ORDINANCE NO. 2017-O-098

AN ORDINANCE AMENDING CHAPTER 2, ARTICLE I OF THE CODE OF ORDINANCES BY ADDING A NEW SECTION 2-11 TO ESTABLISH PROCEDURES FOR THE DEBARMENT OF A VENDOR; CONTAINING FINDINGS AND OTHER PROVISIONS RELATING TO THE FOREGOING SUBJECT; PROVIDING FOR SEVERABILITY; PROVIDING FOR PUBLICATION; AND DECLARING AN EFFECTIVE DATE.

WHEREAS, the City of Laredo is a municipal corporation organized under the Constitution and the laws of the State of Texas and exercises powers granted by the City's Charter and the provisions of Article Xl, Section 5 of the Texas Constitution; and

WHEREAS, the City of Laredo is committed to ensuring that all goods, equipment, material and services are secured through a process that eliminates any form or favoritism or otherwise excludes qualified providers from competing for contracts; and

WHEREAS, pursuant to the authority of §252.043(f) of the Texas Local Government Code, the City has the right to reject any and all bids or proposals in accordance with established procurement policies that fosters competition and ensures the equitable treatment of all persons and entities doing business with the City; and

WHEREAS, the City seeks an administrative process to identify individuals and entities that do business with the City who have not complied with the City's contracting requirements, have engaged in willful misconduct, have demonstrated bad faith, or have engaged in bad business practices, in order to avoid entering into future contracts with such Vendors; and

WHEREAS, the City has directed the City Attorney's Office to prepare this Ordinance for the purpose of establishing such an administrative process for the debarment of Vendors that are determined to have engaged in such conduct; and

WHEREAS, the City Council finds and hereby declares that adoption of this Debarment Ordinance is an appropriate means to protect the efficiency, quality and integrity of its purchasing system as well as to promote the City's policy to solicit offers from, award contracts to, and consent to subcontracts only with responsible and ethical Vendors.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LAREDO, TEXAS:

Section 1. That the findings contained in this Ordinance are determined to be true and correct and are hereby adopted as part of this Ordinance.

Section 2. That Chapter 2, Article I of the Code of Ordinances, Laredo, Texas, is hereby amended to add a new Section 2-11 to read as follows:

2-11 Debarment of Vendors

(a) Authority, Purpose, and Applicability

1. It is the policy of the City of Laredo to conduct business with responsible individuals and entities. To effectuate this policy, the City shall investigate the background and qualifications of Vendors in order to obtain all the information necessary to make a reasoned decision, and after due process, if necessary to protect the best interests of the City, to take administrative action, up to and including, debarment.

2. Debarment is available with respect to any type of City contract or transaction irrespective of the form, (written contracts, purchase orders, etc.) including but not limited to public improvements, procurement of goods or services, professional services, concession, franchise, license and lease agreements. The City will not approve a City contract or grant a concession, permission, privilege, license, or other right, whether as partner, affiliate, subcontractor, supplier, or otherwise any firm that is debarred by the City, the State of Texas, or the Federal Government.

3. Debarment will be imposed only when it is in the public interest for the City's protection and should not be construed as punishment. It is a remedy available to the City in addition to, but not as a substitute for, other remedies such as the rejection of bids, cancellation of contracts for non-responsive or irresponsible performance, or filing a claim or an action for recovery under a contract or bond guaranteeing contract performance. This section does not in any way limit the ability of the City to make decisions regarding a contractor's responsibilities, and to determine whether a Vendor is responsible or capable of performing work under a contract. The City will also retain all other rights and remedies it has under any federal, state, or local statutes or ordinances and under the contract.

4. Notwithstanding a debarment, the City shall continue contracts or subcontracts in existence at the time the contractor was debarred if the contractor is not in default of such contract. However, the City may not add new work, exercise options, or otherwise extend the duration of current contracts or delivery orders. The City shall neither accept nor be liable for any increase in costs, or other expenses, delay, loss, or subsequent ineligibility to contract with the City, incurred by a Vendor as a result of the City rejecting any proposed person, firm, partner, affiliate, subcontractor or supplier that is debarred or suspended after the submission of a bid, proposal, or other communication leading to a contract, but before the approval or award of the contract.

5. Subject to City Council approval, the City Manager or his or her designee is authorized to establish appropriate methods and procedures to coordinate debarment actions and to implement this Section in general, pursuant to City policy and state law. The seriousness of the Vendor's acts or omissions, any remedial measures or mitigating factors, and the best interest of the City shall be considered in making any debarment policy or decision.

