

DRAFT

ORDINANCE NO.

**AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING
TITLE 4 OF THE SAN JOSE MUNICIPAL CODE BY
AMENDING CHAPTER 4.10 TO CONSOLIDATE,
STREAMLINE, UPDATE AND CLARIFY THE MANNER IN
WHICH THE CITY WILL CONDUCT CONTRACTOR
DEBARMENTS**

WHEREAS, the City of San José City Council desires to approve this Ordinance for the reasons set forth in the memorandum, dated September 13, 2021, from the Director of Public Works Matt Cano and the Director of Finance Julia Cooper on the October 5, 2021 City Council meeting; and

WHEREAS, pursuant to the provisions and requirements of the California Environmental Quality Act of 1970, together with related State CEQA Guidelines and Title 21 of the San José Municipal Code (collectively, "CEQA"), the Director of Planning, Building and Code Enforcement has determined that the provisions of this Ordinance do not constitute a project, under File No. PP Not a Project, File No. PP17-008, General Procedure and Policy Making resulting in no changes to the physical environment; and

WHEREAS, the City Council of the City of San José is the decision-making body for this Ordinance; and

WHEREAS, this Council has reviewed and considered the "not a project" determination under CEQA prior to taking any approval actions on this Ordinance;

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

Chapter 4.10 of Title 4 of the San José Municipal Code is hereby amended to read as follows:

**CHAPTER 4.10
CONTRACTOR DEBARMENT**

**Part 1
Purpose**

4.10.100 Scope of Chapter.

- A. This Chapter sets forth the procedures for debarring Contractors.
- B. Debarring a Contractor results in the Contractor being prohibited from doing business with the City for a period not to exceed five (5) years.
- C. This Chapter does not preclude the City from rejecting a Contractor for not being responsible based on the requirements of a specific procurement outside of the debarment process set forth in this Chapter.

4.10.105 Rationale.

- A. Contracting with the City is an important municipal affair. The City's contracting process is for the benefit of the public, not Contractors.
- B. Awarding a Contract to a Contractor that engages in conduct that is a basis for debarment under this Chapter compromises the integrity of the City's contracting process. Debarment protects the integrity of the City's contracting process and helps ensure the proper expenditure of public funds.

4.10.110 Due Process.

This Chapter sets forth the due process required before the City can preclude the Contractor from participating in the City's contracting process.

**Part 2
Definitions**

4.10.115 Definitions.

The definitions in this Part and in Section 1.04.020 of the San José Municipal Code govern the application and interpretation of this Chapter.

4.10.120 Affiliate.

- A. "Affiliate" means:
 - 1. Any Person that, directly or indirectly, controls the Contractor or has the power to control the Contractor,

2. Any Person that the Contractor, directly or indirectly, controls or has the power to control, or
 3. Any Person that is, directly or indirectly, controlled by or can be controlled by another Person that also, directly or indirectly, controls the Contractor.
- B. For purposes of this definition, indicia of control include, without limitation, the following:
1. Interlocking management or ownership,
 2. Identity of interests among family members,
 3. Shared facilities and equipment, or
 4. Common use of employees.
- C. For any business entity formed after the issuance of a notice of proposed Debarment, indicia of control also includes, without limitation, the new entity having the same or similar management, ownership or principal employees as the Contractor.

4.10.125 Contract.

- A. "Contract" means any agreement between the City and a Person that:
1. Sets forth the terms and conditions pursuant to which the Person will provide goods, services, construction, labor, supplies, materials or some other benefit to the City, or
 2. Sets forth the terms and conditions pursuant to which the Person will receive a grant or other public funds.
- B. The definition of "Contract" includes, without limitation, grant agreements, purchase orders, consultant agreements, solution agreements, services agreements, maintenance agreements, construction agreements, service orders, work orders, and task orders.

4.10.130 Contractor.

"Contractor" means any Person that, directly or indirectly via an Affiliate:

- A. Responds to, or reasonably could be expected to respond to, the City's procurement of a Contract, or
- B. Enters, or reasonably could be expected to enter, a Contract with the City.

4.10.135 Day.

"Day" means a calendar day unless otherwise specified.

4.10.140 Debarment.

"Debarment" is the City's administrative determination that a Contractor is disqualified for a specified length of time from participating in the procurement of a Contract, entering a Contract, or otherwise doing business with the City.

