

1 [Minimum Compensation Ordinance.]

2 **Ordinance amending the San Francisco Administrative Code by amending Sections**
 3 **12P.2, 12P.3, 12P.4, 12P.5, 12P.6, 12P.7 and 12P.8, and by adding Sections 12P.5.1,**
 4 **12P.6.1 and 12P.6.2, to amend the Minimum Compensation Ordinance by making both**
 5 **substantive and clarifying changes with respect to: the obligations imposed on**
 6 **Contractors; notification, investigation, auditing, inspection, enforcement and**
 7 **settlement procedures; the withholding of contract payments; provisions relating to**
 8 **waivers; certain definitions, including the definition of Covered Employees; an increase**
 9 **in the hourly wage rate for all employees; the assessment of liquidated damages; and**
 10 **the process for determining whether a Contractor has violated the Ordinance and for**
 11 **the administrative appeal of such determinations.**

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 13 Note: Additions are *single-underline italics Times New Roman*;
 14 deletions are ~~*strikethrough italics Times New Roman*~~.
 15 Board amendment additions are double underlined.
 16 Board amendment deletions are ~~strikethrough normal~~.

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

18 Section 1. The San Francisco Administrative Code is hereby amended by amending
19 Sections 12P.2, 12P.3, 12P.4 and 12P.5, to read as follows:

20 **SEC. 12P.2. DEFINITIONS.**

21 As used in this Chapter the following capitalized terms shall have the following
22 meanings:

23 (a) "Agency" shall mean the ~~Department of Administrative Services~~ the Office of Labor
24 Standards Enforcement.

25 (b) "City" shall mean the City and County of San Francisco.

1 (c) "Consumer Price Index" or "CPI" shall mean the Consumer Price Index for urban wage
2 earners and clerical workers for the San Francisco-Oakland-San Jose metropolitan statistical area.

3 (d) "Contract" shall mean an agreement or portion of an agreement that provides for
4 services to be purchased at the expense of the City or out of trust funds established by
5 Charter, ordinance or Memorandum of Understanding ("MOU"). The term "Contract" shall
6 include, without limitation, Included Subcontracts and agreements such as grant agreements,
7 pursuant to which agreements the City grants funds to a Contractor for services (including,
8 without limitation, cultural activities, performances or exhibitions) to be rendered to all or any
9 portion of the public rather than to City government. ~~Notwithstanding the foregoing, the term~~
10 ~~"Contract" shall exclude:~~

11 (e) Notwithstanding the foregoing, the term "Contract" shall exclude:

12 (1) ~~(i)~~ Excluded Subcontracts;

13 (2)(A) ~~(ii)~~ Any agreement with a Contractor that, together with the Employees of
14 any Included Subcontractor and of any entity that is owned or controlled by the Contractor or
15 which owns or controls the Contractor, would have twenty (20) or fewer Employees;

16 (B) Notwithstanding subsection (e)(2)(A), for every Contract and Contract Amendment
17 entered into on or after the Effective Date of the Amendment, the term "Contract" shall exclude any
18 agreement with a Contractor that, together with the Employees of any Included Subcontractor and of
19 any entity that is owned or controlled by the Contractor or which owns or controls the Contractor,
20 would have five or fewer Employees;

21 (3) ~~(iii)~~ Agreements for the purchase or lease of goods or for guarantees, warranties,
22 shipping, delivery or initial installation of such goods;

23 (4) ~~(iv)~~ Agreements entered into pursuant to settlement of legal proceedings;

1 ~~(5)~~ ~~(v)~~ Agreements for urgent or specialized litigation requirements where the City
2 Attorney's Office finds that it would be in the best interests of the City not to include the
3 requirements of this Chapter;

4 ~~(6)~~ ~~(A)~~ ~~(v)~~ Agreements with any person or entity in which the cumulative amount of
5 compensation payable to such person or entity under all agreements with a Contracting
6 Department is less than twenty-five thousand dollars (\$25,000), or \$50,000 in the case of
7 Nonprofit Corporations, in any fiscal year, provided that the agreement in question shall be
8 deemed a Contract on and after the effective date of any instrument which causes such
9 cumulative compensation under all agreements with a Contracting Department to exceed
10 twenty-five thousand dollars (\$25,000), or \$50,000 in the case of Nonprofit Corporations;

11 ~~(B)~~ Notwithstanding the provisions of subsection (e)(6)(A) for every Contract and Contract
12 Amendment entered into on or after the Effective Date of the Amendment the term "Covered
13 Employee", the term Contract shall exclude Agreements with any person or entity in which the
14 cumulative amount of compensation payable to such person or entity under all agreements with a
15 Contracting Department is less than twenty-five thousand dollars (\$25,000) in any fiscal year, provided
16 that the agreement in question shall be deemed a Contract on and after the effective date of any
17 instrument which causes such cumulative compensation under all agreements with a Contracting
18 Department to exceed twenty-five thousand dollars (\$25,000);

19 ~~(7)~~ ~~(vii)~~ Agreements for the investment, management or use of trust assets where
20 compliance with this Chapter would violate the fiduciary duties of the trustee;

21 ~~(8)~~ ~~(viii)~~ Agreements entered into prior to the Effective Date (unless and until a
22 Contract Amendment is entered into);

23 ~~(9)~~ ~~(ix)~~ Agreements entered into after the Effective Date (unless and until a Contract
24 Amendment is entered into) pursuant to, and within the scope of, bid packages or requests for
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1 proposals advertised and made available to the public prior to the Effective Date, which bid
2 packages or requests for proposals were not amended on or after the Effective Date;

