

ORDINANCE NO. 2021-1497

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SAN MARCOS, CALIFORNIA, ADDING SAN MARCOS MUNICIPAL CODE SECTION 2.30.105 ESTABLISHING PROCEDURES TO PREQUALIFY CONTRACTORS FOR ELIGIBILITY TO BID ON PUBLIC WORKS PROJECTS AND SECTION 2.30.190 ESTABLISHING GROUNDS FOR THE DEBARMENT OF CONTRACTORS

WHEREAS, the City of San Marcos (City) does not currently have a process for prequalifying contractors for eligibility to bid on City public works projects, or for prohibiting debarred contractors from conducting business and executing future contracts with the City for a variety of reasons including but not limited to, unsatisfactory performance; a local, state, or federal law or regulation offense or violation; a Fair Political Practices Commission enforcement order, etc.; and

WHEREAS, pursuant to Section 200 of the City's Charter, the City has the authority to establish standards, procedures, rules, or regulations governing all aspects of public works contract procurement; and

WHEREAS, California Public Contract Code section 20101 authorizes public agencies to establish a process to prequalify bidders for eligibility to bid on public works projects, at their sole discretion, by requiring prospective bidders to complete and submit a standardized questionnaire and financial statement, including a complete statement of the bidder's experience in performing public works; and

WHEREAS, in accordance with the City's Charter, the City desires to adopt a procedure similar to that contemplated by Public Contract Code section 20101, for prequalifying prospective bidders by implementing a City process to evaluate and objectively rate contractors, including using a standardized questionnaire and applying a uniform rating system to examine a number of criteria; and

WHEREAS, evaluating a contractor's eligibility to bid on a public works projects prior to submission of a bid would allow the City to review the contractor's experience in constructing public works, and assess the contractor's reliability and credibility, quality, fitness, and capacity to perform the work; and

WHEREAS, prequalifying prospective bidders assists the City in selecting the most qualified and experienced contractors with the demonstrated ability to complete similar projects and reduces the amount of work and time involved in evaluating bids from those contractors who are unqualified or rejecting low bidders as non-responsive following the submission of bids; and

WHEREAS, so long as a contractor receives at least the minimum score necessary under a prequalification system, the contractor will be deemed qualified to bid on City projects; and

WHEREAS, the City wishes to allow prospective bidders who are denied prequalification status to dispute their prequalification rating prior to the closing time for receipt of bids in accordance with

Section 20101, which requires public agencies to establish an appeal process for disqualified bidders; and

WHEREAS, the City further wishes to establish grounds for contractor debarment from future City projects; and

WHEREAS, debarment is an administrative sanction to be imposed in the public interest to ensure that only the most qualified and responsible contractors do business with and are awarded contracts by the City; and

WHEREAS, when the City enters into contracts with contractors who violate the law, fail to deal with the City in good faith and/or who provide unsatisfactory performance, it compromises the integrity of the contracting process and may result in the improper expenditure of public funds; and

WHEREAS, upon a determination that grounds for debarment exist, a debarred contractor would be prohibited from doing business with the City for a reasonable, specified period of time; and

WHEREAS, prior to declaring debarment of a contractor, the City desires to afford contractors due process through an appeals process.

NOW THEREFORE, the City Council of the City of San Marcos, in accordance with the freedom accorded to charter cities generally, and by the Charter of the City of San Marcos specifically, does ordain as follows:

Section 1.      Recitals. The foregoing recitals are true and correct.

Section 2.      Add SMMC Sections 2.30.105 and 2.30.190. The San Marcos Municipal Code is hereby amended to add Sections 2.30.105 and 2.30.190, as follows:

## **CHAPTER 2.30**

### **PURCHASING**

#### **SECTIONS:**

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<b>2.30.105</b>	<b>Prequalification of Prospective Bidders for Public Works Projects</b>
<b>2.30.190</b>	<b>Debarment of Contractors</b>

**2.30.105      City to Determine When Prequalification of Prospective Bidders Will be Used for Public Works Projects.** The City will determine when and if the Prequalification and Debarment procedures specified below will be applicable to and required for a public work project(s). When the

City determines that Prequalification procedures are applicable and required, the following procedures will be used to prequalify contractors for eligibility to bid on public works projects.

