

CITY AND COUNTY OF SAN FRANCISCO
BOARD OF SUPERVISORS
BUDGET AND LEGISLATIVE ANALYST
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Policy Analysis Report

To: President Shamann Walton
CC: Board of Supervisors
From: Budget and Legislative Analyst's Office
Re: Options and Key Considerations Regarding an Amendment to the Administrative Code to Remove the Mandatory Cost Criterion in Awarding CMGC Contracts
Date: March 31, 2022



Summary of Requested Action

The Board of Supervisors directed the Budget and Legislative Analyst to issue a report laying out options and key considerations for an ordinance to amend the Administrative Code to remove the mandatory cost criterion in awarding Construction Manager/General Contractor (CMGC) contracts. This direction was given in Board Resolution 496-21 (File 21-0703), which was unanimously approved on October 19, 2021.

For further information about this report, contact Dan Goncher at the Budget and Legislative Analyst's Office.

Executive Summary

- The 2020-2021 San Francisco Civil Grand Jury made the Van Ness Improvement Project the subject of one of their reports. The project had significant cost and schedule overruns, and in their report, "Van Ness Avenue: What Lies Beneath," the Grand Jury found that the contracting processes for the project failed to instill accountability.
- The SFMTA utilized an alternative project delivery method called Construction Manager/General Contractor (CMGC) for the Van Ness BRT project. The CMGC method is considered alternative because it brings the project contractor into the project at a much earlier stage than in traditional methods, ideally no later than at 30 percent of design completion. The contractor is then available to provide input on the design of the project and collaborate with the designer and project sponsor.
- The San Francisco Administrative Code requires that, when evaluating bidders for a CMGC contract, the cost criterion must weigh at least 40 percent. The Grand Jury found that this mandatory minimum led to the selection of the less technically

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qualified bidder to award the contract for the Van Ness project, which led to problems throughout the project.

- We reviewed a judgmental sample of other jurisdictions' CMGC procurement processes and found that nearly all the other jurisdictions sampled did not require a mandatory minimum cost criterion when evaluating bidders for CMGC contracts.
- Furthermore, we reviewed industry best practice reports and found that it is typically in the best interest of the project sponsor to be able to weigh the cost criterion relative to non-cost criteria flexibly, depending on how important price and cost are going to be for the project relative to non-cost criteria like experience and expertise. Additionally, the Transportation Research Board highlighted instances in which cost was weighted as a factor, and the weights used were all lower than San Francisco's.
- We also interviewed representatives from departments with the authority to contract for public works projects and every representative agreed that the required 40 percent minimum threshold was too high and/or rigid. However, department representatives stressed that cost is an important criterion for construction contracts and should continue to be required as a factor.
- Additionally, we found that the Administrative Code requires a minimum 40 percent weight for cost for Design-Build construction contracts.

Policy Options

Regarding the City's policy on the cost criterion in CMGC contracts, the Board could:

1. Eliminate the 40 percent weighting threshold on the cost criterion in Administrative Code Chapter 6.68, but continue to require that cost be a mandatory criterion. Each project sponsor could determine, on a project-by-project basis, how to weigh cost compared to non-cost criteria. This would allow flexibility for different projects based on their needs. For example, for more complex projects, staff might want to weigh cost less heavily given the greater experience and technical expertise needed to carry out such projects, whereas less complex projects may not need to rely so much on experience and technical expertise when selecting a CMGC contractor.
2. Eliminate the 40 percent weighting threshold on the cost criterion in Administrative Code Chapter 6.68, but require that departments develop their own minimum thresholds in a written policy. This would allow departments the flexibility to determine a threshold that works for their projects' needs, but would be more

prescriptive than Policy Option #1 by requiring a uniform minimum weighting across all CMGC projects within each department.

3. Reduce the 40 percent weighting threshold on the cost criterion in Administrative Code Chapter 6.68 to a lower amount similar to one of the three jurisdictions that had such a threshold in the Transportation Research Board study (e.g. 15, 25, or 30 percent). This would provide departments with more flexibility in their weighting of cost but would still ensure a minimum weighting of costs on CMGC procurements.
4. Do not change the current minimum weighting for the cost criterion on CMGC contracts. The current threshold of 40 percent has worked for some project sponsors. Additionally, it is important to continue to use cost as an evaluation factor for CMGC contracts and keeping the status quo of minimum 40 percent cost would ensure cost continues to be represented as a criterion.

