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OAKLAND
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AGENDA REPORT

TO: DEANNA J. SANTANA
CITY ADMINISTRATOR

FROM: Katano Kasaine

SUBJECT: Supplemental Report
Goldman Sachs Debarment
Proceedings

DATE: April 9, 2013

City Administrator
Approval

Date 4/11/13

COUNCIL DISTRICT: City-Wide

RECOMMENDATION

Staff recommends that the City Council accept a supplemental report to update the Council on the process of possibly debaring Goldman Sachs pursuant to the City's debarment ordinance.

EXECUTIVE SUMMARY

Staff has prepared a Request for Qualifications ("RFQ") that will be issued this week to qualified individuals and firms to perform an investigation and determine whether grounds exist to initiate debarment proceedings against Goldman Sachs. The recipients of the RFQ were identified through an informal search in coordination with the City Attorney's Office.

Ordinance No. 12926 C.M.S. (see Attachment A), which amended the Oakland Municipal Code to add Chapter 2.12 entitled "Debarment Program" and provide an administrative process for barring a contractor from doing business with the City, is attached hereto for reference.

BACKGROUND

On July 3, 2012, the City Council authorized the City Administrator to negotiate the termination of the swap agreement with Goldman Sachs. If Goldman Sachs refused to terminate the swap agreement without termination fees or penalty within 60 days, then they would be excluded from any future business with the City, and the City should continue to use all good faith efforts including options proposed by the Stop Goldman Sachs Coalition until such time as Goldman Sachs drops the termination fees and penalty.

After receiving this direction from the City Council, Staff began negotiations with Goldman Sachs and returned to the September 25, 2012 Finance and Management Committee meeting to report on the status of the City's negotiations efforts. At that time, the City and Goldman Sachs

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continued to be in active negotiations, whereby the Finance Committee provided staff an additional 45-60 days of negotiation and directed staff to return to the November 27, 2012 Finance and Management Committee meeting with results of the negotiations.

Between the time of the September 2012 committee meeting through the November 2012 committee meeting, Staff had been engaged in numerous discussions with Goldman Sachs regarding the interest rate Swap and City Council's directive to terminate the Swap at a zero cost. Due to the contractual nature of the Swap and Goldman Sachs' position that any structured termination of the Swap reflect a market value transaction, Goldman Sachs did not agree to terminate the Swap at \$0.

Staff reported these results to the Finance Committee at the November 27, 2012 committee meeting and requested the City Council provide direction to staff on negotiating an amendment to the Swap by accelerating the termination of the Swap through promissory note payments in lieu of the current Swap payments. Under the proposed promissory note structure, the Swap would be paid off by June 2014, at which time the Swap agreement would be terminated. The Finance Committee reaffirmed the Council's earlier resolution to terminate the swap and conduct no further business with Goldman Sachs.

At the December 18, 2012 City Council meeting, the City Council passed a recommendation from Councilmember Desley Brooks requesting the City Administrator to initiate debarment proceedings pursuant to Oakland Municipal Code Chapter 2.12 against Goldman Sachs, and to provide a report status of the proceedings at the second Council meeting in March 2013. The second Committee meeting in March was cancelled; therefore the item was scheduled for the next Committee meeting on April 9, 2013.

Between January through March 2013, working with the City Attorney's Office, staff sought after individuals and firms that would be qualified to conduct an investigation of possibly bringing debarment proceedings against Goldman Sachs. Staff identified between five to six individuals and firms that will be receiving the Request For Qualifications ("RFQ"). Through the results of the RFQ, an individual or firm will be selected by the end of April, which will initiate the debarment investigation. Staff anticipates that the selected investigator will require a minimum of three months to perform the investigation and issue a report on the results of the investigation to the City Administrator.

ANALYSIS

Staff will be returning to the City Council in May 2013 for authorization of a budget for the investigative services and possibly later on for authorization of a budget for the Hearing Board (or Officer), since neither are currently budgeted. In addition, Staff anticipates returning to the City Council to provide updates related to the debarment process.

For questions regarding this report, please contact Katano Kasaine, Treasurer, at (510) 238-2989.