(a) Definitions

For purposes of this Chapter, any reference to “responsible” shall mean determining whether a prospective bidder has met the specified criteria developed pursuant to this Chapter 2.30, rather than determining the lowest responsible bidder in a bidding process.

(c) Notice of Prequalification Procedure to Prospective Bidders.

The City shall distribute a notice to prospective bidders inviting the submission of prequalification information.

(d) Prequalification Procedure.

The City’s prequalification procedure includes the following:

(1) Standardized Questionnaire and Financial Statement. The City shall require prospective bidders to complete and submit a standardized questionnaire and financial statement, including a statement of the prospective bidder’s prior experience in performing public works projects. Each questionnaire, and any other documents and materials submitted to the City as part of the prequalification requirements, must be signed under penalty of perjury by an individual who has the legal authority to bind the contractor on whose behalf that person is signing. If any information provided by a prospective bidder changes, the prospective bidder must immediately notify the City and provide updated and accurate information in writing. Omission of any requested information may result in automatic disqualification of the prospective bidder by the City.

(2) Uniform Scoring System. The City shall have the right to rate prospective bidders on the basis of their completed standardized questionnaires, financial statements, and interviews, to determine whether or not prospective bidders are qualified to perform work on City public works projects, refined or tailored as needed to address any given project. In determining responsibility, the City may choose to consider certain factors , including, but not limited to, the prospective bidder’s business history and organizational performance; compliance with occupational safety and health laws, workers’ compensation and other labor legislation; and completion of recent projects and quality of performance.

(3) Disqualification Determination. If a prospective bidder is determined not to be qualified under the City’s specified criteria, the City shall state its determination and the basis thereof in writing, including any supporting evidence received or adduced in the course of the City’s review, and shall deliver a copy of such determination to the prospective bidder. The effective date of the notice is the date that said notice is deposited in the U.S. Mail. The prospective bidder shall be permitted to dispute the disqualification and rebut any evidence used against the prospective bidder prior to the closing time

for receipt of bids on the project. If the prospective bidder does not timely dispute the disqualification by or before the closing time for receipt of bids on the project, then no further action by the City is necessary, and the prequalification rating of the bidder becomes effective without any further proceedings.

(4) Appeal Process. The disqualified bidder will be given the opportunity to rebut any evidence used as a basis for the disqualification and to present evidence to the City relating to why the bidder should be deemed to be qualified. The disqualified bidder may give written notice requesting the appeal to the City Clerk within ten (10) days following the effective date of the City's disqualification determination. As soon as is feasible, but not later than the expiration of thirty (30) days following receipt of the request for an appeal, the City Manager shall hear the appeal. The disqualified bidder may rebut evidence which is the basis for the City's determination and present evidence as to why the bidder is qualified. The City Manager may affirm the disqualification or reverse the determination. The decision of the City Manager with respect to the appeal serves as the City's final determination and serves to exhaust the disqualified bidder's administrative remedies. Disqualified bidders may apply in future prequalification processes.

(5) Modification of Prequalification Procedure. City staff have the right to periodically update and revise any or all of the questions included in the standardized questionnaire and financial statement and/or the uniform scoring system on an administrative basis. City Council approval shall not be needed for such updates and/or revisions.

(e) Duration of the Prequalification.

The City shall have the right to prequalify each prospective bidder for a single project, or for multiple projects occurring within two (2) calendar years following the date of initial prequalification.

(f) Revocation of Prequalified Status.

Following a determination of prequalification, in the event a material change occurs with respect to information or documentation submitted on a prospective bidder's prequalification application through the date of submission of a bid or award of a contract, the prospective bidder must inform the City of the same. In the event it learns of such a material change, the City has the right to further evaluate said prospective bidder's qualifications, and to revoke a prequalification determination in writing, and shall deliver a copy of such determination to the disqualified bidder. Such material changes may include, but are not limited to, submission of materially false information, failing to disclose disqualifying information, changes to a prospective bidder's bonding capacity and/or financial condition, departure of key personnel, or other factors that would affect the ability of a prospective bidder to perform the work and would therefore place public funds at risk should the prospective bidder be determined to be prequalified and be awarded a contract. Any appeal of a City determination to revoke a prequalification determination shall be processed in accordance with section 2.30.105 (d)(4), above. The decision of the City Manager with respect to such appeal serves as the City's final determination, and serves to exhaust the bidder's administrative remedies.

