

File No. 110330

Committee Item No. 5
Board Item No. 5

COMMITTEE/BOARD OF SUPERVISORS AGENDA PACKET CONTENTS LIST

Committee: Budget and Finance SUB-Committee

Date: May 4, 2011

Board of Supervisors Meeting

Date 5/10/11

Cmte Board

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| <input type="checkbox"/> | <input type="checkbox"/> | Ethics Form 126 |
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Completed by: Victor Young

Date: April 29, 2011

Completed by: Victor Young

Date: 5-5-11

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

1 [Administrative Code-Public Work Construction Contractor/Subcontractor Appeal Hearing
2 Procedures for Non-Compliance with Prevailing Wage Requirements]

3 **Ordinance amending Administrative Code Section 6.22 "Public Work Construction**
4 **Contract Terms and Working Conditions" by amending Subsection 6.22(E)(8) to further**
5 **delineate due process procedures for administrative hearings on appeals by public**
6 **work contractors and/or subcontractors from a Certification of Forfeiture made by the**
7 **City's Labor Standards Enforcement Officer or responsible department head for non-**
8 **compliance with prevailing wage requirements; and to additionally conform**
9 **distribution of forfeiture provisions to state law.**

10 NOTE: Additions are *single-underline italics Times New Roman font*;
11 deletions are *strike through italics Times New Roman font*.
12 Board amendment additions are double-underlined Arial font;
13 Board amendment deletions are ~~strikethrough Arial font~~.

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

15 Section 1. The San Francisco Administrative Code is hereby amended by amending
16 Section 6.22, to read as follows:

17 Sec. 6.22. - PUBLIC WORK CONSTRUCTION CONTRACT TERMS AND WORKING
18 CONDITIONS.

19 All construction contracts awarded by the City and County of San Francisco shall
20 contain the following minimum terms and conditions:

21 (A) **Bonds.** Before the execution of any contract for public work or improvement in
22 excess of \$25,000, the department head authorized to execute such contracts shall require
23 the successful bidder to file corporate surety bonds for the faithful performance thereof and to
24 guarantee the payment of wages for services engaged and of bills contracted for material,
25 supplies and equipment used in the performance of the contract. The bond shall be for a sum
not less than 100 percent of the award.

1 The City and County of San Francisco, acting through its Human Rights Commission
2 ("HRC"), intends to provide guarantees to private bonding assistance companies and financial
3 institutions in order to induce those entities to provide required bonding and financing to
4 eligible contractors bidding on and performing City public work contracts. This bonding and
5 financial assistance program is subject to the provisions of Administrative Code Chapter 14B.

6 (B) **Insurance.** All construction contracts awarded under this Chapter must conform to
7 the insurance requirements established by the Risk Manager. The Risk Manager shall
8 develop uniform insurance requirements for City contracts subject to this Chapter and shall
9 publish such requirements in the Risk Manager's Manual. The Risk Manager shall review and
10 update such insurance requirements on an annual basis.

11 Every contractor and subcontractor shall comply with the provisions of California Labor
12 Code section 3700. Prior to commencing the performance of work under any public work
13 contract, the contractor and all of its subcontractors shall file with the awarding department a
14 certificate of insurance against liability for workers compensation or proof of self-insurance in
15 accordance with the provisions of the California Labor Code.

16 (C) **Indemnification.** All construction contracts awarded under this Chapter shall
17 require that the contractor fully indemnify the City and County to the maximum extent provided
18 by law, such that each contractor must save, keep, bear harmless and fully indemnify the City
19 and County and any of its officers or agents from any and all liability, damages, claims,
20 judgments or demands for damages, costs or expenses in law or equity that may at any time
21 arise.

22 This indemnification requirement may not be waived or abrogated in any way for any
23 contract without the recommendation of the City's Risk Manager and the express permission
24 and approval of the Board of Supervisors.
25

1 (D) **Assignment.** No contract shall be assigned except upon the recommendation of
2 the department head concerned and with the approval of the Mayor or the Mayor's designee,
3 relative to the department under the Mayor's jurisdiction, or the approval of the board or
4 commission concerned for departments not under the Mayor.

5 (E) **Prevailing Wages.**

6 (1) **Generally.** All contractors and subcontractors performing a public work or
7 improvement for the City and County of San Francisco shall pay its workers on such projects
8 the prevailing rate of wages as provided below. For the purpose of prevailing wage
9 requirements only, the definition of a public work shall include those public works or
10 improvements defined in the foregoing section 6.1 of this Chapter and shall also include (a)
11 any trade work performed at any stage of construction (including preconstruction work) and
12 (b) any public work paid for by the City and County of San Francisco with "the equivalent of
13 money" under the meaning of Labor Code section 1720(b).