Respectfully submitted,



KATANO KASAINÉ
Treasurer

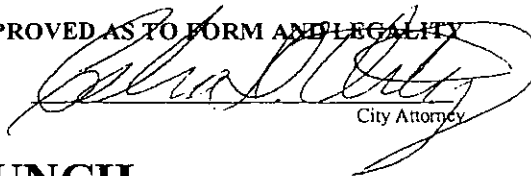
Attachment:

Attachment A: Ordinance 12926 C.M.S.

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APPROVED AS TO FORM AND LEGALITY



City Attorney

INTRODUCED BY COUNCILMEMBER _____

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ORDINANCE No. 12926 C.M.S.

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

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

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

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

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

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

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

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

Chapter 2.12 DEBARMENT PROGRAM

2.12.010 - Definitions

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

- (1) "Affiliate" means entities and/or persons are affil

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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*.
 - (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 as authorized by law.
 - (5) "*Benefits*" means money or any other thing of value provided by or realized because of a contract with the *City*. A thing of value includes insurance or guarantees of any kind and designation as a *City* "local business enterprise" or "small local business enterprise."
 - (6) "*City Contracting Policies*" means any policies of the *City Council* applicable to *City contracts* for goods and services, or to such contracts considered or awarded in connection with a *covered* or *related transactions*, including, but not limited to, *City's* Prevailing Wages, Living Wage, Equal Benefits, Local and Small Local Business Enterprise, Apprentice and local hire, Nuclear Free and Nondiscrimination policies.

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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
- (8) "*Consent Decree*" means a settlement between the *City* and a *contractor* whereby the *contractor* promises to refrain from certain acts or omissions.
- (9) "*Contract*" means any agreement to provide goods to, or perform services for or on behalf of, the *City*, or such contracts considered or awarded in connection with a *covered* or *related transaction*.
- (10) "*Contractor*" means any *person*, partnership, corporation, joint venture, company, vendor or other business entity who seeks to contract, submits a qualification statement, proposal, bid or quote or contracts directly or indirectly with the *City* for the purpose of providing goods or services to or for the *City*, or who seeks to or contracts to provide goods or services in connection with a *covered* or *related transaction*, including, without limitation, any *contractor*, subcontractor, consultant, sub-consultant or supplier at any tier. The term "*contractor*" shall include any responsible managing corporate officer who has personal involvement and/or responsibility in obtaining a *contract* with the *City* or in supervising and/or performing the work prescribed by the *contract*.
- (11) "*Contracting Officer*" means the *City* employee responsible for administering the *contract*.
- (12) "*Covered transaction*" means application for or participation in a *City contracting policy program*, activity, *contract* or *related transaction*, regardless of type, amount or source of funding.
- (13) "*Conviction*" means a judgment or *conviction* of a criminal offense of a type which would give rise to *debarment* of the convicted party under the terms of this Ordinance by any court of competent jurisdiction at the trial or appellate level whether entered upon a verdict or a plea, and includes a conviction upon a plea of nolo contendere.
- (14) "*Debarment*" means an administrative action taken by the *City* that results in a *contractor*, and any *affiliate* of the *contractor*, being prohibited from bidding upon or being awarded a *contract* with the *City* and/or performing a *contract* in connection with *covered* or *related transactions* for a period of up to five (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 expertise, but shall not be employees that participated in the complaint, investigation

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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 *person* who has a critical influence on or substantive control over a *contractor's* participation

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participation in a *covered* or *related transaction*, whether or not employed by the *participant*, *contractor* or any *affiliate* of a *participant* or *contractor*, the operations of which are so intertwined with the *participant* that the separate corporate identities may be disregarded.

