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# AGENDA REPORT

**TO:** Sabrina B. Landreth  
City Administrator

**FROM:** Deborah Lusk-Barnes  
Director, Contracts and  
Compliance

**SUBJECT:** Border Wall Prohibition

**DATE:** October 11, 2017

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City Administrator Approval

Date:

10/12/17

## RECOMMENDATION

**Staff Recommends Adopting An Ordinance Amending The Oakland Municipal Code To Prohibit The City From Contracting With Companies Who Contract With The Federal Government To Provide Services Or Goods To Construct The Border Wall Referenced In Executive Order No. 13767, Dated January 25, 2017.**

## EXECUTIVE SUMMARY

On January 25, 2017, President Donald Trump issued Executive Order 13767, titled "Border Security and Immigration Enforcement Improvements". The order directs construction of a contiguous wall approximately 2,000 miles along the southern Mexico-United States border. On March 21, 2017, Oakland City Council adopted Resolution No. 86662 C.M.S. denouncing Executive Order No. 13767 such that unless and until Trump rescinds this order, directing, in its proprietary capacity, the City Administrator to, in instance where there is no significant additional cost, to be defined in regulations, or conflict with law; take action prohibiting Border Wall contractors (BWCs) from entering into city contracts; and prohibiting city staff from entering new or amending existing contracts or purchase agreements for the procurement of goods and/or services with BWCs.

In response to the directives of Resolution No 86662, staff developed a policy and procedures prohibiting BWCs from contracting with the City of Oakland; staff from contracting or amending agreements with them; and requiring all contractors/vendors and subcontractors to declare under penalty of perjury that they are not directly or indirectly under contractual agreement(s) to build, support, service, and/or maintain the operations of the "Border Wall" while competing for or under contract with the City of Oakland.

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## **BACKGROUND / LEGISLATIVE HISTORY**

The City of Oakland is committed to the fair and just treatment of immigrants, regardless of their ethnicity, religion or place of origin, and the City has been on record since July 8, 1986 as a City of Refuge when it adopted Resolution No. 63950, promising to protect undocumented immigrants by not assisting in their prosecution, detainment and deportation based on the enforcement of federal immigration law.

On January 25, 2017, President Donald Trump issued Executive Order 13767, titled "Border Security and Immigration Enforcement Improvements" and on March 21, 2017, the City Council adopted Resolution No. 86662 C.M.S. denouncing Executive Order No. 13767 "Border Security and Immigration Enforcement" to build a wall on the U.S.-Mexico border.

Resolution No 86662 states that unless and until President Donald J. Trump rescinds this Order, the Oakland City Council, in its proprietary capacity, directs the City Administrator – in instances where there is no significant additional cost, to be defined in regulations, or conflict with law – will develop, implement, monitor and enforce contracting policies that will direct city staff to refrain from entering into (formally bid/solicited and informally bid/solicited) all new or amended contracts to purchase all goods/commodities and services (i.e. professional, technical, scientific or financial services, goods, construction labor and materials or other services, or supplies) from businesses that enter into contracts to provide such services, goods, materials or supplies to build the U.S.-Mexico border wall (Border Wall Prohibition).

## **ANALYSIS**

Oakland has historically been and remains today a city of immigrants and refugees, with 27% of its residents being foreign born – 31 percent of whom were born in Mexico – and in all its forms, diversity provides a strong foundation of the City's economic vitality, cultural vibrancy and social character. The Oakland City Council in the past has recognized the contributions of immigrant communities in the City and throughout California.

The Border Wall will have negative impacts directly and indirectly Bay Area-wide. Per the 2010-2012 American Community Survey, almost one-third (30%) of residents in the Bay Area region (2.1 million) are immigrants and about 20% of all immigrants in the Bay Area (430,000) are undocumented. Approximately one in every 10 workers in California is an undocumented immigrant, contributing \$130 billion annually to California's gross domestic product.

In the Bay Area region, immigrants account for 37% of the labor force and undocumented immigrants are 7% of the total workforce. Immigrants – many of them undocumented – make up 83% of electrical, electronics, and electromechanical assemblers, 87% agricultural-product graders and sorters, 78% of miscellaneous agricultural workers (including animal breeders), 84% of maids and housekeeping cleaners, 63% of grounds maintenance workers, 61% of first-line supervisors of housekeeping and janitorial workers, 59% of janitors and building cleaners, 87% of sewing machine operators, 81% of tailors, dressmakers, and sewers, 80% of food processing workers, 77% of miscellaneous metal and plastic workers, 70% of cooks, 69% of dishwashers, and 54% of chefs and head cooks.

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In Alameda County, unauthorized immigrants comprise 6% of the total immigrant population. Children under the age of 18 are 23% of the total immigrant population, with 3% identified as undocumented immigrants. Children who reside with at least one undocumented immigrant parent constitutes 15% of the immigrant population. By comparison, in East Oakland, unauthorized immigrants make up 17% of the total immigrant population. It is estimated that 35% of children living in East Oakland are undocumented immigrants and have at least one undocumented parent.<sup>1</sup>

An article in the "Weekly Wastebasket" titled "Building a Wall of Waste"<sup>2</sup> reported that a "Border Wall" will have a staggering price tag. As far back as 2006, veteran border agents reported nearly insurmountable obstacles to constructing a "fence" citing rugged desert, creek beds, flash flooding etc. rendering the construction prohibitive.

