

ORDINANCE NO. 9-09 N.S.

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF RICHMOND
AMENDING CHAPTER 2.50 TO THE RICHMOND MUNICIPAL CODE ENTITLED
BUSINESS OPPORTUNITY ORDINANCE**

SECTION I

Chapter 2.50 entitled “**RICHMOND BUSINESS OPPORTUNITY ORDINANCE**” of the Richmond Municipal Code is hereby added to read as follows:

Sections:

- 2.50.010 Findings.**
- 2.50.020 Declaration of Policy and Purpose.**
- 2.50.030 Scope and goals.**
- 2.50.040 Definitions.**
- 2.50.050 Powers and duties of the City.**
- 2.50.060 Powers and responsibilities of contractors.**
- 2.50.070 Rating incentives.**
- 2.50.080 Compliance.**
- 2.50.090 Exceptions.**
- 2.50.100 Monitoring Compliance.**
- 2.50.110 Duration of chapter.**

2.50.010 Findings.

The City Council of the City of Richmond hereby finds that it is in the best interest of the City of Richmond to have a healthy local business community. The City Council of the City of Richmond also finds that Richmond businesses often encounter obstacles to obtaining financing and credit; to obtaining bonding and insurance and to maintaining their economic viability.

2.50.020 Declaration of policy and purpose.

(a) It is the policy of the City of Richmond to ensure full and equitable opportunities for Richmond business enterprises to participate as contractors in the provision of goods and services to the City. Policies and programs that enhance the opportunities and entrepreneurial skills of Richmond businesses will best serve the public interest because the growth and development of such businesses will have a significant positive impact on the economic health of the City. Moreover, businesses in Richmond need to be encouraged because there are fewer businesses in the Richmond area than in comparable parts of the Bay Area and because the businesses that do exist in the City of Richmond tend to be smaller and, presumably, more fragile than businesses located in other parts of the San Francisco Bay Area.

(b) It is the City of Richmond's policy that first preference for awarding contracts be given to businesses located within its City limits. The public interest is served by continuing to encourage

businesses to locate and remain in Richmond through the provision of a preference to Richmond businesses in the award of City contracts.

(c) The City is instituting rating incentives for Richmond businesses in the award of City contracts in order to encourage businesses to locate and remain in Richmond and thereby enhance employment opportunities for persons living in Richmond. In effect, the rating incentives are intended to assist these businesses in contributing to the economic health of the City. The rating incentives should not unduly hamper non-Richmond businesses in the contracting process, and parallels the ratings incentives awarded in many other jurisdictions.

(d) Because many Richmond businesses are small and may not have the resources, capability or experience to act as prime contractors or to provide specialty services, it is the policy of the City of Richmond to encourage qualified prime contractors to use Richmond businesses as subcontractors to participate and gain experience in a way that will enhance their ability to compete for contracts on their own.

2.50.030 Scope and goals.

(a) The provisions of this chapter shall apply to three categories of contracts funded by the City of Richmond: (1) construction and construction-related contracts valued at or above one hundred thousand dollars (\$100,000); (2) service contracts, valued at or above fifty thousand dollars (\$50,000); (3) contracts for the procurement of goods, materials, equipment, furnishings or supplies, valued at or above twenty-five thousand dollars (\$25,000).

(b) In accordance with the findings in Section 2.50.010, the evidence supports the conclusion that Richmond businesses have been disadvantaged when competing for contracts.

(c) In order to eliminate the disparity between available and utilized Richmond businesses, the City is establishing a goal to achieve an adequate level of Richmond business participation in City contracts. The goal is that a minimum of twenty percent (20%) of the total contract dollar amount for all contracts covered by this chapter is allocated to Richmond businesses.

2.50.040 Definitions.

As used in this chapter:

"Contract" means any agreement between the City and a person to provide or procure labor, goods, materials, equipment, furnishings, supplies or services to, for or on behalf of the City of Richmond. Except as otherwise specifically defined in this section a contract does not include:

(1) Awards made by the City with a federal/state grant or City general fund monies to a nonprofit entity where the City offers assistance, guidance or supervision on a project or program and the recipient of the grant award uses the monies to provide services to the community;

(2) Sales transactions where the City sells its personal or real property; or

(3) Gifts of materials, equipment, supplies or services to the City.

