

FILED
OFFICE OF THE CITY CLERK
OAKLAND

CITY OF OAKLAND

AGENDA REPORT

2009 JAN 15 PM 5:24

TO: Office of the City Administrator
ATTN: Dan Lindheim
FROM: Department of Contracting and Purchasing
DATE: January 27, 2009

RE: **Supplemental Report on the Proposed Debarment Ordinance Adding Chapter 2.12, Debarment Program, to the Oakland Municipal Code.**

SUMMARY

At the December 2, 2008 Public Works Committee meeting, staff presented additional supplement information relative to a proposed Debarment Program adding Chapter 2.12 to the Oakland Municipal Code.

The Public Works Committee directed staff to review other municipal debarment ordinances to determine the best approach for Council's consideration. In addition, staff was asked to include definitions that best fit the scope of the ordinance, and to provide a matrix to include timelines.

After review of other municipal debarment ordinances, staff recommends a combination of debarment strategies from the Los Angeles County Metropolitan Transportation Authority, San Diego, and the ordinance initially proposed, which was based on the Port of Oakland's debarment ordinance.

The original ordinance is more reflective of current City processes and language and, most importantly, speaks to due process and identifies the authority of the City Administrator as the "Debarment Official". The San Diego and LA County MTA Ordinances provide a more detailed foundation for the determination of cause, a shorter turnaround time, details regarding contractor due process, specific language regarding temporary suspension, good working definitions and the use of a debarment hearing board.

FISCAL IMPACT

There are no fiscal impacts.

BACKGROUND

On June 10, 2008, staff presented an informational report on construction projects that were closed out by a City agency but not the Social Equity Division, Department of Contracting and Purchasing (DC&P), during the Fiscal Year (FY) 03-04 and 04-05. The content of the original report included discussions of Local Employment compliance, project closeouts and a proposed contractor debarment ordinance. Staff subsequently provided three supplemental reports on July 22, October 28, and December 2, 2008 specific to these topics.

Item: _____
Public Works Committee
January 27, 2009

At the last committee meeting, the initial report was bifurcated into a contractor debarment report and Local Employment policy recommendations. The Public Works Committee asked that staff return to Rules and schedule a separate report of Local Employment policy recommendations and return to the Public Works Committee with additional information relative to a more comprehensive debarment ordinance.

A telephone survey was conducted for the purpose of gaining insight into potential obstacles or impediments and to glean perspectives on the successes and failures of said ordinances. Generally the comments were positive. Overall, municipalities reported that a debarment program/policy was helpful. Vincent Amerson of the County of Los Angeles stated, "Our contractors seem to be aware of our increased periods for debarment and this seems to have deterred them from violating the terms and conditions of our contracts, which has led to a decrease in the number of debarments the past few years." Other localities believe that debarments do not occur often and businesses are responsible and responsive.

General Overview of Other Debarment Ordinances: Five (5) debarment ordinances were considered. A summary is provided as Attachment 1.

(1) City and County of San Francisco: The City and County of San Francisco's Debarment Ordinance provides for hearings to commence within 120 days of the Notice of the Proposed Debarment. The Contractor has 15 days after receipt of the "Counts and Allegations" to request an administrative hearing. The term of debarment is not to exceed five (5) years. The ordinance allows for the contractor to object to the hearing officer within five (5) working days of appointment. The ordinance is silent on the contractor's right to appeal the determination.

(2) County of Los Angeles: The County of Los Angeles provides a six to eight week notice before the initial debarment hearing. The ordinance also provides for a non-responsible determination finding. A non-responsibility finding refers to a finding that a bidder/proposer is incapable of performing as a responsible contractor based on past performance history or other relevant documentation. A Contractor Hearing Board (CHB) comprised of County employees that can recommend debarment to the Los Angeles County Board of Supervisors is another component of this ordinance. The Board can modify, deny, or adopt the recommendation of the CHB. A debarment finding becomes final upon the approval of the Board.

(3) Port of Oakland: The Port of Oakland's Debarment Ordinance provides a 120-day timeline for the hearing to commence upon the Notice of Proposed Debarment. The Hearing may occur in person or in writing upon agreement by all parties. Within 15 days of the hearing or written presentations, the Hearing Officer issues a "Statement of Decision". The Executive Director then determines whether to impose debarment if so ordered. The term and effect of the debarment can be for a term of debarment not to exceed five years.

