

BILL NO. _____

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY OF FRESNO,
CALIFORNIA, REPLACING SECTION 4-104 OF THE
FRESNO MUNICIPAL CODE, RELATING TO DEBARMENT

THE FRESNO CITY COUNCIL DOES ORDAIN AS FOLLOWS:

SECTION 1. Section 4-104 of the Fresno Municipal Code is repealed.

SECTION 2. Section 4-104 of the Fresno Municipal Code is added to read:

SECTION 4-104. DEBARMENT.

(a) Findings.

(1) The Council finds that contracting with the City of Fresno is an important municipal affair, and that the award of contracts to contractors who fail to deal with the city in good faith compromise the integrity of the contracting process and results in the improper expenditure of public funds. The Council recognizes the city must afford contractors due process in any determination that precludes any individual or business entity from participating in the contracting process. This Section does not apply to a determination of nonresponsibility or a single contract or identifiable group of contracts, but for the broader determination of irresponsibility of a contractor for the general purpose of contracting with the city for a specified period. The Council therefore adopts

this ordinance to prescribe standard procedures for the prosecution, determination, and implementation of administrative debarments.

(b) Purpose and Intent.

(1) In order to promote integrity in the city's contracting processes and to protect the public interest, the city shall only do business with responsible bidders and contractors.

(2) This Section sets forth the grounds for debarment and suspension.

(c) Definitions.

(1) "Adequate Evidence" means information sufficient to support the reasonable belief that a particular act or omission has occurred.

(2) "Affiliate" means

(i) the assignee, successor, subsidiary of, or parent company, of another person; or

(ii) a Controlling Stockholder of a person; or

(iii) a person who has the same or similar management of the debarred corporate or other legal entity; or

(iv) a person who directly or indirectly controls, or has the power to control, another person, or is directly or indirectly controlled by another person. Indicia of control

include interlocking Management or ownership, identity of interests among Relatives, shared facilities and equipment, and common use of employees; or

(v) a business entity organized following the debarment, suspension, or proposed debarment of a person which has the same or similar Management, ownership or principal employees as the bidder or contractor that was debarred, suspended or proposed for debarment, or the debarred person or the business entity created after the debarment, suspension, or proposed debarment operates in a manner designed to evade the application of this Section or to defeat the purpose of this Section.

(3) “Bidder” means a person who submits a bid, proposal, or other document to the city seeking award of a contract. The term Bidder does not include a subcontractor.

(4) “Contract” means any written agreement between the city and a person for public works, goods, services, franchise, or consultant services.

(5) “Contractor” means a person who has contracted with the city to provide public works, goods, services, franchise, or consultant services for or on behalf of the city. The term Contractor includes a subcontractor, vendor, franchisee, consultant, or any of their respective officers, directors, shareholders, partners,

managers, employees, or other individuals associated with the Contractor, subcontractor, consultant, or vendor.

(6) “Controlling Stockholder” means a stockholder who:

(i) owns more than 25% of the voting stock of a corporation; or

(ii) notwithstanding the number of shares that the stockholder owns, has the power to direct or control the direction of the Management or policies of a corporation.

(7) “Debar”, “Debarred”, or “Debarment” means an action taken by the city which results in a Bidder or Contractor being prohibited from any of the following: bidding or proposing on a Contract, being awarded a Contract, or performing work on a Contract for a defined period of time. A Bidder or Contractor subject to such prohibition is debarred.

(8) “Debarment Hearing Board” means a board established by the City Manager to hold hearings, to take evidence, and to make Debarment determinations for the city.

(9) “Department” means a city Department acting through the Department director or designee.

(10) “Final Performance Evaluation” means a city-issued final evaluation of a Contractor’s overall performance which is generally issued subsequent to completion of performance on the Contract.

(11) “Management” means the officers, partners, owners, foremen, or other individuals responsible for a corporate or other legal entity’s financial and operational policies and practices.

(12) “Person” has the same meaning as that in Fresno Municipal Code Section 1-204(g). In addition, if a Person is a corporate or other legal entity, it includes individuals who constitute the Person’s Management. It also includes any individual or other legal entity that:

(i) Directly or indirectly (e.g. through an Affiliate), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Contract, or a subcontract under a Contract; or

(ii) conducts business, or reasonably may be expected to conduct business, with the city as an agent or representative of another Person.

(13) “Preponderance of the evidence” means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

(14) “Prime Contractor” means a Person who enters a Contract directly with the city.

