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June 4, 2013

HONORABLE CITY COUNCIL
Oakland, California

LEGAL OPINION

Re: Amendments to Oakland's Debarment Ordinance

Dear Council President Kernighan and Members of the Council:

I. Introduction

At its May 28, 2013 meeting, the Finance and Management Committee forwarded to the Council proposed amendments to the Debarment Ordinance. The proposed amendments incorporate a number of the changes that our Office advised are necessary to comply with the City Charter. However, the proposed amendments include four provisions that are not in compliance with the City Charter.

The Committee asked that our Office include in the supplemental agenda packet additional amendments that our Office has determined to be necessary to comply with the City Charter. In particular, the Finance Chairperson requested that we provide language that addresses the Council's power to adopt a policy requiring the City Administrator to initiate a debarment proceeding (i.e., issue a notice of proposed debarment) if there is evidence supporting one or more of the grounds for debarment set forth in the ordinance.

Exhibit A is a redlined version of the Ordinance including the amendments the Finance Committee forwarded to Council and alternative language for the four sections of the Ordinance (Section 1.12.030.D, Section 2.12.040.B, Section 2.12.060.A and Section 2.12.240) to comply with the City Charter.

II. Amendments That Are Not In Compliance With The City Charter

The following amendments forwarded by the Finance Committee to the Council do not comply with the Charter: Sections 2.12.030.D, 2.12.040.B, 2.12.060.A and 2.12.240.

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Revised language for these sections is in Exhibit A, identified as 'Amendment that Complies with the City Charter'. (Strikethroughs show deletion of language in the current ordinance; underscoring shows new language.)

A. Section 2.12.030D

1. Amendment Forwarded by Finance Committee

The City Administrator or the Council may determine whether debarment proceedings will be initiated against a contractor.

2. Amendment that Complies with the City Charter

Delete this entire section.

3. Legal Issue

The Council does not have the power to make the administrative enforcement decision whether to initiate a debarment action against a contractor on a case-by-case basis. The term "debarment proceeding" is used in the Ordinance to refer to the initiation of the debarment action (see Section 2.12.060.A, i.e., the issuance of the Notice of Proposed Debarment.) As we discuss under Part III of this opinion, the case-by-case decision to issue a Notice of Debarment is an administrative enforcement action based on the investigation conducted by the City Administrator.

B. Section 2.12.040B

1. Amendment Forwarded by Finance Committee

Information concerning the existence of a cause for debarment from any source shall be promptly investigated, reported and referred to the City Council or the City Administrator for consideration. ~~The City Council or City Administrator~~ shall be responsible for deciding whether or not to proceed with the action. After consideration, the *City Administrator* may issue a notice of proposed debarment, pursuant to Section 2.12.060 of this Ordinance.

2. Amendment that Complies with the City Charter

Information concerning the existence of a cause for debarment from any source shall be promptly investigated, reported and referred to the *City Administrator* for consideration. ~~The City Administrator~~ shall initiate a

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debarment proceeding when any evidence supporting a ground or grounds for debarment set forth in Section 2.12.050 exists, in which case the *City Administrator* shall issue a notice of proposed debarment, pursuant to Section 2.12.060 of this Ordinance.

3. Legal Issue

The proposed amendment requires forwarding of information concerning existence of cause for debarment to the Council for "consideration" and provides that the Council or the Administrator shall be responsible for deciding whether to proceed with a debarment action. Both of these roles are administrative enforcement actions, namely the consideration of the evidence and the case-by-case decision to proceed with a debarment action. As such they are only in the City Administrator's purview. We have proposed an amendment that would make a policy determination that debarment actions must be initiated if there is any evidence that supports a ground for debarment.

C. Section 2.12.060.A

1. Amendment Forwarded by Finance Committee

After City Council action or on his/her determination to initiate debarment proceedings the *City Administrator* shall issue a *Notice of Proposed Debarment* to the contractor and any *affiliates* that *City* determines should be parties to the action (hereafter, collectively "respondent") at least ninety (90) days prior to the date of the *debarment* hearing advising:

2. Amendment that Complies with the City Charter

The City Administrator shall initiate a debarment proceeding when any evidence supporting a ground or grounds for debarment set forth in Section 2.12.050 exists. The City Administrator shall initiate a *debarment proceeding* by issuing a *Notice of Proposed Debarment* to the contractor and any *affiliates* that *City* determines should be parties to the action (hereafter, collectively "respondent") at least ninety (90) days prior to the date of the *debarment* hearing advising: (hereafter, collectively "respondent") at least ninety (90) days prior to the date of the *debarment* hearing advising:

3. Legal issue

See discussion above under Part II(A)3.

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D. Section 2.12.240

1. Amendment Forwarded by Finance Committee

In the event that the City determines that a contractor's acts or omissions are insufficient to warrant debarment, the City Administrator may take one or more of the following actions at the direction of the City Council, provided that the City Administrator carries out contractor negotiations and all other administrative tasks expressly or implicitly required for the options described: . . .

2. Amendment that Complies with the City Charter

[The above proposed amendment does not comply with the Charter, the original language set for below should be retained:]

In the event that the City determines that a contractor's acts or omissions are insufficient to warrant debarment, the City Administrator may take one or more of the following actions:

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3. Legal Issue

The Council does not have the power to make administrative decisions such as deciding which actions to take on a case-by-case basis following an investigation by the City Administrator (See also discussion above under Part II(A)3.)

