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APPROVED AS TO FORM AND LEGALITY


CITY ATTORNEY'S OFFICE

INTRODUCED BY COUNCILMEMBER _____

OAKLAND CITY COUNCIL

== 13269 ==
ORDINANCE NO. _____ C.M.S.

ORDINANCE AMENDING OAKLAND MUNICIPAL CODE CHAPTER 2.06 TO ADD REQUIREMENTS TO MAKE PROMPT DISBURSEMENTS OF GRANT FUNDS TO GRANT RECIPIENTS

WHEREAS, the Oakland City Council enacted a prompt payment ordinance in January 15, 2008, now codified as Chapter 2.06 of the Oakland Municipal Code, which requires that local businesses contracted by the city for goods and services be timely paid by the City and pay their subcontractors and suppliers timely; and

WHEREAS, the Oakland City Council now wishes to enact similar requirements for its grant recipients requiring the City to make prompt disbursements of grant funds; and

WHEREAS, the City of Oakland is committed to supporting, maintaining and fostering the development of a healthy business and public service community in Oakland; and

WHEREAS, Oakland for profit and nonprofit contractors, subcontractors, grantees, and sub grantees receiving grant funds experience payment delays and related issues that may result in cash flow problems affecting the viability of those entities and result in delayed or poor performance;

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

SECTION 1. Oakland Municipal Code Chapter 2.06, *Prompt Payment*, is hereby amended and restated to impose prompt payment requirements for recipients of City grants, as follows (additions are noted as underlined text; deletions are noted as strikeout text):

2.06.010 Definitions.

The following definitions apply to this chapter:

"City" as used in this chapter, means the City of Oakland as a municipal organization, city agencies or departments or city officials authorized by the City Council or City Administrator to enter into purchase contracts or grant agreements on behalf of the City of Oakland when acting in his/her official capacity.

"Claim" means a bill, invoice or written request for payment provided by the vendor. Written request includes "contract" as defined below.

"Claimant" means a Local Prime Contractor, Subcontractor or grant recipient that files a claim with the city for overdue payment or disbursement of funds and associated interest penalties.

"Contractor" as used in this chapter means a Local Prime Contractor, Subcontractor, or grant recipient.

"Disputed Invoice" means an improperly executed invoice, any invoice that contains errors or requires additional evidence of its validity, or any invoice that contains expenditures or proposed expenditures that are ineligible or that do not otherwise comply with reimbursement or disbursement requirements of the grant funding source. If an invoice is "disputed", the payment/disbursement shall not be subject to late penalties until the dispute is resolved.

"Goods" means products, goods, materials, equipment or other tangible items rendered pursuant to a purchase contract.

"Grant agreement" means any enforceable City of Oakland agreement executed expressly to provide grant funding to any nonprofit or for profit entity or individual to support the grant recipient's provision of services to members of the public or the community at large, whether the original source of such funding is the City or some other source. Notwithstanding the above, "grant agreement" as used in this chapter shall not include loan agreements, or agreements to provide support for the purchase, improvement, or development of real property. Grant agreements must be approved and executed in accordance with all applicable contracting requirements of the City of Oakland. Claimants shall not be entitled to relief hereunder, for payment delays that occur prior to the proper execution of a grant agreement.

"Grant recipient" means a for-profit or nonprofit entity or individual that is awarded grant funding pursuant to a grant agreement approved by the City Council.

"Invoice" means a bill or claim that requests payment for goods and/or services rendered to the municipal organization pursuant to a city purchase contract by a Local Prime Contractor or by a Subcontractor, or bill or claim that requests disbursement of grant funds for services, art or other products, goods and materials rendered to

residents, businesses and other third parties pursuant to a grant agreement or by any grant recipient.

"Local Business" as used in this chapter and in accord with the City of Oakland Local and Small Local Business Enterprise Program means a for-profit or nonprofit business, including but not limited to local artists: (a) with a substantial presence in the City of Oakland's geographic boundaries, (b) with a full operation conducting business for at least twelve (12) consecutive months in the City of Oakland, (c) with a valid City of Oakland business tax certificate or exemption from City of Oakland business tax, and (d) that is an independent business headquartered in Oakland. Individuals contracted for services to the municipal organization have to be businesses to establish they are Local Businesses.

"Local Prime Contractor" means a "Local Business" as defined above that is in direct or in privity of contract with the City of Oakland.

"Managers and Operators" means a non-profit or for-profit business that is contracted by the City of Oakland to operate and/or manage city programs, programs open to the public on City of Oakland property, city facilities or concession businesses on City of Oakland property.

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

"Services" means any and all services rendered pursuant to a purchase contract or grant agreement including, but not limited to, professional, scientific or technical services benefitting the municipal organization, and services benefitting members of the public, or the creation or development of cultural or artistic work.