3 (10) ~~(x)~~ Except as provided in subsection (i)(4), aAgreements involving the
4 expenditure by the City of grant or special funds (A) to the extent the application of this
5 Chapter would violate or be inconsistent with the terms or conditions of the applicable grant
6 agreement, or with the rules, regulations or instructions of the public agency administering
7 such grant agreement, which terms or conditions or rules, regulations or instructions provide
8 for compensation lower than the Minimum Compensation, provided, however, that this subsection
9 (A) shall not apply to terms or conditions of a grant agreement from the State of California that
10 violates or is inconsistent with California Labor Code Section 1205(c), and/or (B) to the extent that
11 application of this Chapter would require the City to use General Fund monies to supplement
12 the grants, special funds or other non-General Fund revenues to maintain the current level of
13 services;

14 (11) ~~(xi)~~ Agreements with a Contractor that is a public entity whose jurisdictional
15 boundaries are not coterminous with those of the City;

16 (12) ~~(xii)~~ Agreements for employee benefits to be provided to City employees,
17 where the Director of Human Resources finds that no entity is willing to comply with this
18 Chapter and is capable of providing the required employee benefits;

19 (13) ~~(xiii)~~ Agreements that require the Contractor to pay no less than the “prevailing
20 rate of wage” in accordance with Section A7.204 of Appendix A to the City's Charter or
21 ~~Chapter 6~~ any provision of the San Francisco Administrative Code, but only to the extent (A)
22 each Covered Employee is covered by such requirement, and (B) such prevailing rate of
23 wage is not less than the gross hourly compensation required under Section 12P.3(a)(1) ~~(#)~~ of
24 this Chapter;

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1 ~~(14) (xiv)~~ Agreements for the investment of City monies where the Treasurer finds
2 that requiring compliance with this Chapter will violate the Treasurer's fiduciary duties and for
3 the investment of retirement, health or other funds held in trust pursuant to Charter, statute,
4 ordinance or MOU where the official or officials responsible for investing or managing such
5 funds finds that requiring compliance with this Chapter will violate their fiduciary duties;

6 ~~(15) (xv)~~ Agreements made in connection with loans or grants under which the
7 City, as creditor or grantor, is providing funds to be used by the debtor or grantee to:

8 (A) Acquire an interest in real property on which residential improvements for low- or
9 moderate-income households will be constructed;

10 (B) Construct improvements owned or leased by the debtor or grantee, on condition
11 that residents of the improvements qualify as low- or moderate-income households; or

12 (C) Rehabilitate improvements owned or leased by the debtor or grantee; and

13 ~~(16) (xvi)~~ Agreements (including, without limitation, any lease, concession,
14 franchise or easement agreement) for the exclusive use of real property owned by the City or
15 of which the City has exclusive use, other than agreements for the use of airport property as
16 set forth in Section 12P.4.

17 ~~(f)~~ "Contract Amendment" shall mean *the modification of a Contract ~~an agreement~~*
18 *entered into on or after the Effective Date, pursuant to which a Contract entered into prior to the*
19 *Effective Date is modified or supplemented* in order to: ~~(1) (i)~~ extend the term; ~~(2) (ii)~~ modify the
20 total amount of payments due from the City under a Contract; ~~(3) (iii)~~ modify the scope of
21 services to be performed by a Contractor; or ~~(4) (iv)~~ expand or relocate the premises covered
22 under an airport property contract. The term does not include construction change orders.

23 ~~(g)~~ "Contracting Department" shall mean the City department, office, commission or
24 other City entity which enters into the applicable Contract on behalf of the City.

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1 (h) "Contractor" shall mean either:

2 (1) (i) The person or entity that enters into a Services Contract with the City; or

3 (2) (ii) In the case of an Included Subcontract, the subcontractor who enters into the
4 Included Subcontract with the Contractor.

5 (i) "Covered Employee" shall mean:

6 (1) (a) An Employee of a Contractor who, during the applicable Pay Period, performs at
7 least four (4) hours per week during the Pay Period of work funded (in whole or in part) under
8 the applicable Contract or ~~to~~ on the project funded under the applicable Contract:

9 (A) (i) Within the geographic boundaries of the City;

10 (B) (ii) On real property owned or controlled by the City, but outside the geographic
11 boundaries of the City; or

12 (C) (iii) Elsewhere in the United States, but only if such related work performed
13 elsewhere within the United States consists of at least ten (10) hours per each work week
14 during the Pay Period in question.

15 (2) Notwithstanding the provisions of subsection (i)(1), for every Contract and Contract
16 Amendment entered into on or after the Effective Date of the Amendment the term "Covered Employee"
17 shall include an Employee of a Contractor who works elsewhere in the United States and who, during
18 the applicable Pay Period, performs at least four (4) hours per week of work funded (in whole or in
19 part) under the applicable Contract or to on the project funded under the applicable Contract.

20 (3) Employees of the In-Home Supportive Services Public Authority shall be covered
21 employees as designated in Section 70.11 of this Code.

22 (4) (b) Notwithstanding the foregoing, the term "Covered Employee" shall exclude the
23 following Employees of a Contractor that is a Nonprofit Corporation:

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1 ~~(A)(i)~~ Any Employee who is: ~~(A)~~ under the age of eighteen (18) and is claimed as a
2 dependent for federal income tax purposes and is employed as an after-school or summer
3 Employee; or ~~(B)~~ employed as a trainee in a bona fide training program consistent with
4 Federal law, which training program enables the Employee to advance into a permanent
5 position; provided, however, these exemptions only apply when the Employee does not
6 replace, displace or lower the wage or benefits of any existing position or Employee; and,
7 ~~(B)(ii)~~ Any disabled Employee of a Contractor, which disabled Employee: ~~(A)~~ is
8 covered by a current sub-minimum wage certificate issued to the Contractor by the U.S.
9 Department of Labor; or ~~(B)~~ would be covered by such a certificate but for the fact that the
10 Contractor is paying a wage equal to or higher than the minimum wage.

