

City of Cincinnati



Interdepartment
Correspondence Sheet

Date: January 19, 2016

To: Vice Mayor David Mann

From: Paula Boggs Muething, City Solicitor *PBM*

Subject: **Ordinance – MODIFYING the provisions of Title III, “Financial, Personnel, Procurement, and Real Property Procedures,” of the Cincinnati Municipal Code by ordaining new Chapter 326, “Wage Enforcement”; and further by MODIFYING the provisions of Chapter 321, “Procurement and Disposal of Supplies, Services and Construction,” of the Cincinnati Municipal Code by amending Section 321-153, “Default; Further Bids or Proposals Refused”**

Transmitted herewith is an ordinance captioned:

MODIFYING the provisions of Title III, “Financial, Personnel, Procurement, and Real Property Procedures,” of the Cincinnati Municipal Code by ordaining new Chapter 326, “Wage Enforcement”; and further by MODIFYING the provisions of Chapter 321, “Procurement and Disposal of Supplies, Services and Construction,” of the Cincinnati Municipal Code by amending Section 321-153, “Default; Further Bids or Proposals Refused.”

Attachment

PBM/LDM/(ps)
186619-14

{00191771-1}



City of Cincinnati

LDM *1/25/16*

An Ordinance No. _____

- 2016

MODIFYING the provisions of Title III, “Financial, Personnel, Procurement, and Real Property Procedures,” of the Cincinnati Municipal Code by ordaining new Chapter 326, “Wage Enforcement”; and further by **MODIFYING** the provisions of Chapter 321, “Procurement and Disposal of Supplies, Services and Construction,” of the Cincinnati Municipal Code by amending Section 321-153, “Default; Further Bids or Proposals Refused.”

WHEREAS, the City has an interest in ensuring that workers in the City, particularly people working on City-supported projects, are paid in compliance with all federal, state, and local laws; and

WHEREAS, a study by the National Employment Law Project found that some amount of pay is illegally withheld, routinely, from the paychecks of over sixty percent of low-wage workers in major cities across the United States; and

WHEREAS, the Ohio Attorney General’s Office has previously estimated that more than 90,000 Ohio workers were illegally misclassified as independent contractors when they actually were employees, resulting in a cost to Ohio state and local governments of hundreds of millions of dollars in lost unemployment compensation, workers’ compensation premiums, and state and local income taxes; and

WHEREAS, when employers in the City of Cincinnati commit this type of wage theft or payroll fraud, their illegal activity costs the City income tax revenue, negatively impacting the City’s ability to pay for basic services; and

WHEREAS, it is necessary to clarify the City’s interest in protecting workers from wage theft and payroll fraud in contracts into which the City enters; and

WHEREAS, payroll fraud refers to when a business conceals its true tax or other financial liability to a government agency, most commonly by misclassifying employees or paying for business transactions in cash without keeping appropriate records; and

WHEREAS, wage theft means not properly paying workers for all work performed, most commonly by paying less than minimum wage, not paying for all hours worked, or failing to pay overtime, in violation of local, state, or federal law; and

WHEREAS, Council also desires that the City take all possible action to recover any incentives that were offered to parties doing business with the City if those parties, or their contractors or subcontractors, are found to have committed wage theft or payroll fraud; and

WHEREAS, Council also deems it appropriate to clarify by ordinance that commission of wage theft or payroll fraud may be grounds for debarment from future contracts with the City; and

WHEREAS, this ordinance is in furtherance of the “Compete” goal to “Foster a climate conducive to growth, investment, stability, and opportunity” as described on page 3 of Plan Cincinnati (2012); now, therefore,

BE IT ORDAINED by the Council of the City of Cincinnati, State of Ohio:

Section 1. That Chapter 326, “Wage Enforcement,” of Title III, “Financial, Personnel, Procurement, and Real Property Procedures,” is hereby ordained as follows:

Chapter 326 – WAGE ENFORCEMENT

Sec. 326-1. - Legislative Intent and Purpose.

It is the purpose of this chapter to assure that city incentives support development that complies with state and federal wage and payroll laws, thereby ensuring that workers receive proper compensation for their work. Where there are violations of those state and federal wage and payroll laws on city supported developments, this chapter obligates any parties involved in the development who know about the violations to report them. This chapter also communicates to parties receiving incentives from the city that if they or their contractors violate wage or payroll laws, the city intends to recoup its investment to the extent allowed under the laws and regulations governing those city-sponsored incentives.

Sec. 326-2. - Definitions.

For the purpose of this chapter, the words and phrases defined in the sections hereunder shall have the meanings respectively ascribed to them, unless a different meaning is clearly indicated by the context.