(4) Los Angeles County Metropolitan Transportation Authority (MTA): Los Angeles County provides that a debarment proceeding shall be initiated within at least ninety (90) days prior to the

Item: _____
Public Works Committee
January 27, 2009

debarment hearing. The Respondent must submit a response to the Debarring Official's notice within 30 days of receiving Notice of Proposed Debarment. The ordinance also provides for an Executive Review Panel, which is responsible for ensuring a fair and efficient administration of debarment proceedings. The Executive Review Panel is comprised of three members designated by the Debarring Official to preside over the hearing. The Chief Executive Officer of the MTA or his/her designee is the Debarring Official. They are responsible for initiating recommended debarment actions and obtaining concurrence of the Office of the General Counsel.

(5) The City of San Diego: The City of San Diego does not state timelines. It establishes a procedure for debarring and suspending a contractor. It provides language allowing a contractor to be suspended for a temporary period pending the completion of an investigation. It provides a procedure for noticing but again no specific timeline. It also provides specific grounds for debarment and the term commensurate with said act. It establishes a Debarment Hearing Board and provides a procedure for hearing. The Ordinance also provides a right to appeal a debarment decision, but no timeline for said appeal. Of note in their Ordinance is Section 22.0826, which allows the City of San Diego at its discretion to execute a written agreement wherein the affected debarred contractor can agree not to bid for a period of one year in lieu of the City pursuing a one year debarment.

KEY ISSUES AND IMPACTS / PROGRAM

Definitions: At the request of the committee, the proposed Ordinance provides more detailed definitions to include, for example: (1) Affiliate, (2) City Contracting Policies, (3) Consent Decree, (4) Contracting Officer, (5) Debarment Hearing, and (6) Voluntary Exclusion. All definitions provide more direct guidance by framing the context of the scope and by clarifying terms specific to the proposed debarment program.

Grounds: More detailed examples and descriptions of grounds for debarment are provided in the proposed Ordinance. Including but not limited to the following, the City may debar a contractor if the City finds, in its discretion, that the contractor is responsible for:

1. Willful or intentional misconduct in connection with any City bid, request for qualifications, request for proposals, purchase order and/or contract; or
2. Willful or intentional failure to perform in accordance with contract terms; or
3. Commission of fraud or a criminal offense; or
4. 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; and
5. Debarment by any other governmental agency for the period imposed by that agency;

Noticing: The City and County of San Francisco and the Port of Oakland ordinances provide a 120-day timeline for a debarment hearing to commence upon notice to the contractor of the proposed debarment. The County of Los Angeles provides for a 6-8 week notice of debarment hearing. The City of San Diego did not provide a specific timeline for the hearing to commence upon notification

of the proposed debarment. The Los Angeles Metropolitan Transportation Authority (MTA) provides a ninety (90) day timeline for noticing of proposed debarment and 30 days to request hearing to commence upon notice of proposed debarment. Staff proposes that the City adopt the MTA ninety (90) day timeline for debarment hearings to commence upon notice of the proposed debarment. This will reduce the overall 120 day timeline by 30 days. A 90 day time line will provide staff sufficient time for more complicated cases to be addressed.

In a majority of the programs reviewed, the contractor must submit a written response within **15 days** of the receipt of the Notice of Proposed Debarment. A 15 day period in Oakland's ordinance will allow sufficient time for all parties.

Debarment Hearing Board: In addition to the appointment of a hearing officer, other entities use a hearing board, which in most cases is comprised of executive level employees within the agencies. Los Angeles County utilizes a contractor hearing board (CHB). Membership of the CHB is comprised of the executive level employees in various subject matter departments within the agency. The City Administrator's Office functions as the chair to call meetings as necessary to hear departmental debarment cases. The County Counsel acts as a legal advisor to the CHB. The Los Angeles County MTA utilizes an Executive Review Panel. The Executive Review Panel consists of a three member panel designated by the Debarring Official to preside over contractor suspension and debarment hearings and makes findings. Members of the panel are not to have been involved in the investigation of the grounds for debarment.

San Diego uses a Debarment Hearing Board similar to the MTA Executive Review Panel. The City Manager appoints three individuals who serve on the board. These individuals shall be unbiased and may be City employees, but shall not be employees who have participated in the decision to recommend the debarment nor are subject to the authority, direction or discretion of employees or have participated in the decision to recommend debarment. Staff recommends this structure for the City of Oakland.