"Contract Awarding Authority" or "CAA" means the City officer, department, employee or board authorized to enter into contracts on behalf of the City. In the case of an agreement with a person, firm or nonprofit entity to perform or fund the performance of construction-related services, the term "contract awarding authority" or "CAA" shall mean the person or nonprofit entity receiving funds from the City to perform or fund the performance of such services.

"Contractor" means any person who submits a bid or proposal to perform, performs any part of, agrees with a person to provide services in relation to or enters into any contract subject to this

chapter with department heads and officers of CAA's empowered by law to enter into such contracts on the part of the City for public works or improvements to be performed, or for goods or services or supplies to be purchased at the expense of the City or to be paid out of monies deposited in the treasury or out of trust monies under the control of, or collected by, the City. "Good faith effort" means the steps undertaken to comply with the goals and requirements of this chapter and shall include the following:

- (1) Attending any pre-solicitation or pre-bid meetings scheduled by the City to inform all bidders of the Richmond business requirements for the project for which the contract will be awarded;
- (2) Identifying specific items of work to be performed by Richmond firms in order to increase the likelihood of meeting the Richmond business goals, including breaking down contracts into smaller units;
- (3) Advertising, not less than 20 calendar days before the date the bids are opened, in one or more daily or weekly newspapers, trade association publications, trade journals or other media as specified by the City. This subsection applies only if the City gave public notice of the project not less than 30 calendar days prior to the date the bids are opened;
- (4) Providing written notice of its interest in bidding on the contract to the number of Richmond business firms required to be notified by the project specifications. Written notice shall specify which items of work the prime contractor has identified pursuant to subsection (2), above. This notice shall be provided to Richmond business firms not less than 20 calendar days prior to the opening of bids. These solicitations shall include a description of the specific items of work to be performed by the Richmond business firms and all related conditions of the work including the engineer's estimate and specifications for the items for which the bid is solicited. The City shall make available to the bidder a list or a source of lists of enterprises which are certified by the City as Richmond business enterprises not less than 20 calendar days prior to bid opening;
- (5) Following up initial solicitations of interest by contacting the Richmond business firms to determine with certainty whether the enterprises were interested in performing specific items of the project;
- (6) Making the project plans, specifications, and in the case of a construction, design or engineering contract, the City Engineer's estimate available for review by interested Richmond firms;
- (7) Requesting assistance from Richmond community organizations; Richmond contractor or professional groups; local, state or federal business assistance offices; or other organizations that provide assistance in the recruitment and placement of Richmond business enterprises, if any are available;
- (8) Negotiating in good faith with the Richmond businesses, and not unjustifiably rejecting as unsatisfactory bids or proposals prepared by any Richmond businesses, as determined by the City;
- (9) Assist interested Richmond businesses in obtaining bonds, lines of credit, or insurance required by the City or contractor.

"Joint venture" means and may be referred to as an "association" of two or more businesses acting as a contractor and performing or providing services on a contract, in which each joint venture or association partner combines property, capital, efforts, skill and/or knowledge. In order to be considered a Richmond business joint venture, the joint venture must first be certified by the City.

"Person" means one or more individuals, partnerships, associations, organizations, trade or professional associations, corporations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers or any combination thereof, including any official, agent or employee of the City of Richmond.

"Richmond business" means any business which possesses or establishes all of the following at least six months before bids or proposals are opened:

- (1) A written agreement for City occupancy or proof of ownership of a Richmond office;
 - (2) Proof that business is transacted in the Richmond office;
 - (3) A conspicuously displayed business sign at the Richmond business premises except where the business operates out of a residence;
 - (4) Proof that the office is appropriately equipped for the type of business for which certification as a Richmond business is sought. Where equipment, such as computers, and reproduction and communications machines are typically and routinely used in a non-Richmond location, comparable equipment shall be installed and routinely used at the Richmond office. A Richmond office that is used solely or primarily for "meetings" shall not comply, unless such activities are the sole or principal use of the principal non-Richmond office;
 - (5) A valid City of Richmond business license;
 - (6) An operating telephone that, when answered by a person, is answered only on the Richmond premises;
 - (7) Proof that the Richmond office is the principal office of the business where the predominant office work of the business is performed; and
 - (8) When the Richmond office is a "branch" or supplementary office of a multi-location business, proof that the Richmond office is staffed by at least one paid employee or owner on a fulltime basis (minimum 30 hours per week), or that the Richmond office is staffed by at least one paid employee or owner at least as many hours per week as the principal non-Richmond office.
- "Subcontractor" means any person providing goods or services to a contractor for profit, if such goods or services are procured or used in fulfillment of the contractor's obligations arising from a contract with the City of Richmond.

