

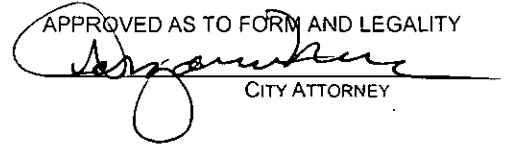
Revised

FILED
OFFICE OF THE CITY CLERK
OAKLAND

APPROVED AS TO FORM AND LEGALITY

INTRODUCED BY COUNCILMEMBER DESLEY BROOKS

2007 DEC 13 PM 5:57


CITY ATTORNEY

ORDINANCE NO. _____ C.M.S.

ORDINANCE ESTABLISHING A PROMPT PAYMENT POLICY REQUIRING PAYMENT WITHIN 4520 BUSINESS DAYS AFTER RECEIPT OF AN INVOICE FOR PURCHASE OF GOODS AND/OR SERVICES APPLICABLE TO 1) THE CITY WITH RESPECT TO CONTRACTS LET DIRECTLY TO LOCAL BUSINESSES, 2) TO NON-PROFIT AND FOR-PROFIT ENTITIES CONTRACTED TO MANAGE OR OPERATE CITY FACILITIES OR PUBLIC PROGRAMS OR CONCESSIONS ON CITY-OWNED PROPERTY, AND 3) TO CITY CONTRACTORS WITH RESPECT TO THEIR SUBCONTRACTORS, AND IMPOSING INTEREST PENALTIES FOR VIOLATIONS, TO BE CODIFIED AT OAKLAND MUNICIPAL CODE TITLE 2, CHAPTER 2.06

Whereas, the City of Oakland is committed to supporting, maintaining and fostering and foster the development of a healthy businesses community in Oakland and has maintained a Local and Small Business Enterprise program since 1992 for this purpose; and

Whereas, businesses based in Oakland and subcontractors that participate in City of Oakland contracts for goods, construction and services experience payment related issues and delays by having to navigate through varying processes used by numerous city departments and, in many cases, by not knowing or communicating with the appropriate department contact(s); and

Whereas, Oakland contractors and subcontractors on such City contracts also experience payment delays and related issues that can result in cash flow problems affecting the viability of those businesses and result in delayed or poor performance; and

Whereas, Oakland contractors and subcontractors may experience the same or similar payment and cash flow problems in their contracts with non-profit and for-profit entities that are hired to manage and/or operated City facilities, programs, concessions or public programs on City of Oakland property; and

Whereas, market data indicates that it would better serve the interests of the City and the Oakland business community to establish a ~~fifteen~~twenty (4520) day payment cycle for local contractors and all subcontractors that participate in City and City management and operation contracts for goods, construction or services; and

Whereas, it would better serve the interests of the City and the Oakland business community to make project funds more available to local prime contractors and subcontractors by prohibiting the retention of contractor funds for goods and materials, by requiring expedited release of contractor retention in proportion to delivery of services, by requiring expedited pass-through of mobilization fees paid by the City to subcontractors; and

Whereas, it would better serve the interests of the City and the Oakland business community to post payment, retention release and mobilization fee payments on the City's website to allow contractors to monitor the status of their projects; and

Whereas, it would better serve the interests of the City and the Oakland business community to appoint a liaison as a single point of contact to address payment issues with City agencies, departments and manager and operators;

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

Section 1. The Oakland Municipal Code is amended to add the Prompt Payment Ordinance at Title 2, Chapter 2.06 as follows:

Chapter 2.06 Prompt Payment

2.06.010. Definitions. The following definitions apply to this Chapter:

"City" as used in this Chapter shall mean the City of Oakland as a municipal organization, City Agencies or Departments or City officials authorized by the City Council or City Administrator to enter into purchase contracts on behalf of the City of Oakland when acting in his/her official capacity.

"Claim" as used in this Chapter shall mean a bill, invoice or written request for payment provided by the vendor. Written request includes "contract" as defined below.

"Claimant" as used in this Chapter means a prime local contractor or subcontractor that files a claim with the City for overdue payment and associated interest penalties.

"Disputed Invoice" as used in this Chapter means an improperly executed invoice or invoice that contains errors or requires additional evidence of its validity.