Sec. 326-2-A1. - Adverse Determination.

“Adverse determination” means a determination that a person has committed wage theft or payroll fraud. Such a determination includes an administrative merit determination, arbitration award or decision, or civil judgment, including any determination made in or through an administrative hearing, any governmental body, or any industry-specific regulatory or investigative body.

Sec. 326-2-A2. - Agreement.

“Agreement” means any contract entered into between the city and a person under which the city provides an incentive or benefit that is projected to exceed \$25,000, including but not limited to the following:

- (a) Community Reinvestment Area tax abatements;
- (b) job creation tax credits;
- (c) any commercial loan; or
- (d) any conveyance of land for less than fair market value.

The City’s construction, expansion or modification of a public infrastructure improvement benefiting a project shall not be included in calculating the total value of an economic incentive or benefit for purposes of this definition.

Sec. 326-2-C1. - Contractor.

“Contractor” means the individual, partnership, corporation, association or other entity that is leading the construction or provision of goods or services on a development site on behalf of the person.

Sec. 326-2-C2. - Complaint.

“Complaint” shall mean a report made to the city or any governmental agency having relevant jurisdiction that a person has committed wage theft or payroll fraud. A complaint may be such a report submitted to the U.S. Department of Labor, the Ohio Department of Commerce, or another body with authority to investigate and adjudicate such reports, which comes to the attention of the city. If a report is made directly to the city and not to another agency, it must include the following information in order to be considered a complaint: the person alleged to have committed the theft or fraud; the project during which or the agreement under which that person is alleged to have committed the theft or fraud; a description of the theft or fraud suspected to have been committed; the name of the complainant; and the name of at least one witness or victim of the theft or fraud, which person may be the complainant.

Sec. 326-2-D. - Development Site.

“Development site” means the property that is the subject of an agreement or on which a contractual undertaking is to be performed.

Sec. 326-2-P1. - Payroll Fraud.

“Payroll fraud” shall mean concealing a person’s true tax or other financial liability to a government agency from government licensing, regulatory, or taxing agencies through tax evasion or fraud; misclassification of employees; the unreported or

underreported payment of wages; paying a business transaction in cash without keeping appropriate records of reporting and withholding; or any other means.

Sec. 326-2-P2. - Person.

“Person” means any individual, partnership, corporation, firm, trust, association or other business entity that enters into an agreement with the city.

Sec. 326-2-S. - Subcontractor.

“Subcontractor” means any person who enters into a contract with a contractor to perform work on the development site or work pursuant to, related to, or in furtherance of an agreement.

Sec. 326-2-W. - Wage Theft.

“Wage theft” means a violation of the Ohio Prompt Pay Statute, O.R.C. 4113.15; the Ohio Minimum Fair Wage Standards Act, O.R.C. Chapter 4111; Ohio’s Minimum Wage Constitutional Amendment, Section 34a of Article II of the Ohio Constitution; O.R.C. Chapters 4109 or 4115; O.R.C. Sections 4113.17, 4113.18, 4113.52, or 4113.61; any federal statute or regulation comparable to the aforementioned Ohio statutes; any statute or regulation of another state that may apply to a particular agreement; or the city’s living wage requirements in Cincinnati Municipal Code Chapter 317; or any successor to any of these laws or regulations.

Sec. 326-3. - Reporting Wage Theft and Payroll Fraud.

- (a) Any person entering into an agreement shall include provisions in solicitations and contracts regarding a development site that require all employers to provide that person with a sworn statement as to whether there has been any adverse determination against the employer within the preceding 3-year period for wage theft or payroll fraud.
- (b) Any person entering into an agreement shall require that any contractor or subcontractor performing work or proposing to perform work on a development site provide a sworn statement whether there has been an adverse determination rendered against that contractor or subcontractor in the preceding 3-year period for wage theft or payroll fraud.
- (c) Any person entering an agreement shall include provisions in solicitations and contracts regarding the development site that require all contactors, subcontractors and employers to provide that person with an updated sworn statement within 30 days of any adverse determination rendered against the employer for any wage theft or payroll fraud.

- (d) Any person who has entered an agreement with the city, the term of which is not expired, shall report to the city in a sworn statement any complaint of wage theft or payroll fraud against the person or any of its contractor or subcontractors.
- (e) All such sworn statements shall be submitted to the city within 30 days of receipt by the person who entered into the agreement.

Sec. 326-5. - Contract or Agreement Language.

