

## ORDINANCE NO. 2018-06

### AN ORDINANCE OF THE CITY OF EASTVALE AMENDING ORDINANCE NO. 2010-11 TO ADD A NEW SECTION ENTITLED “FEDERALLY FUNDED PROCUREMENTS”

The City Council of the City of Eastvale, California ordains as follows:

#### **SECTION 1. Codification and Renumbering of Ordinance No. 2010-11.**

Section 1 of Ordinance No. 2010-11 approved the addition of a new Chapter 3.12 to the Eastvale Municipal Code entitled “Purchasing; Professional Services; Disposition of Supplies and Equipment.” The City Council hereby directs that the contents of the approved Chapter 3.12 be codified in the Eastvale Municipal Code and renumbered to be Chapter 4.06. The City Council further directs that all section numbers and cross references within the new Chapter 4.06 be updated to reflect this renumbering. No other changes shall be made to the content of Section 1 of Ordinance No. 2010-11 except as provided herein.

#### **SECTION 2. Addition of Section 4.06.110 to the Eastvale Municipal Code.**

A new Section 4.06.110 is hereby added to the Eastvale Municipal Code, to read as follows:

##### **“4.06.110. Federally Funded Procurements.**

A. Purpose and Applicability. This section pertains to federally-funded projects and purchases. The purpose of this section is to ensure compliance with all applicable federal requirements when federal money is being expended by the City. To the extent that any provisions of this section are inconsistent with any other provisions of this chapter, the provisions of this section shall prevail with respect to federally-funded procurements. If any provision of this section becomes inconsistent with federal requirements, whether due to a change in federal law or regulations, through judicial precedent, or for any other reason, then the City shall not be required to comply with the inconsistent provision.

B. Code of Conduct. As representatives of the City of Eastvale, all employees are expected to conduct themselves in a professional and ethical manner, maintaining high standards of integrity and the use of good judgement. Employees are expected to be principled in their business interactions and act in good faith with individuals both inside and outside the City. The following Code of Conduct shall govern the performance, behavior and actions of the City, including employees, directors, appointed or elected officials, volunteers, or agents who are engaged in any aspect of procurement, including, but not limited to, purchasing goods and services, awarding contracts and grants, and the administration and supervision of contracts:

1. No employee, director, appointed or elected official, volunteer, or agent of the City shall participate in the selection, award, or administration of contracts supported by a federal award if a conflict of interest is real or apparent to a reasonable person.

2. Conflicts of interest may arise when any employee, officer, or agent of the City, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a real or apparent financial or other interest in or a tangible personal benefit from a firm considered for the contract.

3. The City's employees, directors, appointed or elected officials, volunteers, or agents shall neither solicit nor accept gratuities, favors, gifts, consulting fees, trips, or anything having a monetary value in excess of the gift limitation amount established by the Fair Political Practices Commission from a vendor, potential vendor, family or employees of a vendor, contractor or parties to subcontractors.

4. Disciplinary measures for violations of the Code of Conduct by employees, directors, appointed or elected officials, volunteers, or agents who are engaged in any aspect of procurement, including, but not limited to, purchasing goods and services, awarding contracts and grants, and the administration and supervision of contracts could lead to disciplinary measures, up to and including possible termination of employment.

### C. Solicitation Procedures

1. Acquisition of unnecessary or duplicative items must be avoided. Consideration should be given to consolidating or dividing procurements to obtain a more economical purchase. When appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

2. To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services, the City shall enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services.

3. Federal excess and surplus property shall be utilized in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

4. Value engineering clauses may be used in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

5. Contracts shall only be awarded to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

6. Records will be maintained to sufficiently detail the history of procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price. The City Clerk will be the repository for said records and shall be maintained in accordance with the City's adopted records retention schedule.

7. Time and material type contracts (open-ended) may be used only after a determination that no other contract is suitable. Time and material type contract means a contract where the cost to the City is the sum of the actual cost of materials and direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expense, and profit. Each time and material contract will set a ceiling price that the contractor exceeds at its own risk. A higher degree of oversight is required in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

8. The City alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the City of any contractual responsibilities under its contracts. The federal awarding agency will not substitute its judgment for that of the City unless the matter is primarily a federal concern. Violations of law will be referred to the local, state, or federal authority having proper jurisdiction.

#### D. Competition

1. All procurement transactions must be conducted in a manner providing full and open competition. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, and invitations for bids or requests for proposals will be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include, but are not limited to:

- a. Placing unreasonable requirements on firms in order for them to qualify to do business;
- b. Requiring unnecessary experience and excessive bonding;
- c. Noncompetitive pricing practices between firms or between affiliated companies;
- d. Noncompetitive contracts to consultants that are on retainer contracts;
- e. Organizational conflicts of interest;
- f. Specifying only a brand name product instead of allowing an equal product to be offered and describing the performance or other relevant requirements of the procurement; and
- g. Any arbitrary action in the procurement process.

