

CITY OF OAKLAND
AGENDA REPORT

FILED
OFFICE OF THE CITY CLERK
OAKLAND

2008 NOV 24 PM 4:36

TO: Office of the City Administrator
ATTN: Dan Lindheim
FROM: Department of Contracting and Purchasing
DATE: December 2, 2008
RE: **Supplemental Report on the Proposed Ordinance Adding Chapter 2.05, Section 2.05.010-110 to the Oakland Municipal Code and Entitled the "Oakland Contractor Debarment Program".**

SUMMARY

At the October 28, 2008 Public Works Committee Meeting, Council considered a proposed debarment ordinance as an addition to Chapter 2.05, Section 2.05.010 to the Oakland Municipal Code. In addition, Council decided to separate out the Local Employment and Apprenticeship report with recommendations, and change that report to an action item as opposed to an informational report. The Local Employment and Apprenticeship report will be presented to the Public Works Committee on December 16, 2008.

The Public Works Committee directed staff to address the following:

- Definition of material breach and a list of conditions or causes that might constitute debarment actions;
- Appointment of a Hearing Officer and/or other alternative resources;
- Apply a 30 day hearing process as opposed to 180 day process;
- Confer with the Community and Economic Development Agency staff before returning to the Public Works Committee.

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 by Department of Contracting and Purchasing (DC&P), Social Equity Division, during the Fiscal Year (FY) 03-04 and 04-05. Staff subsequently provided two supplemental reports on July 22 and October 28, 2008.

This most recent report addresses several follow up questions posed by the Public Works Committee.

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KEY ISSUES AND IMPACTS

Definition of Material Breach:

Staff was directed to provide a definition of material breach. Several examples from different sources are provided for discussion purposes.

“material breach in contract law is a breach that is **substantial** and operates to excuse further performance by the aggrieved party. A material breach destroys the value of the contract and gives rise to an action for breach of contract.”¹

“material breach is a breach of contract that is so substantial that it defeats the purpose of the parties in making the contract and gives the non-breaching party the right to cancel the contract and sue for damages.”²

An interesting workshop discussion of material breach was provided by Hugh J. Gorman, III, a partner in Hinckley, Allen & Snyder LLP's Construction Law Group.

What is the difference between a "**material**" breach and a "**non-material**" breach of a construction contract? Legal dictionaries and common law decisions define a “breach of contract” as a violation of one portion of a contract that does not excuse the non-breaching party’s performance but gives the non-breaching party the right to recover damages. Conversely, a “**material breach** of contract” is a *substantial breach of a significant term or terms of a contract that excuses the non-breaching party from further performance under the contract and gives the non-breaching party the right to recover damages.*

Here are some real project examples of these definitions in action —A utility contractor installs brand Y instead of brand X ductile iron pipe. (Brand X was required in the contract specifications.) Despite the fact that both brand X and Y ductile iron pipe function equally well, the contractor has nevertheless breached its contract by failing to comply with the material specifications of the contract. In this example, the utility contractor’s breach is a “non-material breach” of the contract, and the owner’s remedy would be to recover damages (if any) it suffered because it did not receive the full “benefit of its bargain” (i.e., the difference in value between brand X and Y pipe).

If the above facts are changed so that the contract provides for the installation of 24-inch brand X ductile iron pipe and the utility contractor instead installs 8-inch brand X ductile iron pipe, the contractor has committed a “material breach” of its contract obligations because the 8-inch water line will not carry/service the same amount of water as the 24-inch pipe specified in the contract. In this case, the owner may be justified in terminating

¹ Answers.com – Breach of Contract

² Find Law

the contract and certainly would be entitled to recover damages because it clearly did not receive the benefit of its bargain.

.....despite contracting parties' best intentions and efforts at drafting comprehensive contract provisions, it is inevitable that all possible situations will not be covered in the contract documents.