The Department of Homeland Security, Customs and Border Protection (CBP) issued a notice indicating its intent to issue a solicitation on or about March 6, 2017 "for the design and build of several prototype wall structures in the vicinity of the United States border with Mexico", requiring submittal of concept papers by March 10, 2017, and submittal of responsive proposals by March 24, 2017. On September 26, 2017, contractors broke ground on eight prototypes. U.S. Customs and Border Protection stated that Prototypes must be completed within 30 days. Upon completion, they will be tested by the Department of Homeland Security. Next steps are not clear beyond this point. The contractors selected to compete include: Caddell Construction Co., based in Montgomery, Alabama, W.G. Yates Construction of Philadelphia, Mississippi, Texas Sterling Construction Co., based in Houston, and Fisher Sand and Gravel based in Tempe, Arizona.<sup>3</sup>

## APPLICATION OF POLICY

The United States Supreme Court has upheld the power of a municipality to make legitimate economic decisions without being subject to the restraints of the interstate commerce clause when it participates in the market place as a corporation or a citizen as opposed to exerting its regulatory powers. As such, the City of Oakland declares the right to measure the moral character of its business partners in determining with whom it seeks business relations.

- The application of the policy shall be within the following types of goods and services:
- Construction (including sub-contractors).
- Engineering (including sub-consultants).
- Planning.
- Information technology businesses and their subsidiaries.
- All financial institutions.
- Resources/logistics.

<sup>1</sup> Fact Sheet "Unauthorized and Uninsured", Enrico Marcelli and Manuel Pastor, San Diego State University and University of Southern California

<sup>2</sup> January 26, 2017 Weekly Wastebasket Volume: XXII No. 4

<sup>3</sup> Washington Times, August 31, 1917

- Communications and public relations surveillance and security.
- Other ancillary service providers related to construction of the U.S.-Mexico wall, engaged by contractors/vendors/suppliers which design and/or build the U.S.-Mexico wall.
- Current City of Oakland contracts with businesses that are contractually engaged to provide any services or such services or goods to build all or part the U.S.-Mexico wall, should not be renewed or otherwise extended.

Application of the Border Wall Prohibition policy will be folded into the City's current contracting and purchasing procedures whereby:

- The City will publish a list of BWCs providing goods or services under contract for work with the federal government and who support in any form or fashion, the construction, operation and/or maintenance of the border wall;
- City staff will be required to refrain from entering new or amending existing contracts to purchase professional, technical, scientific or financial services, goods, construction labor and materials or other services, or supplies from businesses engaged in the building, servicing and or maintenance of the border wall;
  - Evidence of staff's compliance will be reflected in the City Administrator's Contract Authority Check and a "Border Wall Compliance Certificate" issued by Contracts and Compliance.
  - The Border Wall Prohibition will be declared by way of Schedule W in **Attachment B**
  - All contractors/vendors and subcontractors will be required to declare under penalty of perjury that they are not and do not plan to participate in the building, servicing, maintenance of the operations of the "Border Wall" while under contract with the City.
  - This declaration will be provided through the signed "Schedule W" which will be inserted as part of the combined contract schedules.
- To maintain compliance throughout the life of the project, project staff will report to the assigned compliance officer any changes to the approved project teams as reflected in the compliant Schedules E and R.
- Prior to the City Council awarding any contract exceeding the City Administrator's contract limit to a vendor for the purpose of supplying a good/commodity or service to the City of Oakland, the City Administrator, designee, or designated official agent of the City of Oakland, shall require the contractor to stipulate, as a material condition of the contract, that it has not been hired to provide services, goods, products, equipment, or technology, etc. for the construction of the border wall, or any border wall work and does not intend to seek such work or provide such services for the duration of the City of Oakland contract. Contractor further will stipulate that failure to comply with the requirements of this Chapter 2.\_\_\_\_.0 shall constitute a material breach by Contractor of the terms of the Contract. The City in its sole discretion shall determine such failure.

- Language reflecting the Border Wall Prohibition will be folded in with all authorized standard boilerplate documents including "Terms and Conditions" as put forward by Purchasing Services.
- Required authorized standard City-wide boilerplate documents must include but may not be limited to:
  1. Professional Services Agreement (PSA) (including As-Needed and On Call Agreements).
  2. Construction contract boilerplate.
  3. Information Technology Service Agreement.
  4. Maintenance Agreements.
  5. Commodity Purchase Agreements.
  6. Request for Proposals/Qualifications (RFP/Q).
  7. Notices Inviting Bids (NIB).
  8. Informal Solicitations.
- Upon close out or completion of deliverables and prior to issuance of final payment (while honoring the Prompt Payment Ordinance) the vendor must submit a statement attached to the final invoice, under penalty of perjury, declaring compliance with the Border Wall Prohibition. An invoice is not declared fully complete unless and until the declaration of compliance is accepted.
- Unless otherwise waived per the conditions of the Ordinance, bids, proposals or submittals will be denied if the vendor is not in compliance with the Border Wall prohibition.
- In instances where there is no significant additional cost, to be defined in regulations, or conflict with law – to develop, implement, monitor and enforce contracting policies that will direct city staff to refrain from entering formally bid/solicited and informally bid/solicited for all new or amended contracts to purchase all goods/commodities and services.

"Declaration of Significant Cost" to justify a Limited Conditional Waiver will be recommended in writing by the director responsible for the city department in need of the good/commodity or service and approved by the City Administrator, official or designee.

Border Wall Prohibition Rules and Regulations are found in **Attachment A**.