11 ~~(5)~~ For every Contract and Contract Amendment entered into on or after the Effective Date
12 of the Amendment, the term "Covered Employee" shall include an Employee of a Contractor who also
13 participates in the CalWorks Program, or any similar successor program, who during the applicable
14 Pay Period performs any welfare-to-work activities considered "employment" under the Fair Labor
15 Standards Act (29 U.S.C. §§ 201 et. seq.) and any applicable United States Department of Labor
16 regulations or guideline, funded (in whole or in part) under the applicable Contract or on the project
17 funded under the applicable Contract; provided, however, that the hourly rate of payment for these
18 Covered Employees shall be set by the Executive Director of the Department of Human Services at the
19 maximum rate that is in conformance with CalWorks eligibility criteria so that these Covered
20 Employees maintain CalWorks eligibility. Prior to June 1 of each year, the Executive Director shall
21 provide such rate to the Office of Labor Standards Enforcement for publication. This amount shall be
22 adjusted yearly, as necessary, to reflect any changes in federal or state law governing CalWorks
23 eligibility.

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1 (j) _____ "Effective Date" shall mean the applicable effective date specified in Section
2 12P.15 ~~12P.12~~ of this Chapter.

3 (k) _____ "Effective Date of the Amendment" shall mean the date thirty days after adoption of the
4 amendment to this Ordinance introduced on November 15, 2005.

5 (l) _____ "Employee" shall mean any person who is employed by a Contractor, including
6 part-time and temporary employees.

7 (m) _____ "Excluded Subcontract" shall mean any agreement or portion of an agreement
8 between a Contractor and a person or entity who is not an Employee of such Contractor,
9 which agreement or portion of an agreement relates to a Contract but is not an Included
10 Subcontract. The term "Excluded Contract" shall include, without limitation, an agreement
11 pursuant to which a Contractor obtains from such a person or entity goods to be used in the
12 fulfillment of the Contractor's duties under the applicable Contract. The term shall also
13 include agreements (including, without limitation, any lease, concession, franchise or
14 easement agreement) for the exclusive use of real property owned by the City or of which the
15 City has exclusive use, other than agreements for the use of airport property as set forth in
16 Section 12P.4.

17 (n) _____ "Hourly Rate" shall mean the hourly gross compensation required under this Chapter.

18 (o) _____ "Included Subcontract" shall mean an agreement or portion of an agreement
19 between a Contractor and a person or entity who is not an Employee of such Contractor,
20 pursuant to which such person or entity: (1) ~~(i)~~ agrees to assist a Contractor in performing a
21 Contract; or (2) ~~(ii)~~ agrees to assist a Contractor with a project funded by grant monies
22 conveyed to the Contractor under the applicable Contract. An agreement to assist a
23 Contractor shall mean an agreement to perform all or a portion of a component of the services
24 covered by the Contract with the City.

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1 (p) “Minimum Compensation” shall mean each of the components required under
2 Section 12P.3. of this Chapter.

3 (q) “Nonprofit Corporation” shall mean a nonprofit corporation, duly organized,
4 validly existing and in good standing under the laws of the jurisdiction of its incorporation and
5 (if a foreign corporation) in good standing under the laws of the State of California, which
6 corporation has established and maintains valid nonprofit status under Section 501(c)(3) of
7 the United States Internal Revenue Code of 1986, as amended, and all rules and regulations
8 promulgated under such Section.

9 (r) “Pay Period” shall mean the applicable Contractor's regular pay period.

10 SEC. 12P.3. MINIMUM COMPENSATION COMPONENTS.

11 Minimum Compensation shall consist of each of the following:

12 (a) Contracts in existence prior to the Effective Date of the Amendment.

13 (1) Contracts with parties other than Nonprofit Corporations or public entities.

14 (A) (i) From October 8, 2000 through December 31, 2001, hourly Hourly gross
15 compensation in the amount of nine dollars (\$9.00) per hour. The hourly rate shall increase after
16 December 31, 2001 as set forth in this Section.

17 (ii) ~~In no less than twelve (12) nor more than eighteen (18) months from the Effective Date,~~
18 ~~the City shall increase the hourly gross compensation to ten dollars (\$10.00) per hour; provided,~~
19 ~~however, that in the case of Nonprofit Corporations and public entities, this adjustment shall only be~~
20 ~~made if the Joint Report issued by the Controller, Mayor's Budget Office, and Budget Analyst, pursuant~~
21 ~~to San Francisco Administrative Code Section 3.6, finds that the City has sufficient funds to pay the~~
22 ~~anticipated costs of the adjustment. A finding of “sufficient funds” shall mean that the City will not be~~
23 ~~required to reduce services in order to pay the anticipated costs of the adjustment.~~

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1 ~~(iii) For each of the next three (3) years after the adjustment provided in Subsection (a)(ii) is~~
2 ~~made, at annual intervals, the City shall make an additional adjustment of 2.5%.~~

3 (B) From January 1 through December 31, 2002, the hourly rate shall be \$10.00.

4 (C) From January 1 through December 31, 2003, the hourly rate shall be \$10.25.

5 (D) From January 1 through December 31, 2004, the hourly rate shall be \$10.51.

6 (E) From January 1, 2005 and thereafter, the hourly rate shall be \$10.77, unless the parties
7 execute a Contract Amendment, in which case the provisions of Subsection (b) shall govern the hourly
8 rate.

9 (2) Contracts with Nonprofit Corporations and public entities. Notwithstanding the
10 provisions of this Section, the hourly rate for Nonprofit Corporations and public entities shall remain
11 in the amount of \$9.00, unless the parties execute a Contract Amendment, in which case the provisions
12 of Subsection (b) shall govern.