14 (2) **Leased Property Included.** For the limited purposes of this subsection, a "public
15 work or improvement" also means and includes any construction work done under private
16 contract when all of the following conditions exist:

17 (a) The construction contract is between private persons; and

18 (b) The property subject to the construction contract is privately owned, but upon
19 completion of the construction work will be leased to the City and County of San Francisco for
20 its use; and

21 (c) Either of the following conditions exist: (1) The lease agreement between the
22 lessor and the City and County of San Francisco, as lessee, is entered into prior to the
23 construction contract, or (2) The construction work is performed according to the plans,
24 specifications, or criteria furnished by the City and County of San Francisco, and the lease
25

1 agreement between the lessor and the City and County of San Francisco as lessee, is
2 entered into during, or upon completion, of the construction work.

3 (3) **Determination of the Prevailing Wage.** It shall be the duty of the Board of
4 Supervisors, from time to time and at least once during each calendar year, to fix and
5 determine the prevailing rate of wages as follows:

6 On or before the first Monday in November of each year, the Civil Service Commission
7 shall furnish to the Board of Supervisors data as to the highest general prevailing rate of
8 wages of the various crafts and kinds of labor as paid in private employment in the City and
9 County of San Francisco, plus "per diem wages" and wages for overtime and holiday work.
10 The Civil Service Commission shall provide the Board of Supervisors data for "per diem
11 wages" pursuant to California Labor Code sections 1773.1 and 1773.9, as amended from time
12 to time. The Board of Supervisors shall, upon receipt of such data, fix and determine the
13 prevailing rate of wages. The prevailing rate of wages as so fixed and determined by the
14 Board of Supervisors shall remain in force and shall be deemed to be the highest general
15 prevailing rate of wages paid in private employment for similar work, until the same is
16 changed by the Board of Supervisors. In determining the highest general prevailing rate of
17 wages per diem wages and wages for overtime and holiday work, as provided for in this
18 section, the Board of Supervisors shall not be limited to the consideration of data furnished by
19 the Civil Service Commission, but may consider such other evidence upon the subject as the
20 Board shall deem proper and thereupon base its determination upon any or all of the data or
21 evidence considered.

22 In the event that the Board of Supervisors does not fix or determine the highest general
23 prevailing rate of wages in any calendar year, the rates established by the California
24 Department of Industrial Relations for such year shall be deemed adopted.
25

1 **(4) Specifications to Include Wage Rate.** The department head authorized to
2 execute a construction contract under this Chapter shall include in the contract specifications,
3 or make available in the offices of the department or at the job site, a detailed statement of the
4 prevailing rate of wages as fixed and determined by the Board of Supervisors at the time the
5 department issued the Advertisement For Bids on the contract. The contractor shall agree to
6 pay to all persons performing labor in and about the public work or improvement the highest
7 general prevailing rate of wages as determined pursuant to this Chapter, including wages for
8 holiday and overtime work. If the specifications do not include the prevailing rate of wages, the
9 specifications shall include a statement that copies of the prevailing rate of wages as fixed
10 and determined by the Board of Supervisors are on file at the department's principal office or
11 at the job site and shall be made available to any interested party on request.

12 **(5) Subcontractors Bound by Wage Provisions.** Every contract for any public work
13 or improvement shall also contain a provision that the contractor shall insert in every
14 subcontract or other arrangement which he or she may make for the performance of any work
15 or labor on a public work or improvement. This provision shall be that the subcontractor shall
16 pay to all persons performing labor or rendering service under said subcontract or other
17 arrangement the highest general prevailing rate of wages as fixed and determined by the
18 Board of Supervisors for such labor or services.

19 **(6) Records to be Kept by Contractors and Subcontractors.** Every public works
20 contract or subcontract awarded under this Chapter shall contain a provision that the
21 contractor shall keep, or cause to be kept, for a period of four years from the date of
22 substantial completion of a public work, payrolls and basic records including time cards, trust
23 fund forms, apprenticeship agreements, accounting ledgers, tax forms and superintendent
24 and foreman daily logs for all trades workers performing work at or for a City and County of
25 San Francisco public work or improvement. Such records shall include the name, address and

1 social security number of each worker who worked on the project, including apprentices, his
2 or her classification, a general description of the work each worker performed each day, the
3 rate of pay (including rates of contributions for, or costs assumed to provide fringe benefits),
4 daily and weekly number of hours worked, deductions made and actual wages paid. Every
5 subcontractor who shall undertake the performance of any part of a public work or
6 improvement shall keep a like record of each person engaged in the execution of the
7 subcontract.

8 The contractor shall maintain weekly certified payroll records for submission to the
9 awarding department as required. The contractor shall be responsible for the submission of
10 payroll records of its subcontractors. All certified payroll records shall be accompanied by a
11 statement of compliance signed by the contractor indicating that the payroll records are
12 correct and complete, that the wage rates contained therein are not less than those
13 determined by the San Francisco Board of Supervisors and that the classifications set forth for
14 each employee conform with the work performed.

15 All such records as described in this section shall at all times be open to inspection and
16 examination of the duly authorized officers and agents of the City and County of San
17 Francisco, including representatives of the Office of Labor Standards Enforcement.