Excluded Contractor List: Staff proposes a list of debarred firms to be placed on the "Excluded Contractor List" with the term of debarment and referred to as "Listed Persons". 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 in response to a solicitation for professional services, the City shall not consider such bids, quotations, proposals or offers.

Voluntary Exclusion: Staff proposes "voluntary exclusion" as an option to debarment proceedings in the event that the firm's acts or omissions are insufficient to warrant debarment. In this instance the City and the contractor may agree to a voluntary exclusion of the contractor and any of its principals and/or affiliates from City activities and transactions of a period of up to five (5) years. Contractors who are voluntarily excluded from participation in City transactions will be placed on the Excluded Contractor List.

SUSTAINABLE OPPORTUNITIES

Economic: Savings of tax dollars and cost of services to the City.

Environmental: No environmental opportunities have been identified.

Social Equity: No Social Equity opportunities have been identified.

DISABILITY AND SENIOR CITIZEN ACCESS

There are no ADA or senior citizen access issues contained in this report

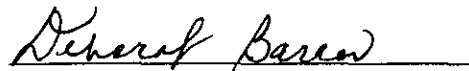
RECOMMENDATION(S) AND RATIONALE

It is recommended that Council accept the proposed Debarment Ordinance.

ACTION REQUESTED OF THE CITY COUNCIL

Accept the Debarment Ordinance and the additional information contained in this agenda report.

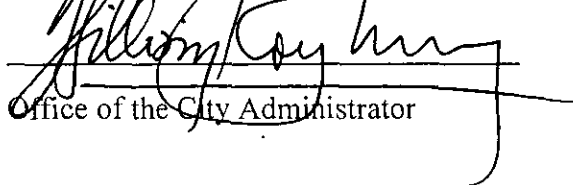
Respectfully submitted,



DEBORAH L. BARNES, Director
Department of Contracting & Purchasing

Prepared by:
Shelley Darensburg, Sr. CCO
DCP—Social Equity

APPROVED AND FORWARDED TO THE
PUBLIC WORKS COMMITTEE:


Office of the City Administrator

Item: _____
Public Works Committee
January 27, 2009

DEBAMRENT TIMELINE MATRIX

	Timeline for Hearing to Commence after Notice to Business of Proposed Debarment (Prehearing Procedures)	Timeline for Contractor to Request Hearing	Timeline to Appoint Hearing Officer	Object to Hearing Officer	Other Hearing Officer Options	Timeline for Response to Notice of Proposed Debarment	Timeline for City to Respond to Respondent's response	Debarment Decision	Appeal of Debarment Decision	Appeal Decision
City of Oakland (Proposed)	A debarment proceeding shall be initiated by Notice of Proposed Debarment to the contractor, its bonding companies and affiliates, at least 90 days prior to the date of the debarment hearing.	The contractor, its bonding companies and/or affiliates must submit a written response within 15 days of the receipt of the Notice of Proposed Debarment.	no timeline stated. City Administrator will appoint Debarment Hearing Board, or a retired judge	None	The City Administrator may appoint a retired judge if the debarment proceeding is unusually complex, expected to be of extended duration, or for any other reason.	The Respondent shall submit to the Debarment Board and serve in accordance with Section 8, a response to the Notice of proposed Debarment within thirty (30) days of receipt of the notice.	The City may submit to the Debarment Hearing Board and serve, in accord with Section 8, a reply to the Respondent's response not later than thirty (30) days after receiving the Respondent's response.	Within 45 days of the conclusion of the hearing, or in the event that the Respondent fails to file a written response within thirty (30) days of receipt of the City Administrator's Notice of Proposed Debarment, the allegations of the City may be deemed admitted, the Debarment Hearing Board may enter an order of default and transmit it to the City Administrator, who shall thereafter issue the debarment, with service on the parties.	No internal appeal within City process.	Recourse is to Superior Court.
City and County of San Francisco	The hearing date shall be set at the hearing officer's sole discretion, except the hearing must commence within 120 days of the date of the charging official served the Counts and Allegations. The hearing officer may extend the 120 days period only upon good cause shown; proceeding as expeditiously as possible is in the public's best interests.	15 days after receipt of the Counts and Allegations	15 days of the request for hearing	5 days	None	None	None	Within 15 days of the hearing, or of the date final written presentations are due, the hearing officer shall issue his/her Findings and Recommendation.	no appeal right stated	NA