(b) Definitions

1. "Affiliate" means a person or entity is an affiliate of another person or entity that directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person or entity. In determining affiliation, the City shall consider all appropriate factors, including common ownership, common management, and contractual relationships.

2. "Debarment" is the process of excluding a Vendor from consideration for future awards on City contracts, or from acting as a subcontractor, sub-consultant, or supplier under future City contracts for a specified period that shall depend on the seriousness of the acts or omissions, or on any other relevant factor. Any debarment decision may be extended to include affiliates of the Vendor, if they are specifically named and given written notice of the proposed debarment and an opportunity to respond.

3. ""Offer" is a Vendor's response to a solicitation that includes an invitation for bid, a request for proposal, a request for qualification statements, or a request for quotation.

4. "Purchasing Agent" refers to the City of Laredo Purchasing Agent or other designee from the Purchasing Division of the Finance Department of the City.

5. "Vendor" means any individual, firm, or legal entity that submits offers for or is awarded, a City contract. The term includes suppliers, contractors, consultants, subcontractors, sub-consultants, affiliates, and successors in interest.

(c) Imputed Liability. The City will impute to the Vendor all liability, and hold a Vendor liable to the City, for all acts of an owner, officer, principal, director, shareholder, partner, agent, affiliate employee, associate, representative, affiliate, subcontractor, or supplier of the Contractor, or other person(s) acting on behalf of the Contractor in performance of a City contract. The City will consider a Contractor's receipt and acceptance of any benefit derived under or arising out of performance of a City contract including, but not limited to, compensation, as evidence of its approval, ratification, knowledge of and/or acquiescence in the act of any of the above-mentioned persons that may be a basis for debarment.

(d) Referral and Grounds for Debarment.

1. Any employee or official of the City may refer a Vendor to the Purchasing Agent for purposes of determining whether debarment is appropriate. The referral shall be signed and in writing and shall set forth the basis of the complaint asserted. Debarment is an independent action that may be taken and is not necessarily part of a successive disciplinary progression.

2. If conditions exist that warrant debarment, the Purchasing Agent, after reviewing all supporting evidence, shall provide Vendor with notice of the possible debarment, the basis of the referral, and an opportunity to protest.

3. The City may debar a Vendor if it finds based upon a preponderance of the evidence that any of the following has occurred:

   a. The Vendor is the subject of a criminal investigation by any federal, state or local prosecuting or investigative agency for a criminal offense that is incident to obtaining, attempting to obtain, executing, or performing a public or private contract, or any subcontract to the public or private contract; or for any other offense indicating a lack of business integrity, ethics, honesty, or one of moral turpitude. If the investigation is closed and the Vendor is not charged with an offense, debarment of the Vendor on this ground shall be automatically lifted;

   b. The Vendor has been arrested or charged with a criminal offense in connection with obtaining, attempting to obtain, executing, or performing a public or private contract, or any subcontract to the public or private contract; or for any other offense indicating a lack of business integrity, ethics, honesty, or one of moral turpitude. If the charges are dismissed or the Vendor is found not guilty, debarment of the Vendor on this ground shall be automatically lifted;

   c. The Vendor has been convicted of a criminal offense in connection with obtaining, attempting to obtain, executing or performing a public or private contract or any subcontract to the public or private contract; or for any other offense indicating a lack of business integrity, ethics, honesty, or one of moral turpitude;

   d. The Vendor is indebted to the City or has defaulted on any debt, account, contract or obligation owed to the City. In lieu of debarment, the City shall be entitled to offset against any debt, claim, demand, or account owed by the City to the selected Vendor, pursuant to the awarded contract, for any indebtedness owed to the City by the Vendor. The City may withhold from payment under the awarded contract an amount equal to the total amount of indebtedness owed to the City by the Vendor. The City may apply the amount withheld to the indebtedness owed to the City by the selected Vendor until paid in full. No assignment or transfer of such debt, claim, demand or account shall affect the right of the City to offset against the same.

