

CHAPTER 14B
LOCAL BUSINESS ENTERPRISE AND
NON-DISCRIMINATION IN CONTRACTING ORDINANCE
(Effective February 7, 2011)

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SEC. 14B.1. - PURPOSE AND FINDINGS.

(A)

Short Title. This ordinance shall be entitled "Local Business Enterprise and Non-Discrimination in Contracting Ordinance."

(B)

Findings.

(1)

The Board finds that San Francisco's small businesses are a significant sector of the local economy and form the backbone of our neighborhoods. Small businesses contribute hundreds of millions of dollars to San Francisco's economy each year. Through payroll taxes alone, small businesses make a significant investment in the economic health of our City and the quality of life of its citizens and visitors.

(2)

Because San Francisco's small businesses experience higher costs than large businesses or businesses located outside the City, they suffer disadvantage in any competition with those businesses. The Board finds that small local businesses are at a competitive disadvantage in competing for work on public contracts. Because of their size, very small, or "micro," local businesses are at an even greater competitive disadvantage in competing for work on public contracts.

(3)

The public has an interest in fostering a strong and vibrant network of small and very small micro businesses in San Francisco. In part, San Francisco can accomplish this goal by ensuring that small and micro local businesses can compete for public contracts on a level playing field.

(4)

The Board finds that the disadvantages suffered by very small and micro local businesses in competing as prime contractors on public contracts can be reduced by discounting their bids and ratings by ten percent. Granting a ten percent discount does not unduly burden businesses not eligible for such discounts, and is similar to the corrective adjustments given to small and very small micro businesses in other jurisdictions. The Board finds that the additional disadvantages suffered by micro local businesses can be reduced by setting aside appropriate small contracts for competition only among micro businesses.

(5)

San Francisco has a long history of working to end discrimination in all aspects of public contracting. The City must continue to award and administer its public contracts in a manner that is fair and provides equal

opportunity to all local businesses, regardless of race, gender or other category protected by law. San Francisco must ensure that it does not discriminate and does not contract with any business that discriminates on the basis of race, gender or other protected category.

Specifically, this Board initially passed Ordinance No. 139-84 on April 2, 1984 to combat the City and County of San Francisco's own active and passive participation in discrimination against minority- and women-owned businesses, both in its own contracting for goods and services and in the private market for such goods and services. At the time of passage, women- and minority-owned businesses were virtually excluded as contractors on prime City contracts.

Since that time, this Board and the City's Human Rights Commission have actively and extensively documented and studied discrimination against and disadvantages faced by these groups to gauge the effectiveness of the prior Minority, Women and Local Business Enterprise Ordinances (the "M/W/LBE Ordinances") and to assess the need for further and continuing action. The earlier studies are documented in the legislative history of the previous amendments and re-enactments of the ordinance, including Ordinance Nos. 175-89, 155-92, 210-97, 457-97, 82-98, 296-98, 210-99, 283-99 and 134-03. The findings underlying these ordinances have been reviewed and analyzed in the preparation of this Ordinance and are hereby incorporated by reference into the legislative history of this Ordinance. These materials include disparity studies, transcripts of live testimony by dozens of witnesses, case studies of discrimination, and voluminous other materials. An index and a separate synopsis of this material are on file with the Clerk of this Board in File No. 98-0612. These materials are all incorporated by reference into the legislative history of this Ordinance. The collection and analysis of relevant information is ongoing.

On July 26, 2004, in *Coral Construction, Inc. v. City and County of San Francisco* (Sup. Ct. No. 421249), the San Francisco Superior Court enjoined the City from enforcing certain provisions of the M/W/LBE Ordinance. In a subsequent order, the court clarified that the injunction applied to Sections 12D.A.6, 12D.A.7, 12D.A.8, 12D.A.9, 12D.A.10, 12D.A.14, and 12D.A.17 of the Administrative Code, for all contracts for which bids or proposals are advertised or solicited on or after July 26, 2004. The injunction became effective immediately.

In issuing its injunction, the Superior Court did not dispute the accuracy of the City's disparity studies or otherwise take issue with the City's underlying findings of discrimination and disparity. However, the Court ruled that California's Proposition 209 does not allow the City to address the identified problem through its prior methods. The Board finds and declares that the need for the City to identify, rectify, and prevent discrimination in its public contracting still exists, and the City is committed to ensuring that neither MBEs nor WBEs nor any other business is arbitrarily or unfairly excluded from contracting opportunities. The City remains committed to addressing discrimination in public contracting to the fullest extent allowed by law, in a manner that is consistent with all requirements of Federal and State law.

(C)

Purpose.

(1)

Assistance to Small Local Businesses. The City shall assist small and micro local businesses to increase their ability to compete effectively for the award of City contracts. The Mayor shall establish Citywide goals for participation by small and micro local businesses in contracting. The City shall provide the bid discounts, set asides, and subcontracting opportunities set forth in this Ordinance, information and training, and other assistance to small and micro local businesses in order to reach these goals. The Human Rights Commission and Director shall assist other City departments to implement the goal of increasing participation in City contracts by small and micro local businesses.

(2)

Nondiscrimination. Neither the City nor any of its officers or employees shall discriminate against any person or business on any basis prohibited by law in the award or administration of City contracts. Persons or businesses that are awarded City contracts shall not discriminate against any person or business on any basis prohibited by law in the performance or administration of any City contract, including in the selection of subcontractors.

(3)

Human Rights Commission. The Human Rights Commission shall adopt rules and regulations necessary to carry out this Ordinance.

(Added by Ord. 92-06, File No. 050784, App. 5/11/2006)

SECTION 14B.2. - DEFINITIONS.

"Architect/Engineering Contract" means an agreement for architectural, engineering, or other professional design, consulting, or construction management services for a public work/construction project.

"Back Contracting" shall mean any agreement or other arrangement between a prime contractor and its Subcontractor that requires the prime contractor to perform or to secure the performance of the subcontract in such a fashion and/or under such terms and conditions that the prime contractor enjoys the financial benefits of the subcontract. Such agreements or other arrangements include, but are not limited to, situations in which either a prime contractor or Subcontractor agrees that any term, condition, or obligation imposed upon the Subcontractor by the subcontract shall be performed by or be the responsibility of the prime contractor.

"Bid" means a quotation, proposal, solicitation, or offer by a Bidder or Contractor to perform or provide labor, materials, equipment, supplies, or services to the City for a price.

"Bidder" means any business that submits a bid or proposal.

"City" means the City and County of San Francisco.

"Commercially Useful Function" shall mean that the business is directly responsible for providing the materials, equipment, supplies or services to the City as required by the solicitation or request for quotes, bids or proposals. Businesses that engage in the business of providing brokerage, referral or temporary employment services shall not be deemed to perform a "commercially useful function" unless the brokerage, referral or temporary employment services are those required and sought by the City. When the City requires and seeks specialty products made to order for the City or otherwise seeks products which, by industry practice, are not regularly stocked in warehouse inventory but instead are purchased directly from the manufacturer, no more than five percent of the cost of the product shall be credited towards LBE participation goals. When the City requires and seeks products which are, by industry practice, stocked in warehouse inventory and are in fact, regularly stocked by the listed supplier or distributor, no more than sixty percent of the cost of the product shall be credited towards LBE participation goals. If the listed supplier or distributor does not regularly stock the required product, no more than five percent of the cost of the product shall be credited towards LBE participation goals.

"Commission" means the Human Rights Commission.

"Commodity Contract" means an agreement to purchase any product, including materials, equipment, and supplies, including associated incidental services.

"Contract" means any agreement between the City and a person to provide or procure labor, materials, equipment, supplies, or services to, for, or on behalf of the City for a price to be paid out of monies deposited in the City Treasury or out of trust monies under the control of or collected by the City. A "Contract" includes an agreement between a non-profit or public entity and a Contractor for the performance of construction or construction-related services, where the contract is funded by the City. A "Contract" does not include: (1) grants, whether funded by the City or by Federal or State grant funds, to a nonprofit entity to provide services to the community; (2) sales of the City's personal or real property; (3) loan transactions, whether the City is a debtor or creditor; (4) lease, franchise, or concession agreements; (5) agreements to use City real property; (6) gifts of materials, equipment, supplies or services to the City; or (7) agreements with a public agency except for contracts or other agreements between the City and persons or entities, public or private, in which such persons or entities receive money from or through the City for the purpose of contracting with businesses to perform public improvements. Without limitation of the foregoing, "Contract" includes any agreement between the City and a person to provide or procure labor, materials, equipment, supplies, or services to, for, or on behalf of the City for PUC Regional Projects.

"Contract Awarding Authority" means any City officer, department, commission, employee, or board authorized to enter into Contracts on behalf of the City. A non-profit or public entity that receives funds from the City to pay for construction or construction related services is a "Contract Awarding Authority" for the purposes of contracting for the performance of those services.

"Contractor" means any person who enters into a Contract with the City.

"Control" means a person possesses the legal authority to manage business assets, good will, and the day-to-day operations of a business and actively and continuously exercises such authority.

"Director" means the Director of the Human Rights Commission, or his or her designee.

"Discount" means a downward adjustment in price or upward adjustment in rating of a proposal, whichever applies, that is made under Section 14B.7.

"Eligible Public Works/Construction Contract" means a Contract with (1) an estimated cost which exceeds \$10,000 but is less than or equal to the Threshold Amount, and (2) a scope of work which, based on HRC Micro-LBE availability data, would attract bids from at least two qualified Micro-LBEs. Eligible Public Works/Construction Contracts include Job Order Contracts set aside for Micro-LBEs under Administrative Code [Section 6.62\(C\)](#).

"Eligible Services/Commodities Contract" means a Professional Services, General Services, Architect/Engineering or Commodities Contract with (1) an estimated cost which exceeds \$10,000 but is less than or equal to the Minimum Competitive

Amount, and (2) a scope of work which, based on HRC Micro-LBE availability data, would attract bids from at least two qualified Micro-LBEs.

"General Manager" means the General Manager of the San Francisco Public Utilities Commission, or his or her designee.

"General Services Contract" means an agreement for those services that are not professional services. Examples of "general services" include, but are not limited to, janitorial, security guard, pest control, and landscaping services.

"Joint Venture" shall mean an association of two or more professional services or architect/engineering businesses acting as a Contractor and performing or providing services on a Professional Services or Architect/Engineering Contract, in which each Joint Venture partner combines property, capital, efforts, skill, and/or knowledge and each Joint Venture partner shares in the Ownership, Control, management responsibilities, risks, and profits of the Joint Venture in proportion to its claimed level of participation.

"Local Business Enterprise (LBE)" means a business that is certified as an LBE under Section 14B.3.

"Minimum Competitive Amount" means (i) for the procurement of commodities, professional services, and architect/engineering services, the "Minimum Competitive Amount" as defined in [Section 6.40\(A\)](#) of the Administrative Code, which shall be \$100,000 and (ii) for the procurement of general services, an amount equivalent to the "Threshold Amount" as defined in Chapter [6.1\(M\)](#) of the Administrative Code which shall be \$400,000, provided that on January 1, 2015, and every five years thereafter, the Controller shall recalculate the applicable Minimum Competitive Amount (and the Threshold Amount from which the Minimum Competitive Amount for general services is calculated) to reflect any proportional increase in the Urban Regional Consumer Price Index from January 1, 2010, rounded to the nearest \$1,000.

"Minority Business Enterprise (MBE)" means a business that is certified as an MBE under Section 14B.4(B).

"Other Business Enterprise (OBE)" means a business that is certified as an OBE under Section 14B.4(D).

"Owns" or "Ownership" means a person: (a) possesses a record ownership interest, such as partnership interest or stock interest, of at least fifty-one percent (51%) of the business or such lesser amount as the HRC determines, under the circumstances of the particular business' overall ownership and control structure, constitutes a significant ability to influence business operations and a strong personal stake in the business's viability; (b) possesses incidents of ownership, including an interest in profit and loss, equal to at least the record ownership interest; (c) contributes capital to the business equal to at least the record ownership percentage (unsecured promissory notes or notes secured by the business or business assets are not sufficient to constitute capital contributions); and (d) actively and continuously devotes expertise to the operations of the business relevant to the business's "Commercially Useful Function" of a quality and quantity proportionate to the record ownership interest.