13 (b) Contract and Contract Amendments entered into on or after the Effective Date of the
14 Amendment:

15 (1) The hourly rate shall be in the amount of \$10.77. In order to prevent inflation from
16 eroding the value of this rate of pay, beginning January 1, 2006, and annually thereafter on the first of
17 January, the hourly rate of \$10.77 shall increase by an amount corresponding to the prior year's
18 increase, if any, in the Consumer Price Index ("CPI"). By December 1 of each year, the Agency shall
19 make available at its office and on its website the hourly rate required by this Section, which shall
20 include any adjustments based on the CPI.

21 (2) When preparing proposed budgets and requests for supplemental appropriations for
22 contract services, City departments that regularly enter into agreements for the provision of services by
23 nonprofit corporations shall transmit with their proposal a written confirmation that the department

1 has considered in its calculations the costs that the nonprofit corporations calculate that they will incur
2 in complying with the Minimum Compensation Ordinance.

3 (3) Subject to the budgetary and fiscal provisions of the Charter, it shall be the policy of the
4 City to endeavor to ensure sufficient funding to prevent a reduction in the services to the community
5 provided by Nonprofit Corporations and public entities.

6 ~~(c)~~(b) Compensated time off (at the compensation rates specified in subsection s (a) or
7 (b) of this Section) in an hourly amount that, on an annualized basis for a full-time employee,
8 equals twelve (12) days per year. Such time off shall vest with the Covered Employee at the
9 end of the applicable Pay Period and may be used, for sick leave, vacation or personal
10 necessity. Notwithstanding the foregoing, if a Contractor reasonably determines, in good
11 faith, that the Contractor cannot comply with this requirement for compensated time off, the
12 Contractor shall provide the Covered Employee with a cash equivalent of such compensated
13 time off.

14 ~~(d)~~(e) Uncompensated time off in an hourly amount that, on an annualized basis for a
15 full-time employee, equals ten (10) days per year. Such time off shall vest with the Covered
16 Employee at the end of the applicable Pay Period and may be used, at the option of the
17 Covered Employee, for sick leave for the illness of the Covered Employee or such Covered
18 Employee's spouse, domestic partner, child, parent, sibling, grandparent or grandchild.

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20 **SEC. 12P.4. SAN FRANCISCO INTERNATIONAL AIRPORT.**

21 The requirements of this Chapter shall apply to a written agreement (including, without
22 limitation, any lease, concession, franchise or easement agreement) for the exclusive use of
23 real property that is owned by the City or of which the City has exclusive use, if such property
24 is under the jurisdiction of the San Francisco Airport Commission and the term of the

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1 agreement exceeds twenty-nine (29) days in any calendar year, whether by single or
2 cumulative instruments. If cumulative instruments cause the term of the agreement to exceed
3 twenty-nine (29) days, the agreement in question shall be subject to this Article only on and
4 after the effective date of the instrument which causes the term to exceed twenty-nine (29)
5 days. The requirements of this Chapter shall also apply to (i) any sublease or other
6 agreement allowing other parties the exclusive right to occupy or use all or any portion of the
7 property covered by the agreement and (ii) any agreement between a tenant or subtenant and
8 any other person or entity to perform services on the airport property. Contractors who have
9 agreements covered by this Section shall comply with the requirements of this Chapter insofar
10 as they have "Covered Employees." For purposes of this Section, "Covered Employee" shall
11 mean an employee who provides at least ten (10) hours of work on the property that is the
12 subject of the agreement in a two-week Pay Period, adjusted proportionately if the Pay Period
13 is other than two weeks. Notwithstanding the provisions of this Section, all exemptions and
14 waivers from the requirements of this Chapter that apply to Contracts shall also apply to
15 agreements for the use of airport property described in this Section, except *that for* the
16 exemption in Section 12P.2(e)(16) (xvii) relating to property contracts does not apply to agreements
17 for the use of real property owned by the City or of which the City has exclusive use if the property is
18 under the jurisdiction of the San Francisco Airport Commission. Except as otherwise specifically
19 provided, all requirements of this Chapter, and the monitoring and enforcement mechanisms
20 provided in this Chapter, shall apply to agreements covered by this Section.

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22 **SEC. 12P.5. CONTRACT REQUIREMENTS.**

23 Every Contract or Contract Amendment entered into on or after the Effective Date shall
24 provide as follows:

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1 (a) For each hour worked by a Covered Employee during each Pay Period during
2 the term of the Contract (as such term may be extended from time to time), Contractor shall
3 provide to such Covered Employee no less than the Minimum Compensation as required in
4 this Chapter.

5 (b) Failure to comply with the foregoing requirement shall constitute a material
6 breach by Contractor of the terms of the Contract. Such failure shall be determined by the
7 City in its sole discretion.

8 (c) If, within thirty (30) days after the Contractor receives written notice of such a
9 breach, Contractor fails to cure such breach or, if such breach cannot reasonably be cured
10 within such period of thirty (30) days, Contractor fails to commence efforts to cure within such
11 period, or thereafter fails diligently to pursue such cure to completion, the City shall have the
12 right to pursue any rights or remedies available under the terms of the Contract or under
13 applicable law.

14 (d) The Contractor shall not discharge, reduce in compensation, or otherwise
15 discriminate against any Employee for complaining to the City with regard to the employer's
16 compliance or anticipated compliance with this Chapter, for opposing any practice proscribed
17 by this Chapter, for participating in proceedings related to this Chapter, or for seeking to
18 assert or enforce any rights under this Chapter by any lawful means.

