

1 [Administrative Code - Ban on City Contracts with Border Wall Contractors]

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3 **Ordinance amending the Administrative Code to prohibit City contracting with**
4 **companies who bid on contracts or contract with the Federal Government to provide**
5 **services or goods to construct the border wall referenced in Executive Order**
6 **No. 13767, dated January 25, 2017.**

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

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

15 Section 1. The Administrative Code is hereby amended by adding Chapter 12E,
16 Sections 12E.1-12E.10, to read as follows:

17 **CHAPTER 12E: PROHIBITING CONTRACTING WITH CONTRACTORS WORKING ON**
18 **THE BORDER WALL**

19
20 **SEC. 12E.1. FINDINGS AND PURPOSE.**

21 *San Francisco has a long history of valuing immigrants and all the contributions they make to*
22 *the City and to the United States. The City values immigrants' rights and the dignity of all persons,*
23 *regardless of their immigration status.*

24 *San Francisco is a city of immigrants and refugees, with approximately a third of its residents*
25 *being foreign-born. The City's diversity provides a strong foundation for its economic vitality, cultural*

1 vibrancy, and social character. San Francisco's immigrant community makes significant contributions
2 to power the City's economy and revitalize local communities that otherwise are in decline.

3 Throughout the 2016 presidential race, Donald J. Trump, then a candidate for the presidency of
4 the United States, made racist and xenophobic statements that became a cornerstone of his campaign.
5 Amidst a whirlwind of statements disparaging Mexican immigrants, he stated "[t]hey're bringing
6 drugs. They're bringing crime. They're rapists." He stated that Mexican immigrants "are killers and
7 rapists." He blamed the Mexican government for sending "the bad ones over because they don't want
8 to pay for them," and made other derogatory and discriminatory assertions. Donald J. Trump built
9 much of his presidential campaign around the promise of building a wall on the southern border to stop
10 illegal immigration to the United States, based on his defamatory characterizations of those who cross
11 the border into the United States.

12 Once elected, President Donald J. Trump issued Executive Order No. 13,767 on January 25,
13 2017, titled, "Border Security and Immigration Enforcement Improvements." 82 Federal Register
14 8793. The Executive Order directs the Department of Homeland Security to take all appropriate steps
15 to immediately plan, design, and construct a physical wall along the southern border between the
16 United States and Mexico, using appropriate materials and technology to achieve complete operational
17 control of the southern border. The Executive Order also directs the Administration to prioritize the
18 use of Federal lands and funding for the enforcement of border security and the construction of the
19 border wall.

20 The City and County of San Francisco does not support the building of such a wall, as it stands
21 as a symbol of prejudice, discrimination, and the denial of human dignity. The City should not support
22 through its contracting process any business that seeks to capitalize off of building this wall. The City
23 and the country have always stood in support of the innovation, work ethic, and strengths that
24 immigrants bring to this country. San Francisco has been a direct beneficiary of those contributions.

1 The Executive Order, and the wall it seeks to build, represent an affront to American values, and to the
2 dignity that is owed to all persons, regardless of their national origin or immigration status.

3 The City has a strong interest in dissociating itself from the symbol this wall represents, which
4 requires dissociating itself from the entities and individuals that seek to enrich themselves at the
5 expense of the values the City holds dear and the solidarity the City treasures among its immigrant and
6 native-born residents. The Board of Supervisors finds that the City should adhere to its values of
7 diversity, inclusion and openness when exercising its contracting authority, and make a concrete
8 statement of these values by refusing to contract with business partners who seek to benefit financially
9 from perpetuating the divisive symbolism that the Trump Administration’s border wall reflects and
10 promotes. The City should not expend City funds on businesses that seek to profit from building a wall,
11 which contravenes these values.

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13 **SEC. 12E.2. DEFINITIONS.**

14 “Border Wall” means, as defined in the Executive Order and in the Secure Fence Act of 2006,
15 a contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier
16 along the land border between the United States and Mexico, including all points of entry, as well as
17 associated improvements to gain operational control along such land border, including but not limited
18 to, roads, lighting, cameras, and sensors.

19 “Border Wall Contract” means a contract with the Federal Government to provide services or
20 goods to build the Border Wall.

21 “Border Wall Entity” means any corporation, partnership, individual, sole proprietorship, joint
22 venture, or other non-governmental legal entity or combination thereof, which has submitted a bid or
23 proposal in response to a procurement request, or otherwise proposes to enter into or has entered into
24 a Border Wall Contract on or after January 25, 2017.