   e. The Vendor has been disqualified from entering into a contract with any other municipality, state or federal agency for failure to meet standards related to the integrity of the bidder, or under any such facts and circumstances which indicate that the Vendor is not responsible or ethical;

a. The Vendor becomes insolvent, has payments frozen by the IRS , has proceedings in bankruptcy instituted against it, assigns over its estate or effects for payment thereof, or has a receiver or trustee appointed over its property;

b. The Vendor has failed, absent good cause, to perform on any other City contract according to its specifications, terms, and conditions, including the time to complete performance; or is non-responsive to a notice to cure any breach of the contract;

c. The Vendor has filed a lawsuit against the City that is no longer pending, if the City Attorney reasonably determines that any of the causes of action or allegations was wholly unsubstantiated and unsupported by the evidence, or filed, asserted or alleged in bad faith or for an improper purpose. Nothing in this paragraph may be construed to prohibit a Vendor from filing a lawsuit in good faith based on valid legal grounds and supported by evidence;

d. The Vendor has submitted a claim against the City that is no longer pending, if made in bad faith, completely without merit, had no basis in the facts known to all parties, or was submitted by the Vendor without proper proofs and justifications, for an improper purpose, or in order to harass the City or delay a City project. Nothing in this paragraph may be construed to prohibit a contractor from submitting a claim in good faith and with accurate, detailed and complete proof, justifications and supporting data;

e. The Vendor has committed serious or repetitive safety issues, which may be evidenced by violations of the Occupational Safety and Health Act (OSHA) and Standards, worker's compensation claims, personal injury lawsuits, or the safety record of any entity;

f. The Vendor has committed a violation of any of the provisions of the City's Code of Ethics, or engaged in dishonesty incident to obtaining, prequalifying for, or performing any contract or modification thereof; or

g. Any other cause of so serious or compelling a nature that it affects the present responsibility of the Vendor.

(e) Notice of Possible Debarment. Before a Vendor is debarred, the Purchasing Agent shall provide written notice to the Vendor. The notice to the Vendor shall be sent in any written form, including facsimile transmission or email, and by certified mail, return receipt requested, and shall include:

1. A statement that the Vendor will be placed on debarment and the identifying solicitation or contract number, if applicable;

2. A description of the facts that are the reason for debarment;

3. A copy of this Ordinance;

4. A statement that offers, bills, proposals, or requisitions will not be solicited from the Vendor and that any Offers submitted by the Vendor to the City will not be considered for award if debarred;

5. The length of time the Vendor may be debarred; and

6. Information regarding the right to protest a possible debarment and that the protest must be received by the Purchasing Agent within ten (10) calendar days after the Vendor has received notice of possible debarment.

(f) Protest

1. The Vendor's written request to protest shall be sent by facsimile, certified mail, return receipt requested, or hand delivery to the Office of the Purchasing Agent, and must be concise and presented logically and factually. The request must include at a minimum:

   a. The Vendor's name, address, telephone number, fax number, and contact; and

   b. The identifying number of the solicitation or contract, if applicable, and detailed statement of the factual grounds for the protest, including copies of relevant documents.

2. If a written protest is not received from the Vendor within seven (7) calendar days of the Vendor's receipt of notice of debarment, then the Purchasing Agent's decision shall be final and conclusive. If the Vendor does not submit a timely written request to protest, the Vendor waives the right to protest the possible debarment.

3. When a protest is filed, the City will make every reasonable effort to resolve the protest before a decision on the contract is made. However, the City will not delay a contract award if the City Manager determines that:

   a. The City urgently requires the goods, supplies, or services to be purchased; or

   b. The failure to make an award will unduly delay delivery or performance.

4. The Purchasing Agent and or City Engineer have the authority to settle, resolve, or otherwise dispose of a debarment referral in strict accordance with these guidelines. Within (3) business days of receiving a timely request for protest by the Vendor, the Purchasing Agent shall forward a copy to the Contract Compliance Officer. The Contract Compliance Offer shall report to the City Council monthly as to the filing, status, and disposition of any pending debarment protest.

(g) Informal Hearing.

1. If the Vendor submits a timely written protest request based upon disputed material facts, the Purchasing Agent shall schedule an Informal Hearing within thirty (30) calendar days after the request was received.

2. The Purchasing Agent shall send written notice by certified mail, return receipt requested, of the time and place of the Informal Hearing to the Vendor at the Vendor's last known address provided to the City by the Vendor. The notice will include a statement that the Vendor may be represented by counsel and may present evidence and testimony to support the factual grounds for the Vendor's protest. A copy of this written notice will also be sent to the department that requested the solicitation and the City Attorney's Office.

3. The Purchasing Agent will afford the Vendor an opportunity to submit, in writing, information and argument in opposition to the proposed debarment, to include submittal of any documentary evidence. If the Vendor's submission in opposition raises a genuine dispute over facts material to the proposed debarment, the Purchasing Agent may request additional information of the Vendor prior to the date of the Informal Hearing.