III. Analysis

In a legal opinion dated May 28, 2013, this Office advised the Council that the City Charter does not allow the Council, by ordinance or any other means, to grant the Council or Councilmembers administrative powers. The Charter clearly and expressly separates the legislative (policy-making) powers which are the province of the Council and the administrative powers which are the province of the City Administrator and other elected offices such as the Mayor. The City Charter declares that the Council has no administrative powers (City Charter section 207) and prohibits the Council and Councilmembers from interfering in administrative affairs (City Charter section 218). The Charter grants to the City Administrator the power and makes it her duty to manage the City's administrative affairs and to investigate, administer and enforce all laws, policies and contracts. (City Charter section 504.)

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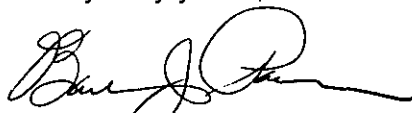
We advised the Finance Committee at its May 28, 2013 meeting that the Charter grants the City Administrator the power and she has the duty to carry out the execution and administration of contracts, to carry out enforcement actions against contractors and to otherwise implement City policies and ordinances, including those related to specific contracts or to contracting in general. The Charter expressly prohibits the Council from carrying out administrative duties such as those necessary for debarment – oversight of contracts for performance, compliance and wrongful conduct, investigation of contractors, review of evidence and administrative enforcement actions.

Accordingly, the Council has the power to establish a debarment policy/process via ordinance. But the Council cannot conduct the investigation, issue notices, or make a decision on a case-by-case basis to initiate a debarment action because these all are administrative actions. The Council can include a policy that sets standards and procedures in the ordinance. For example, the Council can amend the ordinance to include a policy to investigate any information that could be a ground for debarment under the Ordinance and the Council can include a policy that a debarment action be initiated when certain threshold evidentiary standards are met. At the Finance Committee meeting we provided the example of a policy that a debarment action be initiated when there is any evidence that supports one or more of the grounds for debarment that are listed in the Ordinance.

IV. Conclusion

The Council can amend the Debarment Ordinance to provide policy direction to the City Administrator requiring her to initiate debarment actions (i.e., issue a proposed notice of debarment) when certain standards are met. The Charter prohibits the Council from making the administrative, case-by-case enforcement decisions to initiate a debarment action.

Very truly yours,



BARBARA J. PARKER
City Attorney

Attorney Assigned:
Doryanna Moreno
Kathleen Salem-Boyd

Attachment: Revised Draft Ordinance

INTRODUCED BY COUNCILMEMBER _____

CITY ATTORNEY'S OFFICE

ORDINANCE NO. _____ C.M.S.

ORDINANCE AMENDING OAKLAND'S CONTRACTOR DEBARMENT
ORDINANCE CODIFIED AT OAKLAND MUNICIPAL CODE CHAPTER
2.12 (ENACTED BY ORDINANCE NO. 12926 C.M.S.), TO ESTABLISH
STANDARDS FOR INVESTIGATION AND COMMENCEMENT OF
DEBARMENT ACTIONS

Whereas, the City Council wishes to amend the City's Debarment Ordinance to establish standards for the investigation and commencement of debarment actions;

Now, therefore, the Council of the City of Oakland does ordain as follows:

Section 1. The City of Oakland's Debarment Ordinance codified at Oakland Municipal Code Chapter 2.12 is amended as follows:

2.12.010 - Definitions.

The following terms, whenever used in this chapter, shall be construed as defined in this section:

"Affiliate" means entities and/or persons are affiliates of each other:

1. Who is an assignee, successor, subsidiary of, or parent company of another person or contractor;
2. Who has the same or similar management of the debarred corporate or other legal entity; or
3. If, directly or indirectly, either one controls or has the power to control the other, or, a third person or entity controls or has the power to control both. Indicia of control include, but are not limited to:
 - a. Interlocking management or ownership;
 - b. Identity of interests among family members or relatives;
 - c. Shared facilities and equipment, common use of employees or a business entity organized following the debarment or suspension pending debarment, or proposed debarment of a person which has the same or similar management, ownership or principal employees as the contractor that was debarred or suspended pending debarment;

- d. The debarred person or entity created after debarment or suspension pending debarment which operates in a manner designed to evade the application or defeat the purpose of this chapter;
- e. Bankruptcy, dissolution, or reorganization of a contractor or entity which has the same or similar management, ownership, or principal employees as the, debarred; or
- f. Ineligible, or voluntarily excluded entity or person.

"Bid" means any response to a notice inviting firm, fixed and/or sealed bids or quotes, solicitation for or invitation to submit firm, fixed and/or sealed bids or similar communication by or on behalf of a contractor seeking to participate or receive a benefit, directly or indirectly, in or under a covered or related transaction.

"City Council" means the Oakland City Council.

"City Administrator" means the City Administrator of the City of Oakland, or an officer specifically designated by the City Administrator or by another City official in accord with the City Charter, to act for and carry out the City Administrator's duties.

"City" means the City of Oakland acting through its City Council, City Administrator or through any officer with powers delegated by the City Charter, City Council, City Administrator or as authorized by law.

"Benefits" means money or any other thing of value provided by or realized because of a contract with the City. A thing of value includes insurance or guarantees of any kind and designation as a City "local business enterprise" or "small local business enterprise."

"City contracting policies" means any policies of the City Council applicable to City contracts for goods and services, or to such contracts considered or awarded in connection with a covered or related transactions, including, but not limited to, City's prevailing wages, living wage, equal benefits, local and small local business enterprise, apprentice and local hire, nuclear free and nondiscrimination policies.

"Civil judgment" means a decision in a civil action at the trial or appellate level by any court of competent jurisdiction, whether entered by verdict, settlement, stipulation or otherwise creating a civil liability for the wrongful acts complained of.

"Consent decree" means a settlement between the City and a contractor whereby the contractor promises to refrain from certain acts or omissions.

"Contract" means any agreement to provide goods to, or perform services for or on behalf of, the City, or such contracts considered or awarded in connection with a covered or related transaction.