	Timeline for Hearing to Commence after Notice to Business of Proposed Debarment (Prehearing Procedures)	Timeline for Contractor to Request Hearing	Timeline to Appoint Hearing Officer	Object to Hearing Officer	Other Hearing Officer Options	Timeline for Response to Notice of Proposed Debarment	Timeline for City to Respond to Respondent's response	Debarment Decision	Appeal of Debarment Decision	ATTACHMENT 1 Appeal Decision
County of Los Angeles	6-8 weeks notice "before the debarment hearing". Up to 40 days	5 day notice	no time line stated	no time line stated	Contractor Hearing Board 1. Composition/Structure The regular membership of the CHB is comprised of the CAO, ISD, OAAC, and DPW. The Departments of Health Services, Parks and Recreation and Public Social Services serve as alternate members. Alternate members normally serve only when more than one regular member cannot participate due to a matter before the CHB involving their departments. However, they may be called to serve			within 45 days after conclusion of hearing	within 21 days of receipt of the final decision	within 30 days of submission of appeal
Los Angeles County Metropolitan Transportation Authority (MTA)	90 days prior to the date of debarment hearing	30 days upon receipt of Debarring Official notice	no time line stated	no time line stated	Executive Review Panel			no time line stated	no time line stated	no time line stated
Port of Oakland	The hearing must commence within 120 days of the date of the served Notice of Proposed Debarment	15 days After Receipt of the Notice of Proposed Debarment	15 days after receipt of objection	5 days for contract or to reject	None			within 15 days of hearing	no appeal right stated	NA
San Diego	*15 days prior to the hearing	no time line stated	no time line stated	no time line	None			no time line stated	5 calendar days	no time line stated

FILED
OFFICE OF THE CITY CLERK
OAKLAND

2009 JAN 15 PM 5:25

APPROVED AS TO FORM AND LEGALITY

INTRODUCED BY COUNCILMEMBER _____

DRAFT

City Attorney

OAKLAND CITY COUNCIL

ORDINANCE No. _____ C.M.S.

ORDINANCE AMENDING TITLE 2 OF THE OAKLAND MUNICIPAL CODE TO ADD CHAPTER 2.12, DEBARMENT PROGRAM

WHEREAS, the City of Oakland seeks an administrative process to identify contractors and businesses that contract with and do business with the City and that have not complied with the City's contracting requirements, or that have engaged in willful misconduct, or demonstrated bad faith or engaged in fraudulent or bad business practices or methods, in order to avoid doing business with and not enter into any further contracts with such contractors;

WHEREAS, a responsible contractor demonstrates the attribute of trustworthiness as well as fitness, capacity and experience to satisfactorily perform the work; and

WHEREAS, it is the City's policy to conduct business only with responsible contractors; and

WHEREAS, the City of Oakland, through such an administrative process, wishes to declare any such potential bidders or contractors as ineligible and to disqualify such bidders or contractors from participating in the competitive process for future contracts or from entering into new contracts with the City; and

WHEREAS, the City has directed the City Attorney to prepare this ordinance for the purpose of establishing such an administrative process for the debarment of contractors or bidders that are determined by the Council, upon the recommendation of the City Administrator, to have engaged in such conduct; now, therefore

THE COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:

SECTION 1. Debarment. Title 2 of the Oakland Municipal Code is amended to added Chapter 2.12 entitled the "Debarment Program".

Chapter 2.12 DEBARMENT PROGRAM

2.12.010 - Definitions

The following terms, whenever used in this Ordinance, shall be construed as defined in

this section:

- (1) "*Affiliate*" means entities and/or persons are affiliates of each other:
 - i. Who is an assignee, successor, subsidiary of, or parent company of another *person* or *contractor*; or
 - ii. Who has the same or similar management of the debarred corporate or other legal entity; or
 - iii. 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*.
- (2) "*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*.
- (3) "*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.
- (4) "*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 authorized by law.
- (5) "*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."
- (6) "*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.