4.10.145 Debarring Official.

"Debarring Official" means a City official authorized to initiate and pursue an administrative Debarment proceeding on the City's behalf. Each of the following City officials is a Debarring Official:

- A. The City Manager as to all Contracts,
- B. A City department head as to Contracts the department head is authorized to award or execute, or is responsible for administering and managing, and
- C. A City Council appointee as to Contracts the appointee is authorized to award or execute, or is responsible for administering and managing.

**Part 3
Causes for Debarment**

4.10.150 Causes.

The Debarring Official can debar a Contractor for any of the following causes.

- A. The Contractor's submission to the City of false, untrue or misleading information in any context, including, without limitation, the procurement or performance of a Contract. This cause includes, without limitation, each of the following:

1. The submission of false, untrue or misleading information based on the Contractor acting in deliberate ignorance, or in reckless disregard, of the truthfulness of the information,
 2. The submission of false, untrue or misleading information that the Contractor represents as accurate information without having taken reasonable steps of determine the accuracy of the information, and
 3. The failure to disclose and correct an inadvertent submission of false, untrue or misleading information after discovering the information is false, untrue or misleading.
- B. The Contractor's submission of false claim as defined in any applicable federal, state, or municipal false claims law.
- C. Any act of the Contractor indicating a lack of business integrity or honesty, including, without limitation, fraud, bribery, collusion, bid rigging, price fixing, perjury, lying, embezzlement, theft, forgery, or falsification or destruction of records or evidence.
- D. The Contractor's failure to comply with, or disregarding of, the terms and conditions of a Contract.
- E. The Contractor's substandard performance on a Contract, including, without limitation, substandard quality of work, repeated unexcused delays, or repeated failure to cooperate with the City department administering the Contract.
- F. The Contractor's violation of federal, state, County of Santa Clara, or City law, administrative regulation, order, or official policy applicable to the performance of the Contract or the procurement of the Contract. This includes, without limitation, each of the following:
1. Noncompliance with requirements that protect the integrity of the procurement process,
 2. Noncompliance with labor or safety requirements such as prevailing wage, living wage, wage theft prevention, occupational safety and health, and nondiscrimination requirements,
 3. Noncompliance with requirements for the handling, transfer, storage or disposal of hazardous materials or hazardous waste, or

- 4. Noncompliance with conflict of interest requirements, such as the City's gift ordinance set forth in Chapter 12.08.
- G. The Contractor's debarment by any other federal, state or local agency.
- H. The Contractor's use of a debarred person to perform any part of a Contract if the Contractor knows the person or entity is debarred.
- I. The Contractor's breach of the duty of good faith and fair dealing, including, without limitation, the filing of nonmeritorious claims or lawsuits against any public agency or agencies.
- J. Evidence that the Contractor lacks financial responsibility.
- K. Any conviction, verdict, judgment, settlement, stipulation, or plea agreement base on any of the above-referenced causes for Debarment.
- L. Any other cause of such a serious or compelling nature that it demonstrates the Contractor's present lack of responsibility.

Part 4 Initiating Debarment

4.10.155 Basis for Initiating.

A Debarring Official can initiate a Debarment against a Contractor if the Debarring Official determines the Contractor has engaged in one or more of the causes identified in Part 3 of this Chapter.

4.10.160 Length of Debarment.

The Debarring Official can debar a Contractor for a period of up to five (5) years from the effective date of the Debarment.

4.10.165 Considerations.

In deciding if Debarment is warranted, and if so, the length of the Debarment, the Debarring Official will consider factors such as the following.

- A. The severity of the harm resulting from the activity in question.

- B. The degree to which the activity in question involves intentional or reckless conduct by the Contractor.
- C. The Contractor's history of engaging in conduct similar to the activity in question.
- D. Whether the Contractor had effective standards of conduct and internal control systems in place at the time of the activity in question.
- E. Whether the Contractor brought the activity in question to the attention of the City in a timely manner.
- F. Whether the Contractor independently investigated the activity in question and, if so, made the result of the investigation available to the City.
- G. Whether the Contractor cooperated during any investigation and any court or administrative action.
- H. Whether the Contractor has paid or has agreed to pay any criminal, civil, and administrative liability resulting from the activity in question (including any investigative or administrative costs incurred by the City), and has made or agreed to make full restitution.
- I. Whether the Contractor has taken appropriate disciplinary action against the individuals responsible for the activity in question.
- J. Whether the Contractor has implemented or agreed to implement remedial measures that will avoid the activity in question from occurring again.
- K. Whether the Contractor's management recognizes and understands the seriousness of any misconduct giving rise to the activity in question and has implemented programs to prevent its recurrence.