In the construction industry, more often than not, parties benefit if a contractor is kept on the job, and remedial efforts are taken both at the negotiation table and in the field to alleviate contractual disputes and correct deficiencies in work product. It's not always easy to ascertain whether or not a breach is material permitting the non-breaching party to cancel a contract. *Conclusions on these types of issues can only be reached after viewing the factual circumstances through the legal prism of substantial performance, right to cure, remediation rights, mitigation, excuse and the right to recover damages.*³

Examples of Material Breach:

1. When a contractor abandons the job before completion or refuses to comply with the contract after **repeated** written notifications by the Resident Engineer;
2. Willful and verified use of substandard or hazardous materials in the project (i.e. specifications require copper pipes and iron pipes are used instead);
3. Willful failure to perform in accordance with the terms of one or more contracts;
4. A history of failure to perform, or of unsatisfactory performance;

The Code of Federal Regulations (49 C.F.R. PART 29) provides the following response to the question "what type of conduct will lead to a debarment?" The response is as follows:

"The basis for a debarment can be for either a conviction or a civil judgment. Criminal convictions that lead to a debarment may include (a) fraud, (b) antitrust violations, (c) forgery, (d) bribery, (e) falsification of records, (f) making false statements, (g) making false claims, (h) conspiracy, (i) failure to comply with applicable environmental requirements (such as the proper storage, transportation, and disposal of hazardous waste), (j) failure to pay the predetermined minimum wage, and (h) other offenses indicating a lack of business integrity or business honesty that seriously and directly affects a person's or company's present responsibility.."⁴

As noted by Mr. Hugh Gorman, conclusions regarding material breaches can be reached only after viewing the factual circumstances through the prism of substantial performance, right to

³ Understand Material Breach of Contract Written by Hugh J. Gorman, III Friday, 06 July 2007 *Construction Business Owner*, June 2007

⁴ The Code of Federal Regulations (49 C.F.R. PART 29) Debarment and Suspension Frequently Asked Questions.

cure, remediation rights, mitigation, excuse and the right to recover damages. He notes that “we will be hard pressed to site examples such that they will cover the breadth of what might occur”.

In addition to looking to examples, a list of questions may serve as a debarment decision making guide. Because each agency has hands on experience managing contracts with specific scopes of work, it is wise for each agency to establish a debarment check list that meets their own specific needs.

The City’s recommended debarment language was designed to provide a degree of flexibility to accommodate a variety of circumstances that must be coupled with mindful and cautious care in avoiding inappropriate misuse and harm by all parties involved. Staff may ask for example (1) did the contractor harm the lives of residents? (2) Was there blatant disregard for contract specifications and/or work deliverables such that the results can not be corrected? (3) Have there been repeated acts of irresponsibility? (4) Is there evidence of fraud? (5) Has the business created an irreversible liability for the City? (6) Was the company debarred by another government entity? (7) Are substantial financial liabilities involved?

City agencies will need to establish a guide to a debarment decision making process that is as informal as is practicable and consistent with principles of fundamental fairness.

Appointment of Hearing Officer

The Committee directed staff to revisit appointing a retired state or federal judge as a hearing officer because of limited availability. Other ordinances reflect appointments ranging from a Controller to a Director of Administrative Services. Without restricting the City to a retired judge, Council may want to allow staff the flexibility of appointing a hearing officer or a debarment hearing committee that is specific to the conditions of the debarment. Participants may include, but may not be limited to (a) a subject matter expert, (b) a mediator or other individuals qualified in due process, (c) individuals such as retired judges; and/or (d) a debarment committee made up of a combination of the above. The overarching consideration in this regard will be to appoint a hearing officer that is suited to the scope of the circumstances.

Pre-Hearing Procedure

The Committee voiced concern about the contractor having the option of rejecting a hearing officer. Review of various ordinances suggests the tendency toward allowing contractors the right to reject a hearing officer. The issue raised by council was specific to the impact on the timeline if a business repeatedly rejects each hearing officer brought forward. Staff suggests applying a 24 hour timeline for refusal to address that concern.

Notice of Proposed Debarment

Council was concerned that the 120-day period served to drag out the debarment decision and wanted to reduce the timeline to 30 days. The 120-day time line is useful given the potential need

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for more complicated and multi-layered circumstances requiring various steps that must be taken to ensure due process. Nevertheless, the 120 days does not preclude staff from attempting to resolve debarment issues within a range of 30-120 days given the nature and scope of the debarment circumstances. In fact, some debarment matters may be simply one of adopting a debarment action already taken by another locality. Clearly that action will not take 120 days. Another circumstance may be such that the egregious action is so clear and so undeniable that the business will not challenge the City's right to debar. In other cases, circumstances may require a 120-day period or more. From a practical standpoint, flexibility to accommodate the scope of the matter is a key consideration in this regard.

