

RESOLUTION NO. _____

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE APPROVING AMENDMENTS TO COUNCIL POLICY 0-44, "WAGE THEFT PREVENTION POLICY", TO REVISE MANDATORY DISQUALIFICATION FROM PROCUREMENT, REMOVE THE EXEMPTION FOR CITY OF SAN JOSE PUBLIC WORKS PROJECTS, **LIMIT CONSIDERATION OF WAGE THEFT TO EVALUAION FOR PROCUREMENT OF LIMITED SERVICES**, AND EXEMPT FROM MANDATORY DISQUALIFICATION FUTURE PROCUREMENTS FOR JANITORIAL SERVICES OR SECURITY GUARD SERVICES IF THE PROPOSER CAN DEMONSTRATE THE ABILITY TO COMPLY WITH CERTAIN LABOR REQUIREMENTS INCLUDING WAGES, HOURS, WORKING CONDITIONS, AND A GRIEVANCE PROCESS TO ADDRESS WAGE CLAIMS, AND MAKE OTHER CLARIFYING CHANGES

WHEREAS, the City Council of the City of San José ("City") adopted City Council Policy 0-44, "Wage Theft Prevention Policy", by City Council action on May 24, 2016, to prevent wage theft on City contracts ("Policy"); and

WHEREAS, the current Policy 1) requires potential contractors to disclose prior wage theft judgments or final administrative orders during the contract solicitation process; 2) requires City contractors to disclose wage theft judgments and final administrative orders during the term of the contract; 3) requires City contractors and subcontractors to comply with all wage and hour laws; 4) authorizes the City to terminate the contract for violation of wage and hour laws; and 5) specifies how the City may seek denial, suspension or revocation of City permits and licenses for violation of wage and hour laws; and

WHEREAS, the current Policy relies solely on self-disclosure and the threshold for mandatory disqualification may cause the City to be at a disadvantage when competing for goods and services; and

WHEREAS, removing the exemption for public works projects, and modifying the threshold for mandatory disqualification based on verifiable judgments or decisions from the California Labor Commissioner would provide for consistent and reliable consideration of wage theft in all City procurement and contracting; and

WHEREAS, janitorial and security service industry workers are industries that provide services to the City, and are industries that have experienced a pattern of wage theft that could be minimized through requiring proposers to demonstrate compliance with certain labor requirements; and

WHEREAS, the City Council desires to amend the Policy to revise mandatory disqualification from procurement, remove the exemption for City public works projects, and exempt from mandatory disqualification future procurements for janitorial services or security guard services if the proposer can demonstrate the ability to comply with certain labor requirements including wages, hours, working conditions, and a grievance process to address wage claims, and make other clarifying changes; and

WHEREAS, this Policy supersedes City Council Policy 0-44 approved by the City Council on May 24, 2016 under Resolution No. 77755, and shall be effective July 1, 2023;

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE THAT:

The revised City Council Policy 0-44, entitled “Wage Theft Prevention Policy,” which revised policy is attached hereto as Exhibit A and incorporated herein by this reference as though fully set forth herein, is hereby approved and shall, ~~as of the date and time of adoption of this Resolution~~ **effective July 1, 2023**, replace City Council Policy 0-44, approved by the City Council on May 24, 2016.

ADOPTED this _____ day of _____, 2023, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

MATT MAHAN
Mayor

ATTEST:

TONI J. TABER, CMC
City Clerk

City of San José, California

COUNCIL POLICY

TITLE WAGE THEFT PREVENTION POLICY	PAGE 1 of 5	POLICY NUMBER 0-44
EFFECTIVE DATE July 1, 2016	REVISED DATE <u>March 28, 2023</u> <u>(Effective July 1, 2023)</u>	
APPROVED BY COUNCIL ACTION May 24, 2016, Item 4.1, Res. No. 77755; <u>March 28, 2023, Item 3.6, Res. No. XXXXX</u>		

BACKGROUND

Wage theft occurs when an employer fails to pay its workers the wages to which they are legally entitled. It is the crime of stealing earned wages from workers. There are numerous forms of wage theft involving violations of employment laws but all resulting in workers earning less than they are entitled to earn.

Local and national studies on wage theft report that wage theft is a pervasive and chronic problem. Wage theft is not incidental, aberrant, rare or committed only by a few rogue employers at the periphery of the labor market. Instead, it takes place in industries that span the economy – from retail, restaurants and grocery stores; caregiver industries; manufacturing, construction and wholesalers; building services such as janitorial and security; and personal services such as dry cleaning and laundry, car washes and beauty and nail salons.

~~At the June 23, 2015 City Council Priority Setting Session, the issue of wage theft and how to combat it was deemed to be the Council's highest priority. Staff was directed to analyze various policy options to combat wage theft.~~

PURPOSE

To establish a Council Policy and procedure to prevent wage theft on City contracts as well as deny, suspend or revoke certain City permits and licenses to businesses with unpaid wage theft judgments.