"Supplier" means any person who submits a bid or proposal or enters into a contract for the supplying of goods, materials, equipment, furnishings or supplies.

2.50.050 Powers and duties of the City.

In addition to the duties and powers given to the City, as set forth elsewhere in the Richmond Municipal Code, the City shall have the following duties and powers:

- (1) The City shall notify Richmond businesses of contracting and procurement opportunities under this chapter by appropriate means designed to maximize awareness of these opportunities.
- (2) Certification of Richmond Businesses. City shall have the exclusive power to certify businesses as bona fide Richmond businesses.
- (3) Certification of Richmond Business Joint Ventures.
 - (A) The City shall have the exclusive power to certify Richmond business joint ventures. Richmond businesses participating in certified joint ventures shall have a commensurate share of the profit or loss to be realized from the joint venture. Joint venture certification procedures shall require that the joint venture submit a written request for certification with its bid and provide the City with a full account of the nature of the business, the local ownership interest, the basis for creation of the joint venture, and the responsibilities of the interested parties.

(B) The joint venture shall submit a written agreement creating the joint venture and, in the case of construction contracts, a joint venture license. Joint ventures must conform to the pertinent laws which govern the creation of such business arrangements. The City shall have the right to review and determine if the joint venture has complied with applicable laws and the requirements and intent of this chapter.

(C) The joint venture shall provide the City with any further information or documents the City requests to assist the City in determining whether the Richmond business joint venture is bona fide. The information received from such a joint venture shall demonstrate that the Richmond business has a commensurate share of responsibility and profit or loss to be realized from the joint venture.

(D) During the term of a contract with a joint venture, the City shall have the right to review the joint venture's records to determine whether the joint venture is being carried out as a bona fide Richmond business joint venture. The City may investigate whether the joint venture partners are sharing equitably in the profit or loss of the entity and whether they are performing tasks commensurate with their share of the joint venture.

(E) If the City determines upon reasonable investigation that a Richmond business joint venture is not bona fide, the joint venture may be subject to the penalties set out below in Section 2.50.130.

(F) The joint venture shall be allowed to count the entire amount of the work performed by the Richmond business partner in determining whether the joint venture meets the Richmond business goals.

(4) Certification of Mentor Protege Agreements.

(A) The City shall have the exclusive power to certify mentor protege agreements. In such agreements, a prime contractor (mentor) will help develop the technical and business capabilities of a Richmond business (protege). Such agreements shall be in writing, shall delineate the rights and responsibilities of each mentor and protege, and shall last for the entire time of any contract awarded to the mentor-protege team.

(B) No officer, director, employee or member of the mentor-protege team shall be allowed to bid or otherwise participate independently on a City contract where the mentor-protege team is bidding or otherwise participating.

(C) The protege must be an independent business operation prior to submittal of a mentor-protege agreement and throughout the term of the agreement.

(5) The City shall initiate and investigate complaints arising from a failure to comply with any of the requirements of this chapter, rules and regulations adopted pursuant to this chapter, or contract provisions pertaining to Richmond business participation.

(6) Whenever contract supplements, amendments, or change orders are made which cumulatively increase the total dollar value of a contract by more than ten percent (10%), the contractor shall comply with those Richmond business provisions of this chapter which applied to the original contract with respect to the supplement, amendment or change order.

(7) During the term of a contract covered by this chapter, or within twelve months after the termination of any such contract, where there is a prime contractor and one or more Richmond business subcontractors, the City shall have the right to review any records of the contractors to verify that any subcontract is bona fide and that any subcontractor is actually performing the work of their subcontract.

