

FILE NO. 041117

ORDINANCE NO.

1 [Establishing a Disadvantaged Business Enterprise Program.]

2

3 **Emergency ordinance amending the San Francisco Administrative Code by adding**
4 **Chapter 14A to establish a Disadvantaged Business Enterprise Program and suspend**
5 **Chapter 12D.A; adopting declaration of emergency; making applicable certain**
6 **emergency contracting procedures; and providing for data collection to ensure**
7 **nondiscrimination in City contracting.**

8 Note: This entire ordinance is new.

9 Additions are *single-underline italics Times New Roman*;
10 deletions are *strikethrough italics Times New Roman*.
11 Board amendment additions are double underlined.
12 Board amendment deletions are ~~strikethrough normal~~.

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

14 Section 1. The San Francisco Administrative Code is hereby amended by adding
15 Chapter 14A to read as follows:

16 **SEC. 14A.01. AFFIRMING CITY POLICY AGAINST DISCRIMINATION IN PUBLIC**
17 **CONTRACTING; TEMPORARILY SUSPENDING CHAPTER 12D.A.**

18 The City, and every commission, department, officer and employee, shall fully and
19 vigorously enforce all laws prohibiting discrimination and requiring equal opportunity in City
20 contracting. All City contracts require contractors to comply with all such applicable local,
21 state and federal laws. These include but are not limited to the Unruh Civil Rights Act and
22 Section 3303(a)(4) of the San Francisco Police Code, which prohibit contractors from
23 discriminating against subcontractors on any basis prohibited by law. The City shall fully
24 enforce its contractual rights, and shall consider discrimination by a prime contractor against
25 subcontractors on any basis prohibited by law to be a material breach of contract. The City

1 shall vigorously pursue appropriate remedies for any breach by any contractor of such
2 obligations under law or contract to the maximum extent allowed by law.

3 Effective immediately upon the passage of this ordinance, all provisions of
4 Administrative Code Chapter 12D.A and any other contracting program invalidated by the
5 Superior Court order dated July 26, 2004, in Coral Construction, Inc. v. City and County of
6 San Francisco (Sup. Ct. No. 421249) shall be and are suspended and are of no force and
7 effect; provided, however, the provisions of Chapter 12D.A and any other contracting program
8 invalidated by the court order shall be suspended only so long as, and only to the extent that,
9 the City is enjoined by the court from enforcing the provisions of Chapter 12D.A or other
10 similar program. If the injunction is lifted or stayed in its entirety, Chapter 12D.A and any other
11 contracting program previously invalidated by the court order shall automatically become
12 effective and enforceable, and this Chapter 14A shall be suspended for such period of time
13 during which Chapter 12D.A is operative.

14 **SEC. 14A.02. OPERATIVE DATE; APPLICABILITY.**

15 This ordinance shall become effective and operative immediately upon passage, and
16 shall expire on the 61st day following passage unless reenacted as provided by Section 2.107
17 of the San Francisco Charter.

18 The provisions of this ordinance are intended to substitute, on a temporary emergency
19 basis only, a DBE program for the MBE and WBE programs that the Superior Court
20 invalidated in its order of July 26, 2004 in Coral Construction Inc. v. City and County of San
21 Francisco (Sup. Ct. No. 421249). When any provision of local law refers to Chapter 12D.A of
22 the San Francisco Administrative Code or any other contracting program enjoined by the
23 court's order of July 26, 2004, it shall be read as referring instead to Chapter 14A as set forth
24 in this emergency ordinance.

1 This ordinance shall govern all contracts initiated on or after July 26, 2004 and any
2 Amendment to a Pre-existing Contract as that term is defined in Section 14A.4 and as those
3 contracts are governed by Section 14A.14(K).

4 **SEC. 14A.1. SHORT TITLE.**

5 This ordinance shall be entitled the “Disadvantaged Business Enterprise Ordinance.”

6 **SEC. 14A.2. FINDINGS.**

7 1. The Board finds that San Francisco's small businesses drive our economy and form the
8 backbone of our neighborhoods. Small businesses pump hundreds of millions of dollars into San
9 Francisco's economy each year. Through payroll taxes alone, small businesses make a significant
10 contribution to the economic health of our City and the quality of life of its citizens and visitors.

11 2. Because San Francisco's small businesses experience higher costs, they suffer
12 disadvantage in any competition with big and/or out-of-town businesses. The Board finds that small
13 local businesses are at a competitive disadvantage in competing for work on public contracts, both as
14 prime contractors and as subcontractors.

15 3. The Board finds that the public has an interest in fostering a strong and vibrant network
16 of small businesses in San Francisco. In part, San Francisco can accomplish this goal by ensuring that
17 small local businesses can compete for public contracts on a level playing field.

18 4. The Board finds that the disadvantages suffered by small local businesses in competing
19 as prime contractors on public contracts can be reduced by discounting their bids and ratings by ten
20 percent. Granting a ten percent discount does not unduly burden businesses not eligible for such
21 discounts, and is similar to the corrective adjustments given to small local businesses in other
22 jurisdictions. The Board also finds that the disadvantages suffered by small local businesses in
23 competing for subcontracting opportunities on public contracts can be reduced by requiring prime
24 contractors to use good faith efforts to use such businesses as subcontractors. Requiring good faith
25

1 efforts to use small local businesses does not unduly burden prime contractors or businesses not
2 eligible for such efforts, and is similar to subcontracting requirements in other jurisdictions.

3 **SEC. 14A.3. SCOPE.**

4 The disadvantaged business Enterprise (“DBE”) bid/ratings discount shall be afforded to
5 economically disadvantaged local businesses certified under Section 14A.5 in the award of all City
6 contracts subject to exceptions hereinafter specifically enumerated in Sections 14A.12 and 14A.19.

7 **SEC. 14A.4. DEFINITIONS.**

8 “Amendment to a Pre-existing Contract” shall mean a substantive change to the terms
9 of any contract the term of which has not expired on or before the date that this emergency
10 ordinance takes effect, but shall not include amendments to decrease the scope of work or
11 decrease the amount to be paid under a contract.

