

1 [Local Business Enterprise and Non-Discrimination in Contracting Ordinance.]

2

3 **Ordinance amending the San Francisco Administrative Code by amending Sections**

4 **14B.2, 14B.3, 14B.7, 14B.8, 14B.13 to (1) each fiscal year, require departments to set**

5 **aside not less than 50% of public works/construction contracts worth \$400,000 or less**

6 **and not less than 50% of other contracts worth \$100,000 or less for the Micro-Local**

7 **Business Enterprise Set Aside Program, (2) permit departments to designate Job Order**

8 **Contracts , without limitation as to dollar value, as set aside for the Micro-Local**

9 **Business Enterprise Set Aside Program in order to satisfy the department's 50%**

10 **requirement, (3) require departments to report quarterly during the year 2010 and**

11 **thereafter yearly to the Board of Supervisors on the contracts set aside for the Micro-**

12 **Local Business Enterprise Set Aside Program, and to cooperate with HRC's requests**

13 **for information to fulfill its reporting requirements, and (4) require Micro - LBEs that**

14 **subcontract any portion of a set-aside contract to perform at least 25% of the contract**

15 **work, (5) create a SBA-LBE category, in addition to the Small and Micro-LBE**

16 **categories, that gives contractors with income set with reference to Small Business**

17 **Administration limits a bid preference of 2% on contracts between \$5 million and \$20**

18 **million, and (6) contractors who achieve total LBE participation in excess of 35% of**

19 **their established LBE subcontracting and subconsultanting goals are to be excepted**

20 **from satisfying good faith outreach requirements.**

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22 **NOTE:** Additions are *single-underline italics Times New Roman*;

23 deletions are *strike-through italics Times New Roman*.

24 Board amendment additions are double-underlined;

25 Board amendment deletions are ~~strikethrough normal~~.

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

1 Section 1. The San Francisco Administrative Code is hereby amended by amending
2 Section 14B.1, to read as follows:

3 **SECTION 14B.3. DEFINITIONS.**

4 Architect/Engineering Contract" means an agreement for architectural, engineering, or
5 other professional design, consulting or construction management services for a public
6 work/construction project.

7 "Back contracting" shall mean any agreement or other arrangement between a prime
8 contractor and its subcontractor that requires the prime contractor to perform or to secure the
9 performance of the subcontract in such a fashion and/or under such terms and conditions that
10 the prime contractor enjoys the financial benefits of the subcontract. Such agreements or
11 other arrangements include, but are not limited to, situations in which either a prime contractor
12 or subcontractor agrees that any term, condition or obligation imposed upon the subcontractor
13 by the subcontract shall be performed by or be the responsibility of the prime contractor.

14 "Bid" means a quotation, proposal, solicitation or offer by a bidder or contractor to
15 perform or provide labor, materials, equipment, supplies or services to the City for a price.

16 "Bidder" means any business that submits a bid or proposal.

17 "City" means the City and County of San Francisco.

18 "Commercially useful function" shall mean that the business is directly responsible for
19 providing the materials, equipment, supplies or services to the City as required by the
20 solicitation or request for quotes, bids or proposals. Businesses that engage in the business of
21 providing brokerage, referral or temporary employment services shall not be deemed to
22 perform a "commercially useful function" unless the brokerage, referral or temporary
23 employment services are those required and sought by the City. When the City requires and
24 seeks specialty products made to order for the City or otherwise seeks products which, by
25 industry practice, are not regularly stocked in warehouse inventory but instead are purchased

1 directly from the manufacturer, no more than five percent of the cost of the product shall be
2 credited towards LBE participation goals. When the City requires and seeks products which
3 are, by industry practice, stocked in warehouse inventory and are in fact, regularly stocked by
4 the listed supplier or distributor, no more than sixty percent of the cost of the product shall be
5 credited towards LBE participation goals. If the listed supplier or distributor does not regularly
6 stock the required product, no more than five percent of the cost of the product shall be
7 credited towards LBE participation goals.

8 "Commission" means the Human Rights Commission.

9 "Commodity contract" means an agreement to purchase any product, including
10 materials, equipment and supplies.

11 "Contract" means any agreement between the City and a person to provide or procure
12 labor, materials, equipment, supplies, or services to, for, or on behalf of the City for a price to
13 be paid out of monies deposited in the City Treasury or out of trust monies under the control
14 of or collected by the City. A "contract" includes an agreement between a non-profit or public
15 entity and a contractor for the performance of construction or construction-related services,
16 where the contract is funded by the City. A "contract" does not include: (1) grants, whether
17 funded by the City or by Federal or State grant funds, to a nonprofit entity to provide services
18 to the community; (2) sales of the City's personal or real property; (3) loan transactions,
19 whether the City is a debtor or creditor; (4) lease, franchise, or concession agreements; (5)
20 agreements to use City real property; (6) gifts of materials, equipment, supplies or services to
21 the City; or (7) agreements with a public agency except for contracts or other agreements
22 between the City and persons or entities, public or private, in which such persons or entities
23 receive money from or through the City for the purpose of contracting with businesses to
24 perform public improvements. Without limitation of the foregoing, "contract" includes any
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1 agreement between the City and a person to provide or procure labor, materials, equipment,
2 supplies, or services to, for, or on behalf of the City for PUC Regional Projects.

3 "Contract awarding authority" means any City officer, department, commission,
4 employee or board authorized to enter into contracts on behalf of the City. A non-profit or
5 public entity that receives funds from the City to pay for construction or construction related
6 services is a "contract awarding authority" for the purposes of contracting for the performance
7 of those services.

8 "Contractor" means any person who enters into a contract with the City.

9 "Control" means an individual possesses the legal authority to manage business
10 assets, good will and the daily operations of a business, and actively and continuously
11 exercises such authority.

12 "Director" means the Director of the Human Rights Commission, or his or her designee.

13 "Discount" means a downward adjustment in price or upward adjustment in rating of a
14 proposal, whichever applies, that is made under Section 14B.7.

15 "General Manager" means the General Manager of the San Francisco Public Utilities
16 Commission, or his or her designee.

17 "General services contract" means an agreement for those services that are not
18 professional services. Examples of "general services" include: janitorial, security guard, pest
19 control and landscaping services.

