

BOARD of SUPERVISORS



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## MEMORANDUM

TO: Ben Rosenfield, Controller, Office of the Controller  
Naomi Kelly, City Administrator, Office of the City Administrator  
Alaric Degrafinried, Interim Director, Public Works  
Harlan Kelly, Jr., General Manager, SFPUC

Victor Young, Assistant Clerk  
Rules Committee

A handwritten signature in black ink that reads "Victor Young".

DATE: May 19, 2020

SUBJECT: LEGISLATION INTRODUCED

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The Board of Supervisors' Rules Committee received the following proposed legislation on May 12, 2020:

**File No. 200443**

**Ordinance amending the Administrative Code to include as a mandatory element in the definition of the term "Responsible" substantiation of a record of safe performance on construction projects by the bidder or proposer on a Public Works or Improvement project, and to expressly require construction contract awards for all specific project-delivery methods be made only to Responsible construction contractors.**

If you have comments or reports to be included with the file, please forward them to me at the Board of Supervisors, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102 or by email at: [victor.young@sfgov.org](mailto:victor.young@sfgov.org).

cc. Todd Rydstrom, Office of the Controller  
Peg Stevenson, Office of the Controller  
Lynn Khaw, Office of the City Administrator  
Lihmeei Leu, Office of the City Administrator  
David Steinberg, Public Works  
Jeremy Spitz, Public Works  
Jennifer Blot, Public Works  
John Thomas, Public Works  
Lena Liu, Public Works  
Juliet Ellis, SFPUC  
John Scarpulla, SFPUC  
Donna Hood, SFPUC

1 [Administrative Code - Requirement for Prospective Contractors to Substantiate Safety  
2 Record to be Eligible for a Public Works Contract]

3 **Ordinance amending the Administrative Code to include as a mandatory element in the**  
4 **definition of the term “Responsible” substantiation of a record of safe performance on**  
5 **construction projects by the bidder or proposer on a Public Work or Improvement**  
6 **project, and to expressly require construction contract awards for all specific project-**  
7 **delivery methods be made only to Responsible construction contractors.**

8 NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.  
9 **Additions to Codes** are in *single-underline italics Times New Roman font*.  
10 **Deletions to Codes** are in *strikethrough italics Times New Roman font*.  
11 **Board amendment additions** are in double-underlined Arial font.  
12 **Board amendment deletions** are in ~~strikethrough Arial font~~.  
13 **Asterisks (\* \* \* \*)** indicate the omission of unchanged Code  
14 subsections or parts of tables.

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

16 Section 1. Background and Findings.

17 (a) Summary of Legislation.

18 (1) Chapter 6 of the Administrative Code generally requires departments to  
19 award contracts for Public Work or Improvement projects to a Responsible Bidder or  
20 proposer. The term “Responsible” is defined in Section 6.1 to provide the qualifications and  
21 capabilities that a Bidder or Proposer must possess for the City to determine that it is  
22 Responsible. The definition does not specifically include substantiation of a record of safe  
23 performance on construction projects as a required element. This ordinance amends the  
24 definition to include a record of safe performance on construction projects as a required  
25 element.

(2) This ordinance also adds the requirement to award construction contracts  
only to Responsible construction contractors for the following specified types of project-

1 delivery method procurements that currently do not explicitly require award to a Responsible  
2 construction contractor: Emergency Repairs, Work, and Contracts (Section 6.60); Design-  
3 Build (Section 6.61); Hazardous Materials Abatement Work (Section 6.63); and Contracting  
4 for Elevator, Escalator, Security, Fire Protection or Fire Alarm Systems, Inspection,  
5 Maintenance, and Repair Work (Section 6.65).

6 (b) Controller’s Audit Recommendations.