Confer with internal users to garner input

As directed by the Committee, the City Attorney's Office convened a meeting between the Department of Contracting and Purchasing staff and Community and Economic Development Agency (CEDA) staff. The discussion covered all concerns from a practical standpoint to maintaining the integrity of the process. It was agreed that a set of internal guidelines for each agency will help to frame the context in which staff can initiate a debarment. The primary concern was that the process would be one of cautious regard, fairness, documentation and respect for due process.

Further, once the Public Works Committee reviews and approves the draft, staff will go out to both internal and external staff for a thirty (30) day comment period, which will include on-line announcement and the exact text of the proposed ordinance.

SUSTAINABLE OPPORTUNITIES

Economic: The Local Employment and Oakland Apprenticeship Programs provide employment of local Oakland residents and contracting opportunities for local Oakland certified firms.

Environmental: No environmental opportunities have been identified.

Social Equity: The Local Employment and Oakland Apprenticeship Programs provide benefits to Oakland residents and local businesses.

DISABILITY AND SENIOR CITIZEN ACCESS

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

RECOMMENDATION(S) AND RATIONALE

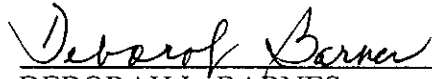
It is recommended that Council accept the proposed Debarment Ordinance to serve as an administrative tool to address abuse, fraud, poor performance or other misconduct.

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ACTION REQUESTED OF THE CITY COUNCIL

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

Respectfully submitted,



DEBORAH L. BARNES

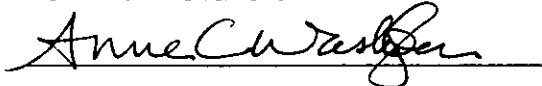
Director, Department of Contracting &
Purchasing

Prepared by:

Shelley Darensburg, Sr. CCO

DCP—Social Equity

APPROVED AND FORWARDED TO THE
PUBLIC WORKS COMMITTEE:



Office of the City Administrator

FILED
OFFICE OF THE CITY CLERK
OAKLAND

APPROVED AS TO FORM AND LEGALITY

INTRODUCED BY COUNCILMEMBER _____

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Richard D. Ortiz
City Attorney

OAKLAND CITY COUNCIL

ORDINANCE No. _____ C.M.S.

ORDINANCE AMENDING TITLE 2 OF THE OAKLAND MUNICIPAL CODE TO ADD CHAPTER 2.12 – ARTICLE I, CONTRACTOR DEBARMENT

WHEREAS, the City of Oakland wishes to establish 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, the City of Oakland, through such an administrative process, wishes to declare any such potential bidders or Contractors, for a period of time, 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, this ordinance will establish 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:

Chapter 2.12, Article I is hereby added to the Oakland Municipal Code and is entitled the "Oakland Contractor Debarment Program".

Chapter 2.12 – Contractor Debarment

Section 2.12.010 - Definitions

The following definitions apply for only the purposes of this Section.

- (1) **Affiliate.** Any individual person or business entity related to a Contractor where such individual or business entity, directly or indirectly, controls or has the power to control the other, or where a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership; identity of interests among family members; shared facilities and equipment; common use of employees or a

business entity organized or following the suspensions, debarment, bankruptcy, dissolution or reorganization of a person which has the same or similar management; and/or ownership or principal employee as the Contractor.

(2) Contract. Any City of Oakland contract for the purchase of goods or services including without limitation any subcontract, subconsultant agreement or supply agreement at any tier.

(2)(3) Contractor. Any individual person or business entity who submits a qualification statement, proposal, bid or quote or who contracts directly or indirectly with the City for the purpose of providing any goods or services to or for the City including without limitation any Contractor, subcontractor, consultant, subconsultant 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.

(3)(4) Debarment. The administrative determination against a potential bidder, or Contractor declaring such potential bidder or Contractor irresponsible and disqualified from participating in the competitive process for contracts with the City or from entering into contracts, with the City for a period specified in the debarment order.

(4)(5) City Administrator. The City Administrator of the City of Oakland or an officer specifically designated to act for and carry out the City Administrator's duties.

Section 2.12.015 – Debarment Authority

Notwithstanding any other City ordinance, the Council shall have authority to issue a Final Notice of Debarment against any Contractor in accordance with the procedures set forth in this Section. Nothing in this ordinance is intended to in any way limit the City's right or authority to suspend or terminate a contract for alleged breach, performance problem or noncompliance independent of a debarment action and regardless of whether a debarment action is initiated.

