code of Ethics and improve transparency:

A. Presentations, resolutions and any other information offered to the Boards of the City's independent authorities for consideration should be posted on the authority's website and made available to the public no less than four days before the governing body takes action on that information.¹⁴³

B. Off-site meetings involving executives, Board members or other representatives of any part of the Consolidated Government regarding official business should be prohibited or restricted to avoid unnecessary expense, facilitate compliance with public records and sunshine laws, and avoid the appearance of impropriety.¹⁴⁴

¹⁴² Revised JEA Board Policy 2.7, which JEA implemented as part of Mr. Zahn's Total Market Compensation Strategy used to justify the PUP, now requires JEA's CEO to promote policies to achieve market (50th percentile) total compensation in JEA's "industry and geographic area." (The revised policy defines "total compensation" to include "Base Salary, Short term Incentives and Long Term Incentives.") JEA's senior leadership used revised JEA Board Policy 2.7 to implement total compensation adjustments based on data from *private* utilities, which typically have greater total compensation for executives than non-profit municipal utilities like JEA.

¹⁴³ JEA's senior leadership withheld the complete package for the July 23, 2019 Board meeting until *the day of* the meeting, which prevented the JEA Board and the public from adequately assessing JEA's privatization initiatives, the PUP and their implications.

¹⁴⁴ As an example, Tim Baker gave a presentation regarding polling and regulatory considerations at the Club Continental meeting on July 10, 2019. At that time, Mr. Baker's company, BCSP, LLC, served as a consultant to FPL, whose parent company, NextEra, was a bidder in JEA's ITN. Mr. Baker's participation in JEA's strategic planning process for the ITN created, at the very least, an appearance of impropriety that may have led to legal challenges to the ITN's outcome. Likewise, JEA Board Member Alan Howard met with Pillsbury attorneys at the Club Continental meeting on July 10, 2019. The next day, Mr. Howard sent Stephen Amdur, the leader of Pillsbury's mergers and acquisitions private equity team, an email offering to work on the ITN at a reduced hourly rate in exchange for a success fee (a fee paid upon the completion of a successful merger or acquisition). Mr. Howard subsequently voted in favor of Scenario 3 (privatization), and Mr. Howard's law firm thereafter served as a paid consultant for JEA in the ITN process.

C. The City Council should prohibit or substantially limit contracts with retroactive effective dates.¹⁴⁵

D. To protect OGC from the appearance of serving conflicting interests, OGC should have prescribed processes for the retention of independent counsel and the termination or limitation of OGC representation when conflicts exist.¹⁴⁶

E. To ensure that decisions are made in the best interests of the City, rather than individuals, City employees should, absent approval by the City Council and Mayor, be prohibited from receiving any financial benefit related to privatization, any procurement process or any other transaction in which employees have direct involvement or influence.¹⁴⁷

F. To ensure compliance with public records laws, including Florida Statute Section 119.0701, contracts and subcontracts for the benefit of the Consolidated Government should (i) require contractors and subcontractors to preserve public records and (ii) require contractors and subcontractors to waive or substantially limit their right to withhold documents and information as confidential or trade secret.¹⁴⁸

¹⁴⁵ JEA's June 28, 2019 engagement letter with Pillsbury had a retroactive effective day of January 1, 2019. Similarly, Aaron Zahn's employment agreement had a retroactive effective date of November 27, 2018. Such arrangements facilitate a lack of accountability and transparency, and a circumvention of existing laws. For example, section 215.425(1), Florida Statutes, states, "No extra compensation shall be made to any officer, agent, employee, or contractor after the service has been rendered or the contract made."

¹⁴⁶ On December 20, 2017, the same day PFM issued the City's December 2017 privatization RFP, one of the RFP recipients, Mark Weinberg of Citibank, forwarded the RFP by email to Melissa Dykes, Joe Orfano and Michael Mace. Mr. Weinberg stated, "Apparently the primary reason for this is the potential privatization of JEA that a few members of the JEA board asked for last month." Mrs. Dykes forwarded Mr. Weinberg's email, including the RFP, to Jody Brooks who, in turn, forwarded the email and RFP to Jason Gabriel on December 21, 2017. Regardless, City Council and the Council Auditor's Office did not learn of the RFP until February 2018.

¹⁴⁷ Although Section 602.1204(b) of the Jacksonville Ethics Code already prohibits and penalizes any public officer or employee who breaches the public trust for private gain, JEA's senior leadership appear to have attempted to circumvent that ordinance by, among other things, offering to give all JEA employees similar (but lesser) PUP benefits.

¹⁴⁸ JEA's request for proposals typically state the successful bidder must maintain and produce public records. However, the contracts with JEA's strategic planning and ITN consultants lacked that requirement.

G. Contractors and subcontractors should provide reasonably detailed descriptions for the services rendered with each billing statement or invoice submitted for payment.¹⁴⁹

H. To enhance transparency, all consultants providing services in connection with any privatization or recapitalization of municipal assets should contract directly with the applicable agency unless the governing body authorizes otherwise at a public meeting.¹⁵⁰

I. Any break-up fee, success fee or other fee contingent upon the privatization of a municipal asset should be prohibited unless approved by the City Council and any applicable independent authority's Board.¹⁵¹

J. Funds should not be used for privatization activity if the funds were not explicitly budgeted for privatization activity.

[Appendix A begins on next page]

¹⁴⁹ For example, McKinsey submitted a September 30, 2019 invoice to JEA for \$100,000 with a terse explanation: "support to develop Strategic Plan for JEA."

¹⁵⁰ According to OGC, JEA's outside counsel, Foley & Lardner and Pillsbury, subcontracted with several consultants without OGC approval.

¹⁵¹ J.P. Morgan and Morgan Stanley would receive a success fee based on the net proceeds realized by JEA's privatization. Kyle Billy estimated in a December 10, 2019 memorandum that J.P. Morgan and Morgan Stanley would each received a success fee of \$13.25 million if JEA's privatization resulted in net proceeds of \$5.5 billion.