- (25) “*Proposal*” means any response to a solicitation, application, request for *proposal*, invitation to submit a *proposal* or similar communication by or on behalf of a *contractor* seeking to participate or receive a benefit, directly or indirectly, in or under a *covered* or *related transaction*.
- (26) “*Related transaction*” means a transaction directly related to a *covered transaction*, which assists the *participant* in executing a *covered transaction*, regardless of the extent of the influence on or substantive control over the covered transaction by the *person* performing the related transaction. *Related transactions* include, but are not limited to, transactions of the *participant* with any of the following *persons*:
- iv. *contractors* (including direct subcontractors);
 - v. principal investigators;
 - vi. loan officers;
 - vii. staff appraisers and inspectors;
 - viii. underwriters;
 - ix. bonding companies;
 - x. appraisers and inspectors;
 - xi. real estate agents and brokers;
 - xii. management and marketing agents;
 - xiii. accountants, consultants, investment bankers, architects, engineers, attorneys and others in a business relationship with participants in connection with a *covered transaction* under an *City* contracting or agreement or activity;
 - xiv. vendors of materials and equipment in connection with an *City* contracting, agreement or activity;
 - xv. closing agents;
 - xvi. turnkey developers of projects;
 - xvii. title companies;
 - xviii. escrow agents;
 - xix. project owners;
 - xx. employees or agents of any of the above.
- (27) “*Respondent*” means a *person* against whom a debarment action has been initiated.
- (28) “*Suspend*” or “*Suspension*” means the temporary disqualification of a *contractor* from participating in *covered* or *related transactions* pending the completion of an investigation and any proceedings before a *Debarment Hearing Board*. A *contractor* so disqualified is “*suspended*.”
- (29) “*Voluntary Exclusion*” or “*Voluntarily Excluded*” means a status, assumed by a

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person, who is excluded from participating in *covered* and *related transactions* in accordance with the terms of a written settlement agreement with the *City*.

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

2.12.020 - Coverage

B. This Ordinance applies to:

- i. Any *contractor* who has participated, is currently participating, or may reasonably be expected to participate, in a Covered Transaction, irrespective of the source of funding;
- ii. Any *contractor* who has participated, is currently participating, or may reasonably be expected to participate, in a *related transaction*, irrespective of the source of funding including, without limitation, projects involving *City* funding, regardless of amount, or any other *City* interest, including, without limitation, a real or personal property interest;
- iii. Any *principal* of the *contractors* described in (i) and (ii) above, and:
- iv. Any *affiliate* of the *contractors* described in (i), (ii) or (iii) above.

2.12.030 - General

- A. The 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*.
- 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.
- C. *Debarment* constitutes *debarment* of all divisions or other organizational elements of the *contractor* named in the *debarment* proceedings, unless the *debarment* decision is limited by its terms to specific *affiliates*, divisions, organizational elements and individuals. The *City Administrator* may extend the *debarment* decision to include

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any *affiliates* of the *contractor* and *persons* if they are:

- i. Specifically named, and
 - ii. Given written notice of the proposed *debarment* and an opportunity to respond
- D. The *City* hereby delegates the *debarment* of *contractors* to the *City Administrator*.

2.12.040 - Investigation, Referral and Temporary Suspension

- A. The *City* shall utilize *City* personnel and other appropriate resources to conduct the investigation and develop the documentation required by paragraph (C) of this section.
- B. Information concerning the existence of a cause for *debarment* from any source shall be promptly investigated, reported, and referred to the *City Administrator* for consideration. The *City Administrator* shall be responsible for deciding whether or not to proceed with the action. After consideration, the *City Administrator* may issue a notice of proposed *debarment*, pursuant to Section 2.12.060 of this Ordinance.
- C. Basic documentation shall be developed that includes but is not limited to:
- i. The name of the specific *respondent(s)* against whom the action is being proposed or taken;
 - ii. The reason(s) for proposing the *debarment*;
 - iii. A short narrative stating the facts and/or describing other evidence supporting the reason(s) for the need to debar;
 - iv. The recommended time period for the *debarment*;
 - v. Copies of any relevant support documentation identified under this section.
- D. The Office of the City Attorney is responsible for reviewing the documentation and notices for legal sufficiency.
- E. The *City Administrator* may temporarily *suspend* a *contractor* upon the determination that adequate evidence exists supporting *debarment* and doing so in the public interest. The *City Administrator* shall notify the contractor of the *suspension* in accordance with Section 2.12.060, pending the *Debarment Hearing Board* ruling on the matter. Once the *City Administrator* has *suspended* a *contractor*, the *suspension* shall continue until the *Debarment Hearing Board* makes a final decision on the

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decision on the proposed *debarment*.