"Local Business" as used in this Chapter and in accord with the City of Oakland Local and Small Local Business Enterprise Program means a business: (a) with a substantial presence in the city of Oakland's geographic boundaries, (b) with a full operation conducting business for at least 12 consecutive months in the City of Oakland, (c) with a valid City of Oakland business tax certificate, and (d) that is an independent business headquartered in Oakland.

"Local Prime Contractor" as used in this chapter means a "local business" as defined above that is in direct or in privity of contract with the City of Oakland.

"Goods" as used in this chapter means products, goods, materials, equipment or other tangible items rendered pursuant to a purchase contract.

"Invoice" as used in this Chapter means a bill or claim that requests payment for goods and/or services rendered pursuant to a City purchase contract by a local prime contractor or by a subcontractor.

"Managers and Operators" as used in this Chapter shall mean a non-profit or for-profit business that is contracted by the City of Oakland to operate and/or manage City programs,

programs open to the public on City of Oakland property, City facilities or concession businesses on City of Oakland property.

“Purchase contract” as used in this chapter means any enforceable City of Oakland agreement executed expressly for the purchase, lease or rental of goods and/or services, including purchase orders, sub-purchase orders, delegated purchase orders, service agreements or subcontracts. Purchase contracts must be approved and executed in accordance with all purchasing requirements of the City of Oakland. Claimants shall not be entitled to relief, hereunder, for payment delays that occur prior to the proper execution of a purchase contract.

“Services” as used in this Chapter means any and all services rendered pursuant to a purchase contract including, but not limited to, professional, scientific or technical services.

“Subcontractor” as used in this chapter means a subcontractor, supplier, vendor or any business or organization, other than the prime contractor, that delivers goods and/or services in connection with a purchase contract.

“Undisputed Invoice” as used in this Chapter means an invoice executed by the claimant for goods and/or services rendered in connection with a purchase contract for which additional evidence is not required to determine its validity. Undisputed invoices include:

1. a once disputed invoice which has been corrected or for which additional evidence of its validity has been provided and received by the City, the prime contractor or subcontractor responsible for issuing payment.
2. an improper invoice whether goods and/or services have been received by the City, the prime contractor or subcontractor responsible for issuing payment, but the City, the prime contractor or subcontractor responsible for issuing payment fails to notify the claimant that the invoice is improper within 15 working days of receipt of the invoice.

2.06.020. Purpose. The purpose of this Prompt Payment Ordinance is to establish policies and procedures to assure that local contractors and all subcontractors working on City of Oakland purchase contracts receive prompt payment, and to enhance and increase local business contracting opportunities with the City of Oakland by establishing: 1) shortened payment requirements for City of Oakland businesses and all subcontractors, regardless of location, that provide goods and/or services in connection with a City of Oakland contract purchase contract, and 2) a City liaison to serve as a single point of contact to address payment delays and other issues relative to City of Oakland purchase contracts.

2.06.030. Local Business and Subcontractor Payment Liaison.

- A. The City will appoint a single point of contact (Liaison) to address invoice payment or other issues raised by City of Oakland Local Prime Contractors or any subcontractor in connection with City of Oakland purchase contracts for goods and/or services, or invoice payment issues raised by a subcontractor in connection with a City of Oakland Manager/Operator contract. The Liaison position will be assigned to perform duties within the Office of Contract Compliance. The Liaison will be the City's central point of

contact for local prime contractors and subcontractors, and will be responsible for coordinating the actions required to resolve issues with City agencies and departments and Manager/Operators.

- B. The Office of Contract Compliance will establish a City-wide procedural mechanism to identify local contractors, will inform such businesses of the program through electronic means as well as through existing and ongoing training programs and workshops, and will issue a statement of the requirements of this ordinance with bid notices and requests for proposals/qualifications.