(8) All contracts or other agreements between the City of Richmond and persons or entities, public or private, where such persons or entities receive money from or through the City for the

purpose of contracting with businesses to perform contracts, shall require such persons or entities to comply with the provisions of this chapter in awarding and administering such contracts, except where prohibited by state or federal law or regulation.

(9) The requirements of this chapter are separate from those imposed by the United States or the State of California as a condition of financial assistance or otherwise. However, the City shall enforce the imposition of such Federal Minority Business Enterprise and Women Business Enterprise requirements in addition to the requirements of this chapter whenever such federal requirements are warranted.

2.50.060 Powers and responsibilities of contractors.

Contractors shall have the following powers and responsibilities:

(1) Each contractor shall have responsibility for monitoring its compliance with the provisions of pertinent sections of this chapter and the rules and regulations implementing this chapter, including obtaining and analyzing reports, conducting preliminary investigations to determine compliance or noncompliance with this chapter, and taking any other action which may be appropriate to assure that all project contractors comply with these provisions.

(2) Each contractor shall be responsible for meeting all of its Richmond business participation goals as specified in each relevant section of the chapter. The contractor shall be given an opportunity to demonstrate that it has made a "good faith effort" to ensure that the goals are met, and to ensure compliance with the requirements of this chapter. Where the City finds that the contractor has failed to take appropriate action to assure compliance with the chapter, the City may find the contractor in noncompliance and take appropriate action.

(3) Each contractor shall have the right to make field inspections, to review documents, monitor and interview such individual commercial tenants, employers and subcontractors as necessary to verify the accuracy of reports and to otherwise monitor compliance with the requirements of this chapter.

(4) Each contractor shall cooperate with monitoring efforts of the City including, but not limited to, providing all relevant records and documents, assisting field or site inspections, and other monitoring efforts deemed necessary by the City.

(5) Each contractor shall designate a staff person who shall have the primary responsibility for ensuring that its responsibilities as outlined in each relevant section of the chapter are being met.

2.50.070 Rating incentives.

Whenever a bid process is utilized in awarding a contract, the following rating incentives shall apply:

(1) A five percent (5%) or five point rating incentive to bids submitted by Richmond business prime contractors;

(2) A five percent (5%) or five point rating incentive to bids submitted by Richmond business joint ventures that utilize a minimum of 20% participation by Richmond businesses, based on the total dollar amount of the contract;

(3) A five percent (5%) or five point rating incentive to bids submitted pursuant to a mentor-protégé agreement.

2.50.080 Compliance.

(a) Bid specifications shall require bidders and contractors to do the following:

(1) Demonstrate in their bid that they have used good faith efforts to utilize Richmond business subcontractors; and

(2) Identify the particular Richmond business subcontractors, equipment owners and operators and suppliers to be utilized in performing the contract, specifying for each subcontractor the dollar value of the participation, the type of work to be performed and such information as may be reasonably required to determine the responsiveness of the bid.

(b) During the term of the contract, any failure to comply with the level of Richmond business subcontractor participation specified in the contract shall be deemed a material breach of the contract.

(c) The CAA or the department making the contract award recommendation shall use good faith efforts to solicit bids or proposals from Richmond businesses certified by the City to provide the specified services.

(d) The City is empowered to take actions to ensure compliance with the provisions of this chapter. The actions which the City is empowered to take may include, but are not limited to:

(1) Ordering the suspension of the selection process; or

(2) Intervening in the selection process to correct contracting practices which hinder business opportunities for Richmond businesses.

2.60.090 Exceptions.

(a) The City shall waive the Richmond business rating incentives and good faith efforts requirements of this chapter under the following circumstances:

(1) Whenever the City finds, with the advice of the CAA, that needed goods or services are available only from a sole source and the prospective contractor is not currently disqualified from doing business with the City or from doing business with any governmental agency based on a failure to comply with Richmond business or City requirements;

(2) If the CAA certifies in writing to the City that:

(A) Pursuant to the contract, it is necessary to respond to an emergency which endangers the public health or safety, and

There is no time to apply the rating incentives and no Richmond businesses capable of performing the emergency work are immediately available;

(3) Any certification submitted pursuant to this provision shall be made prior to the contract's being submitted for City Council review and approval.