"Contractor" means any person, partnership, corporation, joint venture, company, vendor or other business entity who seeks to contract, submits a qualification statement, proposal, bid or quote or contracts directly or indirectly with the City for the purpose of providing goods or services to or for the City, or who seeks to or contracts to provide goods or services in connection with a covered or related transaction, including, without limitation, any contractor, subcontractor, consultant, sub-consultant or supplier at any tier. The term "contractor" shall include any responsible managing corporate officer who has personal involvement and/or responsibility in obtaining a contract with the City or in supervising and/or performing the work prescribed by the contract.

"Contracting officer" means the City employee responsible for administering the contract.

"Covered transaction" means application for or participation in a City contracting policy program, activity, contract or related transaction, regardless of type, amount or source of funding.

"Conviction" means a judgment or conviction of a criminal offense of a type which would give rise to debarment of the convicted party under the terms of this chapter by any court of competent jurisdiction at the trial or appellate level whether entered upon a verdict or a plea, and includes a conviction upon a plea of nolo contendere.

"Debarment" means an administrative action taken by the City that results in a contractor, and any affiliate of the contractor, being prohibited from bidding upon or being awarded a contract with the City and/or performing a contract in connection with covered or related transactions for a period of up to five years. A contractor and affiliate who has been determined by the City to be subject to such a prohibition is "debarred."

"Debarment Hearing Board" means the three-member board appointed by the City Administrator to hold hearings, take evidence and make determinations about debarment for the City. Members of the Board shall be unbiased, executive level persons and may be City or other public sector employees with subject matter expertise, but shall not be employees that participated in the complaint, investigation or decision to recommend debarment, or employees subject to the authority, direction or discretion of employees who participated in the decision to recommend debarment.

"Ex parte communication" means any communication with a member of the Debarment Hearing Board, other than by Board member's staff, which is direct, or indirect, oral or written, concerning the merits or procedures of any pending proceeding which is made by a party in the absence of any other party.

"Final notice of debarment" means a written notice under signature of the City Administrator to the affected person(s), contractor or affiliates of the debarment decision of the Debarment Hearing Board.

"Indictment" means indictment for a criminal offense. An information or other filing by the City charging a criminal offense shall be given the same effect as an indictment.

"Ineligible" means excluded from City contracting (and subcontracting, if appropriate) pursuant to statutory, or regulatory authority of the City.

"Notice of proposed debarment" means the written communication issued by the City Administrator and served on a contractor in accordance with Section 2.12.060, to notify a contractor of proposed debarment and initiate a debarment action. The City Administrator may issue a notice of proposed debarment against any contractor relative to any matter consistent with the grounds for debarment. Notice shall be considered to have been received by the contractor and any other related-party so served five days after being deposited in the US Mail, postage pre-paid, and addressed by the City to the contractor's or affiliates' last known address based on information provided by the contractor or affiliates.

"Participant" means any person who submits a bid or proposal for, enters into, or reasonably may be expected to enter into a contract or covered or related transaction. This term also includes any person who is legally authorized to act on behalf of or to commit a participant to a contract or in a covered or related transaction.

"Person" means any individual, corporation, partnership, association, member of a joint venture, unit of government or legal entity, for-profit or non-profit, however organized.

"Preponderance of the evidence" means proof by information that, compared with that opposing it, tends to the conclusion that the fact at issue is more probably true than not.

"Principal" means officer, director, owner, partner, key employee or other person with significant management or supervisory responsibilities for a contractor; a person who has a critical influence on or substantive control over a contractor's participation in a covered or related transaction, whether or not employed by the participant, contractor or any affiliate of a participant or contractor, the operations of which are so intertwined with the participant that the separate corporate identities may be disregarded.

"Proposal" means any response to a solicitation, application, request for proposal, invitation to submit a proposal or similar communication by or on behalf of a contractor seeking to participate or receive a benefit, directly or indirectly, in or under a covered or related transaction.

"Related transaction" means a transaction directly related to a covered transaction, which assists the participant in executing a covered transaction, regardless of the extent of the influence on or substantive control over the covered transaction by

the person performing the related transaction. Related transactions include, but are not limited to, transactions of the participant with any of the following persons:

1. Contractors (including direct subcontractors);
2. Principal investigators;
3. Loan officers;
4. Staff appraisers and inspectors;
5. Underwriters;
6. Bonding companies;
7. Appraisers and inspectors;
8. Real estate agents and brokers;
9. Management and marketing agents;
10. Accountants, consultants, investment bankers, architects, engineers, attorneys and others in a business relationship with participants in connection with a covered transaction under an City contracting or agreement or activity;
11. Vendors of materials and equipment in connection with an City contracting, agreement or activity;
12. Closing agents;
13. Turnkey developers of projects;
14. Title companies;
15. Escrow agents;
16. Project owners;
17. Employees or agents of any of the above.

"Respondent" means a person against whom a debarment action has been initiated.

"Suspend" or "suspension" means the temporary disqualification of a contractor from participating in covered or related transactions pending the completion of an investigation and any proceedings before a Debarment Hearing Board. A contractor so disqualified is "suspended."

"Voluntary exclusion" or "voluntarily excluded" means a status, assumed by a person, who is excluded from participating in covered and related transactions in accordance with the terms of a written settlement agreement with the City.

"Warning letter" means a written communication from the City to one or more persons concerning acts and omissions prohibited by this chapter.

2.12.020 - Coverage.

This chapter applies to:

- A. Any contractor who has participated, is currently participating, or may reasonably be expected to participate, in a covered transaction, irrespective of the source of funding;
- B. Any contractor who has participated, is currently participating, or may reasonably be expected to participate, in a related transaction, irrespective of the source of funding including, without limitation, projects involving City funding, regardless of amount, or any other City interest, including, without limitation, a real or personal property interest;
- C. Any principal of the contractors described in subsections A. and B.; and
- D. Any affiliate of the contractors described in subsections A., B. or C.

