

1 [Administrative Code - Repealing Provisions Extending the Expiration Date of the 2003
2 Minority Business Enterprise/Women Business Enterprise/Local Business Enterprise
3 Ordinance]

4 **Ordinance amending the San Francisco Administrative Code by: 1) repealing**
5 **Section 12D.A.22 and amending Section 14B.18, to repeal provisions extending**
6 **expiration of Chapter 12D.A in the event the injunction in Coral Construction, Inc., v.**
7 **City and County of San Francisco (S.F. Sup. Ct. No. 421249) is lifted or stayed; and**
8 **2) amending a cross-reference to Section 14B.18 in Section 14B.13(D)(5).**

9 NOTE: Additions are *single-underline italics Times New Roman*;
10 deletions are *strike-through italics Times New Roman*.
11 Board amendment additions are double-underlined;
12 Board amendment deletions are ~~strike through normal~~.

13 Be it ordained by the People of the City and County of San Francisco:

14 Section 1. The San Francisco Administrative Code is hereby amended by
15 repealing Section 12D.A.22 in its entirety.

16 ~~**SECTION 12D.A.22. EXPIRATION.**~~

17 ~~*Coral Construction, Inc. v. City and County of San Francisco (S.F. Sup. Ct. No. 421249)*~~
18 ~~*invalidated portions of this Chapter and enjoined the City from implementing this program. As a*~~
19 ~~*result, the City implemented a race and gender neutral program under Chapter 14B of the San*~~
20 ~~*Francisco Administrative Code and suspended Chapter 12D.A. of the San Francisco Administrative so*~~
21 ~~*long as, and only to the extent that, the City is enjoined by the court from enforcing the provisions of*~~
22 ~~*this Chapter. In the event the injunction is lifted or stayed, this ordinance shall expire one year from*~~
23 ~~*date of said action. If, during that year, the Commission, after conducting public hearings, finds that*~~
24 ~~*the purposes identified in Chapter 12D.A.3 have not yet been achieved and the program continues to be*~~
25 ~~*required under federal law, the Commission shall certify that finding to this Board no later than 120*~~

1 ~~days prior to the expiration date. Thereafter, upon a finding of good cause, this Board may extend the~~
2 ~~ordinance for additional three-year periods.~~

3 Section 2. The San Francisco Administrative Code is hereby amended by amending
4 Section 14B.18, to read as follows:

5 **SECTION 14B.18. APPLICABILITY, OPERATIVE DATE AND TRANSITION PROVISIONS.**

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

12 ~~(A)~~ (B) Operative date of this Chapter. Chapter 14B shall become operative on
13 September 1, 2006, and shall govern all contracts initiated on or after that date.

14 ~~(B)~~ (C) Applicability. Chapters 12D.A, 14A and 14B shall apply as follows:

15 (1) Any amendment to a contract initiated before July 26, 2004 in which the
16 Contractor agreed to comply with Chapter 12D.A shall be governed by Chapter 12D.A;
17 provided, however, that if a competitive solicitation for an agreement to the proposed changes
18 to the contract is required by law, or the law would otherwise require execution of a new
19 contract, rather than an amendment to an existing contract, the provisions of Chapter 14B and
20 not Chapter 12D.A shall apply.

21 Chapter 14A shall apply to (1) all contracts in which the Contractor agreed to
22 comply with Chapter 14A and any amendment to those contracts and (2) all contracts initiated
23 on or after July 26, 2004 and before September 1, 2006 and any amendment to such
24 contracts; provided, however, that if a competitive solicitation for an agreement to the
25 proposed changes to the contract is required by law, or the law would otherwise require

1 execution of a new contract, rather than an amendment to an existing contract, the provisions
2 of Chapter 14B and not Chapter 14A shall apply.

3 (2) This Chapter 14B shall govern all contracts initiated on or after September 1,
4 2006, and any amendments thereto.

5 (3) For all contracts described in Section 14B.18(B)(1) ~~14B.18(C)(1)~~ and Section
6 14B.18(B)(2) ~~14B.18(C)(2)~~ to which this Chapter 14B applies, when any provision of the San
7 Francisco Municipal Code or other local law refers to Chapter 12D.A or 14A of the San
8 Francisco Administrative Code, it shall be read as referring instead to Chapter 14B.