18 Should the department head responsible for the public work or the Labor Standards
19 Enforcement Officer determine that a contractor or subcontractor is not in compliance with the
20 requirements of this subsection, the department head or the Labor Standards Enforcement
21 Officer shall issue written notification to the contractor or subcontractor mandating compliance
22 within not fewer than ten calendar days from the date of the notification. Should the contractor
23 or subcontractor fail to comply as required in the notification, the department head who
24 executed the contract or the Labor Standards Enforcement Officer may impose a penalty of
25 \$25.00 for each calendar day of noncompliance, or portion thereof, for each worker. Upon the

1 request of the responsible department head or the Labor Standards Enforcement Officer, the
2 Controller shall withhold these penalties from progress payments then due or to become due.

3 **(7) Additional Required Contract Provisions.** Every public works contract shall
4 contain provisions stating that (1) the contractor will cooperate fully with the Labor Standards
5 Enforcement Officer and other City employees and agents authorized to assist in the
6 administration and enforcement of the prevailing wage requirements and other labor
7 standards imposed on public works contractors by the Charter and Chapter 6 of the San
8 Francisco Administrative Code; (2) the contractor agrees that the Labor Standards
9 Enforcement Officer and his or her designees, in the performance of their duties, shall have
10 the right to engage in random inspections of job sites and to have access to the employees of
11 the contractor, employee time sheets, inspection logs, payroll records and employee
12 paychecks; (3) the contractor shall maintain a sign-in and sign-out sheet showing which
13 employees are present on the job site; (4) the contractor shall prominently post at each job-
14 site a sign informing employees that the project is subject to the City's prevailing wage
15 requirements and that these requirements are enforced by the Labor Standards Enforcement
16 Officer; and (5) that the Labor Standards Enforcement Officer may audit such records of the
17 contractor as he or she reasonably deems necessary to determine compliance with the
18 prevailing wage and other labor standards imposed by the Charter and this Chapter on public
19 works contractors. Failure to comply with these requirements may result in penalties and
20 forfeitures consistent with California Labor Code section 1776(g), as amended from time to
21 time.

22 **(8) Non-compliance with Wage Provisions—Penalties.**

23 **(a) Penalty and Forfeiture.** Any contractor or subcontractor who shall fail or neglect to
24 pay to the several persons who shall perform labor under any contract, subcontract or other
25 arrangement on any public work or improvement as defined in this Chapter the highest

1 general prevailing rate of wages as fixed by the Board of Supervisors under authority of this
2 Chapter; shall forfeit; and, in the case of any subcontractor so failing or neglecting to pay said
3 wage, the original contractor and the subcontractor shall jointly and severally forfeit to the City
4 and County of San Francisco back wages due plus the penal sum of \$50.00 per day for each
5 laborer, workman or mechanic employed for each calendar day or portion thereof, while they
6 shall be so employed and not paid said highest general prevailing rate of wages, and in
7 addition shall be subject to the penalties set forth in Article V of this Chapter, including
8 debarment.

9 (b) **Enforcement.** It shall be the duty of the officer, board or commission under whose
10 jurisdiction said public work or improvement is being carried on, made or constructed, when
11 certifying to the Controller any payment which may become due under said contract, to deduct
12 from said payment or payments the total amount of said forfeiture provided for in this
13 subsection. In doing so, the department head must also notify in writing the Labor Standards
14 Enforcement Officer of his/her action. The Labor Standards Enforcement Officer may also
15 upon written notice to the department head who is responsible for the project, certify to the
16 Controller any forfeiture(s) to deduct from any payment as provided for in this *subsection*
17 Subsection 6.22(E)(8). Certification of forfeitures under this subsection shall be made only upon
18 an investigation and audit by the responsible department head or the Labor Standards
19 Enforcement Officer and upon service of written notice to the contractor identifying that includes
20 identification of the grounds for the forfeiture or forfeitures ("Certification of Forfeiture"). The
21 audit supporting the forfeiture shall be appended to the Certification of Forfeiture, but failure to
22 append such documentation shall not invalidate the Certification. Service of the Certification of
23 Forfeiture shall be made by United States mail and the date of service shall be the date of mailing.
24 The Controller, in issuing any warrant for any such payment, shall deduct from the amount
25

1 which would otherwise be due on said payment or payments the amount of said forfeiture or
2 forfeitures as so certified.