2.12.030 - General.

- A. The grounds for debarment set forth in Section 2.12.050 are not intended to be an exhaustive list of the acts or omissions for which a person may be debarred; grounds other than those enumerated in this section may be a basis for debarment.
- B. The City may debar a contractor for any of the debarment grounds set forth in Section 2.12.050. The purpose of this chapter is, generally, to authorize debarment of contractors who engage in a pattern and practice of, or who are recurrently responsible for, any single or combination of debarment ground(s). However, a single occurrence of any debarment ground(s) may also subject contractors to debarment, depending on the egregious or serious nature of the acts or omissions. The existence of a cause or ground for debarment, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any mitigating factors shall be considered in making any debarment decision. Debarment actions shall be carried out in accordance with the procedures in Sections 2.12.060 through 2.12.180.
- C. Debarment constitutes debarment of all divisions or other organizational elements of the contractor named in the debarment proceedings, unless the debarment decision is limited by its terms to specific affiliates, divisions, organizational elements and individuals. The City Administrator may extend the debarment decision to include any affiliates of the contractor and persons if they are:
 - 1. Specifically named, and
 - 2. Given written notice of the proposed debarment and an opportunity to respond.
- D. **Amendment forwarded by Finance Committee:** ~~The City hereby delegatoo~~ The City Council or the ~~tho debarment of contractors to the City Administrator.~~

City Administrator may determine whether debarment proceedings will be initiated against a contractor.

Amendment that complies with the City Charter. ~~[Delete this entire section.]~~ ~~The City hereby delegates the debarment of contractors to the City Administrator.~~

2.12.040 - Investigation, referral and temporary suspension.

- A. The City shall utilize City personnel and other appropriate resources to conduct the investigation and develop the documentation required by subsection C.
- B. **Amendment forwarded by Finance Committee:** Information concerning the existence of a cause for debarment from any source shall be promptly investigated, reported, and referred to the City Council or the City Administrator for consideration. The City Council or the City Administrator shall be responsible for deciding whether or not to proceed with the action. After consideration, the City Administrator may issue a notice of proposed debarment, pursuant to Section 2.12.060.

Amendment that complies with the City Charter: Information concerning the existence of a cause for debarment from any source shall be promptly investigated, reported, and referred to the City Administrator for consideration. The City Administrator shall proceed with a debarment action when any evidence supporting a ground or grounds for debarment set forth in Section 2.12.060 exists, in which case ~~be responsible for deciding whether or not to proceed with the action.~~ After consideration, the City Administrator ~~shall~~ may issue a notice of proposed debarment, pursuant to Section 2.12.060.

- C. Basic documentation shall be developed that includes but is not limited to:
 - 1. The name of the specific respondent(s) against whom the action is being proposed or taken;
 - 2. The reason(s) for proposing the debarment;
 - 3. A short narrative stating the facts and/or describing other evidence supporting the reason(s) for the need to debar;
 - 4. The recommended time period for the debarment;
 - 5. Copies of any relevant support documentation identified under this section.
- D. The Office of the City Attorney is responsible for reviewing the documentation and notices for legal sufficiency.
- E. The City Administrator may temporarily suspend a contractor upon the determination that adequate evidence exists supporting debarment and doing so in the public interest. The City Administrator shall notify the contractor of the suspension in accordance with Section 2.12.060, pending the Debarment

Hearing Board ruling on the matter. Once the City Administrator has suspended a contractor, the suspension shall continue until the Debarment Hearing Board makes a final decision on the decision on the proposed debarment.

2.12.050 - Debarment of contractors—Grounds.

In accord with Section 2.12.030, the City may debar a contractor if the City finds, in its discretion, that the contractor has, or is engaged in, any of the following:

- A. Willful or intentional misconduct in connection with any City bid, request for qualifications, request for proposals, purchase order and/or contract including, without limitation:
 - 1. Collusion in obtaining a City contract or payment thereunder;
 - 2. Submission of false information in response to a solicitation, advertisement or invitation for bids or quotes;
 - 3. Submission of false information in response to a solicitation or request for qualifications or proposals;
 - 4. Submission of false claims as defined in California Government Code, Section 12650 et seq. and Title 31 U.S.C. Section 3729 et seq.;
 - 5. Issuance of a verdict, judgment, settlement, stipulation or plea agreement establishing the contractor's violation of any civil or criminal law against any government entity relevant to the contractor's ability or capacity to honestly perform under or comply with the terms and conditions of a City contract;
- B. Willful or intentional failure to perform in accordance with the terms of one or more contracts including, but not limited to, terms pertaining to City contracting policies;
- C. Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public agreement or transaction;
- D. Violation of federal or state antitrust statutes, including those prescribing price fixing between competitors, allocation of customers between competitors, and bid rigging;
- E. Commission of embezzlement, theft, forgery, bribery, making false statements, submitting false information, attempting to commit a fraud against the City, receiving stolen property, making false claims to any public entity, obstructing justice, fraudulently obtaining public funds;
- F. Taking or misappropriating City property or using City property, including real and personal property, in an unauthorized manner;
- G. Performance or conduct on one or more private or public agreements or transactions that caused or may have caused a threat to the health or safety of the contractor's employees, any other persons involved with the transaction, the general public or property;

