

**CITY OF OAKLAND  
AGENDA REPORT**

FILED  
OFFICE OF THE CITY CLERK  
OAKLAND

2009 APR -2 PM 6: 17

TO: Office of the City Administrator  
ATTN: Dan Lindheim  
FROM: Department of Contracting and Purchasing  
DATE: April 7, 2009  
RE: **Supplemental Report on the Proposed Debarment Ordinance Adding Chapter 2.05, Section 2.05.010-110 to the Oakland Municipal Code and Entitled the "Oakland Contractor Debarment Program".**

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**SUMMARY**

At the March 24, 2009 Public Works Committee meeting, staff was directed to provide the following information: 1) Additional language or clarification of existing language for the single occurrence of "willful misconduct" in Section 3.12.030 of the Debarment Ordinance; 2) The total calculated cost to implement and/or administer the Debarment Program; and 3) Staff's feedback on the 30 day public comment period.

**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) during the Fiscal Year (FY) 03-04 and 04-05. The content of the original report included discussions on Local Employment compliance, project closeouts and a proposed contractor debarment ordinance. Staff subsequently provided five supplemental reports on July 22, October 28, December 2, 2008, January 27, 2009 and March 24, 2009.

**KEY ISSUES AND IMPACTS**

**Section 2.12.030-Debarment of Contractors-General:**

In response to the Committee's concern that debarment could only be imposed on contractors with recurrent breaches, violations, etc., the City Attorney has advised that the current language allows debarment for the first or single egregious act:, as shown by the double-underlined phrase.

A. The grounds for debarment . . .

The City may debar a contractor for any of the debarment grounds set forth in Section 2.12.050. The purpose of this ordinance is, generally, to authorize debarment of contractors who engage in a pattern and practice of, or who are recurrently responsible for any, any single or combination of debarment(s). However, a single occurrence of any debarment ground(s) may also subject contractors to debarment, depending on the

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egregious or serious nature of the acts or omissions. The existence of the a cause or ground for debarment, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor’s acts or omissions any mitigating factors shall be considered in making any debarment decision.

Therefore, depending on the level of egregiousness, a single act can lead to debarment.

**Total Calculated Cost to Implement and/or Administer the Debarment Program**

Staff does not anticipate that additional resources will be necessary to implement the ordinance. A review of various debarment actions by other entities appears minimal.

**Staff Feedback on Outreach to External and Internal Stakeholders:**

*Attachment B* provides a summary of responses received from both internal and external stakeholders. Comments have been divided into three categories. The categories are as follows: I. Positive Comments, II. Feedback/Recommendations and III. General Comments.

To allow for a more succinct discussion, the following provides a summary of the Category 2 feedback/recommendations and applicable staff responses:

Feedback/Recommendation	Staff Response
(1) "Section 2.12.010 (14) and Section 2.12.170--There may be felony/criminal or other serious breaches of contract where the City should not be limited to only 5 years of debarment. Maybe a line could be added that for very serious and extreme situations debarment can be for any duration the City Administrator finds appropriate."	(1) Staff recommends adding permanent debarment to Section 2.12.010 (14) as follows, "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 transaction for a period of one year <u>up to permanent debarment.</u> " Also, Section 2.12.170 – Period of Debarment would also be changed to: "Debarments shall be for a period commensurate with the seriousness of the respondent’s conduct up to a maximum of permanent debarment.
(2) Section 2.12.050 vii -- City employees be included after contractor’s employees in this sentence	(2) The language in Section 2.12.050 vii already includes "any other persons involved with the transaction..."
(3) Section 2.12.200 G - Recommend "except as provided in 2.12.220" be included since we will have to pay a contractor if a current contract is continued (or wrapped up) after the commencement of a debarment on a different contract or PO.	(3) This is a clarification of language. Staff concurs and recommends adding "except as provided in 2.12.220.
(4) Section 2.12.220 B--Recommend remove, "or in any way extend the duration of or increase current contract amounts	(4) The intent is to allow staff the opportunity to issue change orders until a final debarment decision is rendered. That option is exists in Section 2.12.220 A. However, it could be provided