1 “Border Wall Work” means any work performed or goods provided pursuant to a Border Wall
2 Contract.

3 “City” means the City and County of San Francisco.

4 “Contract” means an agreement between a Contracting Department and any person or entity
5 that provides, at the expense of the City, for public works or public improvements to be purchased
6 under Chapter 6 of the Administrative Code, or for commodities or services to be purchased under
7 Chapter 21 of the Administrative Code. Notwithstanding the foregoing, “Contract” shall not include:

8 (a) Agreements for the investment of trust money or relating to the management of trust
9 assets, agreements to invest City moneys in U.S. government securities, or agreements for the
10 investment, deposit, or safekeeping of City moneys, where, for any such agreement, the Treasurer, as a
11 fiduciary of the City, determines that entering into the agreement is in the interest of soundly investing
12 public assets; or

13 (b) Agreements entered into for underwriting services for the purchase and sale of City
14 bonds, notes, and other forms of indebtedness; or

15 (c) Agreements for a cumulative amount of \$10,000 or less per Contractor in each fiscal
16 year; or

17 (d) Agreements advertised, solicited, or initiated prior to the Operative Date of this
18 Chapter 12E, including amendments to existing Contracts. Only agreements first advertised, solicited,
19 or initiated on or after the Operative Date are included in the definition of “Contract.”

20 “Contracting Department” means the City department, office, board, commission, or other
21 City agency authorized to enter into a Contract on behalf of the City.

22 “Contractor” means any corporation, partnership, individual, sole proprietorship, joint
23 venture, or other non-governmental legal entity or combination thereof, which enters into a Contract
24 with the City.

1 “Executive Order” means the Executive Order entitled, “Border Security and Immigration
2 Enforcement Improvements,” Exec. Order No. 13,767, 82 Fed. Reg. 8793 (January 25, 2017).

3 “Operative Date” means 90 days after the effective date of Chapter 12E.

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5 **SEC. 12E.3. BORDER WALL ENTITY LIST**

6 (a) The Controller shall develop and post, using credible information available to the public, a
7 list of Border Wall Entities as determined by the Controller to have bid, proposed on and/or entered
8 into Border Wall Contracts. The Controller shall develop the initial list no later than the Operative
9 Date, except that the Controller has the obligation to use his or her best efforts to develop the list as
10 soon as practicable after enactment. Once developed, such list will be posted on the Controller’s
11 website, and updated twice a year thereafter.

12 (b) Prior to the final development and posting of the list required to be produced pursuant to
13 subsection 12E.3(a), and with each biannual update of the list, the Controller shall provide written
14 notice to all Border Wall Entities to be included on the list, together with written notice informing such
15 entity or person that inclusion on such list would make the entity or person unable to enter into
16 Contracts with the City, and that such entity or person may apply to the Controller to appeal the
17 Controller’s decision and seek to be removed from such list pursuant to the requirements of subsection
18 12E.3(c), or may seek a court order for the same purpose.

19 (c) In the event an entity or person included by the Controller on the list referenced in
20 subsection 12E.3(a) appeals the Controller’s decision, it must certify, in writing, to the Controller’s
21 satisfaction that such entity or person permanently has ceased submitting bids or proposals for the
22 purpose of entering into a Border Wall Contract and, in the case of a Border Wall Entity that has
23 performed Border Wall Work, has ceased performing such work, or obtains a court order from a court
24 of competent jurisdiction that such entity or person shall be removed from such list due to the court’s
25 determination that such entity or person permanently has ceased submitting bids or proposals for the

1 purpose of entering into a Border Wall Contract and, in the case of a Border Wall Entity that has
2 performed Border Wall Work, has ceased performing such work. If the Controller receives a
3 satisfactory certification or court determination as described in the preceding sentence, then the
4 Controller shall remove such entity or person from its list referenced in subsection 12E.3(a).

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6 **SEC. 12E.4 CONTRACTING.**

7 (a) The City shall not enter into a Contract with a Border Wall Entity.

8 (b) Contracting Departments shall require all entities or persons that submit a bid or proposal
9 in response to a solicitation for procurement for a Contract, or otherwise proposes to enter into a
10 Contract, to certify that the entity or person is not identified on the list referenced in subsection
11 12E.3(a) and that the entity or person will not bid on, propose to perform Border Wall Work, or enter
12 into a Border Wall Contract during the term of the proposed Contract. All entities or persons that
13 submit a bid or proposal in response to a solicitation for procurement for a Contract, or otherwise
14 propose to enter into a Contract, shall execute a certification that the entity or person is not on the list
15 referenced in subsection 12E.3(a) and that it commits to not pursue Border Wall Work or enter into a
16 Border Wall Contract during the term of the proposed Contract.