20 "Joint venture" shall mean an association of two or more professional services or
21 architecture/engineering businesses acting as a contractor and performing or providing
22 services on a professional services or architecture/engineering contract, in which each joint
23 venture partner combines property, capital, efforts, skill, and/or knowledge and each joint
24 venture partner shares in the ownership, control, management responsibilities, risks and
25 profits of the joint venture in proportion to its claimed level of participation.

1 "Local Business Enterprise (LBE)" means a business that is certified as an LBE under
2 Section 14B.3. LBEs are either Small-LBEs or Micro-LBEs, and are also either MBEs, WBEs,
3 or OBEs.

4 "Minimum competitive amount" means for professional services, general services,
5 architect/engineering and commodities contracts, the "minimum competitive amount" as
6 defined in ~~Chapter Section~~ 6.40(A) of the Administrative Code, ~~which shall be \$29,000 except that~~
7 ~~on January 1, 2010, and every five years thereafter, the Controller shall recalculate the minimum~~
8 ~~competitive amount to reflect any proportional increase in the Urban Regional Consumer Price Index~~
9 ~~from January 1, 2005, rounded to the nearest \$1,000.~~

10 "Minority Business Enterprise (MBE)" means a business that is certified as an MBE
11 under Section 14B.4(B)

12 "Other Business Enterprise (OBE)" means a business that is certified as an OBE under
13 Section 14B.4(D).

14 "Owns" or "Ownership" means an individual: (a) possesses a record ownership
15 interest, such as partnership interest or stock interest, of at least 51 percent of the business;
16 (b) possesses incidents of ownership, including an interest in profit and loss, equal to at least
17 the required record ownership interest; (c) contributes capital to the business equal to at least
18 the required record ownership percentage (unsecured promissory notes or notes secured by
19 the business or business assets are not sufficient to constitute capital contributions); and (d)
20 contributes expertise relevant to the business "commercially useful function" proportionate to
21 the stated ownership interest.

22 "Person" means any individual or group of individuals, including but not limited to
23 partnerships, associations, and corporations.

24 "Professional services contract" means an agreement for services that require
25 extended analysis, the exercise of discretion and independent judgment, or the application of

1 an advanced, specialized type of knowledge, expertise, or training customarily acquired either
2 by a prolonged course of study or equivalent experience in the field. Examples of professional
3 service providers include licensed professionals such as accountants, and non-licensed
4 professionals such as parking lot management, software developers and financial consultants.
5 For the purpose of this Ordinance, a contract for architectural, engineering, or other
6 professional design, consulting or construction management services for a public work project
7 shall be considered an architect/engineering contract and not a professional services contract.
8 "PUC" or "Public Utilities Commission" means the San Francisco Public Utilities Commission,
9 the City Department that provides water, wastewater, and municipal power services to San
10 Francisco and, under contractual agreement with 29 wholesale water agencies, also supplies
11 water to 1.6 million additional customers within three Bay Area counties.

12 "Public works/construction contract" means a contract for the erection, construction,
13 renovation, alteration, improvement, demolition, excavation, installation, or repair of any public
14 building, structure, infrastructure, bridge, road, street, park, dam, tunnel, utility or similar public
15 facility that is performed by or for the City, and the cost of which is to be paid wholly or
16 partially out of moneys deposited in the City Treasury or out of trust monies under the control
17 of or collected by the City. For purposes of this Ordinance only, "public works/construction
18 contract" includes contracts between a person, including a non-profit entity or public agency,
19 and a contractor for construction or construction-related services, where the contract is funded
20 by the City.

21 "PUC Regional Projects" means the projects to be performed outside of the geographic
22 limits of San Francisco that are identified as regional projects and included in the formally
23 approved Capital Improvement Program of the San Francisco Public Utilities Commission's
24 approximately \$4.3 billion project to seismically reinforce and otherwise enhance the Hetch
25 Hetchy water supply system, as it may be amended from time to time, and shall also include

1 Repair and Replacement work ("R&R") only where such work is to be performed in
2 association with a regional Capital Improvement Program project.

3 "Subcontractor" means any person providing goods or services to a contractor or
4 subcontractor in fulfillment of the contractor or subcontractor's obligations arising from a
5 contract with the City.

6 "Threshold amount" means, for public works/construction projects, the "threshold
7 amount" as defined in Chapter 6.1(L) (M) of the Administrative Code ~~which shall be \$114,000~~
8 ~~except that on January 1, 2010, and every five years thereafter, the Controller shall recalculate the~~
9 ~~threshold amount to reflect any proportional increase in the Urban Regional Consumer Price Index~~
10 ~~from January 1, 2005, rounded to the nearest \$1,000.~~

11 "Woman Business Enterprise (WBE)" means a business that is certified as a WBE
12 under Section 14B.4(C).

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14 Section 2. The San Francisco Administrative Code is hereby amended by amending
15 Section 14B.3, to read as follows:

16 **SECTION 14B.3. LBE CERTIFICATION.**

17 (A) Criteria for LBE Certification. Through appropriately promulgated procedures, if
18 any, the Director shall certify as an LBE any business that meets all of the following criteria
19 and also meet either the criteria set forth in Section 14.B.3(B), ~~or~~ Section 14.B.3(C) or Section
20 14B.3(D):

21 (1) The business is financially and operationally independent from, and operates at
22 arm's length to, any other business.

23 (2) The business is continuously in operation.

24 (3) The business is a for-profit enterprise.

25 (4) The business performs a commercially useful function.

1 (5) The business maintains its principal place of business in a fixed office within the
2 geographic boundaries of the City that provides all of the services for which LBE certification
3 is sought, other than work required to be performed at a job site; provided, however, that
4 suppliers are not required to maintain their principal place of business in San Francisco, but
5 are required to maintain a fixed office in San Francisco that meets all of the requirements of
6 this Section other than the principal place of business requirement.

7 An office is a fixed and established place of business, including a qualified home office,
8 where business is conducted on a regular basis of the type for which certification is sought. A
9 residence qualifies as an office only if none of the persons who own or control the business
10 also maintains an office outside the residence in the same or related field, and the persons
11 who own or control the business claimed a business deduction on the prior year's income tax
12 return, or for, businesses started after the last tax return, would qualify for a deduction on the
13 next tax return. None of the following constitutes an office: a post office box, a temporary
14 location, a movable property, a location that was established to oversee a project such as a
15 construction project office, or work space provided in exchange for services, as opposed to
16 monetary rent.