- H. Debarment by any other governmental agency for the period imposed by that agency;
- I. Violation of federal regulations for disadvantaged business entity status including, but not limited to, violation of 49 CFR part 26 et seq. and misrepresenting minority or disadvantaged business entity status;
- J. Noncompliance with the prevailing wage requirements of the Labor Law, including any pending violations by the contractor or any affiliate. A "pending violation" is defined as an investigation by any governmental entity (e.g. another city, county, school district, etc.). Investigations by private businesses will not be recognized.
- K. Violation of any nondiscrimination provisions included in any public agreement or transaction;
- L. Any other significant Labor Law violations, including, but not limited to, child labor violations, failure to pay wages, or unemployment insurance tax delinquencies.
- M. Violation of any licensing, subletting or sublisting laws;
- N. Falsification, concealment, withholding and/or destruction of records;
- O. Violation of settlement agreements and/or consent decrees which impose obligations on the contractor to perform certain activities and/or to refrain from certain acts;
- P. Violation of any law, regulation or agreement relating to conflict of interest with respect to government funded contracting;
- Q. Knowingly or negligently doing business with a debarred, suspended, ineligible, or voluntarily excluded contractor in connection with a covered or related transaction;
- R. Violation of a material provision of any settlement of a debarment action;
- S. Commission of an egregious act or unlawful offense which indicates a lack of business integrity or business honesty;
- T. Failure to perform or history of unsatisfactory performance of one or more contracts including, without limitation, default on contracts with the City or any other public agency;
- U. Failure to perform or unsatisfactory performance of one or more City contracting policies;
- V. Commission of any act or omission which negatively reflects on the contractor's quality, fitness or capacity to perform a contract with the City or any other public entity, or which negatively reflects on same including, but not limited to, deficiencies in on-going contracts, false certifications or statements, fraud in performance or billing or lack of financial or technical resources;
- W. Any other cause of so serious or compelling a nature that it affects the present responsibility of a contractor.

2.12.060 - Notice of proposed debarment to contractor (respondent).

- A. **Amendment forwarded by Finance Committee:** ~~The After City Council action or on his/her determination to initiate debarment proceedings the City Administrator shall initiate a debarment proceeding by issuing~~ issue a notice of proposed debarment to the contractor and any affiliates that City determines should be parties to the action (hereafter, collectively, "respondent"), at least 90 days prior to the date of the debarment hearing advising.

Amendment that complies with the City Charter: The City Administrator shall proceed with a debarment action when any evidence supporting a ground or grounds for debarment set forth in Section 2.12.050 exists. The City Administrator shall initiate a debarment proceeding by issuing a notice of proposed debarment to the contractor and any affiliates that City determines should be parties to the action (hereafter, collectively, "respondent"), at least 90 days prior to the date of the debarment hearing advising:

1. That debarment is being considered;
2. That respondent is suspended pending final determination in the debarment proceeding when the City Administrator has determined that suspension is in the public interest;
3. Information on the specific debarment action proposed;
4. Of the reasons for the proposed debarment in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which it is based;
5. Of the cause(s) relied upon under Section 2.12.050 for proposing debarment;
6. Of the provisions of Sections 2.12.070—2.12.180, and any other procedures, if applicable, governing debarment decision making;
7. That the respondent must submit a written response within 15 days of the receipt of the notice of proposed debarment and the consequence of not providing a response;
8. The date, time and place of the debarment hearing;
9. Of the potential effect of a debarment;
10. Of the right to a hearing before the Debarment Hearing Board;
11. That the respondent may appear at the debarment hearing to challenge the debarment action, and that failure to appear may result in a waiver of the respondent's defenses to the debarment action, and be taken as an admission by the party failing to appear that the basis for the debarment is accurate, except to the extent the respondent challenges the debarment action solely by means of a written submission.

12. That the City may submit a reply to the written response of the respondent within 30 days following receipt of the response made by or on behalf of the respondent.
- B. The notice to the respondent shall be signed by the City Administrator and transmitted by certified mail, return receipt requested to the last known address provided the City by the respondent.
- C. Notice to the respondent shall be deemed sufficient if it is served by any of the means authorized by California Code of Civil Procedure Section 1013, or as otherwise specified in Section 2.12.080
- D. Any attempt by the respondent to affirmatively avoid service by way of example, and not limitation, refusing to pick-up a certified letter, shall be deemed ineffective and shall not prevent the debarment proceeding from going forward.

2.12.070 - Documents submitted to the debarment hearing board.

- A. Contractor (Respondent) Response.
 1. The respondent shall submit to the Debarment Hearing Board, and serve in accordance with Section 2.12.080, a response to the notice of proposed debarment not later than 30 days of receipt which shall:
 - a. State whether the respondent will appear at the hearing;
 - b. Respond to the allegations of the City. Allegations contained in the City's notice to the respondent may be deemed admitted by the Debarment Hearing Board when not specifically denied in the respondent's response.
 2. The response may set forth any affirmative defenses and evidentiary support therefore to the City's allegations. Respondent must set forth any affirmative defense in which it intends to rely in the response.
 3. If the respondent intends to waive its right to a hearing and rely solely on the response in support of its position, the response must clearly state such intention. Failure to clearly state such intention may be deemed a waiver of the respondent's defenses to the debarment action if the respondent does not appear at the hearing.
 4. In the event that the respondent fails to file a written response not later than 30 days of receipt of the City Administrator's notice of proposed debarment in accordance with this section, the allegations of the City may be deemed admitted, the Debarment Hearing Board may enter an order of default and transmit it to the President of the City Council and the City Administrator. The City Administrator's decision shall thereafter issue, with service on the parties.
- B. Reply by the City. The City may submit to the Debarment Hearing Board and serve in accordance with Section 2.12.080, a reply to the respondent's response not later than 30 days after receiving the respondent's response.