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	in Section B, as a reiteration, if Council directs.
<p>(5) Under Section 2.12.060-xii, it says, "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. But under Section 2.12.070 B, it says, "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." Shouldn't these sections say the same thing?</p>	<p>(5) The intent is to have consistent language. Staff concurs and recommends changing Section 2.12.060- xii to state, not later than 30 days after receiving the respondent's response to match Section 2.12.080.</p>
<p>(6) Thank you for the opportunity to comment on proposed Contractor Debarment ordinance. As an Oakland resident and taxpayer, I am pleased that the City Council is considering such an ordinance. For the purposes of the following comments, I consider any debarred, suspended or otherwise excluded" party to be an excluded party, and have broadened the idea of "debarment" to "exclusion" so that suspension and other exclusion are encompassed in my comments. (Debarred, suspended or otherwise excluded" is a term used in Presidential Executive Order 12549, which addresses excluded parties.) Section 2.12.050 viii identifies one of the grounds for debarment is "Debarment by any other governmental agency for the period imposed by that agency.</p> <p>(a) " I recommend that Section 2.12.040 make clear the City Administrator has the specific right to suspend any contractor for the period of any exclusion order imposed by <i>another government agency (while debarment proceedings are in progress)</i>. The intent of this comment is to prevent contractors excluded by another agency from obtaining an Oakland contract (or change order or an existing contract) while waiting for Oakland debarment proceedings.</p>	<p>(6) (a) The proposed ordinance allows for a "quasi-reciprocal" agreement in light of final debarment decisions. As such, the city accepts the final debarment determination by an outside entity. However, Ordinances that were reviewed focus on suspensions initiated by the entity only. In addition, other ordinances suggest that businesses are not guilty until proven so through the hearing process.</p>
<p>(b) I'm not sure whether Section 2.12.050 addresses campaign contributions to Oakland officials during the period prohibited by the terms of the solicitation. If so, then fine. If not, I recommend that campaign contributions made during the period prohibited by the terms of the solicitation be made a <i>specific cause of action identified in Section 2.12.050, instead of keeping it in the "included, but not limited to" category.</i></p>	<p>(b) Section 2.12.050 xvi addresses this matter as follows: "Violation of any law, regulation or agreement relating to conflict of interest with respect to government funded contracting."</p> <p>Staff believes that the definition of "Affiliate" as stated in the ordinance is clear and recommends no further clarification be added.</p>
<p>(7) I recommend that Oakland exclusion orders be communicated to, at a minimum, the United States General Services Agency and the State of California Department of</p>	<p>(7) The "Excluded Contractor List" will be posted.</p>

<p>General Services. My understanding is that the Federal government recognizes exclusion orders of state and local agencies, and is consistent with the idea that the Oakland plans to recognize other government agencies' exclusion actions.</p>	
<p>(b) I recommend that the ordinance make clear that the MINIMUM civil penalty (including damages) for obtaining a contract or change order while excluded is the amount paid under the contract or change order amount (as applicable) obtained while excluded. This recommended treatment is consistent with the Caltrans interpretation, in which contract awards to excluded construction contractors results in withdrawal of all Federal monies on the entire construction phase of the award (the construction contract amount is a major, but not the only, component of the construction phase).</p>	<p>(b) Each debarment action will be taken on an individual basis such that civil penalties may be warranted.</p>
<p>(8) Thank you for accepting my request to seek clarification from the City Attorney for the following as outlined in Section 2.12.050 X: definition of "pending violations by the contractor or any affiliate".</p> <p>What is a "pending violation?" Does this mean a violation that is under investigation by the Labor Commissioner? The specific definition of a "pending violation" needs to be added. Can you also please clarify the definition of "affiliate?"</p>	<p>(8) Staff believes that the definition of "Affiliate" as stated in the ordinance is clear (See Section 2.12.010 – Definitions (1)).</p> <p>Staff recommends that the ordinance be clarified by adding to Section 2.12.050 x, "A pending investigation by any governmental entity, which would include an investigation by another city, county, school district, etc. Investigations by private businesses."</p>
<p>(9) The Policy should allow for 'third parties' to initiate the City's Debarment review. Our major recommendation is that the policy allow for the City to review a request from a "third party" to initiate a debarment review.</p> <p>Given the fact that City Departments responsible for compliance issues are understaffed and as a result are unable to track the performance of the contractor at other public agencies, a process should be put in place that allows for the City to consider evidence of violations that are presented by credible third party organizations or individuals. For example, Labor-Management Compliance Organizations, that monitor the prevailing wage and apprenticeship compliance of contractors with many other public agencies, will be able to provide the City of Oakland with actual verdicts, judgments and settlements of violations at other public agencies from contractors doing business with the City. For example, it may be difficult to find an expert in the fields for Apprenticeship requirements, Federal or state antitrust statutes, and falsification or records (and these are only three of the 23 categories for debarment).</p>	<p>(9) In Section 2.12.040 –titled "Investigation, Referral and Temporary Suspension" states in part, "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."</p> <p>The City of Oakland has an automated certified payroll system in place to track the payment of prevailing wages on city-funded projects. In addition, a full time Field Technician monitors active projects by visiting these projects at least once a week.</p>
<p>(10) Careful thought should be given to the make-up of the "Debarment Hearing Board". The proposed policy under</p>	<p>(10) Other localities have found that building a strong subject-matter expert hearing board can occur by tapping available</p>