17 To establish a principal place of business in San Francisco, a business must
18 demonstrate that the majority of its principals are based in the San Francisco office, and that it
19 pays San Francisco payroll taxes on at least 51% of its total payroll.

20 Suppliers must maintain a warehouse in the City that is continuously stocked with
21 inventory consistent with their certification. Truckers must park their registered vehicles and
22 trailers within the City.

23 (6) The business possesses a current San Francisco Business Tax Registration
24 Certificate.

25

1 (7) The business has been located and doing business in San Francisco for at least six
2 months preceding the application for certification.

3 (8) The business owner has licenses or other relevant trade or professional
4 certifications, or, where licensing is not required, relevant training and experience that are
5 appropriate for the type of business for which the business seeks certification.

6 (9) The business is owned and controlled as defined herein by individuals who reside in
7 the United States or its territories.

8 (10) The business has average gross annual receipts in the prior three fiscal years that
9 satisfy the criteria set forth in either Section 14B.3(B), ~~or~~ Section 14B.3(C), or Section 14B.3(D).

10 (11) The business is not owned or controlled as defined herein in part or in whole by a
11 full time City employee.

12 (B) Criteria for Small - LBE. The Director shall certify as a "Small - LBE" any business
13 that meets the requirements of 14B.3(A) and has average gross annual receipts in the prior
14 three fiscal years that do not exceed the following limits: (1) public works/construction -
15 \$14,000,000; (2) specialty construction contractors - \$7,000,000; (3)
16 goods/materials/equipment and general services - \$7,000,000; (4) professional services and
17 architect/engineering - \$2,500,000; and (5) trucking - \$3,500,000. The City shall determine
18 gross receipts, according to recognized accounting methodologies that the City determines
19 most accurately reflect the actual money that the business received during the relevant
20 period. Any business under common ownership, in whole or in part, with any other business
21 meets the requirements of this subparagraph only if the aggregate gross annual receipts of all
22 of the businesses under such common ownership do not exceed these limits. All businesses
23 owned by married spouses or domestic partners are considered under common ownership
24 unless the businesses are in unrelated industries and no community property or other jointly
25 owned assets were used to establish or are used to operate either business.

1 (C) Criteria for Micro - LBE. The Director shall certify as a "Micro - LBE" any business
2 that meets the requirements in 14B.3(A) and also has average gross annual receipts in the
3 prior three fiscal years that do not exceed the following limits: (1) public works/construction -
4 \$7,000,000; (2) specialty construction contractors - \$3,500,000; (3)
5 goods/materials/equipment and general services - \$3,500,000; (4) professional services and
6 architect/engineering - \$1,250,000; and (5) trucking - \$1,750,000. Any business under
7 common ownership, in whole or in part, with any other business meets the requirements of
8 this subparagraph only if the aggregate gross annual receipts of all of the businesses under
9 such common ownership do not exceed these limits. All businesses owned by married
10 spouses or domestic partners are considered under common ownership unless the
11 businesses are in unrelated industries and no community property or other jointly owned
12 assets were used to establish or are used to operate either business.

13 (D) Criteria for SBA LBE. The Director shall certify as a "SBA LBE" any business that: (1)
14 meets the requirements in 14B.3(A); (2) has average gross annual receipts in the prior three fiscal
15 years that does not exceed the following "Small Business" thresholds based on certain U.S. Small
16 Business Administration benchmarks: (1) public works/construction - \$33.5 million; (2) specialty
17 construction contractors - \$17 million; (3) goods/materials/equipment and general services - \$17
18 million; (4) professional services and architect/engineering - \$7 million and (5) trucking - \$8.5 million.
19 This certification is available to graduated LBE firms and to other firms that meet these criteria. The
20 City shall determine gross receipts, according to recognized accounting methodologies that the City
21 determines most accurately reflect the actual money that the business received during the relevant
22 period. Any business under common ownership, in whole or in part, with any other business meets the
23 requirements of this subparagraph only if the aggregate gross annual receipts of all of the businesses
24 under common ownership do not exceed these limits. All businesses owned by married spouses or
25 domestic partners are considered under common ownership unless the businesses are in unrelated

1 industries and no community property or other jointly owned assets were used to establish or are used
2 to operate either business.

3

4 Section 2. The San Francisco Administrative Code is hereby amended by amending
5 Section 14B.7, to read as follows:

6 **SECTION 14B.7. PRIME CONTRACTS**

7 A) Good Faith Efforts to Obtain LBE Bids on Contracts Subject to this Ordinance.
8 Contract awarding authorities shall use good-faith efforts for all contracts subject to the
9 discount provisions of this Ordinance to solicit and to obtain bids from the broadest possible
10 range of LBEs and to ensure that neither MBEs nor WBEs nor OBEs are arbitrarily excluded
11 from participation. Good faith efforts shall include the following.

12 (1) Arranging contracts by size and type of work to maximize the opportunities for
13 LBEs to participate. This includes dividing projects into smaller parts.

14 (a) As soon as practical before soliciting bids or proposals, contract awarding
15 authorities shall submit large contract proposals to the Director for review. The Director shall
16 determine whether the proposed contract can be divided into smaller contracts so as to
17 enhance the opportunity for participation by LBEs. For purposes of this paragraph, "large
18 project" means any public works/construction contract estimated to cost more than
19 \$5,000,000, any professional services contract estimated to cost more than \$100,000, and
20 any multiple year commodities contract with a term greater than one year, including any
21 options to renew or extend.

22 (b) If the Director determines, after consulting with the contract awarding authority,
23 that the contract can be divided into smaller contracts, then the Director and the contract
24 awarding authority shall confer regarding all of the costs and benefits of soliciting the contract
25 as a single contract or dividing it into smaller contracts, including but not limited to the

1 potential for enhanced opportunities for LBE participation as prime contractors, the potential
2 for LBE participation as subcontractors, relative costs, administrative issues, and any other
3 matters relevant to the accomplishment of the purpose of the subject contract or contracts. If,
4 after exchanging information and conferring regarding these issues, the contract awarding
5 authority and the Director are unable to agree on whether or how the contract divided into
6 smaller contracts, or on the size and number of contracts, the Mayor or the Mayor's designee
7 shall resolve the matter.