12 “Architect/Engineering Contracts” shall mean an agreement for architects, engineers, and other
13 outside temporary professional design, consultant or construction management services for a
14 public work project.

15 “Back contracting” shall mean any agreement or other arrangement between a prime
16 contractor and its subcontractor that requires the prime contractor to perform or to secure the
17 performance of the subcontract in such a fashion and/or under such terms and conditions that the
18 prime contractor enjoys the financial benefits of the subcontract. Such agreements or other
19 arrangements include, but are not limited to, situations in which either a prime contractor or
20 subcontractor agrees that any term, condition or obligation imposed upon the subcontractor by the
21 subcontract shall be performed by or be the responsibility of the prime contractor.

22 “Best efforts” when required of contract awarding authority shall mean reasonable efforts to
23 include DBEs in City contracting.

1 “Bid” shall mean and include a quotation, proposal, solicitation or offer by a bidder or
2 contractor to perform or provide labor, materials, equipment, supplies or services to the City and
3 County of San Francisco for a price.

4 “Bidder” shall mean any business that submits a quotation, bid or proposal to provide labor,
5 materials, equipment, supplies or services to the City and County of San Francisco.

6 “City” shall mean the City and County of San Francisco.

7 “Commercially useful function” shall mean that the business is directly responsible for
8 providing the materials, equipment, supplies or services to the City as required by the solicitation or
9 request for quotes, bids or proposals. Businesses that engage in the business of providing brokerage,
10 referral or temporary employment services shall not be deemed to perform a “commercially useful
11 function” unless the brokerage, referral or temporary employment services are those required and
12 sought by the City. When the City requires and seeks specialty products made to order for the City or
13 otherwise seeks products which, by industry practice, are not regularly stocked in warehouse inventory
14 but instead are purchased directly from the manufacturer, the value of the “commercially useful
15 function” provided by a supplier or distributor shall be valued at no more than five percent of the cost
16 of the product. When the City requires and seeks products which are, by industry practice, stocked in
17 warehouse inventory and are in fact, regularly stocked by the listed supplier or distributor, the value of
18 the “commercially useful function” provided by the supplier or distributor shall not exceed sixty percent
19 of the cost of the product. If the listed supplier or distributor does not regularly stock the required
20 product, the value of the “commercially useful function” provided by the supplier or distributor shall be
21 valued at no more than five percent of the cost of the product.

22 “Commission” shall mean the Human Rights Commission of the City and County of San
23 Francisco.

24 “Commodity” shall mean products, including materials, equipment and supplies, purchased by
25 the City.

1 “Concession” shall mean any privilege conferred by the City on a person to engage in business
2 on property owned or leased by the City.

3 “Contract” shall mean and include any agreement between the City and a person to provide or
4 procure labor, materials, equipment, supplies or services to, for or on behalf of the City for a price. A
5 “contract” shall include an agreement between the City and a person or nonprofit entity to perform
6 construction-related services or fund the performance of such services. A “contract” does not include:
7 (1) awards made by the City with federal/State grant or City funds to a nonprofit entity where the City
8 offers assistance, guidance, or supervision on a project or program and the recipient of the grant
9 award uses the grant monies to provide services to the community; (2) sales transactions where the
10 City sells its personal or real property; (3) a loan transaction where the City is acting as a debtor or a
11 creditor; (4) lease, franchise, or concession agreements; (5) agreements to use City real property; (6)
12 gifts of materials, equipment, supplies or services to the City; or (7) agreements with a public agency
13 except as provided in Section 14A.8(E).

14 “Contract awarding authority” shall mean the City officer, department, commission, employee
15 or board authorized to enter into contracts on behalf of the City. In the case of an agreement with a
16 person or nonprofit entity to perform or fund the performance of construction-related services, the term
17 “contract awarding authority” shall mean the person or nonprofit entity receiving funds from the City
18 to perform or fund the performance of such services.

19 “Contractor” shall mean any person(s), firm, partnership, corporation, or combination thereof,
20 who submits a bid or proposal to perform, performs any part of, agrees with a person to provide
21 services relating to and/or enters into a contract with department heads and officers or contract
22 awarding authorities empowered by law to enter into contracts on the part of the City for public works
23 or improvements to be performed, or for goods or services or supplies to be purchased at the expense
24 of the City or to be paid out of monies deposited in the treasury or out of trust monies under the control
25 of or collected by the City.

1 “Control” of a business shall refer to the possession of the legal authority and power to
2 manage business assets, good will and daily operations of the business, and the active and continuous
3 exercise of such authority and power in determining the policies and directing the operations of the
4 business.

5 “Director” shall mean the Director of the Human Rights Commission of San Francisco.

6 “Disadvantaged Business Enterprise” (“DBE”) shall mean a business that meets all the
7 requirements for, and is certified as, a DBE under Section 14A.5(B) and any duly adopted rules and
8 regulations.

9 “Discount” shall mean an upward or downward price adjustment, according to the context,
10 that is made pursuant to Section 14A.8.

11 “Franchise” shall mean and include the right or privilege conferred by grant from the City, or
12 any contracting agency thereof, and vested in and authorizing a person to conduct such business or
13 engage in such activity as is specified in the grant. A “franchise” shall not include an agreement to
14 perform construction-related services.

15 “General services contract” shall mean an agreement for those services that are not
16 professional services. Examples of "General Services" include: janitorial, security guard, pest control,
17 parking lot management and landscaping services.

18 “Good-faith efforts” when required of a contract awarding authority or department shall mean
19 the actions undertaken by a department to obtain DBE participation in a contract as prime contractors,
20 and shall include the following efforts: (1) encouraging DBEs to attend prebid meetings scheduled by a
21 department or the Commission to inform potential contractors of contracting opportunities; (2)
22 advertising in general circulation media, trade association publications and local business focused
23 media and posting the contacting opportunity on the Office of Contract Administration's website
24 pursuant to Section 14A.9(3); (3) notifying DBEs that are available to perform the work contemplated
25 in a contract and soliciting their interest in the contract; (4) dividing the contract work into

1 economically feasible units to facilitate DBE participation in the contract; (5) pursuing solicitations of
2 interest by contacting DBEs to determine whether these businesses are interested in participating on
3 the contract; (6) providing DBEs with adequate information about the plan, specifications and
4 requirements of the contract; (7) where applicable, negotiating with DBEs in good faith and
5 demonstrating that DBEs were not rejected as unqualified without sound reasons based on a thorough
6 investigation of their capabilities; and (8) using the services of available community and contractors'
7 groups that provide assistance in the recruitment of DBEs for public sector contracts.