7 The Office of the Controller, City Services Auditor, issued a report dated April 11, 2017,  
8 recommending that the City adopt and institute a proactive approach to construction safety  
9 management and oversight on public works projects to reduce hazardous conditions and  
10 workplace injuries in order to meet the City’s commitment to the safety and well-being of its  
11 residents, visitors, and the City’s and its construction contractors’ employees. In particular, at  
12 Chapter 2, the report recommended “inclus[ion] of safety components in the bidding and  
13 contracting process [as] part of a proactive approach to construction safety,” further stating  
14 that “[t]he City should be proactive to better ensure construction safety by including it as a  
15 criterion for awarding contracts... The definition of *responsibility* could include qualitative  
16 factors such as safety records... Although the Administrative Code does not specify that  
17 departments must request safety records, doing so may help the City select contractors that  
18 abide by applicable OSHA statutes and regulations... By selecting the lowest bidder and  
19 ignoring safety records, the City is at risk of awarding contracts to contractors that have not  
20 invested in safety and have a history of safety violations.”

21 (c) Government Audit and Oversight Committee Hearing Concerning a Workplace  
22 Fatality, and Recommendations.

23 On August 10, 2018, a contractor on a Municipal Transportation Agency (“SFMTA”)  
24 Public Work or Improvement construction project experienced a workplace fatality of one of its  
25 construction workers, which resulted in an Occupational Safety and Health Administration

1 (“OSHA”) citation against the contractor. In the wake of this fatality, on October 17, 2018, the  
2 Board of Supervisors’ Government Audit and Oversight Committee (“Committee”) held a  
3 hearing regarding the City’s vetting process of contractors’ safety records on procurements of  
4 construction contractor services on Public Work or Improvement projects. Concurring with the  
5 Controller’s Office’s recommendations, the Committee charged the departments empowered  
6 by Chapter 6 of the Administrative Code to contract for Public Work or Improvement projects  
7 to develop a City-wide approach to construction safety. Committee members expressed  
8 concern that the contractor that had experienced the fatality had checked “no” on the  
9 SFMTA’s bid form when asked “In the past ten years, has the potential bidder... been cited for  
10 any serious or willful violations by OSHA?” Supervisor Yee noted that in 2015 OSHA had  
11 upheld a serious and willful citation against the company. Supervisor Yee stated that the  
12 hearing was not to focus on a particular company, but rather to inquire as to how City  
13 departments asked potential Bidders about their safety records and the basis for potentially  
14 finding a contractor non-responsible (unqualified) based on its safety record. Supervisor Yee  
15 advocated for improving how the City vets construction contractors on their safety records to  
16 ensure the safety of construction workers, City employees, and members of the public at  
17 construction sites. Supervisors Yee and Peskin stated that the Chapter 6 departments should  
18 have a more robust procedure for vetting the safety records of potential contractors in the  
19 procurement process. Supervisor Peskin opined that it is problematic that it can take OSHA  
20 years to resolve an appealed citation, and recommended asking about all contractor OSHA  
21 citations including those still under investigation or on appeal. Committee members further  
22 indicated that all Chapter 6 departments should work together to develop a uniform procedure  
23 for vetting contractor safety records. A representative of the SFMTA advised the Supervisors  
24 that the Chapter 6 departments were seeking to develop a better way to evaluate open OSHA  
25 cases in vetting potential bidders for construction projects. The Supervisors asked the

1 departments to report back on progress in developing a more robust process for vetting the  
2 safety records of bidders for the City's construction contracts.

3 (d) Robust Safety Prequalification Procedures Adopted by the SFPUC.

4 San Francisco Public Utilities Commission ("SFPUC") staff, in collaboration with  
5 representatives of other Chapter 6 departments, the Office of Risk Management, industry  
6 experts, and associations representing construction companies, developed a more robust  
7 safety prequalification procedure consistent with goals expressed by the Controller's Office  
8 and the members of the Committee. The procedure requires each construction contract  
9 bidder or proposer to submit copies of its reported OSHA injury and illness rate, lost work rate,  
10 and its OSHA violations, including those still being investigated and those that are on appeal.  
11 OSHA requires licensed construction contractors to report that information annually on OSHA  
12 form 300A; the SFPUC procedure requires bidders and proposers to submit copies of the  
13 entity's form 300A as part of the prequalification process. The SFPUC Commission approved  
14 use of the new safety prequalification procedure by Resolution No. 19-0214, adopted on  
15 November 12, 2019.