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

18 The Director shall deem any application for DBE certification under Chapter 14A that is
19 pending on the effective date of this Ordinance to be an application for certification under
20 Chapter 14B.

21 (D) ~~(E)~~ State or Federal Provisions. In contracts which involve the use of any funds
22 furnished, given or loaned by the Government of the United States or the State of California,
23 all laws, rules and regulations of the Government of the United States or the State of
24 California or of any of its departments relative to the performance of such work and the
25

1 conditions under which the work is to be performed, shall prevail over the requirements of this
2 Ordinance when such laws, rules or regulations are in conflict.

3 (E) ~~(F)~~ Severability. The provisions of this Ordinance are declared to be separate and
4 severable. The invalidity of any clause, sentence, paragraph, subdivision, section or portion of
5 this Ordinance, or the invalidity of the application thereof to any person or circumstances shall
6 not affect the validity of the remainder of this Ordinance, or the validity of its application to
7 other persons or circumstances.

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

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

16 (H) ~~(I)~~ Municipal Transportation Agency. Consistent with Charter Section 8A.101(g),
17 the Municipal Transportation Agency shall comply with the provisions of this Chapter 14B.

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

22 (2) From every progress payment, the City shall hold 10 percent in retention.

23 (3) If the department head responsible for the public work or his/her designee
24 determines that the contract is 50 percent or more complete, that the contractor is making
25 satisfactory progress, and that there is no specific cause for greater withholding, the

1 department head or his/her designee, upon the written request of contractor, may authorize
2 one of the following two options: (a) the City shall release part of the retention to the
3 contractor so that the amount held in retention by the City, after release to the contractor, is
4 reduced to an amount not less than 5 percent of the total value of the labor and materials
5 furnished, and the City shall proceed to retain 5 percent of any subsequent progress payment
6 under the contract; or (b) the City shall continue to hold the already withheld retention amount,
7 up to 5 percent of the total contract price, and shall not deduct further retention from progress
8 payments.

9 (4) Retention shall be withheld solely for the benefit and protection of the City.

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

19 (6) In no event shall the City be liable for interest or charges arising out of or
20 relating to the date the City issues any progress payment or the date the City releases all or
21 part of the retention, except that the City will pay interest at the legal rate, as set forth in
22 section 685.010(a) of the California Code of Civil Procedure as that section may be amended
23 from time to time, on any improperly withheld amounts commencing no earlier than 90 days
24 after the date the City should have made any progress payment or released all or part of the
25 retention. Under no circumstances shall the legal rate of interest paid by the City under this

1 provision exceed 10 percent per annum. The payment of interest under this provision is the
2 limit of the City's liability with respect to any claim for interest on improperly withheld amounts.

3 Section 3. The San Francisco Administrative Code is hereby amended by amending
4 Section 14B.13, so that 14B.13(D) shall read as follows:

5 **SECTION 14B.13. POWERS AND DUTIES OF CONTRACT AWARDING AUTHORITIES.**

6 * * *

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

20 (1) For contracts having an estimated value under \$1 million, the contract
21 awarding authority shall set aside 2% of the value of the contract for the purpose described in
22 this Section.

23 (2) For contracts having an estimated value of at least \$1 million but less than
24 \$10 million, the contract awarding authority shall set aside 1% of the value of the contract for
25 the purpose described in this Section.

1 (3) For contracts having an estimated value of at least \$10 million but less than
2 \$50 million, the contract awarding authority shall set aside .5% of the value of the contract for
3 the purpose described in this Section.

4 (4) For contracts having an estimated value of \$50 million or more, the HRC
5 Director, in consultation with the contract awarding authority, shall determine the level of
6 funding necessary to administer and enforce this Ordinance with respect to the subject
7 contract, provided that the funding shall not exceed .5% of the value of the contract. The
8 contract awarding authority shall set aside the designated funds to be used solely for the
9 purpose described in this Section.

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

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

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

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

3 Section 4. Effective Date. This ordinance shall become effective 30 days from the
4 date of passage.

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6 APPROVED AS TO FORM:
7 DENNIS J. HERRERA, City Attorney

8 By: _____
9 CHRISTINE VAN AKEN
10 Deputy City Attorney