"Subcontractor" means a subcontractor, supplier, vendor, sub-grantee or any business or organization, other than the prime contractor, that delivers goods and/or services in connection with a purchase contract or grant agreement.

"Undisputed Invoice" means an invoice properly executed by the claimant for goods and/or services rendered in connection with a purchase contract or grant agreement for which additional evidence is not required to determine its validity. Undisputed invoices include:

1. A once disputed invoice which has been corrected or for which additional evidence of its validity has been provided and received by the city, the prime contractor or subcontractor or grant recipient responsible for issuing payment.
2. An improper invoice whether goods and/or services have been received by the city, the prime contractor or subcontractor responsible for issuing payment, but

the city, the prime contractor or subcontractor or grant recipient responsible for issuing payment fails to notify the claimant that the invoice is improper within fifteen (15) working days of receipt of the invoice.

2.06.020 Purpose.

The purpose of this Prompt Payment Ordinance is to establish policies and procedures to assure that local contractors and grant recipients and all subcontractors working on City of Oakland purchase contracts or grant agreements receive prompt payment or disbursement of grant funds, and to enhance and increase local business contracting and community service opportunities with the City of Oakland by establishing: (1) shortened payment requirements for City of Oakland businesses and all subcontractors and grant recipients, regardless of location, that provide goods and/or services in connection with a City of Oakland purchase contract or grant agreement, and (2) a City Liaison to serve as a single point of contact to address payment and disbursement delays and other issues relative to City of Oakland purchase contracts or grant agreements. The city and grant recipients are exempt from any provisions of this chapter that conflict with requirements of the grant funding source.

2.06.030 Local business, and subcontractor and grant recipient payment liaison.

- A. The city will appoint a single point of contact (Liaison) to address invoice payment or other issues raised by City of Oakland Local Prime Contractors, Subcontractors, or grant recipients in connection with City of Oakland purchase contracts for goods and/or services or grant agreements, or invoice payment issues raised by a subcontractor in connection with a City of Oakland Manager/Operator contract. The Liaison position will be assigned to perform duties within the Office of Contracts and Compliance. The Liaison will be the city's central point of contact for Local Prime Contractors, and Subcontractors and grant recipients, and will be responsible for coordinating the actions required to resolve issues with city agencies and departments and Manager/Operators.
- B. The Office of Contracts and Compliance will establish a city-wide procedural mechanism to identify local contractors, will inform such businesses of the program through electronic means as well as through existing and ongoing training programs and workshops, and will issue a statement of the requirements of this ordinance with bid notices and requests for proposals/qualifications.

2.06.040 Local prime contractors and grant recipients, contractor retention.

- A. Local Prime Contractors. The City of Oakland shall pay all Local Prime Contractors for goods and/or services rendered pursuant to a purchase contract within twenty (20) business days after receipt of an undisputed invoice. In the event an invoice is disputed, the city shall notify the subcontractor and Liaison in writing within five (5) business days of receiving the disputed invoice that there is a bona fide dispute, in

which case the city may withhold the disputed amount but shall pay the undisputed amount.

B. Retention. The city shall not withhold any monies as project retention associated with the rendering of goods under a purchase contract.

C. Grant Recipients. The City of Oakland shall issue disbursements of grant funds to grant recipients within twenty (20) business days after receipt of an undisputed invoice. In the event an invoice is disputed, the city shall notify the grant recipient and Liaison in writing within five (5) business days of receiving the disputed invoice that there is a bona fide dispute, in which case the city shall withhold the disputed amount and may withhold the full amount if the grant funding source requires that the disputed expenditures be fully resolved prior to any disbursement of grant funds. The foregoing notwithstanding, this chapter shall not apply to grant payments/disbursements when the original funding source for the grant is eliminated, until and unless the city identifies and appropriates funds from an alternative source for the grant. If an outside funding source for a grant agreement requires its review and approval before payments are made to a grant recipient, this period shall be suspended for any period of review by said outside funding source.

2.06.050 Subcontractor payment, retention, mobilization fees.

A. Prompt Payment. All Manager/Operators, city prime contractors and subcontractors and grant recipients shall pay their subcontractors for goods and/or services rendered in connection with a purchase contract or grant agreement within twenty (20) business days of receipt of the subcontractor's undisputed invoice. In the event an invoice is disputed, Manager/Operators, prime contractors and subcontractors and grant recipients shall notify the Liaison in writing within five (5) business days of receiving the disputed invoice that there is a bona fide dispute, in which case the prime contractor or subcontractor or grant recipient may withhold the disputed amount but shall pay the undisputed amount, provided that grant recipients may withhold the full amount if the grant funding source requires that the disputed expenditures be fully resolved prior to any disbursement of grant funds. The foregoing notwithstanding, this chapter shall not apply to grant payments/disbursements when the original funding source for the grant is eliminated, until and unless the city identifies and appropriates funds from an alternative source for the grant.