<p>section 2.12.010, (15) defines the make-up of the Debarment Hearing Board as, "Members of the Board shall be unbiased, executive level 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." However, most likely the City staff that would have the "subject matter expertise" would be directly or indirectly responsible for the contractors compliance to City polices and of the debarment investigations. If legally feasible we would recommend that other credible and unbiased persons that are neither City Staff nor public sector employees would be considered as well. In addition, we recommend that there could be various boards to address the varying types of violations that would be up for consideration</p>	<p>resources in the public sector. However, there may be times when that is not possible. Staff suggests allowing some flexibility to address that need.</p>
<p>(11) It should be made specifically clear that contractors that have violated state and federal laws while contracted by other public agencies should also be considered for debarment. Although the State's Department of Industrial Relations has the authority to debar contractors for prevailing wage and apprenticeship violations, this rarely occurs and usually only after three willful violations. This issue could also be addressed up front through a pre-qualification process, but debarment should also be a useful tool to prevent these violating contractors from participating on City of Oakland projects.</p> <p>Additionally, through recognizing violations at other public agencies, the City could enter into "reciprocal agreements" with agencies that also have similar debarment policies. Although it appears that this concern has been referenced in section 2.12.050, i, (e), it should be made more explicit, and should be described in the policy section of the proposed ordinance.</p>	<p>(11) Section 2.12.050 – Debarment of Contractors – Grounds, viii, states "Debarment by any other governmental agency for the period imposed by that agency." Staff does not believe a change is necessary in this regard.</p> <p>In Section 2.12.040 – "Investigation, Referral and Temporary Suspension" reads in part, "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." No changes are recommended.</p>

**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, and the changes to the ordinance as noted in the report.

**ACTION REQUESTED OF THE CITY COUNCIL**

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

Respectfully submitted,

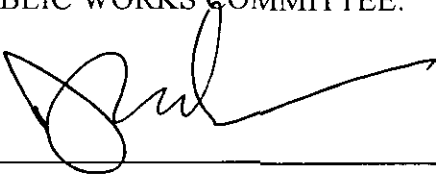


DEBORAH L. BARNES  
Director, Department of Contracting &  
Purchasing

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

Revised Attachment B – Verbatim Comments

APPROVED AND FORWARDED TO THE  
PUBLIC WORKS COMMITTEE:



Office of the City Administrator

Item: \_\_\_\_\_  
Public Works Committee  
April 7, 2009

VERBATIM COMMENTS

<b>I. Positive Comments: CEC-Course Evaluation Comments, IS-Internal Stakeholder, ES-External Stakeholder</b>		
1	CEC	This appears to be a very valuable tool. I'm really curious to know how far down in the organization debarment goes and for how long.
2	ES	Fully support a debarment ordinance. Live on Myrtle St. in Oakland. Received City funds to have a ramp built for quadriplegic son in 2005. The ramp broke and the contractor refused to repair it. Contractor claimed that the family broke the ramp. Family claims contractor broke it. Son can not get out of the house without calling the fire department or neighbors to help. He is a prisoner in his own home and nothing ever happened to the contractor.
3	ES	A good idea.
4	ES	I fully support this ordinance.
5	ES	I received a postcard regarding the proposed Debarment Program. If you would like, I can forward you a copy of Alameda County's Debarment Form.
6	ES	I am a long standing contractor with the City of Oakland providing professional appraisal services. I am in favor of any program that will cull out those who lack the qualifications need to provided the needed services. I am no expert on the issues you face regarding bad faith or fraud, but I like most Oakland residents have seen the levels of incompetence that occur from time to time. I am in favor of a Debarment Program for the City of Oakland.
7	ES	As a responsible local contractor we welcome the proposed Debarment Program emphatically. In the current climate of fiscal uncertainty it will help the City in its search for responsible and capable bidders. While it will have no effect on responsible, ethical contractors, it will provide for real consequences and penalties for contractors who engage in bad faith or fraudulent practices. The City's bidding requirements and goals are clearly defined and provide for a small bid discount for local contractors (3%). They are in no way excessive in comparison to other municipalities (for example, the City of San Francisco gives a full 10% discount to local bidders). Consequently, no contractor is at a significant disadvantage when bidding City of Oakland project. That is why it is especially egregious when fraudulent practices are employed by contractors rather than respecting the integrity of the process. If a contractor is found to be involved in fraudulent practices, and are fully aware of the consequences, then the Debarment Program should be implemented wholeheartedly. It comes down to the old adage – "if you play fair then you have nothing to fear".
8	ES	Contractor integrity and good faith is the essence of public works contracts, and the City is taking a positive step to ensure that the taxpayer's money will be spent in the best possible way. I would like to commend the Contract Compliance Department for the great work they do in providing a fair and equitable environment for the bidding process.
<b>II. Feedback/Recommendations</b>		
1	CEC	Section 2.12.010 (14) and Section 2.12.170--There may be felony/criminal or other serious breaches of contract where the City should not be limited to only 5 years of debarment. Maybe a line could be added that for very serious and extreme situations debarment can be for any duration the City Administrator find appropriate.
2	CEC	Section 2.12.050 vii -- Recommend City employees be included after contractor's employee in this sentence.
3	CEC	Section 2.12.200 G - Recommend "except as provided in 2.12.220" be included since we will have to pay a contractor if a current contract is continued (or wrapped up) after the commencement of a debarment on a different contract or PO.
4	CEC	Section 2.12.220 Recommend remove "or in any way extend the duration of our increase current contract amounts"
5	IS	Under Section 2.12.060-xii, it says, "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. But under Section 2.12.070 B, it says, "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." Shouldn't these sections say the same thing?