All agreements subject to this chapter shall contain the following two paragraphs or substantially similar language:

- (a) This contract is or may be subject to the Wage Enforcement provisions of the Cincinnati Municipal Code. These provisions require that any person who has an agreement with the city or with a contractor or subcontractor of that person shall report all complaints or adverse determinations of Wage Theft and Payroll Fraud (as defined in Chapter 326 of the Cincinnati Municipal Code) against the person, contractor or subcontractors to the Department of Economic Inclusion within 30 days of notification of the complaint or adverse determination.
- (b) Under the Wage Enforcement provisions, the City shall have the authority, under appropriate circumstances, to terminate this Agreement or reduce the incentives or subsidies to be provided under this Agreement and to seek other remedies.

The omission of this language in any agreement shall not constitute a waiver of this chapter's requirements or of any other legal requirement with respect to such agreement, the development site, or any contractor or subcontractor.

Sec. 326-7. - Wage Theft Monitoring, Investigation and Compliance.

- (a) The city manager shall develop rules and regulations for the following:
 - (1) Review of agreements to ensure that language required by this chapter is included.
 - (2) Monitoring of agreements to ensure compliance with this chapter, including reviewing complaints, referring complaints to an appropriate agency for investigation, and monitoring the outcome of complaints, for any complaints about the practices of any person, contractor or subcontractor relating to the provisions of this chapter.
- (b) Whenever the city becomes aware of any complaint against a person or the person's contractor or subcontractor for wage theft or payroll fraud with respect to any work done on a development site:

- (1) The city manager or his or her designee shall report the complaint to the appropriate state or federal agency responsible for investigation and enforcement of a particular type of violation.
 - (2) The city manager or his designee reserves the right to investigate wage theft or payroll fraud complaints and to take appropriate action.
 - (3) The city will provide a written notice to the person stating that, if an adverse determination is rendered against the person or the person's contractor or subcontractor, the city will pursue any available legal, contractual or equitable remedies, which may include without limitation any or all of the penalties listed in subsections (c) and (d) of this section. The notice also will state that the person or contractor may provide the city with information showing that the adverse determination is under review, contested, or appealed.
 - (4) The city will attempt to take action as described in (c) or (d) of this section within 30 days of the city's receipt of the complaint.
- (c) Whenever any adverse determination is rendered against a person or the person's contractor for wage theft or payroll fraud with respect to any work done on a development site, or, if the adverse determination is appealed, then whenever the final decision on appeal confirms the adverse determination, the city will pursue any available legal, contractual or equitable remedies, which may include without limitation any or all of the following remedies whether or not provided for in the agreement:
- (1) Termination of the agreement with the person or unilateral reduction of the incentive or benefit to be provided under the agreement by up to 100% of the yet to be paid or provided incentive or benefit;
 - (2) Deeming the person or the person's contractor ineligible for future agreements or other contracts with the city until all wage theft and payroll fraud penalties have been paid in full;
 - (3) Debarment of the person or the person's contractor from future agreements or other contracts with the city; and
 - (4) Informing the relevant city departments of the adverse determination, including but not limited to the tax commissioner, the department of finance, and the city prosecutor, in order to determine if further action is necessary.
- (d) Whenever any adverse determination is rendered against a person's subcontractor, if there is no resolution of the wage theft violation or payroll fraud satisfactory to the city within 30 days of the city's receipt of notification of the adverse determination or final decision of an appeal, the city will pursue any available legal, contractual or equitable remedies, which may include without limitation the following remedies whether or not provided for in the agreement:

- (1) Termination of the agreement with the person or unilateral reduction of the incentive or benefit to be provided under the agreement by up to 100% of the yet to be paid or provided incentive or benefit;
 - (2) Deeming the person, the person's contractor, and/or the subcontractor ineligible for future agreements or other contracts with the city until all wage theft and payroll fraud penalties have been paid in full;
 - (3) Debarment of the person, the person's contractor, and/or the subcontractor from future agreements or other contracts with the city; and
 - (4) Informing the relevant city departments, including but not limited to the tax commissioner, the department of finance, or the city prosecutor, in order to determine if further action is necessary or available.
- (e) Any remedies available to the city under this section are in addition to, and not in replacement of, any remedies available to the city under an agreement or otherwise. The pursuit of any remedy or remedies by the city shall not exclude the city's pursuit of any other remedy or remedies.
- (f) The Department of Economic Inclusion shall be the department with primary responsibility for investigation, recordkeeping, and enforcement of this chapter.

Sec. 326-9. - Application to New Contracts.

The provisions of this chapter shall apply to the following:

- (a) Agreements entered into after the effective date of the ordinance codified in this chapter;
- (b) Renewals and/or amendments to agreements entered into after the effective date of the ordinance codified in this chapter which renewal or amendment alone meets the financial threshold requirement of this chapter.