3 (c) **Recourse Procedure.** *If the contractor or subcontractor disagrees with the forfeiture as*
4 *so provided in the foregoing subparagraph (b), then the following procedure applies* A contractor
5 and/or a subcontractor may appeal from a Certification of Forfeiture. The Controller shall adopt and
6 maintain rules and regulations for any appeal under this Subsection 6.22(E)(8)(c), which rules shall
7 generally include the following parameters for efficient and effective due process:

8 (i) Any Appeal from Certification of Forfeiture shall be filed in writing by The the contractor
9 and/or subcontractor (referred to in this Subsection 6.22(E)(8)(c), whether singular or plural, as the
10 "Appellant") may request a hearing in writing within 15 days of the date of the notification of
11 forfeiture service of the Certification of Forfeiture. The request shall be directed to Appellant shall file
12 the Appeal from Certification of Forfeiture with the City Controller and serve a copy on the Labor
13 Standards Enforcement Officer. Failure by the contractor or subcontractor to submit a timely,
14 written request for a hearing Appeal from Certification of Forfeiture shall constitute concession to
15 the assessment and the forfeiture, and the forfeiture shall be deemed final upon expiration of the
16 15-day period;

17 (ii) The Office of Labor Standards Enforcement shall promptly afford Appellant an opportunity
18 to meet and confer in good faith regarding possible resolution of the Certification of Forfeiture in
19 advance of further proceedings under this Subsection 6.22(E)(8)(c), with the intention that such
20 meeting occur within 30 days of the date the Appeal from Certification of Forfeiture is filed.

21 (iii) After the expiration of 30 days following the date the Appeal from Certification of
22 Forfeiture is filed, any party may request in writing, with concurrent notice to all other parties, that the
23 Controller appoint a hearing officer to hear and decide the appeal. If no party requests appointment of
24 a hearing officer, the Certification of Forfeiture shall be deemed final on the 60th day after the date the
25 Appeal from Certification of Forfeiture is filed.

1 (~~ii~~ iv) Within 15 days of receiving a ~~proper~~ written request for appointment of a hearing
2 officer under Section 6.22(E)(8)(c)(iii), the Controller shall appoint an impartial hearing officer and
3 immediately notify the enforcing official and Appellant, and their respective counsel or authorized
4 representative if any, of the appointment. The appointed hearing officer shall be an Administrative
5 Law Judge; or an attorney with knowledge and not less than five ~~year's~~ years' experience in labor
6 law, construction law, prevailing wage, and/or wage and hour issues, ~~and shall so advise the~~
7 ~~enforcing official and the contractor or subcontractor, and/or their respective counsel or authorized~~
8 ~~representative;~~

9 (~~iii~~ v) The hearing officer shall promptly set a date for a hearing. The hearing must
10 commence within 45 days of the ~~notification of the appointment~~ date the Controller notice of the
11 hearing officer appointment, and conclude within 75 days of such ~~notification~~ notice, ~~unless all~~
12 ~~parties agree to an extended period;~~ The hearing officer shall conduct a fair and impartial evidentiary
13 hearing in conformance with the time limitations set forth in this subsection 6.22E(8)(c) and in the
14 rules and regulations, so as to avoid undue delay in the resolution of any appeal. The hearing officer
15 shall have the discretion to extend the times under this subsection 6.22E(8)(c), and any time
16 requirements under the rules and regulations, only upon a showing of good cause.

17 (~~iv~~ vi) ~~The contractor or subcontractor shall have~~ Appellant has the burden of proving by a
18 preponderance of the evidence that the basis for the Certification of Forfeiture is incorrect, including
19 any back wage and penalty assessment is incorrect; assessments that are at issue in the appeal.

20 (~~v~~ vii) Within 30 days of the conclusion of the hearing, the hearing officer shall issue a
21 written decision affirming, modifying, or dismissing the ~~assessment~~ forfeiture. The decision of
22 the hearing officer shall consist of findings and a determination. The hearing officer's findings
23 and determination shall be final.

24 (~~vi~~ viii) ~~The contractor or subcontractor~~ Appellant may appeal a final determination under
25 this section only by filing in the San Francisco Superior Court a petition for a writ of mandate

1 under California Code of Civil Procedure, section 1084, et seq., as applicable and as may be
2 amended from time to time.

3 (d) **Distribution of Forfeiture.** The Controller shall withhold any forfeiture as provided
4 in the foregoing paragraphs until such time as either the contractor or subcontractor has
5 conceded to the forfeiture or, in the event of an *objection appeal*, there is a determination no
6 longer subject to judicial review. The Controller shall then distribute the amounts withheld in
7 the following order: (1) the Labor Standards Enforcement Officer shall make ~~his~~ best efforts to
8 distribute back wages withheld to the individual workers identified as not having been paid the
9 proper wage rate; (2) the penal sums provided for above shall inure to the benefit of the
10 general fund of the City and County of San Francisco; (3) the Controller shall hold the balance
11 of any back wages in escrow for workers whom the Labor Standards Enforcement Officer,
12 despite his/her best efforts, cannot locate. In the event back wages are unclaimed for a period of
13 three years, the Controller shall undertake administrative procedures for unclaimed funds in
14 conformance with Government Code Section 50050, et seq., as may be amended from time to time. ~~two~~
15 ~~years or more shall be dedicated to the enforcement of the prevailing wage requirements.~~