2.06.040. Local Prime Contractors, Contractor Retention.

- A. Local Prime Contractors. The City of Oakland shall pay all Local Prime Contractors for goods and/or services rendered pursuant to a purchase contract within **fifteentwenty (1520) business days** after receipt of an undisputed invoice. In the event an invoice is disputed, the City shall notify the subcontractor and Liaison in writing within **threefive (35) business days** of receiving the disputed invoice that there is a bona fide dispute, in which case the City may withhold the disputed amount but shall pay the undisputed amount.
- B. Retention.
 - 1. City shall not withhold any monies as project retention associated with the rendering of goods; and
 - 2. City shall release retention held for services in proportion to the percentage of completed services rendered by a prime contractor for which payment is due and undisputed within **five (5) business days** of payment.

2.06.050. Subcontractor Payment, Retention, Mobilization Fees.

- A. Prompt Payment. All Manager/Operators, City prime contractors and subcontractors shall pay their subcontractors for goods and/or services rendered in connection with a purchase contract within **fifteentwenty (1520) business days** of receipt of the subcontractor's undisputed invoice. In the event an invoice is disputed, Manager/Operators, prime contractors and subcontractors shall notify the Liaison in writing within **threefive (35) business days** of receiving the disputed invoice that there is a bona fide dispute, in which case the prime contractor or subcontractor may withhold the disputed amount but shall pay the undisputed amount.
- B. If a subcontractor files a claim for all or a portion of a disputed invoice pursuant to Section 2.06.080 below, Manager/Operators or contractors shall be required to post with the City cash, a certified check, or a bond in an amount sufficient to cover the disputed amount and penalty. Upon the Liaison's determination that the invoice is valid the cash, certified check or bond shall be released to the claimant. If the Liaison finds in favor of the contractor the cash, certified check or bond shall be returned to the contractor. If the Manager/Operator or contractor fails or refuses to post security, the Liaison may withhold funds from the next progress payment sufficient to cover the claim.
- C. Affidavit Reporting Subcontractor Payments. Contracts in which subcontracting is used shall require the prime contractor or subcontractor, within **five (5) business days**

following receipt of a payment from the City, to file an affidavit, under penalty of perjury, that he or she has paid all subcontractors. The affidavit shall provide the names and address of all subcontractors and the amount paid to each.

D. Retention.

1. City Manager/Operators, prime contractors and subcontractors shall not withhold any monies for project retention associated with the rendering of goods; and
2. City Manager/Operators, prime contractors and subcontractors shall release retention held for services in proportion to the percentage of subcontractor services for which payment is due and undisputed within **five (5) business days** of payment. City Manager/Operators, prime contractors and subcontractors shall file notice with the City **within five (5) business days** of release of retention.

E. Mobilization Fee. Prime contractors and subcontractors shall pay subcontractors that will render goods and/or services their portion of mobilization fees within **Five (5) business days** of being paid such fees. Prime contractors and subcontractors shall file notice with the City **within five (5) business days** of payment of mobilization fees to a subcontractor.

F. Website Posting. Information regarding City's retention release and payment of mobilization fees shall be posted on the City's Website **within five (5) business days** of such payment or release. Information regarding City Manager/operators, prime contractor and subcontractor retention release and payment of mobilization fees, and affidavits reporting subcontractor payments shall be posted on the website within **five (5) business days** of the filing of such notices and affidavits with the City.

2.06.070. Interest Penalty.

A. If any amount due by the City to a Local Prime Contractor for goods and/or services rendered pursuant to a purchase contract is not timely paid in accordance with this Chapter, the Local Prime Contractor is entitled to interest penalty in the amount of ten (10%) of the improperly withheld amount per yearmonth for every month that payment is not made, provided the Local Prime Contractor agrees to release the City from any and all further claims for interest penalties that may be claimed or collected on the amount due and paid. Local Prime Contractors that receive interest penalties for late payment pursuant to this Chapter may not seek further interest penalties on the same late payment in law or equity.

B. If any amount due by a Manager/Operator to a claimant for goods and/or services rendered pursuant to a Manager/Operator purchase contract is not timely paid in accordance with this Chapter, the claimant is entitled to interest penalty in the amount of ten (10%) of the improperly withheld amount per yearmonth for every month that payment is not made, provided the claimant agrees to release the Manager/Operator and City from any and all further claims for interest penalties that may be claimed or collected on the amount due and paid. Claimants that receive interest penalties for late payment pursuant to this Chapter may not seek further interest penalties on the same late payment in law or equity.