8 (2) Encouraging LBEs to attend prebid meetings that are held to inform potential
9 bidders of contracting opportunities.

10 (3) Advertising in general circulation media, trade association publications and local
11 business media, and posting the contacting opportunity on the Department's website or other
12 centralized City website.

13 (4) Notifying LBEs that are certified to perform the work contemplated in a contract
14 and soliciting their interest in the contract.

15 (5) Providing LBEs with adequate information about the plans, specifications and
16 requirements of the contract.

17 (6) When allowed by local laws governing City contracting, negotiating with LBEs in
18 good faith.

19 (7) Using the services of community and contractors' groups to assist in the
20 recruitment of LBEs.

21 (8) For professional services, general services, architectural/engineering and
22 commodities contracts, the estimated cost of which exceeds \$10,000 but is less than the
23 minimum competitive amount or for public works/construction contracts, the estimated cost of
24 which exceeds \$10,000 but is less than the threshold amount, contract awarding authorities
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1 are not required to undertake the good faith efforts steps set forth in Sections 14B.7(A)(3)
2 when it is impracticable to do so.

3 (B) Best Efforts on Contracts Not Otherwise Subject to this Ordinance. In the award of
4 leases, franchises, concessions, and other contracts not subject to the discount provisions of
5 this Ordinance, contract awarding authorities shall utilize the good faith efforts steps unless
6 impracticable to do so. At a minimum, contract awarding authorities should notify LBEs that
7 are certified to perform the work contemplated in a contract and solicit their interest in the
8 contract.

9 (C) Non-Discrimination in Prime Contracting. Contract awarding authorities shall
10 ensure that all aspects of the contracting process are free from discrimination against any
11 person on any basis prohibited by law, and ensure broad contracting opportunities for all
12 categories of LBEs. Contract awarding authorities shall maintain such documentation of their
13 selection process as required by the Director to monitor and ensure compliance with this
14 provision.

15 (D) Contracts Subject to Prime Bidding Discounts. Unless otherwise provided in this
16 Ordinance, contract awarding authorities shall apply discounts to all contracts the estimated
17 cost of which exceeds \$10,000.

18 (E) Amount of Discount. Unless otherwise provided in this Ordinance, contract
19 awarding authorities shall apply a 10% discount to any bid from a Small - LBE or Micro - LBE.
20 *Unless otherwise provided in this Ordinance, contract awarding authorities shall apply a 2% bid*
21 *discount to any bid from an SBA-LBE.* Contract awarding authorities shall apply these discounts
22 to each stage of the selection process, including qualifications, proposals and interviews.

23 (F) Joint Ventures For Professional Services and Architecture/Engineering. Unless
24 otherwise provided in this Ordinance, contract awarding authorities shall extend the following
25 bid/rating discount to all bids, proposals and contracts from Small and Micro-LBEs on

1 professional services and architecture/engineering contracts: (1) five percent to a joint venture
2 with LBE participation that equals or exceeds 35 percent but is under 40 percent; (2) seven
3 and one-half percent to a joint venture with LBE participation that equals or exceeds 40
4 percent; (3) ten percent to a LBE or a joint venture among LBEs. Contract awarding
5 authorities shall apply the bid/rating discount to each stage of the selection process, including
6 qualifications, proposals and interviews.

7 The contract awarding authority shall apply the joint venture bid/ratings discount only to
8 professional services and architecture/engineering contracts and only to a joint venture (1)
9 that meets the requirements contained in this Ordinance, and (2) when the LBE is an active
10 partner in the joint venture, performs work, manages the job and takes financial risks in
11 proportion to the required level of participation stated in the bid documents, is responsible for
12 a clearly defined portion of the work to be performed, and shares proportionately in the
13 ownership, control, management responsibilities, risks, and profits of the joint venture. The
14 portion of the LBE joint venture's work shall be set forth in detail separately from the work to
15 be performed by the non-LBE joint venture partner. The LBE joint venture's portion of the
16 contract must be assigned a commercially reasonable dollar value.

17 (G) Affidavit. Each bidder, proposer and contractor shall be required to sign an
18 affidavit declaring under penalty of perjury its intention to comply fully with the provisions of
19 this Ordinance and attesting to the truth and accuracy of all information provided regarding
20 such compliance.

21 (H) Additional Requirements and Required Contract Terms. Contract awarding
22 authorities shall include in all contracts with their contractors, and all contractors shall include
23 in their contracts with subcontractors the following requirements, in addition to other
24 requirements set forth in the Municipal Code. For the purposes of this Section, "contractor"
25 includes all subcontractors.

1 (1) Each contract shall incorporate this Ordinance by reference, shall require
2 contractors to comply with its provisions in awarding and administering such contracts, and
3 shall provide that the willful failure of any bidder or contractor to comply with the requirements
4 of this Ordinance or rules and regulations implementing this Ordinance shall be deemed a
5 material breach of contract.

6 (2) Contracts shall provide that in the event that the Director finds that any bidder,
7 subcontractor or contractor willfully fails to comply with any of the provisions of this Ordinance,
8 rules and regulations implementing the Ordinance, or contract provisions pertaining to LBE,
9 MBE, WBE, OBE or Micro-LBE participation, outreach, or non-discrimination, the bidder,
10 subcontractor or contractor shall be liable for liquidated damages for each contract in an
11 amount equal to the bidder's or contractor's net profit on the contract, 10 percent of the total
12 amount of the contract or \$1,000, whichever is greatest, as determined by the Director. All
13 contracts shall also contain a provision in which the bidder, subcontractor or contractor
14 acknowledges and agrees that the liquidated damages assessed shall be payable to the City
15 upon demand and may be set off against any monies due to the bidder, subcontractor or
16 contractor from any contract with the City.

17 (3) Contracts shall require all contractors to maintain records, including such
18 information requested by the Director or Commission, necessary for monitoring their
19 compliance with this Ordinance. Contracts shall require prime contractors to include in any
20 subcontract with a LBE a provision requiring the subcontractor to maintain the same records.
21 Contracts shall require contractors and subcontractors to maintain such records for three
22 years following completion of the project and shall permit the Director, Commission and
23 Controller to inspect and audit such records.