16 (F) **Hours and Days of Labor.**

17 (1) **Generally.** For the purpose of meeting prevailing conditions and enabling
18 employers to secure a sufficient number of satisfactory workers and artisans, no person
19 performing labor or rendering service in the performance of any contract or subcontract for
20 any public work or improvement as defined in this Chapter shall perform labor for a longer
21 period than five days (Monday through Friday) of eight hours each, with two 10-minute breaks
22 per eight-hour day, except in those crafts in which a different work day or week now prevails
23 by agreement in private employment. Any person working hours in addition to the above shall
24 be compensated in accordance with the prevailing overtime standards and rates.
25

1 **(2) Noncompliance—Penalties and Forfeiture.** Any contractor or subcontractor who
2 shall violate any of the provisions of this subsection shall be liable for the same penalties and
3 forfeits as those specified in Subsection 6.22(E) of this Chapter; penalties and forfeits shall be
4 applicable for each laborer, mechanic or artisan employed for each calendar day or portion
5 thereof whereon such laborer, mechanic or artisan is compelled or permitted to work more
6 than the days and hours specified herein. The provisions of this subsection shall be made a
7 part of all contracts and subcontracts for the construction of any public work or improvement.

8 **(3) Contracts Outside City and County.** In the event that any public work or
9 improvement is to be constructed outside of the City and County of San Francisco and at such
10 a distance therefrom that those engaged in performing labor on said public work or
11 improvement must under ordinary conditions remain at or near the site of said work or
12 improvement when not actually engaged in the performance of labor thereon, then the officer,
13 board or commission responsible for the construction of said public work or improvement may,
14 in making specifications or letting contracts therefor, make provision therein for days and
15 hours of labor beyond the limitations provided for in Section 6.22(F) of this Chapter; but not to
16 exceed eight hours in any one calendar day, or six days in any calendar week. In the event
17 that emergency conditions shall arise, making a change advisable during the performance of
18 any such contract, or any portion thereof, the hours and days of labor may be extended
19 beyond the limits hereinabove expressed; but not to exceed eight hours per day, upon the
20 written authority of the officer, board or commission awarding such contract. Failure of the
21 contractor to perform such contract within the time provided shall not constitute an
22 emergency.

23 **(G) Local Hiring.**
24
25

1 (1) **Contract Requirements.** All construction contracts for public works or
2 improvements to be performed within the boundaries of the City and County of San Francisco
3 shall contain the following provisions:

4 Contractor agrees to make a good-faith effort, with the assistance of community
5 organizations designated by the City or local labor union hiring halls, to hire qualified
6 individuals who are residents of the City and County of San Francisco to comprise not less
7 than 50% of each contractor's total construction work force, measured in labor work hours,
8 and contractor promises to give special preference to minorities, women and economically
9 disadvantaged individuals.

10 Contractor shall keep, and provide to the City, an accurate record showing the name,
11 place of residence, hours employed and per diem pay of each person employed by the
12 contractor, including full-time, part-time, permanent and temporary employees.

13 Contractor shall keep, and provide to the City, an accurate record describing in detail
14 contractor's good-faith efforts to secure employment of residents of the City and County of
15 San Francisco.

16 A failure to abide by these contract provisions may result in the imposition of sanctions
17 and penalties, including those provided for in San Francisco Administrative Code Section
18 6.80.

19 (2) **Definitions.**

20 "Qualified Individual" shall mean an individual who (A) is eligible for a certified
21 apprenticeship program in an applicable trade; (B) has completed a certified apprenticeship
22 program in an applicable trade; or (C) has completed comparable time in an applicable trade.

23 "Resident of the City and County of San Francisco" shall mean an individual who is
24 domiciled, as defined by Section 200(b) of the California Election Code, within the boundaries
25 of the City and County during the entire time of the performance of the contract and who can

1 verify his or her domicile, upon request of the contractor or City, by producing documentation
2 such as a rent/lease agreement, telephone and utility bills or payment receipts, a valid
3 California driver's license or identification card, and/or any other similar, reliable evidence that
4 verifies that the individual is domiciled within the City and County of San Francisco.

5 "Economically disadvantaged" shall mean an individual who has been unable to secure
6 employment in his or her trade for more than 20 working days in the past six months, or
7 whose annual maximum income falls within the income limits established by the Mayor's
8 Office of Community Development for the Community Development Block Grant (CDBG)
9 programs.

10 (3) **Enforcement.** The Human Rights Commission shall be the City agency charged
11 with the monitoring and enforcement of the provisions of this subsection.

12 (H) **Modifications—General Requirements.** If it becomes necessary in the
13 prosecution of any public work or improvement under contract to make alterations or
14 modifications or to provide for extras, such alterations, modifications or extras shall be made
15 only on written recommendation of the department head responsible for the supervision of the
16 contract, together with the approval of the Mayor or the Mayor's designee or the board or
17 commission, as appropriate to the department, and also the approval of the Controller, except
18 as hereafter provided. The Mayor or the board or commission, as appropriate to the
19 department, may delegate in writing the authority to approve such alterations, modifications or
20 extras to the department head, except as provided below. The Controller may delegate in
21 writing the authority to encumber funds from prior appropriations for such alterations,
22 modifications or extras to the department head prior to the certification for payment. Such
23 authority, when granted, will clearly state the limitations of the changes to be encompassed.