Regarding the City's policy on the cost criterion in Design-Build contracts, the Board should consider:

5. Revising Chapter 6.61 of the Administrative Code, which, similar to Chapter 6.68 for CMGC projects, requires that departments weigh cost at a minimum of 40 percent of the overall evaluation for Design-Build contracts. We recommend that, if the Board revises Chapter 6.68 for CMGC projects, that it revise Chapter 6.61 in a manner so that it is consistent with the revisions made to Chapter 6.68. This would minimize confusion and prevent the creation of an incentive to select a project delivery method based on the permissiveness of the Administrative Code related to cost criterion requirements.

Project Staff: Dan Goncher, Anna Garfink

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Background

The Van Ness Improvement Project

The Van Ness Improvement Project is a major capital project involving infrastructure upgrades and the installation of bus rapid transit (BRT) lanes along the length of the Van Ness corridor. The project was first studied for feasibility following the 2003 passage of the Prop K sales tax, and in 2013 the Board of Supervisors voted to authorize the Van Ness BRT project. The original goals of the project, as stated by the San Francisco County Transportation Authority in the initial 2006 feasibility study, were to:

1. Improve the level of service for existing transit passengers;
2. Establish an efficient north/south link in San Francisco's transit network;
3. Support the identity of the Van Ness corridor through a robust landscape and urban design program that also integrates new transit infrastructure with adjacent land uses; and
4. Develop standards for implementing BRT services citywide.

The project spans Van Ness Avenue from Lombard Street to Mission Street and includes the replacement of aging sewer, water, and streetlight infrastructure throughout the corridor, improved pedestrian safety designs, and two center-running BRT lanes (one northbound, one southbound) with nine new median bus stops. As of March 2022, the project is nearing completion, and the San Francisco Municipal Transportation Agency (SFMTA) estimates that BRT service will begin on the corridor on April 1, 2022.

The Civil Grand Jury Report

The current project completion date is nearly three years later than the project was originally scheduled to be completed, and the budget has increased from its original estimates as well. The significant schedule and cost overruns of the project were the subject of a 2020-2021 San Francisco Civil Grand Jury report entitled "Van Ness Avenue: What Lies Beneath." The original project budget was estimated at \$309 million, including \$193 million in construction costs, with construction beginning in 2016 and a planned construction completion date of late 2019. However, the final budget for the project has increased – as of June 2021 it was \$346 million, which is 12 percent higher than the original budget – and the revenue service date is scheduled for April 1, 2022.

The 2020-2021 Grand Jury investigated the causes of the schedule delays and cost increases and made over a dozen findings and recommendations related to the City's ability to deliver major capital projects like Van Ness BRT. The Grand Jury's major finding was that the Van Ness BRT project and its delays are emblematic of systematic issues that the City faces when delivering major capital infrastructure projects. Specifically, the Grand Jury found that:

1. Planning and design processes failed to capture the scope of the project adequately;

2. Contracting processes failed to instill accountability; and
3. Ongoing project management failed to remediate problems efficiently and effectively.

The scope of this report, as directed by the Board of Supervisors in Resolution 496-21 (File 21-0703), focuses on item #2: *Contracting processes failed to instill accountability*. The Grand Jury had several specific findings and recommendations related to City procurement processes; however, the focus of this report is on one specific finding and one recommendation relating to procurement of the general contractor.