B. If a subcontractor files a claim for all or a portion of a disputed invoice pursuant to Section 2.06.080 below, Manager/Operators or contractors or grant recipients shall be required to post with the city cash, a certified check, or a bond in an amount sufficient to cover the disputed amount and penalty. Upon the Liaison's determination that the invoice is valid, the cash, certified check or bond shall be released to the claimant. If the Liaison finds in favor of the contractor or grant recipient the cash, certified check or bond shall be returned to the contractor. If the Manager/Operator or contractor fails or refuses to post security, the Liaison may withhold funds from the next progress payment sufficient to cover the claim, or if the claim is made under a grant agreement from the next disbursement provided, it is allowed by the grant funding source.

- C. Affidavit Reporting Subcontractor Payments. Contracts in which subcontracting is used shall require the prime contractor or subcontractor or grant recipient, within five (5) business days following receipt of a payment from the city, to file an affidavit, under penalty of perjury, that he or she has paid all subcontractors. The affidavit shall provide the names and address of all subcontractors and the amount paid to each.
- D. Retention.
 1. Manager/Operators, prime contractors and subcontractors and grant recipients shall not withhold any monies for project retention associated with the rendering of goods; and
 2. Manager/Operators, prime contractors and subcontractors and grant recipients shall release retention held for services in proportion to the percentage of subcontractor services for which payment is due and undisputed within five (5) business days of payment.
 3. The retention and release requirements in this subsection shall not apply to grant recipients to the extent they conflict with requirements of the grant recipients' grant funding source.
 Manager/Operators, prime contractors and sub-contractors and grant recipients shall file notice with the city within five business days of release of retention.
- E. Mobilization Fee. Prime contractors and subcontractors and grant recipients shall pay subcontractors that will render goods and/or services their portion of mobilization fees within five (5) business days of being paid such fees. Prime contractors and subcontractors and grant recipients shall file notice with the city within five business days of payment of mobilization fees to a subcontractor.
- F. Website Posting. Information regarding the city's retention release and payment of mobilization fees shall be posted on the city's website within five (5) business days of such payment or release. Information regarding Manager/Operators, prime contractor and subcontractor and grant recipient retention release and payment of mobilization fees, and affidavits reporting subcontractor payments shall be posted on the website within five (5) business days of the filing of such notices and affidavits with the city.

2.06.060 Interest penalty.

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

amount of ten ~~(10%)~~ percent (10%) of the improperly withheld amount per year for every month that payment is not made, provided the claimant agrees to release the Manager/Operator and city from any and all further claims for interest penalties that may be claimed or collected on the amount due and paid. Claimants that receive interest penalties for late payment pursuant to this chapter may not seek further interest penalties on the same late payment in law or equity.

- C. If any amount due by the city to be disbursed to a grant recipient pursuant to a grant agreement is not timely paid in accordance with this chapter, the grant recipient is entitled to interest penalty in the amount of ten percent (10%) of the improperly withheld amount per year for every month that payment is not made, provided the grant recipient agrees to release the city from any and all further claims for interest penalties that may be claimed or collected on the amount due and paid. Grant recipients that receive interest penalties for late payment pursuant to this chapter may not seek further interest penalties on the same late payment in law or equity.
- D. If any amount due by a prime contractor or subcontractor or grant recipient to any claimant for goods and/or services rendered in connection with a purchase contract or grant agreement is not timely paid in accordance with this chapter, the prime contractor or subcontractor or grant recipient shall owe and pay to the claimant interest penalty in the amount of ten ~~(10%)~~ percent (10%) of the improperly withheld amount per year for every month that payment is not made, provided the claimant agrees to release the prime contractor or subcontractor or grant recipient from any and all further interest penalty that may be claimed or collected on the amount paid. Claimants that receive interest penalties for late payment pursuant to this chapter may not seek further interest penalties on the same late payment in law or equity.
- E. For grant agreements, payment of interest penalties shall come from city general purpose funds if and to the extent the source of the grant funding does not permit the use of grant funds to pay such penalties.

2.06.070 Bid solicitations, request for proposals/qualifications, contracts.

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

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

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

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

For the purpose of posting on the city's website, contractors, grant recipients and its subcontractors are required to file notice with the city of release of retention and payment of mobilization fees, within five (5) business days of such payment or release; and contractor or grant recipient is required to file an affidavit, under penalty of perjury, that he or she has paid all subcontractors, within five (5) business days following receipt of payment from the city. The affidavit shall provide the names and address of all subcontractors and the amount paid to each.