24 (1) **Increasing or Decreasing Price.** Alterations, modifications or extras in any
25 contract, which will increase or decrease the contract cost or scope, may be made or allowed

1 only on the written recommendation of the department head responsible for the supervision of
2 the contract stating the amount and basis for such increase or decrease. For any cumulative
3 increase or decrease in price in excess of ten percent of the original contract price or scope,
4 the department head shall obtain the approval of the Mayor or Mayor's designee or the board
5 or commission as appropriate and also the approval of the Controller notwithstanding any
6 delegation provided for above.

7 (2) **Extensions of Time.** Upon finding that work under a construction contract cannot
8 be completed within the specified time because of an unavoidable delay as defined in the
9 contract, the department head may extend the time for completion of the work. If the
10 cumulative extensions of time exceeds ten percent of the original contract duration, the
11 department head shall first obtain the approval of the Mayor, the Mayor's Designee, board or
12 commission; as appropriate to the department notwithstanding any delegation provided for
13 above. All time extensions shall be in writing, but in no event shall any extension be granted
14 subsequent to the issuance of a certificate of final completion.

15 (a) **Time Extension Not Waiver of City's Rights.** The granting of an extension of
16 time because of unavoidable delays shall in no way operate as a waiver on the part of the City
17 and County or the department head, Mayor, board or commission of the right to collect
18 liquidated damages for other delays or of the right to collect other damages or of any other
19 rights to which the City and County is entitled.

20 (b) **No Extension Granted When Contract Based on Time Estimates.** When any
21 award of contract has been made in consideration, in whole or in part, of the relative time
22 estimates of bidders for the completion of the work, no extension of time may be granted on
23 such contract beyond the time specified for completion, unless the liquidated damages for
24 each day the work is uncompleted beyond the specified time shall be collected; provided,
25 however, that this shall not apply to unavoidable delays due to acts of God.

1 (c) **Avoidable and Unavoidable Delay; Limitation of Damages for Delay.** The
2 department head administering the public work shall have the authority to specify in the
3 contract the delays that shall be deemed avoidable or unavoidable. The City and County shall
4 not pay damages or compensation of any kind to a contractor because of delays in the
5 progress of the work, whether such delays be avoidable or unavoidable; provided, however,
6 the City and County may pay for (1) delays caused to the contractor by the City and County
7 and (2) such unavoidable delays as may be specifically stated in the contract. Such latter
8 delays will be compensated for only under the conditions specified in the contract.

9 (d) **Notice of Delay Required.** The contractor shall promptly notify the department
10 head in writing, of all anticipated delays in the prosecution of the work and, in any event,
11 promptly upon the occurrence of a delay, the notice shall constitute an application for an
12 extension of time only if the notice requests such extension and sets forth the contractor's
13 estimate of the additional time required together with a full recital of the causes of unavoidable
14 delays relied upon. The department head may take steps to prevent the occurrence or
15 continuance of the delay, may classify the delay as avoidable or unavoidable and may
16 determine to what extent the completion of the work is delayed thereby.

17 (i) **Liquidated Damages.** Any contract may provide a time within which the contract
18 work, or portions thereof, shall be completed and may provide for the payment of agreed
19 liquidated damages to the City and County for every calendar or working day thereafter during
20 which such work shall be uncompleted.

21 (j) **Retention of Progressive Payments.** Any contract may provide for progressive
22 payments, if the Advertisement For Bids shall so specify. Each progress payment shall
23 constitute full compensation for the value of work performed and materials furnished for a
24 specified period, less amounts withheld as a result of dispute or as required by law.

25 (1) From every progress payment, the City shall hold 10 percent in retention.

1 (2) If the department head responsible for the public work determines that the contract
2 is 50 percent or more complete, that the contractor is making satisfactory progress, and that
3 there is no specific cause for greater withholding, the department head, upon the written
4 request of contractor, may authorize one of the following two options: (a) the City shall release
5 part of the retention to the contractor so that the amount held in retention by the City, after
6 release to the contractor, is reduced to an amount not less than 5 percent of the total value of
7 the labor and materials furnished, and the City shall proceed to retain 5 percent of any
8 subsequent progress payment under the contract; or (b) the City shall continue to hold the
9 already withheld retention amount, up to 5 percent of the total contract price, and shall not
10 deduct further retention from progress payments.