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18 **SEC. 12E.5. NONAPPLICABILITY, EXCEPTIONS, AND WAIVERS.**

19 (a) Section 12E.4 shall not apply to Contracts in the following circumstances:

20 (1) The services or goods under the applicable Contract are available only from one
21 source as approved by the appropriate authority pursuant to applicable provisions of the
22 Administrative Code; there are no qualified responsive bidders, proposers, or prospective vendors that
23 comply with the requirements of Section 12E.4 to perform the applicable Contract; or, as determined in
24 writing by the Controller, the City would otherwise be unable to obtain essential goods or services on a
25 reasonable basis; or

1 (2) The Contracting Department determines, pursuant to applicable provisions of the
2 Administrative Code, that the Contract is necessary to respond to an emergency which endangers the
3 public health or safety; and further determines that no entity that complies with subsection 12E.4 and is
4 capable of responding to the emergency is immediately available to perform the required services; or

5 (3) The General Manager of the San Francisco Public Utilities Commission may waive
6 the requirements of this Chapter 12E where the Contractor is providing wholesale or bulk water,
7 power, or natural gas, the conveyance or transmission of same, or ancillary services such as spinning
8 reserve, voltage control, or loading scheduling, as required for assuring reliable services in
9 accordance with good utility practice, to or on behalf of the San Francisco Public Utilities
10 Commission; provided that the purchase of same may not practically be accomplished through the
11 City's standard competitive bidding procedures; and further provided that this waiver provision shall
12 not apply to Contractors or franchisees providing direct, retail services to end users within the City;
13 and

14 (4) A Contractor has demonstrated that it has ceased to seek to perform or to perform
15 Border Wall Work, so long as the scope of those services has ceased before the Operative Date.

16 (b) For any determination of nonapplicability, exception, or waiver pursuant to subsection
17 12E.5(a), the Contracting Department shall maintain a record documenting the basis for such decision.
18 Each Contracting Department that makes a determination of nonapplicability, exception, or waiver
19 pursuant to subsection 12E.5(a) shall submit a report to the Controller summarizing the Contract and
20 the basis for inapplicability. Such reports shall be submitted annually within 30 days of the end of the
21 fiscal year.

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23 **SEC. 12E.6. CONTRACT REQUIREMENTS; LIQUIDATED DAMAGES.**

24 Every Contract subject to the requirements of this Chapter 12E shall include the provisions set
25 forth below.

1 (a) Failure to comply with the requirements of this Chapter 12E shall constitute a
2 material breach by Contractor of the terms of the Contract. The City in its sole discretion shall
3 determine such failure.

4 (b) If a Contractor fails to comply with the requirements of this Chapter 12E, the City
5 shall have the right to pursue any rights or remedies available under this Chapter, under the terms of
6 the Contract, and under applicable law, consistent with the procedures set forth in Section 12E.7. In
7 such an event, the City may take any or all of the following actions:

8 (1) Inform the Controller that the Contractor should be added to the list
9 prescribed in subsection 12E.3(a);

10 (2) Assess liquidated damages as provided for in the Contract; or,

11 (3) Terminate the Contract.

12 (c) Liquidated Damages. Contractor agrees:

13 (1) To be liable to the City for liquidated damages as provided in this Section
14 12E.6;

15 (2) That Contractor's commitment to comply with the requirements of this
16 Chapter 12E is a material element of the City's consideration for the Contract and that the failure of
17 Contractor to comply will cause significant and substantial harm to the City and the public which is
18 extremely difficult to determine or quantify, and that the liquidated damages set forth in this Chapter
19 12E are reasonable amounts to pay for the harm caused by the Contractor's non-compliance;

20 (3) That for failure to comply with the requirements of this Chapter 12E, the
21 City may require the Contractor to pay the City liquidated damages of up to \$100 for each day that the
22 Contractor is found to be in violation of this Chapter 12E;

23 (4) That while liquidated damages in the maximum amounts set forth in this
24 subsection 12E.6(c) are a reasonable estimate of the harm caused by the Contractor's non-compliance
25 with contractual provisions required by this Chapter 12E, the Contracting Department may determine

1 that less than the full amount is warranted depending on the circumstances of each case. The
2 Contracting Department shall give due consideration to the following factors in determining the
3 amount of liquidated damages: the size of the Contractor's business, the Contractor's good faith, the
4 gravity of the violation, and the history of previous violations.

