File No. 120750 Committee Item No. 7
Board Item No. _____

COMMITTEE/BOARD OF SUPERVISORS

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Committee: Government Audit and Oversight **Date** September 27, 2012

Board of Supervisors Meeting **Date** _____

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☒	☐	Small Business Commission Recommendation, dtd 8/23/12
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Completed by: Alisa Miller **Date** September 21, 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 - Retention of Progressive Payments for Public Works Construction Contracts]

Ordinance amending the San Francisco Administrative Code Section 6.22(J) to reduce the amount of retention withheld from progress payments in construction contracts from ten to five percent; and to make minor clarifying corrections.

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 amending Section 6.22(J), to read as follows:

(J) **Retention of Progressive Payments**. Any contract *for construction services* may provide for progressive *or milestone* payments, if the Advertisement For Bids shall so specify. Each progress *or milestone* 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.

(1) *For all contracts entered into on or after the effective date of this Ordinance, from* ~~*From*~~ every progress payment, the City shall hold *5*~~*10*~~ percent in retention.

(2) *Notwithstanding the subparagraph above, the City may hold greater than 5 percent but not more than 10 percent in retention if the Department head responsible for the public work determines that the work or improvement is substantially complex and therefore warrants a higher retention amount, and the retention amount is specified in the Advertisement For Bids. For contracts with retention amounts greater than 5 percent, if*~~*If*~~ the Department head responsible for

the public work 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, 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.

(3) The Department head shall authorize the release of retention, in whole or in part, for work completed by subcontractors certified by the HRC as LBEs. The Department head shall do so only upon a written request by the contractor certifying (i) the work by the certified LBE subcontractor is completed and satisfactory *in accordance with the plans and specifications for the project;* (ii) the total ~~*final*~~ amount paid to the certified LBE subcontractor *by the contractor as of the date of the written request and the total amount of the subcontract;* and (iii) the amount of retention associated with the work performed by the certified LBE subcontractor. Following a release of such retention, and in order to calculate retention and retention withholding from further progress *or milestone* payments, the City will reduce the total retention required under the foregoing paragraphs (1) and (2) by the amount paid to the certified LBE subcontractor(s) for whom the City released the retention. The release of retention under this subparagraph shall not reduce the responsibilities or liabilities of the contractor or its surety under the contract or applicable law. For any contract awarded under this Chapter prior to the enactment of this subparagraph, a Department head may in his or her sole discretion incorporate this subparagraph by change.

(4) The Department head shall authorize the release of retention, in whole or in part, for work completed by subcontractors under any public work contract awarded under this Chapter with a construction duration of more than two years. The Department head shall do so only upon a written request by the contractor certifying (i) the work by the subcontractor is completed and satisfactory *in accordance with the plans and specifications for the project;* (ii) the total ~~final~~ amount paid to the subcontractor *by the contractor as of the date of the written request and the total amount of the subcontract;* and (iii) the amount of retention associated with the work performed by the subcontractor. The City may issue *or authorize* the *release of* retention within six months of the date of the request. Following a release of such retention, and in order to calculate retention and retention withholding from further progress *or milestone* payments, the City will reduce the total retention required under the foregoing paragraphs (1) and (2) by the amount paid to the subcontractor(s) for whom the City released retention. The release of retention under this subparagraph shall not reduce the responsibilities or liabilities of the contractor or its surety under the contract or applicable law. For any contract awarded under this Chapter prior to the enactment of this subparagraph with a construction duration of more than two years, a Department head may in his or her sole discretion incorporate this subparagraph by change order.

(5) Retention shall be withheld solely for the benefit and protection of the City,

(6) *When the Department head responsible for the public work determines that the contract is 98 percent or more complete, the Department head may reduce retention funds to an amount equal to 200 percent of the estimated value of work yet to be completed, plus any amount necessary to cover offsets by the City for liquidated damages, defective work, stop notices, forfeitures, and other charges.* 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.*~~

(7) *For all contracts awarded under this Chapter, i*~~I~~n no event shall the City be liable for interest or charges arising out of or relating to the date the City issues any progress*, milestone or other* 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.

(8) For contracts entered into between January 1, 2012 and the effective date of this Ordinance, upon the written request of the contractor, the Department head responsible for the public work shall have the discretion to reduce retention to 5 percent, pursuant to one of the two options set forth in subparagraph (2).

Section 2. Effective Date. This ordinance shall become effective 30 days from the date of passage.