11 (3) The department head shall authorize the release of retention, in whole or in part,
12 for work completed by subcontractors certified by the HRC as LBEs. The department head
13 shall do so only upon a written request by the contractor certifying (i) the work by the certified
14 LBE subcontractor is completed and satisfactory (ii) the total final amount paid to the certified
15 LBE subcontractor and (iii) the amount of retention associated with the work performed by the
16 certified LBE subcontractor. Following a release of such retention, and in order to calculate
17 retention and retention withholding from further progress payments, the City will reduce the
18 total retention required under the foregoing paragraphs (1) and (2) by the amount paid to the
19 certified LBE subcontractor(s) for whom the City released the retention. The release of
20 retention under this subparagraph shall not reduce the responsibilities or liabilities of the
21 contractor or its surety under the contract or applicable law. For any contract awarded under
22 this Chapter prior to the enactment of this subparagraph, a department head may in his or her
23 sole discretion incorporate this subparagraph by change.

24 (4) The department head shall authorize the release of retention, in whole or in part,
25 for work completed by subcontractors under any public work contract awarded under this

1 Chapter with a construction duration of more than two years. The department head shall do so
2 only upon a written request by the contractor certifying (i) the work by the subcontractor is
3 completed and satisfactory (ii) the total final amount paid to the subcontractor and (iii) the
4 amount of retention associated with the work performed by the subcontractor. The City may
5 issue the retention within six months of the date of the request. Following a release of such
6 retention, and in order to calculate retention and retention withholding from further progress
7 payments, the City will reduce the total retention required under the foregoing paragraphs (1)
8 and (2) by the amount paid to the subcontractor(s) for whom the City released retention. The
9 release of retention under this subparagraph shall not reduce the responsibilities or liabilities
10 of the contractor or its surety under the contract or applicable law. For any contract awarded
11 under this Chapter prior to the enactment of this subparagraph with a construction duration of
12 more than two years, a department head may in his or her sole discretion incorporate this
13 subparagraph by change order.

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

15 (6) The City shall release retention to the contractor upon the following conditions: (a)
16 the contractor has reached final completion under the contract terms and conditions and (b)
17 the contract is free of offsets by the City for liquidated damages, defective work and the like,
18 and is free of stop notices, forfeitures, and other charges. When the department head
19 responsible for the public work or his/her designee determines that the contract is 98 percent
20 or more complete, the department head or his/her designee may reduce retention funds to an
21 amount equal to 200 percent of the estimated value of work yet to be completed, provided that
22 the contract is free of offsets by the City and is free of stop notices, forfeitures, and other
23 charges.

24 (7) In no event shall the City be liable for interest or charges arising out of or relating to
25 the date the City issues any progress payment or the date the City releases all or part of the

1 retention, except that the City will pay interest at the legal rate, as set forth in section
2 685.010(a) of the California Code of Civil Procedure as that section may be amended from
3 time to time, on any improperly withheld amounts commencing no earlier than 90 days after
4 the date the City should have made any progress payment or released all or part of the
5 retention. Under no circumstances shall the legal rate of interest paid by the City under this
6 provision exceed 10 percent per annum. The payment of interest under this provision is the
7 limit of the City's liability with respect to any claim for interest on improperly withheld amounts.

8 **(K) Inspection and Acceptance of Completed Work; Final Payment.** The
9 department head authorized to execute any contract for public works or improvements shall
10 be responsible for the inspection and acceptance of such work on completion. Such
11 acceptance shall be in writing and shall include the certificate of the department head
12 concerned that the work covered by the contract has been fully and satisfactorily completed in
13 accordance with the plans and specifications therefor. Receipt of copy of such acceptance in
14 writing shall constitute the Controller's authority to complete any payments due the contractor
15 under the contract; provided that the Controller may make such additional investigation or
16 inspection as is provided by Administrative Code Section 10.07.

17 **(L) Termination for Convenience.** In all contracts for the construction of any public
18 work or improvement, the department head authorized to execute any contract for any public
19 work or improvement may include in the specifications setting forth the terms and conditions
20 for the performance of the contract a provision that the City and County may terminate the
21 performance of work under the contract whenever the department head shall determine, with
22 the approval of the Mayor, the Mayor's designee or the board or commission concerned, that
23 such termination is in the best interest of the City and County. Any such termination shall be
24 effected by delivery to the contractor of a notice of termination specifying the extent to which
25 performance of work under the contract is terminated and the date upon which such

1 termination becomes effective. The department head is hereby authorized to include within
2 such construction contract the appropriate language to implement this subsection.

3 (M) **Articles Not to be Prison Made.** No article furnished under any contract
4 awarded under the provisions of this Chapter shall have been made in a prison or by convict
5 labor except for articles made in prisons or by convicts under the supervision and control of
6 the California Department of Corrections and limited to articles for use by the City and
7 County's detention facilities.

8 (N) **Employment of Apprentices.** All construction contracts awarded under this
9 Chapter shall require the Contractor to comply with the requirements of the State
10 Apprenticeship Program (as set forth in the California Labor Code, Division 3, Chapter 4
11 [commencing at Section 3070] and Section 1777.5), as it may be amended from time to time,
12 and shall require the Contractor to include in its subcontracts the obligation for subcontractors
13 to comply with the requirements of the State Apprenticeship Program.