C. If any amount due by a prime contractor or subcontractor to any claimant for goods

and/or services rendered in connection with a purchase contract is not timely paid in accordance with this Chapter, the prime contractor or subcontractor shall owe and pay to the claimant interest penalty in the amount of ten (10%) of the improperly withheld amount per ~~year~~month for every month that payment is not made, provided the claimant agrees to release the prime contractor or subcontractor from any and all further interest penalty that may be claimed or collected on the amount paid. Claimants that receive interest penalties for late payment pursuant to this Chapter may not seek further interest penalties on the same late payment in law or equity.

2.06.070. Bid Solicitations, Request For Proposals/Qualifications, Contracts.

- A. All notices inviting bids, requests for proposals/qualifications and city contracts for the purchase of goods and/or services, and requests for proposals/qualifications and contracts for Manager/Operators as defined in Section 2.06.010, above, shall contain the following or substantially equivalent language:

This contract is subject to the Prompt Payment Ordinance of Oakland Municipal Code, Title 2, Chapter 2.06. The Ordinance requires that, unless specific exemptions apply, Contractor and its subcontractors shall pay undisputed invoices of their subcontractors for goods and/or services within ~~fifteen~~**twenty (20) business days** of submission of invoices unless the Contractor or its subcontractors notify the Liaison in writing within ~~three~~**five (5) business days** that there is a bona fide dispute between the Contractor or its subcontractor and claimant, in which case the Contractor or its subcontractor may withhold the disputed amount but shall pay the undisputed amount.

Disputed payments are subject to investigation by the City of Oakland Liaison and, and upon the filing of a compliant, Contractor or its subcontractors opposing payment shall provide security in the form of cash, certified check or bond to cover the disputed amount and penalty during the investigation. If Contractor or its subcontractor fails or refuses to deposit security, the City will withhold an amount sufficient to cover the claim from the next Contractor progress payment. The City, upon a determination that an undisputed invoice or payment is late, will release security deposits or withholds directly to claimants for valid claims.

Contractor and its subcontractors shall not be allowed to retain monies from subcontractor payments for goods as project retention, and are required to release subcontractor project retention in proportion to the subcontractor services rendered, for which payment is due and undisputed, within **five (5) business days** of payment. Contractor and its subcontractors shall be required to pass on to and pay subcontractors mobilization fees within **five (5) business days** of being paid such fees by the City.

For the purpose of posting on the City's website, Contractor and its subcontractors, are required to file notice with the City of release of retention and payment of mobilization fees, **within five (5) business days** of such payment or release; and, Contractor is required to file an affidavit, under penalty of perjury, that he or she has paid all subcontractors, within **five (5) business days** following receipt of payment

from the City, The affidavit shall provide the names and address of all subcontractors and the amount paid to each.

- B. Any contractor or subcontractor that delivers goods and/or services pursuant to a purchase contract, shall include the same or similar provisions as those set forth in this Section 2.06.070 in their subcontracts.

2.06.080. Complaint and Investigation.

- A. Any claims made pursuant to Sections 2.06.040 and 2.06.050 above are subject to investigation and notice of violation and demand for payment and interest penalties by the Liaison. A local prime contractor or subcontractor who alleges violation of any provision of this chapter may report such acts to the Liaison.
- B. Complaints shall be handled as follows:
 - 1. The complainant shall submit a completed complaint form and copies of invoices or billing documents that have been submitted to the City, to a City purchase contractor or to a Manager/Operator. To expedite investigation, complainant shall also submit any documents in their possession showing that his/her goods and/or services or other deliverables have been rendered to and inspected or reviewed and accepted by the City or Manager/Operator in connection with the claim.
 - 2. The Liaison shall collect a security deposit in the form of cash, certified a check, or bond in an amount sufficient to cover the claim from the Manager/Operator or contractor that has disputed the invoice. If a Manager/Operator or contractor that is required to post security fails or refuses to do so, the Liaison may withhold funds from the next progress payment sufficient to cover the claim. Upon the Liaison's determination that the invoice is valid the cash, certified check or bond shall be released to the claimant. If the Liaison finds in favor of the Contractor the cash, certified check or bond shall be returned to the Contractor.
 - 3. The Liaison shall contact the City agency, department, Manager/Operator or contractor responsible for payment within ~~threefive~~ (35) businesses days of receipt of the complaint form to investigate the claim. The Liaison's determination of whether an invoice is valid shall be based on the following:
 - i) Whether the invoice conformed to requirements defined in Section 2.06.020 of this Chapter, at the time of submission to the contractor,
 - ii) Whether there is a discrepancy between the invoice or claimed amount and the provisions of the purchase contract,
 - iii) Whether there is a discrepancy between the invoice or claimed amount and either the contractor's actual delivery of goods and/or services to the City, or the City's acceptance of such goods and/or services,
 - iv) Whether the City Agency, Prime Contractors or subcontractor responsible for payment provided timely notice of the disputed invoice as required under 2.06.050.A, and