16 Since the SFPUC implemented the new safety prequalification procedure, most bidders  
17 and proposers have qualified by answering questions that objectively measure worksite safety  
18 by the results reported to OSHA on its form 300A concerning injury and illness rates, lost work  
19 rates, and the rate of OSHA violations compared to industry standards for the type of work  
20 and scaled by the size of company. The procedure directs contractors that did not prequalify  
21 solely on answers to questions about injury and illness rates and lost work rates, an  
22 acceptable rate of OSHA violations, and any workplace fatalities with the opportunity to  
23 provide their corporate safety documents and procedures and explanations about their OSHA  
24 violations for review by an independent safety expert retained by the Office of Risk  
25 Management. The expert evaluates and scores the applicants' safety documents and

1 explanations about OSHA citations and provides the SFPUC General Manager with scores,  
2 recommendations, and rationale. The General Manager is responsible for making a final  
3 determination on the bidder's safety record as part of the agency's responsibility  
4 determination. The SFPUC's safety prequalification procedures provide any contractor that  
5 fails to achieve prequalified to bid status the opportunity to appeal the determination in a  
6 hearing before a neutral hearing officer.

7 (e) Departments' Support for Construction Contractor Safety Requirements.

8 The City Administrator has convened meetings with Chapter 6 department heads and  
9 assistant department heads. All Chapter 6 departments support adoption of uniform safety  
10 prequalification procedures modeled after those adopted by the SFPUC. With enactment of  
11 this ordinance, the City Administrator is prepared to issue regulations, modeled on the safety  
12 prequalification procedure adopted by the SFPUC, to establish a City-wide approach to  
13 construction safety on the City's Public Work or Improvement projects.

14  
15 Section 2. Chapter 6 of the Administrative Code is amended by revising Sections 6.1,  
16 6.60, 6.61, 6.63, and 6.65, to read as follows:

17  
18 **SEC. 6.1. DEFINITIONS.**

19  
20 \* \* \* \*

21 **Responsible or Responsibility.** A Bidder, General Contractor, or Prime Contractor for a  
22 Public Work or Improvement that~~who~~:

23 (1a) meets the qualifying criteria required for a particular project, including without  
24 limitation the expertise, experience, record of prior timely performance, license, resources, and  
25 bonding and insurance capability necessary to perform the work under the Contract; and

1 (2b) at all times deals in good faith with the City and submits bids, estimates, invoices,  
2 claims, requests for equitable adjustments, requests for change orders, requests for Contract  
3 modifications, or requests of any kind seeking compensation on a City Contract only upon a  
4 good faith honest evaluation of the underlying circumstances and a good faith, honest  
5 calculation of the amount sought; and

6 (c) substantiates its record of safe performance on construction projects, including but not  
7 limited to consideration of federal or state Occupational Safety and Health Administration (“OSHA”)  
8 violations and work place fatalities, including OSHA citations under appeal, in accordance with  
9 regulations issued by the City Administrator.

10 \* \* \* \*

11  
12 **SEC. 6.60. EMERGENCY REPAIRS, WORK, AND CONTRACTS.**

13 \* \* \* \*

14 (e) **Exemptions.** Contracts awarded in accordance with this Section 6.60 under  
15 emergency circumstances as described and defined above are exempt from the requirements  
16 of this Chapter 6 and Chapters 12A, 12B, 12C, and ~~Chapter~~ 14B of the Administrative Code. It  
17 is, however, the policy of the Board of Supervisors for contracting departments to make every  
18 effort to comply with the provisions of Administrative Code Chapters 12A, 12B, 12C, and 14B.  
19 In order to effectuate this policy, the Department Heads and their staff members shall  
20 collaborate with CMD periodically to create a list of Responsible Contractors qualified to  
21 perform various types of emergency work, making every effort to include qualified,  
22 Responsible, and certified LBE contractors on that list. CMD shall be responsible for  
23 outreach efforts to make sure that certified LBE Contractors are aware of the opportunity to be  
24 considered for the list. For all emergency construction contracts, ~~The~~the Contract Awarding  
25 departments or commissions shall be Responsible for evaluating and determining whether

1 Contractors are ~~not~~ responsible and qualified to perform the various scopes of work. The  
2 Department Heads shall report quarterly to the Board of Supervisors regarding LBE inclusion  
3 on the list of Responsible and qualified Contractors for emergency Contracts, a description of  
4 each emergency Contract awarded, the reason why the work was performed under these  
5 emergency procedures, and whether the emergency Contract was awarded to an LBE  
6 Contractor. Such reports shall be referred to a Board committee for public hearing.