14 (O) **Safety.** All construction contracts awarded under this Chapter shall require the
15 Contractor and all of its subcontractors to abide by the applicable Occupational Safety and
16 Health statutes and regulations.

17 Additionally, all construction contracts awarded under this Chapter shall require the
18 Contractor and all of its subcontractors to abide by the requirements of Administrative Code
19 Section 64.1, prohibiting masonry-dry cutting and masonry dry-grinding, with exceptions.

20 (P) **Claims.** The City shall consider only those claims for additional payment under a
21 public work contract that are certified and that conform to the contract requirements for claims,
22 pricing, and schedule.


23 (1) **Claims by Contractors.** The contractor shall certify under penalty of perjury that
24 (a) the claim is made in good faith; (b) the supporting data are accurate and complete to the
25 best of Contractor's knowledge and belief; and (c) the amount request accurately reflects the

1 Contract adjustment for which the Contractor believes the City is liable. An individual or officer
2 authorized to act on behalf of the Contractor shall execute the certification.

3 (2) **Claims by Subcontractors.** Subcontractors at any tier are not third-party
4 beneficiaries of any Contract awarded under this Chapter. The City shall not consider a direct
5 claim by any subcontractor. A Contractor presenting to the City any claim on behalf of a
6 subcontractor must certify the subcontractor's claim in the same manner the Contractor would
7 certify its own claim under the foregoing paragraph (1).

8
9
10 APPROVED AS TO FORM:
11 DENNIS J. HERRERA, City Attorney

12 By:


13 MARIE C. BLITS
14 Deputy City Attorney

LEGISLATIVE DIGEST

[Administrative Code-Public work construction contractor/subcontractor appeal hearing procedures for non-compliance with prevailing wage requirements]

Ordinance amending Administrative Code Section 6.22 "Public Work Construction Contract Terms and Working Conditions" by amending Subsection 6.22(E)(8) to further delineate due process procedures for administrative hearings on appeals by public work contractors and/or subcontractors from a Certification of Forfeiture made by the City's Labor Standards Enforcement Officer or responsible department head for non-compliance with prevailing wage requirements; and to additionally conform distribution of forfeiture provisions to state law.

Existing Law

Administrative Code §6.22 "Public Work Construction Contract Terms and Working Conditions" requires that public work contractors and subcontractors pay defined prevailing wages to workers, and provides forfeiture and penalties that may be imposed for non-compliance. The City's Office of Labor Standards Enforcement and contracting department heads implement and enforce these provisions. A contractor found in violation by OLSE and/or a contracting department head may appeal that determination of violation by timely filing a request for administrative hearing review with the Controller. The Controller will appoint an impartial hearing officer to conduct an evidentiary due process hearing and decide the matter. Under current code provisions, the Controller has utilized outside hearing officers for most of these cases. The contractor may appeal the hearing officer's decision to Superior Court. Section 6.22 also provides for distribution of any unclaimed back wages, after a two year period.

Amendments to Current Law

The proposed Ordinance would amend Administrative Code §6.22 by amending Subsections 6.22(E)(8)(b) and (c) to improve the administrative hearing process by further clarifying and specifying due process procedures and efficiencies for the public work contractor prevailing wage hearings, including an opportunity to meet and confer before proceeding to hearing; and to provide the Controller more flexibility in appointing hearing officers, by utilizing Administrative Law Judges and lawyers. The proposed Ordinance would also amend Subsection 6.22(E)(8)(d) "Distribution of Forfeiture" to better comply with current state law (California Government Code §§50050 *et seq.*), by providing a three year period prior to distribution of any unclaimed back wages.

Background Information

The Controller worked with the Office of Labor Standards Enforcement and the City Attorney's Office to develop these proposed amendments.

FILE NO.

LEGISLATIVE DIGEST

[Administrative Code-Public work construction contractor/subcontractor appeal hearing procedures for non-compliance with prevailing wage requirements]

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SMALL BUSINESS COMMISSION
OFFICE OF SMALL BUSINESS



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

April 27, 2011

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

**Re: File No. 110330 [Administrative Code - Public Work Construction
Contractor/Subcontractor Appeal Hearing Procedures for Non-Compliance with Prevailing
Wage Requirements]**

Small Business Commission Recommendation: **Approval**

Dear Ms. Calvillo:

On April 11, 2011, the Small Business Commission voted to recommend approval of Board of Supervisors File No. 110330.

The Commission thanks Monique Zmuda of the Controllers Office and Donna Levitt of the Office of Labor Standards and Enforcement for their informative presentations.

Sincerely,

A handwritten signature in cursive script, appearing to read "Regina Dick-Endrizzi".

Regina Dick-Endrizzi
Director, Office of Small Business

cc. Supervisor David Chiu
Monique Zmuda, Controllers Office
Donna Levitt, Office of Labor Standards Enforcement

