

ORDINANCE NO. 42-09 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 amended as follows (**indicates deletion; underline text indicates insertion**):

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 also finds that Richmond businesses, particularly small 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 to ensure full and equitable opportunities for Richmond business enterprises, including small businesses, 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 and Richmond small 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 Richmond tend to be smaller and more fragile than businesses located in other parts of the San Francisco Bay Area.

(b) It is the City'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, including small businesses, to locate and remain in Richmond through the provision of a preference to Richmond businesses and Richmond small businesses in the award of City contracts.

(c) The City is instituting rating incentives for Richmond businesses and Richmond small 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 promote the growth and development of Richmond businesses and Richmond small businesses and 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 to encourage qualified prime contractors to use Richmond businesses and Richmond small

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: (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 and Richmond small businesses have been disadvantaged when competing for contracts.

(c) In order to eliminate the disparity between available and utilized Richmond businesses, including small 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-five percent (25%) of the total contract dollar amount for all contracts covered by this chapter is allocated to Richmond businesses and that a minimum of ten percent (10%) of the total contract dollar amount for all contracts covered by this chapter is allocated to Richmond small businesses.

2.50.040 Definitions.

As used in this chapter:

"Contract" means any contract or 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. 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;
- (3) Gifts of materials, equipment, supplies or services to the City; or
- (4) Contracts exempted from the provisions of Chapter 2.52 of the Richmond Municipal Code.

"Contract Awarding Authority" or "CAA" means the City officer, department, employee or board authorized and empowered by law to enter into contracts on behalf of the City. In the case of an agreement with a contractor to perform or fund the performance of construction-related services, the term "contract awarding authority" or "CAA" shall mean the contractor 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 CAA's 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 mandatory activities, as determined by the City:

- (1) Attending any pre-solicitation or pre-bid meetings scheduled by the City to inform all contractors of the Richmond business and Richmond small business requirements for the project for which the contract will be awarded;
- (2) Listing any Richmond businesses and Richmond small businesses that will be participating in the project for which the contract will be awarded;
- (3) Advertising, not less than 20 calendar days before the date the bids are to be opened by the CAA, 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 for which the contract will be awarded not less than 30 calendar days prior to the date the bids are opened;
- (4) Following up initial solicitations of interest by contacting Richmond businesses and Richmond small businesses to determine with certainty whether such businesses are interested in performing specific items for the contract; and
- (5) Negotiating in good faith with Richmond businesses and Richmond small businesses and not unjustifiably rejecting as unsatisfactory bids or proposals prepared by any Richmond businesses or Richmond small businesses.

Good faith effort shall also include the following non-mandatory activities for which the contractor must accomplish at least two of five of the following, as determined by the City:

- (1) Identifying specific items of work to be performed by Richmond businesses and Richmond small businesses in order to increase the likelihood of meeting the business goals and intent of this chapter, including breaking down contracts into smaller units;
- (2) Providing written notice of its interest in bidding on the contract to the number of Richmond businesses and Richmond small businesses required to be notified by the project specifications for the project for which the contract will be awarded. Written notice shall specify which items of work the prime contractor has identified pursuant to subsection (1), above. This notice shall be provided to Richmond businesses and Richmond small businesses not less than 20 calendar days prior to the opening of bids by the CAA. These solicitations shall include a description of the specific items of work to be performed by the Richmond businesses and Richmond small businesses 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 contractor a list or a source of lists of enterprises which have been certified as Richmond businesses and Richmond small businesses not less than 20 calendar days prior to bid opening;
- (3) 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 businesses and Richmond small businesses;
- (4) 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 businesses and Richmond small businesses, if any are available; and
- (5) Assisting interested Richmond businesses and Richmond small 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 Richmond businesses or Richmond small 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. Richmond businesses and Richmond small businesses participating in joint ventures shall have a commensurate share of the profit or loss to be realized from the joint venture. The joint venture shall be allowed to count the entire amount of the work performed by the Richmond business and/or Richmond small business partner in determining whether the joint venture meets the business goals of this chapter. In order to be considered a Richmond business joint venture, the joint venture must conform to pertinent laws which govern the creation of such business arrangements and first be certified by the City as provided in Section 2.50.050(3).

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

"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 full time equivalent employee (minimum 30 hours per week), or that the Richmond office is staffed by at least one full time equivalent employee 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.

"Richmond small business" means any Richmond business that is certified as a small business by the California Department of General Services, or as a Disadvantaged Business Enterprise by the California Unified Certification Program.

"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 and Richmond small businesses of contracting and procurement opportunities under this chapter by appropriate means designed to maximize awareness of these opportunities.

(2) The City shall have the exclusive power to certify businesses as bona fide Richmond businesses and Richmond small businesses, and may rely on outside organizations such as the California Department of General Services and the California Unified Certification Program for any such certification.

(3) The City shall have the exclusive power to certify Richmond business joint ventures. In order for the City to make its determination:

(A) The joint venture shall 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.

(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 joint venture is bona fide. The information received from such a joint venture shall demonstrate that the Richmond business and/or Richmond small business has a commensurate share of responsibility and profit or loss to be realized from the joint venture.