2.12.050 - *Debarment of Contractors – Grounds*

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:

- i. Willful or intentional misconduct in connection with any *City bid*, request for qualifications, request for *proposals*, purchase order and/or *contract* including, without limitation, (a) collusion in obtaining a *City contract* or payment thereunder, (b) submission of false information in response to a solicitation, advertisement or invitation for *bids* or quotes, (c) submission of false information in response to a solicitation or request for qualifications or *proposals*, (d) submission of false claims as defined in California Government Code, Section 12650 et seq. and Title 31 U.S.C. Section 3729 et seq., (e) issuance of a verdict, judgment, settlement, stipulation or plea agreement establishing the *contractor's* violation of any civil or criminal law against any government entity relevant to the *contractor's* ability or capacity to honestly perform under or comply with the terms and conditions of a *City contract*;
- ii. Willful or intentional failure to perform in accordance with the terms of one or more *contracts* including, but not limited to, terms pertaining to *City contracting policies*;
- iii. Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public agreement or transaction;
- iv. Violation of Federal or State antitrust statutes, including those prescribing price fixing between competitors, allocation of customers between competitors, and *bid rigging*;
- v. Commission of embezzlement, theft, forgery, bribery, making false statements, submitting false information, attempting to commit a fraud against the *City*, receiving stolen property, making false claims to any public entity, obstructing justice, fraudulently obtaining public funds;
- vi. Taking or misappropriating *City* property or using *City* property, including real and personal property, in an unauthorized manner;
- vii. Performance or conduct on one or more private or public agreements or transactions that caused or may have caused a threat to the health or safety of the *contractor's* employees, any other persons involved with the transaction, the general public or property;
- viii. *Debarment* by any other governmental agency for the period imposed by that

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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*. A "pending violation" is defined as an investigation by any governmental entity (e.g. another city, county, school district, etc.). Investigations by private businesses will not be recognized.
- xi. 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*

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contracting policies;

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

2.12.060 - Notice of Proposed Debarment to *Contractor (Respondent)*

- A. The *City Administrator* shall initiate a *debarment* proceeding by issuing a *Notice of Proposed Debarment* to the *contractor* and any *affiliates* that *City* determines should be parties to the action (hereafter, collectively, "*respondent*"), at least ninety (90) days prior to the date of the *debarment* hearing advising:
 - i. That *debarment* is being considered;
 - ii. That *respondent* is *suspended* pending final determination in the *debarment* proceeding when the *City Administrator* has determined that *suspension* is in the public interest;
 - iii. Information on the specific *debarment* action proposed;
 - iv. Of the reasons for the proposed *debarment* in terms sufficient to put the *respondent* on notice of the conduct or transaction(s) upon which it is based;
 - v. Of the cause(s) relied upon under Section 2.12.050 for proposing *debarment*;
 - vi. Of the provisions of Sections 2.12.070 – 2.12.180, and any other procedures, if applicable, governing *debarment* decision making;
 - vii. That the *respondent* must submit a written response within fifteen (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

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debarment action, and that failure to appear may result in a waiver of the *respondent's* defenses to the *debarment* action, and be taken as an admission by the party failing to appear that the basis for the *debarment* is accurate, except to the extent the *respondent* challenges the *debarment* action solely by means of a written submission.

- xii. That the *City* may submit a reply to the written response of the *respondent* within (30) days following receipt of the response made by or on behalf of the *respondent*.
- B. The notice to the *respondent* shall be signed by the *City Administrator* and transmitted by certified mail, return receipt requested to the last known address provided the *City* by the *respondent*.
- C. 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* not later than 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.

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- iv. In the event that the *respondent* fails to file a written response not later than thirty (30) days of receipt of the *City Administrator's Notice of Proposed Debarment* in accordance with this section, the allegations of the *City* may be deemed admitted, the *Debarment Hearing Board* may enter an order of default and transmit it to the *City Administrator*. The *City Administrator's* decision shall thereafter issue, with service on the parties.

