

ORDINANCE NO. _____

**AN ORDINANCE OF THE CITY COUNCIL OF
THE CITY OF MERCED, CALIFORNIA, ADDING
CHAPTER 3.06, "REGULATED
COMMUNICATIONS IN CITY PROCUREMENT
PROCESS," TO THE MERCED MUNICIPAL
CODE**

**THE CITY COUNCIL OF THE CITY OF MERCED DOES ORDAIN
AS FOLLOWS:**

SECTION 1. ADDITION TO CODE. Chapter 3.06, "Regulated Communications in City Procurement Process," is hereby added to the Merced Municipal Code to read as follows:

"CHAPTER 3.06

**REGULATED COMMUNICATIONS IN CITY
PROCUREMENT PROCESS**

Section:

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|-----------------|---|
| 3.06.010 | Short Title. |
| 3.06.020 | Declaration of Legislative Intent. |
| 3.06.030 | Definitions. |
| 3.06.040 | Applicability. |
| 3.06.050 | Regulation of Communications During
Competitive Procurement; Notice of
Regulated Communication Rule. |
| 3.06.060 | Disclosure of Regulated Communications. |
| 3.06.070 | Sanctions. |
| 3.06.080 | Evaluation of Disclosed Communications;
Criteria for Imposition of Sanctions. |
| 3.06.090 | Appeals. |
| 3.06.010 | Short Title. |

This Chapter shall be known as the Regulated Communications in City Procurement Process Ordinance.

3.06.020 Declaration of Legislative Intent.

In enacting this Chapter, the City Council hereby declares and finds as follows:

- A. All communications by and between Proposers, the Mayor and Councilmembers in competitive procurement should be open and public.
- B. All elected officials should be provided the same information for decision-making involved in competitive procurement.
- C. The provisions of this Chapter are necessary and appropriate in order to instill greater public confidence in the integrity of the City's procurement processes by eliminating the appearance of impropriety and special consideration.
- D. The provisions of this Chapter will lessen the chance of miscommunication or misunderstanding during competitive procurement.
- E. The provisions of this Chapter will foster a greater sense of equity and fair play in competitive procurement.
- F. The provisions of this Chapter ensure that the Mayor and all Councilmembers are afforded equal access to information during the procurement process.
- G. The provisions of this Chapter are intended to provide Councilmembers and the Mayor more useful information with which to render a fair and just decision.
- H. This Chapter furthers the Charter purpose of having professional staff research, evaluate, and make recommendations concerning the award of public contracts.

I. Nothing in this Chapter is intended to chill First Amendment Free Speech rights, such as the public's right to petition government, or the elected official's right of Free Debate.

J. This Chapter provides Proposers with defined channels to communicate information to Councilmembers and the Mayor, consistent with the overall purposes of this Chapter.

K. The award of a contract and the acts leading up to it are legislative in nature.

L. In enacting this Chapter, it is not the intent of the City Council to change the legislative nature of its procurement process.

M. This Chapter relates to an internal procedure dealing with the subject of competitive procurement. Nothing in this Chapter shall confer upon, or create rights in, any person that the person would not have absent this Chapter.

3.06.030 Definitions.

The following definitions shall apply for purposes of this Chapter:

A. 'Communication' means communication in any form, directly or indirectly, by or between a Proposer, on the one hand, and Councilmember or the Mayor, on the other hand, during the pendency of a competitive procurement regardless of whether or not the Proposer at the time of the communication had yet to put forward, present, or sponsor a request, proposal, bid, or quote for consideration of a contract, if the Proposer eventually does so.

B. 'Competitive procurement' shall mean and include the processes for request for expression of interest,

request for proposals, and request for qualifications, as defined in this Chapter.

C. 'Continue' shall mean to persist in, remain in, carry on, recommence or resume a communication.

D. 'Disclosure' shall mean the writing, or oral statement entered in City Council proceedings, containing the information required by Section 3.06.060 of this Chapter necessary to disclose a regulated communication.

E. 'Elected official' shall mean the Mayor or any Councilmember of the City of Merced.

F. 'Initiate' shall mean to cause a communication to begin; to send, transmit, or convey information.

G. 'Initiation of competitive procurement' shall mean the issuance, publication or announcement by the City of Request for Expression of Interest, Request for Proposals or Request for Qualifications. The competitive procurement remains pending until it is completed upon any of the following: the award of a contract; the issuance of official City notice of cancellation of the process; or a determination by the Council not to award a contract, provided the determination is final and the City Council does not direct the re-initiation of the competitive procurement at the time it determines not to make an award.