- (7) "*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.
- (8) "*Consent Decree*" means a settlement between the *City* and a *contractor* whereby the *contractor* promises to refrain from certain acts or omissions.
- (9) "*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*.
- (10) "*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*.
- (11) "*Contracting Officer*" means the *City* employee responsible for administering the *contract*.
- (12) "*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.
- (13) "*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 Ordinance 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.
- (14) "*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 5 years. A *contractor* and *affiliate* who has been determined by the *City* to be subject to such a prohibition is "debarred."

- (15) "*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 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.
- (16) "*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.
- (17) "*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*.
- (18) "*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.
- (19) "*Ineligible*" means excluded from *City* contracting (and subcontracting, if appropriate) pursuant to statutory or regulatory authority of the *City*.
- (20) "*Notice of Proposed Debarment*" means the written communication issued by the *City Administrator* and served on a *contractor* in accordance with **Section 8** of this Ordinance, 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 (5) 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*.
- (21) "*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*.
- (22) "*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.

- (23) "*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.
- (24) "*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.
- (25) "*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*.
- (26) "*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*:
- iv. *contractors* (including direct subcontractors);
 - v. principal investigators;
 - vi. loan officers;
 - vii. staff appraisers and inspectors;
 - viii. underwriters;
 - ix. bonding companies;
 - x. appraisers and inspectors;
 - xi. real estate agents and brokers;
 - xii. management and marketing agents;
 - xiii. 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;
 - xiv. vendors of materials and equipment in connection with an *City* contracting, agreement or activity;
 - xv. closing agents;
 - xvi. turnkey developers of projects;
 - xvii. title companies;
 - xviii. escrow agents;
 - xix. project owners;
 - xx. employees or agents of any of the above.
- (27) "*Respondent*" means a *person* against whom a debarment action has been

initiated.

(28) “*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*.”

(29) “*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*.

(30) “*Warning Letter*” means a written communication from the *City* to one or more *persons* concerning acts and omissions prohibited by this Ordinance.

2.12.020 - Coverage

B. This Ordinance applies to:

- i. 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;
- ii. 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;
- iii. Any *principal* of the *contractors* described in (i) and (ii) above, and;
- iv. Any *affiliate* of the *contractors* described in (i), (ii) or (iii) above.

2.12.030 - General

- A. The causes of *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 causes set forth in **Section 2.12.050** using the procedures set forth in **Sections 2.12.060 through 2.12.018**. The existence of a cause 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.
- 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:

- i. Specifically named, and
 - ii. Given written notice of the proposed *debarment* and an opportunity to respond
- D. 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 paragraph (C) of this section.
- B. 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 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.
- C. Basic documentation shall be developed that includes but is not limited to:
- i. The name of the specific *respondent(s)* against whom the action is being proposed or taken;
 - ii. The reason(s) for proposing the *debarment*;
 - iii. A short narrative stating the facts and/or describing other evidence supporting the reason(s) for the need to debar;
 - iv. The recommended time period for the *debarment*;
 - v. 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 proposed debarment.

2.12.050 - Debarment of Contractors - Grounds

The City may debar a contractor if the City finds, in its discretion, that the contractor is responsible for any of the following:

- i. Willful or intentional misconduct in connection with any City bid, request for qualifications, request for proposals, purchase order and/or contract including, without limitation, (a) collusion in obtaining a City contract or payment thereunder, (b) submission of false information in response to a solicitation, advertisement or invitation for bids or quotes, (c) submission of false information in response to a solicitation or request for qualifications or proposals, (d) submission of false claims as defined in California Government Code, Section 12650 et seq. and Title 31 U.S.C. Section 3729 et seq., (e) 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;
- ii. 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;
- iii. Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public agreement or transaction;
- iv. Violation of Federal or State antitrust statutes, including those prescribing price fixing between competitors, allocation of customers between competitors, and bid rigging;
- v. 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;
- vi. Taking or misappropriating City property or using City property, including real and personal property, in an unauthorized manner;
- vii. 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;