(15) “Relative” means:

(i) an individual related by consanguinity within the second degree as determined by the common law; or

- (ii) a spouse; or
- (iii) an individual related to a spouse within the second degree as determined by the common law; or
- (iv) an individual in an adoptive relationship within the second degree as determined by the common law; or
- (v) any individual considered to be “family” in commonly understood terms of the word.

(16) “Subcontractor” means:

- (i) a Person who Contracts directly with a Prime Contractor but not directly with the city; or
- (ii) any Person under Contract with a Prime Contractor or another subcontractor to provide any service, materials, labor or otherwise perform on a Contract.

(17) “Suspend” or “Suspension” means the Debarment of a Bidder or Contractor for a temporary period of time pending the completion of an investigation and any proceedings before a Debarment Hearing Board or independent hearing officer and any appeals therefrom.

(d) Scope of Section.

(1) This Section establishes procedures for determining whether a Bidder or Contractor is to be Debarred, Suspended, or both.

(2) This Section sets forth the grounds for Debarment and Suspension.

(3) This Section provides that a list of Debarred and Suspended Persons is to be created and maintained by the City Manager. It further spells out the consequences of a Person's Debarment and Suspension.

(4) The City Manager shall adopt procedures and regulations to implement this Section, including procedures for the conduct of Debarment hearings, Suspension meetings, and appeals of Final Performance Evaluations.

(e) Debarment Hearing Board.

(1) Upon a recommendation from a Department for Debarment other than Debarments set forth in subsections (i)(1)(i) and (i)(1)(ii), the City Manager shall appoint a Debarment Hearing Board to hear and determine whether a Bidder or Contractor should be Debarred.

(2) The City Manager appoints the voting board members from the Capital Project Oversight Board to serve on the Debarment Hearing Board. The Debarment Hearing Board shall consist of no fewer than three Capital Project Oversight Board members. The individuals on the Debarment Hearing Board must not have participated in the decision to recommend debarment or work in the Department recommending Debarment.

(f) Suspension While Debarment Proceedings are Pending.

(1) The City Manager may Suspend a Bidder or Contractor pending a Debarment decision if the City Manager determines that Adequate Evidence of one of the grounds for Debarment listed in subsection (h) exists.

(2) The City Manager shall, upon 72 hours' notice, provide a Suspended Bidder or Contractor with an opportunity to appeal the Suspension at an informal meeting.

(3) The City Manager shall notify the Bidder or Contractor of the Suspension in accordance with subsection (g).

(4) The Suspension is effective until the Debarment Hearing Board makes a final decision on the proposed Debarment, until there has been a final ruling by an independent hearing officer in accordance with subsection (j), or until a Bidder or Contractor is Debarred under subsection (l)(5).

(g) Notices Required Under This Section.

(1) Notice shall be by any of the following methods:

(i) Personal delivery with service effective on the date of delivery; or

(ii) Certified mail, postage prepaid, return-receipt requested. Simultaneously, the same notice may be sent by regular mail. If a notice that is sent by certified mail is returned unsigned, then service shall be deemed effective

five calendar days after mailing by regular mail, provided the notice that was sent by regular mail is not returned; or

(iii) Regular mail, if not returned, with service effective five calendar days after mailing; or

(iv) Publication. Service shall be deemed effective on the first date of publication.

(2) Proof of delivery of notice shall be made by the certificate of any officer or employee of the city or by declaration under penalty of perjury of any Person over the age of eighteen years. The proof of delivery shall show that delivery was done in conformity with this Section.

(3) The failure of any Person to receive any notice served in accordance with this Section shall not affect the validity of any Debarment proceedings.

(h) Grounds for Debarment.

(1) Grounds for Permanent Debarment.

(i) A judgment, settlement, stipulation, plea agreement, final conviction, including a plea of nolo contendere, or final unappealable civil judgment, of any of the grounds listed below, constitutes grounds for permanent Debarment of the Bidder or Contractor who is subject to, or the Affiliate of, the Bidder or Contractor who is subject to the

judgment, settlement, stipulation, plea agreement, final conviction, or final unappealable civil judgment:

1. under any local, state, or federal law or regulation for embezzlement, theft, bid rigging, perjury, forgery, bribery, falsification or destruction of records, conspiracy, collusion, or receiving stolen property; or

2. any offense, action, or inaction indicating a lack of business integrity or business honesty; or

3. for commission of a criminal offense arising out of obtaining or attempting to obtain a public or private Contract or subcontract, or in the performance of such Contract or subcontract.