19 (e) The Contractor represents and warrants that it is not an entity that was set up, or
20 is being used, for the purpose of evading the intent of this Chapter.

21 (f) The Contractor shall keep itself informed of the current Minimum Compensation,
22 and shall provide prompt written notice to all Covered Employees of annual adjustments to the
23 Minimum Compensation, as well as any written communications received by the Contractor
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1 from the City, which communications are marked to indicate that they are to be distributed to
2 Covered Employees.

3 (g) The Contractor shall maintain employee and payroll records in compliance with the
4 California Labor Code and Industrial Welfare Commission orders. Where a Contractor does not
5 maintain or retain such records, or does not allow the Agency reasonable access to such records, it
6 shall be presumed that the Contractor paid no more than the minimum wage required under State law.
7 The Contractor shall have the burden of overcoming the presumption by clear and convincing
8 evidence.

9 (h) (g) The Contractor shall provide reports to the City in accordance with any reporting
10 standards promulgated by the Agency.

11 (i) (h) The Contractor shall provide the City with access to pertinent records after
12 receiving a written request to do so and being provided at least five (5) business days to
13 respond.

14 (j) (i) The Agency may conduct random audits of Contractors. Random audits shall
15 be (1) (i) noticed in advance in writing; (2) (ii) limited to ascertaining whether Covered
16 Employees are paid at least the minimum compensation required by this Article; (3) (iii)
17 accomplished through an examination of pertinent records at a mutually agreed upon time
18 and location within ten (10) days of the written notice; and (4) (iv) limited to one audit per
19 Contractor every two years for the duration of the Contract. Nothing in this Section shall be
20 deemed to interfere with the authority of the Agency to investigate any report of an alleged
21 breach of contract as provided in Section 12P.6.

22 (k) (j) Any Contractor subject to the provisions of this Chapter shall promptly notify the
23 Contracting Department Agency of any subcontractors performing services covered by this
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1 Chapter and shall certify to the Contracting Department Agency that it has notified the
2 subcontractors of their obligations under this Chapter.

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4 Section 2. The San Francisco Administrative Code is hereby amended by adding
5 Section 12P.5.1, to read as follows:

6 **SEC. 12P.5.1. ADDITIONAL CONTRACT REQUIREMENTS.**

7 Every Contract and Contract Amendment entered into on or after the Effective Date of the
8 Amendment, shall include the provisions set forth below, in addition to those requirements set forth in
9 Section 12P.5. Where a conflict exists, the provisions of this Section supersede those of Section 12P.5.

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

13 (b) If a Contractor fails to comply with the requirements of this Chapter, the City shall have
14 the right to pursue any rights or remedies available under this Chapter, under the terms of the
15 Contract, and under applicable law, consistent with the procedures set forth in Section 12P.6.2.

16 (c) In order to monitor and determine compliance with this Chapter, employees and agents
17 of the City authorized to assist in the administration and enforcement of this Chapter, including
18 employees and agents of the Agency, shall have the right to (1) engage in inspections of a Contractor's
19 job sites and conduct interviews with a Contractor's employees and (2) conduct audits of Contractors,
20 provided that the City gives notice in advance of such audits and the audits are accomplished through
21 an examination of pertinent records at a mutually agreed upon time and location within ten (10) days
22 of the written notice.

1 Section 3. The San Francisco Administrative Code is hereby amended by amending
2 Sections 12P.6, to read as follows:

3 **SEC. 12P.6. ADMINISTRATION AND ENFORCEMENT.**

4 (a) The Agency shall monitor Contractors for compliance with the requirements of this
5 Chapter and investigate complaints of violations. The Agency shall promulgate guidelines or rules
6 for the administration of this Chapter. Such guidelines and rules shall not be adopted finally
7 by the Agency until the Agency has held a public hearing. The guidelines and rules shall
8 establish procedures for monitoring Contractors, receiving and investigating complaints, and
9 determining ~~providing administrative hearings requested by Covered Employees to determine~~ whether
10 a Contractor has breached a Contract based on the Minimum Compensation requirements of
11 this Chapter. The guidelines and rules shall also establish procedures permitting Contractors
12 to provide payroll information in confidence to the City for purposes of monitoring compliance
13 under this Chapter and authorizing disclosure of the information by the City only when
14 necessary for enforcement purposes. Upon the request of a Contracting Department, the
15 Agency shall also issue a determination as to whether a particular instrument constitutes a
16 Contract or agreement is subject to the requirements of this Chapter. The Agency shall report
17 annually on compliance with this Chapter to the Board of Supervisors. Such report shall
18 include cumulative information regarding the number of waivers granted by the Agency
19 pursuant to Sections 12P.7 and 12P.8 of this Chapter and statistical data regarding such
20 waivers.

21 (b) ~~A Covered Employee may report to the Agency in writing any alleged breach by a~~
22 ~~Contractor of the terms required to be contained in the applicable Contract under this Chapter. The~~
23 ~~Agency shall investigate any such report.~~ If the Agency determines that a Contractor is in breach
24 of any ~~such term~~ required to be contained in the Contract under this Chapter, the Agency shall
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1 notify the Contracting Department of its findings and of any action that the Agency requests
2 the Contracting Department to take with respect to such breach. In order to ensure
3 compliance with this Chapter and to enhance the monitoring activities of the Agency, the City
4 desires to encourage reporting by Covered Employees of any breach. The Agency shall
5 investigate any such report. pursuant to this subsection. The Agency shall keep confidential, to
6 the maximum extent permitted by applicable laws, the Covered Employee's name and other
7 identifying information.

