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**TO:** Detroit City Council

**FROM:** David Whitaker, Director   
Legislative Policy Division

**DATE:** September 28, 2023

**RE:** **Report on Detroit Subcontractor Oversight**

The Legislative Policy Division (LPD) has been requested by Council President Mary Sheffield to provide a report regarding the City of Detroit's (City) ability to provide oversight and/or penalize subcontractors that exhibit illegal discriminatory behavior. The Council President has identified a recent Committee of the whole session, where City Council was presented with allegations of racist and discriminatory behavior, conducted by a licensed Detroit subcontractor.

In responding to Council President's request regarding a subcontractor's discriminatory conduct, LPD's report is to include whether the City has the ability to provide oversight and penalties for subcontractors in the following areas:

- Development Agreements
- Tax Abatements
- Demolition Contracts
- Memorandum of Understanding

In general, any contractor and/or subcontractor doing business in the City of Detroit is obligated to comply with Federal, State of Michigan and City of Detroit statutes and/or ordinances. With regard to any contractor or subcontractor that exhibits illegal discriminatory behavior, the City Code provides the City the ability to take action in accordance with the provisions set forth therein.

The City Charter provides under Section 7-704.1 that the Human Rights Department<sup>1</sup> shall have the authority to:

Investigate complaints of unlawful discrimination against any person because of religion, race, color, national origin, age, sex, sexual orientation, height, weight, familial status, marital status, disability or any status protected by the laws of the State of Michigan or the United States of America, in violation of any ordinance or any law within the City's jurisdiction, and secure equal protection of civil rights without discrimination. The City shall implement this section by ordinance. The Human Rights Department may cooperate with other civil rights and enforcement agencies in the resolution of complaints, where cooperation is requested or where jurisdiction is concurrent;

Pursuant to Section 7-704.1 the City by and through the Human Rights Department has the authority to provide investigative oversight of any subcontractor that has been accused of unlawful discrimination against a person because of religion, race, color, national origin, age, sex, sexual orientation, height, weight, familial status, marital status, disability or any status protected by the laws of the State of Michigan or the United States of America. The Department also has the authority to investigate and provide oversight of any subcontractor in violation of any ordinance or any law within the City's jurisdiction, and secure equal protection of civil rights without discrimination. In furtherance of the authority of the Human Rights Department, the City Code under Section 23-2-7, *Respondent operating under government license*, provides the authority to take certain action where a contractor and or subcontractor requires a license to operate in the City of Detroit:

[t]he Human Rights Department, upon notice and hearing, determines that a respondent operating by virtue of a license issued by the City or other political subdivision, or the state or federal government, or any agency of these, has violated this chapter and that the violation was authorized, requested, commanded, performed or knowingly permitted by the respondent, or by an officer or agent of the respondent acting within the scope of his or her employment or duty, and upon failure of such respondent to correct the unlawful practice and comply with Department orders, the Department shall so certify to the licensing agency. Until the Human Rights Department's finding is reversed through

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<sup>1</sup> LPD Notes that the duties of the Human Rights Department are currently being undertaken by the Civil Rights Inclusion and Opportunity Department (CRIO)

judicial review, the findings of the department shall be grounds for suspension, revocation, or denial of renewal of such license issued by the City.

The Human Rights Department has the authority upon notice and hearing that has determined that a contractor or subcontractor that is licensed by the City, a political subdivision, or the state or federal government has violated Chapter 23, Human Rights (which includes but not limited to illegally discriminatory behavior) can certify the findings to the licensing agency for action to be taken. If the contractor or subcontractor is licensed by the City of Detroit and determined to have exhibited illegally discriminatory behavior, the license can be suspended revoked or denied renewal, unless reversed by judicial review.

The City also has oversight ability over a contractor or subcontractor or any other person or entity that is issued a license by the City to conduct business within the city of Detroit, under Article I, *City Business License*, Section 28-1-16 *Grounds for denial, suspension, revocation of license*. Pursuant to this provision, a licensing department of the Building Safety, Engineering and Environmental Department (BSEED), The Health Department or the Police Department, may deny a new or renewal application, revoke, or suspend a license for any of the following reasons:

(1) Upon proof submitted to the Buildings, Safety Engineering, and Environmental Department Business License Center, the Health Department, or the Police Department of any of the following acts committed by an applicant or licensee or, where the applicant or licensee is a corporation or partnership, by the entity itself or by any of the persons in a position of control or management of the business, including, but not limited to, the officers, directors, controlling stock-holders or managing employees or by a corporation or partnership of which the applicant or licensee was in a position of control or management or by any agent or employee of the applicant or licensee, who is in a position of management or control of the business to be licensed:

a. **The violation of any state statute or this Code** relating, controlling, or in any way relating to the location, construction, maintenance, use, qualification for or operation of a business similar to or the same as that for which a license is being considered, **or engaging in an illegal, unfair, dishonest, deceitful or fraudulent business practice**, which evidences a willful and deliberate disregard for the health, safety or welfare of either the patrons, employees or persons residing or doing business nearby, or competing businesses;

b. Engaging in the same or similar business for which a license is required without first having obtained such license or, having obtained a license, engaging in the same or similar business during the period of suspension or after revocation;

c. Allowing another person to use one's license;

- d. Making any false, misleading or fraudulent statement of fact in the license application or in any document required by the City in conjunction therewith; or
- e. Failure to provide the City with a completed application

In accordance with Section 28-1-16, licenses issued by BSEED, the Health Department or Police Department, which may include contractors or subcontractors may be suspended, revoked or denied renewal if the licensed contractor or subcontractor has been properly determined to have violated state law or City Code (including but not limited to the Elliott-Larsen Civil Rights Act<sup>2</sup> or the City of Detroit's Human Rights ordinance<sup>3</sup>).

In addition to the Human Rights Department under Section 23-2-7, and the provisions regarding business licenses under Section 28-1-16, the City Code's debarment ordinance provides another method of oversight and penalizing a contractor or subcontractor for illegally discriminatory behavior. Article V, Division 10 *Debarment*, provides under Section 17-5-351 *Purpose*:

- (a) The City shall solicit offers from, award contracts to, consent to subcontracts with, or otherwise do business with, responsible contractors only. To effectuate this policy, the debarment of contractors from current or future City work may be undertaken.

Pursuant to the purpose of the debarment ordinance, the City shall solicit and award contracts only to responsible contractors. The debarment of contractors from current or future work may be undertaken to effectuate the policy. A contractor or subcontractor operating in the City where discriminatory behavior has been substantiated may be subject to debarment for not being a responsible contractor. Section 17-5-355 *Grounds for debarment*, provides in pertinent part:

- (a) A contractor may be debarred, based upon a preponderance of the evidence, for:
  - (1) Violation of the terms of a City contract or subcontract, or a contract or subcontract funded in whole or in part by City funds, such as **failure to perform in accordance with the terms of one or more contracts, or the failure to perform, or unsatisfactory performance of one or more contracts;**
  - (2) Failing to comply with state or federal law or regulations, or this Code, applicable to the performance of a contract;

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<sup>2</sup> Public Act 453 of 1976m Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq.

<sup>3</sup> Detroit City Code Chapter 23, Human Rights, Section 23-1-1, et seq.

- (3) Violation of this Code, City procurement, or other policies or administrative orders that have the gravity or sufficiency to justify debarment. The Inspector General shall make a determination on whether the violation has reached a level justifying debarment based upon the totality of the circumstances creating the violation;
- (4) Knowingly or negligently using a debarred contractor as a subcontractor;
- (5) Evidence of (i) the contractor or the contractor's officers or owners, or (ii) any person or entity having a direct or indirect financial or beneficial interest in the contractor or its operations; **engaging in a criminal offense or civil misconduct that evidences a lack of business integrity or business honesty**, including, but not limited to, embezzlement, theft, theft of services, forgery, bribery, fraud, tax evasion, falsification or destruction of records, making false statements, or receiving stolen property, or violations of law relating to the obtaining or performance of public contracts;
- (6) Submission of false or misleading documentation, or making false or misleading statements;
- (7) Submission of false or misleading information provided to the City in an attempt to secure certification as a Detroit-based, Detroit-headquartered, or Detroit-resident business, as defined in [Section 17-5-1](#) of this Code.
- (8) Failure to report unethical conduct by a public servant who has a duty to the City of Detroit; or
- (9) **Any other conduct that evidences the inability of the contractor to act responsibly in its conduct on behalf of the City.**

(b)

The conduct giving rise to the debarment **may be based upon actions taken in connection with work undertaken for the City, or with other public or private entities.**

The grounds listed for debarment is intended to address contractors who are bad actors and include: failing to perform satisfactorily; engaging in criminal or civil misconduct; or other conduct that evidences the inability to act responsibly in its conduct on behalf of the City. The debarment ordinance provides that the conduct of a contractor and/or subcontractor acting discriminatorily in a criminal or civil manner of misconduct, in work undertaken for the City, or with other public or private entities may give rise to debarment action. In addition to the remedy of sanctioning a contractor with debarment the ordinance

indicates under Section 17-5-363 *Application of remedies*, that debarment does not preclude the City from taking other available remedies.