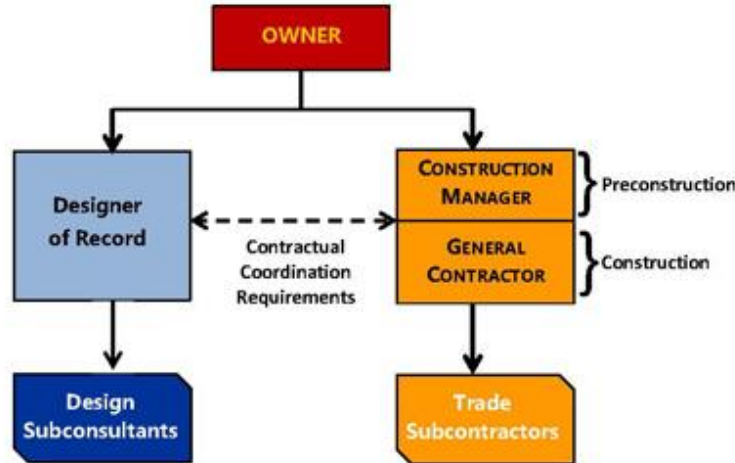
Contractor and the CMGC Method

The general contractor on the Van Ness BRT project is Walsh Construction and they were procured through the Construction Manager/General Contractor (CMGC) method, which is considered an alternative project delivery method for public works projects. Traditionally, local jurisdictions have been required by state law to contract out their public works projects using the Design-Bid-Build project delivery method. In this method, the local jurisdiction uses their internal staff and/or design consultants to have a complete design of the public works project before soliciting bids for the construction portion of the project. The jurisdictions are required to select the lowest qualified bidder when using this method. However, there are alternative project delivery methods that have been available to the private sector for several decades, including: Design-Build, Progressive Design-Build, Construction Manager-at-Risk, Construction Manager/General Contractor, Job-Order Contracting, and others. In the mid-2000s, California changed its laws to allow local jurisdictions to use some alternative project delivery methods for their public works projects.

CMGC is considered an alternative project delivery method because it brings the project contractor into the project at a much earlier stage than the traditional Design-Bid-Build method as illustrated by Exhibit 1 below. With the CMGC method, the agency responsible for the project brings the contractor in ideally no later than at 30 percent of design completion. The agency responsible for the project does this by issuing a request for proposals (RFP) for preconstruction services and the selected general contractor firm acts as a consultant/construction manager during the design phase. As a construction manager, they offer feedback on design, pricing, and help identifying potential risks as the project is being designed. When the design is complete, and if the project owner is satisfied with the construction manager's work, then the construction

manager can negotiate a price for the construction portion of the project. They then become the general contractor for the project.¹

Exhibit 1: CMGC Contract Management Structure



Source: Federal Highway Administration

In 2008, the San Francisco Board of Supervisors amended Chapter Six of the San Francisco Administrative Code (Ordinance No. 119-08; File 08-0277) to add a section allowing for the CMGC method. Chapter 6.68 authorizes department heads to utilize CMGC contracts at their discretion and outlines the three methods by which CMGC contracts can be procured, which are Cost Only, Best-Value, and CMGC Team Best Value.

The Cost Only method requires that departments pre-qualify firms using a request for qualifications (RFQ) and criteria determined by the department and then invites qualified firms to submit a response to an RFP. The Department must then select the lowest responsive bidder.

In the Best Value method, the department can issue a combined RFQ/RFP and then evaluate the proposals based on non-cost and cost criteria. Although the department may select its own criteria, **Chapter 6.68 currently requires that cost be included as a criterion and that it be weighted no less than 40 percent for all CMGC contracts citywide.** The CMGC Team Best Value method is the same as the Best Value method, except that the entire team, including subcontractors, is evaluated under the CMGC Team Best Value method.

¹ We received feedback from the SFPU that this description more accurately reflects their description of the Construction Manager-at-Risk method. The definitions of each of these methods are sometimes interpreted in different ways by different organizations.

According to the Grand Jury's report, the first City department used CMGC to deliver a project in 2007. Notably, Public Works has used CMGC on several major new building projects, such as General Hospital and the Academy of Sciences, to successfully deliver projects on time and on budget. Public Works primarily uses CMGC for building projects. Currently, some City departments use CMGC, and others do not. The Van Ness Improvement Project was the SFMTA's first CMGC project, and the Port has never awarded a CMGC contract. However, the San Francisco Public Utilities Commission (SFPUC), Department of Public Works (DPW), and the Airport use CMGC regularly for large capital projects.

Project owners may choose to select CMGC as their project delivery method for public works projects for several reasons. Industry best practices note that CMGC is best suited for highly complicated projects involving coordination with many entities. By enabling the designer to work directly with the contractor early in the design process, CMGC provides for many more opportunities for risks to be identified and for changes to be made in the design before they become highly problematic during construction. CMGC also allows for a close working relationship to form between the owner of the project and the general contractor, which is important for large projects. Lastly, CMGC can drive innovation and improve quality by involving collaboration throughout the design process.

The SFMTA chose the CMGC method for the Van Ness BRT project and awarded Walsh the preconstruction contract following a competitive RFP process that used the Best Value method to evaluate the bidders. At the time, the Administrative Code required that the cost criterion constitute no less than 65 percent of the overall evaluation. However, realizing the complexity of the project, SFMTA initiated specific authorization from the Board of Supervisors to reduce the 65 percent weight on cost down to 30 percent.² Despite this reduction, one of the Grand Jury's main findings is that Walsh was not the most technically qualified bidder – there was one additional bidder that scored more points on their written proposal and oral presentation – but due to the structure of the scoring criteria, Walsh won the bid. The cost criterion played a major role in the outcome of the bid, and Walsh had the lowest costs for the preconstruction bid of the two bidders. According to the Grand Jury, this weighting of the scoring criteria led Walsh to earn the most points and be awarded the contract.