"Owns" or "Ownership" for purposes of determining whether a business is an MBE means that a minority person possesses all of the above indicia of ownership, and either individually, or in combination with the interests of other owners who are minority persons, the ownership by minority persons constitutes at least fifty-one percent (51%) of the overall business ownership.

"Owns" or "Ownership" for purposes of determining whether a business is a WBE means that a woman possesses all of the above indicia of ownership, and that either individually, or in combination with the interests of other owners who are women, the ownership by women constitutes at least fifty-one percent (51%) of the overall business ownership.

"Person" means any individual or group of individuals, including but not limited to partnerships, associations, and corporations.

"Professional Services Contract" means an agreement for services that require extended analysis, the exercise of discretion and independent judgment, or the application of an advanced, specialized type of knowledge, expertise, or training customarily acquired either by a prolonged course of study or equivalent experience in the field. Examples of professional service providers include, but are not limited to, licensed professionals such as accountants, and non-licensed professionals such as parking lot management, software developers and financial consultants. For the purpose of this Ordinance, a contract for architectural, engineering, or other professional design, consulting or construction management services for a public work project shall be considered an Architect/Engineering Contract and not a Professional Services Contract.

"PUC" or "Public Utilities Commission" means the San Francisco Public Utilities Commission, the City Department that provides water, wastewater, and municipal power services to San Francisco and, under contractual agreement with 29 wholesale water agencies, also supplies water to [1.6](#) million additional customers within three Bay Area counties.

"Public Works/Construction Contract" means a Contract for the erection, construction, renovation, alteration, improvement, demolition, excavation, installation, or repair of any public building, structure, infrastructure, bridge, road, street, park, dam, tunnel, utility, or similar public facility that is performed by or for the City, and the cost of which is to be paid wholly or partially out of moneys deposited in the City Treasury or out of trust monies under the control of or collected by the City. For

purposes of this Ordinance only, "Public Works/Construction Contract" includes Contracts between a Person, including a non-profit entity or public agency, and a Contractor for construction or construction-related services, where the Contract is funded by the City.

"PUC Regional Projects" means the projects to be performed outside of the geographic limits of San Francisco that are identified as regional projects and included in the formally approved Capital Improvement Program of the San Francisco Public Utilities Commission's approximately \$4.3 billion project to seismically reinforce and otherwise enhance the Hetch Hetchy water supply system, as it may be amended from time to time, and shall also include Repair and Replacement work ("R&R") only where such work is to be performed in association with a regional Capital Improvement Program project.

"Subcontractor" means any person providing goods or services to a Contractor or subcontractor in fulfillment of the Contractor or subcontractor's obligations arising from a Contract with the City.

"Threshold Amount" means, for public works/construction projects, the "Threshold Amount" as defined in Chapter [6.1](#) (M) of the Administrative Code which shall be \$400,000 provided that on January 1, 2015, and every five years thereafter, the Controller shall recalculate the Threshold Amount to reflect any proportional increase in the Urban Regional Consumer Price Index from January 1, 2010, rounded to the nearest \$1,000.

"Woman Business Enterprise (WBE)" means a business that is certified as a WBE under Section 14B.4(C).

(Added by Ord. 92-06, File No. 050784, App. 5/11/2006; Ord. 20-10, File No. 091405, App. 2/10/2010; Ord. 97-10, File No. 100333, App. 5/13/2010; Ord. 8-11, File No. 101006, App. 1/7/2011)

SEC. 14B.3. - LBE CERTIFICATION.

(A)

Criteria for LBE Certification. Through appropriately promulgated procedures, if any, the Director shall certify as an LBE any business that meets all of the following criteria and also meets the criteria set forth in Section 14.B.3(B), Section 14.B.3(C) or Section 14B.3(D):

(1)

The business is financially and operationally independent from, and operates at arm's length to, any other business.

(2)

The business is continuously in operation.

(3)

The business is a for-profit enterprise.

(4)

The business performs a commercially useful function.

(5)

The business maintains its principal place of business in a fixed office within the geographic boundaries of the City that provides all of the services for which LBE certification is sought, other than work required to be performed at a job site; provided, however, that suppliers are not required to maintain their principal place of business in San Francisco, but are required to maintain a fixed office in San Francisco that meets all of the requirements of this Section other than the principal place of business requirement.

An office is a fixed and established place of business, as determined by the Director, including a qualified home office, where business is conducted on a regular basis of the type for which certification is sought. A residence qualifies as an office only if none of the business owners also maintain an office outside the residence in the same or related field, and a business owner claimed the home office as a business deduction on the prior year's income tax return, or for businesses started after the last tax return, would qualify for a deduction on the next tax return. None of the following constitutes an office: a post office box, a temporary location, a movable property, a location that was established to oversee a project such as a construction project office, or a work space provided in exchange for services as opposed to monetary rent.

To establish a principal place of business in San Francisco, a business must demonstrate that the majority of its principals are based in the San Francisco office. There shall be a rebuttable presumption that a business that pays San Francisco payroll taxes on at least fifty-one percent (51%) of its total payroll has its principal place of business in San Francisco. The Director may, based upon the circumstances of a particular business' overall business model, ownership and control structure, find a business paying San Francisco payroll taxes on a lower percentage of its payroll in compliance with the "principal place of business" requirement.

Suppliers must maintain a warehouse in the City that is continuously stocked with inventory consistent with their certification. Truckers must park their registered vehicles and trailers within the City.

- (6) The business possesses a current San Francisco Business Tax Registration Certificate.
- (7) The business has been located and doing business in San Francisco for at least six (6) months preceding the application for certification.
- (8) At least one business owner has valid licenses or other relevant trade or professional certifications or, where licensing is not required, the business owners individually and collectively have relevant training and experience that are appropriate for the type of business for which the business seeks certification.
- (9) The business is Owned and Controlled as defined herein by individuals who reside in the United States or its territories.
- (10) The business has average gross annual receipts in the prior three (3)-fiscal years that satisfy the criteria set forth in Section 14B.3(B), Section 14B.3(C), or Section 14B.3(D).
- (11) The business is not Owned or Controlled as defined herein in part or in whole by a full time City employee.

(B)

Criteria for Small - LBE. The Director shall certify as a "Small—LBE" any business that meets the requirements of 14B.3(A) and has average gross annual receipts in the prior three (3) fiscal years that do not exceed the following limits: (1) public works/construction - \$14,000,000; (2) specialty construction contractors - \$7,000,000; (3) goods/materials/equipment and general services - \$7,000,000; (4) professional services and architect/engineering - \$2,500,000; and (5) trucking - \$3,500,000. The City shall determine gross receipts according to recognized accounting methodologies that the City determines most accurately reflect the actual money that the business received during the relevant period. Any business under common ownership, in whole or in part, with any other business meets the requirements of this subparagraph only if the aggregate gross annual receipts of all of the businesses under such common ownership do not exceed these limits. All businesses owned by married spouses or domestic partners are considered under common ownership unless the businesses are in unrelated industries and no community property or other jointly owned assets were used to establish or are used to operate either business.

(C)

Criteria for Micro - LBE. The Director shall certify as a "Micro—LBE" any business that meets the requirements of 14B.3(A) and also has average gross annual receipts in the prior three (3) fiscal years that do not exceed the following limits: (1) public works/construction - \$7,000,000; (2) specialty construction contractors - \$3,500,000; (3) goods/materials/equipment and general services - \$3,500,000; (4) professional services and architect/engineering - \$1,250,000; and (5) trucking - \$1,750,000. The City shall determine gross receipts according to recognized accounting methodologies that the City determines most accurately reflect the actual money that the business received during the relevant period. Any business under common ownership, in whole or in part, with any other business meets the requirements of this subparagraph only if the aggregate gross annual receipts of all of the businesses under such common ownership do not exceed these limits. All businesses owned by married spouses or domestic partners are considered under common ownership unless the businesses are in unrelated industries and no community property or other jointly owned assets were used to establish or are used to operate either business.

(D)

Criteria for SBA—LBE. The Director shall certify as a "SBA—LBE" any business that: (1) meets the requirements of 14B.3(A) and also has average gross annual receipts in the prior three (3) fiscal years that do not exceed the following limits: (1) public works/construction - \$33.5 million; (2) specialty construction contractors - \$17 million; (3) goods/materials/equipment and general services - \$17 million; (4) professional services and architect/engineering - \$7 million and (5) trucking - \$8.5 million. The City shall determine gross receipts according to recognized accounting methodologies that the City determines most accurately reflect the actual money that the business received during the relevant period. Any business under common ownership, in whole or in part, with any other business meets the requirements of this subparagraph only if the aggregate gross annual receipts of all of the businesses under common ownership do not exceed these limits. All businesses owned by married spouses or domestic partners are considered under common ownership unless the businesses are in unrelated industries and no community property or other jointly owned assets were used to establish or are used to operate either business.

(Added by Ord. 92-06, File No. 050784, App. 5/11/2006; Ord. 20-10, File No. 091405, App. 2/10/2010; Ord. 8-11, File No. 101006, App. 1/7/2011)

SEC. 14B.4. - NON-DISCRIMINATION CERTIFICATION.

(A)

For purposes of ensuring non-discrimination in City contracting and subcontracting, and subject to appropriately promulgated procedures, if any, the Director shall further certify Small-LBEs and Micro-LBEs as MBEs, WBEs and OBEs according to the ownership and control of the LBE.

(B)

MBE Certification. The Director shall certify as an MBE any business that is certified as an LBE and is owned and controlled by one or more minority persons. A minority person is a member of one or more of the following ethnic groups:

- (1) African Americans, defined as persons whose ancestry is from any of the Black racial groups of Africa or the Caribbean;
- (2) Arab Americans, defined as persons whose ancestry is from an Arabic speaking country that is a current or former member of the League of Arab States;
- (3) Asian Americans, defined as persons with Chinese, Japanese, Korean, Pacific Islander, Samoan, Filipino, Asian Indian, and Southeast Asian ancestry;
- (4) Iranian Americans, defined as persons whose ancestry is from the country of Iran;
- (5) Latino Americans, defined as persons with Mexican, Puerto Rican, Cuban, Central American or South American ancestry. Persons with European Spanish ancestry are not included as Latino Americans; and
- (6) Native Americans, defined as any person whose ancestry is from any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition.

(C)

WBE Certification. The Director shall certify as a WBE any business that is certified as an LBE and is owned and controlled by one or more women.

(D)

OBE Certification. The Director shall certify as an OBE any business that is certified as an LBE and (i) does not demonstrate to the satisfaction of the Director that it is owned and controlled by one or more women or one or more minority persons or (ii) is not certified as an MBE or a WBE.

(E)

Period of Certification. The Director may certify LBEs as small-LBEs or Micro-LBEs, and as MBEs, WBEs or OBEs for a period not to exceed three years provided that businesses must at all times throughout the certification period meet the criteria in Section 14B.3 and Section 14B.4 as applicable. The Director may require certified businesses annually to submit documentation for the purpose of verifying continuing eligibility for any certification hereunder.

(Added by Ord. 92-06, File No. 050784, App. 5/11/2006)

SEC. 14B.5. - PUC-LBE CERTIFICATION.