24 (4) Contracts shall require prime contractors, during the term of the contract, to fulfill
25 the LBE participation commitments submitted with their bids. Willful failure to comply with the

1 level of LBE subcontractor participation specified in the contract shall be deemed a material
2 breach of contract.

3 (5) Contracts shall require, and shall require prime contractors to include in any
4 subcontract with a LBE a provision requiring, the prime contractor to compensate any LBE
5 subcontractor for damages for breach of contract or liquidated damages equal to 5% of the
6 subcontract amount, whichever is greater, if the prime contractor willfully fails to comply with
7 its commitment to use the LBE subcontractor as specified in the bid/proposal unless the
8 Director and the contract awarding authority both give advance approval to the prime
9 contractor to substitute subcontractors or otherwise modify the commitments in the
10 bid/proposal documents. This provision shall also state that it is enforceable in a court of
11 competent jurisdiction.

12 (6) Contracts shall require prime contractors, whenever amendments, modifications,
13 supplements, or change orders cumulatively increase the total dollar value of the contract by
14 more than 10 percent, to comply with those provisions of this Ordinance that applied to the
15 original contract with respect to the amendment, modification, supplement or change order.

16 (7) Contracts shall require prime contractors to submit to the Director for approval all
17 contract amendments, modifications, supplements, and change orders that cumulatively
18 increase by more than 20 percent the total dollar value of all contracts originally valued at
19 \$50,000 or more. The Director shall review the proposed amendment, modification,
20 supplement or change order to correct any contracting practices that exclude any category of
21 LBEs from new contracting opportunities.

22 (8) Contracts in which subcontracting is used shall prohibit back contracting to the
23 prime contractor or lower-tier subcontracting for any purpose inconsistent with the provisions
24 of this Ordinance, rules and regulations adopted pursuant to this Ordinance, or contract
25 provisions pertaining to LBE utilization.

1 (9) Contracts in which subcontracting is used shall require the prime contractor to pay
2 its subcontractors within three working days after receiving payment from the City unless the
3 prime contractor notifies the Director in writing within 10 working days prior to receiving
4 payment from the City that there is a bona fide dispute between the prime contractor and the
5 subcontractor, in which case the prime contractor may withhold the disputed amount but shall
6 pay the undisputed amount. The Director may, upon making a determination that a bona fide
7 dispute exists between the prime contractor and subcontractor, waive this three-day payment
8 requirement. In making the determination as to whether a bona fide dispute exists, the
9 Director shall not consider the merits of the dispute. Contracts in which subcontracting is used
10 shall also require the contractor, within 10 working days following receipt of payment from the
11 City, to file an affidavit, under penalty of perjury, that he or she has paid all subcontractors.
12 The affidavit shall provide the names and address of all subcontractors and the amount paid
13 to each.

14 (I) Exceptions.

15 (1) The bid discount provisions of this Ordinance *for Small and Micro-LBEs* are not
16 applicable to any contract estimated by the contract awarding authority to cost in excess of
17 \$10,000,000~~7~~, *and the bid discount provisions of this Ordinance for SBA-LBEs are not applicable to*
18 *any contract estimated by the contract awarding authority to cost less than \$5,000,000 and in excess of*
19 *\$20,000,000.*

20 (2) Notwithstanding any other provision of this Section, contract awarding authorities
21 shall not apply a discount where to do so would result in a contract being awarded to a
22 business without the capacity to perform it. The Commission may adopt rules and regulations
23 setting standards for determining that an LBE has sufficient skill, experience, and financial
24 capacity to perform the contract.

25

1 (J) Waivers. The Director shall waive the LBE bid discounts, and report the waiver to
2 the Commission, if:

3 (1) The Director finds, with the advice of the contract awarding authority and the
4 Office of Contract Administration, that needed goods or services are available from a sole
5 source that is qualified to do business with the City;

6 (2) The contract awarding authority certifies in writing to the Director, prior to the
7 Controller's contract certification, that the contract is being awarded under the emergency
8 provisions of Administrative Code Section 6.60 or Administrative Code Section 21.15 and that
9 there is either (i) no time to apply bid discounts or establish subcontracting goals, or (ii) no
10 immediately available LBEs that are capable of performing the emergency work; or

11 (3) For contracts in excess of \$5,000,000, a contract awarding authority establishes
12 that sufficient qualified LBEs capable of providing the needed goods and services required by
13 the contract are not available, or the application of the LBE discount will result in significant
14 additional costs to the City if the waiver of the bid discount is not granted.

15 (K) ~~Pilot~~ Micro-LBE Set-Aside Program. Each fiscal year, the Contract awarding
16 departments in consultation with the ~~The~~ Director ~~may~~ shall set aside for competitive award to
17 Micro - LBEs ~~any of the following~~ not less than 50% of the contracts that fall within each of the
18 following categories:

19 (1) Public work/construction contracts where the contract amount is equal to or less
20 than ~~\$400,000;~~ 250,000;

21 (2) Contracts other than public work/construction contracts where the contract amount
22 is equal to or less than \$100,000.

23 In order to satisfy the requirement to set aside not less than 50% of the contracts that fall within
24 each of these categories, contract awarding departments may count Job Order Contracts, without

1 limitation as to dollar value, that the department has set aside for Micro-LBEs under Administrative
2 Code Section 6.62(C).

3 (3) The competitive award requirements of the Municipal Code shall otherwise apply to
4 contracts in the set-aside program, except that if (a) fewer than two Micro - LBEs submit bids,
5 or (b) the contract awarding authority determines that the contract would not be awarded at a
6 fair market price, then the contract awarding authority may reject all bids and remove the
7 contract from the set-aside program.

8 ~~(4) The Director shall have a goal of setting aside in each fiscal year 25% of all contracts that~~
9 ~~are eligible to be set aside in each fiscal year.~~

10 (4) In the year 2010, contract awarding departments must make the following disclosures to
11 the Board of Supervisors each quarter. Thereafter, beginning in 2011, contract awarding departments
12 must make the following disclosures to the Board of Supervisors every year when the contract
13 awarding department makes its annual budget submission to the Board of Supervisors. These
14 disclosures shall include: (1) the number of contracts and the amount of each contract awarded under
15 the Micro – LBE set-aside; and (2) all public work/construction contracts equaling \$400,000 or less
16 not awarded under this program, and all other contracts equaling \$100,000 or less not awarded under
17 this program, accompanied by an explanation as to why the contract was not set-aside for award under
18 this program, or, if set aside, whether it was subsequently not awarded or awarded under any other
19 procedure.