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6 **SEC. 12E.7. ENFORCEMENT**

7 (a) Determination of Violation. Upon determining that a Contractor may have violated the
8 terms of a Contract required under this Chapter 12E, the Contracting Department shall send written
9 notice to the Contractor of the possible violation and of the Contractor's right to respond to the
10 Contracting Department's initial determination by submitting pertinent documents and other
11 information. The written notice also shall notify the Contractor that the Contracting Department is
12 authorized to direct the Controller to withhold payment otherwise due to the Contractor following a
13 final determination by the Contracting Department, pursuant to the provisions of this Section 12E.7. If
14 after providing the Contractor with a reasonable opportunity to respond to the allegations the
15 Contracting Department makes a final determination that a violation has occurred, the Contracting
16 Department shall provide a written notice of violation to the Contractor.

17 (b) Right to Appeal. The Contractor may appeal the Contracting Department's final
18 determination. The Contractor must file an appeal with the Controller in writing, and serve a copy on
19 the appropriate Contracting Department, specifying the basis for contesting the determination, no later
20 than 15 days after the date of the notice of determination. Failure to file an appeal in writing with the
21 Controller within 15 days shall cause the Contracting Department's determination to be deemed a final
22 administrative decision by the City.

23 (c) Administrative Hearing.

24 (1) Within 15 days after the Controller receives an appeal, it shall appoint a hearing
25 officer and shall notify the Contracting Department and the Contractor of the appointment.

1 (2) The hearing officer shall promptly set a date for a hearing. The hearing shall
2 commence within 45 days of the notification of the appointment of the hearing officer and conclude
3 within 75 days of such notification, unless all parties agree to an extension of either or both time
4 periods, subject to subsection 12E.7(d)(1).

5 (3) The Contracting Department shall have the burden of producing evidence that the
6 Contractor has violated the requirements of this Chapter 12E and the burden of proving the violation.

7 (d) Hearing Officer's Decision.

8 (1) Within 30 days of the conclusion of the hearing, the hearing officer shall issue a
9 written decision consisting of findings and a decision affirming, modifying, or vacating the Contracting
10 Department's determination. If the hearing officer vacates the Contracting Department's determination
11 in its entirety, that decision shall also vacate any assessment of liquidated damages. If the hearing
12 officer affirms the Contracting Department's determination, the hearing officer shall issue a decision
13 upholding the Contracting Department's determination, including the amount of the liquidated
14 damages assessed by the Contracting Department. With respect to liquidated damages, the hearing
15 officer's jurisdiction to modify the Contracting Department's assessment is limited and the following
16 procedures apply. If the hearing officer modifies the Contracting Department's determination, the
17 hearing officer shall transmit the decision to the Contracting Department, which shall within five
18 business days modify the assessment of liquidated damages consistent with the hearing officer's
19 decision based on the criteria set forth in subsection 12E.6(c)(4) and transmit the modified assessment
20 to the hearing officer. Upon receiving the modified assessment from the Contracting Department, the
21 hearing officer shall within three business days issue a final decision, which shall include the amount of
22 the liquidated damages assessment as modified by the Contracting Department.

23 (2) The decision of the hearing officer shall be final. The Contractor may seek review
24 of the hearing officer's decision only by filing a petition for a writ of mandate under California Code of
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1 Civil Procedure Section 1094.5, as may be amended from time to time, in the San Francisco Superior
2 Court.

3 (3) The failure of the Controller or hearing officer to comply with the time
4 requirements of this Section 12E.7 shall not cause the Controller or the hearing officer to lose
5 jurisdiction over an appeal from the Contracting Department's determination filed under this Section.

6 (4) Upon receiving the hearing officer's decision affirming or modifying the
7 Contracting Department's determination, the Contractor shall take the corrective action, including the
8 payment of liquidated damages, if any, within 14 days of receiving the hearing officer's decision. If a
9 Contractor fails to take corrective action within that time, the City may immediately pursue all
10 available remedies against the Contractor.

11 (e) Withholding of Payments by Controller.

12 (1) When the Contracting Department sends notice to a Contractor under Section
13 12E.7(a) of its final determination that the Contractor has violated the requirements of this Chapter
14 12E and of the Contractor's right of appeal to the Controller, the Contracting Department may direct
15 the Controller to deduct from the payment or payments otherwise due to the Contractor the amount that
16 the Contracting Department has determined the Contractor must pay to the City for liquidated
17 damages. The Controller, in issuing any warrant for any such payment, shall deduct the amounts
18 specified by the Contracting Department.