(A)

PUC-LBE Certification. In order to increase the ability of small businesses that are located within the PUC water system service area but outside of the geographical limits of San Francisco to compete for regional PUC contracts, the Director shall certify businesses as PUC-LBEs, including as either Small-PUC-LBEs or Micro-PUC-LBEs, and as either PUC-MBEs, PUC-WBEs, or PUC-OBEs, that meet all of the following criteria:

- (1) Only established small public works/construction, construction material supplies, construction equipment rental and trucking firms may be certified as PUC-LBEs or any subcategory of PUC-LBE.
- (2) Only firms located within the PUC water system service area may be certified as PUC-LBEs or any subcategory of PUC-LBE.
- (3) Only firms with average gross annual receipts in the prior three fiscal years that meet the requirements of Section 14B.3(B) or Section 14B.3(C) for Small-LBEs or Micro-LBEs, respectively may be certified as PUC-Small-LBEs or PUC-Micro-LBEs.
- (4) PUC-LBEs owned and controlled by one or more minority persons or women according to all of the criteria set forth in Section 14B.3(B) or 14B.3(C), respectively, shall be certified as PUC-MBEs or PUC-WBEs. PUC-LBEs that do not demonstrate qualifying ownership and control by minority persons or women shall be certified as PUC-OBEs.
- (5) Firms shall meet all criteria that the HRC shall by rule adopt to the end that firms certified as PUC-LBEs shall be similarly situated to LBEs to the extent practicable, taking into account the special circumstances of their location and the needs of the PUC Regional projects.

(B)

PUC Small Firm Advisory Committee. There is hereby established a PUC Small Firm Advisory Committee as follows:

(1)

The PUC Small Firm Advisory Committee shall have five (5) members who shall be appointed by the PUC General Manager in consultation with the Bay Area Water Supply and Conservation Agency (BAWSCA) to represent the interest of individuals and businesses located within the PUC Water System Service Area but outside of the geographical limits of San Francisco. Members shall serve at the pleasure of the PUC General Manager. Members of the PUC Small Firm Advisory Committee shall not be compensated, but shall be reimbursed for expenses in accordance with the Controller's published policies.

(2)

The purposes and duties of the PUC Small Firm Advisory Committee are:

(a)

To adopt rules and procedures within the Advisory Committee's responsibilities;

(b)

To assist the Director in verifying the eligibility for certification of PUC-LBE applicants by conducting site visits or undertaking other local or regional fact gathering to ensure that applications for PUC-LBE certification undergo substantially the same scrutiny as applications for other LBE certification;

(c)

To outreach to the business community about PUC-LBE certification and contracting opportunities and to provide information to the Director regarding the availability of potential PUC-LBEs;

(d)

To receive reports from the City, to publicly discuss, and make recommendations for rules and procedures regarding the implementation of this Ordinance for PUC regional projects to the Director and the PUC;

(e)

To make recommendations to HRC to study the feasibility of additional programs that will increase the participation of eligible firms for the regional program;

(f)

To provide status reports on the Advisory Committee's activities to the Commission and the General Manager.

(4)

The PUC Small Firm Advisory Committee shall establish bylaws, rules and/or regulations for the conduct of its business. Administrative assistance and staffing for the PUC Small Firm Advisory Committee shall be provided in the discretion of the PUC.

(5)

Except for the PUC Small Firm Advisory Committee's authority as provided in Section 14B.5.B.2, the Director shall have the authority over the implementation of this Ordinance for PUC Regional Projects to the same extent as all other bids, proposals and contracts subject to the Ordinance. The Director shall consult fully with the PUC to the extent required in the Ordinance.

(C)

PUC-LBEs shall have the status of LBEs for all purposes of this Ordinance only for construction, specialty construction, construction material suppliers, construction equipment rental firms and trucking services for PUC Regional Projects. PUC-LBEs shall not have the status of LBEs for PUC contracts for architectural and engineering services, professional services or general services or for any other bid, proposal or contract subject to this Ordinance.

(Added by Ord. 92-06, File No. 050784, App. 5/11/2006)

SEC. 14B.6. - NON-PROFIT CERTIFICATION.

(A)

Notwithstanding any other provisions of this Ordinance, in order to increase the ability of small, local non-profit enterprises to compete for City contracts on an equal basis with small, local for-profit enterprises, the Director shall certify non-profit enterprises that meet all of the following criteria:

(1)

The non-profit enterprise is financially and operationally independent from, and operates at arm's length to, any other non-profit or for-profit enterprise.

(2)

The non-profit enterprise is continuously in operation.

(3)

The business is a California Nonprofit Organization that is both (a) regulated as either a Nonprofit Public Benefit Corporation under California Corporations Code Sections 5110-6815 or a Nonprofit Religious

Corporation under California Corporations Code Sections 9110-9690, and (b) tax-exempt under section 501(c)(3) of the Internal Revenue Code.

(4)

The non-profit enterprise performs a commercially useful function. In the case of non-profits, the commercially useful function may be related or unrelated to its stated charitable mission. The tax, or other implications, including forfeiture of tax-exempt status, that a certified non-profit may incur for engaging in substantial business operations unrelated to its charitable mission are solely the responsibility of the non-profit and not a criteria for certification hereunder.

(5)

The non-profit enterprise maintains its principal place of business in a fixed office within the geographic boundaries of the City.

An office is a fixed and established place of business, including a qualified home office, where business is conducted on a regular basis of the type for which certification is sought. A residence qualifies as an office only if none of the persons who own or control the business also maintains an office related to a for-profit or non-profit enterprise outside the residence in the same or related field, and the persons who own or control the business claimed a business deduction on the prior year's income tax return, or for, businesses started after the last tax return, would qualify for a deduction on the next tax return. None of the following constitutes an office: a post office box, a temporary location, a movable property, a location that was established to oversee a project such as a construction project office, or work space provided in exchange for services, as opposed to monetary rent.

To establish a principal place of business in San Francisco, a non-profit enterprise must demonstrate that the majority of its paid and volunteer staff are based in the San Francisco office.

Suppliers must maintain a warehouse in the City that is continuously stocked with inventory consistent with their certification. Truckers must park their registered vehicles and trailers within the City.

(6)

The non-profit enterprise has applicable current filings with State and Federal agencies, including the California Attorney General (Form RRF-1), the California Franchise Tax Board (Forms 199 and 109), the California Secretary of State (Form S1-100) and the Internal Revenue Service (Form 990).

(7)

The non-profit enterprise has been located and doing the same type of business activity as the type(s) for which certification is sought in San Francisco for at least six months preceding the application for certification.

(8)

The non-profit has staff under continuous contractual commitment with licenses or other relevant trade or professional certifications, or, where licensing is not required, relevant training and experience that are appropriate for the type of business for which the non-profit seeks certification.

(9)

The Board of Directors or other governing body of the non-profit enterprise consists exclusively of individuals who reside in the United States or its territories.

(10)

The non-profit enterprise has average gross annual receipts in the prior three fiscal years that satisfy the criteria set forth in either Section 14B.3(B) or 14B.3(C).

(11)

(A) Full time city employees, if any, that serve on the Board of Directors or other governing body of the non-profit enterprise shall not constitute a majority of the membership of such body or be capable of exercising a controlling number of votes for such body and (b) any non-profit that includes any full time City employees on its Board of Directors or other governing body shall be ineligible for award, as a prime contractor or subcontractor, of any contract to be awarded by, and/or overseen by, the City Department or entity that employs such Board or other governing body member.

(B)

Criteria for Small - LBE. The Director shall certify as a "Small - LBE" any non-profit enterprise that meets the requirements of 14B.6(A) and has average gross annual receipts in the prior three fiscal years that do not exceed the following limits: (1) public works/construction - \$14,000,000; (2) specialty construction contractors - \$7,000,000; (3) goods/materials/equipment and general services - \$7,000,000; (4) professional services and architect/engineering - \$2,500,000; and (5) trucking - \$3,500,000. The City shall determine gross receipts according to recognized accounting methodologies that the City determines most accurately reflect the actual money that the non-profit enterprise received or was entitled to receive during the relevant period. Any non-profit enterprise under common ownership, in whole or in part, with any other for-profit or non-profit enterprise meets the requirements of this subparagraph only if the aggregate gross annual receipts of all of

the for-profit and non-profit enterprises under such common ownership do not exceed these limits. All for-profit and non-profit enterprises owned by married spouses or domestic partners are considered under common ownership unless all such enterprises are in unrelated industries and no community property or other jointly owned assets were used to establish or are used to operate any such enterprise.

(C)

Criteria for Micro - LBE. The Director shall certify as a "Micro - LBE" any non-profit enterprise that meets the requirements of 14B.6(A) and has average gross annual receipts in the prior three fiscal years that do not exceed the following limits: (1) public works/construction - \$7,000,000; (2) specialty construction contractors - \$3,500,000; (3) goods/materials/equipment and general services - \$3,500,000; (4) professional services and architect/engineering - \$1,250,000; and (5) trucking - \$1,750,000. The City shall determine gross receipts according to recognized accounting methodologies that the City determines most accurately reflect the actual money that the non-profit enterprise received or was entitled to receive during the relevant period. Gross receipts for non-profits shall include all gifts, grants and other revenues from business activities and investments, according to methodologies that the City determines most accurately reflect the available resources of the non-profit. Any non-profit enterprise under common ownership, in whole or in part, with any other for-profit or non-profit enterprise meets the requirements of this subparagraph only if the aggregate gross annual receipts of all of the for-profit and non-profit enterprises under such common ownership do not exceed these limits. All for-profit and non-profit enterprises owned by married spouses or domestic partners are considered under common ownership unless all such enterprises are in unrelated industries and no community property or other jointly owned assets were used to establish or are used to operate any such enterprise. A non-profit shall be considered affiliated with a for-profit if the parent non-profit seeking certification has an ownership interest in the for-profit subsidiary, whether or not the for-profit subsidiary is engaged in the same charitable mission or business activities as the parent non-profit. A non-profit shall be considered affiliated with another non-profit if the parent non-profit seeking certification has legal control in whole or in part of the non-profit subsidiary whether or not the non-profit subsidiary is engaged in the same charitable mission or business activities as the parent non-profit.

(D)

Certification as OBE. All non-profit LBEs shall be certified as OBEs. Non-profits shall not be eligible for certification as MBEs or WBEs. Non-profit LBEs shall have the status of LBEs for all purposes of this Ordinance, including but not limited to bid/ratings discounts and subcontracting participation credit.

(E)

Additional Requirements. Certification of non-profit LBEs shall be subject to such requirements, if any, that the Director shall by rule adopt, to the end that eligibility requirements for certification for non-profit LBEs shall conform to eligibility requirements for certification for-profit LBEs to the extent practicable taking into consideration the differences in their ownership and operational structures.

(Added by Ord. 91-06, File No. 060432, App. 5/12/2006)

SECTION 14B.7. - PRIME CONTRACTS

(A)

Good Faith Efforts to Obtain LBE Bids on Contracts Subject to this Ordinance. Contract awarding authorities shall use good-faith efforts for all contracts subject to the Discount provisions of this Ordinance to solicit and to obtain bids from the broadest possible range of LBEs and to ensure that neither MBEs nor WBEs nor OBEs are arbitrarily excluded from participation. Good faith efforts shall include the following:

(1)

Arranging contracts by size and type of work to maximize the opportunities for LBEs to participate. This includes dividing projects into smaller parts.

(a)

As soon as practical before soliciting Bids, Contract Awarding Authorities shall submit large contract proposals to the Director for review. The Director shall determine whether the proposed contract can be divided into smaller contracts so as to enhance the opportunity for participation by LBEs. For purposes of this paragraph, "large project" means any Public Works/Construction Contract estimated to cost more than \$5,000,000, any Professional Services Contract estimated to cost more than \$100,000, and any Commodities Contract with a term greater than one year, including any options to renew or extend.

(b)

If the Director determines, after consulting with the Contract Awarding Authority, that the Contract can be divided into smaller contracts, then the Director and the Contract Awarding Authority shall confer regarding all of the costs and benefits of soliciting the Contract as a single contract or dividing it into smaller contracts, including but not limited to the potential for enhanced opportunities for LBE participation as prime contractors, the potential for LBE participation as Subcontractors, relative costs, administrative issues, and any other matters relevant to the accomplishment of the

purpose of the subject Contract or Contracts. If, after exchanging information and conferring regarding these issues, the Contract Awarding Authority and the Director are unable to agree on whether to divide the Contract into smaller contracts or how to divide the Contract, the Mayor or the Mayor's designee shall resolve the matter.