- v) Whether additional evidence supporting the validity of the invoice or claimed amount must be provided by the claimant.
- 4. There shall be no appeal of the Liaison's determination in favor of the claimant. If, however, the Liaison determines that the claimant's invoice provides insufficient evidence for payment, the claimant shall be advised of the additional information required for payment and given an opportunity to provide the same.
- 5. When the Liaison determines that a violation of this Chapter has occurred, the Liaison shall assess interest penalties at the rate provided in Section 2.06.060 of this Chapter and issue a demand to the City employee responsible for administering the related purchase contract, the Manager/Operator, the prime contractor or the subcontractor responsible for the late payment. City shall issue a check for the amount of the undisputed claim and interest penalties assessed by the Liaison to the Local Prime Contractor **within threefive (53) business days** of the date of the Liaison determination. The City may not appeal seek review by the City Administrator of Liaison determinations for claims submitted by Local Prime Contractors within five (5) business days of the date of determination.

2.06.090. Administrative Procedures and Regulations. The City Administrator shall develop administrative procedures and regulations for determining City, Manager/Operator, prime contractor and subcontractor compliance with, and full implementation of, this Chapter including, but not limited to, establishment of an interest penalty scheme and investigation procedures.

2.06.100. Exemptions. City and Manager/Operator purchase contracts are exempt from this Chapter when:

- A. Issued in response to a local disaster or emergency provided: i) the emergency or disaster is acknowledged by a public declaration of emergency or disaster of the United States, State of California, County of Alameda, Oakland City Council or City Administrator, ii) the purchase contract is issued without advertising or competitive bid pursuant to the City Administrator's emergency authority in Oakland Municipal Code Chapter 2, Sections 2.04.020.G or H, and iii) the purchase contract is completed within the declared period of emergency or disaster.
- B. State or Federal laws preempt the local or other regulation of the purchase, in which case State or Federal mandates shall take precedence,

2.06.110. Applicable to New Contracts. Except for procurement or construction contracts for which fixed, sealed bids were required on a date prior to the date of final adoption of this ordinance set forth below, the provisions of this Ordinance shall apply to any purchase contract or Manager/Operator contract, or amendment, extension, change order or modification of such contracts, and to any Manager/Operator contract, amendment, extension or modification, entered into or consummated after the effective date of the ordinance codified in this chapter.

Section 2. The City shall implement an electronic billing and payment system for purchasing contracts by February 1, 2008.

Section 23. Severability. If any article, section, subsection sentence, clause or phrase of this ordinance or exhibit is held to be invalid or unconstitutional, the offending portion shall be severed and shall not affect the validity of remaining portions which shall remain in full force and effect.

Section 34. Effective Date. This ordinance shall become effective on February 1, 2008~~immediately on final adoption if it receives six or more affirmative votes; otherwise it shall become effective upon the seventh day after final adoption.~~

IN COUNCIL, OAKLAND, CALIFORNIA, (DATE), 20(YEAR)

PASSED BY THE FOLLOWING VOTE:

AYES- BROOKS, BRUNNER, CHANG, KERNIGHAN, NADEL, QUAN, REID AND
 PRESIDENT DE LA FUENTE

NOES-

ABSENT-

ABSTENTION-

ATTEST:

LATONDA SIMMONS
City Clerk and Clerk of the Council
of the City of Oakland, California