8 (c) In addition to any other rights or remedies available to the City under the term of
9 the Contract or under applicable law, the City shall have the following rights, in the event of
10 such failure by the Contractor:

11 (1) (i) the right, at the discretion of the Agency, to charge the Contractor an amount equal
12 to the difference between the Minimum Compensation levels required by this Chapter and any
13 compensation actually provided to each Covered Employee who was not paid in accordance
14 with the terms of this Chapter, together with simple annual interest of 10% on such amount from
15 the date payment was due at the maximum rate then permitted by law;

16 (2) (ii) the right, at the discretion of the Agency, to set off all or any portion of the amount
17 described in the preceding clause (1) (i) of this Subsection against amounts due to Contractor
18 under the Contract;

19 (3) (iii) the right, at the discretion of the Contracting Department, to terminate the Contract
20 in whole or in part;

21 (4) (iv) in the event of a breach by Contractor of the covenant referred to in Section
22 12P.5(d), the right, at the discretion of the Agency, to seek require reinstatement of the affected
23 Covered Employee and, if necessary, seek a court order for such reinstatement or to obtain other
24 appropriate equitable relief and, in addition, to require payment of any wages lost because of the
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1 Contractor's discriminatory or retaliatory action, together with simple annual interest of up to 10%
2 from the date payment should have been made; and

3 (5) ~~(iv)~~ the right, at the discretion of the Agency or the Contracting Department, to bar a
4 Contractor from entering into future contracts with the City for three (3) years.

5 (6) The City may bring a civil action against the Contractor to pursue the remedies
6 provided by this Chapter and other applicable law. The prevailing party shall be entitled to all costs
7 and expenses, including reasonable attorneys' fees.

8 Each of these rights shall be exercisable individually or in combination with any other
9 rights or remedies available to the City. Any amounts realized by the City pursuant to this
10 subsection shall be paid to each applicable Covered Employee.

11 When this Chapter authorizes the Agency to charge interest, in determining the
12 appropriate amount to charge the Agency shall give due consideration to the size of the
13 Contractor's business, the Contractor's good faith, the gravity of the violation, and the history
14 of previous violations.

15 (d) Each Covered Employee shall be a third-party beneficiary under the Contract as
16 set forth in this subsection and in subsection (e) of this Section, and may pursue the following
17 remedies in the event of a breach by the Contractor of any contractual covenant described in
18 Section 12P.5(a) or Section 12P.5(d), but only after the Covered Employee has provided the
19 notice and participated in the administrative review hearing provided in this subsection. The
20 Covered Employee shall give written notice of a breach to the Contractor and to the Agency.
21 If the Agency and the Contracting Department determine that no breach has occurred, or if
22 the Contracting Department fails to obtain the cure of a breach by the Contractor within sixty
23 (60) days after receipt of notice by the Covered Employee, the Covered Employee may
24 request an administrative review hearing. The Covered Employee must request such a
25

1 hearing within ninety (90) days after giving written notice of the breach. Unless the Covered
2 Employee withdraws the request for a hearing, the Agency shall conduct, or arrange to have
3 conducted, a hearing. The Employee shall have the right to attend the hearing personally or
4 through a designated representative. The Agency shall notify the Contractor of the hearing so
5 that the Contractor may attend and present evidence. After the hearing is completed, the
6 person conducting the hearing shall determine whether the Contractor has breached the
7 Contract. Upon the issuance of a written decision finding a breach, and after a waiting period
8 of twenty-one (21) days, the Covered Employee may bring an action against the Contractor
9 for such breach in the Superior Court of the State of California, as appropriate, unless the City
10 has commenced an action against the Contractor based on the breach, or obtained
11 compliance, within the 21-day waiting period and provided notice to the Covered Employee of
12 that action. If the Covered Employee prevails in such action, the Covered Employee may be
13 awarded: (1) ~~(A)~~ an amount equal to the difference between the Minimum Compensation and
14 any compensation actually provided to the Covered Employee, together with *simple annual*
15 interest *of 10%* on such amount from the date payment was due *at the maximum rate then*
16 *permitted by law*; and (2) ~~(B)~~ in the event of a breach by Contractor of the covenant referred to
17 in Section 12P.5(d), the right to seek reinstatement or to obtain other appropriate equitable
18 relief.

19 (e) In the event of any legal action or proceeding between Contractor and a
20 Covered Employee arising from this Agreement, the unsuccessful party to such action or
21 proceeding shall pay to the prevailing party all costs and expenses, including reasonable
22 attorneys' fees and disbursements, incurred by such prevailing party in such action or
23 proceeding and in any appeal in connection with such action or proceeding; provided,
24 however, that a Contractor shall be entitled to such costs and expenses only if the court
25

1 determines that the Covered Employee's action or proceeding was frivolous, vexatious or
2 otherwise an act of bad faith. If such prevailing party recovers a judgment in any such action,
3 proceeding or appeal, such costs, expenses and attorneys' fees and disbursements shall be
4 included in and as a part of such judgment. ~~This Article does not authorize any award of costs,
5 expenses, or attorney's fees in favor of or against the City.~~

6 (f) The City shall maintain the confidentiality of payroll information obtained in the
7 course of monitoring compliance with this Chapter and shall disclose such information only as
8 necessary for enforcement purposes.

9 (g) The Agency shall develop a procedure for obtaining an assurance from
10 Contractors when they sign an agreement subject to this Chapter that they comply with the
11 requirements of this Chapter, such as the signing of an affidavit of compliance.