- viii. *Debarment* by any other governmental agency for the period imposed by that agency;
- ix. Violation of federal guidelines 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;
- x. Noncompliance with the prevailing wage requirements of the Labor Law, including any pending violations by the *contractor* or any *affiliate*;
- xi. Violation of any *City* requirements for providing a drug-free workplace;
- xii. Violation of any nondiscrimination provisions included in any public agreement or transaction;
- xiii. Any other significant Labor Law violations, including, but not limited to, child labor violations, failure to pay wages, or unemployment insurance tax delinquencies;
- xiv. A violation of a statutory or regulatory provision or requirement applicable to a public or private agreement or transaction;
- xv. Violation of any licensing, subletting or sublisting laws;
- xvi. Falsification, concealment, withholding and/or destruction of records;
- xvii. 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;
- xviii. Violation of any law, regulation or agreement relating to conflict of interest with respect to government funded contracting;
- xix. Knowingly or negligently doing business with a debarred, *suspended*, ineligible, or voluntarily excluded contractor in connection with a *covered* or *related transaction*;
- xx. Violation of a material provision of any settlement of a *debarment* action;
- xxi. Commission of an act or offense which indicates a lack of business integrity or business honesty;
- xxii. A history of 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;

- xxiii. A history of failure to perform or history of unsatisfactory performance of one or more *City contracting policies*;
- xxiv. 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 engagement in a pattern or practice 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;
- xxv. 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. 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:
 - i. That *debarment* is being considered;
 - ii. That *respondent* is *suspended* pending final determination in the *debarment* proceeding when the *City Administrator* has determined that *suspension* is in the public interest;
 - iii. Information on the specific *debarment* action proposed;
 - iv. 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;
 - v. Of the cause(s) relied upon under **Section 2.12.050** for proposing *debarment*;
 - vi. Of the provisions of **Sections 2.12.070 – 2.12.018**, and any other procedures, if applicable, governing *debarment* decision making;
 - vii. 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;
 - viii. The date, time and place of the *debarment* hearing;
 - ix. Of the potential effect of a *debarment*;

- x. Of the right to a hearing before the *Debarment Hearing Board*;
 - xi. 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.
 - xii. 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. The Office of the *City Attorney* will be consulted on all proposed *debarment* actions prior to the notice being sent to the *respondent(s)*.
 - D. 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**.
 - E. 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

- i. 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* within thirty (30) days of receipt which shall:
 - (1) State whether the *respondent* will appear at the hearing;
 - (2) 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.
- ii. 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.

- iii. 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.
- iv. In the event that the *respondent* fails to file a written response within thirty (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 *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 thirty (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

- i. 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**.
- ii. All documents required or permitted under this Ordinance, in addition to being served on *Debarment Hearing Board* in accordance with this Section, shall be served upon:
 - (1) the Office of the *City Administrator* at One Frank Ogawa Plaza, 3rd Floor, Oakland, CA 94612;
 - (2) The *Respondent* or *Respondent's* representative;

- iii. 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:
 - i. the *respondent* to be served or that *respondent's* designated representative or agent, at the last known address;
 - ii. the *respondent's* last known place of business; or
 - iii. 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 procedures set forth in **Sections 2.12.080.A and B.**

2.12.090 - Time Computation

Any period of time prescribed or allowed by this Ordinance 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(14)** of this Ordinance, appointed by the *City Administrator*, unless the *City Administrator* elects to appoint a retired judge under **Section 2.12.010.B** below.
- 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*

i. The *Debarment Hearing Board* shall conduct a fair and impartial hearing and, to that end, shall have the power to:

- (1) schedule the debarment hearing date, time and place;
- (2) postpone the *debarment* hearing date;
- (3) regulate the course of the hearing and the conduct of the parties and their counsel;
- (4) hold conferences to facilitate the settlement or simplification of the issues by consent of the parties or at the request of a party;
- (5) 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;
- (6) 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;
- (7) receive evidence and rule on offers of proof;
- (8) administer oaths and affirmations;
- (9) issue a final decision imposing *debarment* of the *respondent* with respect to future *City contracts* and *covered or related transactions*, or imposing no sanction;
- (10) 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;
- (11) 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.

ii. **Prohibition Against *Ex-parte* Communications**

- (1) *Ex-parte communications* are prohibited unless:
 - (a) the purpose and content of the communication has been disclosed in advance or simultaneously to all parties

involved; or

- (b) the communication is a request for information to the *Debarment Hearing Board's* staff concerning the status of the *debarment* action.