Section 3. This section is uncodified. In enacting this Ordinance, the Board intends to amend only those words, phrases, paragraphs, subsections, sections, articles, numbers, punctuation, charts, diagrams, or any other constituent part of the Administrative Code that

are explicitly shown in this legislation as additions, deletions, Board amendment additions, and Board amendment deletions in accordance with the "Note" that appears under the official title of the legislation.

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

By: _____
Yadira Taylor
Deputy City Attorney

FILE NO. 120750

LEGISLATIVE DIGEST

[Administrative Code – Retention of Progressive Payments for Public Works Construction Contracts]

Ordinance amending the San Francisco Administrative Code by amending section 6.22(J) to reduce the amount of retention withhold from progress payments in construction contracts from ten to five percent; and to make minor clarifying corrections.

Existing Law

Section 6.22(J) of the San Francisco Administrative Code requires that the City hold ten percent in retention from each progress payment made on public works construction contracts. The purpose of the retention is to ensure prompt, on-time completion of construction projects, to ensure any defects are repaired, and as a form of security against potential mechanics liens that subcontractors or suppliers might record. The Code further allows that this retention be stepped down to five percent when the contract is 50 percent or more complete if other requirements are met, and allows release of retention for work completed by subcontractors certified by the HRC as LBEs.

Amendments to Current Law

This Ordinance would decrease the required retention amount from ten to five percent for all contracts entered into on or after the effective date of the Ordinance. For contracts entered into between January 1, 2012 and the effective date of the Ordinance, retention could be reduced to five percent upon written request by a contractor and approval of the Department head responsible for the public work. This Ordinance would also allow the City to hold greater than five but no more than ten percent retention if the Department head responsible for the public work determines that the work is substantially complex and warrants higher retention. For contracts with greater than five percent retention, the Ordinance would retain the ability to step down the retention to five percent when the contract is 50 percent or more complete.

This Ordinance would also make minor corrections to help clarify existing language.

Background Information

Like San Francisco, other public owners in California typically require ten percent retention in their public works construction projects. Citing the slowing economy and problems with sufficient cash flow to ensure proper performance by contractors, state legislators introduced Senate Bill 293 to reduce required retention amounts in construction contracts. Signed on October 9, 2011 by Governor Brown and effective January 1, 2012, SB 293 established a five

percent cap on retention on public works construction contracts. The law sunsets on January 1, 2016.

While San Francisco is a Charter City and can determine its own retention policy, for similar reasons as above, the Department of Public works desires the City's retention policy to be amended to allow the reduction of the amount withheld from payments on public works construction projects to five percent.

SMALL BUSINESS COMMISSION
OFFICE OF SMALL BUSINESS

CITY AND COUNTY OF SAN FRANCISCO
EDWIN M. LEE, MAYOR

August 23, 2012

Ms. Angela Calvillo, Clerk of the Board
Board of Supervisors
City Hall room 244
1 Carlton B. Goodlett Place
San Francisco, CA 94102-4694

File No. 120750 [Administrative Code - Retention of Progressive Payments for Public Works Construction Contracts]

Small Business Commission Recommendation: **Approval**

Dear Ms. Calvillo:

On August 13, 2012 the Small Business Commission held a hearing on Board of Supervisors File No. 120750 and voted 5-0 to recommend approval of the ordinance.

The Commission found that this ordinance will benefit small businesses by speeding up the recovery of progressive payments on construction projects and will lead to cash flow improvements for our small business contractors. This policy takes a step towards leveling the playing field between small business contractors and well financed corporations. Mayor Lee, Supervisor Carmen Chu, and Mohammed Nuru, Director of the Department of Public Works are to be commended for bringing this legislation forward.

Sincerely,

Regina Dick-Endrizzi
Director, Office of Small Business

Cc: Jason Elliott, Mayor's Office
Supervisor Carmen Chu
Mohammed Nuru, Department of Public Works

OFFICE OF THE MAYOR
SAN FRANCISCO

EDWIN M. LEE
MAYOR

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2012 JUL 10 PM 3:12
BY

TO: Angela Calvillo, Clerk of the Board of Supervisors

FROM: Mayor Edwin M. Lee

RE: Administrative Code – Retention of Progressive Payments for Public Works Construction Contracts

DATE: July 10, 2012

Attached for introduction to the Board of Supervisors is the ordinance amending the San Francisco Administrative Code by amending section 6.22(J) to reduce the amount of retention withheld from progress payments in construction contracts from ten to five percent; and to make minor clarifying corrections.

Please note this item is cosponsored by Supervisor Chu.

I request that this item be calendared in Government Audit and Oversight Committee.

Should you have any questions, please contact Jason Elliott (415) 554-5105.

cc. Supervisor Carmen Chu

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