8 “Good-faith efforts” when required of a prime City contractor shall mean the steps undertaken
9 to comply with the goals and requirements imposed by the City for participation by DBEs as
10 subcontractors, and shall include the following:

11 (1) Attending any presolicitation or prebid meetings scheduled by the City to inform all
12 bidders of DBE program requirements for the project for which the contract will be awarded;

13 (2) Identifying and selecting specific items of the project for which the contract will be
14 awarded to be performed by DBEs to provide an opportunity for participation by those enterprises;

15 (3) Advertising for DBEs that are interested in participating in the project, not less than 10
16 calendar days before the date the bids can first be submitted, in one or more daily or weekly
17 newspapers, trade association publications, trade-oriented publications, trade journals, or other
18 media, specified by the City. This paragraph applies only if the City gave public notice of the project
19 not less than 15 calendar days prior to the date the bids can first be submitted;

20 (4) Providing, not less than 10 calendar days prior to the date on which bids can first be
21 submitted, written notice of his or her interest in bidding on the contract to the number of DBEs
22 required to be notified by the project specifications. The City shall make available to the bidder not less
23 than 15 calendar days prior to the date the bids are opened a list or a source of lists of enterprises that
24 are certified by the Director as DBEs;

1 (5) Following up initial solicitations of interest by contacting potential DBE subcontractors
2 to determine with certainty whether those enterprises were interested in performing specific items of
3 the project;

4 (6) Providing interested DBEs with information about the plans, specifications, and
5 requirements for the selected subcontracting or material supply work;

6 (7) Requesting assistance from community organizations; contractor or professional
7 groups; or other organizations that provide assistance in the recruitment and placement of DBEs, if
8 any are available;

9 (8) Negotiating in good faith with interested DBEs, and not unjustifiably rejecting as
10 unsatisfactory bids or proposals prepared by any DBEs, as determined by the City;

11 (9) Where applicable, advising and making efforts to assist interested DBEs in obtaining
12 bonds, lines of credit, or insurance required by the City or contractor;

13 (10) Making efforts to obtain DBE participation that the City could reasonably expect would
14 produce a level of participation sufficient to meet the City's goals and requirements.

15 “Human Rights Commission (HRC)” shall mean the Human Rights Commission of San
16 Francisco, hereinafter referred to as the “Commission.”

17 “Joint Venture” shall mean an association of two or more businesses acting as a contractor and
18 performing or providing services on a contract, in which each joint venture partner combines property,
19 capital, efforts, skill, and/or knowledge and each joint venture partner shares in the ownership, control,
20 management responsibilities, risks and profits of the joint venture in proportion to its claimed level of
21 participation.

22 “Lease” shall mean and include an agreement by which the City or any contracting agency
23 thereof, grants to a person the temporary possession and use of property for consideration.

1 “Lower-tier subcontracting” shall mean any agreement or other arrangement between a sub-
2 contractor and a person as defined herein where it is agreed that said person shall perform any term,
3 condition or obligation imposed by the subcontract upon the subcontractor.

4 “Office” or “Offices” shall mean a fixed and established place where work is performed of a
5 clerical, administrative, professional or production nature directly pertinent to the business being
6 certified. A temporary location or movable property or one that was established to oversee a project
7 such as a construction project office does not qualify as an “office” under the ordinance. Work space
8 provided in exchange for services (in lieu of monetary rent) does not constitute an "office." The office is
9 not required to be the headquarters for the business but it must be capable of providing all the services
10 to operate the business for which DBE certification is sought.

11 “Participation commitment” shall mean the targeted level of DBE subcontractor participation
12 that each prime city contractor has designated in its bid.

13 “Participation goals” shall mean the targeted levels of City-wide DBE participation in City
14 contracts.

15 “Person” includes one or more individuals, partnerships, associations, organizations, trade or
16 professional associations, corporations, cooperatives, legal representatives, trustees, trustees in
17 bankruptcy, receivers, or any group of persons, including any official, agent or employee of the City.

18 “Professional services contract” shall mean an agreement for services which require extended
19 analysis, the exercise of discretion and independent judgment in their performance, and/or the
20 application of an advanced, specialized type of knowledge, expertise, or training customarily acquired
21 either by a prolonged course of study or equivalent experience in the field. Examples of professional
22 service providers include licensed professionals such as accountants, and non-licensed professionals
23 such as software developers and financial and other consultants, except that services of architects,
24 engineers, and other outside temporary professional design, consultant or construction management
25

1 services for a public work project shall be considered architect/engineering contracts and shall not be
2 considered professional services contracts for the purpose of this Ordinance.

3 “Public works/construction contract” shall mean an agreement for the erection, construction,
4 renovation, alteration, improvement, demolition, excavation, installation, or repair of any public
5 building, structure, infrastructure, bridge, road, street, park, dam, tunnel, utility or similar public
6 facility performed by or for the City and County of San Francisco, the cost of which is to be paid wholly
7 or partially out of moneys deposited in the treasury of the City and County.

8 “Services” shall mean Professional Services and General Services.

9 “Subcontractor” shall mean any business providing goods or services to a contractor for profit,
10 if such goods or services are procured or used in fulfillment of the contractor's obligations arising from
11 a contract with the City.

12 “Subcontractor participation goals” shall mean the targeted level of DBE subcontractor
13 participation designated by the Director for prime city contracts.