**REVISED ATTACHMENT B**

6	ES	(a) Thank you for the opportunity to comment on proposed Contractor Debarment ordinance. As an Oakland resident and taxpayer, I am pleased that the City Council is considering such an ordinance. For the purposes of the following comments, I consider any "debarred, suspended or otherwise excluded" party to be an excluded party, and have broadened the idea of "debarment" to "exclusion" so that suspension and other exclusion are encompassed in my comments. (Debarred, suspended or otherwise excluded" is a term used in Presidential Executive Order 12549, which addresses excluded parties.) Section 2.12.050 viii identifies one of the grounds for debarment is "Debarment by any other governmental agency for the period imposed by that agency..."
	ES	I recommend that Section 2.12.040 make clear the City Administrator has the specific right to suspend any contractor for the period of any exclusion order imposed by another government agency (while debarment proceedings are in progress). The intent of this comment is to prevent contractors excluded by another agency from obtaining an Oakland contract (or change order or an existing contract) while waiting for Oakland debarment proceedings. (b) I'm not sure whether Section 2.12.050 addresses campaign contributions to Oakland officials during the period prohibited by the terms of the solicitation. If so, then fine. If not, I recommend that campaign contributions made during the period prohibited by the terms of the solicitation be made a specific cause of action identified in Section 2.12.050, instead of keeping it in the "included, but not limited to" category.
7	ES	I recommend that Oakland exclusion orders be communicated to, at a minimum, the United States General Services Agency and the State of California Department of General Services. My understanding is that the Federal government recognizes exclusion orders of state and local agencies, and is consistent with the idea that the Oakland plans to recognize other government agencies' exclusion actions. Putting in a requirement for communication of all Oakland exclusion orders also will prevent excluded parties from trying to negotiate the non-communication of exclusion orders to other parties. I recommend that the ordinance make clear that the MINIMUM civil penalty (including damages) for obtaining a contract or change order while excluded is the amount paid under the contract or change order amount (as applicable) obtained while excluded. This recommended treatment is consistent with the Caltrans interpretation, in which contract awards to excluded construction contractors results in withdrawal of all Federal monies on the entire construction phase of the award (the construction contract amount is a major, but not the only, component of the construction phase).
8	ES	Thank you for accepting my request to seek clarification from the City Attorney for the following as outlined in Section 2.12.050 X : definition of "pending violations by the contractor or any affiliate". What is a "pending violation?" Does this mean a violation that is under investigation by the Labor Commissioner? The specific definition of a "pending violation" needs to be added. Can you also please clarify the definition of "affiliate?"
9	ES-A	The Policy should allow for 'third parties' to initiate the City's Debarment review. Our major recommendation is that the policy allow for the City to review a request from a "third party" to initiate a debarment review. Given the fact that City Departments responsible for compliance issues are understaffed and as a result are unable to track the performance of the contractor at other public agencies, a process should be put in place that allows for the City to consider evidence of violations that are presented by credible third party organizations or individuals. For example, Labor-Management Compliance Organizations, that monitor the prevailing wage and apprenticeship compliance of contractors with many other public agencies, will be able to provide the City of Oakland with actual verdicts, judgments and settlements of violations at other public agencies from contractors doing business with the City. For example, it may be difficult to find a expert in the fields for Apprenticeship requirements, Federal or state antitrust statutes, and falsification or records (and these are only three of the 23 categories for debarment).
10	ES-B	Careful thought should be given to the make-up of the "Debarment Hearing Board". The proposed policy under section 2.12.010, (15) defines the make-up of the Debarment Hearing Board as, "Members of the Board shall be unbiased, executive level 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." However, most likely the City staff that would have the "subject matter expertise" would be directly or indirectly responsible for the contractors compliance to City polices and of the debarment investigations. If legally feasible we would recommend that other credible and unbiased persons that are neither City Staff nor public sector employees would be considered as well. In addition, we recommend that there could be various boards to address the varying types of violations that would be up for consideration.
11	ES-C	It should be made specifically clear that contractors that have violated state and federal laws while contracted by other public agencies should also be considered for debarment. Although the State's Department of Industrial Relations has the authority to debar contractors for prevailing wage and apprenticeship violations, this rarely occurs and usually only after three willful violations. This issue could also be addressed up front through a pre-qualification process, but debarment should also be a useful tool to prevent these violating contractors from participating on City of Oakland projects. Additionally, through recognizing violations at other public agencies, the City could enter into "reciprocal agreements" with agencies that also have similar debarment policies. Although it appears that this concern has been referenced in section 2.12.050, i, (e), it should be made more explicit, and should be described in the policy section of the proposed ordinance.



III. Other		
1	CEC	Could more clearly review grounds and most common infractions. Also exactly what needs to be submitted for debarment.
2	CEC	Will there be a database of debarred businesses?
3	CEC	Should obtain feedback from some contractor before starting program/ordinance
4	CEC	Still new subject for Oakland. Will wait for future training course to know specifics
5	CEC	The City continues implementing programs but not enough staff to enforce the new ordinance and other established ordinances.
6	CEC	Learned new things.
7	IS	Would the contractor still be obligated to complete the work during the proposed debarment period?
8	IS	If a contractor is suspended and they do not get debarred, what legal consequences would the City face?

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OAKLAND

REVISED 3/17/09

APPROVED AS TO FORM AND LEGALITY

INTRODUCED BY COUNCILMEMBER

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DRAFT  
City Attorney

OAKLAND CITY COUNCIL

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

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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;

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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."

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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:

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(1) "Affiliate" means entities and/or persons are affiliates of each other:

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- 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.

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(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.

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(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."

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(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.

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(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.

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(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.

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(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, executive level persons and may be City or other public sector employees with subject matter

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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 2.12.060 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

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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.

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(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:

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- 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.

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(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."

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(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.

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

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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.

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2.12.030 - General

A. The grounds for 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.

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B. The City may debar a contractor for any of the debarment grounds set forth in Section 2.12.050. The purpose of this ordinance is, generally, to authorize debarment of contractors who engage in a pattern and practice of, or who are recurrently responsible for, any single or combination of debarment ground(s). However, a single occurrence of any debarment ground(s) may also subject contractors to debarment, depending on the egregious or serious nature of the acts or omissions. The existence of a cause or ground 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. Debarment actions shall be carried out in accordance with the procedures in Section 2.12.060 through 2.12.180 below.