2.12.011- *Debarment* Hearing Procedure

A. Right to Hearing

- A. All *respondents* subject to *debarment* pursuant to this Ordinance shall be entitled to a hearing at the date, time and place set forth in the notice.
- B. 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 Section 2.12.070, the allegations of the *City* shall be deemed admitted, and an order of default shall be entered pursuant to Section 2.12.070(A) iv.
- C. 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

- A. The hearing shall be informal in nature and members of the *Debarment Hearing Board* may ask questions at any time.
- B. 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

- A. 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.
- B. The *respondent* may be represented at the hearing as follows:
 - (1) individuals may appear on their own behalf;

- (2) a member of a partnership or joint venture may appear on behalf of the partnership or joint venture;
 - (3) a bona fide officer may appear on behalf of a corporation or association upon a showing of adequate authorization;
 - (4) an attorney who submits a notice of appearance and representation with the *Debarment Hearing Board* may represent the *respondent*; or
 - (5) an individual not included within subsections (1) through (4) of this section 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.

2.12.012- Standard of Proof

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

2.12.013 - 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*.

2.12.014 - 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 3 days following the conclusion of the hearing and good cause shown.

2.12.015 - 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.

2.12.016 - Scope of Debarment

- A. *Debarment* of a contractor or affiliate under this Ordinance 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 Ordinance 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.

2.12.017 - Period of Debarment

Debarments shall be for a period commensurate with the seriousness of the *respondent's* conduct, up to a maximum of five (5) years.

2.12.018 - 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 Section 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 *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:
 - A. Reference to the notice of proposed *debarment*;
 - B. Whether the *Debarment Hearing Board* determined that cause for *debarment* has been established;
 - C. If the cause for *debarment* has been established:
 - (1) Specifying the reasons for *debarment*;

- (2) Stating the period of *debarment*, including effective dates;
- (3) Advising of the scope of the *debarment*;
- (4) 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*.

2.12.019 - "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*.

2.12.020 - 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 sub-consultants 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.

2.12.021 - Imputed Conduct

- A. The conduct of the type described in Section 2.12.050 above 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 above 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 above 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.

2.12.022 - Continuation of Current Contracts

- A. Notwithstanding *debarment*, or proposed *debarment*, the *City* may at its sole discretion continue *contracts* or subcontracts in existence at the time the *person* or *contractor* was debarred or proposed for *debarment*, unless the *City Administrator* directs otherwise. A decision as to the type of termination action, if any, to be taken should be made only after review by *City* contracting and technical personnel, the *City Attorney's Office* and the *City Administrator* to ensure the propriety of the proposed action.

- B. The *City* shall not award additional contracts or in any way extend the duration of or increase funding for current contracts, 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 funding for current contracts that identify a *person* or *contractor* debarred or proposed for debarment as a subcontractor, subconsultant or team member, or who are Listed Persons, unless specifically approved in writing by the *City Administrator* for good cause shown.

2.12.023 - 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*.

2.12.024 - Actions Other Than *Debarment*

In the event that it is determined that the *respondent's* acts or omissions are insufficient to warrant *debarment*, the *City Administrator* may take one or more of the following actions:

A. *Voluntary Exclusion*

- i. 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 (5) years.
- ii. A *contractor* and any of its *principals* and/or *affiliates* who agree to *voluntary exclusion* shall be placed on the *Excluded Contractor List*.
- iii. 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 Ordinance 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 Ordinance. 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 Ordinance, 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.

2.12.025 - Judicial Review.

- A. Judicial review of any final decision reached by the *City* under this ordinance 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 Oakland Municipal Code 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 Ordinance, 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.

2.12.026 - Pre-emption.

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

SECTION 2. Severability.

If any section, subsection, subpart or provision of this Ordinance, or the application thereof to any person or circumstances, is held invalid, the remainder of the provisions of this Ordinance and the application of such to other persons or circumstances shall not be affected thereby.

SECTION 3. Effective Date.

This ordinance shall become effective immediately on final adoption if it receives six or more affirmative votes on final adoption; otherwise it shall become effective upon the seventh day after final adoption.

IN COUNCIL, OAKLAND, CALIFORNIA, _____

PASSED BY THE FOLLOWING VOTE:

AYES- BROOKS, DE LA FUENTE, KAPLAN, KERNIGHAN, NADEL, QUAN, REID, and
PRESIDENT BRUNNER

NOES-

ABSENT-

ABSTENTION-

ATTEST: _____

LaTonda Simmons
City Clerk and Clerk of the Council
of the City of Oakland, California

DATE OF ATTESTATION: _____

DRAFT