7 \* \* \* \*

8  
9 **SEC. 6.61. DESIGN-BUILD.**

10 \* \* \* \*

11 (b) **Competitive Bid or Fixed Budget Limit Procurement.**

12 (1) **Pre-Qualification.** When selecting a Design-Builder based on competitive  
13 bid or proposals for a fixed budget limit project, the Department Head shall pre-qualify Design-  
14 Builders, or a combination of the Design-Builders and one or more of their subcontractors  
15 prior to issuing an invitation to submit bids or proposal. The procedure for pre-qualification is  
16 as follows:

17 (A) The Department Head shall issue a request for qualifications inviting  
18 interested parties to submit their qualifications to perform the project. The request for  
19 qualifications shall include criteria by which the prospective Design-Builders will be evaluated  
20 during the qualification process. The evaluation criteria shall be based on qualifications and  
21 experience relevant to the services needed for the project. The list of criteria may include, but  
22 is not limited to the following: (i) qualifications to design-build the proposed project; (ii)  
23 evidence of financial capacity; (iii) experience on similar projects; (iv) ability to collaboratively  
24 and cooperatively deliver projects on time and on budget; (v) history of liquidated damages for  
25 delay and other damages paid on prior projects, and prior litigation; (vi) reputation with owners



1 of prior projects; (vii) claims history with insurance carriers and sureties; ~~and~~ (viii) substantiated  
2 record of safe performance on construction projects in accordance with the definition of Responsible in  
3 Section 6.1; and (ix) other criteria that the Department Head may deem appropriate. The  
4 Department Head shall set objective scoring criteria and incorporate the criteria into any  
5 scoring procedure.

6 \* \* \* \*

7 (4) **Procurement of Trade Subcontractors.** The Department ~~h~~Head may  
8 require that all subcontractors be listed at the time of bid or proposal or may identify specific  
9 trades for which the Design-Builder must list subcontractors. Following award of the Contract,  
10 the Design-Builder shall add or substitute trade subcontracts with a value exceeding 0.5% of  
11 the Contract amount applicable to the construction work as follows:

12 (A) Unless otherwise authorized by the Department Head, each trade  
13 subcontract opportunity shall be advertised as provided in subsection 6.21(a)(1);

14 (B) The Design-Builder shall establish reasonable qualification criteria  
15 and standards;

16 (C) The Design-Builder may then award the subcontract to a Responsible  
17 subcontractor either on a best value basis or to the ~~Responsible~~-Bidder with the lowest  
18 Responsive bid;

19 (D) All subcontractors, whether listed at the time of bid or proposal or  
20 added or substituted under this subsection 6.61(b)(4), shall be afforded all of the protections  
21 of the California Subletting and Subcontracting Fair Practices Act at California Public Contract  
22 Code Section 4100 et seq., as amended from time to time.

23 (c) **Best Value Procurement.** If the project seeks private financing proposals and/or  
24 the Department Head determines that it is in the public's best interest to consider  
25 qualifications and/or other subjective criteria (e.g., quality of design proposal) as part of the

1 final selection process, the Department Head shall require that prospective proposers be pre-  
2 qualified pursuant to the process in Section 6.61(a)(1) or shall issue a combined request for  
3 qualifications and proposals inviting Design-Builders, or a combination of Design-Builders and  
4 their Core Trade Subcontractors meeting specified minimum qualification criteria, to submit  
5 design-build proposals, which will be evaluated based upon Responsibility and qualifications,  
6 stated subjective criteria, and project and/or financing costs. The license and business tax  
7 requirements of subsections 6.21(a)(6) and (8) shall apply to requests for proposals under this  
8 subsection 6.61(c).