12 ~~(h) The Agency may compromise and settle unlitigated claims that Contractors have
13 violated the requirements of this Chapter, including Contractors that have agreements for real property
14 as set forth in Section 12P.4.~~

15 ~~(i) All Contractors and Contracting Departments shall cooperate fully with the Agency in
16 connection with any investigation of an alleged violation of this Chapter or with any inspection
17 conducted by the Agency.~~

18
19 Section 4. The San Francisco Administrative Code is hereby amended by adding
20 Sections 12P.6.1 and 12P.6.2, to read as follows:

21 **SEC. 12P.6.1. LIQUIDATED DAMAGES.**

22 Every Contract and Contract Amendment into on or after the Effective Date of the Amendment
23 shall contain a provision in which the Contractor agrees:

24 (a) To be liable to the City for liquidated damages as provided in this Section;
25

1 (b) To be subject to the procedures governing enforcement of a breach of the terms of a
2 Contract, which terms are required by this Chapter, as set forth in Section 12P.6.2;

3 (c) That Contractor's commitment to pay the Minimum Compensation as required in this
4 Chapter is a material element of the City's consideration for the Contract and that the failure of
5 Contractor to comply will cause significant and substantial harm to the City and the public which is
6 extremely difficult to determine or quantify, and that the liquidated damages set forth in this Section are
7 reasonable amounts to pay for the harm caused by the Contractor's non-compliance;

8 (d) That for any failure to provide the required Minimum Compensation (hourly wage and time
9 off), the Agency may require the Contractor to pay the City liquidated damages of up to one hundred
10 dollars (\$100) for each one-week pay period for each employee not provided the required
11 compensation. The Agency shall adjust this amount proportionately for Contractors that use a pay
12 period other than one week;

13 (e) That for any failure to provide reports to the City or access to pertinent records, or any
14 failure to cooperate with any audit, inspection or investigation conducted by the Agency, the Agency
15 may require the Contractor to pay the City liquidated damages of up to one thousand dollars (\$1000);

16 (f) That while liquidated damages in the maximum amounts set forth in this Section are a
17 reasonable estimate of the harm caused by the Contractor's non-compliance with contractual
18 provisions required by this Chapter, the Agency may determine that less than the full amount is
19 warranted depending on the circumstances of each case. The Agency shall give due consideration to
20 the following factors in determining the amount of liquidated damages: the size of the Contractor's
21 business, the Contractor's good faith, the gravity of the violation, the history of previous violations, the
22 failure to comply with record-keeping, reporting, anti-retaliation or other non-wage requirements, and
23 the extent to which the imposition of liquidated damages would undermine the purpose of this Chapter

1 by imposing unreasonable financial burdens on the Contractor, thereby restricting its ability to fulfill
2 its obligations under this Chapter.

3
4 **SEC. 12P.6.2. INVESTIGATION AND DETERMINATION OF VIOLATIONS.**

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

13 (b) Right to Appeal. The Contractor may appeal the Agency's final determination. The
14 Contractor must file an appeal with the Agency in writing, specifying the basis for contesting the
15 determination, no later than 15 days after the date of the notice of determination. Failure to file an
16 appeal in writing with the Controller within 15 days shall cause the Agency's determination to be
17 deemed a final administrative decision by the City.

18 (c) Administrative Hearing.

19 (1) Within 15 days after the Agency receives an appeal, the Controller shall appoint a hearing
20 officer and shall notify the Agency and the Contractor.

21 (2) The hearing officer shall promptly set a date for a hearing. The hearing shall
22 commence within 45 days of the notification of the appointment of the hearing officer and conclude
23 within 75 days of such notification, unless all parties agree to an extended period.

1 (3) The Agency shall have the burden of producing evidence that the Contractor has
2 violated the requirements of this Chapter and the burden of proving the violation.

3 (d) Hearing Officer's Decision.

4 (1) Within 30 days of the conclusion of the hearing, the hearing officer shall issue a written
5 decision consisting of findings and a decision affirming, modifying, or vacating the Agency's
6 determination. If the hearing officer vacates the Agency's determination in its entirety, that decision
7 shall also vacate any assessment of liquidated damages. If the hearing officer affirms the Agency's
8 determination, the hearing officer shall issue a decision upholding the Agency's determination,
9 including the amount of the liquidated damages assessed by the Agency. With respect to liquidated
10 damages, the hearing officer's jurisdiction to modify the Agency's assessment is limited and the
11 following procedures apply. If the hearing officer modifies the Agency's determination, the hearing
12 officer shall transmit the decision to the Agency, which shall within five business days modify the
13 assessment of liquidated damages consistent with the hearing officer's decision based on the criteria set
14 forth in Section 12P.6.1 and transmit the modified assessment to the hearing officer. Upon receiving
15 the modified assessment from the Agency, the hearing officer shall within three business days issue a
16 final decision which shall include the amount of the liquidated damages assessment as modified by the
17 Agency.

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

22 (3) The failure of the Controller or hearing officer to comply with the time requirements of this
23 Section shall not cause the Controller or the hearing officer to lose jurisdiction over an appeal from the
24 Agency's determination filed under this Section.

1 (4) Upon receiving the hearing officer's decision affirming or modifying the Agency's
2 determination, the Contractor shall take the corrective action, including the payment of liquidated
3 damages ,if any, within 14 days of receiving the hearing officer's decision. If a Contractor fails to take
4 corrective action within the time required by the provisions of this Section, the City may immediately
5 pursue all available remedies against the Contractor.

6 (e) Withholding of Payments by Controller.

7 (1) When the Agency sends notice to a Contractor under Section 12P.6.2(a) of its final
8 determination that the Contractor has violated the requirements of this Chapter and of the Contractor's
9 right of appeal to the Controller, the Agency may direct the Contracting Department and the Controller
10 to deduct from the payment or payments otherwise due to the Contractor the amounts that the Agency
11 has determined the Contractor must pay to Covered Employees for violation of this Chapter and to the
12 City for liquidated damages. The Controller, in issuing any warrant for any such payment, shall deduct
13 the amounts specified by the Agency.