Section 2.12.020 – Grounds For Debarment

The Council may issue a Final Notice of Debarment for any Contractor who the hearing officer, based on evidence presented, finds to have engaged in any willful misconduct in connection with any City bid, request for qualifications, request for proposals, purchase order and/or contract. Such willful misconduct may include, but need not be limited to the following: (1) submission of false information in response to an advertisement or invitation for bids or quotes, a request for qualifications or a request for proposals; (2) failure to comply with or breach of the material terms of a contract, subject to any terms and conditions for notice and cure in the City contract; (3)

failure to comply with City policies, programs and regulations applicable to the contracts and/or contractors in the Oakland Municipal Code regardless of whether there are express terms regarding such laws in the contract; (4) a pattern and practice of disregarding or repudiating terms or conditions of City contracts or Oakland Municipal Codes including, without limitation, breach of contract, non-compliance with any City contracting requirements or programs in connection therewith, or repeated unexcused delays and poor performance; (4) submission of false claims as defined in California Government Code, Section 12650 et seq. and Title 31 U.S.C. Section 3729 et seq.; (5) 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 to perform under or comply with the terms and conditions of a City contract; and/or (6) collusion in obtaining award of any City contract, or payment or approval thereunder.

Section 2.12.030 –Initiating The Proceedings; Notice Of Proposed Debarment

The City Administrator may initiate a debarment proceeding by issuing a Notice of Proposed Debarment. Such Notice may be issued against any Contractor relating to any matter consistent with the foregoing grounds for debarment. The City Administrator may issue a Notice of Proposed Debarment regardless of whether the City Administrator awarded, was responsible for or was involved in any way with the underlying contract or circumstances leading to the Notice of Proposed Debarment.

Section 2.12.040 – Service Of The Notice Of Proposed Debarment

The City Administrator shall serve the Notice of Proposed Debarment on each named individual person or business entity in a manner ensuring confirmation of delivery. For example, service may be achieved by United States Postal Service certified mail, return receipt, requested or with other delivery confirmation, hand delivery (messenger service) or other commercial delivery service that provides written confirmation of delivery.

Section 2.12.050 – Request For Hearing

Within 15 days after receipt of the Notice of Proposed Debarment, the Contractor may submit a written request for an administrative hearing. The Contractor may make such request through counsel or other authorized representative.

Section 2.12.060 – Failure To Respond To The Notice Of Proposed Debarment

Failure of the Contractor to submit to the City a written request to be heard within the time required in Section 2.12.050, or failure of the Contractor or the Contractor's representative to appear for a requested hearing that has been duly noticed, shall be deemed an admission by the Contractor to the allegations set forth in the Notice of Proposed Debarment. In accordance with the procedures set forth below, the City

Administrator shall present evidence in support of the debarment to the appointed hearing officer and the hearing officer shall make a determination on such evidence.

Section 2.12.070 – Appointment Of The Hearing Officer or Debarment Hearing Panel

The City Administrator shall appoint a hearing officer for any debarment proceeding and notify the Contractor of the appointment. The notice of appointment shall include the name of the hearing officer. The Contractor may object to the appointed hearing officer within five business days of the notification for good cause including bias, conflict of interest or other potential prejudice. If the City Administrator, at his/her sole discretion, appoints a new hearing officer, then he/she shall notify the Contractor as soon as practicable but not more than 15 days after receipt of the objection. The hearing officer shall be an attorney with subject matter expertise and experience as a hearing officer; or a retired state or federal judge in good standing; or will be a debarment hearing panel. The hearing officer or debarment hearing panel will be appointed by the City Administrator in conformity with administrative hearing procedures to be prepared and published by the City Administrator, or his or her designee retired state or federal judge in good standing. These procedures will provide the criteria and instructions for appointing hearing officers and conducting the debarment hearing process.

Section 2.12.080 – Pre-Hearing Procedure

A. The City Administrator shall notify each Contractor named in the Notice of Proposed Debarment of the scheduled hearing date. The hearing must commence within 120 days of the date of the City Administrator served the Notice of Proposed Debarment unless, if the City Administrator determines hearing officer, may extend the 120-day period only upon for good cause shown by either party, that the pre-hearing period should be extended, shown; proceeding. Notwithstanding the foregoing, the City Administrator will endeavor to schedule the hearing as expeditiously as possible is reasonable in the public's best interest.

