

*City of San José, California***COUNCIL POLICY**

<b>TITLE</b> WAGE THEFT PREVENTION POLICY	<b>PAGE</b> 1 of 5	<b>POLICY NUMBER</b> 0-44
<b>EFFECTIVE DATE</b> July 1, 2016	<b>REVISED DATE</b> April 11, 2023 (Effective July 1, 2023)	
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**BACKGROUND**

Wage theft occurs when an employer fails to pay its workers the wages to which they are legally entitled. It is the crime of stealing earned wages from workers. There are numerous forms of wage theft involving violations of employment laws but all resulting in workers earning less than they are entitled to earn.

Local and national studies on wage theft report that wage theft is a pervasive and chronic problem. Wage theft is not incidental, aberrant, rare or committed only by a few rogue employers at the periphery of the labor market. Instead, it takes place in industries that span the economy – from retail, restaurants and grocery stores; caregiver industries; manufacturing, construction and wholesalers; building services such as janitorial and security; and personal services such as dry cleaning and laundry, car washes and beauty and nail salons.

**PURPOSE**

To establish a Council Policy and procedure to prevent wage theft on City contracts as well as deny, suspend or revoke certain City permits and licenses to businesses with unpaid wage theft judgments.

**POLICY**

It is the policy of the City of San José that all parties contracting with the City must comply with all applicable federal, state and local wage and hour laws including but not limited to the Federal Fair Labor Standards Act (“FLSA”), the California Labor Code and the San José Minimum Wage Ordinance.

**Bid or Proposal Disqualification Circumstances**

1. A potential contractor that has submitted a formal or informal bid or proposal to provide either: (a) supplies, materials, goods, and/or services

*City of San José, California*

<b>TITLE</b> Wage Theft Prevention Policy	<b>PAGE</b> 2 of 5	<b>POLICY NUMBER</b> 0-44
---	-----------------------	------------------------------

to the City pursuant to San José Municipal Code Chapter 4.12; or (b) a bid to perform a Major or Minor Public Works project pursuant to San José Municipal Code Chapters 27.06, 27.08 and 27.10 ***shall*** be disqualified if the potential contractor has received two or more final wage judgments from the California Labor Commissioner's Office in the last five years prior to the date of submission, including but not limited to Civil Wage and Penalty Assessments (CWPAs) and Bureau of Field Enforcement (BOFE) citations related to wages, hours or benefits, **or** has one or more unpaid wage judgments including but not limited to CWPAs and BOFE citations in the past five years prior to the date of submission of a bid or proposal to provide supplies, materials, goods and/or services.

2. A potential contractor that has submitted: (a) a formal or informal bid or proposal to provide supplies, materials, goods, and/or services to the City pursuant to San José Municipal Code Chapter 4.12; or (b) a bid to perform a Major or Minor Public Works project pursuant to San José Municipal Code Chapters 27.06, 27.08 and 27.10 ***may*** be disqualified if the potential contractor has been found, by a court or by final administrative action of an investigatory government agency, to have violated applicable wage and hour laws on one or more occasions and all wage and hour judgments have been satisfied in the past five years prior to the date of submission of a bid or proposal to provide supplies, materials, goods and/or services.
3. A potential contractor that has submitted a formal or informal bid or proposal for a procurement for security guard or janitorial services will not automatically be disqualified under Section 1 above from the procurement if the proposer is covered by a collective bargaining agreement prior to the date of contract, or can prove they have a mutually agreed upon process in place between employer and employees, which expressly provides for wages, hours of work, working conditions, and a mechanism for workers to file wage complaints and resolve wage issues through a grievance procedure.
4. Potential contractors that have submitted; (a) a formal or informal bid or proposal for a procurement for a service; or (b) or a bid to perform a Major or Minor Public Works project pursuant to San José Municipal Code Chapters 27.06, 27.08 and 27.10 that is highly regulated under state or federal law will not be disqualified under Sections 1 and 2 above from the procurement if disqualification would limit the City's ability to compete in the market for service(s) for the most qualified potential contractors. The City may consider (i) the number of judgments or final administrative

*City of San José, California*

<b>TITLE</b> Wage Theft Prevention Policy	<b>PAGE</b> 3 of 5	<b>POLICY NUMBER</b> 0-44
---	-----------------------	------------------------------

decisions and their cumulative dollar amount; (ii) the number of employees impacted by the prior violations; (iii) the size of the company; and (iv) history of compliance with wage and hour laws as part of the evaluation of potential contractors. The potential contractor is subject to all other requirements of this Policy.