4.10.170 Notice of Proposed Debarment.

- A. A Debarring Official initiates an administrative Debarment by issuing a written notice of proposed Debarment to a Contractor. The Debarring Official must name and issue the notice of proposed Debarment to any known Affiliates that will be subject to the Debarment.
- B. A Debarring Official can issue a notice of proposed Debarment regardless of whether such Official awarded, executed, or was responsible for administering

and managing, the underlying Contract leading to the notice of proposed Debarment.

4.10.175 Contents of Notice.

The notice of proposed Debarment must include the following:

- A. A statement that the Debarring Official is proposing to debar the Contractor in accordance with this Chapter.
- B. The length of the proposed Debarment.
- C. The reasons for the proposed Debarment stated in sufficient detail to put the Contractor on notice of the activity upon which the Debarment is based.
- D. The cause for Debarment as set forth in Part 3 of this Chapter.
- E. The evidence relied on by the Debarring Officer.
- F. The consequences of the Debarment.
- G. A description of the procedures for contesting the notice, including a statement that the proposed Debarment is automatically effective unless the Contractor requests a meeting with the Debarring Official on or before fifteen (15) Days of the date of the notice.
- H. A statement referencing that Debarment is in accordance with the procedures set forth in this Chapter.

4.10.180 Service of Notice.

The Debarring Official must serve the notice of proposed Debarment on the Contractor and any named Affiliates by hand delivery, by United States Postal Service certified mail return receipt requested or with other delivery confirmation, or by other commercial delivery service that provides written confirmation of delivery.

Part 5 Informal Meeting with Debarring Official

4.10.185 Request to Meet.

- A. The Contractor must make a timely, written request to meet with the Debarring Official if the Contractor wants to contest the notice of proposed Debarment.
- B. The Contractor must serve the request on the Debarring Official on or before fifteen (15) Days of receiving the notice of proposed Debarment.

4.10.190 Failure to Request Meeting.

The Contractor is deemed to have consented to Debarment and is automatically debarred in accordance with the notice of Debarment if the Contractor:

- A. Fails to request a meeting with the Debarring Official in accordance with Section 4.10.185, or
- B. Fails to appear at a requested meeting that the Debarring Official properly noticed.

4.10.195 Scheduling Meeting.

- A. The Debarring Official must schedule a meeting with the Contractor within a reasonable time after the Contractor's timely request for such meeting.
- B. The Debarring Official must give the Contractor written notice of the date, time and location of the meeting. The Debarring Official may conduct the meeting remotely.

4.10.200 Meeting.

- A. The meeting between the Contractor and the Debarring Official is intended to be an informal discussion of the notice of proposed Debarment.
- B. The Contractor can present to the Debarring Official any facts, arguments, documents and written evidence in opposition, or mitigation, to the notice of proposed Debarment.
- C. No oral testimony by a third person will be presented at the meeting by the Debarring Official or the Contractor.
- D. The meeting does not need to be recorded.

4.10.205 Post-Meeting Notice.

- A. Within a reasonable time after the meeting, the Debarring Official will issue a written notice to the Contractor stating one of the following:
 - 1. The original notice of proposed Debarment stands without change,
 - 2. The original notice of proposed Debarment is amended and setting forth the amendments to the notice of proposed Debarment, or
 - 3. The notice of proposed Debarment is dropped or suspended and stating any agreed upon terms and conditions for such action.
- B. The Debarring Official's written notice must state how the Contractor can request an administrative hearing if the Contractor is dissatisfied with the notice.
- C. The Debarring Official must serve the written notice required by this Section on the Contractor by hand delivery, by United States Postal Service certified mail return receipt requested or with other delivery confirmation, or by other commercial delivery service that provides written confirmation of delivery.

4.10.210 Compromise Agreements.

- A. Any decision by the Debarring Official to drop or suspend a notice of proposed Debarment based on a compromise with the Contractor must be implemented by a written agreement between the City and Contractor setting forth the terms and conditions of such compromise.
- B. No compromise is effective until the City and Contractor have executed such an agreement.