(2)

Encouraging LBEs to attend prebid meetings that are held to inform potential bidders of contracting opportunities.

(3)

Advertising in general circulation media, trade association publications and local business media, and posting the contracting opportunity on the Department's website or other centralized City website.

(4)

Notifying LBEs that are certified to perform the work contemplated in a contract and soliciting their interest in the contract.

(5)

Providing LBEs with adequate information about the plans, specifications, and requirements of the contract.

(6)

When allowed by local laws governing City contracting, negotiating with LBEs in good faith.

(7)

Using the services of community and contractors' groups to assist in the recruitment of LBEs.

(8)

For Professional Services, General Services, Architect/Engineering and Commodities Contracts, the estimated cost of which exceeds \$10,000 but is less than the Minimum Competitive Amount or for Public Works/Construction Contracts, the estimated cost of which exceeds \$10,000 but is less than the Threshold Amount, Contract Awarding Authorities are not required to undertake the good faith efforts steps set forth in Sections 14B.7(A)(3) when it is impracticable to do so.

(B)

Best Efforts on Contracts Not Otherwise Subject to this Ordinance. In the award of leases, franchises, concessions, and other Contracts not subject to the Discount provisions of this Ordinance, Contract Awarding Authorities shall utilize the good faith efforts steps unless impracticable to do so. At a minimum, Contract Awarding Authorities should notify LBEs that are certified to perform the work contemplated in a Contract and solicit their interest in the Contract.

(C)

Non-Discrimination in Prime Contracting. Contract Awarding Authorities shall ensure that all aspects of the contracting process are free from discrimination against any person on any basis prohibited by law, and ensure broad contracting opportunities for all categories of LBEs. Contract Awarding Authorities shall maintain such documentation of their selection process as required by the Director to monitor and ensure compliance with this provision.

(D)

Contracts Subject to Prime Bidding Discounts. Contract Awarding Authorities shall apply Discounts to all Contracts the estimated cost of which exceeds \$10,000 and is less than \$10,000,000, except that the Bid Discount provisions applicable to SBA-LBEs shall apply only to contracts (other than Commodities Contracts) with an estimated cost no less than \$400,000 and no greater than \$20,000,000, and to Commodities Contracts with an estimated cost no less than \$400,000 and no greater than \$10,000,000. Discounts shall apply only to bids where the LBE prime or joint venture bidder will perform a commercially useful function on the Contract. LBE prime or joint venture bidders who fail to perform a commercially useful function under the Contract are subject to sanctions as set forth in Section 14B.17(D).

(E)

Amount of Discount. Unless otherwise provided in this Ordinance, Contract Awarding Authorities shall apply a ten percent (10%) Discount to any Bid from a Small—LBE or Micro—LBE. Contract awarding authorities shall apply these Discounts to each stage of the selection process, including qualifications, proposals and interviews.

If after the application of the Discounts provided for in this Subsection 14B.7(E) or Subsection 14B.7 (F) to any Bid from a Small or Micro-LBE, the apparent low Bidder or highest ranking proposer is not a Small or Micro-LBE, Contract Awarding Authorities shall apply a 2% Bid Discount to any Bid from an SBA-LBE. Contract awarding authorities shall apply this two percent (2%) discount to Contracts at each stage of the selection process, including qualifications, proposals and interviews, except that the two percent (2%) Discount for SBA-LBEs shall not be applied at any stage if it would adversely affect a Small or Micro-LBE. For contracts estimated by the Contract Awarding Authority to cost in excess of \$10,000,000 but less than \$20,000,000, Contract Awarding Authorities shall apply a two percent (2%) Discount to any Bid for Public Works/Construction, Architect/Engineering, Professional Services or General Services Contracts from an SBA-LBE, but not Commodities Contracts.

(F)

Joint Ventures For Professional Services and Architect/Engineering. Unless otherwise provided in this Ordinance, Contract Awarding Authorities shall extend the following Bid/rating Discount to all Bids from Small and Micro-LBEs on Professional Services and Architect/Engineering prime Contracts: (1) five percent (5%) to a Joint

Venture with Small and/or Micro-LBE prime contractor participation that equals or exceeds thirty-five percent (35%) but is under forty percent (40%); (2) seven and one-half percent (7.5%) to a Joint Venture with Small and/or Micro-LBE prime contractor participation that equals or exceeds forty percent (40%); (3) ten percent (10%) to a Small and/or Micro-LBE prime contractor or a Joint Venture among Small and/or Micro-LBE prime contractors. Contract Awarding Authorities shall apply the Bid/rating Discount to each stage of the selection process, including qualifications, proposals and interviews.

The Contract Awarding Authority shall apply the Joint Venture Bid/ratings Discount only to Professional Services and Architect/Engineering Contracts and only to a Joint Venture (1) that meets the requirements contained in this Ordinance and (2) when the LBE is an active partner in the Joint Venture, performs work, manages the job, takes financial risks in proportion to the required level of participation stated in the bid documents, is responsible for a clearly defined portion of the work to be performed, and shares proportionately in the Ownership, Control, management responsibilities, risks, and profits of the Joint Venture. The portion of the LBE Joint Venture's work shall be set forth in detail separately from the work to be performed by the non-LBE Joint Venture partner. The LBE Joint Venture's portion of the Contract must be assigned a commercially reasonable dollar value.

(G)

Affidavit. Each Bidder, proposer and Contractor shall be required to sign an affidavit declaring under penalty of perjury its intention to comply fully with the provisions of this Ordinance and attesting to the truth and accuracy of all information provided regarding such compliance.

(H)

Additional Requirements and Required Contract Terms. Contract Awarding Authorities shall include in all Contracts with their Contractors, and all Contractors shall include in their Contracts with Subcontractors the following requirements, in addition to other requirements set forth in the Municipal Code. For the purposes of this Subsection, "contractor" includes all Subcontractors.

(1)

Each Contract shall incorporate this Ordinance by reference, shall require Contractors to comply with its provisions in awarding and administering such contracts, and shall provide that the willful failure of any Bidder or Contractor to comply with the requirements of this Ordinance or rules and regulations implementing this Ordinance shall be deemed a material breach of contract.

(2)

Contracts shall provide that in the event that the Director finds that any Bidder, Subcontractor or Contractor willfully fails to comply with any of the provisions of this Ordinance, rules and regulations implementing the Ordinance, or contract provisions pertaining to LBE, MBE, WBE, OBE or Micro-LBE participation, outreach, or non-discrimination, the bidder, subcontractor or contractor shall be liable for liquidated damages for each contract in an amount equal to the Bidder's or Contractor's net profit on the Contract, ten percent (10%) of the total amount of the contract or \$1,000, whichever is greatest, as determined by the Director. All contracts shall also contain a provision in which the Bidder, Subcontractor or Contractor acknowledges and agrees that the liquidated damages assessed shall be payable to the City upon demand and may be set off against any monies due to the bidder, subcontractor or contractor from any contract with the City.

(3)

Contracts shall require all contractors to maintain records, including such information requested by the Director or Commission, necessary for monitoring their compliance with this Ordinance. Contracts shall require prime contractors to include in any subcontract with a LBE a provision requiring the subcontractor to maintain the same records. Contracts shall require contractors and subcontractors to maintain such records for three years following completion of the project and shall permit the Director, Commission and Controller to inspect and audit such records.

(4)

Contracts shall require prime contractors, during the term of the contract, to fulfill the LBE participation commitments submitted with their bids. Willful failure to comply with the level of LBE subcontractor participation specified in the contract shall be deemed a material breach of contract.

(5)

Contracts shall require, and shall require prime contractors to include in any subcontract with a LBE a provision requiring, the prime contractor to compensate any LBE Subcontractor for damages for breach of contract or liquidated damages equal to 5% of the subcontract amount, whichever is greater, if the prime contractor willfully fails to comply with its commitment to use the LBE subcontractor as specified in the Bid unless the Director and the contract awarding authority both give advance approval to the prime contractor to substitute subcontractors or otherwise modify the commitments in the Bid documents. This provision shall also state that it is enforceable in a court of competent jurisdiction.

(6)

Contracts shall require prime contractors, whenever amendments, modifications, supplements, or change orders cumulatively increase the total dollar value of the contract by more than 10 percent, to comply with those provisions of this Ordinance that applied to the original contract with respect to the amendment, modification, supplement or change order.

(7)

Contracts shall require prime contractors to submit to the Director for approval all contract amendments, modifications, supplements, and change orders that cumulatively increase by more than twenty percent (20%) the total dollar value of all contracts originally valued at \$50,000 or more. The Director shall review the proposed amendment, modification, supplement or change order to correct any contracting practices that exclude any category of LBEs from new contracting opportunities.

(8)

Contracts in which subcontracting is used shall prohibit back contracting to the prime contractor or lower-tier subcontracting for any purpose inconsistent with the provisions of this Ordinance, rules and regulations adopted pursuant to this Ordinance, or contract provisions pertaining to LBE utilization.

(9)

Contracts in which subcontracting is used shall require the prime contractor to pay its subcontractors within three working days after receiving payment from the City unless the prime contractor notifies the Director in writing within ten (10) working days prior to receiving payment from the City that there is a bona fide dispute between the prime contractor and the subcontractor, in which case the prime contractor may withhold the disputed amount but shall pay the undisputed amount. The Director may, upon making a determination that a bona fide dispute exists between the prime contractor and subcontractor, waive this three-day payment requirement. In making the determination as to whether a bona fide dispute exists, the Director shall not consider the merits of the dispute. Contracts in which subcontracting is used shall also require the contractor, within 10 working days following receipt of payment from the City, to file an affidavit, under penalty of perjury, that he or she has paid all subcontractors. The affidavit shall provide the names and address of all subcontractors and the amount paid to each.

(I)

Exceptions. Notwithstanding any other provision of this Section, Contract Awarding Authorities shall not apply a Discount where to do so would result in a Contract being awarded to a business without the capacity to perform it. The Commission may adopt rules and regulations setting standards for determining that an LBE has sufficient skill, experience, and financial capacity to perform the contract.

(J)

Waivers. The Director shall waive the LBE Bid Discounts, and report the waiver to the Commission, if:

(1)

The Director finds, with the advice of the Contract Awarding Authority and the Office of Contract Administration, that needed goods or services are available from a sole source that is qualified to do business with the City;

(2)

The Contract Awarding Authority certifies in writing to the Director, prior to the Controller's contract certification, that the Contract is being awarded under the emergency provisions of Administrative Code [Section 6.60](#) or Administrative Code [Section 21.15](#) and that there is either (i) no time to apply bid discounts or establish subcontracting goals, or (ii) no immediately available LBEs that are capable of performing the emergency work; or

(3)

For Contracts in excess of \$5,000,000, a Contract Awarding Authority establishes that sufficient qualified LBEs capable of providing the needed goods and services required by the Contract are not available, or the application of the LBE discount will result in significant additional costs to the City if the waiver of the Bid Discount is not granted.

(K)

Micro-LBE Set-Aside Program.

(1)

Each fiscal year, each Contract Awarding Authority, in consultation with the Director, shall set aside the following for award to Micro-LBEs:

(a)

Not less than 50% of eligible Public Work/Construction Contracts and

(b)

Not less than 25% of Eligible Services/Commodities Contracts.

(2)

Contracts under the Micro-LBE Set-Aside Program shall be competitively awarded in accordance with the Purchaser's regulations, except that if (a) fewer than two qualified Micro-LBEs submit bids, or (b) the Contract Awarding Authority determines that the Contract would not be awarded at a fair market price, then the Contract Awarding Authority may reject all Bids and rebid the contract outside the set-aside program.