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

2.06.080 Complaint and investigation.

- A. Any claims made pursuant to Sections 2.06.040 and 2.06.050 above are subject to investigation and notice of violation and demand for payment and interest penalties by the Liaison. A Local Prime Contractor, or Subcontractor or grant recipient who alleges violation of any provision of this chapter may report such acts to the Liaison.
- B. Complaints shall be handled as follows:
 - 1. The claimant shall submit a completed complaint form and copies of invoices or billing documents that have been submitted to the city, to a city purchase contractor or grant recipient or to a Manager/Operator. To expedite investigation, the claimant shall also submit any documents in their possession showing that his/her goods and/or services or other deliverables have been rendered to and inspected or reviewed and accepted by the city or grant recipient or Manager/Operator in connection with the claim.

2. The Liaison shall collect a security deposit in the form of cash, certified check, or bond in an amount sufficient to cover the claim from the Manager/Operator or contractor or grant recipient that has disputed the invoice. If a Manager/Operator or contractor or grant recipient that is required to post security fails or refuses to do so, the Liaison may withhold funds from the next progress payment sufficient to cover the claim, except that in the case of grant recipients such withholding shall be done only if it is not in conflict with requirements of the grant recipient's grant funding source. Upon the Liaison's determination that the invoice is valid the cash, certified check or bond shall be released to the claimant. If the Liaison finds in favor of the contractor the cash, certified check or bond shall be returned to the contractor or grant recipient.
3. The Liaison shall contact the city agency, department, Manager/Operator or contractor or grant recipient responsible for payment within five (5) business days of receipt of the complaint form to investigate the claim. The Liaison's determination of whether an invoice is valid shall be based on the following:
 - (i) Whether the invoice conformed to requirements defined in Section 2.06.020 of this chapter, at the time of submission to the contractor,
 - (ii) Whether there is a discrepancy between the invoice or claimed amount and the provisions of the purchase contract,
 - (iii) Whether there is a discrepancy between the invoice or claimed amount and either the contractor's actual delivery of goods and/or services to the city or the community at large, or the city's acceptance of such goods and/or services,
 - (iv) Whether the city agency, prime contractors, ~~or subcontractors~~ or grant recipients responsible for payment provided timely notice of the disputed invoice as required under 2.06.050 (A), and
 - (v) Whether additional evidence supporting the validity of the invoice or claimed amount must be provided by the claimant, and
 - (vi) Whether the expenditures or other claims set forth in the invoice submitted by the grant recipient complies with the requirements of the grant funding source.
4. There shall be no appeal of the Liaison's determination in favor of the complainant. If, however, the Liaison determines that the complainant's invoice provides insufficient evidence for payment, the complainant shall be advised of the additional information required for payment and given an opportunity to provide the same.
5. When the Liaison determines that a violation of this chapter has occurred, the Liaison shall assess interest penalties at the rate provided in Section 2.06.060 of this chapter and issue a demand to the city employee responsible for administering the related purchase contract or grant agreement, the Manager/Operator, the prime contractor, ~~or the subcontractor~~ or grant recipient responsible for the late payment. The city shall issue a check for the amount of the undisputed claim and interest penalties assessed by the Liaison to the Local Prime Contractor or grant recipient within (5) five business days of the date of the Liaison determination. The city may seek review by the City Administrator

of Liaison determinations for claims submitted by Local Prime Contractors or grant recipients.

2.06.090 Administrative procedures and regulations.

The City Administrator shall develop administrative procedures and regulations for determining city, Manager/Operator, prime contractor, ~~and subcontractor~~ and grant recipient compliance with, and full implementation of, this chapter including, but not limited to, establishment of an interest penalty scheme and investigation procedures.

2.06.100 Exemptions.

City and Manager/Operator purchase contracts and city grant agreements are exempt from this chapter when:

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

2.06.110 Applicable to new contracts.

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

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

SECTION 3. Effective Date. This Ordinance shall become effective immediately on final adoption if it receives six or more affirmative votes; otherwise it shall become effective upon the seventh day after final adoption.

1495688

IN COUNCIL, OAKLAND, CALIFORNIA, NOV 18, 2014

PASSED BY THE FOLLOWING VOTE:

AYES - BROOKS, GALLO, ~~GIBSON McELHANEY~~, KALB, KAPLAN, REID, SCHAAF AND PRESIDENT KERNIGHAN -7

NOES -

ABSENT - Gibson McElhaney - 1

ABSTENTION -

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

Introduction Date
NOV 05 2014

Date of Attestation 11/19/14

**ORDINANCE AMENDING OAKLAND MUNICIPAL CODE CHAPTER
2.06 TO ADD REQUIREMENTS TO MAKE PROMPT DISBURSEMENTS
OF GRANT FUNDS TO GRANT RECIPIENTS**

NOTICE AND DIGEST

This Ordinance amends and restates Chapter 2.06 to the Oakland Municipal Code, the Prompt Payment Ordinance, to add requirements for prompt payment of grant funds to grant recipients under City grant agreements.