### **Grounds for Contract Termination**

A current contractor found by a court or by final administrative action of an investigatory government agency to have violated applicable wage and hour laws, in the five years prior to or during the term of the contract with the City, ***may*** be in material breach of its contract with the City if the violation is not fully disclosed and/or satisfied per City contract requirements. Such breach may serve as a basis for contract termination and/or any other remedies available under law, including a stipulated remediation plan.

### **PROCEDURE**

#### **I. MANDATORY DISCLOSURE REQUIREMENT**

As a part of any City solicitation for supplies, materials, goods, and/or services, a potential contractor shall fully complete a "Bid Certification" ("Certification") in a form approved by the Department of Finance in coordination with the Office of Equality Assurance. As a part of any City bid to perform a Major or Minor Public Works project pursuant to San José Municipal Code Chapters 27.06, 27.08 and 27.10, a potential contractor shall fully complete a "Bid Certification" ("Certification") in a form approved by the Director of Public Works in coordination with the Office of Equality Assurance. The Certification requires each potential contractor to disclose whether the contractor has been found by a court or final administrative action of an investigatory government agency to have violated federal, state, or local wage and hour laws within the past five years from the date of the submitted bid or proposal. For each disclosed violation, the potential contractor shall provide a copy of (i) the court order and judgment and/or final administrative decision; and (ii) documents demonstrating either that the order/judgment has been satisfied, or if the order/judgment has not been fully satisfied, a written and signed description of potential contractor's efforts to date to satisfy the order/judgment. The completed Certification shall be submitted by the potential contractor to the City as a part of its bid or proposal.

The City ***shall*** disqualify a potential contractor if the potential contractor has been found by the California Labor Commission to have violated applicable wage and hour laws, including but not limited to CWPAs and BOFE citations related to wages, hours, or benefits, on two or more occasions or has one unpaid wage judgment, assessment, or citation.

*City of San José, California*

<b>TITLE</b> Wage Theft Prevention Policy	<b>PAGE</b> 4 of 5	<b>POLICY NUMBER</b> 0-44
---	-----------------------	------------------------------

The City, at its sole discretion, **may** disqualify a potential contractor based on any satisfied judgments or final administrative decisions . In evaluating whether to disqualify a potential contractor, the City should evaluate (i) the number of the judgments or final administrative decisions and their cumulative dollar amount; (ii) the number of employees impacted by the prior violations; (iii) the size of the company and history of compliance with wage and hour laws; and (iv) the impact to the City; and (v) other factors that may be appropriate.

Inaccurate or incomplete disclosures constitute a violation of the City’s Wage Theft Prevention Policy and **may** result in immediate disqualification from the City solicitation and contracting process.

## II. CONTRACT LANGUAGE AFTER SUCCESSFUL BID OR PROPOSAL

All City contracts subject to this Policy shall include provisions that substantially conforms to the following to the extent permitted by law:

### “Wage Theft Prevention

**Compliance with Wage and Hour Laws:** Contractor, and any subcontractor performing work under this Agreement, shall comply with all applicable federal, state and local wage and hour laws. Applicable laws may include, but are not limited to, the Federal Fair Labor Standards Act, the California Labor Code, the San José Living Wage Policy, the San José Prevailing Wage Policy, and the San José Minimum Wage Ordinance.

**Final Judgments, Decisions, and Orders:** For purposes of this Section, a “final judgment, decision, or order” refers to one for which all appeals have been exhausted or the time period to appeal has expired. Relevant investigatory government agencies include: the federal Department of Labor, the California Division of Labor Standards Enforcement, the City of San José Office of Equality Assurance, or any other governmental entity or division tasked with the investigation and enforcement of wage and hour laws.