14 **SEC. 14A.5. POWERS AND DUTIES OF THE COMMISSION AND THE DIRECTOR.**

15 (A) In addition to the duties and powers given to the Human Rights Commission elsewhere,
16 the Commission shall:

17 1. Levy the same sanctions that a contracting awarding authority may levy as specified in
18 Section 14A.8(A)7;

19 2. When necessary, subpoena persons and records, books and documents for a proceeding
20 of the Commission or an investigation by the Director or an audit pursuant to Section 14A.5(E)
21 conducted to further the purposes of this ordinance;

22 3. Adopt rules and regulations establishing standards and procedures for effectively
23 carrying out this ordinance;

24 4. Issue forms for the Controller or contract awarding departments to collect information
25 from contractors as prescribed by this ordinance;

1 5. Hear appeals challenging: (i) the Director's disqualification of a bidder or Contractor
2 as specified in Section 14A.13(B), (ii) the Director's denial of an application for or revocation of the
3 certification of a business as an DBE, as specified in Section 14A.5(B), or (iii) the Director's denial of a
4 request to waive or to reduce subcontractor participation goals as specified in Section 14A.14(H);

5 6. By regulation require contract awarding authorities, departments and the Controller to
6 provide to the Director such information as will be necessary to enable the Director to report to the
7 Mayor and the Board of Supervisors at the end of each fiscal year on the progress each City
8 department has made towards the achievement of DBE participation goals and to perform his/her other
9 duties. The database is a public record available to the public as provided by state and local law;

10 7. Adopt rules and regulations as deemed necessary by the Director to ensure that the joint
11 venture bid/rating discount is applied only to joint ventures where the DBE has sufficient skill,
12 experience, and financial capacity to perform the portion of the work identified for the DBE.

13 8. Consistent with the provisions of the ordinance make such other rules and regulations as
14 are necessary to guide its implementation.

15 (B) In addition to the duties and powers given to the Director elsewhere, the Director shall
16 have the following duties and powers:

17 1. Through appropriately promulgated procedures, if any, the Director shall certify as a
18 DBE any business that:

19 (a) has average gross annual receipts in the three fiscal years immediately preceding its
20 application for certification as a DBE that do not exceed the following limits: (1) public works/
21 construction - \$14,000,000; specialty construction contractors -\$7,000,000; (2) goods/ materials/
22 equipment and general services suppliers -\$7,000,000; (3) professional services and
23 architect/engineering - \$2,500,000; (4) trucking - \$3,500,000; and (5) telecommunications -
24 \$5,000,000. Any business under common ownership, in whole or in part, with any other business(es)
25 shall meet the requirements of this subparagraph only if the aggregate gross annual receipts of all of

1 the businesses under such common ownership do not exceed the limits specified herein. All businesses
2 owned by married spouses or domestic partners shall be considered under common ownership unless
3 the businesses are in unrelated industries and no community property or other jointly owned assets
4 were used to establish or are used to operated either business;

5 (b) _____ is an independent and continuing business for profit;

6 (c) _____ performs a commercially useful function as defined in Section 14A.4;

7 (d) _____ has fixed offices or distribution points, as defined in Section 14A.4, located within the
8 geographical boundaries of the City where a commercially useful function is performed. Businesses
9 that supply commodities must continuously maintain warehouses stocked with inventory within the
10 geographical boundaries of the City. Truckers must park their registered vehicles and trailers within
11 the geographical boundaries of the City. Post office box numbers or residential addresses shall not
12 suffice to establish a local office;

13 (e) _____ is listed in the Permits and License Tax Paid File with a San Francisco business street
14 address;

15 (f) _____ possesses a current Business Tax Registration Certificate at the time of the application
16 for certification as a DBE;

17 (g) _____ has been located and doing business in the City for at least six months preceding its
18 application for certification as a DBE;

19 (h) _____ has business cards for the San Francisco office;

20 (i) _____ has business stationary for the San Francisco office;

21 (j) _____ has a written agreement for occupancy of a San Francisco office including
22 documentation of payment of monetary rent (receipts and copies of cancelled checks);

23 (k) _____ is a listed business in an appropriate business buyers guide such as a telephone yellow
24 pages listing San Francisco based businesses;

1 (l) has a San Francisco office in which business is transacted that is appropriately
2 equipped for the type of business for which the enterprise seeks certification as a DBE;

3 (m) has a conspicuously displayed business sign at the San Francisco business premises,
4 except where the business operates out of a residence; and

5 (n) has licenses issued to the business owner appropriate for the type of business for which
6 the enterprise seeks certification.

7 Notwithstanding the criteria in this subsection, no business that is owned in part or in whole by
8 a full time City employee or City officer shall be considered a DBE.

9 2. Because San Francisco Administrative Code 12D.A required a business to meet all of
10 the criteria listed in 14A.5(B)1 in order to be certified as a Local Business Enterprise ("LBE") under
11 Section 12D.A, and because every business certified as an LBE under Section 12D.A did meet those
12 criteria, the prior LBE certification under San Francisco Administrative Code 12D.A shall constitute a
13 DBE certification under this ordinance, unless the Director determines that any such business no
14 longer meets the criteria set forth for certification in Section 14A.5(B)1. DBE certification under this
15 Subsection shall expire on the date that the LBE certification under Section 12D.A would have expired.

16 3. The Director shall deem any application for LBE certification under Section 12D.A that
17 is pending on the effective date of this ordinance to be an application for DBE certification under this
18 ordinance.

19 4. Except where the Director cannot certify a business because the business has not been
20 established in San Francisco for the requisite six months, whenever the Director denies an application
21 for or revokes the certification of a business as a DBE because the business is not eligible to be
22 certified as a bona fide DBE, the Director shall, within three working days of his/her decision, notify
23 the aggrieved business in writing of the basis for revocation or denial of certification and the date on
24 which the business will be eligible to reapply for certification. The notice shall be transmitted to the
25 business via certified mail or via facsimile. The Director shall require a business to wait at least six

1 months but not more than two years after the denial or revocation before reapplying to the Director for
2 certification as a DBE. The Director shall provide any business whose certification is revoked an
3 opportunity to be heard within three business days of the revocation. A business may appeal the
4 Director's denial or revocation of certification of a business as DBE to the Commission. The appeal
5 must be filed with the Commission within three business days following receipt of the Director's
6 decision. Notice by the Director to the business of denial or revocation of certification as a DBE shall
7 apprise the business of its right to appeal the decision.