POLICY

It is the policy of the City of San José that all parties contracting with the City must comply with all applicable federal, state and local wage and hour laws including but not limited to the Federal Fair Labor Standards Act ("~~FSLA~~FLSA"), the California Labor Code and the San José Minimum Wage Ordinance.

DRAFT--Contact the Office of the City Clerk at (408) 535-1260 or CityClerk@sanjoseca.gov for final document.

REVISED—Per Supplemental Memorandum dated 03/23/2023.

Bid or Proposal Disqualification Circumstances

1. A potential contractor that has submitted a formal or informal bid or proposal to provide supplies, materials, goods, and/or services to the City pursuant to San José Municipal Code Chapter 4.12 ***shall*** be disqualified if the potential contractor has received three or more final wage judgments from the California Labor Commissioner's Office in the last three years prior to the date of submission ~~been found, by a court or by final administrative action of an investigatory government agency, to have violated applicable wage and hour laws on more than one (1) occasion~~ **or** has one ~~(1)~~or more unpaid wage judgments in the past five ~~(5)~~ years prior to the date of submission of a bid or proposal to provide supplies, materials, goods and/or services.
2. A potential contractor that has submitted a formal or informal bid or proposal to provide supplies, materials, goods, and/or services to the City pursuant to San José Municipal Code Chapter 4.12 ***may*** be disqualified if the potential contractor has been found, by a court or by final administrative action of an investigatory government agency, to have violated applicable wage and hour laws on one ~~(1)~~or more occasions ~~and the all~~ wage and hour judgments ~~has~~have been satisfied in the past five ~~(5)~~ years prior to the date of submission of a bid or proposal to provide supplies, materials, goods and/or services.
3. A potential contractor that has submitted a formal or informal bid or proposal for a procurement for security guard or janitorial services will not automatically be disqualified under Section 1 above from the procurement if the proposer can provide documentation that demonstrates how they intend to comply with this Policy including wage, hours, working conditions, and a grievance process for wage and hour claims. The proposer may rely on provisions in a collective bargaining agreement or other documentation.
4. Potential contractors that have submitted a formal or informal bid or proposal for a procurement for a service that is highly regulated under state or federal law will not be disqualified under Sections 1 and 2 above from the procurement if disqualification would limit the City's ability to compete in the market for service(s) for the most qualified potential contractors. The City may consider (i) the number of judgments or final administrative decisions and their cumulative dollar amount; (ii) the number of employees impacted by the prior violations; (iii) the size of the company; and (iv) history of compliance with wage and hour laws as part

of the evaluation of potential contractors. The potential contractor is subject to all other requirements of this Policy.

Grounds for Contract Termination

A current contractor found by a court or by final administrative action of an investigatory government agency to have violated applicable wage and hour laws, in the five ~~(5)~~ years prior to or during the term of the contract with the City, ***may*** be in material breach of its contract with the City if the violation is not fully disclosed and/or satisfied per City contract requirements. Such breach may serve as a basis for contract termination and/or any other remedies available under law, including a stipulated remediation plan.

~~This Policy does not apply to any “public works” contracts as defined in City Charter Section 1217.~~

PROCEDURE

I. MANDATORY DISCLOSURE REQUIREMENT

As a part of any City solicitation for supplies, materials, goods, and/or services, a potential contractor shall fully complete a “Bid Certification” (“Certification”) in ~~substantially the same~~ form ~~as the attached Attachment A approved by the Department of Finance in coordination with the Office of Equality Assurance.~~ The Certification requires each potential contractor to disclose whether the contractor has been found by a court or final administrative action of an investigatory government agency to have violated federal, state, or local wage and hour laws within the past five ~~(5)~~ years from the date of the submitted bid or proposal. For each disclosed violation, the potential contractor shall provide a copy of (i) the court order and judgment and/or final administrative decision; and (ii) documents demonstrating either that the order/judgment has been satisfied, or if the order/judgment has not been fully satisfied, a written and signed description of potential contractor’s efforts to date to satisfy the order/judgment. The completed Certification shall be submitted by the potential contractor to the City as a part of its bid or proposal.

The City ***shall*** disqualify a potential contractor ~~based on the disclosed violation~~ if the potential contractor has been found by ~~a court or by final administrative action of an investigatory government agency~~ the California Labor Commission to have violated applicable wage and hour laws on ~~more than one (1) three~~ occasions or has one ~~(1)~~ unpaid wage judgment.

The City, at its sole discretion, ***may*** disqualify a potential contractor based on ~~the one (1) any satisfied judgments or final administrative decisions disclosed satisfied~~

judgment. In evaluating whether to disqualify a potential contractor, the City should evaluate (i) the amount-number of the judgments or final administrative decisions and their cumulative dollar amount; (ii) the number of employees impacted by the prior violations; (iii) the size of the company and history of compliance with wage and hour laws; and (iv) the impact to the City; and (v) other factors that may be appropriate.