20 (5) Contracts that are set-aside for award to Micro - LBEs shall not be subject to
21 subcontracting goals under Section 14B.8. Micro - LBEs that subcontract any portion of a set-
22 aside contract should subcontract to businesses certified as Micro - LBEs, to the maximum
23 extent possible. Micro - LBEs that subcontract any portion of a set-aside contract must serve
24 a commercially useful function based on the contract's scope of work, and must perform at
25 least ~~50%~~ 25% of the contract work.

1 (L) Prompt payment. The City shall pay LBEs within 30 days of the date on which the
2 City receives an invoice for work performed for and accepted by the City. The Controller shall
3 work with the Director and contract awarding authorities to implement this Citywide prompt-
4 payment policy. The City shall consult with affected community members and relevant City
5 officials, including the Director, the Controller, and contract awarding authorities, to design
6 and implement a prompt payment program within six (6) months of the effective date of this
7 Ordinance. Such program shall include procedures for the payment of late penalties where
8 prompt payment does not occur.

9

10 Section 3. The San Francisco Administrative Code is hereby amended by amending
11 Section 14B.8, to read as follows:

12 **SECTION 14B.8. SUBCONTRACTING.**

13 (A) **LBE Participation Goals.** Prior to soliciting bids or proposals, contract awarding
14 authorities shall provide the Director with a proposed job scope for all public
15 work/construction, and for all architect/engineering, professional service and general service
16 contracts that exceed the minimum competitive amount or threshold amount. The contract
17 awarding authority may ask the Director to waive subcontracting goals where it anticipates
18 that there are no subcontracting opportunities or there are not sufficient LBEs available to
19 perform the subcontracting work available on the contract.

20 The Director shall set LBE participation goals for each such contract, where
21 appropriate, based on the following factors:

- 22 (1) The extent of subcontracting opportunities presented by the contract; and
- 23 (2) The availability of LBE subcontractors capable of providing goods and services on
24 the contract.

25

1 (B) Satisfaction of Good Faith Efforts Requirements. At the time of a bid or proposal, all bids
2 and proposals must meet the LBE subcontractor and subconsultant goals set by the Director, and also
3 must conduct good faith efforts and file evidence of good faith efforts as required in Sections 14B.(D)
4 and (E) respectively, with the following exception. If upon submission of a bid or proposal, the bid or
5 proposal provides for a total LBE participation rate that exceeds by 35% the established LBE
6 subcontractor and subconsultant goal of the bid or proposal, the contractor will not be required to
7 conduct good faith efforts or to file evidence of good faith efforts as required in Sections 14B.(D) and
8 (E). The following LBEs shall be considered in determining the total LBE participation rate: prime
9 contractors, joint venture partners, subcontractors, and subconsultants.

10 (~~C~~B) Bids or proposals that do not meet the LBE participation goal set under 14B.8(A)
11 will be rejected as non-responsive unless the Director finds that the bidder diligently undertook
12 all the good faith efforts required by this Ordinance and that the failure to meet the goal
13 resulted from an excusable error. The contract awarding authority shall require bidders or
14 proposers on the contracts to contact a LBE before listing that LBE as a subcontractor in the
15 bid or proposal. A bid or proposal that fails to comply with this requirement will be rejected as
16 non-responsive. In addition only LBE's that have been contacted and agreed to be listed as
17 subcontractors shall be credited toward meeting the LBE participation goal.

18 (~~D~~E) Good Faith Outreach. In addition to meeting the LBE participation goal bidders
19 shall undertake good faith outreach as set forth in this Section 14B.8(~~D~~E) to select
20 subcontractors to meet LBE goals, except that bidders on public works/construction contracts
21 for less than the threshold amount are not required to undertake the good faith efforts steps
22 set forth in Sections 14B.8(~~D~~E)(3) when it is impracticable to do so. Bids or proposals from
23 bidders who fail to undertake the adequate good faith outreach steps and/or who fail to submit
24 the applicable documentation of such good faith outreach required in Section 14B.8(~~E~~D) shall
25 be declared nonresponsive, unless they meet the exception in Section 14B.8(B). The Human

1 Rights Commission shall by Rule and Regulation assign a numeric value to each of the good
2 faith outreach steps listed below. Adequate good faith outreach shall be a minimum of 80
3 points with a total of 100 points possible.

4 (1) Attending any presolicitation, or prebid, or pre-proposal meetings scheduled by the
5 City to inform all bidders of LBE program requirements for the project for which the contract is
6 awarded;

7 (2) Identifying and selecting subcontracting opportunities to meet LBE goals;

8 (3) Advertising for LBE subcontractors by posting the opportunity in an accessible
9 location, specified by the City, not less than 10 calendar days before the date the bids can first
10 be submitted. The advertisement must include information where bidders may obtain
11 adequate information about the plans, specifications, requirements for the work. This
12 paragraph applies only if the City gave public notice of the project not less than 15 calendar
13 days prior to the date the bids can first be submitted;

14 (4) Not less than 10 calendar days before the date the bids can first be submitted,
15 contacting at least the requisite number of LBEs by trade certified to perform the identified
16 work required by the 14B Rules and Regulations, and

17 (5) Performing follow-up contact on the initial solicitation with interested
18 subcontractors or subconsultants and negotiating in good faith with LBEs, as set forth in the
19 14B Rules and Regulations, and not unjustifiably rejecting their bids or proposals.

20 (6) Advising and assisting interested LBEs that are bidding on and performing City
21 public work and construction contracts with the City's bonding and financial assistance
22 programs to obtain bonds, lines of credit, or insurance required by the City or the bidder.