19 (2) The Controller shall withhold these funds until (A) the hearing officer issues a
20 decision finding that the Contractor does not owe all or a portion of the amount withheld, in which case
21 the Controller shall release funds to the Contractor consistent with the hearing officer's decision, or
22 (B) the Contractor consents to pay to the City the amounts that the Contracting Department or hearing
23 officer found due. As to any funds being withheld for which neither (A) nor (B) applies, the Controller
24 shall retain the funds until the hearing officer's decision is no longer subject to judicial review, at
25 which time the Controller shall distribute the funds as provided in subsection 12E.7(e)(3), provided

1 that this action is consistent with any final determination of a court of competent jurisdiction.

2 Notwithstanding the provisions of this subsection 12E.7(e), the Contracting Department may authorize
3 the release of payments withheld from the Contractor under this subsection 12E.7(e) if the Contracting
4 Department determines that the continued withholding of funds imposes a substantial risk of
5 endangering public health or safety, interfering with a service or project that is essential to the City, or
6 having an unreasonable adverse financial impact on the City.

7 (3) The Controller shall deposit sums imposed as liquidated damages and withheld by
8 the City in the City's General Fund.

9 (f) The Controller may adopt rules, regulations, and guidelines to implement this Chapter 12E.

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11 **SEC. 12E.8. PREEMPTION.**

12 Nothing in this Chapter 12E shall be interpreted or applied so as to create any requirement,
13 power, or duty in conflict with any federal or state law. In Contracts that involve the use of any funds
14 furnished, given, or loaned by the Government of the United States or the State of California, all laws,
15 rules, regulations, and guidance of the United States or California or of any federal or State agencies
16 relative to the performance of such work and the conditions of such grant, gift or loan, shall prevail
17 over the requirements of this Chapter 12E when such laws, rules, regulations, or guidance are in
18 conflict.

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20 **SEC. 12E.9. UNDERTAKING FOR THE GENERAL WELFARE.**

21 In enacting and implementing this Chapter 12E, the City is assuming an undertaking only to
22 promote the general welfare. It is not assuming, nor is it imposing on its officers and employees, an
23 obligation for breach of which it is liable in money damages to any person who claims that such breach
24 proximately caused injury.

1 **SEC. 12E.10. SEVERABILITY.**

2 If any section, subsection, sentence, clause, phrase, or word of this Chapter 12E, or any
3 application thereof to any person or circumstance, is held to be invalid or unconstitutional by a
4 decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining
5 portions or applications of the Chapter. The Board of Supervisors hereby declares that it would have
6 passed this Chapter and each and every section, subsection, sentence, clause, phrase, and word not
7 declared invalid or unconstitutional without regard to whether any other portion of this Chapter or
8 application thereof would be subsequently declared invalid or unconstitutional.

9
10 Section 2. Renumbering of Existing Chapter 12E and its Sections. Existing Chapter
11 12E of the Administrative Code, consisting of existing Sections 12E.1-12E.4, shall be
12 renumbered as Chapter 16, Article XIV, of the Administrative Code, consisting of Sections
13 16.600-16.603; and any cross-references in the Municipal Code to existing Chapter 12E or its
14 component sections shall be renumbered accordingly, including the reference to Section 12E
15 in Administrative Code Section 104.3(e) and the reference in existing Section 12E.3 to
16 existing Section 12E.4. These numbering changes are not made for any substantive reason
17 and shall have no substantive effect. The changes are made solely for the purpose of
18 renumbering the affected chapter and sections, so as to permit this ordinance to be codified in
19 Chapter 12E of the Administrative Code. The City Attorney shall direct the publisher of the
20 Municipal Code to take all appropriate steps to effectuate this

21
22 Section 3. Effective and Operative Date.

23 (a) This ordinance shall become effective 30 days after enactment. Enactment occurs
24 when the Mayor signs the ordinance, the Mayor returns the ordinance unsigned or does not
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1 sign the ordinance within ten days of receiving it, or the Board of Supervisors overrides the
2 Mayor's veto of the ordinance.

3 (b) This ordinance shall become operative 90 days after the effective date.
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6 APPROVED AS TO FORM:
7 DENNIS J. HERRERA, City Attorney

8 By: _____
9 JULIA H. VEIT
Deputy City Attorney

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