² The Grand Jury reported that the SFMTA received authorization to reduce the cost criterion weight from 65 percent, and SFMTA staff indicated they received authorization to reduce it to 30 percent. However, since then, the City's Administrative Code has been amended and the mandatory cost criterion weight is now 40 percent.

The Cost Criterion Recommendation

The selection of Walsh as the general contractor for the CMGC contract led the Grand Jury to make the following finding and recommendation:

Finding: The evaluation rubric for preconstruction contract bids weighted cost too heavily, as compared to technical expertise, even after project-specific legislation allowed for a lower weight to be assigned to cost.

Recommendation: By June 2022, the Board of Supervisors should amend Section 6.68 of the Administrative Code to remove the mandatory cost criterion in awarding CMGC contracts.

The Grand Jury recommended changing the Administrative Code to ensure that a situation in which a less-qualified bidder wins a major construction contract does not happen again. Specifically, the Grand Jury recommended changing or eliminating the following language from Chapter 6.68 subsection (b)(2)(A) of the San Francisco Administrative Code, which currently states:

The cost criterion shall constitute not less than 40% of the overall evaluation.

The following sections analyze this recommendation and present options and key considerations to the Board regarding how to implement it.

Analysis

We analyzed a judgmental sample of other jurisdictions' use of cost in evaluating CMGC contracts and compared it to San Francisco's Administrative Code. We also briefly analyzed the City's use of cost in other construction contracting methods compared to the CMGC method.

San Francisco's Use of Cost in Construction Contracting

The City's Administrative Code requires that cost be included as a criterion and weighted no less than 40 percent for CMGC contracts, but that requirement varies for other types of construction contracting methods, both traditional and alternative:

- For Design-Build, cost must also be weighted at 40 percent.³
- The City does not have any code regulating procurement for projects utilizing Construction Manager-at-Risk projects.

³ See Chapter 6.61 in the San Francisco Administrative Code.

- For traditional Design-Bid-Build, the Administrative Code requires that the award go to the bidder submitting the lowest bid that is responsive to the requirements specified in the bid documents (i.e. “lowest responsive bidder”).
- For Job Order Contracts, departments must follow the procedures of traditional Design-Bid-Build procurement.⁴

CMGC and Design-Build are the only two forms of construction procurement that have mandatory minimum cost criterion thresholds in San Francisco. Additionally, there are other forms of construction procurement outlined in the Administrative Code; however, they are not discussed here because they are not the focus of this report.

Comparison: Peer Jurisdictions’ Use of Cost in Construction Contracting

We analyzed a judgmental sample of other cities’, counties’, and states’ CMGC procurement processes and found that virtually none of the jurisdictions we sampled require a mandatory weighting of the cost criterion for CMGC contracts. Jurisdictions vary in their approach to integrating cost into their evaluations of CMGC bids despite uniformly not requiring a specific cost weighting threshold, as summarized below in Exhibit 2. To obtain this information, we reviewed jurisdictions’ administrative codes, written policies and procedures on CMGC contracting, and, in some cases, corresponded directly with jurisdiction representatives regarding their CMGC policies.

⁴ Job Order Contracting is defined by Caltrans as “an on-call construction services contract where construction work and performance is determined by issuing Work Orders with the contractor during a fixed period of time.”

Exhibit 2: Comparison of Peer Jurisdictions' CMGC Cost Criterion

Jurisdiction	Mandatory Cost Criterion	Weighting	Comments
Cities			
San Francisco, CA	For CMGC: Yes For Design-Build: Yes	40%	
Los Angeles, CA	For CMGC: Cost Only – none Best Value – N/A	N/A	The only CMGC contract LA has procured was the Sixth Street Viaduct, which used the Cost Only method of evaluating bidders and thus only considered cost after the non-cost criteria had already been evaluated.
Seattle, WA	No	None required	
Austin, TX	For Construction Manager-at-Risk: Yes For Design-Build: Yes	See Comments	Cost is permitted to be a <i>maximum</i> of 30 points out of a total of 180 points (17%).
San Diego, CA	For Design-Build: Yes	None required	San Diego rarely weights Design-Build cost below 40%.
Counties			
Los Angeles County, CA	N/A	N/A	Does not utilize CMGC.
Contra Costa County, CA	N/A	N/A	Does not utilize CMGC for horizontal projects.
Regional and State Transportation Authorities			
California Department of Transportation (Caltrans)	No	N/A	
Minnesota Department of Transportation (MnDOT)	For CMGC: Best Value - Yes	None required	
Massachusetts Bay Transportation Authority	For CMGC: Yes	40%	
Colorado Department of Transportation	For CMGC: Yes	30%	

Source: BLA outreach to jurisdictions and review of online administrative codes and policies.