(b) The City shall waive the Richmond business rating incentives for contracts in excess of one million dollars (\$1,000,000) whenever a CAA establishes that:

(1) Sufficient qualified Richmond businesses capable of providing the needed goods and services required by the contract are unavailable, and sufficient qualified businesses located outside of the area capable of providing the needed goods and services required by the contract are available;

or

(2) The application of the Richmond business rating incentives will result in significant additional costs to the City if the waiver of the rating incentive is not granted.

2.50.100 Monitoring compliance.

(a) The City shall monitor compliance with and will submit a quarterly report to the City Council on the status of the implementation of this chapter. Compliance will be measured from the initial day of performance and shall continue for the duration of the project in question. The City shall issue an exit report for any contract which includes Richmond business prime contractor participation as a joint venture partner. The purpose of the exit report is to ensure that Richmond businesses are actually performing services on joint ventures.

(b) Noncompliance by Contractors. In cases where the City has cause to believe that a contractor acting in good faith has failed to comply with any of the requirements of this chapter, rules and regulations adopted pursuant to this chapter, or contract provisions pertaining to Richmond business participation, the City shall notify the CAA and shall attempt to resolve the noncompliance through conciliation. The City shall be empowered to require the bidder or contractor to participate in alternative dispute resolution to resolve the noncompliance. If the noncompliance cannot be resolved, the City shall submit to the City Manager and the contractor a written finding of noncompliance. The City Manager shall give the contractor an opportunity to appeal the finding, and if the City Manager concurs with the finding of the City, the City Manager shall take such action as will effectuate the purposes of this chapter.

(c) Wilful or Bad Faith Noncompliance by Contractors. In cases where the City has reason to believe that any bidder or contractor has wilfully failed to comply with any of the provisions of this chapter, rules and regulations adopted pursuant to this chapter, or contract provisions pertaining to Richmond business participation, the City shall be empowered to conduct an investigation and require the bidder or contractor to participate in alternative dispute resolution to resolve the noncompliance. If the alternative dispute resolution is not successful, and after affording the contractor notice and an opportunity to be heard, the City may impose sanctions for each violation of this subsection. Such sanctions may include, but are not limited to:

- (1) Declaring the bidder or contractor to be nonresponsive and ineligible to receive the award of the contract;
- (2) Determining that the bidder or contractor has wilfully failed to comply with the provisions of this chapter and calculating the liquidated damages for which the bidder or contractor shall be liable. The liquidated damages shall be in an amount equal to the bidder's, or contractor's net profit on the contract, or ten percent (10%) of the total amount of the contract or one thousand dollars (\$1,000), whichever is greatest, said amount to be determined by the City. All contracts shall contain a provision in which the bidder, subcontractor or contractor acknowledges and agrees that the liquidated damages assessed shall be payable to the City upon demand and may be set off against any monies due to the bidder, subcontractor or contractor from any contract with the City and the City shall have the right to withhold payment due the bidder, subcontractor or contractor.

2.50.110 Duration of chapter.

The provisions of this chapter shall remain in effect until **January 29, 2010**. On that date, the provisions shall cease to exist unless the City Council acts to renew the provisions of this chapter.

SECTION 2

If any section, subsection, sentence, clause, or phrase of this Ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the ordinance. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, sentence, clause, and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared invalid or unconstitutional.

SECTION 3

This Ordinance shall be effective 30 days after passage and adoption.

First introduced at a regular meeting of the City Council of the City of Richmond held on April 21, 2009 and finally passed and adopted at a regular meeting held on **April 28, 2009**, by the following vote:

AYES: Councilmembers Bates, Butt, Ritterman, Rogers, Viramontes, Vice Mayor Lopez, and Mayor McLaughlin.

NOES: None.

ABSTENTIONS: None.

ABSENT: None.

DIANE HOLMES
CLERK OF THE CITY OF RICHMOND

(SEAL)

Approved:

GAYLE McLAUGHLIN
Mayor

Approved as to form:

RANDY RIDDLE

City Attorney

State of California }
County of Contra Costa : ss.
City of Richmond }

I certify that the foregoing is a true copy of Ordinance No. 9-09, finally passed and adopted by the Council of the City of Richmond at a meeting held on April 28, 2009.