H. 'Proposer' shall mean a person, other than a City division or department, who puts forward, presents, or sponsors an expression of interest, statement of qualification, request, proposal, or quote for consideration of a contract. For purposes of this Chapter, a Proposer is also any agent or representative, or officer of a Proposer, and any person holding an ownership, beneficial, equitable or security interest in a Proposer. However, a commercial lending institution is not a

proposer if it merely holds a security interest as a result of a loan or loans which are made in the lender's regular course of business on terms available to members of the public without regard to official status.

I. 'Record' shall mean the oral and written information conveyed to the Mayor and City Council through writings and statements made available to the public in connection with a competitive procurement, and upon which the City Council could rely in considering whether to award a contract. 'Record' shall include oral communication during a regular or special meeting of the City Council.

J. 'Regulated communication' shall mean any communication prohibited under Section 3.06.050 of this Chapter.

K. 'Request for Expression of Interest' (RFEI) means a solicitation to prospective proposers on a procurement opportunity. An RFEI may be issued in advance of an RFP to assist in the development of a more definitive set of terms and conditions, scope of work or service and the selection of qualified proposers. An RFEI does not contain all of the information a prospective proposer needs to provide a full bid or proposal response, and should not be construed as an RFP or notice inviting bids. The RFEI enables potential proposers to determine whether they have a serious interest in preparing a proposal or bid in response. The RFEI may be used simultaneously with a RFQ when the proposed procurement is well defined and the City has clear expectations for the procurement.

L. 'Request for Proposal' (RFP) shall mean an invitation for providers of services or work to solicit the right to supply services or work to the City, when any award is to be made to a Proposer providing the best value in meeting the interest of the City and the objectives of the project, based on criteria, such as

benefit to the City, qualifications, experience, and demonstrated ability, subject to the City's right to reject any and all proposals.

M. 'Request for Qualification' (RFQ) shall mean a City request for the submission of a statement of qualifications from interested potential Proposers as a pre-requisite to a bid or proposal for the right to supply materials, supplies, equipment, services or work.

O. 'Subject Proposer,' as used in this Chapter, shall mean the Proposer who is the subject of a disclosure and consideration of potential sanctions.

P. 'Writing' shall mean a writing as defined in California Evidence Code Section 250.

3.06.040 Applicability.

This Chapter applies to competitive procurement which may result in the award of a contract by the City Council, including RFPs, RFEIs, and RFQs. It applies whether the procurement process is classified as legislative or otherwise. The requirements of this Chapter apply upon the initiation of competitive procurement until the procurement process is completed, and is not dependent on whether or not a contract is awarded. Any communication (even if unintended or inadvertent) covered by this Chapter must be disclosed, as provided by this Chapter or any other applicable local, state, or federal law or regulation.

3.06.050 Regulation of Communications During Competitive Procurement; Notice of Regulated Communication Rule.

A. No Proposer shall initiate, engage in, or continue any communication to or with any elected official, and no elected official shall initiate, engage in, or continue any communication to or with any Proposer, concerning

or touching upon any matter which is the subject of a competitive procurement within the scope of this Chapter except as permitted in subsection B of this Section.

B. Only communications meeting the following requirements are allowed under this Chapter. A communication that is:

1. Made on the record in a regular or special meeting of the City Council; or
2. Between or among elected officials outside of a regular or special City Council meeting, provided that none of the communicants is an agent or representative of a Proposer, or acting in concert with or at the behest of a Proposer, and provided further the communication is not prohibited under the Ralph M. Brown Act (California Government Code §§ 54950, *et seq.*); or
3. Part of the record presented to the City Council as a result of being communicated to City staff involved in, and in the ordinary course of, the competitive procurement; or
4. An identical writing that is delivered simultaneously and by identical means to all elected officials, the City's Purchasing Supervisor, and the City Manager, at their respective official City offices. Except to the City's Purchasing Supervisor, hand deliveries must be made by someone other than a Proposer.
5. The regulated communication rule established by this Section and a reference to this Chapter shall be set forth in each RFEI, RFP and RFQ, or in the respective specifications or other documents referred to therein.