**Prior Judgments against Contractor and/or its Subcontractors:** BY SIGNING THIS AGREEMENT, CONTRACTOR AFFIRMS THAT IT HAS DISCLOSED ANY FINAL JUDGMENTS, DECISIONS OR ORDERS RELATING TO WAGE AND HOUR LAWS FROM A COURT OR INVESTIGATORY GOVERNMENT AGENCY FINDING AS TO THE CONTRACTOR AND ITS SUBCONTRACTOR(S) – IN THE FIVE YEARS PRIOR TO EXECUTING THIS AGREEMENT. CONTRACTOR FURTHER AFFIRMS THAT IT OR ITS SUBCONTRACTOR(S) HAS SATISFIED AND COMPLIED WITH ANY SUCH

*City of San José, California*

<b>TITLE</b> Wage Theft Prevention Policy	<b>PAGE</b> 5 of 5	<b>POLICY NUMBER</b> 0-44
---	-----------------------	------------------------------

JUDGMENTS, DECISIONS OR ORDERS – OR HAS REACHED AGREEMENT WITH THE CITY REGARDING THE MANNER IN WHICH IT WILL SATISFY – ANY SUCH JUDGMENTS, DECISIONS OR ORDERS.

**Judgments or Decisions During Term of Contract:** If at any time during the term of this Agreement, a court or investigatory government agency issues a final judgment, decision or order finding that Contractor or a subcontractor it employs to perform work under this Agreement has violated any applicable wage and hour law, or Contractor learns of such a judgment, decision, or order that was not previously disclosed, Contractor shall inform the Office of Equality Assurance, no more than 15 days after the judgment, decision or order becomes final or of learning of the final judgment, decision or order. Contractor and its subcontractors shall promptly satisfy and comply with any such judgment, decision, or order, and shall provide the City's Office of Equality Assurance with documentary evidence of compliance with the final judgment, decision or order within five days of satisfying the final judgment, decision or order. The City reserves the right to require Contractor to enter into an agreement with the City regarding the manner in which any such final judgment, decision, or order will be satisfied.

**City's Right to Withhold Payment:** Where Contractor or any subcontractor it employs to perform work under this Agreement has been found in violation of any applicable wage and hour law by a final judgment, decision or order of a court or government agency, the City reserves the right to withhold payment to Contractor until such judgment, decision or order has been satisfied in full.

**Material Breach:** Failure to comply with any part of this Section constitutes a material breach of this Agreement. Such breach may serve as a basis for immediate termination of this Agreement and/or any other remedies available under this Agreement and/or law.

**Notice to City Related to Wage Theft Prevention:** Notice provided to the City's Office of Equality Assurance as required under this Section shall be addressed to: Office of Equality Assurance, 200 East Santa Clara Street, 5<sup>th</sup> Floor, San José, CA 95113. The Notice provisions of this Section are separate from any other notice provisions in this Agreement and, accordingly, only notice provided to the above address satisfies the notice requirements in this Section."

The City may terminate any agreement if a contractor fails to comply with the wage theft prevention contract provisions.

*City of San José, California*

<b>TITLE</b> Wage Theft Prevention Policy	<b>PAGE</b> 6 of 5	<b>POLICY NUMBER</b> 0-44
---	-----------------------	------------------------------

**III. REVOCATION OF PERMITS, LICENSES AND REGISTRATIONS**

Pursuant to Section 6.02.130, the City may deny, suspend or revoke a permit or license for permits issued under Title 6 for failure to comply with a final judgment, decision or order of a court or government agency relating to wage and hours laws.

If the City receives complaints about Title 6 permittees regarding wage theft, the Office of Equality Assurance shall work with the City Attorney's Office and the department responsible for issuance of the permit or license to investigate the complaint to determine denial, suspension, or revocation of the permit or license until the wage judgment is satisfied.