### **FISCAL IMPACT**

It is not clear when a most responsive and responsible contractor or contractors will be selected. Staff recommends conducting a fiscal assessment six to eight months after contracts have been award. At that time staff, will have a better idea of the activity generated by the prohibition and will return to Council with a report on resources needed to maintain compliance and enforcement of the new policy.

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## **PUBLIC OUTREACH / INTEREST**

Internal and external outreach will include all city departments, local Chambers of Commerce, membership organizations, supporters and opponents of the policy. Business districts and council districts must be informed as well as a city-wide noticing using various business databases.

San Francisco, in the introduction of a similar Ordinance, proposed a public hearing. Staff recommends this option for City Council consideration.

## **COORDINATION**

During the implementation process, all departments must be informed and engaged in applying the Border Wall Prohibition policy. The key staff citywide will be those persons currently responsible for procurement of goods and services on behalf of the City and those entities responsible for serving the business community. Public Works, Department of Transportation, Contracts and Compliance, Purchasing Services, The Business Assistance Center, and Business Taxes will be key partners in the implementation process. Other localities with business databases will prove invaluable in the City's outreach efforts as well.

## **SUSTAINABLE OPPORTUNITIES**

***Economic:*** The Oakland City Council stands up for fiscally prudent, fair and compassionate spending of public funds by standing up to Executive Order "Border Security and Immigration Enforcement" as it directs the federal Administration to prioritize the use of Federal lands and funding for the enforcement of border security and the construction of the border wall. Government estimates put the cost of the U.S.-Mexico wall at \$21.6 billion. These are significant dollars that could be better used for other programs and services that serve and support the economy through strategies such as affordable housing, infrastructure, and education instead of threatening the health, safety and welfare of our immigrant families.

***Environmental:*** The Border Wall Prohibition may help to mitigate the negative environmental impacts created by influencing the market available to plan and construct the wall, excavate the land, acquisition of land owned by others, years of litigation over land ownership, and the visual image of a monument to separation, exclusion and division.

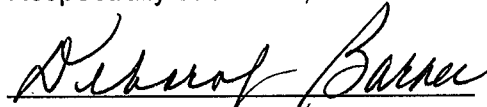
***Social Equity:*** The City of Oakland is committed to the fair and just treatment of immigrants, regardless of their ethnicity, religion or place of origin.

**ACTION REQUESTED OF THE CITY COUNCIL**

Staff recommends adopting an ordinance amending the Oakland Municipal Code to prohibit the City from contracting with companies who contract with the federal government to provide services or goods to construct the border wall referenced in Executive Order No. 13767, dated January 25, 2017.

For questions regarding this report, please contact Deborah Lusk-Barnes, Director, Contracts and Compliance, [dbarnes@oaklandnet.com](mailto:dbarnes@oaklandnet.com) (510) 238-6270.

Respectfully submitted,



Deborah Lusk-Barnes, Director  
Contracts and Compliance  
Office of the City Administrator

Reviewed By

Mary Mayberry  
Administrative Services Manager I

Attachments:

- A: Border Wall Rules and Regulations
- B: Border Wall Schedule W

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**RULES AND REGULATIONS**

**SECTION I.** Title 2 of the Oakland Municipal Code is amended to add Chapter 2. \_\_ ”  
**ORDINANCE AMENDING THE OAKLAND MUNICIPAL CODE TO PROHIBIT THE CITY FROM CONTRACTING WITH COMPANIES WHO CONTRACT WITH THE FEDERAL GOVERNMENT TO PROVIDE SERVICES OR GOODS TO CONSTRUCT THE BORDER WALL REFERENCED IN EXECUTIVE ORDER NO. 13767, DATED JANUARY 25, 2017**

, to read as follows:

**2. \_\_.010. Purpose.** To mandate and direct the City Administrator – in instances where there is no significant additional cost, to be defined in regulations, or conflict with law – to refrain from entering into new or amended contracts to purchase professional, technical, scientific or financial services, goods, construction labor and materials or other services, or supplies from businesses that enter into contracts to provide such services, goods, materials or supplies to build the U.S.-Mexico border wall;

**2. \_\_.020. Definitions.**

*“Border wall” means, as defined in the Executive Order and in the Secure Fence Act of 2006, a contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier along the land border between the United States and Mexico, including all points of entry, as well as associated improvements to gain operational control along such land border, including but not limited to, roads, lighting, cameras, detection beams or devices, sensors or other such tools or instruments, or related cyber network or cloud computing , internet, or cloud-based computer technology or services.*

*“Border Wall Contract” means a contract with the Federal Government to provide services or goods to build the Border Wall.*

*“Border Wall Entity” means any corporation, partnership, individual, sole proprietorship, joint venture, or other non-governmental legal entity or combination thereof, which has submitted a bid or proposal in response to a procurement request, or otherwise proposes to enter into or has entered into a Border Wall Contract on or after January 25, 2017.*

*“Border Wall Work” means any services, work performed or products, materials, or goods provided pursuant to a Border Wall Contract.*

*“City” means the City of Oakland.*

*“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.*



"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. *Agreements advertised, solicited, or initiated prior to the Operative Date of this Chapter 2.\_\_\_\_\_, including amendments to existing Contracts. Only agreements first advertised, solicited, or initiated on or after the Operative Date are included in the definition of "Contract."*

*"Contracting Department" means the City department, office, board, commission, or other City agency authorized to enter into a Contract on behalf of the City.*

"Contractor" means any person, partnership, corporation, joint venture, company, individual, sole proprietorship, vendor or other non-governmental legal or 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.