9 \* \* \* \*

10 (5) **Procurement of Trade Subcontractors.** With the approval of the  
11 Department Head, the selected Design-Builder may procure trade work in conformance with  
12 the following procedures:

13 \* \* \* \*

14 (B) **Core Trade Subcontractors.** Upon approval of the Department  
15 Head, the Design-Builder may procure design, preconstruction, or design-assist services from  
16 Responsible Core Trade Subcontractors based on qualifications only. As soon as practical, or  
17 as otherwise approved by the department, each Core Trade Subcontractor shall provide a  
18 written cost proposal for construction of the related trade package. Before authorizing the  
19 Design-Builder to subcontract with a Core Trade Subcontractor for the trade package, the  
20 department must validate the cost proposal by an independent cost estimate. The Department  
21 Head, in ~~his or her~~ the Department Head's sole discretion, may require the Design-Builder to  
22 competitively procure the trade package by competitive bid in conformance with subsection  
23 6.61(b)(5)(A).

24 \* \* \* \*

1           **SEC. 6.63. HAZARDOUS MATERIALS ABATEMENT WORK.**

2           Department Heads are authorized to execute Contracts for hazardous materials  
3 abatement work ("Abatement Work") in accordance with the following procedures:

4           (a) The department shall advertise for and receive proposals from hazardous  
5 materials abatement Contractors, which proposals shall address the qualifications of the  
6 Contractors to perform the testing, design, and advice portions of Abatement Work and  
7 Responsibility to perform construction-related Abatement Work. The proposals shall be evaluated  
8 according to the requirements of this Chapter 6 and Chapters 12B, 12C, and 14B of the  
9 Administrative Code, relevant to professional services and Public Work or Improvement  
10 Contracts.

11           \* \* \* \*

12  
13           **SEC. 6.65. CONTRACTING FOR ELEVATOR, ESCALATOR, SECURITY, FIRE**  
14 **PROTECTION OR FIRE ALARM SYSTEMS, INSPECTION, MAINTENANCE, AND REPAIR**  
15 **WORK.**

16           \* \* \* \*

17           (a) The department ~~shall~~ may award master agreement Contracts, on an "if-and-as-  
18 needed" basis to Responsible special service providers ~~who can establish experience, expertise,~~  
19 ~~and quality of work~~. A potential special service provider may apply for a master agreement  
20 under this Section 6.65 by providing the department with a statement of its experience and  
21 qualifications and other information as requested by the department. Within 60 days of  
22 receiving such information, the department shall advise the applicant of its eligibility for an  
23 award of a master agreement. Master agreements for special services under this Section 6.65  
24 shall conform to the insurance, indemnification, and Prevailing Wage requirements of Section  
25

1 6.22. Master agreements shall provide for an expiration term of not more than five years from  
2 the date the Contract is certified by the Controller, including all modifications.

3 \* \* \* \*

4  
5 Section 3. Undertaking for the General Welfare. In enacting and implementing this  
6 ordinance, the City is assuming an undertaking only to promote the general welfare. It is not  
7 assuming, nor is it imposing on its officers and employees, an obligation for breach of which it  
8 is liable in money damages to any person who claims that such breach proximately caused  
9 injury.

10  
11 Section 4. Scope of Ordinance. In enacting this ordinance, the Board of Supervisors  
12 intends to amend only those words, phrases, paragraphs, subsections, sections, articles,  
13 numbers, punctuation marks, charts, diagrams, or any other constituent parts of the Municipal  
14 Code that are explicitly shown in this ordinance as additions, deletions, Board amendment  
15 additions, and Board amendment deletions in accordance with the "Note" that appears under  
16 the official title of the ordinance.

17 Section 5. Effective Date. This ordinance shall become effective 30 days after  
18 enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the  
19 ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board  
20 of Supervisors overrides the Mayor's veto of the ordinance.

21  
22 APPROVED AS TO FORM:  
23 DENNIS J. HERRERA, City Attorney

24 By: /s/  
25 RANDY PARENT  
Deputy City Attorney

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