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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

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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

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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.

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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.

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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*,

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the *suspension* shall continue until the *Debarment Hearing Board* makes a final decision on the proposed *debarment*.

**2.12.050 - Debarment of Contractors - Grounds**

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In accord with Section 2.12.030 above, the *City* may debar a *contractor* if the *City* finds, in its discretion, that the *contractor* has, or is engaged in, any of the following:

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- 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;

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- viii. *Debarment* by any other governmental agency for the period imposed by that agency;
- ix. Violation of federal regulations 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*;
- x. Violation of any nondiscrimination provisions included in any public agreement or transaction;
- xii. Any other significant Labor Law violations, including, but not limited to, child labor violations, failure to pay wages, or unemployment insurance tax delinquencies.
- xiii. Violation of any licensing, subletting or sublisting laws;
- xiv. Falsification, concealment, withholding and/or destruction of records;
- xv. 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.
- xvi. Violation of any law, regulation or agreement relating to conflict of interest with respect to government funded contracting;
- xvii. Knowingly or negligently doing business with a debarred, *suspended*, ineligible or voluntarily excluded contractor in connection with a *covered* or *related* transaction;
- xviii. Violation of a material provision of any settlement of a *debarment* action;
- xix. Commission of an egregious act or unlawful offense which indicates a lack of business integrity or business honesty;
- xx. 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;
- xxi. Failure to perform or unsatisfactory performance of one or more *City* *contracting policies*;

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xxii. 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 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;

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xxiii. Any other cause of so serious or compelling a nature that it affects the present responsibility of a contractor.

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#### 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:

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- 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 – 2.12.180, 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

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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. 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.

D. 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

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(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**

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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**.

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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:

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(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;

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- 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 service procedures set forth in this section.

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#### 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

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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(15) of this Ordinance, appointed by the *City Administrator*, unless the *City Administrator* elects to appoint a retired judge under Section 2.12.100, B below.

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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;

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- (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.

**2.12.110- Debarment Hearing Procedure**

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**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.

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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 2.12.070A, the allegations of the *City* shall be deemed admitted, and an order of default shall be entered pursuant to Section 2.12.070A iv.

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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

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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.

**2.12.120 - Standard of Proof**

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

**2.12.130 - Burden of Proof**

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- 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*.

**2.12.140 - Closing of the Hearing Record**

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- 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.

**2.12.150 - Rules of Evidence**

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- 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

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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.

#### 2.12.160 - Scope of Debarment

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- 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.

#### 2.12.170 - Period of Debarment

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

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2.12.180 - Debarment Decision

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- 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*.

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2.12.190 - "Excluded Contractor List"

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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.

**2.12.200 - Effect of Debarment**

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- 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.

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**2.12.210 - Imputed Conduct**

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- 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.

**2.12.220 - Continuation of Current Contracts**

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A. Notwithstanding *debarment*, or proposed *debarment*, the *City* may at its sole discretion continue *contracts* with *contractors* or that include subcontractors who are proposed for *debarment* which are in existence at the time the *person*, *contractor* or subcontractor 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.

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B. The *City* shall not award additional contracts to or in any way extend the duration of or increase current contract amounts 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 a current contract amount that identifies or lists 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.

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**2.12.230 - Restrictions on Subcontracting**

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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, sub-consultant, team member or other party to the *contract*.

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2.12.240 - Actions Other Than Debarment

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In the event that the City determines that a contractor's acts or omissions are insufficient to warrant debarment, the City Administrator may take one or more of the following actions:

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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

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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

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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.

2.12.250 - Judicial Review

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- 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

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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.

2.12.260 - Pre-emption.

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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.

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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.

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IN COUNCIL, OAKLAND, CALIFORNIA,

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PASSED BY THE FOLLOWING VOTE:

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

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NOES-

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ABSENT-

ABSTENTION-

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ATTEST: \_\_\_\_\_  
LaTonda Simmons  
City Clerk and Clerk of the Council  
of the City of Oakland, California

DATE OF ATTESTATION: \_\_\_\_\_

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