"Commodities" shall include, but not be limited to, supplies, goods, commodities, vehicles, machinery, and equipment.

"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.

*"Duration of prohibition" governs the date at which the prohibition starts and when the prohibition is reviewed for further action. For contractors under contract to work on the Border Wall, the prohibition starts immediately upon the issuance of a "Certificate of Non-Compliance" and will be reviewed 5 years after completion of the Border Wall work.*

*"Executive Order" means the Executive Order entitled, "Border Security and Immigration Enforcement Improvements," Exec. Order No. 13,767, 82 Fed. Reg. 8793 (January 25, 2017).*

*"Limited Restricted Waiver" means that upon careful review, the City Administrator may issue a limited restricted waiver only in instances where there is a significant additional cost such that the expenditure will be fiscally imprudent; in the case of an emergency where the health safety and welfare concerns of Oakland residents are at issue; or this policy conflicts with law(s) specific to this prohibition.*

*"Operative Date" means 90 days after the effective date of this Chapter 2.\_\_\_\_*

"Professional Services" shall mean any skilled or licensed services including without limitation, any engineering, architectural, construction, financial or information technology contract, providing any consulting advice or technical assistance, or otherwise acting as an agent pursuant to a contractual agreement.

"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:

- Contractors (including direct subcontractors);
- Principal investigators;
- Loan officers;
- Staff appraisers and inspectors;
- Underwriters;
- Bonding companies;
- Appraisers and inspectors;
- Real estate agents and brokers;
- Management and marketing agents;
- 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;
- Vendors of materials and equipment in connection with an City contracting, agreement or activity;
- Closing agents;
- Turnkey developers of projects;
- Title companies;
- Escrow agents;
- Project owners;
- Employees or agents of any of the above.

## **2. .030 Border Wall Entity List**

*A. The City Administrator shall develop and post, using credible information available to the public, a list of Border Wall Entities as determined by the City Administrator to have entered into Border Wall Contracts. The City Administrator shall develop the initial list no later than the Operative Date, except that the City Administrator has the obligation to use his or her best efforts to develop the list as soon as practicable after enactment. Once developed, such list will be posted on the City Administrator's website, and updated twice a year thereafter.*

*B. Prior to the final development and posting of the list required to be produced pursuant to Section 2. \_\_.030 subsection A., and with each biannual update of the list, the City Administrator shall provide written notice to all Border Wall Entities to be included on the list, together with written notice informing such entity or person that inclusion on such list would make the entity or person unable to enter into Contracts with the City, and that such entity or person may apply to the City Administrator to appeal the City Administrator's decision and seek to be removed from such list pursuant to the requirements of 2. \_\_.030 subsection C, or may seek a court order for the same purpose.*

*C. In the event an entity or person included by the City Administrator on the list referenced in subsection 2. \_\_.030 subsection A appeals the City Administrator's decision, it must certify, in writing, to the City Administrator's satisfaction that such entity or person permanently has ceased performing such work, or obtains a court order from a court of competent jurisdiction that such entity or person shall be removed from such list due to the court's determination that such entity or person permanently has ceased working on a Border Wall Contract. If the City Administrator receives a satisfactory certification or court determination as described in the preceding sentence, then the City Administrator shall remove such entity or person from its list referenced in 2. \_\_.030 subsection A.*

## **2. \_\_.040. General Prohibited Purchasing Transactions, Licensed Contractors, Technology Vendors, Suppliers**

### **A. General prohibition**

1. The City of Oakland shall be prohibited from entering into any contractual agreement for the purchase of services, goods, equipment, *cyber network or cloud computing, internet, or cloud-based computer technology or services* with any "BORDER WALL ENTITY" individual, firm, or financial institution who provides any services, goods, equipment or information technology or cloud-based technology or services, to construction of the a wall along any part of the United States – Mexico border. Such prohibited contracts include, but are not limited to:
  - i. professional services, including but not limited to, financial, banking, architectural, engineering, design, information technology or consulting services.];
  - ii. construction or public works of improvement;

- iii. software, hardware, electronic equipment and other types of information technology or *related cyber network including, without limitation, cloud computing , internet, or cloud-based computer technology or services, or* digital purchases;
2. This subsection shall apply only to those contracts awarded by the City Council. For those contracts not awarded by the City Council, the City Manager shall promulgate an administrative instruction pursuant to Section VI so that City departments meet the intent of this Ordinance with respect to the award of professional service contracts.

#### B. Solicitations

*Contracting Departments shall include a reference to the prohibitions and requirements set forth herein in its solicitations for contracts, notice inviting bids/quotes, requests for quotes, requests for proposals/qualifications including without limitation for professional services, construction, information technology or cyber, internet, or cloud-based services. Contracting Departments will require all entities or persons that submit a bid or proposal in response to a solicitation for procurement for a Contract, or otherwise proposes to enter into a Contract, to certify that the entity or person is not identified on the list referenced in Chapter 2. .030 and that the entity or person will not enter into a Border Wall Contract during the term of the proposed Contract. All entities or persons that submit a bid or proposal in response to a solicitation for procurement for a Contract, or otherwise propose to enter into a Contract, shall execute an Affidavit as set forth in Chapter 2. .040 C below that the entity or person is not on the list referenced in Chapter 2. .030 and that it commits to not entering into a Border Wall Contract during the term of the proposed Contract.*

