File No. 120818 Committee Item No. 1
Board Item No. _____

COMMITTEE/BOARD OF SUPERVISORS

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Committee: City Operations **Date** 9/24/2012

Board of Supervisors Meeting **Date** _____

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Completed by: Derek Evans **Date** 9/20/2012
Completed by: _____ **Date** _____

An asterisked item represents the cover sheet to a document that exceeds 25 pages.
The complete document can be found in the file.

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

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

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

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

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

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

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

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

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

SECTION 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.*~~

(A) ~~*(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.

(B) ~~*(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(B)(1)* ~~*14B.18(C)(1)*~~ and Section *14B.18(B)(2)* ~~*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.

(C) ~~*(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.

(D) ~~*(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.

(E) ~~(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.

(F) ~~(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.

(G) ~~(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.

(H) ~~(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.

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

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

* * *

(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)*~~ *14B.18(G)*.

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

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

By: _____
CHRISTINE VAN AKEN
Deputy City Attorney

FILE NO. 120818

LEGISLATIVE DIGEST

[Administrative Code – Repealing provisions extending the expiration date of the 2003 MBE/WBE/LBE Ordinance.]

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

Existing Law

Existing law provides that, in the event the injunction in Coral Construction, Inc. v. City and County of San Francisco (S.F. Sup. Ct. No. 421249) is lifted or stayed, Administrative Code Chapter 12D.A will become effective 120 days later and will remain in effect for at least one year and may be extended for additional three-year periods.

Amendments to Current Law

The current law is amended to delete sections that extend the expiration date of Chapter 12D.A and allow it to take effect if the injunction in Coral Construction, Inc. v. City and County of San Francisco (S.F. Sup. Ct. No. 421249) is lifted or stayed.

CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

CHRISTINE VAN AKEN
Deputy City Attorney

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MEMORANDUM

TO: Supervisor Sean Elsbernd

FROM: Christine Van Aken CVA
Deputy City Attorney

DATE: July 27, 2012

OUR FILE NUMBER: 110172

TYPE OF LEGISLATION: Ordinance

Attached please find the original and four copies of the following legislation and legislative digest:

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

NOTES: None.

We have also forwarded you an electronic version of the legislation and digest for submission to the Clerk of the Board upon introduction of this legislation. Please let me know if you have any questions or would like any additional information.

cc: C. Adams