- C. Stipulations. The parties are encouraged to meet and resolve as many matters as possible by stipulated agreement prior to the hearing. The parties may stipulate as to any relevant matters of fact or law. Stipulations may be received in evidence at the hearing, and when received shall be binding on the parties with respect to the matter stipulated.
- D. Document and Submission Requirements.
 - 1. An original and one copy of all documents to be presented to the Debarment Hearing Board and copies of all documents served on said Board shall be served simultaneously on the opposing party at the specific location designated on the notice of debarment in accordance with Section 2.12.080
 - 2. All documents required or permitted under this chapter, in addition to being served on Debarment Hearing Board in accordance with this section, shall be served upon:
 - a. The Office of the City Administrator at One Frank Ogawa Plaza, 3rd Floor, Oakland, CA 94612;
 - b. The respondent or respondent's representative;
 - 3. Documents served in accordance with this section and Section 2.12.080 shall state clearly the party's name and the title of the document. All documents should be typewritten or printed in clear, legible form.

2.12.080 - Service.

- A. Service of documents on the respondent, including the notice, shall be made by any reasonable means, including by first class mail, fax, e-mail or delivery to:
 - 1. The respondent to be served or that respondent's designated representative or agent, at the last known address;
 - 2. The respondent's last known place of business; or
 - 3. A principal of the respondent, of the entity for which the respondent is a principal.
- B. Proof of service shall not be required unless the fact of service is denied under oath and put in issue by appropriate objection on the part of the respondent allegedly served. In such cases, service may be established by written receipt signed or on behalf of the respondent to be served, or may be established prima facie by any responsible means, including, but not limited to affidavit or certificate of service of mailing.
- C. Service of documents on other interested parties, such as insurance and bonding companies, shall follow the service procedures set forth in this section.

2.12.090 - Time computation.

Any period of time prescribed or allowed by this chapter shall include in its computation of the prescribed period, Saturdays, Sundays and national holidays, except that when the last day of the period is Saturday, Sunday, national holiday or other day

that the City is closed, the period shall run until the end of the next following business day.

2.12.100 - Debarment Hearing Board powers and responsibilities.

- A. To ensure the fair and efficient administration of debarment proceedings, they shall be presided over by the Debarment Hearing Board, as defined in Section 2.12.010(15), appointed by the City Administrator, unless the City Administrator elects to appoint a retired judge under subsection B. below, in which case the City Administrator shall retain a retired judge subject to the City's purchasing requirements.
- B. The City Administrator may, in his/her sole discretion, appoint a retired judge to conduct the debarment hearing for matters expected to be unusually complex or of extended duration, or for any other reason. The retired judge shall have all of the powers and duties otherwise reserved to the Debarment Hearing Board.]
- C. Powers of the Debarment Hearing Board.
 - 1. The Debarment Hearing Board shall conduct a fair and impartial hearing and, to that end, shall have the power to:
 - a. Schedule the debarment hearing date, time and place;
 - b. Postpone the debarment hearing date;
 - c. Regulate the course of the hearing and the conduct of the parties and their counsel;
 - d. Hold conferences to facilitate the settlement or simplification of the issues by consent of the parties or at the request of a party;
 - e. Consider and rule upon all evidentiary and procedural matters pertaining to the hearing, including, but not limited to, setting page limits on documents that may be submitted;
 - f. Make findings of fact and take notice of any material fact not appearing in evidence in the record which would properly be a matter of judicial notice;
 - g. Receive evidence and rule on offers of proof;
 - h. Administer oaths and affirmations;
 - i. Issue a final decision imposing debarment of the respondent with respect to future City contracts and covered or related transactions, or imposing no sanction;
 - j. Recommend to the City staff, if so requested, a course of action to remedy respondent's past actions which gave rise to the debarment action;
 - k. Take any other action necessary to protect each party's rights, to avoid delay in the disposition of the debarment proceeding and to maintain order.
 - 2. Prohibition Against Ex Parte Communications.

- a. Ex-parte communications are prohibited unless:
 - (1) The purpose and content of the communication has been disclosed in advance or simultaneously to all parties involved; or
 - (2) The communication is a request for information to the Debarment Hearing Board's staff concerning the status of the debarment action.

2.12.110 - Debarment hearing procedure.

A. Right to Hearing.

1. All respondents subject to debarment pursuant to this chapter shall be entitled to a hearing at the date, time and place set forth in the notice.
2. The respondent may elect to waive its right to a hearing and rely solely on a written response. If the respondent elects to waive its right to a hearing, such waiver must be clearly stated in the respondent's response. If respondent fails to file a written response as required under Subsection 2.12.070 A., the allegations of the City shall be deemed admitted, and an order of default shall be entered pursuant to Subsection 2.12.070 A.4.
3. The Debarment Hearing Board shall perform no independent collection of evidence and shall render a decision based on the evidence as submitted by the parties, although the Debarment Hearing Board may take judicial notice of common, uncontested facts.

B. Conduct of Hearing.

1. The hearing shall be informal in nature and members of the Debarment Hearing Board may ask questions at any time.
2. The hearing shall proceed with all reasonable speed. The Debarment Hearing Board may order the hearing be recessed for good cause, stated on the record. The Hearing Board may, for convenience of the parties, or in the interest of justice, order that the hearing be continued or extended to a later date.

C. Representation of the Parties.

1. The City may be represented by a member of the staff of the Office of the City Attorney and/or by an attorney assigned by the Office of the City Attorney, as may be appropriate in a particular case.
2. The respondent may be represented at the hearing as follows:
 - a. Individuals may appear on their own behalf;
 - b. A member of a partnership or joint venture may appear on behalf of the partnership or joint venture;
 - c. A bona fide officer may appear on behalf of a corporation or association upon a showing of adequate authorization;
 - d. An attorney who submits a notice of appearance and representation with the Debarment Hearing Board may represent the respondent; or
 - e. An individual not included within subsections 2.a. through 2.d. may represent the respondent upon an adequate showing, as determined by

the Debarment Hearing Board, that the individual possesses the legal, technical or other qualifications necessary to advise and assist in the presentation of the respondent's case.