*The City will include a reference to the prohibitions set forth herein in its solicitations for contracts such as notices inviting bids/quotes, requests for quotes, requests for proposals/qualifications or any other type of submission for consideration to secure a City contract, including without limitation, to professional services, construction, information technology or related cyber network or cloud computing , internet, or cloud-based computer technology or services, or engineering, architectural, geo-technical, financial and other such technical services.*

#### C. Affidavit Required

- A. Prior to contracting with any firm or individual for the provision of professional services, the City Administrator, or any official agent of the City of Oakland, shall obtain from said firm or individual an affidavit stating that the policy of said firm or individual is to forego any contractual relations to provide construction, engineering, architectural, geo-technical, information or cyber technology, or any other type of professional services in connection with the Border Wall Work or Border Wall Contract, for the duration of the City of Oakland contract. The provisions of this Section shall apply to renewals of existing contracts as well as to

new contracts. The affidavit shall require said firm or individual to notify the City if it subsequently enters into any contractual agreement to work on the border wall.

2. The requirements of this Section shall be satisfied by ensuring that professional services are provided only by firms, individuals or financial institutions who have submitted affidavits pursuant to subsections \_\_\_\_ or \_\_\_\_, and upon the promulgation of the administrative instruction issued pursuant to subsection \_\_\_\_.

#### D. Non-complaint Businesses

*City will reject bids, quotations, proposals or other submission whereby contractors or proposers refuse to submit or fail to provide, the affidavit referenced above, or that refuse to comply with the policy, unless a waiver is granted by the City Administrator pursuant to section 2.\_\_.050 . . . . below.”] City will reject any bids, quotes, proposals or responses to City solicitations from any contractor or proposer that refuses to submit or otherwise fails to comply with the affidavit requirements of Chapter 2.\_\_40 C.*

At the City Administrator's discretion, the City Administrator may prepare a list of firms or individuals potentially providing professional services to the City of Oakland who have submitted an affidavit that complies with the preceding subsection. Said affidavits shall be filed with the City Clerk.

#### E. Contract Stipulation

Prior to the City Council awarding any contract to a vendor for the purpose of supplying a commodity to the City of Oakland, the City Manager, or any official agent of the City of Oakland, shall require the contractor to stipulate, as a material condition of the contract, that it has not been hired to provide services, goods, products, equipment, or information or cyber technology, construction, architectural, engineering, or any professional services . . . . . for the construction of the Border Wall, or any Border Wall Work or provide such services for the duration of the City of Oakland contract. Contractor further will stipulate that failure to comply with the requirements of this Chapter 2.\_\_.0 shall constitute a material breach by Contractor of the terms of the Contract. The City is its sole discretion shall determine such failure.

#### **2.\_\_.050. NonApplicability, Exceptions and Waiver.**

The prohibition on contracting with firms that work on the Border Wall may be waived by the City Council or City Administrator for purchases within their respective authorities for the following reasons:

- i. *There is no other qualified responsive bidders, proposers, or prospective vendors or providers that comply with the requirements of this Chapter 2.\_\_\_\_ to perform the applicable Contract, or as determined in writing by the City Administrator, the City would otherwise be unable to obtain essential goods or services on a reasonable basis; or]*
- ii. *The City Administrator determines, pursuant to applicable provisions of the Oakland Municipal Code, that the Contract is necessary to respond to an emergency which endangers the public health or safety; and further determines that no entity that complies with the requirements of this Chapter 2.\_\_\_\_ and is capable of responding to the emergency is immediately available to perform the required services; or*
- iii. *The City Administrator determines that there is a substantial difference in cost to purchase professional or technical services from another provider so that it impractical, fiscally imprudent or cost-prohibitive to contract with the sole or the few contractors or proposers that comply with this Chapter 2.\_\_\_\_.*
- iv. *A Contractor has demonstrated that it has ceased to perform Border Wall Work, so long as the scope of those services has ceased before the Operative Date.*

The City Administrator shall maintain a record documenting the basis for, and periodically report to the City Council, every exercise of waiver implemented pursuant to this subsection, or any determination of nonapplicability or exception. The City Manager shall develop rules and regulations which specifically address both the criteria and reporting procedures. Such rules and regulations shall be approved by the City Council.

## **2.\_\_\_\_.060. Rules and Regulations**

The City Administrator shall be authorized to promulgate any rules and regulations necessary or appropriate to carry out the purposes and requirements of this Ordinance, effective upon approval of the City Council.

**SECTION 2.\_\_\_\_.070. Severability.** If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held to be invalid or unconstitutional by decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the Chapter. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, clause or phrase thereof irrespective of the fact that one or more other sections, subsections, clauses or phrases may be declared invalid or unconstitutional.

**SECTION 2.\_\_\_\_.080. Effective Date.** This ordinance shall become effective immediately on final adoption if it receives six or more affirmative votes; otherwise it shall become effective upon the seventh day after final adoption.

