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**Title:** \*\*\*BILL - (For adoption) - Replacing Section 4-104 of the Fresno Municipal Code and Rescinding Resolution No. 2003-130, Relating to Debarment (Subject to Mayor Veto)

**Sponsors:** Public Works Department

**Indexes:**

**Code sections:**

**Attachments:** 1. 18-0633 Ordinance - Debarment.pdf, 2. 18-0633 Resolution.pdf

Date	Ver.	Action By	Action	Result
5/17/2018	1	City Council	adopted	

**REPORT TO THE CITY COUNCIL**

**May 17, 2018**

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**SUBJECT**

\*\*\*BILL - (For adoption) - Replacing Section 4-104 of the Fresno Municipal Code and Rescinding Resolution No. 2003-130, Relating to Debarment (Subject to Mayor Veto)

**RECOMMENDATIONS**

Staff recommends the Council consider for adoption an Ordinance replacing Section 4-104 of the Fresno Municipal Code and Rescinding Resolution 2003-130, Relating to Debarment.

**EXECUTIVE SUMMARY**

In order to promote integrity in the City's contracting processes and protect the public interest, the City only conducts business with responsible bidders and contractors. Section 4-104 of the Fresno Municipal Code, which pertains to debarment procedures, is being recommended by staff for

replacement in order to improve the delivery of construction projects for the community. Debarment refers to an action taken by the City which prohibits a bidder or contractor being able to bid, propose, receive a contract award or perform work on a City contract for a defined period of time.

The recommended changes to the ordinance would set forth the grounds for debarment and suspension, provide clear procedures for notifications to bidders or contractors, and improve the process for appeals and hearings related to debarment by incorporating the recently established Capital Projects Oversight Board into the process. The proposed changes also allow the City to establish a proactive process in which a contractor could be precluded from participating in future bids due to a history of poor performance.

## **BACKGROUND**

At the present time, Section 4-104 of the Fresno Municipal Code states that “any bidder for a city contract who has been determined by the Council to be non-responsible may be debarred in accordance with a resolution adopted by Council establishing procedures and requirements for debarment. Such procedures shall include a right to appeal from a determination for debarment pursuant to Chapter 1, Article 4 of this Code.” The Council previously adopted Resolution 2003-130 which outlines those detailed procedures. Staff is recommending the Council approve modified procedures by adopting the new ordinance and rescinding the older resolution for the following reasons:

- With the City Manager’s current debarment authority limited to those bidders whom the Council has determined to be non-responsible, there is the potential for construction projects to be delayed while such a contractor goes through an appeals process after the City open bids and advises such a bidder of the recommended finding of non-responsibility.
- The resolution currently in effect requires up to two hearings, one with the City Manager and one with the Independent Hearing Officer, with the debarment not becoming effective until after both hearings have occurred. A survey of other cities has demonstrated that a single hearing is the general practice.
- Staff recommends that incorporating members of the Capital Projects Oversight Board into the process would be appropriate. The Board members’ role would be to consider appeals of proposed debarment for one to three years. Appeals of proposed permanent debarments would continue to be heard by an Independent Hearing Officer.
- The criteria listed in the proposed ordinance have been expanded and are more specific than the criteria previously adopted by the Council in Resolution 2003-130. Staff recommends that the new ordinance will provide greater clarity and be consistent with other large cities.
- The new ordinance would also apply to subcontractors and suppliers, whereas the current resolution in effect only allows for debarment of bidders deemed non-responsible.

The City of Fresno regularly awards contracts to responsive, responsible bidders to perform numerous public works of improvements throughout the City. These projects range from relatively small building maintenance projects such as re-roofing or air conditioning replacement, to moderate-sized projects such as street repaving and traffic signals, to major capital projects such as Bus Rapid Transit, Fulton Street, new community parks or new surface water treatment facilities. For each

awarded project, the contract includes a scope of work which is usually defined by a set of approved plans and specifications, along with an allowable amount of contract time in which to complete the project. Contractors who exceed the allowed number of working days or calendar days become subject to liquidated damages, a reduction in construction contract payments in order to compensate the owner (City) for damages due to late performance.

The vast majority of projects proceed in a satisfactory manner from award to completion. Out of 134 recently completed contracts managed by the Public Works Department, Construction Management Division, 10 of those, or 7.5%, involved liquidated damages for a late finish to the project. However, where problems occur, debarment is an important tool to ensure that the City of Fresno does not continue to do business with bidders and/or contractors who meet the debarment criteria as found in the ordinance.

Permanent or temporary debarment would be considered for any of the following:

#### Permanent Debarment

- Criminal offenses such as embezzlement, theft, bid rigging, perjury, forgery, bribery, falsification or destruction of records, conspiracy, collusion, or receiving stolen property.
- Corrupt practices in bidding, award, administration or performance of a Contract.
- Operating in a manner designed to evade the application of this Section of the Municipal Code.
- Four or more unsatisfactory performance evaluations in a four-year period.
- Commission of acts or omissions so serious or compelling in nature that it affects the present responsibility of the Bidder or Contractor to be awarded a Contract or participate as a subcontractor.

#### Temporary Debarment (periods from one to three years are outlined in the Ordinance)

- Willful breach of a material term of a Contract.
- Violation of a local, state or federal law or regulation applicable to a Contract.
- Repeated substandard performance evaluations on Contracts.
- Failure to complete work required on time and/or within budget when such failure is attributable to the Bidder's or Contractor's negligent or wrongful actions or inactions.
- Substandard quality of work.
- Failure to complete work and the City calls upon the surety (performance bond holder) to complete the work.
- The amount of time to complete the work exceeds the greater of 10% of the project schedule or two calendar weeks beyond the required contract completion date.
- Contractor's inability to acquire the necessary insurance coverage within thirty days of being awarded the Contract.
- Any negligent or wrongful failure to cooperate with the City such that timely, satisfactory completion of the work was jeopardized.
- Use of substandard materials, or failure to furnish and install materials in accordance with Contract requirements.
- Submission of materially false information related to eligibility as a Disadvantaged Business Enterprise.

- Engaging in unlawful discrimination in employment.
- Failure to pay prevailing wages as required in the Contract.

The Ordinance includes appropriate provisions for the appeal of a temporary debarment to a Debarment Hearing Board, which would be composed of members of the Capital Projects Oversight Board, and for the appeal of permanent debarments to an Independent Hearing Officer. The Ordinance also allows for the appeal of final performance evaluations to the Public Works Director (for construction contracts) or Purchasing Manager (for products). These provisions are designed to provide for an objective and transparent process, in order to best protect the public interest.

The ordinance has been approved as to form by the City Attorney's Office.

## **ENVIRONMENTAL FINDINGS**

A change to the City's Debarment Ordinance is not a "project" for the purposes of the California Environmental Quality Act (CEQA) as it will not result in a direct or indirect change in the environment.

## **LOCAL PREFERENCE**

Local preference was not considered because this ordinance does not include a bid or award of a construction or service contract.

## **FISCAL IMPACT**

Implementation of the recommended ordinance is anticipated to be revenue neutral at minimum. Some savings will be achieved in City construction management expenses and operational costs through improved on-time delivery of projects and quality work by contractors.

### **Attachments:**

Ordinance  
Resolution 2003-130