23 (~~E-D~~) Documentation of Good Faith Outreach. Each bid and proposal shall document
24 good faith outreach and include the documentation with the bid. Such documentation shall
25 include: (1) the dollar amount of each subcontract and a statement of the scope of work to be

1 performed under the subcontract; (2) the identification of each subcontract awarded to an LBE
2 and, (3) for each subcontract, copies of the subcontractor bids submitted. Such
3 documentation shall contain at least the bid amount and a description of the scope of work,
4 and separately, for each subcontract, a full and complete statement of the reason(s) for
5 selection of the subcontractor. If the reason is based on relative qualifications, the statement
6 must address the particular qualifications at issue. If the reason is the bid's respective dollar
7 amounts, the statement must state the amounts and describe the similarities and/or
8 dissimilarities in the scope of work covered by the bids. If no written bids were submitted by
9 some or all of the subcontractors who bid the job, the bidder shall submit a written statement
10 containing (1) the amount of each oral bid; and (2) separately, for each subcontract, a full and
11 complete statement of the reason(s) for selection of the subcontractor. Bidders shall maintain
12 the documentation described in this paragraph for three years following submission of the bid
13 or completion of the contract, whichever is later.

14

15 Section 9. The San Francisco Administrative Code is hereby amended by amending
16 Section 14B.13 to read as follows:

17 **SECTION 14B.13. POWERS AND DUTIES OF CONTRACT AWARDING AUTHORITIES.**

18 (A) In addition to the powers and duties given to contract awarding authorities
19 elsewhere, contract awarding authorities shall:

20 (1) Adjust bid bonding and insurance requirements in accordance with the most current
21 version of the City's "Contract Insurance Manual" or as otherwise authorized by the City Risk
22 Manager, Department of Administrative Services.

23 (2) Use the City's Surety Bonding Program set forth in Section 14B.16 to assist LBEs
24 bidding on and performing City public works/construction contracts to meet bonding
25 requirements and/or obtain construction loans.

1 (3) Submit to the Office of Contract Administration (OCA) in electronic format or a
2 format specified by the OCA, all bid opportunities, requests for proposals and solicitations for
3 which published notice or advertising is required, no later than 10 calendar days prior to the
4 due date of the bid opportunity, request for proposals or solicitation. A contract awarding
5 authority must obtain a waiver from its commission, or in the case of a department that has no
6 commission, from the Board of Supervisors, if it cannot meet the requirements of this Section.

7 (4) Impose such sanctions or take such other actions as are designed to ensure
8 compliance with the provisions of this Ordinance, which shall include, but are not limited to:

9 (a) Refuse to award a contract.

10 (b) Order the suspension of a contract.

11 (c) Order the withholding of funds.

12 (d) Order the revision of a contract based upon a material breach of contract provisions
13 pertaining to LBE participation or outreach to MBEs, WBEs, or OBEs.

14 (e) Disqualify a bidder, contractor, subcontractor, or other business from eligibility for
15 providing goods or services to the City for a period not to exceed five years, based on the
16 standards set forth in this Ordinance and rules and regulations promulgated by the
17 Commission. Any business disqualified under this subsection shall have a right to review and
18 reconsideration by the Commission after two years upon a showing of corrective action
19 indicating that violations are not likely to recur.

20 (5) Not award any contract to a person or business that is disqualified from doing
21 business with the City under the provisions of this Ordinance.

22 (6) Designate a staff person to be responsible for responding to the Director and
23 Commission regarding the requirements of this Ordinance.

24 (7) Maintain accurate records as required by the Director and the Commission for each
25 contract awarded, its dollar value, the nature of the goods or services to be provided, the

1 name of the contractor awarded the contract, its identity as a Small-LBE, Micro - LBE, MBE,
2 WBE or OBE, the efforts made by the contract awarding authority to solicit bids from LBEs,
3 including Micro - LBEs, MBEs, WBEs and OBEs, responses received from such businesses,
4 and a full and complete statement of the reason(s) for selection of the contractor addressing
5 the particular qualifications at issue.

6 (8) Where feasible, provide technical assistance to LBEs to increase their ability to
7 compete effectively for the award of City contracts.

8 (9) Work with the Director and the Controller to implement a City-wide prompt-payment
9 policy requiring that LBEs be paid by the City within 30 days of the date on which the City
10 receives an invoice from a LBE for work performed for the City.

11 (10) Provide the Director with written notice of all contract amendments, modifications,
12 supplements and change orders that cumulatively result in an increase or decrease of the
13 contract's dollar amount of more than 10 percent. Such notice shall be provided within 10
14 days of each such contract modification.

15 (11) Whenever contract amendments, modifications, supplements or change orders
16 cumulatively increase the total dollar value of a contract by more than 10 percent, the contract
17 awarding authority shall require compliance with those provisions of this Ordinance that
18 applied to the original contract.

19 (12) All contract amendments, modifications, supplements or change orders that
20 cumulatively increase by more than 20 percent the total dollar value of all contracts originally
21 valued at \$50,000 or more shall be subject to prior approval of the Director, who shall review
22 the proposed amendment, modification, supplement or change order to correct contracting
23 practices that exclude Small-LBEs or Micro - LBEs from new contracting opportunities or
24 discriminate against MBEs, WBEs or OBEs.

25

1 (B) Contract awarding authorities or departments may invite, encourage or request
2 businesses to joint venture on any professional services or architecture/engineering contact to
3 promote LBE participation.

4 (C) For the purpose of determining LBE participation, contracts awarded to joint
5 ventures in which one or more LBEs are combined with one or more business that are not
6 LBEs shall be deemed by the contract awarding authority to be awarded to LBEs only to the
7 extent of the LBE participation in the joint venture.

8 (D) Subject to the budgetary and fiscal provisions of the San Francisco Charter and to
9 any limitations or requirements associated with the issuance of municipal financings, including
10 but not limited to the use of tax-exempt financing and other long-term obligations, contract
11 awarding authorities shall set aside the following percentage of the value of each contract, as
12 defined in Section 14B.2, to fund the administration and enforcement of this Chapter 14B by
13 the HRC. Such funds shall be used solely for the actual costs of administering and enforcing
14 this Chapter. The HRC shall provide monthly statements to contract awarding authorities and
15 the Controller's Office that account for all expenditures related to administering and enforcing
16 this Chapter, broken down by staff member, project, and activity. Any funds that are not
17 expended on the actual costs of administration and enforcement relating to the subject
18 contract shall be returned to the source fund as soon as practicable. This Section 14B.13 (D)
19 shall not apply to contracts that are funded by bonds that were authorized prior to the effective
20 date of this Ordinance.