Part 6 Administrative Hearing

4.10.215 Request for Hearing.

- A. The Contractor must make a timely, written request for an administrative hearing if the Contractor wants to contest the notice issued by the Debarring Official in accordance with Section 4.10.205.
- B. The Contractor must serve the request for an administrative hearing on the City Clerk, with a copy to the Debarring Official, on or before fifteen (15) Days of receiving the notice issued in accordance with Section 4.10.205.

4.10.220 Failure to Request Hearing.

The Contractor is deemed to have consented to Debarment and is automatically debarred in accordance with the notice of proposed Debarment (as it may have been amended by the notice issued in accordance with Section 4.10.205), if the Contractor:

- A. Fails to request a hearing in accordance with Sections 4.10.215, or
- B. Fails to appear at a requested hearing that has been duly noticed.

4.10.225 Appointment of Hearing Officer.

- A. After receiving the Contractor's request for a hearing, the Debarring Official must request the City Manager to appoint a hearing officer. If the City Manager is the Debarring Official, the City Manager will request a Council appointee to appoint a hearing officer.
- B. The selected hearing officer must meet the following requirements:
 - 1. The individual was not involved in awarding, executing, administering or managing any Contract that is the basis of the Debarment proceeding.
 - 2. The individual was not involved in the investigation or decision leading to the notice of proposed Debarment.
- C. The individual appointed as the hearing officer has the authority to make an independent decision based on the facts, evidence and arguments presented by the Debarring Official and the Contractor.

4.10.230 Notice of Appointment.

- A. The Contractor and the Debarring Official will be given written notice of the person appointed as the hearing officer.
- B. The Contractor or the Debarring Official can object, in writing, to the appointed hearing officer within five (5) business days of the notification. The writing must include the reason(s) for the objection.
- C. If an objection is made to the appointed hearing officer, the City representative who appointed the hearing officer will do one of the following:
 - 1. Reject the objection and provide the reasons for this decision, or

2. Provide the Contractor and the Debarring Official with written notice of the appointment of a new hearing officer.

4.10.235 Pre-Hearing Procedure.

- A. The hearing officer will notify the Contractor and Debarring Official of the scheduled hearing date, time and place.
 1. The hearing officer has sole discretion over setting the hearing date, provided that the date must be within ninety (90) Days of the Debarring Official's notice provided in accordance with Section 4.10.205.
 2. The hearing officer can extend the deadline for holding a hearing only upon good cause shown.
- B. Discovery pursuant to the California Code of Civil Procedure and the formal rules of evidence are not applicable to this administrative procedure.
- C. The hearing officer has the sole discretionary authority to direct the Contractor and the Debarring Official to submit in advance of the hearing statements, legal analyses, lists of witnesses, exhibits, documents or any other information the hearing officer deems pertinent.
 1. The hearing officer can request the respective parties to submit rebuttals to such information.
 2. The hearing officer can limit the length, scope, or content of any such statement, analysis, list, rebuttal, document, or other requested information.
 3. The hearing officer will set firm due dates for the submission of all written information.

4.10.240 Hearing.

- A. The hearing officer can conduct the hearing in person or on an electronic meeting platform if the officer deems that to be necessary.
- B. The Debarring Official will present evidence and argument in support of the Debarment. The Contractor can present evidence and argument in defense and/or in mitigation of the Debarment.

- C. Each side is entitled to call witnesses, and the hearing officer can allow cross-examination of witnesses.
- D. The hearing officer can ask questions of any party and of any witness.
- E. The hearing officer has the sole discretion to allow offers of proof, set time limits on arguments and rebuttal arguments, limit the number of witnesses based on relevancy, limit the testimony of witnesses as to substance and time, and otherwise limit the scope of evidence presented based on relevancy.

4.10.245 Written Presentation Only.

- A. Notwithstanding anything to the contrary in Sections 4.10.235 and 4.10.240, the hearing officer can conduct the hearing by written presentation only if:
 - 1. The Contractor and Debarring Official agree in writing the hearing will be solely by written presentation, or
 - 2. The Debarment is based on a final conviction, civil judgment or administrative decision, or on material facts over which no genuine dispute exists.
- B. If the hearing is by written presentation only, the hearing officer must require the Contractor and Debarring Official to submit all documents no later than ninety (90) Days after the Debarring Official's notice provided in accordance with Section 4.10.205.