Sec. 326-11. - Severability.

Each section and each part of each section of this chapter is declared to be an independent section or part of a section, and notwithstanding any other evidence of legislative intent, it is declared to be the controlling legislative intent that if any section or part of a section or any provision thereof, or the application thereof to any person or circumstances, is held to be invalid, the remaining sections or parts of sections and the application of such provision to any other person or circumstances, other than those as to which it is held invalid, shall not be affected thereby. It is further declared to be the legislative intent that the other provisions of this Code would have been adopted independently of such section or parts of a section which are held to be invalid.

Section 2. That Section 321-153, "Default; Further Bids or Proposals Refused," of Chapter 321, "Procurement and Disposal of Supplies, Services and Construction," of Title III,

“Financial, Personnel, Procurement, and Real Property Procedures,” of the Cincinnati Municipal Code is hereby amended as follows:

Sec. 321-153. - Default; Debarment.

- (a) No person, company, vendor, bidder, contractor, subcontractor on a contract or bid, or principal or owner of a company, vendor, bidder, contractor, or subcontractor on a contract or bid that defaults on any bid, proposal or contract with the city of Cincinnati shall be permitted to submit a bid or proposal for any business or participate on any contract in any capacity with the city of Cincinnati until the amount of the damages accruing to the city by reason of such default shall have been fully paid. No such defaulting person, company, vendor, bidder, contractor, subcontractor on a contract or bid, or principal or owner of a company, vendor, bidder, contractor, or subcontractor on a contract or bid shall be permitted to submit a bid or proposal within the period of two years from the date of the default, except with the prior written permission of the city manager.
- (b) A person, company, vendor, bidder, contractor, subcontractor on a contract or bid, or principal or owner of a company, vendor, bidder, contractor, or subcontractor on a contract or bid that provides false information regarding its SBE, SLBE, ELBE, MBE, or WBE status shall be in default and subject to the penalty provided in this section.
- (c) A person, company, vendor, bidder, contractor, subcontractor on a contract or bid, or principal or owner of a company, vendor, bidder, contractor, or subcontractor on a contract or bid shall be in default and subject to the penalty provided in this section for any of the following:
 - (1) Failure to cooperate in the city’s monitoring of contract performance by refusing to provide information or documents required by a contract;
 - (2) Failure to respond adequately to complaints by city representatives regarding performance or other issues;
 - (3) Accumulation of repeated documented complaints regarding performance of a contract;
 - (4) Failure to be a taxpayer in good standing as defined in this chapter;
 - (5) Failure to pay any financial obligation to the city or any of its departments, boards, or commissions; ~~or~~

- (6) Failure to pay prevailing wage as required by state or federal law or comply with similar laws, including without limitation the Davis Bacon and Related Acts and the Contract Work Hours and Safety Standards Act; or:
 - (7) Commission of wage theft or payroll fraud as defined in chapter 326 of the Cincinnati Municipal Code.
- (d) A person, company, vendor, bidder, contractor, subcontractor on a contract or bid, or principal or owner of a company, vendor, bidder, contractor, or subcontractor on a contract or bid that has been debarred by any federal, state, or local governmental agency shall be debarred from participating in city contracts. A person, company, vendor, bidder, contractor, subcontractor on a contract or bid, or principal or owner of a company, vendor, bidder, contractor, or subcontractor on a contract or bid who is awarded a city contract while debarred by any federal, state, or local government agency or becomes debarred by any federal, state, or local government agency while working on a city contract will be considered in default of the city contract and subject to the penalty provided in this section.
- (e) The city purchasing agent shall provide written notice by certified mail to any person or business who is debarred pursuant to this section. The notice shall state the following:
- (1) The effective dates of the debarment; and
 - (2) That any aggrieved party shall have fourteen days to submit written information to the city purchasing agent regarding why the debarred person or business should not be debarred.
- The purchasing agent shall have fourteen days following the receipt of written materials challenging the debarment to issue a written decision regarding the debarment and mail the decision by certified mail to the person who challenged the debarment. The purchasing agent's decision shall be final.
- (f) The city purchasing agent shall maintain a list of persons, companies, vendors, bidders, contractors, subcontractors on a contract or bid, or principals or owners of a company, vendor, bidder, contractor, or subcontractor on a contract or bid found by the city purchasing agent to be in default and subject to the penalty provided in this section. This list will be made publicly available.

Section 3. That existing Section 321-153 is hereby repealed.

Section 4. That this ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed: _____, 2016

Mayor

Attest: _____
Clerk