8 5. The Director shall have the ultimate responsibility for ensuring that the necessary data
9 is collected and analyzed. Annually, and more often if the Director deems necessary, the Director shall
10 identify areas of contracting where the City or any of its departments are failing to meet DBE
11 participation goals. In addition, the Director shall identify areas of contracting where the City is
12 meeting and/or exceeding participation goals to such an extent that the DBE discounts can no longer
13 be justified. The results of this study shall be included in the Commission's annual report required by
14 Section 14A.15.

15 6. The Director shall work with the Controller and City departments to implement a City-
16 wide prompt-payment policy requiring that DBEs be paid by the City within 30 days after the date on
17 which the City receives an invoice from a DBE for work performed for the City;

18 7. The Director shall provide information and other assistance to DBEs to increase their
19 ability to compete effectively for the award of City contracts;

20 8. The Director shall assist the City to increase participation by DBEs in City contracts;

21 9. The Director shall continue to develop and to strengthen education and training
22 programs for DBEs and City contract awarding personnel;

23 10. The Director shall grant waivers as set forth in Sections 14A.12 and 14A.14(E) and (F),
24 and may disqualify a bidder or contractor as set forth in Section 14A.13(B).

1 (C) The requirements of this ordinance are in addition to those imposed by the United States
2 or the State of California as a condition of financial assistance or otherwise. In contracts which
3 involve the use of any funds furnished, given or loaned by the government of the United States or the
4 State of California, all laws, rules and regulations of the government of the United States or the State of
5 California or of any of its departments relative to the performance of such work and the conditions
6 under which the work is to be performed, shall prevail over the requirements of this ordinance when
7 such laws, rules or regulations are in conflict. In addition, the Director may authorize the substitution
8 of such State or federal DBE requirements for the requirements of this ordinance whenever such State
9 or federal requirements are substantially the same as those of this ordinance.

10 (D) The Director, with the approval of the Commission may enter into cooperative
11 agreements with agencies, public and private, concerned with increasing the use of DBEs in
12 government contracting, subject to the approval of this Board.

13 (E) The Director, in cooperation with the Controller, shall randomly audit at least three
14 prime contractors each fiscal year in order to insure their compliance with the provisions of this
15 ordinance. The Director, in cooperation with the Controller, shall furthermore randomly audit 10
16 percent of the joint ventures granted bid discounts in each fiscal year. The Controller shall have the
17 right to audit the books and records of the contractors, joint venture participants, and any and all
18 subcontractors to insure compliance with the provisions of this ordinance.

19 (F) The powers and duties of the Commission and the Director shall be as set forth in this
20 ordinance, subject to the power to reorganize functions as provided in Section 4.132 of the San
21 Francisco Charter.

22 **SEC. 14A.6. POWERS AND DUTIES OF THE CONTROLLER.**

23 (A) In addition to the duties given to the Controller elsewhere, the Controller shall work
24 cooperatively with the Director to provide such contractual encumbrance and payment data as the
25 Director advises are necessary to monitor the participation of DBEs in City prime contracts. If any

1 department refuses or fails to provide the required data to the Controller, the Controller shall
2 immediately notify the Mayor, this Board and the Director.

3 (B) The Controller shall not certify the award of any contract subject to this ordinance
4 where the Director has notified the Controller that the contract awarding authority has not provided
5 the information the Director advises is necessary under this ordinance.

6 (C) Each request for payment to a City contractor submitted to the contract awarding
7 authority shall be accompanied by a subcontractor participation form approved by the Commission.
8 That form shall contain information that the Commission has determined is necessary to enable the
9 Commission and the Director (1) to monitor compliance by City departments and their prime
10 contractors with their obligations under this ordinance (2) to determine whether City departments are
11 achieving their prime and subcontracting goals under this ordinance, and (3) to make such other
12 reports and analyses as are required by this ordinance.

13 In the event that a request for payment fails to include the information required pursuant to this
14 Section, the contract awarding authority shall, within two working days, notify the Director and the
15 affected prime contractor[s] of the failure and afford each affected prime contractor an opportunity to
16 be heard promptly. That notice shall inform the contractor that the contract awarding authority has
17 tentatively determined that the information has not been provided, what information is missing and that
18 if this failure is substantiated, then the Controller will be notified to withhold 20 percent of the
19 requested payment until the information is provided. If the Controller finds, after consultation with the
20 Director and the notice and opportunity to be heard, that the information has not been provided, the
21 Controller shall withhold 20 percent of the payment otherwise due until the information is provided.

22 (D) It is the City's policy that DBEs should be paid by the City within 30 days of the date on
23 which the City receives an invoice for work performed for the City. The Controller shall work with the
24 Director and representatives of City departments to implement this City-wide prompt-payment policy.

1 (E) The contract awarding authority shall require all prime contractors to submit, within 10
2 days following payment to the prime contractor of moneys owed for work completed on a project, an
3 affidavit under penalty of perjury, that all subcontractors on the project or job have been paid and the
4 amounts of each of those payments. The name, telephone number and business address of every
5 subcontractor shall be listed on the affidavit. If a prime contractor fails to submit this affidavit, the
6 contract awarding authority shall notify the Director who shall take appropriate action as authorized
7 under Section 14A.13(B) and (F).

8 **SEC. 14A.7. POWERS AND DUTIES OF THE MAYOR.**

9 In addition to the duties given to the Mayor elsewhere, the Mayor shall:

10 1. By July 1st of each fiscal year, issue notices to all City departments informing them of
11 their duties under this ordinance. The notice shall contain the following information: (1) the City-wide
12 DBE participation goals that departments are expected to use good-faith efforts to attain during the
13 fiscal year and that a department's failure to use good-faith efforts to attain the DBE participation
14 goals shall be reported to this Board in the Commission's annual report; and (2) the data each
15 department is required to provide the Controller on each contract award;

16 2. Coordinate and enforce cooperation and compliance by all departments with this
17 ordinance.