B. Reply by the City

The *City* may submit to the *Debarment Hearing Board* and serve in accordance with Section 2.12.080, a reply to the *respondent's* response not later than thirty (30) days after receiving the *respondent's* response.

C. Stipulations

The parties are encouraged to meet and resolve as many matters as possible by stipulated agreement prior to the hearing. The parties may stipulate as to any relevant matters of fact or law. Stipulations may be received in evidence at the hearing, and when received shall be binding on the parties with respect to the matter stipulated.

D. Document and Submission Requirements

- i. An original and one copy of all documents to be presented to the *Debarment Hearing Board* and copies of all documents served on said *Board* shall be served simultaneously on the opposing party at the specific location designated on the notice of debarment in accordance with Section 2.12.080.
- ii. All documents required or permitted under this Ordinance, in addition to being served on *Debarment Hearing Board* in accordance with this Section, shall be served upon:
 - (1) the Office of the *City Administrator* at One Frank Ogawa Plaza, 3rd Floor, Oakland, CA 94612;
 - (2) The *Respondent* or *Respondent's* representative;
- iii. Documents served in accordance with this Section and Section 2.12.080 shall state clearly the party's name and the title of the document. All documents should be typewritten or printed in clear, legible form.

2.12.080 - Service

- A. Service of documents on the *respondent*, including the notice, shall be made by any reasonable means, including by first class mail, fax, e-mail or delivery to:

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- i. the *respondent* to be served or that *respondent's* designated representative or agent, at the last known address;
 - ii. the *respondent's* last known place of business; or
 - iii. a *principal* of the *respondent*, of the entity for which the *respondent* is a *principal*.
- B. Proof of service shall not be required unless the fact of service is denied under oath and put in issue by appropriate objection on the part of the *respondent* allegedly served. In such cases, service may be established by written receipt signed or on behalf of the *respondent* to be served, or may be established prima facie by any responsible means, including, but not limited to affidavit or certificate of service of mailing.
- C. Service of documents on other interested parties, such as insurance and bonding companies, shall follow the service procedures set forth in this section.

2.12.090 - Time Computation

Any period of time prescribed or allowed by this Ordinance shall include in its computation of the prescribed period, Saturdays, Sundays and national holidays, except that when the last day of the period is Saturday, Sunday, national holiday or other day that the *City* is closed, the period shall run until the end of the next following business day.

2.12.100 - *Debarment Hearing Board* Powers and Responsibilities

- A. To ensure the fair and efficient administration of debarment proceedings, they shall be presided over by the *Debarment Hearing Board*, as defined in Section 2.12.010(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.
- 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;

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- (3) regulate the course of the hearing and the conduct of the parties and their counsel;
- (4) hold conferences to facilitate the settlement or simplification of the issues by consent of the parties or at the request of a party;
- (5) consider and rule upon all evidentiary and procedural matters pertaining to the hearing, including, but not limited to, setting page limits on documents that may be submitted;
- (6) make findings of fact and take notice of any material fact not appearing in evidence in the record which would properly be a matter of judicial notice;
- (7) receive evidence and rule on offers of proof;
- (8) administer oaths and affirmations;
- (9) issue a final decision imposing *debarment* of the *respondent* with respect to future *City contracts* and *covered* or *related transactions*, or imposing no sanction;
- (10) recommend to the *City* staff, if so requested, a course of action to remedy *respondent's* past actions which gave rise to the *debarment* action;
- (11) take any other action necessary to protect each party's rights, to avoid delay in the disposition of the *debarment* proceeding and to maintain order.

ii. Prohibition Against *Ex-parte Communications*

- (1) *Ex-parte communications* are prohibited unless:
 - (a) the purpose and content of the communication has been disclosed in advance or simultaneously to all parties involved;
or
 - (b) the communication is a request for information to the *Debarment Hearing Board's* staff concerning the status of the *debarment* action.