14 (2) The Controller shall withhold these funds until (A) the hearing officer issues a decision
15 finding that the Contractor does not owe all or a portion of the amount withheld, in which case the
16 Controller shall release funds to the Contractor consistent with the hearing officer's decision or (B) the
17 Contractor consents to the use of the funds to pay Covered Employees and/or the City the amounts that
18 the Agency or hearing officer found due. As to any funds being withheld for which neither (A) nor (B)
19 applies, the Controller shall retain the funds until the hearing officer's decision is no longer subject to
20 judicial review, at which time the Controller shall distribute the funds as provided in subsection (e)(3)
21 of this Section, provided that this action is consistent with any final determination of a court of
22 competent jurisdiction. Notwithstanding the provisions of this subsection, the Agency may authorize
23 the release of payments withheld from the Contractor under this Section if the Agency determines that
24 the continued withholding of funds imposes a substantial risk of endangering public health or safety,
25

1 interfering with a service or project that is essential to the City, or having an unreasonable adverse
2 financial impact on the City.

3 (3) The Controller shall distribute amounts withheld from Contractors under this Section in the
4 following order:

5 (A) The Agency shall make its best efforts to distribute any amounts that are determined due to
6 the Contractor's Covered Employees to those individuals, or may require the Contractor to do so. The
7 Controller shall hold the balance of any such amounts for Covered Employees whom the Agency and
8 Employer, despite best efforts, cannot locate. Funds held for at least two years shall be deposited in
9 the City's General Fund.

10 (B) Sums imposed as liquidated damages shall be deposited in the City's General Fund.

11
12 Section 5. The San Francisco Administrative Code is hereby amended by amending
13 Sections 12P.7, 12P.8, 12P.9, to read as follows:

14 **SEC. 12P.7. WAIVERS BY THE AGENCY.**

15 The Agency shall waive the requirements of this Chapter ~~under the following~~
16 ~~circumstances: where the~~

17 (a) ~~The~~ Contracting Department has certified in writing to the Agency, and the
18 Agency has found that:

19 (a) (i) ~~Either (A) there is only one prospective Contractor willing to enter into the applicable~~
20 ~~Contract on the terms and conditions established by the City (other than the requirements of this~~
21 ~~Chapter); or (B) the~~ The needed services under the applicable Services Contract are available
22 only from a sole source; and (ii) ~~the~~ The prospective Contractor is not currently
23 disqualified from doing business with the City or any other governmental agency; ~~or -~~

1 (b) ~~The Contracting Department has certified in writing to the Agency (prior to the~~
2 ~~Controller's contract certification), and the Agency has found that:~~

3 (i) Pursuant to Chapters 6 and 21 of the Administrative Code, the Contract is
4 necessary to respond to an emergency which endangers the public health or safety; and

5 (ii) ~~no~~ No entity that complies with the requirements of this Chapter and is capable
6 of responding to the emergency is immediately available to perform the required services; or:

7 (c) ~~The Contracting Department has certified in writing to the Agency, and the Agency has~~
8 ~~found that:~~

9 (i) There are no qualified responsive bidders or prospective vendors that comply
10 with the requirements of this Chapter; and

11 (2) (ii) ~~the~~ The Contract is for a service, project, or property that is essential to the City
12 or the public; or:

13 (d) ~~The Contracting Department has certified in writing to the Agency, and the Agency has~~
14 ~~found that:~~

15 (i) ~~The~~ The Services to be purchased are available under a bulk purchasing
16 arrangement with a federal, state or local governmental entity;

17 (ii) ~~purchase~~ Purchase under such arrangement will substantially reduce the City's
18 cost of purchasing such Services; and

19 (iii) ~~purchase~~ Purchase under such an arrangement is in the best interest of the City
20 or the public.

21
22 **SEC. 12P.8. ADDITIONAL WAIVERS BY THE AGENCY - NONPROFIT CORPORATIONS.**

23 A Nonprofit Corporation may seek a waiver from the requirements of the adjustments
24 provided in ~~12P.3(a)(ii) and (iii)~~ Section 12P.3(a) and (b) if the highest paid managerial position
25

1 in the organization earns a salary which, when calculated on an hourly basis, is not more than
2 six times the lowest wage paid by the organization to a Covered Employee. The Nonprofit
3 Corporation shall provide to the Contracting Department a written statement, prepared and
4 signed by the Nonprofit Corporation, setting forth an explanation of the economic hardship to
5 the Nonprofit Corporation or the negative impact on services that would result from
6 compliance with this Chapter. If the Contracting Department determines that the written
7 explanation is adequate to justify the waiver and that substantial evidence supports the written
8 explanation, it shall recommend the requested waiver to the Agency. The Agency may grant
9 the requested waiver. Each waiver shall be effective for a period of up to one year, and
10 subsequent waivers may be requested and granted.

11 **SEC. 12P.9. SPECIAL WAIVER BY THE PUBLIC UTILITIES COMMISSION.**

12 The General Manager of the Public Utilities Commission may waive the requirements
13 of this Chapter where the Contractor is providing to or on behalf of the San Francisco Public
14 Utilities Commission services relating to:

15 (a) The provision, conveyance or transmission of wholesale or bulk water, electricity
16 or natural gas; or

17 (b) Ancillary requirements such as spinning reserve, voltage control, or loading
18 scheduling, as required for ensuring reliable services in accordance with good utility practice;
19 provided, however, that:

20 ~~(1) (i)~~ The purchase of such services may not practically be accomplished through the
21 City's standard competitive bidding procedures; and

22 ~~(2) (ii)~~ The Contractor is not providing direct, retail services to end users within the
23 geographic boundaries of the City.

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

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By: _____
AMY S. ACKERMAN
Deputy City Attorney