3.06.060 Disclosure of Regulated Communications.

- A. Any elected official and any Proposer who has initiated, engaged in, continued in, or received any regulated communication shall disclose that regulated communication, as provided in this Section.
- B. A regulated communication should be disclosed at the earliest feasible time, but in any event, it shall be disclosed no later than 24 hours or the next business day following such communication.
- C. Disclosures shall be in writing unless the regulated communication occurs on the date the City Council is to consider award of the contract, in which case it may be orally disclosed on the record during the City Council proceedings concerning the subject procurement. Written disclosures shall be directed to the City's Purchasing Supervisor, and a copy filed with the City Clerk.
- D. The disclosure shall contain all the information necessary to fully and fairly convey the substance of the communication. At minimum, disclosures shall include the following information:
1. Identity of the person making the disclosure.
 2. Date, time and place of the regulated communication.
 3. Identity of each person who initiated, engaged in, continued, or received the regulated communication.
 4. Copies of all written regulated communications.
 5. Summary of all oral regulated communications.

6. Identity of all persons present during the regulated communication.

7. Identification of the subject competitive procurement and subject Proposer.

E. The City Clerk shall promptly distribute to all Councilmembers and the Mayor every disclosure filed pursuant to this Section. The City Attorney and City Manager shall also receive a copy of the disclosure.

F. The City's Purchasing Supervisor shall record the disclosure in the record of the competitive procurement.

3.06.070 Sanctions.

A. In accordance with the applicable procedures for the respective competitive procurement as referenced or set forth in the specifications of the respective RFEI, RFP or RFQ, a Proposer violating this Chapter may be sanctioned as follows:

1. Disqualification from the competitive procurement; and/or
2. A finding of non-responsibility under the procurement; and/or
3. Setting aside by City Council of any award of contract prior to its execution by both parties.

B. These sanctions may be imposed in addition to any other remedies provided by any other law or regulation.

3.06.080 Evaluation of Disclosed Communications; Criteria for Imposition of Sanctions.

A. The City's Critical Risk Management Team (CRMT), or similar City standing committee shall ensure

that the information which is the subject of a disclosure is reviewed, evaluated, and processed in accordance with applicable laws and regulations, this Chapter, and the specifications, criteria and requirements of the applicable competitive procurement.

B. The CRMT shall evaluate the disclosure, summarize the results of the evaluation of the disclosure, and make a recommendation on whether or not to impose sanctions concerning the regulated communication.

C. Before sanctions may be imposed, it shall first be established that the subject Proposer did initiate, engage in or continue a regulated communication, and, if so, whether any of the following extenuating circumstances exist:

1. The regulated communication was inadvertent and did not affect the integrity or outcome of the procurement process.

2. The regulated communication was initiated by the Mayor or a Councilmember, the subject Proposer advised the Mayor or Councilmember of the regulated communication rule, and the subject Proposer did not continue or engage in the regulated communication.

3. The regulated communication was made under bona fide mistake of fact or law, other than a mistake or ignorance of the provisions of this Chapter, and the regulated communication was not material to the procurement. A regulated communication may be deemed material if it relates to any provision of a RFEI, RFP, RFQ, or specifications or other documents referenced therein, including documents responsible to a RFEI, RFP or RFQ, unless the regulated communication is so obviously insignificant and unimportant that it could be objectively found that

no reasonable person would have been influenced by it, or attached any importance to it.

D. In the absence of extenuating circumstances, the subject Proposer may be sanctioned under this Chapter if doing so is deemed consistent with the objectives of this Chapter and in the best interest of the City.

E. The subject Proposer may appeal the determination of the CRMT that forms the basis of the recommendation for imposition of a sanction in accordance with the appeal procedures specifically applicable to the subject RFEI, RFP, or RFQ.

F. If a disclosure is made subsequent to the posting of the City Council agenda which includes notice of the consideration of the subject contract, the City Council shall refer the matter back to the CRMT for their evaluation, report and recommendations, in accordance with the provisions this section.

SECTION 2. EFFECTIVE DATE. This Ordinance shall be in full force and effect thirty (30) days after its adoption.

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. PUBLICATION. The City Clerk is directed to cause a summary of this Ordinance to be published in the official newspaper at least once within fifteen (15) days after its adoption showing the vote thereon.

The foregoing Ordinance was introduced at a regular meeting of the City Council of the City of Merced on the ____ day of _____, 2016, and was passed and adopted at a regular meeting of said City Council held on the ____ day of _____, 2017, by the following called vote:

AYES: **Council Members:**

NOES: **Council Members:**

ABSTAIN: **Council Members:**

ABSENT: **Council Members:**

APPROVED:

Mayor

ATTEST:
STEVE CARRIGAN, CITY CLERK

BY: _____
Assistant/Deputy City Clerk

(SEAL)

APPROVED AS TO FORM:

Kelly Fincher 11/10/16
City Attorney **Date**