(3)

Each Contract Awarding Authority shall report its compliance with the Micro-LBE Set-Aside Program to the Board of Supervisors by submitting the following information quarterly in the year of 2011 and thereafter annually as part of its annual report under Section 14B.15(B): (a) Each Eligible Public Works/Construction Contract and, each Eligible Services,/ Commodities Contract awarded under the Micro-LBE Set-Aside Program, and its dollar amount; and (b) Each Eligible Public Works/Construction Contract and each Eligible

Services/ Commodities Contract not awarded under the Micro-LBE Set-Aside Program, accompanied by an explanation as to why each such Contract either was not set aside, or, if set aside, was not awarded under the Micro-LBE Set-Aside Program.

(4)

Contracts that are set-aside for award to Micro-LBEs shall not be subject to subcontracting goals under Section 14B.8. Micro-LBEs that subcontract any portion of a set-aside contract should subcontract to businesses certified as Micro-LBEs, to the maximum extent possible. Micro-LBEs that subcontract any portion of a set-aside contract must serve a commercially useful function based on the contract's scope of work, and must perform at least twenty-five percent (25%) of the contract work.

(L)

Prompt payment. The City shall pay LBEs within thirty (30) days of the date on which the City receives an invoice for work performed for and accepted by the City. The Controller shall work with the Director and Contract Awarding Authorities to implement this Citywide prompt-payment policy. The City shall consult with affected community members and relevant City officials, including the Director, the Controller, and Contract Awarding Authorities, to design and implement a prompt payment program within six (6) months of the effective date of this Ordinance. Such program shall include procedures for the payment of late penalties where prompt payment does not occur.

(Added by Ord. 92-06, File No. 050784, App. 5/11/2006; Ord. 20-10, File No. 091405, App. 2/10/2010; Ord. 97-10, File No. 100333, App. 5/13/2010; Ord. 8-11, File No. 101006, App. 1/7/2011)

SEC. 14B.8. - SUBCONTRACTING.

(A)

LBE Participation Goals. Prior to soliciting bids, Contract Awarding Authorities shall provide the Director with a proposed job scope for each (1) Public Works/Construction Contract that equals or exceeds fifty percent (50%) of the Threshold Amount, and (2) each Architect/Engineering, Professional Service and General Services Contracts that equal or exceed fifty percent (50%) of the Minimum Competitive Amount. The Contract Awarding Authority may ask the Director to waive subcontracting goals where it anticipates that there are no subcontracting opportunities or there are not sufficient LBEs available to perform the subcontracting work available on the Contract.

The Director shall set LBE subcontracting participation goals for each such Contract, where appropriate, based on the following factors:

(1)

The extent of subcontracting opportunities presented by the Contract; and

(2)

The availability of Small and Micro-LBE Subcontractors certified to provide goods and services required under the scope of the proposed Contract.

Contractors shall satisfy the LBE subcontracting participation goals by using Small and Micro-LBEs with the following exception: If the Director determines there are not sufficient Small and Micro-LBEs available to perform the subcontracting work on the Contract, the Director may set goals based on the availability of all LBEs and permit Contractors to satisfy the goals by using Small, Micro or SBA-LBEs, or may set separate goals for Small and Micro-LBEs and for SBA-LBEs.

(B)

Satisfaction of Good Faith Efforts Requirements. At the time of a Bid, all Bidders must meet the LBE subcontracting participation goals set by the Director, and also must conduct good faith efforts and file evidence of good faith efforts as required in Sections 14B.(D) and (E) respectively, with the following exceptions

(1)

If upon submission of a Bid, the Bid demonstrates total LBE participation that exceeds by thirty-five percent (35%) the established LBE subcontracting participation goal for the Contract the Bid, the Bidder is not required to conduct good faith efforts or to file evidence of good faith efforts as required in Sections 14B.(D) and (E). For the sole purpose of determining whether a Bid exceeds by thirty-five percent (35%) the established LBE subcontracting participation goal, and therefore exempts the Bidder from the requirement to conduct and file evidence of good faith efforts, participation by the following LBEs shall be counted: Small and Micro-LBE prime contractors, Small and Micro-LBE Joint Venture partners, and Small and Micro-LBE Subcontractors. Participation by SBA-LBE Subcontractors shall be counted if under Subsection 14B(8)(A), the Director permitted use of SBA-LBE firms to satisfy subcontracting goals on the Contract.

(2)

Bidders on Public Works/Construction Contracts in an amount less than the Threshold Amount or on Architect/Engineering, Professional Services or General Services Contracts in an amount less than the Minimum Competitive Amount are not required to conduct good faith efforts or to file evidence of good faith efforts as required in Sections 14B.8(D) and (E) to select Subcontractors to meet LBE goals.

(C)

Bids that do not meet the LBE participation goal set under 14B.8(A) will be rejected as non-responsive unless the Director finds that the Bidder diligently undertook all the good faith efforts required by this Ordinance and that the

failure to meet the goal resulted from an excusable error. The Contract Awarding Authority shall require Bidders to contact a LBE before listing that LBE as a Subcontractor in the Bid. A Bid that fails to comply with this requirement will be rejected as non-responsive. In addition only LBEs that have been contacted and agreed to be listed as Subcontractors shall be credited toward meeting the LBE participation goal.

(D)

Good Faith Outreach. In addition to meeting the LBE participation goal, Bidders on (1) Public Works/Construction Contracts that equal or exceed the Threshold Amount; and (2) Architect/Engineering, Professional Services or General Services Contracts that equal or exceed the Minimum Competitive Amount shall undertake good faith outreach as set forth in this Section 14B.8 (D) to select Subcontractors to meet LBE goals. Except where a Contract does not include a subcontracting goal or a Bid is exempt from good faith outreach under Section 14B.8(B), Bids from Bidders who fail to conduct and/or to document good faith outreach steps as required by this Ordinance and duly promulgated HRC Rules and Regulations shall be declared nonresponsive.

The Human Rights Commission shall by Rule and Regulation assign a numeric value to each of the good faith outreach steps listed below. Adequate good faith outreach shall be a minimum of 80 points with a total of 100 points possible.

(1)

Attending any presolicitation, or prebid, meetings scheduled by the City to inform all bidders of LBE program requirements for the project for which the Contract is awarded;

(2)

Identifying and selecting subcontracting opportunities to meet LBE goals;

(3)

Advertising for LBE Subcontractors by posting the opportunity in an accessible location, specified by the City, not less than ten (10) calendar days before the date the Bids can first be submitted. The advertisement must include information where Bidders may obtain adequate information about the plans, specifications, and requirements for the work. This paragraph applies only if the City gave public notice of the project not less than fifteen (15) calendar days prior to the date the Bids can first be submitted;

(4)

Not less than ten (10) calendar days before the date the bids can first be submitted, contacting at least the requisite number of LBEs by trade certified to perform the identified work required by the 14B Rules and Regulations; and

(5)

Performing follow-up contact on the initial solicitation with interested Subcontractors and negotiating in good faith with LBEs, as set forth in the 14B Rules and Regulations, and not unjustifiably rejecting their Bids.

(6)

Advising and assisting interested LBEs that are bidding on and performing City Public Work and Construction Contracts with the City's bonding and financial assistance programs to obtain bonds, lines of credit, or insurance required by the City or the Bidder.

(E)

Documentation of Good Faith Outreach. Each Bid that equals or exceeds the Threshold Amount or the Minimum Competitive Amount, as applicable, shall document good faith outreach and include the documentation with the Bid. Such documentation shall include: (1) the dollar amount of each subcontract and a statement of the scope of work to be performed under the subcontract; (2) the identification of each subcontract awarded to an LBE and, (3) for each subcontract, copies of the Subcontractor Bids submitted. Such documentation shall contain at least the Bid amount and a description of the scope of work, and separately, for each subcontract, a full and complete statement of the reason(s) for selection of the Subcontractor. If the reason is based on relative qualifications, the statement must address the particular qualifications at issue. If the reason is the Bid's respective dollar amounts, the statement must state the amounts and describe the similarities and/or dissimilarities in the scope of work covered by the Bids. If no written Bids were submitted by some or all of the Subcontractors who bid the job, the Bidder shall submit a written statement containing (1) the amount of each oral bid; and (2) separately, for each subcontract, a full and complete statement of the reason(s) for selection of the Subcontractor. Bidders shall maintain the documentation described in this paragraph for three (3) years following submission of the Bid or completion of the Contract, whichever is later.

(Added by Ord. 92-06, File No. 050784, App. 5/11/2006; Ord. 265-08, File No. 081231, App. 11/25/2008; Ord. 20-10, File No. 091405, App. 2/10/2010; Ord. 8-11, File No. 101006, App. 1/7/2011)

SEC. 14B.9. - ENSURING NON-DISCRIMINATION IN SUBCONTRACTING.

(A)

Prohibition on Discrimination. A bidder may not discriminate in its selection of subcontractors against any person on the basis of race, gender, or any other basis prohibited by law.

(B)

Availability Data. In order to prevent unlawful discrimination in the selection of subcontractors, and to identify and correct unlawful practices, the City will monitor the administration of City contracts, including the selection of subcontractors, as provided in this Section. For public work/construction, architect/engineering, professional service, and general service contracts which the contract awarding authority reasonably anticipates will include subcontractor participation, prior to the solicitation of bids or proposals, the Director shall assemble data regarding the availability of MBEs, WBEs and OBEs to provide work that is likely to be subcontracted. The Director, in the Director's sole discretion, shall determine the appropriate methodology.

(C)

Requirements for Solicitations. In all solicitations of public work/construction, architect/engineering, professional service, and general service contracts which the contract awarding authority reasonably anticipates will include subcontractor participation, the contract awarding authority shall include the availability data described above. Bidders shall undertake all required good faith efforts outreach steps in such a manner as to ensure that neither MBEs nor WBEs nor OBEs are unfairly or arbitrarily excluded from the required outreach.

(D)

Review of Bid. The Director may review or investigate any bid, including the selection of the bidder's subcontractors, to determine whether discrimination may have occurred. The Director shall review bids, during the bid protest period, to determine whether: (1) a potential subcontractor or other person has filed a complaint of discrimination; (2) there is a significant difference between the percentages of MBEs, WBEs, or OBEs available to provide goods and services as subcontractors on the contract and the percentages of the bidder's subcontractors who are MBEs, WBEs, or OBEs; or (3) other facts and circumstances suggest that further inquiry is warranted. The Director, in the Director's sole discretion, shall determine whether and when to investigate further the conduct of a bidder or contractor. Investigations will be conducted under the procedures in Section 14B.17.

(Added by Ord. 92-06, File No. 050784, App. 5/11/2006)

SEC. 14B.10. - POWERS AND DUTIES OF THE COMMISSION AND THE DIRECTOR.

(A)

Human Rights Commission. In addition to the duties and powers given to the Human Rights Commission elsewhere, the Commission shall:

(1)

When necessary, subpoena persons and records, books and documents for a proceeding of the Commission or an investigation by the Director or an audit pursuant to Section 14B.10(B)(5) conducted to further the purposes of this Ordinance.

(2)

Adopt rules and regulations establishing standards and procedures for effectively carrying out this Ordinance.

(3)

Issue forms for the Controller or contract awarding departments to collect information from contractors as prescribed by this Ordinance.

(4)

Hear appeals challenging: (i) the Director's disqualification of a bidder or Contractor, (ii) the Director's denial of an application for or revocation of the certification of a business as a Small-LBE, Micro-LBE, MBE, WBE, or OBE or (iii) the Director's denial of a request to waive or to reduce subcontractor participation goals.

(5)

By regulation require contract awarding authorities, departments and the Controller to provide to the Director such information as will be necessary to enable the Director to report to the Mayor and the Board of Supervisors at the end of each fiscal year on the progress each City department has made towards the achievement of LBE participation goals and towards the goal of ensuring against discrimination and exclusion of MBEs, WBEs, or OBEs, and to perform his/her other duties. The database is a public record available to the public as provided by state and local law.