B. Discovery pursuant to the California Code of Civil Procedure is not applicable to this debarment procedure. The California Administrative Procedures Act is not applicable to this debarment procedure.

C. The hearing officer may, in his/her sole discretion, direct any named Contractor and the City Administrator to submit in advance of the hearing, statements, legal analyses, lists of witnesses, exhibits, documents or any other information the hearing officer deems pertinent to the determination of willful misconduct. The hearing officer may request the respective parties to submit rebuttals to such information. The hearing officer may limit the length, scope or content of any such statement, analysis, list, rebuttal, document, or other requested information. The hearing officer shall set firm due dates for all written presentations.

D. If the hearing officer determines, with the written agreement of each

named Contractor and City Administrator, that the hearing shall be by written presentation, all final writings shall be due no later than 120 days of the date the City Administrator served the Notice of Proposed Debarment, or the date as extended by the City Administrator, whichever is later.

Section 2.12.090 – Fact-Finding Hearing And Determinations

A. Hearings may occur in person or in writing, as set forth above. If the hearing is to occur in person, the hearing officer shall specify the time and place for the City Administrator to present the case and for the Contractor to rebut the charges. The hearing officer may, in his/her sole discretion, allow offers of proof, set time limitations and limit the scope of evidence presented based on relevancy. Each side shall be entitled to call witnesses, and the hearing officer may allow cross-examination of witnesses. The hearing officer may ask questions of any party for the purpose of reaching a determination.

B. The hearing officer shall consider the evidence submitted by the City Administrator and the Contractor. The standard of proof for the fact-finding hearing shall be preponderance of the evidence. Within 15 business days of the hearing, or of the date final written presentations are due, the hearing officer shall issue his/her Statement of Decision addressing only whether or not the City Administrator has substantiated that the Contractor engaged in any of the conduct described above in subdivision (c) hereof. The hearing officer shall not opine as to whether or not debarment is warranted or the duration of such debarment. The hearing officer shall serve the Statement of Decision on the City Administrator, the named Contractor(s), and/or their respective counsels or authorized representatives, and shall submit the same to the City Clerk.

C. If the hearing officer finds that the named Contractor has engaged in any of the conduct described in the subdivision (c), the City Administrator may submit to the full Council or a Committee of the Council his/her recommendation regarding debarment. The Council or the Council Committee shall act on the City Administrator's recommendation at a properly noticed meeting; however, only the Council shall have the authority to impose a debarment. The City Clerk shall serve the Final Notice on each named Contractor, his/her/their counsel or authorized representative, if any. A Final Notice of Debarment under this Section shall be a final administrative determination by the City, reviewable pursuant to Code of Civil Procedure, Section 1094.5.

Section 2.12.100 – Term And Effect Of Debarment; Violation Of Final Notice Of Debarment

A. A Final Notice of Debarment shall provide for a term of debarment not to exceed five (5) years from the date of service. The Final Notice of Debarment shall prohibit any named Contractor and the Contractor's Affiliates from participating in any contract at any tier, directly or indirectly, with or for the City; any Contractor and the Contractor's affiliates named in a Final Notice of Debarment shall be deemed

responsible and disqualified for the purposes of all City contracts. Upon such Final Notice of Debarment, the City may terminate any existing contract with a debarred Contractor or direct the cancellation of an existing subcontract to which a debarred Contractor is a party. In the event of such termination, no recovery shall be had on that contract by the debarred party other than for work satisfactorily completed as of the date of termination.

B. Debarment shall neither exclude nor preclude any other administrative or legal action taken by the City.

C. Violation of a Final Notice of Debarment, such as by submission of a proposal, bid or sub-bid during the debarment period, may be considered a false claim as provided in the California Government Code and the U.S. Code.

Section 2.12.110 – Publication And Reports Of Debarment

Any Final Notice of Debarment issued under this Section shall be a public record. The City Clerk shall maintain and publish on the City's Internet website a current list of Contractors subject to Final Notices of Debarment and the expiration dates for the respective debarment terms.

IN COUNCIL, OAKLAND, CALIFORNIA, _____

PASSED BY THE FOLLOWING VOTE:

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

NOES-

ABSENT-

ABSTENTION-

ATTEST: _____

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

DATE OF ATTESTATION: _____