**SCHEDULE W  
BORDER WALL PROHIBITION**

(This form is to be completed by Contractors and their sub-contractors, and all Vendors seeking to do business with the City of Oakland)

I, \_\_\_\_\_, the undersigned, a  
(Name)

\_\_\_\_\_ of \_\_\_\_\_  
(Title) (Business Entity)

(hereinafter referred to as Business Entity am duly authorized to attest on behalf of the business Entity)

- I. Neither this Business Entity nor any of its subsidiaries, affiliates or agents are under contract with any branch of the federal government to plan, design, build, support, repair and/or maintain any part of the border wall nor do we anticipate entering into or competing for such work for the duration of a contract or contracts with the City of Oakland.
- II. The appropriate individuals of authority are cognizant of their responsibility to notify the city contact person/Project Manager, invoice reviewer or the City Administrator's Office of Contracts and Compliance if any of the identified above decide to compete, plan, design, build, support, repair and/or maintain any part of work or servicing the border wall.
- III. To maintain compliance, upon review and approval of invoices, the contractors/vendors hereby agree to submit attached to each invoice, a declaration on company stationery that the company remains in compliance with the Border Wall Prohibition and will not seek or secure a contract related to all aspects of the Border Wall
- IV. Upon close out or completion of deliverables and prior to issuance of final payment (while honoring the Prompt Payment Ordinance) I agree to submit a statement attached to the final invoice, under penalty of perjury, declaring full compliance with the Border Wall Prohibition. I understand that an invoice is not declared fully complete and accepted unless and until the declaration of compliance is accepted.
- V. I declare under penalty of perjury that the above will not, have not and do not plan to participate in the building, servicing, maintenance of the operations of the so called "Border Wall".

I declare that I have read and understand Ordinance # \_\_\_\_\_ and that the foregoing is true and correct to the best of my knowledge.

\_\_\_\_\_  
(Date)

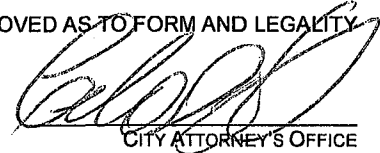
\_\_\_\_\_  
(Name and Signature )

\_\_\_\_\_  
(Name of Business Entity)

\_\_\_\_\_  
(Street Address)

\_\_\_\_\_  
(City, State and Zip Code)

\_\_\_\_\_  
(Name of Parent Company)



CITY ATTORNEY'S OFFICE

INTRODUCED BY COUNCILMEMBER \_\_\_\_\_ 2017 OCT 12 PM 3:37

## OAKLAND CITY COUNCIL

ORDINANCE NO. \_\_\_\_\_ C.M.S.

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ORDINANCE AMENDING THE OAKLAND MUNICIPAL CODE TO PROHIBIT THE CITY FROM CONTRACTING WITH COMPANIES THAT CONTRACT WITH THE FEDERAL GOVERNMENT TO PROVIDE SERVICES OR GOODS TO CONSTRUCT THE BORDER WALL REFERENCED IN EXECUTIVE ORDER NO. 13767, DATED JANUARY 25, 2017

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:

SECTION I. Title 2 of the Oakland Municipal Code is amended to add Chapter 2. \_”  
ORDINANCE AMENDING THE OAKLAND MUNICIPAL CODE TO PROHIBIT THE CITY FROM CONTRACTING WITH COMPANIES THAT CONTRACT WITH THE FEDERAL GOVERNMENT TO PROVIDE SERVICES OR GOODS TO CONSTRUCT THE BORDER WALL REFERENCED IN EXECUTIVE ORDER NO. 13767, DATED JANUARY 25, 2017

, to read as follows:

2. \_\_.010. **Purpose.** To mandate and direct the City Administrator – in instances where there is no significant additional cost, to be defined in regulations, or conflict with law – to refrain from entering into new or amended contracts to purchase professional, technical, scientific or financial services, goods, construction labor and materials or other services, or supplies from businesses that enter into contracts to provide such services, goods, materials or supplies to build the U.S.-Mexico border wall;

2. \_\_.020. **Definitions.**

“Border wall” means, as defined in the Executive Order and in the Secure Fence Act of 2006, a contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier along the land border between the United States and Mexico, including all points of entry, as well as associated improvements to gain operational control along such land border, including but not limited to, roads, lighting, cameras, detection beams



*or devices, sensors or other such tools or instruments, or related cyber network or cloud computing, internet, or cloud-based computer technology or services.*

*"Border Wall Contract" means a contract with the Federal Government to provide services or goods to build the Border Wall.*

*"Border Wall Entity" means any corporation, partnership, individual, sole proprietorship, joint venture, or other non-governmental legal entity or combination thereof, which has submitted a bid or proposal in response to a procurement request, or otherwise proposes to enter into or has entered into a Border Wall Contract on or after January 25, 2017.*

*"Border Wall Work" means any services, work performed or products, materials, or goods provided pursuant to a Border Wall Contract.*

*"City" means the City of Oakland.*

*"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.*

*"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. Agreements advertised, solicited, or initiated prior to the Operative Date of this Chapter 2.\_\_\_\_\_, including amendments to existing Contracts. Only agreements first advertised, solicited, or initiated on or after the Operative Date are included in the definition of "Contract."*

*"Contracting Department" means the City department, office, board, commission, or other City agency authorized to enter into a Contract on behalf of the City.*

*"Contractor" means any person, partnership, corporation, joint venture, company, individual, sole proprietorship, vendor or other non-governmental legal or 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.*

*"Commodities" shall include, but not be limited to, supplies, goods, commodities, vehicles, machinery, and equipment.*

"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.