The provisions of this division are in addition to any other rights or remedies available to the City in connection with the award of any contracts to disqualify bidders who are not responsible, regardless of whether they have been debarred under this division. This right extends, but is not limited to, declining to award contracts to bidders having officers, owners, managers, or persons or entities directly or indirectly holding a financial or beneficial interest in previously associated with debarred contractors.

The provisions of this division are in addition to any contractual or legal rights or remedies available to the City to redress contractual performance issues.

### **Development Agreements**

With regard to oversight of subcontractors working under entities that have development agreements with the City, the issue is whether the City can enforce provisions of the developer's separate contract with the general contractor and/or the general contractor's contract with the subcontractor. The City may, in the development agreement with the developer require their general contractor have a clause in its contract with subcontractors to comply with all local state and federal laws regarding non-discrimination. However, this will not give the City oversight of the subcontractor because the City is not a party to the other contracts. It will allow the City to pressure the developer to enforce its contractual obligation under the development agreement. The developer would then have the general contractor fulfill its contractual obligation to force the subcontractor to comply. While this type of contractual language in a development agreement may be available in light of the oversight the City Code already provides through the Human Rights Department, BSEED and the Inspector General as indicated above, it may not be necessary.

### **Tax Abatements**

With regard to oversight of subcontractors under entities that receive tax abatements from the City, it is LPD's understanding that the City enters into a contract with the entity receiving the abatement, binding the entity to the representations made to receive the abatement. The issue is whether the City can enforce provisions of the developer's separate contract with the general contractor and/or the general contractor's contract with the subcontractor (See development agreement above). If the entity receiving the abatement is the general contractor, the language in the agreement with the City may require the general contractor to have a clause with subcontractors to comply with all local state and federal laws regarding non-discrimination in fulfilling the contractual obligations. Again, it will only allow the City to pressure the entity to enforce its contractual obligation under the City agreement, to have the subcontractor fulfill its

contractual obligation to comply with the laws. Again, the City Code provides through the Human Rights Department, BSEED and the Inspector General more direct means to provide oversight.

## **Demolition Contracts**

With regard to providing oversight of subcontractors under demolition contracts, any contractor that does actual demolition is required to comply with Section 8-2-13, *Wrecking Contractor License*, which provides in pertinent part:

118.1 License required; recommendation of Board of Examiners for Wrecking Contractors required.

No individual, partnership, firm or corporation shall contract to demolish, disassemble, dismantle or dismember, and remove, or engage in the business of demolishing, disassembling, dismantling or dismembering, and removing, residential or commercial buildings or structures, without a license from the Buildings, Safety Engineering, and Environmental Department, which authorizes the holder thereof to engage in such business. Such licenses shall be issued by the Director of the Buildings, Safety Engineering, and Environmental Department to qualified applicants considering the recommendation of the Board of Examiners for Wrecking Contractors.

The requirement that all demolition contractors be licensed under Section 8-2-13 indicates that any demolition contractor including a subcontractor, operating in the city of Detroit must have a Wrecking Contractor License issued by the City. Therefore, any subcontractor doing demolition work would be licensed by the City and subject to the oversight of the licensing agency BSEED under Section 28-1-16, subject to the Human Rights Department authority under Section 23-2-7 and subject to debarment provisions under Section 17-5-355(d) as previously indicated.

## **Memorandum of Understanding**

With regard to oversight of subcontractors under a party to a memorandum of understanding (MOU), it would depend on the type of MOU. There are binding and non-binding MOU's. A binding MOU provides the terms and details of a mutual understanding and contains all the requirements that create a binding contract. A non-binding MOU provides the terms and details of a mutual understanding or agreement, indicating each party's requirements and responsibilities without being contractually obligated to fulfill them. A subcontractor to a party of a non-binding MOU would not afford the City any opportunity to provide oversight through the MOU.

A binding MOU in which the City is a party to the MOU but not the subcontract agreement would not grant the City oversight of the subcontractor by itself. The City can include language as part of the binding MOU that the other party to the MOU require its subcontractor to comply with all local state and federal laws regarding non-discrimination in fulfilling the contractual obligations. Again, it will only allow the City to pressure the entity to enforce its contractual obligation under the City agreement to have the subcontractor fulfill its contractual obligation to comply with the laws. As previously indicated, the City Code provides through the Human Rights Department, BSEED and the Inspector General, more direct means to provide oversight.

If we can be of further assistance, please call upon us.