(ii) The Bidder or Contractor has engaged in any corrupt practice in bidding, award, administration, or performance of a Contract, including but not limited to a Fair Political Practices Commission enforcement order against a Bidder or Contractor, either following a hearing or by stipulation, imposing a penalty for a violation of California Government Code sections 84300(c) or 84301, or a City of Fresno enforcement order against a Bidder or Contractor, either following a hearing or by stipulation, imposing a

penalty for a violation of Fresno Municipal Code sections 2-901 et seq.

(iii) The Bidder or Contractor operates in a manner designed to evade the application of this Section or to defeat the purpose of this Section.

(iv) The city has issued the Bidder or Contractor four or more final performance evaluations with a rating of unsatisfactory in any four year period.

(v) The Person has committed an act or omission so serious or compelling in nature that it affects the present responsibility of the Bidder or Contractor to be awarded a Contract or to participate as a subcontractor.

(2) Grounds for Debarment of Three Years or More.

(i) The Bidder or Contractor willfully breaches a material term of a Contract.

(ii) Violation of a local, state, or federal law or regulation applicable to a Contract other than those identified in subsection (h)(1).

(iii) Three or more occurrences of substandard performance by the Bidder or Contractor on any Contract, including, but not limited to, (1) a material breach of the Contract; (2) a failure to complete work required under the Contract on time and/or within budget when such failure is

attributable to the Bidder's or Contractor's negligent or wrongful actions or inactions; (3) substandard quality of work; or (4) failure to complete work and the City calls upon the performance bond holder to complete the work; (5) the amount of time required to complete the work exceeds the greater of 10% of the project schedule or two calendar weeks beyond the required contract completion date, as contained in the Contract, and liquidated damages were assessed; (6) Contractor's inability to provide the necessary insurance coverage during the contract term; (7) Contractor's inability to acquire the necessary insurance coverage within thirty days of awarding the Contract; or (8) any negligent or wrongful failure to cooperate with the city such that timely, satisfactory completion of the work was jeopardized. The occurrences of substandard performance described herein may occur on the same Contract or on different Contracts.

(iv) The Bidder or Contractor used substandard materials, or has failed to furnish or install materials in accordance with Contract requirements, even if the discovery of the defect is subsequent to acceptance of the work and expiration of the warranty, if such defect is

because of intentionally deficient or grossly negligent performance of the Contract.

(v) The Bidder or Contractor submits materially false information to the city pertaining to:

1. the city's evaluation of the Bidder or Contractor as a Disadvantaged Business Enterprise;
or

2. the city's prequalification or eligibility process; or

(vi) The Bidder or Contractor has engaged in unlawful discrimination in employment.

(vii) The Bidder or Contractor has received three or more Final Performance Evaluations with a rating of unsatisfactory in any three year period.

(viii) The Bidder or Contractor fails to pay prevailing wages, when required by law.

(ix) The Bidder or Contractor violates a material provision of any settlement of a Debarment action.

(3) Grounds for Debarment of Two Years.

(i) A Bidder or Contractor may be Debarred for two years if a Bidder or Contractor has received two or more final performance evaluations with a rating of unsatisfactory in any two-year period.

(ii) Two or more occurrences of substandard performance by such Person on any city Contract, including, but not limited to, (1) a material breach of the Contract; (2) a failure to complete work required under the contract on time and/or within budget when such failure is attributable to such Person's negligent or wrongful actions or inactions; (3) substandard quality of work; or (4) failure to complete work and the City calls upon the performance bond holder to complete the work; (5) the amount of time required to complete the work exceeds the greater of 10% of the project schedule or two calendar weeks beyond the required contract completion date, as contained in the Contract, and liquidated damages were assessed; (6) Contractor's inability to provide the necessary insurance coverage during the contract term; (7) Contractor's inability to acquire the necessary insurance coverage within thirty days of awarding the Contract; or (8) any negligent or wrongful failure to cooperate with the city such that timely, satisfactory completion of the work was jeopardized. The occurrences of substandard performance described herein may occur on the same Contract or on different Contracts.

(iii) One or more occurrences of substandard performance as provided in subsection (h)(3)(ii), within the first year after a Debarment pursuant to this Section.

(4) Grounds for Debarment of One Year.

(i) One or more occurrence(s) of substandard performance by such Person on any Contract, including, but not limited to, (1) a material breach of the Contract; (2) a failure to complete work required under the contract on time and/or within budget when such failure is attributable to such Person's negligent or wrongful actions or inactions; (3) substandard quality of work; or (4) failure to complete work and the City calls upon the performance bond holder to complete the work; (5) the amount of time required to complete the work exceeds the greater of 10% of the project schedule or two calendar weeks beyond the required contract completion date, as contained in the Contract, and liquidated damages were assessed; (6) Contractor's inability to acquire the necessary insurance coverage within thirty days of awarding the Contract; or (7) any negligent or wrongful failure to cooperate with the city such that timely, satisfactory completion of the work was jeopardized. The occurrences of substandard performance described herein may occur on the same Contract or on different Contracts.