- D. All testimony provided at the hearing shall be under oath.
- E. At the request of either the respondent or the City, the proceedings shall be transcribed by an authorized court reporter. The cost of the transcript of the proceedings shall be paid by the party requesting the transcript, or in the event both parties request the transcript, the cost shall be divided evenly between them.

2.12.120 - Standard of proof.

The cause for debarment must be established by a preponderance of the evidence.

2.12.130 - Burden of proof.

- A. The City has the burden of proof to establish the cause for debarment. The respondent has the burden of proof to establish mitigating circumstances.
- B. Where the proposed debarment is based upon a conviction, civil judgment, or a debarment by another governmental agency and the City submits evidence as to the existence of such, the City shall be deemed to have met its burden of proof to establish cause for debarment.

2.12.140 - Closing of the hearing record.

- A. The closing of the hearing record may be postponed by the Debarment Hearing Board, in its discretion, in order to permit the admission of other evidence into the record. In the event further evidence is admitted, each party shall be given an opportunity within a reasonable time to respond to such evidence.
- B. Once the Debarment Hearing Board deems the hearing to be concluded there shall be no further proceedings before it or evidence accepted by it on the cause for debarment unless a request is made in writing within three days following the conclusion of the hearing and good cause shown.

2.12.150 - Rules of evidence.

- A. Every party shall have the right to present its case or defense by oral or documentary evidence and to submit rebuttal evidence. The Debarment Hearing Board may, within its discretion, permit cross-examination of witnesses on request. The Debarment Hearing Board may exclude irrelevant, immaterial or unduly repetitious evidence.
- B. The debarment hearing need not be conducted according to technical rules relating to evidence and witnesses except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law statutory rule which might make improper the admission of the evidence over objection in civil actions.

- C. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.
- D. The rules of privilege as set forth in the California Code of Civil Procedure shall apply.
- E. The Debarment Hearing Board has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.
- F. The Debarment Hearing Board shall not have the power to compel any witness or party to give evidence in contravention of any evidentiary privilege recognized under applicable law, including, but not limited to, the Fifth Amendment privilege against self-incrimination under the Constitution of the United States of America and the attorney-client privilege.

2.12.160 - Scope of debarment.

- A. Debarment of a contractor or affiliate under this chapter constitutes debarment of all its specifically identified principals, individuals, divisions and other organizational elements from all contracts and covered and related transactions with the City, unless the debarment decision is limited by its terms to one or more principals, individuals, divisions or other organization elements or to specific types of transactions.
- B. As may be appropriate, the debarment action may include any affiliate of the participant that is specifically named and given notice of the proposed debarment and an opportunity to respond.
- C. The debarment of a contractor and its affiliates under this chapter may include the debarment of any other business that is, has been or will be controlled or owned by the contractor and its affiliates, or by any entity owned or controlled by a person or persons who own a controlling interest in a contractor and its affiliates, then or at the time the debarment was imposed.

2.12.170 - Period of debarment.

Debarments shall be for a period commensurate with the seriousness of the respondent's conduct, up to a maximum of five years.

2.12.180 - Debarment decision.

- A. The debarment decision shall be made within 45 days after conclusion of the hearing, unless the Debarment Hearing Board extends this period for good cause.
- B. In debarment actions where any respondent fails to provide any submission in opposition by the time provided in Subsection 2.12.070 A., the Debarment Hearing Board may, in its discretion, decide against the respondent, and notice shall be provided by the City Administrator;

- C. Written findings of fact shall be prepared if requested by the parties. The Debarment Hearing Board shall base its decision on the facts as found, together with any information and argument submitted by the parties and any other information in the administrative record.
- D. If the Debarment Hearing Board decides to impose debarment, it shall forward its decision, in writing, to the President of the City Council and the City Administrator.
- E. The City Administrator shall, within 45 days of the close of the hearing, provide notice to the respondent which notice shall include, but not be limited to, the following:
 - 1. Reference to the notice of proposed debarment;
 - 2. Whether the Debarment Hearing Board determined that cause for debarment has been established;
 - 3. If the cause for debarment has been established:
 - a. Specifying the reasons for debarment;
 - b. Stating the period of debarment, including effective dates;
 - c. Advising of the scope of the debarment;
 - d. The time period in which the respondent may submit an appeal under this section.
- F. The notice to the respondent shall be in writing, signed by the City Administrator, and transmitted by certified mail, return receipt requested. ~~The Office of the City Attorney will be consulted on all debarment actions prior to the notice being sent to the respondent.~~

2.12.190 - Excluded contractor list.

The City shall maintain an "excluded contractor list." Such list shall contain the names of all contractors that have been temporarily suspended or debarred by the City and suspended or debarred by any local, state or federal agency, and shall state the period of the suspension and/or debarment.

2.12.200 - Effect of debarment.