(g) Pregualification of Subcontractors.

Nothing in this Section shall preclude the City from prequalifying or disqualifying a subcontractor. The City has the right, but not the obligation, to disqualify subcontractors from working on a public works project as determined to be in the best interest of the City. The disqualification of a subcontractor by the City does not necessarily disqualify prime contractor determined by the City to be prequalified to bid on a public works project. If a subcontractor is not qualified, the prime contractor shall be given an opportunity to replace that subcontractor with a new subcontractor subject to this prequalification procedure, or a subcontractor already prequalified by the City, at the prime contractor's discretion.

(h) Confidentiality and the Public Records Act.

To the extent permitted by law, the City shall keep confidential all prequalification documents submitted by any prospective bidder that are clearly and specifically marked as confidential, and such information deemed to be confidential shall not be considered a public record and shall not be open to public inspection if the City receives a request for documents under the Public Records Act. If any question exists regarding the confidentiality of any documents submitted by any prospective bidder, the City will notify the prospective bidder prior to releasing the documents. An exception exists for a list of the names of prospective bidders applying for prequalification status, their California construction or other professional license number, classifications, and expiration dates, and names of associated qualifying individuals, and their DIR Public Works Contractor Registration Number, which are public records subject to disclosure under the Public Records Act (California Government Code sections 6250, et seq.).

**2.30.190 Debarment of Contractors.** Debarment is an administrative sanction to be imposed only in the public interest for the City's protection, and is not imposed for purposes of punishment. It is designed to protect the City by ensuring full and open competition by granting awards only to contractors qualified under this Chapter. Debarment prohibits the awarding of contracts to, and the execution of contracts with, a debarred contractor.

(a) Definitions.

For purposes of this Section, the following definitions apply:

(1) **"Affiliate"** means any individual or business entity related to a contractor where either one directly or indirectly controls, or has the power to control the other, or where a third party controls or has the power to control both the individual person or business entity and the contractor.

(2) **"Bid"** means the submission of a bid, proposal, or quote in response to a solicitation or other request by the City for bids, proposals, or quotes.

(3) **“Claim”** means any request or demand for money or damages submitted or made pursuant to a contract, statute or law to the City, or an officer, employee, or agent of the City.

(4) **“Contractor”** means any individual or business entity that either (i) directly or indirectly through an affiliate submits offers for and/or is awarded, or reasonably may be expected to submit offers for and/or be awarded a City contract for work, supplies or services; or (ii) conducts business or reasonably may be expected to conduct business with the City as an agent or representative of another contractor. The term Contractor also includes any individual or business entity that participates as a bidder or a subcontractor.

(5) **“Debarment” or “Debarred”** means the administrative action taken by the City to declare that a Contractor is ineligible to submit a Bid, or be awarded a service, procurement, public works contract or any other contract with the City for a period up to three (3) years, unless the Debarment is extended pursuant to section 2.30.190 (c), below, or is made permanent pursuant to Section 2.30.190 (c), below, in which case there is no expiration on said Debarment.

(b) Grounds for Debarment.

In addition to all other remedies permitted by law, upon a finding of any of the following grounds, the City may declare Debarment of a Contractor:

(1) Two (2) or more claims of computational or other errors in Bid submission within a two (2) year period;

(2) Failure or refusal to timely provide or properly execute contract documents;

(3) More than one occurrence of substandard performance by such Contractor on any City contract or agreement, including, but not limited to: (a) a material breach of the contract or agreement; (b) a failure to complete work required under the contract or agreement on time and/or within budget when such failure is attributable to such person’s negligent or wrongful actions or inactions; (c) substandard quality of work and/or materials; or (d) any negligent or wrongful failure to furnish or install materials in accordance with contract requirements, and/or 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 agreement or on different contracts or agreements. The use of substandard materials and/or failure to furnish or install materials in accordance with contract requirements may be used to support Debarment 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 or agreement;