2. Procurements shall be conducted in a manner that prohibits the use of statutorily or administratively imposed state or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When

contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

3. All solicitations will incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a brand name or equivalent description may be used as a means to define the performance or other relevant requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated.

4. Bids and proposals shall identify all the requirements which the offerors must fulfill and all other factors to be used in evaluation bids or proposals

E. Methods of Procurement.

1. Micro-purchase: Micro-purchases may be made on the open market. Micro-purchases are purchases where the aggregate dollar amount does not exceed \$3,000, or the current micro-purchase limitation set by the Federal Acquisition Regulation at 48 CFR Subpart 2.1, where this threshold is periodically adjusted for inflation.

2. Small purchases: Purchases up to the Simplified Acquisition Threshold may be made by following informal purchasing procedures (4.06.050). The Simplified Acquisition threshold is set by the federal government and adjusted periodically. As of the date of this ordinance, the Simplified Acquisition Threshold is \$150,000.

3. Large purchases: Purchases over the Simplified Acquisition Threshold must be made by any of the following competitive processes:

a. Sealed bids. The fixed price (lump sum or unit price) is awarded to the responsible bidder who conformed to all material terms and is the lowest in price.

(i) This method is the preferred procurement method for construction contracts, if the following conditions apply:

(a) A complete, adequate, and realistic specification or purchase description is available;

(b) Two or more responsible bidders are willing and able to compete effectively for the business, and,

(c) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally based on price.

(ii) If sealed bids are used, the following requirements shall apply:

(a) The invitation for bids will be publicly advertised and bids must be solicited from an adequate number of known suppliers, providing them sufficient response time prior to the date for opening the bids;

(b) The invitation for bids, which will include any specifications and pertinent attachments, must define the terms or services in order for the bidder to properly respond;

(c) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(d) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts will only be used in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(e) Any or all bids may be rejected if there is a sound documented reason.

b. Competitive proposals: This procurement method requires formal solicitation, fixed-price or cost-reimbursement contracts, and is used when sealed bids are not appropriate. The contract should be awarded to the responsible firm whose proposal is most advantageous to the project, with price being one of the various factors. If this method is used, the following requirements apply:

(i) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be considered to the maximum extent practical;

(ii) Proposals must be solicited from an adequate number of qualified sources;

(iii) The methods for conducting technical evaluations of the proposals received and for selecting recipients may include, but not limited to: oral interviews, references, past performance, availability to perform work, and certifications as determined by project scope.

(iv) Any response that takes exception to any mandatory items in this proposal process may be rejected and not considered;

(v) Contracts must be awarded to the responsible firm whose proposal is most advantageous to the project, with price and other factors considered; and,

(vi) Competitive proposal procedures may be used for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services, though A/E firms are a potential source to perform the proposed effort.

4. Noncompetitive proposals: Also known as sole-source procurement, this may be appropriate only when one or more of the following criteria are met:

- a. The item is available only from a single source;
- b. The public emergency for the requirement will not permit a delay resulting from competitive solicitation;
- c. The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-federal entity; or
- d. After solicitation of a number of sources, competition is determined inadequate.

F. Contract Cost and Price. A cost or price analysis shall be performed in connection with every procurement action in excess of the Simplified Acquisition threshold, including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, independent estimates shall be made prior to receiving bids and proposals.

1. Profit shall be negotiated as a separate element of the price for each contract in which there is a no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

2. Costs or prices based on estimated costs for contracts under the federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the City under Subpart E- Cost Principles of Part 200- Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.

3. The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

G. Federal Awarding Agency or Pass-Through Entity Review.

1. The City shall make available, upon request of the federal awarding agency or pass-through entity, technical specifications on proposed procurements where the

federal awarding agency or pass-through entity believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the City desires to have the review accomplished after a solicitation has been developed, the Federal awarding agency or pass-through entity may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

2. The City will make available upon request, for the Federal awarding agency or pass-through entity pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates, when:

a. Procurement procedures or operations fails to comply with the procurement standards in this part;

b. The procurement is expected to exceed the Simplified Acquisition Threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation;

c. The procurement, which is expected to exceed the Simplified Acquisition Threshold, specifies a “brand name” product;

d. The proposed contract is more than the Simplified Acquisition Threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

e. A proposed contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold.

3. The City is exempt from the pre-procurement review in paragraph 2 of this section if the federal awarding agency or pass-through entity determines that its procurement systems comply with the standards of this part.

4. The City may request that its procurement system be reviewed by the federal awarding agency or pass-through entity to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews must occur where there is continuous high-dollar funding, and third-party contracts are awarded on a regular basis;

5. The City may self-certify its procurement system. Such self-certification must not limit the federal awarding agency's right to survey the system. Under a self-certification procedure, the federal awarding agency may rely on written assurances from the City that it is complying with these standards. The City must cite specific policies, procedures, regulations, or standards as being in compliance with these requirements and have its system available for review.