As Exhibit 2 above shows, most jurisdictions that use CMGC do not require a mandatory weighting on the cost criterion – especially cities. Out of the five cities surveyed, only San Francisco has a mandatory minimum weight for its cost criterion while the other counties surveyed do not use CMGC. Caltrans does not require cost to be a factor at all when evaluating CMGC bids and the Minnesota Department of Transportation does not require a minimum weighting on cost, only that cost be included as a criterion. However, the Massachusetts Bay

Transportation Authority and the Colorado Department of Transportation require mandatory weighting at 40 percent and 30 percent, respectively.

Feedback from City Departments

We interviewed representatives from all City departments with the authority to contract for public works projects to obtain their feedback on how changing the CMGC cost criterion might affect their contracting practices. None of the staff we spoke with from SFMTA, DPW, SFPUC, the Airport, the Port, or REC was opposed to changing the mandatory weighting of the cost criterion. However, most representatives noted that cost is an important criterion to include and cautioned against eliminating it entirely. A summary of the departments we surveyed and their feedback is included in Exhibit 3 below.

Exhibit 3: Departmental Feedback on Revising Mandatory Cost Criterion for CMGC contracts

Departments with Authority to Contract for Public Works	Support Eliminating Mandatory 40% Weighting?
Public Works	Yes
SFMTA	Yes
SFPUC	Yes
Airport	Yes
Port	Yes
Rec & Park	Yes

Source: BLA outreach to departmental staff

Most department representatives raised no concerns over the proposed change to the cost criterion for CMGC contracts. Bruce Robertson, Deputy Director for Financial Management and Administration at DPW, stated that 40 percent is too high of a mandatory minimum weight for the cost criterion. He also said that specifically prescribing certain policies to certain project delivery methods is challenging because project delivery methods evolve over time; therefore, prescribing the mandatory minimum weights for CMGC and Design-Build contracts only is not necessarily a best practice. City Architect Ron Alameida agrees – he was part of the team that originally wrote Chapter 6.68 of the Administrative Code and he said that he worried that the code was going to be too prescriptive when they wrote it. He emphasized the importance of cost being a factor in evaluating CMGC bids, but said that flexibility in determining the amount of influence it has over the evaluation on a project by project basis is important.

City Engineer Albert Ko and Acting Engineering Manager Iqbal Dhapa agreed that 40 percent may be too high of a mandatory weighting, but urged more strongly the importance of keeping cost as a mandatory factor in the evaluation of CMGC bids. They noted that cost as a factor protects the City from overpaying for construction services, and suggested that the weighting of the cost criterion could be set depending on the size, cost, and risk complexity of the project. Representatives at Recreation and Parks also expressed concern at overly reducing the cost criterion. Melinda Sullivan and Kelli Rudnick, both Project Managers at REC, noted that cost is a crucial factor in construction contracts and needs to be considered. Project Manager Sullivan also noted that, for the Department's first CMGC contract which is currently out to bid, they weighted cost at 50 percent. REC has not yet executed a CMGC project, but REC staff expressed their support for removing the mandatory cost criterion while also noting the importance of cost control and that they would not want it prohibited as a criterion.

The other departments we spoke to indicated that changing the cost criterion for CMGC contracts would not significantly impact their procurement processes. Judi Mosqueda, Director of Project Management for Planning, Design, and Construction at the Airport, said that eliminating the mandatory 40 percent minimum weighting for cost would not affect the Airport's procurement. The Port has not yet issued a contract under the CMGC model, so Port representatives were unsure as to how a change in CMGC criteria policy would affect the Port's construction procurement, but they generally were favorable to the idea.