(6)

Adopt rules and regulations as deemed necessary by the Director to ensure that the joint venture bid/rating discount is applied only to joint ventures where the LBE has sufficient skill, experience, and financial capacity to perform the portion of the work identified for the LBE.

(B)

HRC Director. In addition to the duties and powers given to the HRC Director elsewhere, the Director shall:

(1)

Levy the same sanctions that a contracting awarding authority may levy as specified in Section 14B.17.

(2)

Ensure that the necessary data is collected and analyzed. Annually, and more often if the Director deems necessary, the Director shall identify areas of contracting where the City or any of its departments are failing to meet LBE participation goals or are contracting with MBEs, WBEs, or OBEs at rates less than would be

expected in the absence of discrimination. The results of this study shall be included in the Commission's annual report required by Section 14B.15(B).

(3)

Provide information and other assistance to LBEs to increase their ability to compete effectively for the award of City contracts.

(4)

Grant waivers as set forth in Sections 14B.7(J) and 14B.8(A), and disqualify a bidder or contractor as set forth in Section 14B.17.

(5)

In cooperation with the Controller, randomly audit at least three prime contractors each fiscal year in order to insure their compliance with the provisions of this Ordinance. The Director, in cooperation with the Controller, shall furthermore randomly audit 10 percent of the joint ventures granted bid discounts in each fiscal year. The Controller shall have the right to audit the books and records of the contractors, joint venture participants, and any and all subcontractors to insure compliance with the provisions of this Ordinance.

(6)

Take actions to ensure compliance with the provisions of this Ordinance, including, without limitation, intervening in the selection process, by modifying the criteria used for selecting selection panelists or contractors to correct any practices that hinder equal business opportunities for LBEs or Micro-LBEs, and for MBEs, WBEs, and OBEs.

(Added by Ord. 92-06, File No. 050784, App. 5/11/2006)

SEC. 14B.11. - POWERS AND DUTIES OF THE CONTROLLER.

(A)

In addition to the duties given to the Controller elsewhere, the Controller shall work cooperatively with the Director to provide such contractual encumbrance and payment data as the Director advises are necessary to monitor the participation of Small-LBEs, Micro-LBEs, MBEs, WBEs, and OBEs in City prime contracts. If any department refuses or fails to provide the required data to the Controller, the Controller shall immediately notify the Mayor, this Board and the Director.

(B)

The Controller shall not certify the award of any contract subject to this Ordinance where the Director has notified the Controller that the contract awarding authority has not provided the information the Director advises is necessary under this Ordinance.

(C)

Each request for payment to a City contractor submitted to the contract awarding authority shall be accompanied by a subcontractor participation form approved by the Commission. That form shall contain information that the Commission has determined is necessary to enable the Commission and the Director (1) to monitor compliance by City departments and their prime contractors with their obligations under this Ordinance (2) to determine whether City departments are achieving their prime and subcontracting goals under this Ordinance, and (3) to make such other reports and analyses as are required by this Ordinance.

In the event that a request for payment fails to include the information required pursuant to this Section, the contract awarding authority shall, within two working days, notify the Director and the affected prime contractor[s] of the failure and afford each affected prime contractor an opportunity to be heard promptly. That notice shall inform the contractor that the contract awarding authority has tentatively determined that the information has not been provided, what information is missing and that if this failure is substantiated, then the Controller will be notified to withhold 20 percent of the requested payment until the information is provided. If the Controller finds, after consultation with the Director and notice and opportunity to be heard, that the information has not been provided, the Controller shall withhold 20 percent of the payment otherwise due until the information is provided.

(D)

The contract awarding authority shall require all prime contractors to submit, within 10 days following payment to the prime contractor of moneys owed for work completed on a project, an affidavit under penalty of perjury, that all subcontractors on the project or job have been paid and the amounts of each of those payments. The name, telephone number and business address of every subcontractor shall be listed on the affidavit. If a prime contractor fails to submit this affidavit, the contract awarding authority shall notify the Director who shall take appropriate action as authorized under Section 14B.17.

(Added by Ord. 92-06, File No. 050784, App. 5/11/2006)

SEC. 14B.12. - POWERS AND DUTIES OF THE MAYOR.

In addition to the duties given to the Mayor elsewhere, the Mayor shall:

- (A) By July 1st of each fiscal year, issue notices to all City departments informing them of their duties under this Ordinance. The notice shall contain the following information: (1) the City-wide LBE goals that departments are expected to use good-faith efforts to attain during the fiscal year and that a department's failure to use good-faith efforts to attain the participation goals shall be reported to this Board in the Commission's annual report; (2) the availability of MBEs, WBEs, and OBEs to perform City contracting and that departments are expected to take all steps necessary to ensure against illegal or arbitrary discrimination or exclusion of any certified business; and (3) the data each department is required to provide the Controller on each contract award.
- (B) Coordinate and enforce cooperation and compliance by all Departments with this Ordinance.
- (C) Designate a liaison to the Human Rights Commission to facilitate communication and compliance with this Ordinance.

(Added by Ord. 92-06, File No. 050784, App. 5/11/2006)

SEC. 14B.13. - POWERS AND DUTIES OF CONTRACT AWARDING AUTHORITIES.

- (A) In addition to the powers and duties given to contract awarding authorities elsewhere, contract awarding authorities shall:
 - (1) Adjust bid bonding and insurance requirements in accordance with the most current version of the City's "Contract Insurance Manual" or as otherwise authorized by the City Risk Manager, Department of Administrative Services.
 - (2) Use the City's Surety Bonding Program set forth in Section 14B.16 to assist LBEs bidding on and performing City public works/construction contracts to meet bonding requirements and/or obtain construction loans.
 - (3) Submit to the Office of Contract Administration (OCA) in electronic format or a format specified by the OCA, all bid opportunities, requests for proposals and solicitations for which published notice or advertising is required, no later than 10 calendar days prior to the due date of the bid opportunity, request for proposals or solicitation. A contract awarding authority must obtain a waiver from its commission, or in the case of a department that has no commission, from the Board of Supervisors, if it cannot meet the requirements of this Section.
 - (4) Impose such sanctions or take such other actions as are designed to ensure compliance with the provisions of this Ordinance, which shall include, but are not limited to:
 - (a) Refuse to award a contract.
 - (b) Order the suspension of a contract.
 - (c) Order the withholding of funds.
 - (d) Order the revision of a contract based upon a material breach of contract provisions pertaining to LBE participation or outreach to MBEs, WBEs, or OBEs.
 - (e) Disqualify a bidder, contractor, subcontractor, or other business from eligibility for providing goods or services to the City for a period not to exceed five years, based on the standards set forth in this Ordinance and rules and regulations promulgated by the Commission. Any business disqualified under this subsection shall have a right to review and reconsideration by the Commission after two years upon a showing of corrective action indicating that violations are not likely to recur.
 - (5) Not award any contract to a person or business that is disqualified from doing business with the City under the provisions of this Ordinance.
 - (6) Designate a staff person to be responsible for responding to the Director and Commission regarding the requirements of this Ordinance.

- (7) Maintain accurate records as required by the Director and the Commission for each contract awarded, its dollar value, the nature of the goods or services to be provided, the name of the contractor awarded the contract, its identity as a Small-LBE, Micro - LBE, MBE, WBE or OBE, the efforts made by the contract awarding authority to solicit bids from LBEs, including Micro - LBEs, MBEs, WBEs and OBEs, responses received from such businesses, and a full and complete statement of the reason(s) for selection of the contractor addressing the particular qualifications at issue.
- (8) Where feasible, provide technical assistance to LBEs to increase their ability to compete effectively for the award of City contracts.
- (9) Work with the Director and the Controller to implement a City-wide prompt-payment policy requiring that LBEs be paid by the City within 30 days of the date on which the City receives an invoice from a LBE for work performed for the City.
- (10) Provide the Director with written notice of all contract amendments, modifications, supplements and change orders that cumulatively result in an increase or decrease of the contract's dollar amount of more than 10 percent. Such notice shall be provided within 10 days of each such contract modification.
- (11) Whenever contract amendments, modifications, supplements or change orders cumulatively increase the total dollar value of a contract by more than 10 percent, the contract awarding authority shall require compliance with those provisions of this Ordinance that applied to the original contract.
- (12) All contract amendments, modifications, supplements or change orders that cumulatively increase by more than 20 percent the total dollar value of all contracts originally valued at \$50,000 or more shall be subject to prior approval of the Director, who shall review the proposed amendment, modification, supplement or change order to correct contracting practices that exclude Small-LBEs or Micro - LBEs from new contracting opportunities or discriminate against MBEs, WBEs or OBEs.

(B) Contract awarding authorities or departments may invite, encourage or request businesses to joint venture on any professional services or architecture/engineering contract to promote LBE participation.

(C) For the purpose of determining LBE participation, contracts awarded to joint ventures in which one or more LBEs are combined with one or more business that are not LBEs shall be deemed by the contract awarding authority to be awarded to LBEs only to the extent of the LBE participation in the joint venture.

(D) Subject to the budgetary and fiscal provisions of the San Francisco Charter and to any limitations or requirements associated with the issuance of municipal financings, including but not limited to the use of tax-exempt financing and other long-term obligations, contract awarding authorities shall set aside the following percentage of the value of each contract, as defined in Section 14B.2, to fund the administration and enforcement of this [Chapter 14B](#) by the HRC. Such funds shall be used solely for the actual costs of administering and enforcing this Chapter. The HRC shall provide monthly statements to contract awarding authorities and the Controller's Office that account for all expenditures related to administering and enforcing this Chapter, broken down by staff member, project, and activity. Any funds that are not expended on the actual costs of administration and enforcement relating to the subject contract shall be returned to the source fund as soon as practicable. This Section 14B.13 (D) shall not apply to contracts that are funded by bonds that were authorized prior to the effective date of this Ordinance.

- (1) For contracts having an estimated value under \$1 million, the contract awarding authority shall set aside 2% of the value of the contract for the purpose described in this Section.
- (2) For contracts having an estimated value of at least \$1 million but less than \$10 million, the contract awarding authority shall set aside 1% of the value of the contract for the purpose described in this Section.
- (3) For contracts having an estimated value of at least \$10 million but less than \$50 million, the contract awarding authority shall set aside .5% of the value of the contract for the purpose described in this Section.
- (4) For contracts having an estimated value of \$50 million or more, the HRC Director, in consultation with the contract awarding authority, shall determine the level of funding necessary to administer and enforce this Ordinance with respect to the subject contract, provided that the funding shall not exceed .5% of the value of the contract. The contract awarding authority shall set aside the designated funds to be used solely for the purpose described in this Section.

(5)

Notwithstanding Sections 14B.13 (D)(1), (2), (3) and (4), for the Port of San Francisco, the San Francisco Public Utilities Commission, the San Francisco Department of Public Works and the San Francisco International Airport, each such contract awarding authority and the HRC Director shall confer and jointly shall estimate the costs of administering and enforcing this Chapter with respect to each contract to be issued by each such contract awarding authority. The contract awarding authority shall set aside the agreed-upon funds to be used solely for the purpose described in this Section.

If, after exchanging information regarding the nature of the contract and the administrative activities required, the contract awarding authority and the Director do not agree on the cost of administering and enforcing this Chapter, the Mayor or the Mayor's designee shall determine the appropriate amount to be set aside for the purpose described in this Section.

The Human Rights Commission shall report on compliance by contract awarding authorities with set-asides determined under this Section 14B.13 (D)(5) and on the agreed upon funds for contract awarding authorities under 14B.13 (D)(5) in the Commission's annual report under Section 14B.15 (B).

The Board of Supervisors shall assess the operation of this Section 14B.13 (D)(5) in its three-year review under Section 14B.18 (H).

(Added by Ord. 92-06, File No. 050784, App. 5/11/2006; Ord. 20-10, File No. 091405, App. 2/10/2010)

SEC. 14B.14. - POWERS AND DUTIES OF THE OFFICE OF CONTRACT ADMINISTRATION.