(ii) The Bidder or Contractor made two or more claims of computational or other error in a bid to the city within a two-year period.

(iii) The Bidder or Contractor failed to timely submit bond, Contract, insurance documents, or any other documentation required as a condition of award or performance of a Contract.

(i) Debarment Proceedings before a Debarment Hearing Board.

(1) The Debarment Hearing Board shall hear all recommendations for Debarment other than:

(i) permanent Debarment, which are heard in accordance with subsection (j); and

(ii) Debarment based on unsatisfactory final performance evaluations, which are heard in accordance with subsection (l).

(2) The Debarment Hearing Board shall determine by a Preponderance of the evidence whether a Bidder or Contractor is to be Debarred and for what length of time in accordance with this Section. The Debarment Hearing Board may increase, decrease, or accept the Department's recommendation of the length of Debarment. The Debarment Hearing Board may not impose less than the length of Debarment specified in subsections (h)(2), (h)(3), and (h)(4).

(3) The Debarment Hearing Board's decision on Debarment must be in writing and is final. The Debarment decision shall be issued to the Bidder or Contractor in writing.

(4) The failure of a Person recommended for Debarment to appear at a debarment hearing after notice under subsection (g) constitutes a waiver of that Person's right to contest the Debarment recommendation, and the Department's recommendation shall become final.

(j) Debarment Proceedings before an Independent Hearing Officer.

(1) The City Manager shall appoint an independent hearing officer as required by Section 1-405.

(2) An independent hearing officer shall hear all recommendations that include one or more grounds for permanent Debarment, except for Debarments based on unsatisfactory final performance evaluations, which are heard in accordance with subsection (l).

(3) The independent hearing officer shall determine by a preponderance of the evidence whether a Person is to be Debarred and for what length of time, in accordance with this Section. The independent hearing officer may increase, decrease, or accept the Department's recommendation of the length of Debarment. The independent hearing officer may not reduce the length of a

permanent Debarment if the hearing officer determines a violation identified in subsection (h)(1) occurred, or impose less than the length of Debarment specified in subsection (h)(2) and (h)(4).

(4) The independent hearing officer's decision on Debarment must be in writing and is final. The Debarment decision shall be issued to the Bidder or Contractor in writing.

(5) The failure of a Person recommended for Debarment to appear at a Debarment hearing after notice under subsection (g) constitutes a waiver of that Person's right to contest the Debarment recommendation, and the Department's recommendation shall become final.

(k) Imputation of Knowledge and Conduct.

(1) The fraudulent, criminal, or other serious misconduct of any officer, director, shareholder, partner, employee, or other individuals associated with a Bidder or Contractor may be imputed to the Bidder or Contractor when the conduct occurred in connection with the individual's performance of duties for, or on behalf of, the Bidder or Contractor, or with the Bidder's or Contractor's knowledge, approval, or acquiescence. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(2) The fraudulent, criminal, or other serious misconduct of a Bidder or Contractor may be imputed to any officer, director,

shareholder, partner, employee, or other individual associated with the Bidder or Contractor who participated in, knew of, or had reason to know of the Bidder's or Contractor's conduct.

(3) The fraudulent, criminal, or other serious misconduct of one Bidder or Contractor participating in a joint venture or similar arrangement may be imputed to other participating Bidders or Contractors if the conduct occurred for, on approval of, or acquiescence of these Bidders or Contractors. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(l) Appeal of Final Performance Evaluations.

(1) A Bidder or Contractor may appeal a final performance evaluation with a rating of unsatisfactory on a public works Contract or an architectural or engineering consultant Contract to the Public Works Director.

(2) A Bidder or Contractor may appeal a final performance evaluation with a rating of unsatisfactory on a goods, services, or non-engineering, non-architectural consultant Contract to the Purchasing Manager.

(3) A Bidder or Contractor must submit an appeal in writing to the Public Works Director or Purchasing Manager within sixty days after notice of the final performance evaluation pursuant

to subsection (g). Evaluations may not be appealed after sixty days from the date of such notice.

(4) The decision of the Public Works Director and the Purchasing Manager to uphold an unsatisfactory performance evaluation shall be issued to the Bidder or Contractor in writing and is final.