18 **SEC. 14A.8. POWERS AND DUTIES OF CONTRACT AWARDING AUTHORITIES.**

19 (A) Contract awarding authorities shall:

20 1. Use good-faith efforts as defined in Section 14A.4 for all contracts subject to the
21 bid/rating discount provisions of this ordinance to solicit and to obtain quotes, bids or proposals from
22 DBEs on all solicitations, or document their unavailability;

23 2. Unless otherwise indicated in this ordinance, extend the following bid/rating discount to
24 all bids, proposals and contracts from DBEs: (1) five percent to a joint venture with DBE participation
25 that equals or exceeds 35 percent but is under 40 percent; (2) seven and one-half percent to a joint

1 venture with DBE participation that equals or exceeds 40 percent; (3) ten percent to a DBE or a joint
2 venture among DBEs. Contract awarding authorities shall apply the bid/rating discount to each stage
3 of the selection process, including qualifications, proposals and interviews.

4 The contract awarding authority shall apply the aforementioned appropriate bid/ratings
5 discount only to a joint venture (1) that meets the requirements contained in this ordinance, and (2)
6 when the DBE is an active partner in the joint venture and performs work, manages the job and takes
7 financial risks in proportion to the required level of participation stated in the bid documents and is
8 responsible for a clearly defined portion of the work to be performed, and shares proportionately in the
9 ownership, control, management responsibilities, risks, and profits of the joint venture. The portion of
10 the DBE joint venture's work shall be set forth in detail separately from the work to be performed by
11 the nonDBE joint venture partner. The DBE joint venture's portion of the contract must be assigned a
12 commercially reasonable dollar value;

13 3. Arrange contracting by size and type of work to be performed so as most effectively to
14 enhance the opportunity for participation by DBEs to the maximum extent feasible. As soon as
15 practical before soliciting quotes, bids or proposals, all contract awarding authorities or in the case of
16 a professional services contract, the department making the contract award recommendation, shall
17 submit all large proposals to the Director for review. The purpose of the Director's review is to
18 determine whether the proposed project can be divided into smaller projects so as to enhance the
19 opportunity for participation by DBEs in the project. For purposes of this subsection, the term "large
20 project" shall mean the following: (1) any public works/construction project estimated to cost more
21 than \$5,000,000; and (2) any professional services contract estimated to cost more than \$100,000. If
22 the Director determines, after consulting with the contract awarding authority or department
23 responsible for the project, that the project can be divided into smaller projects, the contract awarding
24 authority or department shall comply with the Director's determination and issue the solicitation for
25 quotes, bids or proposals in accordance with the Director's determination;

1 4. Adjust bid bonding and insurance requirements in accordance with the most current
2 version of the City's "Contract Insurance Manual" or as otherwise authorized by the City Risk
3 Manager, Department of Administrative Services;

4 5. Use the City's Surety Bonding Program set forth in Section 14A.11 to assist DBEs
5 bidding on and performing City public works contracts to meet bonding requirements and/or obtain
6 construction loans;

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

13 7. Impose such sanctions or take such other actions as are designed to ensure compliance
14 with the provisions of this ordinance, which shall include, but are not limited to:

15 (a) Refuse to award a contract,

16 (b) Order the suspension of a contract,

17 (c) Order the withholding of funds,

18 (d) Order the revision of a contract based upon a material breach of contract provisions
19 pertaining to DBE participation,

20 (e) Disqualify a bidder, contractor, subcontractor, or other business from eligibility for
21 providing goods or services to the City for a period not to exceed five years, based on the standards set
22 forth in this ordinance and rules and regulations promulgated by the Commission. Any business
23 disqualified under this subsection shall have a right to review and reconsideration by the Commission
24 after two years upon a showing of corrective action indicating that violations are not likely to recur;
25

1 8. Not award any contract to a person or business that is disqualified from doing business
2 with the City under the provisions of this ordinance;

3 9. Designate a staff person to be responsible for responding to the Director and
4 Commission regarding the requirements of this ordinance;

5 10. Maintain accurate records as required by the Director and the Commission for each
6 contract awarded, its dollar value, the nature of the goods or services to be provided, the name of the
7 contractor awarded the contract, the efforts made by a contractor to solicit bids from and award
8 subcontracts to DBEs;

9 11. Where feasible, provide technical assistance to DBEs to increase their ability to compete
10 effectively for the award of City contracts;

11 12. Work with the Director and the Controller to implement a City-wide prompt-payment
12 policy requiring that DBEs be paid by the City within 30 days of the date on which the City receives an
13 invoice from a DBE for work performed for the City;

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

18 14. Whenever contract amendments, modifications, supplements or change orders
19 cumulatively increase the total dollar value of a contract by more than 10 percent, the contract
20 awarding authority shall require compliance with those DBE provisions of this ordinance that applied
21 to the original contract;

22 15. All contract amendments, modifications, supplements or change orders that
23 cumulatively increase by more than 20 percent the total dollar value of all contracts originally valued
24 at \$50,000 or more shall be subject to prior approval of the Director, who shall review the proposed
25

1 amendment, modification, supplement or change order to correct contracting practices that exclude
2 DBEs from new contracting opportunities.

3 (B) Contract awarding authorities or departments may invite, encourage or request
4 businesses to joint venture on any contract to promote DBE participation.

5 (C) For the purpose of determining DBE participation, contracts awarded to joint ventures
6 in which one or more DBEs are combined with one or more business that are not DBEs shall be
7 deemed by the contract awarding authority to be awarded to DBEs only to the extent of the DBE
8 participation in the joint venture. DBE participation in the supply of goods shall be included in
9 determining DBE participation in a joint venture if the goods are supplied in accordance with
10 established general industry practice.