2.12.110- *Debarment Hearing Procedure*

A. Right to Hearing

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- A. All *respondents* subject to *debarment* pursuant to this Ordinance shall be entitled to a hearing at the date, time and place set forth in the notice.
 - B. The *respondent* may elect to waive its right to a hearing and rely solely on a written response. If the *respondent* elects to waive its right to a hearing, such waiver must be clearly stated in the *respondent's* response. If *respondent* fails to file a written response as required under Section 2.12.070A, the allegations of the *City* shall be deemed admitted, and an order of default shall be entered pursuant to Section 2.12.070A iv.
 - 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

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section may represent the *respondent* upon an adequate showing, as determined by the *Debarment Hearing Board*, that the individual possesses the legal, technical or other qualifications necessary to advise and assist in the presentation of the *respondent's* case.

- D. All testimony provided at the hearing shall be under oath.
- E. At the request of either the *respondent* or the *City*, the proceedings shall be transcribed by an authorized court reporter. The cost of the transcript of the proceedings shall be paid by the party requesting the transcript, or in the event both parties request the transcript, the cost shall be divided evenly between them.

2.12.120- Standard of Proof

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

2.12.130 - Burden of Proof

- A. The *City* has the burden of proof to establish the cause for *debarment*. The *respondent* has the burden of proof to establish mitigating circumstances.
- B. Where the proposed *debarment* is based upon a *conviction, civil judgment, or a debarment* by another governmental agency and the *City* submits evidence as to the existence of such, the *City* shall be deemed to have met its burden of proof to establish cause for *debarment*.

2.12.140 - Closing of the Hearing Record

- A. The closing of the hearing record may be postponed by the *Debarment Hearing Board*, in its discretion, in order to permit the admission of other evidence into the record. In the event further evidence is admitted, each party shall be given an opportunity within a reasonable time to respond to such evidence.
- B. Once the *Debarment Hearing Board* deems the hearing to be concluded there shall be no further proceedings before it or evidence accepted by it on the cause for *debarment* unless a request is made in writing within three (3) days following the conclusion of the hearing and good cause shown.

2.12.150 - Rules of Evidence

- A. Every party shall have the right to present its case or defense by oral or documentary evidence and to submit rebuttal evidence. The *Debarment Hearing Board* may, within its discretion, permit cross-examination of witnesses on request. The *Debarment Hearing Board* may exclude irrelevant, immaterial or unduly repetitious evidence.

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- B. The *debarment* hearing need not be conducted according to technical rules relating to evidence and witnesses except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law statutory rule which might make improper the admission of the evidence over objection in civil actions.
- C. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.
- D. The rules of privilege as set forth in the California Code of Civil Procedure shall apply.
- E. The *Debarment Hearing Board* has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.
- F. The *Debarment Hearing Board* shall not have the power to compel any witness or party to give evidence in contravention of any evidentiary privilege recognized under applicable law, including, but not limited to, the Fifth Amendment privilege against self-incrimination under the Constitution of the United States of America and the attorney-client privilege.

2.12.160 - Scope of Debarment

- A. *Debarment* of a contractor or *affiliate* under this Ordinance constitutes *debarment* of all its specifically identified principals, individuals, divisions and other organizational elements from all *contracts* and *covered* and *related transactions* with the City, unless the *debarment* decision is limited by its terms to one or more principals, individuals, divisions or other organization elements or to specific types of transactions.
- B. As may be appropriate, the *debarment* action may include any *affiliate* of the *participant* that is specifically named and given notice of the proposed *debarment* and an opportunity to respond.
- C. The *debarment* of a contractor and its *affiliates* under this Ordinance may include the *debarment* of any other business that is, has been or will be controlled or owned by the contractor and its *affiliates*, or by any entity owned or controlled by a *person* or *persons* who own a controlling interest in a contractor and its *affiliates*, then or at the time the *debarment* was imposed.

2.12.170 - 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.

2.12.180 - Debarment Decision

- A. The *debarment* decision shall be made within forty (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 forty (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"

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

- 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

- 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*

- 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.
- 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.

2.12.230 - Restrictions on Subcontracting

When a *person* or *contractor* is debarred or proposed for *debarment* *City* shall not award a *contract* that includes such *person* or *contractor* as a subcontractor, supplier, sub-consultant,

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team member or other party to the *contract*.