4.10.250 Hearing Officer's Decision.

- A. After considering all the arguments, facts and evidence, the hearing officer will issue a written decision. The decision will include findings and references to evidence supporting the hearing officer's conclusions. The decision must be supported by a preponderance of the evidence presented.
- B. If the decision is to impose Debarment, the decision must include an order of Debarment setting forth the effective date and term of the Debarment (not to exceed five (5) years), and any special conditions applying to the Debarment.
- C. The hearing officer's decision is the final administrative determination by the City in the matter.

4.10.255 Service of Decision.

The hearing officer must serve the hearing officer's decision on the Contractor and the Debarring Official by hand delivery, by United States Postal Service certified mail return receipt requested or with other delivery confirmation, or by other commercial delivery service that provides written confirmation of delivery.

Part 7 Scope of Debarment

4.10.260 Other Administrative Proceedings.

Debarment neither excludes nor precludes the City from pursuing any other administrative or legal action against the Contractor.

4.10.265 Effect of Debarment.

- A. Debarment prohibits the Contractor and Affiliates named in the Debarment proceedings from doing business with the City, including, without limitation, participating in any Contract at any tier, directly or indirectly. A debarred Contractor and Affiliates named in the Debarment are deemed irresponsible and disqualified for the purposes of all Contracts.
- B. The City will reject any bid, proposal, quote, statement of qualification, or other response to a City procurement submitted by, on behalf of or including the debarred Contractor and Affiliates named in the Debarment proceedings.

4.10.270 Coverage.

- A. Debarment of a Contractor constitutes Debarment of the principal(s) of the debarred Contractor.
- B. Debarment of a Contractor constitutes Debarment of all the Contractor's divisions unless the Debarment is expressly limited by its terms to one or more specifically identified individuals or divisions.
- C. An Affiliate existing before the issuance of the notice of proposed Debarment is debarred if the Affiliate was specifically named and given notice of the Debarment and had the opportunity to be heard in the Debarment proceedings.

- D. The Debarment applies to any Affiliate formed after the issuance of the notice of proposed Debarment regardless of whether the Affiliate is named or given notice of the Debarment proceedings.

4.10.275 Existing Contracts.

- A. The Debarment of a Contractor is grounds for the City to:
1. Terminate an existing Contract with the debarred Contractor,
 2. Direct the termination of an existing subcontract to which the debarred Contractor is a party, or
 3. Not renew or extend the term of any contract or grant.
- B. In the event of termination under this Section 4.10.275, the debarred Contractor's recovery is limited to reasonable compensation for work satisfactorily completed as of the date of termination.

4.10.280 Request to Modify Debarment.

- A. During the period of Debarment, a debarred Contractor can make a written request to the City Manager to modify the Debarment for any reason that eliminates the need for the Debarment or demonstrates that a shorter Debarment period will adequately protect the public interest. Such reasons include, without limitation, the following:
1. Newly discovered material evidence,
 2. Reversal of the conviction, civil judgment or administrative decision upon which the Debarment was based,
 3. Bona fide change in ownership or management; or
 4. Elimination of other grounds for which the Debarment was imposed.
- B. The request by the debarred Contractor must be in writing and accompanied by supporting documentation.
- C. The City Manager's decision regarding such a request is final.

Part 8

Miscellaneous

4.10.285 Conflict with Other Procedures.

To the extent a source of funding requires its own debarment procedures, those procedures apply.

4.10.290 Other Agency Debarment.

The City will not contract with or allow performance of contracts or subcontracts by any Contractor who has been debarred by a federal or state agency providing funds for the contract.

4.10.295 Doing Business with A Debarred Contractor.

- A. A Person seeking a Contract or entering a Contract is prohibited from knowingly using a debarred Contractor.
- B. Violation of this Section may, as determined in the sole discretion of the City Manager, result in rejection of the bid or proposal, nonpayment by the City for work performed by the debarred Contractor, annulment of Contract award or termination of Contract, issuance of a stop work order, initiation of Debarment proceedings, or any other remedy provided by law.

4.10.300 List of Debarred Contractors.

- A. The City Manager will forward a copy of all Debarment decisions to the City Clerk, who will maintain a public list of all Contractors debarred by the City.
- B. The City Clerk will make the list available for inspection and copying by any person during reasonable hours and upon reasonable notice.

PASSED FOR PUBLICATION of title this _____ day of _____, 2021, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

SAM LICCARDO
Mayor

ATTEST:

TONI J. TABER, CMC
City Clerk