4. The purpose of an Informal Hearing is to give the Vendor an opportunity to present its case. It is not a formal adversarial proceeding, and is not subject to the Texas Open Meetings Act. The following individuals from the City may attend the Informal Hearing:

   a. Representatives from the department that requested the solicitation or purchase;

   b. Purchasing Division staff;

   c. City Attorney's Office legal staff; and

   d. Any other appropriate City staff as determined by the Purchasing Agent.

5. The Purchasing Agent shall conduct the hearing as informal as is practicable, and in conjunction with the City Attorney shall ensure the proceeding is consistent with the principles of fundamental fairness, and will afford the contractor an opportunity, with or without counsel, to argue the merits of their case, present its own witnesses, and question the City's witnesses. The weight to be attached to witness testimony and documents presented in any particular form will be at the discretion of the Purchasing Agent.

6. The Purchasing Agent shall provide a written decision to the Vendor no later than ten (10) business days after the date of the hearing. A copy of the decision will also be sent to the department that requested the solicitation and City Attorney's Office.

(h) Period of Debarment. Upon a finding of just cause for debarment, the Vendor shall be debarred until the period specified in the written decision expires. The period for debarment shall correspond to the seriousness of the reason for debarment. The Purchasing Agent may subsequently consider a written request by the Vendor for a reduction of the period for debarment when based on any of the following grounds:

1. Newly discovered material evidence;

2. Reversal of the conviction upon which the debarment was based;

3. Bona fide change in ownership or management;

4. Elimination of other causes for which the debarment was imposed; or

5. Other reasons the Purchasing Agent deems appropriate.

(i) Appeal.

1. The Purchasing Agent's decision regarding a protest may be appealed to the City Manager if the Vendor files a written Request for Review at the City Attorney's Office within (5) calendar days of receiving notice of the debarment decision.

2. Upon the timely filing by the Vendor of a Request for Review, the City Manager shall review the decision of the Purchasing Agent based upon a substantial evidence review of the protest record.

3. The City Manager may take any of the following actions on a timely filed appeal of the Purchasing Agent's debarment decision:

   a. Affirm debarment for the recommended period of time;

   b. Affirm the debarment order with modifications as to the period of debarment;

   c. Return the matter to the Purchasing Agent for further factual evidence if the City Manager finds the record to be incomplete; or

   d. Overturn the debarment order and take no action against the contractor.

3. The decision of the City Manager is final and exhausts all administrative remedies available to Vendor. This notwithstanding, the City Council, on its own motion, shall have the authority to reverse or modify any debarment decision when such action is deemed to be in the best interest of the City.

(j) Debarment List

1. The Purchasing Agent and Contract Compliance Officer shall each be responsible to maintain, disseminate, and make publicly available a current list of debarred Vendors. The list shall clearly state the name of each debarred person or firms, the date of the debarment determination, and the period of debarment. Publication on the City of Laredo website will satisfy the publication requirements of this subsubsection.

2. The Purchasing Agent shall update the List and notify the Contract Compliance officer within three (3) business days after any official debarment or reinstatement action.

3. The Contract Compliance Officer shall establish and enforce procedures for the internal distribution and use of the List to ensure adherence to the policy set forth herein precluding the City from contracting with a debarred Vendor.

(k) Exceptions. The City may proceed to contract with a debarred Vendor only in the following limited circumstances:

1. The Contract is necessary due to a public emergency or calamity or to preserve or protect the public health or safety;

2. The goods or services to be procured are available from only one (1) source; or

3. The City Council finds there to be a compelling reason.

Section 3. It is hereby declared to be the intention of the City Council that the phrases, clauses, sentences, paragraphs and sections of this ordinance are severable, and if any phrase, clause, sentence, paragraph or section of this ordinance shall be declared unconstitutional by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this ordinance, since the same is enacted by the City Council without the incorporation in this ordinance of any such unconstitutional phrase, clause, sentence, paragraph or section.

Section 4. The City Secretary of the City of Laredo is hereby directed to publish the proposed Ordinance as required by Section 2.09 of the Charter of the City of Laredo.

Section 5. This Ordinance shall become effective from and after its adoption and publication required by the City Charter and by state law.

PASSED BY THE CITY COUNCIL AND APPROVED BY THE MAYOR ON THIS THE

25 **DAY OF** August **, 2017.**

PETE SAENZ
MAYOR

ATTEST:

~~**HEBERTO L. RAMIREZ**~~ Jose A. Valdez, Jr.
~~**ACTING**~~ **CITY SECRETARY**

APPROVED AS TO FORM:

KRISTINA K. LAUREL HALE
ACTING CITY ATTORNEY

CITY OF LAREDO, TEXAS