11 (D) Contract awarding authorities shall ensure that all contracts subject to this ordinance
12 include the following requirements, in addition to such other requirements as may be set forth
13 elsewhere:

14 1. Each bidder, proposer and contractor shall be required to sign an affidavit declaring
15 under penalty of perjury, attesting to its intention to comply fully with the provisions of this ordinance
16 and attesting to the truth and accuracy of all information provided regarding such compliance;

17 2. Each contract shall incorporate this ordinance by reference and shall provide that the
18 willful failure of any bidder or contractor to comply with any of its requirements shall be deemed a
19 material breach of contract;

20 3. Contracts shall provide that in the event that the Director finds, pursuant to Section
21 14A.13, that any bidder, subcontractor or contractor willfully fails to comply with any of the
22 provisions of this ordinance, rules and regulations implementing the ordinance, or contract provisions
23 pertaining to DBE participation, the bidder, subcontractor or contractor shall be liable for liquidated
24 damages for each contract in an amount equal to the bidder's or contractor's net profit on the contract,
25 10 percent of the total amount of the contract or \$1,000, whichever is greatest, as determined by the

1 Director pursuant to Section 14A.13(C). All contracts shall also contain a provision in which the
2 bidder, subcontractor or contractor acknowledges and agrees that the liquidated damages assessed
3 shall be payable to the City upon demand and may be set off against any monies due to the bidder,
4 subcontractor or contractor from any contract with the City;

5 4. Contracts shall require all contractors to maintain records, including such information
6 requested by the Director or Commission, necessary for monitoring their compliance with this
7 ordinance and shall require prime contractors to include in any subcontract with a DBE a provision
8 requiring the subcontractor to maintain the same records;

9 5. Contracts shall require prime contractors, during the term of the contract, to fulfill the
10 DBE participation commitments submitted with their bids;

11 6. Contracts shall require prime contractors to include in any subcontract with a DBE a
12 provision requiring the prime contractor to compensate any DBE subcontractor for damages for
13 breach of contract or liquidated damages equal to 5% of the subcontract amount, whichever is greater,
14 if the prime contractor fails to comply with its commitment to use the DBE subcontractor as specified in
15 the bid/proposal unless the Commission and the contract awarding authority both give advance
16 approval to the prime contractor to substitute subcontractors or otherwise modify the commitments in
17 the bid/proposal documents. Contracts shall also require prime contractors to compensate any DBE
18 subcontractor for breach of contract or liquidated damages equal to 5% of the subcontract amount,
19 whichever is greater, if the prime contractor does not fulfill its commitment to use the DBE
20 subcontractor as specified in the bid/proposal unless the Commission and the contract awarding
21 authority both give advance approval to the prime contractor to substitute subcontractors or otherwise
22 modify the commitments in the bid/proposal documents. This provision shall also state that it is
23 enforceable in a court of competent jurisdiction;

24 7. Contracts shall require prime contractors, whenever amendments, modifications,
25 supplements, or change orders cumulatively increase the total dollar value of a construction contract

1 by more than 10 percent, to comply with those DBE provisions of this ordinance that applied to the
2 original contract with respect to the amendment, modification, supplement or change order;

3 8. Contracts shall require prime contractors to submit to the Director for approval all
4 contract amendments, modifications, supplements, and change orders that cumulatively increase by
5 more than 20 percent the total dollar value of all contracts originally valued at \$50,000 or more. The
6 Director shall review the proposed amendment, modification, supplement or change order to correct
7 any contracting practices that exclude women and minorities from new contracting opportunities;

8 9. Contracts in which subcontracting is used shall prohibit back contracting to the prime
9 contractor or lower-tier subcontracting for any purpose inconsistent with the provisions of this
10 ordinance, rules and regulations adopted pursuant to this ordinance, or contract provisions pertaining
11 to DBE utilization;

12 10. Contracts in which subcontracting is used shall require the prime contractor to pay its
13 subcontractors within three working days after receiving payment from the City unless the prime
14 contractor notifies the Director in writing within 10 working days prior to receiving payment from the
15 City that there is a bona fide dispute between the prime contractor and the subcontractor, in which
16 case the prime contractor may withhold the disputed amount but shall pay the undisputed amount. The
17 Director may, upon making a determination that a bona fide dispute exists between the prime
18 contractor and subcontractor, waive this three day payment requirement. In making the determination
19 as to whether a bona fide dispute exists, the Director shall not consider the merits of the dispute.
20 Contracts in which subcontracting is used shall also require the contractor/consultant, within 10
21 working days following receipt of payment from the City, to file an affidavit, under penalty of perjury,
22 that he or she has paid all subcontractors. The affidavit shall provide the names and address of all
23 subcontractors and the amount paid to each;

1 11. Contracts shall require contractors and subcontractors to maintain records necessary
2 for monitoring their compliance with this ordinance for three years following completion of the project
3 and shall permit the Commission and Controller to inspect and audit such records.

4 (E) All contracts or other agreements between the City and persons or entities, public or
5 private, in which such persons or entities receive money from or through the City for the purpose of
6 contracting with businesses to perform public improvements, shall require such persons or entities to
7 comply with the provisions of this ordinance in awarding and administering such contracts.

8 **SEC. 14A.9. POWERS AND DUTIES OF THE OFFICE OF CONTRACT ADMINISTRATION.**

9 In addition to the duties given the Office of Contract Administration elsewhere in this Section,
10 the Office of Contract Administration shall:

11 1. Maintain, with the assistance of the Director, a current list of DBEs to provide each of
12 those commodities or services subject to this ordinance that the Office of Contract Administration
13 indicates are required by the City;

14 2. Maintain a central office where all bids, requests for proposals and solicitations will be
15 listed and kept current;

16 3. Cause to be posted upon a website the following information concerning current bids,
17 requests for proposals and solicitations: the title and number; the name of the contract awarding
18 authority; and the name and telephone number of the person to be contacted for further information.
19 Such information shall be posted with sufficient lead time to provide adequate notice and opportunity to
20 potential City contractors and vendors to participate in the bid opportunity, request for proposals or
21 solicitation, but in no event less than 10 calendar days prior to the due date for such bid opportunity,
22 request for proposals or solicitation.

23 **SEC. 14A.10. APPLICATION OF DISCOUNT.**

24 (A) Contract awarding authorities shall apply a bid/ratings discount as follows:
25

1 1. Public Works/Construction Contracts. Contract awarding authorities shall apply bid
2 discounts as enumerated in Section 14A.8(A) to all public work/construction contracts the estimated
3 cost of which exceeds \$10,000.

4 2. Commodities Contracts. Contract awarding authorities shall apply all bid/rating
5 discounts as enumerated in Section 14A.8(A) to all commodities contracts, the estimated cost of which
6 exceeds \$2,500.

7 3. General Services Contracts. Contract awarding authorities shall apply all bid/ratings
8 discounts as enumerated in Section 14A.8(A) to all general services contracts, the estimated cost of
9 which exceeds \$10,000.