- A. Persons and contractors debarred are ineligible for City contracts and excluded from covered and related transactions as participants, principals, subcontractors or subconsultants for the period set forth in the City debarment order. Such persons or contractors shall be placed on the excluded contractor list. For the period of debarment, City shall not solicit or accept offers from or award contracts to such persons or contractors; nor shall City accept bids including debarred persons or contractors as subcontractors, or consider for award any proposal that identifies debarred persons or contractors as subcontractors, sub-consultants or team members. Persons and contractors debarred are also excluded from conducting business with the City as agents

- or affiliates of other persons or contractors. For purposes of this section, persons on the excluded contractor list are referred to as "listed persons."
- B. City will include notice to interested and solicited parties of the excluded contractor list in solicitations for bids and proposals.
 - C. Persons and contractors debarred are excluded from acting as individual sureties to any person, contractor, principal or participant.
 - D. Contracting officers shall review all bids and all proposals upon opening or receipt, whichever is applicable, for listed persons and shall reject bids that include listed persons, or notify persons submitting a proposal for professional services that include listed persons that such proposal cannot be considered for award unless listed persons are removed.
 - E. Proposals, quotations, or offers received from any listed person shall not be evaluated for award nor shall discussions be conducted with a listed person during a period of ineligibility. If the period of ineligibility expires or is terminated after bid opening in response to a solicitation for bids or price quotations, or after the deadline for submission of proposals for professional services, the City shall not consider such bids, quotations, proposals or offers.
 - F. Immediately prior to award, the contracting officer shall again review the excluded contractors list to ensure that no award is made to a person or contractor on such list.
 - G. Persons who participate in City transactions during the period of their debarment will not be paid for goods and services provided and their contracts shall be deemed void.

2.12.210 - Imputed conduct.

- A. The conduct of the type described in Section 2.12.050 by an officer, director, shareholder, partner, employee, principal, affiliate or other individual associated with a contractor may be imputed to the contractor when the conduct occurred in connection with the individual's performance or duties for or on behalf of the contractor, or with the contractor's knowledge, approval or acquiescence. The contractor's acceptance of the benefits derived from the conduct shall constitute evidence of such knowledge, approval or acquiescence.
- B. The conduct of the type described in Section 2.12.050 by a contractor may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the contractor who participated in, knew of, or had reason to know of the contractor's conduct.
- C. The conduct of the type described in Section 2.12.050 by one contractor participating in a joint venture or similar arrangement may be imputed to the other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval or acquiescence.

2.12.220 - Continuation of current contracts.

- A.** The City shall not award additional contracts to or in any way extend the duration of or increase current contract amounts with, persons or contractors who have been debarred or are proposed for debarment; nor shall the City award additional contracts or extend the duration of or increase a current contract amount that identifies or lists a person or contractor debarred or proposed for debarment as a subcontractor, subconsultant or team member, or who are listed persons.

2.12.230 - Restrictions on subcontracting.

When a person or contractor is debarred or proposed for debarment City shall not award a contract that includes such person or contractor as a subcontractor, supplier, subconsultant, team member or other party to the contract.

2.12.240 - Actions other than *debarment*.

Amendment forwarded by Finance Committee: In the event that the City determines that a contractor's acts or omissions are insufficient to warrant debarment, the City Administrator may take one or more of the following actions at the direction of the City Council, provided that the City Administrator carries out contractor negotiations and all other administrative tasks expressly or implicitly required for the options described:

Amendment that complies with the City Charter [Retain current language set forth below:]

In the event that the City determines that a contractor's acts or omissions are insufficient to warrant debarment, the City Administrator may take one or more of the following actions:

A. Voluntary Exclusion.

1. The City and a contractor *may* agree to a voluntary exclusion of the contractor and any of its principals and/or affiliates from participation in City contracts and covered and related transactions for a period of up to five years.
2. A contractor and any of its principals and/or affiliates who agree to voluntary exclusion shall be placed on the excluded contractor list.
3. A contractor and any of its principals and/or affiliates who participate in City contracts and covered and related transactions during the period of their voluntary exclusion will not be paid for goods and services provided, and may be considered for debarment.

- B. **Consent Decree.** A contractor and any of its principals and/or affiliates found to be in violation of one or more provisions of this chapter may enter into a settlement in the form of a consent decree with the City. The consent decree will specifically provide that the person will refrain from the act(s) or omission(s) that had been found to be in violation of this chapter. A consent decree may be entered into alone or in conjunction with one or more of the procedures described in this section.
- C. **Warning Letter.** Where there appears to be an act or omission in violation of this chapter, a warning letter may be issued to the contractor and any of its principals and/or affiliates. In all subsequent transactions between the contractor and any of its principals and/or affiliates and the City, the warning letter will be considered notice concerning such acts or omissions and may be submitted as evidence in a subsequent debarment proceeding.

2.12.250 - Judicial review.

- A. Judicial review of any final decision reached by the City under this chapter shall be conducted by the Superior Court of the County of Alameda, pursuant to an administrative writ of mandate as described under Section 1094.5 of the Code of Civil Procedure (CCP), provided that the petition for writ of mandate is filed within the time limits set forth in Section 1.20.010, which incorporates the limitation on the filing of actions provided in the Code of Civil Procedure Section 1094.6 for administrative determinations of the City.
- B. In every final decision reached under this chapter, notice of such final decision shall only be given directly to the respondent and such notice shall explain that CCP Section 1094.6 governs the time period within which judicial review of any such final decision must be sought. Final notice to the respondent shall conclude with the following statement:

THE CITY HAS REACHED A FINAL DECISION IN THE ADMINISTRATIVE MATTER PENDING BEFORE THE CITY. IF YOU CHOOSE TO SEEK JUDICIAL REVIEW OF CITY'S FINAL DECISION IN THIS MATTER, SUCH ACTION SHALL BE INITIATED UNDER CCP SECTION 1094.5 AND TIME LIMITS FOR FILING SUCH AN ACTION AS ARE SET FORTH IN CCP SECTION 1094.6. IT IS YOUR SOLE RESPONSIBILITY TO TAKE WHATEVER ACTION YOU DEEM APPROPRIATE IN RESPONSE TO THIS NOTICE.

2.12.260 - Pre-emption.

In the event any contract is subject to federal and/or state laws that are inconsistent with the terms of this chapter, such laws shall control.

