

# CITY OF OAKLAND



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## LEGAL OPINION

July 10, 2012

Dear City Administrator Santana:

**Subject: City's Authority to Exclude Goldman Sachs from Future Contracts with the City**

### **I. Introduction**

At the meeting of the June 26, 2012 Finance Committee, the Committee considered a resolution recommended by staff seeking Council authorization to negotiate termination of the City's Swap with Goldman Sachs below the market rate at terms more favorable to the City than those provided in the agreement between Goldman and the City. The Committee requested and the City Attorney's Office provided a confidential legal opinion outlining the legal issues related to the proposed action and the strategies available to the City. On July 3, 2012, the City Council adopted an amended resolution.

Your office has asked that the City Attorney's Office address the issues but in a form disclosable to the public, which does not disadvantage the City by revealing strategies to Goldman Sachs and others.

### **II. Question**

Can the City of Oakland bar Goldman Sachs from contracting with the City in the future?

### **III. Summary Conclusions**

Federal and state securities laws do not prohibit the City from excluding Goldman Sachs from future bond business. Goldman Sachs could be excluded from future City Contracts by following the administrative procedures set forth in the Oakland Municipal Code, if grounds for

debarment are found to exist.<sup>1</sup> Exclusion of a business from government contracts implicates a liberty interest protected by due process under the U.S. and California constitutions. Chapter 2.12 of the Oakland Municipal Code contains the Debarment Program, which includes the City's procedures for debarment of contractors. If the City follows the administrative procedures set forth in Chapter 2.12 and finds grounds for debarment, the business could be barred from contracting with the City for up to five years. More than twenty-four grounds for debarment are set forth in OMC section 2.12.050. To justify exclusion from City contracts, debarment would be supported by evidence establishing wrongful conduct or violations of a public contract or program, which can include wrongful acts relating to contracts with or debarment by other public agencies.

#### **IV. Background**

##### **A. Debarment under OMC Chapter 2.12**

Businesses have a constitutionally protected right, known as a "liberty interest", to be considered for government contracts. Before a business can be debarred, suspended or otherwise prohibited from contracting with the City, it must be afforded due process rights, including notice of the charges against it, an opportunity rebut the charges, and a fair hearing in a meaningful time and manner. U.S. Constitution, 5<sup>th</sup> and 14<sup>th</sup> Amendments; California Constitution, Article I, §§7, 15; Southern Cal. Underground Contractors, Inc. v. City of San Diego, 108 Cal.App.4<sup>th</sup> 533, 542-543 (2003); Golden Day Schools, Inc. v State Dept. of Education, 83 Cal.App.4<sup>th</sup> 695, 711 (2000). Government entities meet these requirements through the adoption of debarment procedures.

In 2009, the City Council enacted the Debarment Program, contained in OMC, Chapter 2.12, establishing an administrative process to disqualify or exclude businesses from consideration for City contracts for a range of offences and conduct. Further, debarment by one jurisdiction has far reaching consequences as debarred businesses are usually automatically prohibited from being considered for contracts in any other federal, state or local jurisdictions that have enacted debarment procedures by operation of their legislation.

The list of designated grounds for debarment under the City's debarment ordinance is extensive, including in part, collusion in obtaining contract or payment, submission of false information in response to an request for bids or quotes or in response to a solicitation or request for qualifications or proposals, submission of false claims as defined by state or federal law, judgment against the contractor establishing a violation of any civil or criminal law against any government entity relevant to the contractor's ability perform under a City contract, intentional failure to perform a City contract, fraud, violation of federal or state antitrust statutes, embezzlement, theft, forgery, bribery, making false statements, submitting false information,

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<sup>1</sup> A July 3, 2012, letter submitted by advocates, from the law firm Altschuler Berzon subsequently supports the City Attorney's Office's position regarding debarment.

attempting to commit a fraud against the City, receiving stolen property, making false claims to any public entity, obstructing justice, fraudulently obtaining public funds, and many more. Debarment can be based on evidence of such wrongful acts relating to a contractor's dealings with or debarment by any other public agency. (OMC 2.12.050 (A) through (V)) Finally, grounds for debarment exist for "[a]ny other cause of so serious or compelling a nature that it affects the present responsibility of a contractor." (OMC 2.12.050(W))

1. Goldman Sachs is a Contractor Covered by the Debarment Program.

The Debarment Ordinance applies to contractors that participate in both covered and related transactions. (OMC 2.12.020) A covered transaction is "application for or participation in a City contracting policy program, activity, contract or related transaction, regardless of type, amount or source of funding." (OMC 2.12.010) Related transaction are "directly related to a covered transaction, which assists the participant in executing a covered transaction, regardless of the extent of the influence on or substantive control over the covered transaction by the person performing the related transaction." Related transactions expressly include transactions with underwriters, bonding companies, marketing agents, accountants, consultants, and investment bankers. (OMC 2.12.010) Goldman Sachs is an underwriter and investment banker subject to the Debarment Ordinance.

V. Analysis

A. Debarment Procedure

1. Following investigation and review of the facts, the City Administrator decides whether to initiate debarment proceedings.

Under the Debarment Program, the City Administrator decides whether or not to proceed with a debarment action. (2.12.040(B)) The debarment process begins with an investigation. (2.12.040(A).) Information suggesting cause for debarment is investigated, reported and referred to the City Administrator for consideration. Basic documentation (including the reasons for proposing debarment, the facts and evidence supporting the need to debar, a recommended time period for debarment, and supporting documentation) is developed. (OMC 2.12.040(C)) After consideration, the City Administrator may issue a notice of proposed debarment at least 90 days prior to the noticed debarment hearing. (2.12.040(B), 2.12.060(A))<sup>2</sup>

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<sup>2</sup> If she determines at the time notice is given that adequate evidence supports debarment and it is in the public interest, the City Administrator may temporarily suspend a contractor pending a final decision by the Debarment Hearing Board. (OMC 2.12.020(E)).

2. The decision regarding debarment is made by the Debarment Hearing Board following a hearing.

The Debarment Hearing Board consists of three members appointed by the City Administrator to conduct hearings, receive evidence and make the final decisions regarding debarment. Alternatively, at her sole discretion, the City Administrator may appoint a retired judge to conduct the debarment hearing. (OMC 2.12.100)

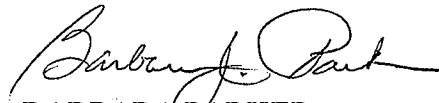
3. The maximum period of debarment is 5 years.

Under the Debarment Ordinance, the maximum period of debarment is 5 years. OMC section 2.12.170 provides: "Debarments shall be for a period commensurate with the seriousness of the respondent's conduct, up to a maximum of five years."

#### **VI. Conclusion**

Goldman Sachs can be prohibited from contracting with the City for up to five years if grounds for debarment are established through an administrative debarment proceeding pursuant to the Debarment Ordinance.

Respectfully submitted,

  
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cc: President Reid and Members of the Council