The SFMTA and the SFPUC both agreed with the Grand Jury's recommendation to eliminate the mandatory cost criterion in their official responses to the Grand Jury report and when we spoke with their representatives that had not changed. At the SFMTA, Tom Maguire, Director of Streets, and Jane Wang, Acting Capital Programs and Construction Manager, both reiterated that changing the 40 percent threshold was a good idea so long as cost is not eliminated or forbidden entirely as a criterion. At the SFPUC, Alan Johanson, the Acting Assistant General Manager of Infrastructure, noted that the cost criterion sends an important signal to bidders that the City cares about the value of the services it procures. He said that there likely would not be negative effects of changing the mandatory weighting, although he noted that the SFPUC has not had issues associated with the 40 percent threshold and CMGC procurement to date.

Our main takeaways from the department interviews are listed below:

1. The current 40 percent cost weighting is too high, and it would likely not be detrimental to lower it.
2. Cost should not be prohibited as an evaluation factor for CMGC contracts. Cost is still a valuable contract evaluation criterion.
3. Overly prescriptive policies regarding major capital projects – such as a mandatory cost criterion weighting – are challenging to implement because of the variation across capital projects. Flexibility should be favored.

Industry Best Practices

There have been many best practice reports written about the CMGC method in general and evaluating its efficacy as a project delivery method. Some of these reports include recommended best practices regarding CMGC procurement and the use of cost. A 2010 Transportation Research Board study on CMGC for highway programs⁵ found that, of the 10 jurisdictions reviewed as case studies, three used cost as a selection criterion and the weights assigned to them were determined on a project-by-project basis. Furthermore, the weights were 15, 25, and 30 percent - all lower than San Francisco's 40 percent requirement. The Transportation Research Board concluded that it is in the best interest of the project sponsor to be able to weigh the cost criterion relative to non-cost criteria flexibly, depending on how important price and cost are going to be for the project relative to non-cost criteria like experience and expertise. Another best practices manual, *CM/GC Guidelines for Public Owners*,⁶ was published jointly by the National Association of State Facilities Administrators and the Associated General Contractors of America in 2007 and was cited in the Grand Jury report. This report notes that, if cost is being used as a criterion for the selection of a CMGC contractor (some states prohibit the use of cost as a CMGC selection criterion), then it is best to be able to change the weight on cost/fees based on how important it is to the project.

Policy Options

Regarding the City's policy on the cost criterion in CMGC contracts, the Board could:

1. Eliminate the 40 percent weighting threshold on the cost criterion in Administrative Code Chapter 6.68, but continue to require that cost be a mandatory criterion. Each project sponsor could determine, on a project-by-project basis, how to weigh cost compared to non-cost criteria. This would allow flexibility for different projects based on their needs. For example, for more complex projects, staff might want to weigh cost less heavily given the greater experience and technical expertise needed to carry out such projects, whereas less complex projects may not need to rely so much on experience and technical expertise when selecting a CMGC contractor.

⁵ *Construction Manager-at-Risk Project Delivery for Highway Programs*, National Cooperative Highway Research Program Synthesis 402, 2010:

https://www.researchgate.net/publication/280610007_Construction_Manager-at-Risk_Project_Delivery_for_Highway_Programs

⁶ https://www.agc.org/sites/default/files/Files/Construction%20Markets/CM_GC_Guidelines.pdf

2. Reduce the 40 percent weighting threshold on the cost criterion in Administrative Code Chapter 6.68 to a lower amount similar to one of the three jurisdictions that had such a threshold in the 2010 Transportation Research Board study (e.g. 15, 25, or 30 percent). This would provide departments with more flexibility in their weighting of cost but would still ensure a minimum weighting of costs on CMGC procurements.
3. Do not change the current minimum weighting for the cost criterion on CMGC contracts. The current threshold of 40 percent has worked for some project sponsors. Additionally, it is important to continue to use cost as an evaluation factor for CMGC contracts and keeping the status quo of minimum 40 percent cost would ensure cost continues to be represented as a criterion.

Regarding the City's policy on the cost criterion in Design-Build contracts, the Board should consider:

4. Revising Chapter 6.61 of the Administrative Code, which, similar to Chapter 6.68 for CMGC projects, requires that departments weight cost at a minimum of 40 percent of the overall evaluation for Design-Build contracts. We recommend that, if the Board revises Chapter 6.68 for CMGC projects, that it revise Chapter 6.61 in a manner so that it is consistent with the revisions made to Chapter 6.68. This would minimize confusion and prevent the creation of an incentive to select a project delivery method based on the permissiveness of the Administrative Code related to cost criterion requirements.