*"Duration of prohibition" governs the date at which the prohibition starts and when the prohibition is reviewed for further action. For contractors under contract to work on the Border Wall, the prohibition starts immediately upon the issuance of a "Certificate of Non-Compliance" and will be reviewed 5 years after completion of the Border Wall work.*

*"Executive Order" means the Executive Order entitled, "Border Security and Immigration Enforcement Improvements," Exec. Order No. 13,767, 82 Fed. Reg. 8793 (January 25, 2017).*

"Limited Restricted Waiver" means that upon careful review, the City Administrator may issue a limited restricted waiver as set forth in subsection 2. \_\_.050 only in instances where there is a significant additional cost such that the expenditure will be fiscally imprudent; in the case of an emergency where the health safety and welfare concerns of Oakland residents are at issue; or this policy conflicts with law(s) specific to this prohibition.

*"Operative Date" means 90 days after the effective date of this Chapter 2. \_\_\_\_\_*

"Professional Services" shall mean any skilled or licensed services including without limitation, any engineering, architectural, construction, financial or information technology contract, providing any consulting advice or technical assistance, or otherwise acting as an agent pursuant to a contractual agreement.

"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 at any tier);
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.

## **2. .030 Border Wall Entity List**

*A. The City Administrator shall develop and post, using credible information available to the public, a list of Border Wall Entities as determined by the City Administrator to have entered into Border Wall Contracts. The City Administrator shall develop the initial list no later than the Operative Date, except that the City Administrator has the obligation to use his or her best efforts to develop the list as soon as practicable after enactment. Once developed, such list will be posted on the City Administrator's website, and updated twice a year thereafter.*

*B. Prior to the final development and posting of the list required to be produced pursuant to subsection 2. .030 A., and with each biannual update of the list, the City Administrator shall provide written notice to all Border Wall Entities to be included on the list, together with written notice informing such entity or person that inclusion on such list would make the entity or person unable to enter into Contracts with the City, and that such entity or person may apply to the City Administrator to appeal the City Administrator's decision and seek to be removed from such list pursuant to the requirements of subsection 2. .030 C., or may seek a court order for the same purpose.*

*C. In the event an entity or person included by the City Administrator on the list referenced in subsection 2. .030 A. appeals the City Administrator's decision, it must certify, in writing, to the City Administrator's satisfaction that such entity or person permanently has ceased performing such work, or obtains a court order from a court of competent jurisdiction that such entity or person shall be removed from such list due to the court's determination that such entity or person permanently has ceased working on a Border Wall Contract. If the City Administrator receives a satisfactory certification or court determination as described in the preceding sentence, then the City Administrator shall remove such entity or person from its list referenced in subsection 2. .030 A.*

## 2.040. General Prohibited Purchasing Transactions, Licensed Contractors, Technology Vendors, Suppliers

### A. General prohibition

1. The City of Oakland shall be prohibited from entering into any contractual agreement for the purchase of services, goods, equipment, *cyber network or cloud computing, internet, or cloud-based computer technology or services* with any "BORDER WALL ENTITY" individual, firm, or financial institution who provides any services, goods, equipment or information technology or cloud-based technology or services, to construction of the a wall along any part of the United States – Mexico border. Such prohibited contracts include, but are not limited to:
  - i. professional services, including but not limited to, financial, banking, architectural, engineering, design, information technology or consulting services.];
  - ii. construction or public works of improvement;
  - iii. software, hardware, electronic equipment and other types of information technology or *related cyber network including, without limitation, cloud computing , internet, or cloud-based computer technology or services,* or digital purchases;
2. This subsection shall apply only to those contracts awarded by the City Council. For those contracts not awarded by the City Council, the City Administrator
3. shall promulgate an administrative instruction pursuant to Section VI so that City departments meet the intent of this Ordinance with respect to the award of professional service contracts.

### B. Solicitations

*Contracting Departments shall include a reference to the prohibitions and requirements set forth herein in its solicitations for contracts, notice inviting bids/quotes, requests for quotes, requests for proposals/qualifications including without limitation for professional services, construction, information technology or cyber, internet, or cloud-based services. Contracting Departments will require all entities or persons that submit a bid or proposal in response to a solicitation for procurement for a Contract, or otherwise proposes to enter into a Contract, to certify that the entity or person is not identified on the list referenced in Chapter 2.030 and that the entity or person will not enter into a Border Wall Contract during the term of the proposed Contract. All entities or persons that submit a bid or proposal in response to a solicitation for procurement for a Contract, or otherwise propose to enter into a Contract, shall execute an Affidavit as set forth in Chapter 2.040 C below that the entity or person is not on the list referenced in Chapter 2.030 and that it commits to not entering into a Border Wall Contract during the term of the proposed Contract.*

*The City will include a reference to the prohibitions set forth herein in its solicitations for contracts such as notices inviting bids/quotes, requests for quotes, requests for*

*proposals/qualifications or any other type of submission for consideration to secure a City contract, including without limitation, to professional services, construction, information technology or related cyber network or cloud computing , internet, or cloud-based computer technology or services, or engineering, architectural, geo-technical, financial and other such technical services.*

#### C. Affidavit Required

1. Prior to contracting with any firm or individual for the provision of professional services, the City Administrator, or any official agent of the City of Oakland, shall obtain from said firm or individual an affidavit stating that the policy of said firm or individual is to forego any contractual relations to provide construction, engineering, architectural, geo-technical, information or cyber technology, or any other type of professional services in connection with the Border Wall Work or Border Wall Contract, for the duration of the City of Oakland contract. The provisions of this Section shall apply to renewals of existing contracts as well as to new contracts. The affidavit shall require said firm or individual to notify the City if it subsequently enters into any contractual agreement to work on the border wall.
2. The requirements of this Section shall be satisfied by ensuring that professional services are provided only by firms, individuals or financial institutions who have submitted affidavits pursuant to subsection 2. \_\_.040 C or granted a waiver under subsection 2. \_\_050, and upon the promulgation of the administrative instruction issued pursuant to subsection 2. \_\_060, the compliance therewith by those entities seeking to contract with the City.