21 (1) For contracts having an estimated value under \$1 million, the contract awarding
22 authority shall set aside 2% of the value of the contract for the purpose described in this
23 Section.

24

25

1 (2) For contracts having an estimated value of at least \$1 million but less than \$10
2 million, the contract awarding authority shall set aside 1% of the value of the contract for the
3 purpose described in this Section.

4 (3) For contracts having an estimated value of at least \$10 million but less than \$50
5 million, the contract awarding authority shall set aside .5% of the value of the contract for the
6 purpose described in this Section.

7 (4) For contracts having an estimated value of \$50 million or more, the HRC Director, in
8 consultation with the contract awarding authority, shall determine the level of funding
9 necessary to administer and enforce this Ordinance with respect to the subject contract,
10 provided that the funding shall not exceed .5% of the value of the contract. The contract
11 awarding authority shall set aside the designated funds to be used solely for the purpose
12 described in this Section.

13 (5) Notwithstanding Sections 14B.13 (D)(1), (2), (3) and (4), for the Port of San
14 Francisco, the San Francisco Public Utilities Commission, the San Francisco Department of
15 Public Works and the San Francisco International Airport, each such contract awarding
16 authority and the HRC Director shall confer and jointly shall estimate the costs of
17 administering and enforcing this Chapter with respect to each contract to be issued by each
18 such contract awarding authority. The contract awarding authority shall set aside the agreed-
19 upon funds to be used solely for the purpose described in this Section.

20 If, after exchanging information regarding the nature of the contract and the
21 administrative activities required, the contract awarding authority and the Director do not
22 agree on the cost of administering and enforcing this Chapter, the Mayor or the Mayor's
23 designee shall determine the appropriate amount to be set aside for the purpose described in
24 this Section.

25

1 The Human Rights Commission shall report on compliance by contract awarding
2 authorities with set-asides determined under this Section 14B.13 (D)(5) and on the agreed
3 upon funds for contract awarding authorities under 14B.13 (D)(5) in the Commission's annual
4 report under Section 14B.15 (B).

5 The Board of Supervisors shall assess the operation of this Section 14B.13 (D)(5) in its
6 three-year review under Section 14B.18 (H).

7

8 Section 11. The San Francisco Administrative Code is hereby amended by amending
9 Section 14B.15 to read as follows:

10 **SECTION 14B.15. REPORTING AND REVIEW.**

11 (A) Reporting by the Director. Commencing January 1, 2007, and no later than the first
12 day of every third month thereafter, the Director shall issue a written report to this Board. That
13 report shall document each City department's performance under the terms of this Ordinance,
14 including, among other things, each City department's progress in meeting LBE goals and
15 ensuring non-discrimination against MBEs, WBEs, and OBEs, and the success of each
16 department's prime contractors in complying with the LBE subcontracting provisions of this
17 Ordinance and ensuring non-discrimination against MBEs, WBEs, and OBEs. That report
18 shall also state the level of participation of all categories of LBEs and whether or not each City
19 department has fully reported all data required by this Ordinance or requested by HRC or the
20 Controller.

21 (1) Whenever the Director's report concludes that a department management's
22 intentional disregard or negligent performance of obligations imposed by this Ordinance has
23 contributed to that department's failure to meet its prime contracting goals or requirements of
24 this Ordinance, or the failure of its prime contractors to meet their subcontracting goals or
25 requirements of this Ordinance, or whenever the Director's report concludes that a City

1 department has failed to provide any data required by this Ordinance or requested by the
2 HRC or the Controller, the Clerk of this Board shall schedule before the appropriate
3 Committee of the Board a hearing on that report. The Clerk shall also give notice of that
4 hearing to the heads of the departments identified in the report and request the attendance of
5 the heads of those departments at the committee hearing. The Clerk's notice shall inform the
6 department heads that they must be prepared to respond to the Director's finding of
7 intentional disregard and/or negligent performance and to explain what steps they intend to
8 take to forestall repetition of the problems identified in the Directors' report. The same
9 procedure shall be followed whenever the Director's report identifies any department as
10 having failed to meet its prime or subcontracting goals for three consecutive quarters. If the
11 Director's report indicates that a City department has not met its goals for three consecutive
12 quarters, HRC and the City department shall institute a targeted program to remedy lack of
13 participation by LBEs in any affected industry.

14 (2) The Director shall report to the Commission all waivers acted upon pursuant to
15 Section 14B.7(J) and 14B.8(A). Such report shall be made on a monthly basis following the
16 granting of the waiver.

17 (B) Reporting by City Departments. ~~By the last day of each fiscal year,~~ As part of their
18 annual budget submission to the Board of Supervisors, all contract awarding authorities and City
19 departments shall report annually to the Mayor on their progress in the preceding fiscal year
20 toward the achievement of the LBE goals and their steps to ensure non-discrimination against
21 MBEs, WBEs, and OBEs. All contract awarding authorities and City departments shall cooperate
22 with requests by the Human Rights Commission for information needed by the Human Rights
23 Commission to make the reports to the Board of Supervisors required by Chapter 14B.15(A).

24 (C) Reporting by the Commission. By July 1st of each fiscal year, the Commission shall
25 submit an annual report to the Mayor and this Board on the progress of the City toward the

1 goals of this Ordinance, together with an identification of problems and specific
 2 recommendations for: (1) improving the City's performance in fostering LBE participation in
 3 City contracting, and (2) ensuring non-discrimination against MBEs, WBEs, and OBEs. The
 4 Commission's report shall include an analysis of the bidding environment in the various
 5 industries that participate in City contracts.

6 Each year, after receiving the Commission's annual report, the Board shall hold a
 7 hearing to review the City's performance under this Ordinance, the administration of this
 8 Ordinance by the HRC, and the progress of City departments towards the purposes of this
 9 Ordinance, and other subjects pertaining to the ordinance.

10 The Board shall act upon the Commission's recommendations by the first Board
 11 meeting of January in each fiscal year.

12

13

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

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17 By: _____
 18 Linda M. Ross
 19 Deputy City Attorney

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