During the term of a contract with a joint venture, or within twelve months after the termination of any such contract, 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.

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

(5) 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 and Richmond small 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.

(6) All contracts with the City for the purpose of contracting with businesses to perform contracts, shall require compliance with the provisions of this chapter in awarding and administering such contracts, except where prohibited by state or federal law or regulation.

(7) 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 Federal Minority Business Enterprise, Women Business Enterprise, Disadvantaged Business Enterprise, and Disabled Veteran Business Enterprise requirements in addition to the requirements of this chapter whenever such federal requirements are warranted.

(8) The City Manager may adopt policies, programs and/or rules and regulations calculated to promote the goals and intent of this chapter, such as mentor-protégé, job order contracting, incentive plan, or on-call contracting programs.

(9) Notwithstanding the contracting and purchasing procedures prescribed in Chapter 2.52 of the Richmond Municipal Code (Contracting and Purchasing Procedures), the CAA may award a contract that has an estimated value of greater than five thousand dollars (\$5,000), but less than (1) one hundred thousand dollars (\$100,000) for construction and construction-related contracts, (2) fifty thousand dollars (\$50,000) for service contracts and (3) twenty-five thousand dollars

(\$25,000) for the procurement of goods, materials, equipment, furnishings or supplies, to a Richmond small business as long as the CAA obtains price quotations from two or more Richmond small businesses. If the estimated cost to the CAA is less than five thousand dollars (\$5,000) for the contract, or a greater amount as administratively established by the City Manager, the CAA shall obtain at least two price quotations from any responsible contractors and suppliers whenever there is reason to believe a response from a single source is not a fair and reasonable price.

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 this chapter, the rules and regulations implementing this chapter, and contract provisions pertaining to Richmond business participation, 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 contractors comply with these provisions.
- (2) Each contractor shall be responsible for meeting all of its Richmond business and Richmond small 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 and intent of this chapter.
- (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 and intent 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.
- (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 provisions of this chapter that applied to the original contract with respect to the supplement, amendment or change order.

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 or Richmond small 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 twenty-five percent (25%) of the total contract amount allocated to Richmond businesses or Richmond small businesses;
- (3) A five percent (5%) or five point rating incentive to bids submitted with a minimum of twenty-five percent (25%) of the total contract dollar amount allocated to Richmond businesses and ten percent (10%) of the total contract dollar amount allocated to Richmond small businesses.

Rating incentives shall not cumulatively equal more than ten percent (10%) or ten points.

2.50.080 Compliance.

(a) In submitting bids for projects for which a contract will be awarded pursuant to this chapter, contractors shall do the following:

- (1) Demonstrate in their bid that they have used good faith efforts to utilize Richmond businesses and Richmond small businesses; and
- (2) Identify the particular Richmond businesses and Richmond small businesses and suppliers to be utilized in performing the contract, specifying for each such business 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 and Richmond small business participation specified in the contract shall be deemed a material breach of the contract.

(c) The CAA shall use good faith efforts to solicit bids or proposals from Richmond businesses and Richmond small businesses.

(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 for the award of contract; or

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

(3) Declaring the contractor to be nonresponsive and ineligible to receive the award of contract;

(4) Declaring an existing contract terminated;

(5) Imposing penalties in the form of liquidated damages. The liquidated damages shall be in an amount equal to the contractor's and/or joint venture'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 liquidated damages assessed shall be payable to the City upon demand and may be set off against any monies due to the contractor from any contract with the City and the City shall have the right to withhold payment due the contractor.

(6) Disqualifying the contractor from eligibility for providing goods or services to the City for a period not to exceed five years. Any business disqualified under this subsection shall have a right to review and reconsideration by the City Manager after two years upon a showing of corrective action indicating that violations are not likely to recur; or

(7) Not awarding any contracts to a contractor that is disqualified from doing business with the City under the provisions of this subsection.

2.50.090 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 this chapter or other 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

(B) There is no time to apply the rating incentives and no Richmond businesses or Richmond small 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 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 and Richmond small 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 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 for which a contract will be awarded pursuant to this chapter. The City shall issue an exit report for any contract which includes Richmond business or Richmond small business participation as a joint venture partner. The purpose of the exit report is to ensure that Richmond businesses and Richmond small businesses are actually performing services on joint ventures.

(b) 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 and intent 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 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, including the actions permitted in Section 2.50.080(d).

(c) In cases where the City has reason to believe that a contractor has willfully or in bad faith 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 or Richmond small business participation, the City shall be empowered to conduct an investigation and require the 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 take action as will effectuate the purposes of this chapter, including the actions permitted in Section 2.50.080(d).

2.50.110 Duration of chapter.

The provisions of this chapter shall remain in effect until **January 31, 2012**. 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 December 1, 2009 and finally passed and adopted at a regular meeting held on December 15, 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

I certify that the foregoing is a true copy of **Ordinance No. 42-09**, finally passed and adopted by the City Council of the City of Richmond at a regular meeting held on December 15, 2009.