#### D. Non-complaint Businesses

*City will reject bids, quotations, proposals or other submission whereby contractors or proposers refuse to submit or fail to provide, the affidavit referenced above, or that refuse to comply with the policy, unless a waiver is granted by the City Administrator pursuant to subsection 2. \_\_.050 below. City will reject any bids, quotes, proposals or responses to City solicitations from any contractor or proposer that refuses to submit or otherwise fails to comply with the affidavit requirements of Chapter 2. \_\_40 C.*

At the City Administrator's discretion, the City Administrator may prepare a list of firms or individuals potentially providing professional services to the City of Oakland who have submitted an affidavit that complies with the preceding subsection. Said affidavits shall be filed with the City Clerk.

#### E. Contract Stipulation

Prior to the City Council awarding any contract to a vendor for the purpose of supplying a commodity to the City of Oakland, the City Administrator, or any official agent of the City of Oakland, shall require the contractor to stipulate, as a material condition of the contract, that it has not been hired to provide services, goods, products, equipment, or information or cyber technology, construction, architectural, engineering, or any professional services . . . . for the construction of the Border Wall, or any Border Wall Work or provide such services for the duration of the City of Oakland contract. Contractor further will stipulate that failure to comply with the requirements of this Chapter 2.\_\_\_\_.0 shall constitute a material breach by Contractor of the terms of the Contract. The City is its sole discretion shall determine such failure.

**2.\_\_\_\_.050. Non-Applicability, Exceptions and Limited Restricted Waiver.**

The prohibition on contracting with firms that work on the Border Wall may be waived through a Limited Restricted Waiver by the City Council or City Administrator for purchases within their respective authorities for the following reasons:

- i. There is no other qualified responsive bidders, proposers, or prospective vendors or providers that comply with the requirements of this Chapter 2.\_\_\_\_ to perform the applicable Contract, or as determined in writing by the City Administrator, the City would otherwise be unable to obtain essential goods or services on a reasonable basis; or]*
- ii. The City Administrator determines, pursuant to applicable provisions of the Oakland Municipal Code, that the Contract is necessary to respond to an emergency which endangers the public health or safety; and further determines that no entity that complies with the requirements of this Chapter 2.\_\_\_\_ and is capable of responding to the emergency is immediately available to perform the required services; or*
- iii. The City Administrator determines that there is a substantial difference in cost to purchase professional or technical services from another provider so that it impractical, fiscally imprudent or cost-prohibitive to contract with the sole or the few contractors or proposers that comply with this Chapter 2.\_\_\_\_.*
- iv. A Contractor has demonstrated that it has ceased to perform Border Wall Work, so long as the scope of those services has ceased before the Operative Date.*
- v. This policy conflicts with law(s) specific to this prohibition.*

The City Administrator shall maintain a record documenting the basis for, and periodically report to the City Council, every exercise of Limited Restricted Waiver implemented pursuant to this subsection, or any determination of non-applicability or exception. The City Administrator shall develop rules and regulations or Administrative Instruction which specifically address both the criteria and reporting procedures. Such rules and regulations shall be approved by the City Council.

**2.\_\_\_\_.060. Rules and Regulations**

The City Administrator shall be authorized to promulgate any rules and regulations or Administrative Instruction, necessary or appropriate to carry out the purposes and requirements of this Ordinance, effective upon approval of the City Council.

**SECTION 2. \_\_.070. Severability.** If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held to be invalid or unconstitutional by decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the Chapter. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, clause or phrase thereof irrespective of the fact that one or more other sections, subsections, clauses or phrases may be declared invalid or unconstitutional.

**SECTION 2. \_\_.080. Effective Date.** This ordinance shall become effective immediately on final adoption if it receives six or more affirmative votes; otherwise it shall become effective upon the seventh day after final adoption.

2119206v1

IN COUNCIL, OAKLAND, CALIFORNIA,

PASSED BY THE FOLLOWING VOTE:

AYES - BROOKS, CAMPBELL WASHINGTON, GALLO, GIBSON MCELHANEY, GUILLÉN, KALB, KAPLAN AND  
PRESIDENT REID

NOES -

ABSENT -

ABSTENTION -

ATTEST:

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

Date of Attestation:

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**NOTICE AND DIGEST**

**ORDINANCE TITLE (Indent half inch both sides and justified)**

**ORDINANCE AMENDING THE OAKLAND MUNICIPAL CODE TO PROHIBIT CITY FROM CONTRACTING WITH COMPANIES THAT BID OR PROPOSE ON CONTRACTS OR CONTRACT WITH THE FEDERAL GOVERNMENT TO PROVIDE SERVICES OR GOODS TO CONSTRUCT THE BORDER WALL REFERENCED IN EXECUTIVE ORDER NO. 13767, DATED JANUARY 25, 2017**

**Ordinance amending the Oakland Municipal Code to prohibit City from contracting with companies who bid or propose on contracts or contract with the Federal Government to provide services or goods to construct the border wall referenced in Executive Order No. 13767, dated January 25, 2017.**

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