(4) Two (2) or more occasions within a two (2) year period of failure to meet bonding or insurance requirements acceptable to the City in the time periods required by the contract;

(5) Failure or refusal to properly perform or complete contract work or warranty performance;

(6) Failure or refusal to honor or observe contractual obligations or legal requirements pertaining to the contract;

(7) One or more violations by such Contractor, during the performance of any city contract or agreement, of any labor or safety statutes, regulations or standards including, but not limited to, applicable local, state, or federal statutes, regulations or standards governing prevailing wage, occupational safety and health, and nondiscrimination requirements;

(8) One or more violations by such Contractor of any law or regulation governing the handling, transfer, storage, or disposal of hazardous materials or hazardous waste;

(9) One or more violations by such Contractor of any law or regulation governing the handling, transfer, storage, or disposal of solid waste generated in connection with construction or demolition;

(10) Submission of a bid, proposal, or other document pertaining to or required by a City contract or agreement, or pertaining to or required by any provision of the bid documents, or this Municipal Code, or applicable state or federal law, and/or during the performance of work, which is known by Contractor to be false or to contain false information, or the submission of a false or fraudulent claim;

(11) Knowingly doing business with a debarred third party in performance of any City contract or agreement awarded after debarment of said third party; or

(12) Any finalized Debarment of the Contractor by another governmental agency on grounds justifying debarment under this Section, during the period of such Debarment.

(13) Received two or more final performance evaluations with a rating of unsatisfactory in any two-year period.

The grounds for Debarment set forth in this section 2.30.190 (b) are not intended to be an exhaustive list of the acts or omissions for which a Contractor may be Debarred, and grounds other than those enumerated above may be a basis for Debarment.

(c) Grounds for Permanent Debarment

(1) 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 Contractor who is subject to, or the affiliate of, the Contractor

who is subject to the judgment, settlement, stipulation, plea agreement, final conviction, or final unappealable civil judgment:

(A) under any state or federal statute or municipal ordinance for fraud, bribery, collusion, conspiracy, theft, bid rigging, forgery, falsification, or destruction of records, receiving stolen property, perjury, embezzlement, or any other similar crime; or

(B) for commission of a criminal offense arising out of obtaining or attempting to obtain a public or private contractor subcontract, or in the performance of such contractor subcontract; or

(C) for any offense, action, or action indicating a lack of business integrity or business honesty.

(2) A Fair Political Practices Commission enforcement order against a Contractor, either following a hearing or by stipulation, imposing a penalty for a violation of the campaign contribution provisions of the California Political Reform Act, or an administrative determination and/or a Superior Court judgment against a Bidder or Contractor, either following a hearing or by stipulation, finding a violation of the campaign contribution provisions of the San Marcos Municipal Code.

(3) The Contractor has engaged in any corrupt practice in bidding, award, administration, or performance of a contract.

(4) The Contractor operates in a manner designed to evade the application of or to defeat the purpose of this Section 2.30.190.

(5) A person or persons representing Contractor has committed an act or omission so serious or compelling in nature that it affects the present responsibility of the Contractor to be awarded a contract or to participate as a subcontractor.

(d) Debarment Determination, Notice.

If grounds for Debarment are found to exist under section 2.30.190 (b) or section 2.30.190 (c), above, the City shall state its determination and the basis thereof in writing, and shall deliver a copy of such determination to the Contractor. The effective date of the notice of Debarment is the date that said notice is deposited in the U.S. Mail. The Contractor shall be permitted to dispute the Debarment and rebut any evidence used against the Contractor pursuant to section 2.30.190 (e), below.

(e) Appeal Process.

The Contractor will be given the opportunity to rebut any evidence used as a basis for the Debarment and to present evidence to the City relating to why the Contractor should not be Debarred. The Contractor may give written notice requesting the appeal to the City Clerk within ten (10) days following



receipt of the City's Debarment determination. Within thirty (30) days following receipt of the request for an appeal, the City Manager shall hear the appeal. The Contractor may rebut evidence which is the basis for the City's determination and present evidence as to why the Contractor should not be Debarred. The City Manager may affirm the Debarment or reverse the Debarment. The City Manager's determination with respect to the appeal serves as the City's final determination, and serves to exhaust the Contractor's administrative remedies.