Inaccurate or incomplete disclosures constitute a violation of the City's Wage Theft Prevention Policy and **may** result in immediate disqualification from the City solicitation and contracting process ~~or immediate termination of any contract with the City.~~

II. CONTRACT LANGUAGE AFTER SUCCESSFUL BID OR PROPOSAL

All City contracts subject to this Policy shall include ~~the following~~ provisions that substantially conforms to the following to the extent permitted by law:

"Wage Theft Prevention

Compliance with Wage and Hour Laws: Contractor, and any subcontractor ~~it employs to complete~~ performing work under this Agreement, shall comply with all applicable federal, state and local wage and hour laws. Applicable laws may include, but are not limited to, the Federal Fair Labor Standards Act, the California Labor Code, the San José Living Wage Policy, the San José Prevailing Wage Policy, and the San José Minimum Wage Ordinance.

Final Judgments, Decisions, and Orders: For purposes of this Section, a "final judgment, decision, or order" refers to one for which all appeals have been exhausted or the time period to appeal has expired. Relevant investigatory government agencies include: the federal Department of Labor, the California Division of Labor Standards Enforcement, the City of San José Office of Equality Assurance, or any other governmental entity or division tasked with the investigation and enforcement of wage and hour laws.

Prior Judgments against Contractor and/or its Subcontractors: BY SIGNING THIS AGREEMENT, CONTRACTOR AFFIRMS THAT IT HAS DISCLOSED ANY FINAL JUDGMENTS, DECISIONS OR ORDERS RELATING TO WAGE AND HOUR LAWS FROM A COURT OR INVESTIGATORY GOVERNMENT AGENCY FINDING AS TO THE CONTRACTOR AND ITS SUBCONTRACTOR(S) – IN THE FIVE (5) YEARS PRIOR TO EXECUTING THIS AGREEMENT – THAT CONTRACTOR OR ITS SUBCONTRACTORS(S) HAS VIOLATED ANY APPLICABLE WAGE AND HOUR LAWS. CONTRACTOR FURTHER AFFIRMS THAT IT OR ITS SUBCONTRACTOR(S) HAS SATISFIED AND COMPLIED WITH ANY SUCH JUDGMENTS, DECISIONS OR ORDERS – OR HAS REACHED AGREEMENT WITH THE CITY REGARDING THE

MANNER IN WHICH IT WILL SATISFY – ANY SUCH JUDGMENTS, DECISIONS OR ORDERS.

Judgments or Decisions During Term of Contract: If at any time during the term of this Agreement, a court or investigatory government agency issues a final judgment, decision or order finding that Contractor or a subcontractor it employs to perform work under this Agreement has violated any applicable wage and hour law, or Contractor learns of such a judgment, decision, or order that was not previously disclosed, Contractor shall inform the Office of Equality Assurance, no more than ~~fifteen~~ (15) days after the judgment, decision or order becomes final or of learning of the final judgment, decision or order. Contractor and its subcontractors shall promptly satisfy and comply with any such judgment, decision, or order, and shall provide the City's Office of Equality Assurance with documentary evidence of compliance with the final judgment, decision or order within five (5) days of satisfying the final judgment, decision or order. The City reserves the right to require Contractor to enter into an agreement with the City regarding the manner in which any such final judgment, decision, or order will be satisfied.

City's Right to Withhold Payment: Where Contractor or any subcontractor it employs to perform work under this Agreement has been found in violation of any applicable wage and hour law by a final judgment, decision or order of a court or government agency, the City reserves the right to withhold payment to Contractor until such judgment, decision or order has been satisfied in full.

Material Breach: Failure to comply with any part of this Section constitutes a material breach of this Agreement. Such breach may serve as a basis for immediate termination of this Agreement and/or any other remedies available under this Agreement and/or law.

Notice to City Related to Wage Theft Prevention: Notice provided to the City's Office of Equality Assurance as required under this Section shall be addressed to: Office of Equality Assurance, 200 East Santa Clara Street, 5th Floor, San José, CA 95113. The Notice provisions of this Section are separate from any other notice provisions in this Agreement and, accordingly, only notice provided to the above address satisfies the notice requirements in this Section."

~~In the event the contractor or subcontractor is in violation of the contract provisions above, the City should weigh the same factors set forth in Section 1 of this Policy to determine whether the City should terminate the contract or pursue some other remedy. The City may terminate any agreement if a contractor fails to comply with the wage theft prevention contract provisions.~~

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III. REVOCATION OF PERMITS, LICENSES AND REGISTRATIONS

~~Add an additional ground to Title~~ Pursuant to Section 6.02.130, ~~the City may to~~ deny, suspend or revoke a permit or license for permits issued under Title 6 for. ~~The additional ground shall be for the~~ failure to pay comply with a final judgment, decision or order of a court or ~~final administrative action of an investigatory~~ government agency ~~for violating relating to applicable~~ wage and hours laws.

If the City receives complaints about Title 6 permittees regarding wage theft, the Office of Equality Assurance shall work with the City Attorney's Office and the department responsible for issuance of the permit or license to investigate the complaint to determine denial, suspension, or revocation of the permit or license until the wage judgment is satisfied.