2.12.240 - Actions Other Than **Debarment**

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:

A. Voluntary Exclusion

- i. The *City* and a *contractor* may agree to a *voluntary exclusion* of the *contractor* and any of its *principals* and/or *affiliates* from participation in *City contracts* and *covered and related transactions* for a period of up to five (5) years.
- ii. A *contractor* and any of its *principals* and/or *affiliates* who agree to *voluntary exclusion* shall be placed on the *Excluded Contractor List*.
- iii. A *contractor* and any of its *principals* and/or *affiliates* who participate in *City contracts* and *covered and related transactions* during the period of their *voluntary exclusion* will not be paid for goods and services provided, and may be considered for *debarment*.

B. Consent Decree

A *contractor* and any of its *principals* and/or *affiliates* found to be in violation of one or more provisions of this Ordinance may enter into a settlement in the form of a *consent decree* with the *City*. The *consent decree* will specifically provide that the person will refrain from the act(s) or omission(s) that had been found to be in violation of this Ordinance. A *consent decree* may be entered into alone or in conjunction with one or more of the procedures described in this section.

C. Warning Letter

Where there appears to be an act or omission in violation of this Ordinance, a *warning letter* may be issued to the *contractor* and any of its *principals* and/or *affiliates*. In all subsequent transactions between the *contractor* and any of its *principals* and/or *affiliates* and the *City*, the *warning letter* will be considered notice concerning such acts or omissions and may be submitted as evidence in a subsequent *debarment* proceeding.

2.12.250 - Judicial Review.

- A. Judicial review of any final decision reached by the *City* under this ordinance shall be conducted by the Superior Court of the County of Alameda, pursuant to an administrative writ of mandate as described under Section 1094.5 of the Code of

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Civil Procedure (CCP), provided that the petition for writ of mandate is filed within the time limits set forth in Oakland Municipal Code Section 1.20.010, which incorporates the limitation on the filing of actions provided in the Code of Civil Procedure Section 1094.6 for administrative determinations of the City.

- B. In every final decision reached under this Ordinance, notice of such final decision shall only be given directly to the *respondent* and such notice shall explain that CCP Section 1094.6 governs the time period within which judicial review of any such final decision must be sought. Final notice to the respondent shall conclude with the following statement:

THE CITY HAS REACHED A FINAL DECISION IN THE ADMINISTRATIVE MATTER PENDING BEFORE THE CITY. IF YOU CHOOSE TO SEEK JUDICIAL REVIEW OF CITY'S FINAL DECISION IN THIS MATTER, SUCH ACTION SHALL BE INITIATED UNDER CCP SECTION 1094.5 AND TIME LIMITS FOR FILING SUCH AN ACTION AS ARE SET FORTH IN CCP SECTION 1094.6. IT IS YOUR SOLE RESPONSIBILITY TO TAKE WHATEVER ACTION YOU DEEM APPROPRIATE IN RESPONSE TO THIS NOTICE.

2.12.260 - Pre-emption.

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

SECTION 2. Severability.

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

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SECTION 3. Effective Date.

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

IN COUNCIL, OAKLAND, CALIFORNIA, MAY 5 2009

PASSED BY THE FOLLOWING VOTE:

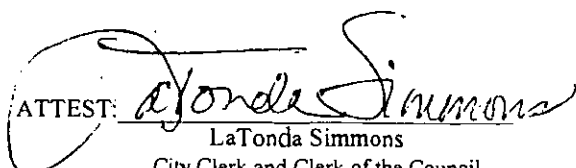
AYES- BROOKS, DE LA FUENTE, KAPLAN, KERNIGHAN, NADEL, QUAN, ~~REID~~, and
PRESIDENT BRUNNER - 7

NOES- 0

ABSENT- 0

ABSTENTION- 0

Excused- Reid- 1

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

Introduction Date: **APR 21 2009**

DATE OF ATTESTATION: _____

S-13
MEETING OF THE
OAKLAND CITY COUNCIL