In addition to the duties given the Office of Contract Administration elsewhere, the Office of Contract Administration shall:

(A)

Maintain, with the assistance of the Director, a current list of Small-LBEs, Micro-LBEs, MBEs, WBEs, and OBEs to provide each of those commodities or services subject to this Ordinance that the Office of Contract Administration indicates are required by the City.

(B)

Maintain a central office where all bids, requests for proposals and solicitations will be listed and kept current.

(C)

Cause to be posted upon a website the following information concerning current bids, requests for proposals and solicitations: the title and number; the name of the contract awarding authority; and the name and telephone number of the person to be contacted for further information. Such information shall be posted with sufficient lead time to provide adequate notice and opportunity to potential City contractors and vendors to participate in the bid opportunity, request for proposals or solicitation, but in no event less than 10 calendar days prior to the due date for such bid opportunity, request for proposals or solicitation.

(Added by Ord. 92-06, File No. 050784, App. 5/11/2006)

SEC. 14B.15. - REPORTING AND REVIEW.

(A)

Reporting by the Director. Commencing January 1, 2007, and no later than the first day of every third month thereafter, the Director shall issue a written report to this Board. That report shall document each City department's performance under the terms of this Ordinance, including, among other things, each City department's progress in meeting LBE goals and ensuring non-discrimination against MBEs, WBEs, and OBEs, and the success of each department's prime contractors in complying with the LBE subcontracting provisions of this Ordinance and ensuring non-discrimination against MBEs, WBEs, and OBEs. That report shall also state the level of participation of all categories of LBEs and whether or not each City department has fully reported all data required by this Ordinance or requested by HRC or the Controller.

(1)

Whenever the Director's report concludes that a department management's intentional disregard or negligent performance of obligations imposed by this Ordinance has contributed to that department's failure to meet its subcontracting goals or requirements of this Ordinance, or the failure of its prime contractors to meet their subcontracting goals or requirements of this Ordinance, or whenever the Director's report concludes that a City department has failed to provide any data required by this Ordinance or requested by the HRC or the Controller, the Clerk of this Board shall schedule before the appropriate Committee of the Board a hearing on that report. The Clerk shall also give notice of that hearing to the heads of the departments identified in the report and request the attendance of the heads of those departments at the committee hearing. The Clerk's notice shall inform the department heads that they must be prepared to respond to the Director's finding of intentional disregard and/or negligent performance and to explain what

steps they intend to take to forestall repetition of the problems identified in the Directors' report. The same procedure shall be followed whenever the Director's report identifies any department as having failed to meet its prime or subcontracting goals for three (3) consecutive quarters. If the Director's report indicates that a City department has not meet its goals for three (3) consecutive quarters, HRC and the City department shall institute a targeted program to remedy lack of participation by LBEs in any affected industry.

(2)

The Director shall report to the Commission all waivers acted upon pursuant to Section 14B.7(J) and 14B.8(A). Such report shall be made on a monthly basis following the granting of the waiver.

(B)

Reporting by City Departments.

(1)

As part of their annual budget submission to the Board of Supervisors, all Contract Awarding Authorities and City departments shall report annually:

(a)

to the Mayor on their progress in the preceding fiscal year toward the achievement of the LBE goals and their steps to ensure non-discrimination against MBEs, WBEs, and OBEs; and

(b)

to the Board of Supervisors, on their compliance with the Micro-LBE Set Aside Program in accordance with Section 14B.7(K)(3).

(2)

All Contract Awarding Authorities and City departments shall cooperate with requests by the Human Rights Commission for information needed by the Human Rights Commission to make the reports to the Board of Supervisors required by [Chapter 14B.15\(A\)](#).

(C)

Reporting by the Commission. By July 1st of each fiscal year, the Commission shall submit an annual report to the Mayor and this Board on the progress of the City toward the goals of this Ordinance, together with an identification of problems and specific recommendations for: (1) improving the City's performance in fostering LBE participation in City contracting and (2) ensuring non-discrimination against MBEs, WBEs, and OBEs. The Commission's report shall include an analysis of the bidding environment in the various industries that participate in City contracts.

Each year, after receiving the Commission's annual report, the Board shall hold a hearing to review the City's performance under this Ordinance, the administration of this Ordinance by the HRC, and the progress of City departments towards the purposes of this Ordinance, and other subjects pertaining to the ordinance.

The Board shall act upon the Commission's recommendations by the first Board meeting of January in each fiscal year.

(Added by Ord. 92-06, File No. 050784, App. 5/11/2006; Ord. 20-10, File No. 091405, App. 2/10/2010; Ord. 8-11, File No. 101006, App. 1/7/2011)

SEC. 14B.16. - SAN FRANCISCO BONDING AND OTHER ASSISTANCE.

(A)

San Francisco Bonding and Financial Assistance Program.

(1)

Program Description. The City and County of San Francisco, acting through the Commission, intends to provide guarantees to private bonding companies and financial institutions in order to induce those entities to provide required bonding and financing to eligible contractors and subcontractors bidding on and performing City public works/construction contracts. This bonding and financial assistance program is subject to the provisions of this Section 14B.16(A).

(2)

Eligible Contracts. The assistance described in this Section 14B.16(A) shall be available for any City public works/ construction contract to which this Ordinance applies.

(3)

Eligible Businesses. Businesses must meet the following criteria to qualify for assistance under this Section 14B.16(A).

(a)

The business may be either a prime contractor or subcontractor; and

(b)

The business must be certified by the Director as an LBE according to the requirements of Section 14B.3, 14B.5, or 14B.6;

- (c) The business may be required to participate in a "bonding assistance training program" as offered by the Commission, which is anticipated to provide the following:
 - (i) Bond application assistance.
 - (ii) Assistance in developing financial statements,
 - (iii) Assistance in development of a pre-bond surety profile,
 - (iv) Identification of internal financial control systems, and
 - (v) Development of accurate financial reporting tools.

(4) **Agreements Executed by the Human Rights Commission.** The Director is hereby authorized to enter into the following agreements in order to implement the bonding and financial assistance program described in this Section 14B.16(A):

- (a) With respect to a surety bond, the agreement to guaranty up to 40 percent of the face amount of the bond or \$750,000, whichever is less;
- (b) With respect to a construction loan to be made to a contractor or subcontractor, an agreement to guaranty up to 50 percent of the original principal amount of the construction loan or 50 percent of the actual loss suffered by the financial institution as a result of a loan default, whichever is less; provided that in any event the City's obligations with respect to a guaranty shall not exceed \$750,000;
- (c) Any other documents deemed necessary by the Director to carry out the objectives of this program, provided that such documents shall be subject to review and approval by the City Attorney's Office.

(5) **Monitoring and Enforcement.** The Director shall maintain records on the use and effectiveness of this program, including but not limited to (1) the identities of the businesses and bonding companies participating in this program, (2) the types and dollar amounts of public work contracts for which the program is utilized, and (3) the types and dollar amounts of losses which the City is required to fund under this program. The Director shall submit written reports to the Board of Supervisors every six months beginning January 1, 2007, advising the Board of the status of this program and its funding capacity, and an analysis of whether this program is providing to be useful and needed.

(6) **Contributions to the San Francisco Self-Insurance Surety Bond Fund.** Subject to the budgetary and fiscal provisions of the San Francisco Charter, each department that conducts public works or improvements under Chapter 6 of the Administrative Code shall contribute annually to the San Francisco Self-Insurance Surety Bond Fund ("the Fund") an amount that is set by multiplying the annual contribution rate set pursuant to Section 10.100-371(c) times its total appropriations for capital construction and improvement.

(7) No later than May 1, 2009, the Director in consultation with the City's Risk Manager shall conduct a study of the City's maintenance and facility contracts for the purpose of recommending a process for the annual contribution rate that would enable the City to include such contracts in the City's Bonding and Financial Assistance Program. No later than June 1, 2009, the Director shall transmit to the Board of Supervisors appropriate legislation to include maintenance and facility contracts in the program.

(8) The Treasurer of the City and County of San Francisco is hereby authorized to negotiate a line(s) of credit or any credit enhancement program(s) or financial product(s) with a financial institution(s) to provide funding; the program's guaranty pool may serve as collateral for any such line of credit.

In the event the City desires to provide credit enhancement under this Subsection for a period in excess of one fiscal year, the full aggregate amount of the City's obligations under such credit enhancement must be placed in a segregated account encumbered solely by the City's obligations under such credit enhancement.

(9) **Term of Bonding Assistance Program.** The Director is authorized to enter into the agreements described in this Subsection for a period ending on the earlier of (1) June 30, 2013 or (2) the date on which the Controller is no longer able to certify the availability of funds for any new guarantee agreement.

(10)

Default on Guarantees. The Human Rights Commission shall decertify any contractor that defaults on a loan or bond for which the City has provided a guarantee on the contractor's behalf. However, the Human Rights Commission may in its sole discretion refrain from such decertification upon a finding that the City has contributed to such default.

(B)

Education and Training. The Director shall continue to develop and to strengthen education and training programs for LBEs and City contract awarding personnel.

(C)

Cooperative Agreements. With the approval of the Commission and the Board of Supervisors, the Director may enter into cooperative agreements with agencies, public and private, concerned with increasing the use of LBEs in government contracting.

(Added by Ord. 92-06, File No. 050784, App. 5/11/2006; Ord. 314-08, File No. 081443, App. 12-19-2008; Ord. 8-11, File No. 101006, App. 1/7/2011)

SEC. 14B.17. - ENFORCEMENT.

(A)

The Director shall monitor the City's utilization of Small-MBEs, Micro-LBEs, MBEs, WBEs, and OBEs in City contracting. The Director shall issue an exit report for any contract that includes LBE subcontracting participation and/or LBE prime contract participation as a joint venture partner. The purpose of this exit report is to ensure that prime contractors are complying with their commitments to use LBE subcontractors and LBEs are performing services as set forth in the bid/proposal and contract documents for the joint ventures.

(B)

Investigations. The Director shall investigate potential violations of this Ordinance.

Bidders, contractors, subcontractors and applicants for certification shall provide to the City any information that the City deems relevant, and shall cooperate in all other respects with such an investigation. A request for information from a bidder, contractor, subcontractor or applicant shall identify the records required and the time for response. If the bidder, contractor, subcontractor or applicant fails to respond to the request for information, or otherwise fails to cooperate in the investigation, appropriate sanctions, as provided in Section 14B.17(C), may be imposed. In an investigation of potential discrimination by a prime bidder prior to contract award, if the bidder fails to respond to the request for information, or otherwise fails to cooperate in the investigation, the bid will be rejected as non-responsive, and additional sanctions may be imposed.

(C)

Conference and Conciliation. In the Director's sole discretion, the Director may attempt to resolve noncompliance with this Ordinance by any bidder, contractor, subcontractor or applicant for certification through informal processes, including conference and conciliation.

(D)

Sanctions. The City, including the Director and contract awarding authorities, as appropriate, may impose any of the following sanctions on a bidder, contractor, subcontractor or applicant for certification who fails to comply with this Ordinance, provided that, any violation related to certification must be based on a finding by the Director:

(1)

Reject all bids;

(2)

Declare a bid non-responsive;

(3)

Suspend a contract;

(4)

Withhold funds;

(5)

Assess penalties;

(6)

Debar a bidder;

(7)

Deny certification;

(8)

Revoke certification.

(E)

Procedures for Denials or Revocation of Certification. Whenever the Director proposes to deny an application for or revoke the certification of a business, the Director shall notify the applicant or certified business in writing of the

basis for the denial or revocation, and the date on which the business will be eligible to reapply for certification. The Director shall provide the applicant or certified business with an opportunity to be heard before a final determination is made. The Director shall require a business to wait at least six months but not more than two years after the denial or revocation before reapplying for certification in the same category.