(f) Term and Effect of Debarment.

Debarment constitutes Debarment of all divisions or other organizational elements of the Contractor for an initial period of up to three (3) years, unless the Debarment decision is limited by its terms to specific divisions, organizational elements, or commodities, or unless the Debarment is made permanent pursuant to Section 2.30.190 (c), above. Prior to expiration of the time period of any non-permanent Debarment imposed under this article, the City Manager may review the record of the evidence presented during the debarment proceedings, as well as any additional facts or information relevant to a review of the Debarment. The City Manager may extend the existing non-permanent Debarment, for successive additional periods of up to two years each, if the City Manager determines that such extension is necessary to protect the public interest. If the City Manager determines that Debarment for an additional period is necessary, the appeal procedures established by section 2.30.190 (e), above, shall be applicable to such decision. City officers, employees and agents shall not solicit offers from, or award contracts to, any Debarred Contractors. Debarred Contractors are also excluded from conducting business with the City as agents or representatives of other contractors. The City may extend the Debarment decision to include any Affiliate of the Contractor if the Affiliate is specifically named, given written notice of the proposed Debarment, and provided an opportunity to respond.

(g) Effect of Debarment by Another Governmental Agency.

The City may also debar a Contractor that is the subject of a final debarment determination by another governmental agency until the term of the debarment by such other governmental agency expires. The Contractor may appeal a debarment determination pursuant to section 2.30.190 (e), above. The City Manager may affirm the Debarment or reverse the Debarment. The City Manager's determination serves as the City's final determination, and serves to exhaust the Contractor's administrative remedies.

(h) Continuation of Existing Contracts.

Debarment shall be deemed a material breach of any other contract between the City and the Contractor, and any existing contracts between the City and the Contractor may be terminated immediately upon Debarment. Notwithstanding the foregoing, the City may continue contracts in existence at the time of Debarment, upon a determination by the City Council, after receiving advice from the City Manager and City Attorney as to the effects of termination of an existing agreement with the Contractor.

(h) List of Debarred Contractors.

The City shall compile and maintain a current consolidated list of all Debarments. The list shall indicate the names and addresses of all debarred Contractors, the ground(s) for Debarment, and the termination date for each listing. After the opening of bids or receipt of proposals, the contracting officer shall review the list of the Debarments. Bids received from any listed Contractor in response to an invitation for bids shall be recorded as received, and then rejected by reason of Debarment. Proposals, quotations, or offers received from any listed Contractor shall not be evaluated for award or included in the competitive process by the applicable City Department during the period the Contractor is on the Debarment list.

Section 3. Severability. If any section, sentence, clause, or phrase of this Ordinance is determined to be invalid, illegal, or unconstitutional by a decision or order of any court or agency of competent jurisdiction, then such decision or order will not affect the validity and enforceability of the remaining portions of this Ordinance. The City Council declares that it would have passed and adopted the Ordinance, and each section, sentence, clause, or phrase thereof, regardless of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared invalid or unconstitutional.

Section 4. Effective Date. This Ordinance shall be effective thirty (30) days following its adoption.

Section 5. Publication. Within fifteen (15) days following its adoption, the City Clerk shall certify to the passage of this Ordinance and cause the same to be published, or the title thereof as a summary, in accordance with the provisions of State law in a newspaper of general circulation designated for legal notices publication in the City of San Marcos.

INTRODUCED at a regular meeting of the City Council of the City of San Marcos, California, held on the 22<sup>nd</sup> day of June, 2021; and

PASSED, APPROVED AND ADOPTED at a regular meeting of the City Council of the City of San Marcos, California, held on the \_\_\_\_\_ day of \_\_\_\_\_, 2021, by the following roll call vote:

AYES: COUNCIL MEMBERS:  
NOES: COUNCIL MEMBERS:  
ABSENT: COUNCIL MEMBERS:

APPROVED:

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Rebecca D. Jones, Mayor

ATTEST:

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Phillip Scollick, City Clerk  
City of San Marcos

APPROVED AS TO FORM:

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Helen Holmes Peak, City Attorney  
City of San Marcos