H. Bonding Requirements. For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the federal awarding or pass-through entity may accept the bonding policy and requirements of the City provided that the

federal awarding agency or pass-through entity has made a determination that the federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows:

1. A bid guarantee from each bidder equivalent to five percent (5%) of the bid price. The bid guarantee must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified;

2. A performance bond on the part of the contractor for 100 percent (100%) of the contract price. A performance bond is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract; and,

3. A payment bond on the part of the contractor for 100 percent (100%) of the contract price. A payment bond is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

I. Contract Provisions. Contracts where federal funding is utilized shall include the following contract clauses, the specific language of which shall be determined by the City Attorney:

1. Equal Employment Opportunity- All contracts, when funded in whole or partly by monies derived from the federal government (either directly or indirectly), shall contain a provision requiring compliance with Equal Employment Opportunity.

2. Davis-Bacon Act- Applies to construction contracts in excess of \$2,000. It requires contracts to pay laborers and mechanics wages not less than the prevailing wage as determined by the Secretary of Labor and must be required to pay wages not less than once a week. Each bid solicitation published by the City must contain the current prevailing wage determination. Any award of the contract must be conditioned on contractor's acceptance of that wage determination and suspected or reported violations of this act shall be immediately reported to the Federal awarding agency.

3. Copeland "Anti-Kickback" Act- Applies to construction contracts in excess of \$2,000. It prohibits kickbacks in construction contracts funded with Federal monies. Contractors and subcontractors or sub recipients shall be prohibited from inducing any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled and suspected or reported violations shall be immediately reported to the Federal awarding agency.

4. Contract Work Hours and Safety Standards Act – Applies to contracts in excess of \$100,000 that involve the employment of mechanics or laborers funded with federal money. Such contracts must include a provision for compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5).

5. Clean Air Act & Federal Water Pollution Control Act- Applies to contracts and sub grants in excess of \$150,000. Contractor shall be required to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act and the Federal Water Pollution Control Act. Suspected or reported violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

6. Debarment and Suspension- Contracts funded with federal grant monies may not be awarded to contractors that have been debarred or suspended from receiving federal monies pursuant to the System for Award Management (SAM).

7. Byrd Anti-Lobbying Amendment- Contractors that apply or bid for an award of \$100,000 must certify that they will not and have not used federal funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award.

J. Contracting with small and minority business, women's business enterprises, and labor surplus area firms. All necessary affirmative steps will be taken to assure that minority business, women's business enterprises, and labor surplus area firms are used when possible. Affirmative steps include:

1. Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

2. Assuring that small and minority businesses and women's business enterprises are solicited whenever they are potential sources;

3. Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses and women's business enterprises;

4. Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses and women's business enterprises;

5. Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and,

6. Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (1) through (5) of this section.”

### **SECTION 3. Severability.**

If any section, subsection, subdivision, sentence, clause, phrase, or portion 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 this Ordinance. The City Council hereby declares that it would have adopted this Ordinance, and each section, subsection, subdivision, sentence, clause, phrase, or portion thereof, irrespective of

the fact that any one or more sections, subsections, subdivisions, sentences, clauses, phrases, or portions thereof be declared invalid or unconstitutional.

**SECTION 4. Effective Date.**

This Ordinance shall take effect thirty (30) days from its passage by the City Council.

**SECTION 5. Publication.**

The City Clerk is authorized and directed to cause this Ordinance to be published within fifteen (15) days after its passage in a newspaper of general circulation and circulated within the City in accordance with Government Code Section 36933(a) or, to cause this Ordinance to be published in the manner required by law using the alternative summary and posting procedure authorized under Government Code Section 36933(c).

**PASSED, APPROVED AND ADOPTED** this 27th day of June, 2018.



Clint Lorimore  
Mayor

**APPROVED AS TO FORM:**



Erica L. Vega  
City Attorney

**ATTEST:**



Steven D. Aguilar  
Assistant City Clerk

STATE OF CALIFORNIA )  
COUNTY OF RIVERSIDE ) §  
CITY OF EASTVALE )

I, Steven D. Aguilar, Assistant City Clerk of the City of Eastvale, California, do hereby certify that the foregoing Ordinance No. 2018-06, was introduced at a regular meeting of the City Council of the City of Eastvale held on the 13<sup>th</sup> day of June, 2018 and was passed by the City Council of the City of Eastvale at a regular meeting held the 27<sup>th</sup> day of June, 2018, by the following vote:

AYES: Council Members Rush, Plott, Tessari, Mayor Pro Tem Rigby, Mayor Lorimore

NOES: None

ABSENT: None

ABSTAIN: None

  
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Steven D. Aguilar, Assistant City Clerk