(5) The City Manager may, upon recommendation of the Public Works Director or Purchasing Manager, Debar a Bidder or Contractor who has received an unsatisfactory final performance evaluation. This determination shall be in writing and is final.

(m) Judicial Review. California Code of Civil Procedure section 1094.6 governs judicial review of a final Debarment decision.

(n) Creation of List of Debarred and Suspended Persons.

(1) The City Manager shall create, maintain, and make publicly available a list of the names, addresses, and applicable Debarment or suspension commencement and expiration dates of all Debarred or Suspended Bidders and Contractors.

(2) The City Manager shall establish procedures to provide for the effective use of the list to ensure that the city does not do business with Bidders or Contractors who have been Debarred or Suspended.

(o) Effect of Debarment or Suspension.

(1) Bidders and Contractors who have been Debarred or Suspended are excluded from submitting bids, submitting responses to requests for proposal or qualifications, receiving contract awards, executing Contracts, participating as a subcontractor, employee, agent, or representative of another Person contracting with the city.

(2) The city shall not accept, evaluate for award, or include any proposals, quotations, bids, or offers from any Debarred or Suspended Bidders and Contractors.

(3) The city shall not award or approve the award of a Contract or execute a Contract under which a Debarred or Suspended Bidder or Contractor is intended to participate as a subcontractor or material supplier.

(4) A Prime Contractor shall not employ, subcontract with, or purchase materials, or services from, a Debarred or Suspended Bidder or Contractor.

(5) The City Manager shall report Debarments under this Section to the appropriate local, state, and federal agencies and authorities.

(p) Effect of Debarment or Suspension on an Affiliate.

(1) Affiliates are Debarred or Suspended to the same extent as the Debarred or Suspended Bidder or Contractor.

(2) A Bidder or Contractor may appeal the city's determination that the Bidder or Contractor is an Affiliate in writing to the City Manager within sixty days after notice of the Affiliate's Debarment pursuant to subsection (g).

(3) An Affiliate may not appeal the Debarment of any other Bidder or Contractor underlying the Affiliate's Debarment.

(4) The decision of the City Manager shall be issued to the Bidder or Contractor who is an Affiliate in writing and is final.

(q) Effect of Debarment by Another Governmental Agency. The City Manager may Debar a Bidder or Contractor who has been Debarred by another governmental agency until the term of the Debarment by the other governmental agency expires. The City Manager's decision under this section is final, and not subject to a hearing before the Debarment Hearing Board or an independent hearing officer.

(r) Liability for Increased Costs. Any Bidder or Contractor who enters into a Contract, either directly as a Prime Contractor or indirectly as a subcontractor, during a period of suspension or Debarment imposed upon that Bidder or Contractor, shall be liable to the city for increased costs incurred as a result of replacing the Debarred or Suspended Bidder or Contractor.

(s) Effect of Debarment or Suspension on Existing Contracts.

(1) The city may continue or terminate Contracts or subcontracts it has with a Debarred or Suspended Bidder or

Contractor that are in existence at the time the Bidder or Contractor is Debarred or Suspended.

(2) The city shall not renew or otherwise extend the duration of current Contracts, or consent to subcontracts, with Debarred or Suspended Bidders or Contractors, unless the City Manager certifies in writing compelling reasons for such renewal or extension.

(3) The city may Contract with another Person to perform public works, goods, services, or consultant services that a Debarred Contractor had been hired to perform.

(t) Agreement Not to Bid or Submit Proposals in Lieu of Debarment or Suspension.

(1) The city may offer a Bidder or Contractor the opportunity to execute a written agreement not to bid or submit proposals or perform any work on Contracts in lieu of the city's pursuing Debarment or Suspension.

(2) This agreement not to bid or submit proposals for Contracts in lieu of the city's pursuing Debarment or Suspension does not constitute a Debarment.

SECTION 3. This ordinance shall become effective and in full force and effect at 12:01 a.m. on the thirty-first day after its final passage.

* * * * *

STATE OF CALIFORNIA)
COUNTY OF FRESNO) ss.
CITY OF FRESNO)

I, YVONNE SPENCE, City Clerk of the City of Fresno, certify that the foregoing ordinance was adopted by the Fresno City Council, at a regular meeting held on the _____ day of _____ 2018.

AYES :
NOES :
ABSENT :
ABSTAIN :

YVONNE SPENCE, MMC
City Clerk

BY: _____
Deputy Date

APPROVED AS TO FORM:
DOUGLAS T. SLOAN
City Attorney

BY: _____
Brandon M. Collet Date
Senior Deputy

BMC:prn, ns [77388bmc/ord] 03-22-18