(F)

Procedures for Director Findings of Discrimination. In determining whether a bidder, contractor or subcontractor has engaged in discrimination in violation of this Ordinance, the Director may consider: (1) direct evidence of discrimination, (2) procedures used to select subcontractors, including relative qualifications, (3) significant differences not attributable to any legitimate non-discriminatory business reason between the available percentages of MBEs, WBEs, or OBEs capable of providing goods and services as subcontractors on a contract or a series of contracts and the percentages of the bidder's subcontractors who are MBEs, WBEs, or OBEs, or (4) any other relevant evidence.

Whenever the Director proposes to issue a finding of discrimination against any bidder, contractor or subcontractor, the Director shall notify the bidder, contractor or subcontractor in writing of the basis for the finding, provided that any proposal to debar a business shall be governed by Section 14B.17(G) The Director shall provide the bidder, contractor or subcontractor with an opportunity to be heard before a final determination is made.

(G)

Procedures for Debarment. The Director shall have the authority to act as a charging official under San Francisco Administrative Code Chapter 28 to debar a bidder or contractor for violations of this Chapter. The debarment procedures of Chapter 28 shall govern.

(H)

Commission to Hear Appeals. Except as provided in Section 14B.17(G), the Commission shall hear appeals challenging any determination of the Director under this Section. The Commission may sustain, reverse or modify the Director's findings and sanctions imposed, or take such other action to effectuate the purpose of this Ordinance. Unless the Commission so orders, an appeal shall not stay the Director's findings and the imposition of sanctions.

(I)

Referral to Other Agencies. No person shall knowingly make, file or cause to be filed with the City any materially false or misleading statement or report in connection with this Ordinance. If the Director has reason to believe that any person has knowingly made, filed, or caused to be filed with the City any materially false or misleading statement or report made in connection with this Ordinance, the Director shall report that information may impose any sanction described in this Section 14B.17, or may refer the matter to the City Attorney or the District Attorney for appropriate action.

(J)

Willful Noncompliance by Contract Awarding Authority. Whenever the Director finds after investigation that a contract awarding authority has willfully failed to comply with its duties under this Ordinance, the Director shall transmit a written finding of noncompliance specifying the nature of the noncompliance, to the contract awarding authority, the Commission, the Mayor and this Board.

The Director shall attempt to resolve any noncompliance through conference and conciliation. Should such attempt fail to resolve the noncompliance, the Director shall transmit a copy of the finding of noncompliance along with a finding that conciliation was attempted and failed to the Commission and this Board.

The finding of noncompliance shall be communicated to the Mayor for appropriate action to secure compliance.

(Added by Ord. 92-06, File No. 050784, App. 5/11/2006)

SEC. 14B.18. - APPLICABILITY, OPERATIVE DATE AND TRANSITION PROVISIONS.

(A)

Suspension of Chapter 12D.A. All provisions of Administrative Code Chapter 12D.A that were invalidated by the San Francisco Superior Court orders dated July 26 and August 23, 2004, in *Coral Construction, Inc. v. City and County of San Francisco* (S.F. Sup. Ct. No. 421249) shall be and are suspended and are of no force and effect; provided, however, if the injunction is lifted or stayed in its entirety, Chapter 12D.A shall become effective and enforceable 120 days after date of said action and this [Chapter 14B](#) shall be suspended.

(B)

Operative date of this Chapter. [Chapter 14B](#) shall become operative on September 1, 2006, and shall govern all contracts initiated on or after that date.

(C)

Applicability. Chapters 12D.A, 14A and 14B shall apply as follows:

(1)

Any amendment to a contract initiated before July 26, 2004 in which the Contractor agreed to comply with Chapter 12D.A shall be governed by Chapter 12D.A; provided, however, that if a competitive solicitation for

an agreement to the proposed changes to the contract is required by law, or the law would otherwise require execution of a new contract, rather than an amendment to an existing contract, the provisions of [Chapter 14B](#) and not Chapter 12D.A shall apply.

[Chapter 14A](#) shall apply to (1) all contracts in which the Contractor agreed to comply with [Chapter 14A](#) and any amendment to those contracts and (2) all contracts initiated on or after July 26, 2004 and before September 1, 2006 and any amendment to such contracts; provided, however, that if a competitive solicitation for an agreement to the proposed changes to the contract is required by law, or the law would otherwise require execution of a new contract, rather than an amendment to an existing contract, the provisions of [Chapter 14B](#) and not [Chapter 14A](#) shall apply.

(2)

This [Chapter 14B](#) shall govern all contracts initiated on or after September 1, 2006, and any amendments thereto.

(3)

For all contracts described in Section 14B.18(C)(1) and Section 14B.18(C)(2) to which this [Chapter 14B](#) applies, when any provision of the San Francisco Municipal Code or other local law refers to Chapter 12D.A or 14A of the San Francisco Administrative Code, it shall be read as referring instead to [Chapter 14B](#).

(D)

Transition Provisions. In order to effect an orderly transition from [Chapter 14A](#) to this Ordinance, any business certified as an LBE under Chapter 12D.A or a DBE under [Chapter 14A](#) shall be deemed an LBE under this [Chapter 14B](#) until the earlier of (1) the expiration of the business' certification under 12D.A or 14A, (2) the business' failure to maintain the certification criteria under which it was certified, or (3) January 1, 2007. The Director may, by appropriate rules and regulations, establish procedures to allow such businesses certified as LBEs or DBEs under 12D.A or 14A to demonstrate their eligibility for certification under Section 14B.3 of this Ordinance on an expedited basis, prior to the expiration of their existing certification.

The Director shall deem any application for DBE certification under [Chapter 14A](#) that is pending on the effective date of this Ordinance to be an application for certification under [Chapter 14B](#).

(E)

State or Federal Provisions. In contracts which involve the use of any funds furnished, given or loaned by the Government of the United States or the State of California, all laws, rules and regulations of the Government of the United States or the State of California or of any of its departments relative to the performance of such work and the conditions under which the work is to be performed, shall prevail over the requirements of this Ordinance when such laws, rules or regulations are in conflict.

(F)

Severability. The provisions of this Ordinance are declared to be separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section or portion of this Ordinance, or the invalidity of the application thereof to any person or circumstances shall not affect the validity of the remainder of this Ordinance, or the validity of its application to other persons or circumstances.

(G)

General welfare clause. In undertaking the enforcement of this Ordinance, the City is assuming an undertaking only to promote the general welfare. It is not assuming, nor is it imposing on its officers and employees, an obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury.

(H)

Three-year review. No later than three years from the effective date of this Ordinance, the Board of Supervisors shall hold a hearing for the purpose of conducting a comprehensive review of this Ordinance. The Board shall take testimony from all affected parties, and shall enact any changes that it deems appropriate.

(I)

Municipal Transportation Agency. Consistent with Charter Section 8A.101(g), the Municipal Transportation Agency shall comply with the provisions of this [Chapter 14B](#).

(1)

Any contract may provide for progressive payments, if the Advertisement For Bids shall so specify. Each progress payment shall constitute full compensation for the value of work performed and materials furnished for a specified period, less amounts withheld as a result of dispute or as required by law.

(2)

From every progress payment, the City shall hold 10 percent in retention.

(3)

If the department head responsible for the public work or his/her designee determines that the contract is 50 percent or more complete, that the contractor is making satisfactory progress, and that there is no specific cause for greater withholding, the department head or his/her designee, upon the written request of contractor, may authorize one of the following two options: (a) the City shall release part of the retention to

the contractor so that the amount held in retention by the City, after release to the contractor, is reduced to an amount not less than 5 percent of the total value of the labor and materials furnished, and the City shall proceed to retain 5 percent of any subsequent progress payment under the contract; or (b) the City shall continue to hold the already withheld retention amount, up to 5 percent of the total contract price, and shall not deduct further retention from progress payments.

(4)

Retention shall be withheld solely for the benefit and protection of the City.

(5)

The City shall release retention to the contractor upon the following conditions: (a) the contractor has reached final completion under the contract terms and conditions and (b) the contract is free of offsets by the City for liquidated damages, defective work and the like, and is free of stop notices, forfeitures, and other charges. When the department head responsible for the public work or his/her designee determines that the contract is 98 percent or more complete, the department head or his/her designee may reduce retention funds to an amount equal to 200 percent of the estimated value of work yet to be completed, provided that the contract is free of offsets by the City and is free of stop notices, forfeitures, and other charges.

(6)

In no event shall the City be liable for interest or charges arising out of or relating to the date the City issues any progress payment or the date the City releases all or part of the retention, except that the City will pay interest at the legal rate, as set forth in section 685.010(a) of the California Code of Civil Procedure as that section may be amended from time to time, on any improperly withheld amounts commencing no earlier than 90 days after the date the City should have made any progress payment or released all or part of the retention. Under no circumstances shall the legal rate of interest paid by the City under this provision exceed 10 percent per annum. The payment of interest under this provision is the limit of the City's liability with respect to any claim for interest on improperly withheld amounts.

(Added by Ord. 92-06, File No. 050784, App. 5/11/2006; Ord. 116-08, File No. 080613, App. 7/11/2008)

SEC. 14B.19. - SUBCONTRACTING: DESIGN-BUILD AND INTEGRATED PROJECT DELIVERY CONTRACTS.

(A)

For design-build contracts authorized under Administrative Code [Section 6.61](#) and integrated project delivery contracts authorized under Administrative Code [Section 6.68](#), the Director shall establish project-wide subcontracting and subconsulting goals for LBE participation.

(B)

The procedure to attain the project-wide LBE goals for low bid design-build contracts awarded under Administrative Code Chapter 6, [Section 6.61](#), shall be in accordance with Section 14B.8.

(C)

The procedure to attain the project-wide LBE goal for trade package subcontracts awarded under design-build contracts (Administrative Code Chapter 6, [Section 6.61](#)(L)) and integrated project delivery contracts (Administrative Code Chapter 6, [Section 6.68](#)), shall be as follows:

(1)

Prior to the advertisement of a trade package design-build contract or an integrated project delivery contract, the Director shall determine the availability of LBEs who could perform the work or supply materials and equipment for each trade package, with reference to the project-wide LBE subcontracting and subconsulting participation goals. In the case of a design-build prime contract, the professional design services such as architectural or engineering performed by LBE firms will be credited toward the established project-wide goal. In the case of a trade package subcontract where some or all of the work is design-build, professional design services such as architectural or engineering performed by LBE firms will be credited toward the established trade package goal.

(2)

The Design-Builder or Construction Manager/General Contractor (the "Prime Contractor") shall undertake the good faith outreach required in Section 14B.8(D).

(3)

The Prime Contractor, with the assistance of the Director, shall set forth the LBE goal for each trade package. Upon receipt of bids from trade package subcontractors for a specific scope of work, the Director shall evaluate whether or not the trade package low bidder has met the stated LBE goal.

(4)

In the event the trade package low bidder fails to meet the stated goal, the bidder shall be allowed to make up the goal within two weeks of bid opening, provided the bidder does not violate the California Subletting and Subcontracting Fair Practices Act (Public Contract Code Section 4100 et seq.). Failure by the bidder to achieve the goal within the two week period, or within some other time allowed by the Director in writing, shall deem the bidder ineligible for award of the trade package subcontract. In such an instance, the Director and the Prime Contractor shall evaluate the second low bidder in the same manner for potential contract award.

(5)

The Director shall monitor the actual LBE participation being attained as the trade package bids are received. In the event the Director determines that the actual LBE participation at a particular time in the bidding of trade packages is less than anticipated, relative to the project LBE goal, the Prime Contractor shall make all efforts to negotiate and award trade packages to LBEs using the seven and one half percent (7½%) of total trade package costs available to it for negotiating subcontracts per Administrative Code Chapter 6, Sections [6.61\(L\)\(3\)](#) or [6.68\(H\)\(3\)](#), as appropriate. After all the trade packages have been awarded, the Prime Contractor must have met the project-wide LBE subcontracting/subconsulting goal. Otherwise, the Prime Contractor shall be subject to sanctions as described herein in Section 14B.17.

(Added by Ord. 18-10, File No. 091404, App. 2/10/2010)