10 4. Architect/Engineering Contracts. Contract awarding authorities and
11 architect/engineering selection panels shall apply all bid/rating discounts as enumerated in Section
12 14A.8(A) to all bids and proposals for architect/engineering contracts the estimated cost of which
13 exceeds \$10,000.

14 5. Professional Services Contracts. Contract awarding authorities shall apply all
15 bid/rating discounts as enumerated in Section 14A.8(A) to all bids and proposals for all professional
16 service contracts the estimated cost of which exceeds \$10,000.

17 (B) Best Efforts Required For Other Contracts. All City departments, commissions, boards,
18 officers and employees, in the performance of their duties, and in the award of leases, franchises,
19 concessions, and other contracts not subject to the bid/ratings discounts of this ordinance, shall make
20 best efforts to use the services of DBEs.

21 (C) The Director is empowered to take actions to ensure compliance with the provisions of
22 this ordinance, including, without limitation, intervening in the selection process, by modifying the
23 criteria used for selecting selection panelists or contractors to correct any practices that hinder equal
24 business opportunities for DBEs.

25 **SEC. 14A.11. BONDING AND FINANCIAL ASSISTANCE PROGRAM.**

1 1. Program Description. The City and County of San Francisco, acting through its Human
2 Rights Commission ("HRC"), intends to provide guarantees to private bonding companies and
3 financial institutions in order to induce those entities to provide required bonding and financing to
4 eligible contractors and subcontractors bidding on and performing City public work contracts. This
5 bonding and financial assistance program is subject to the provisions of this Section 14A.11.

6 2. Eligible Contracts. The assistance described in this Section 14A.11 shall be available
7 for any City public works or construction contract to which this ordinance applies.

8 3. Eligible Businesses. Businesses must meet the following criteria to qualify for assistance
9 under this Section 14A.11:

10 (a) The business may be either a prime contractor or subcontractor; and

11 (b) The business must be certified by the HRC as a DBE according to the requirements of
12 Section 14A.5(B).

13 (c) The business may be required to participate in a "bonding assistance training program"
14 as offered by the HRC, which is anticipated to provide the following:

15 (i) Bond application assistance,

16 (ii) Assistance in developing financial statements,

17 (iii) Assistance in development of a pre-bond surety profile,

18 (iv) Identification of internal financial control systems, and

19 (v) Development of accurate financial reporting tools.

20 4. Agreements Executed by the Human Rights Commission. The HRC is hereby authorized
21 to enter into the following agreements in order to implement the bonding and financial assistance
22 program described in this Subsection 14.A.11:

23 (a) With respect to a surety bond, the agreement to guaranty up to 40 percent of the face
24 amount of the bond or \$750,000, whichever is less;

1 **(b) With respect to a construction loan to be made to a contractor or subcontractor, an**
2 **agreement to guaranty up to 50 percent of the original principal amount of the construction loan or 50**
3 **percent of the actual loss suffered by the financial institution as a result of a loan default, whichever is**
4 **less; provided that in any event the City's obligations with respect to a guaranty shall not exceed**
5 **\$750,000;**

6 **(c) Any other documents deemed necessary by the HRC to carry out the objectives of this**
7 **program, provided that such documents shall be subject to review and approval by the City Attorney's**
8 **Office.**

9 **5. Monitoring and Enforcement. The HRC shall maintain records on the use and**
10 **effectiveness of this program, including but not limited to (1) the identities of the businesses and**
11 **bonding companies participating in this program, (2) the types and dollar amounts of public work**
12 **contracts for which the program is utilized, and (3) the types and dollar amounts of losses which the**
13 **City is required to fund under this program. The HRC shall submit written reports to the Board of**
14 **Supervisors every six months beginning January 1, 2005, advising the Board of the status of this**
15 **program and its funding capacity, and an analysis of whether this program is proving to be useful and**
16 **needed.**

17 **6. Funding and Accounts. Funding for this program may be derived from the following**
18 **sources:**

19 **(a) The Board of Supervisors has appropriated or will appropriate funds for the operation**
20 **of this program.**

21 **(b) Each Department authorized to contract for public works or improvements pursuant to**
22 **San Francisco Administrative Code Chapter 6 may commit to this program up to ten percent (10%) but**
23 **not less than one percent (1%) of the budget for any public work or improvement. (A "public work or**
24 **improvement" is defined in San Francisco Administrative Code Chapter 6.) This subsection is effective**
25

1 for those public works or improvements where the award of the construction contract (as defined and
2 regulated by Administrative Code Chapter 6) occurs after August 10, 2004.

3 (c) The Treasurer of the City and County of San Francisco is hereby authorized to negotiate
4 a line(s) of credit or any credit enhancement program(s) or financial products(s) with a financial
5 institution(s) to provide funding; the program's guaranty pool may serve as collateral for any such line
6 of credit.

7 In the event the City desires to provide credit enhancement under this Subsection for a period in
8 excess of one fiscal year, the full aggregate amount of the City's obligations under such credit
9 enhancement must be placed in a segregated account encumbered solely by the City's obligations under
10 such credit enhancement.

11 7. Term of Bonding Assistance Program. The HRC is authorized to enter into the
12 agreements described in this Section for so long as the Controller is able to certify the availability of
13 funds for any new guarantee agreement.

14 8. Default on Guarantees. The Human Rights Commission shall decertify any contractor
15 that defaults on a loan or bond for which the City has provided a guarantee on the contractor's behalf.
16 However, the Human Rights Commission may in its sole discretion refrain from such decertification
17 upon a finding that the City has contributed to such default.

18 **SEC. 14A.12. EXCEPTIONS AND WAIVERS.**

19 (A) The Director shall waive the DBE bid/ratings discounts and good faith efforts
20 requirements of this ordinance under the following circumstances:

21 1. Whenever the Director finds, with the advice of the contract awarding authority and the
22 Office of Contract Administration, that needed goods or services are available from a sole source that
23 is not currently disqualified from doing business with the City.

24 2. If the contract awarding authority certifies in writing to the Director, prior to the
25 Controller's contract certification, that (a) the contract is being awarded under emergency

1 circumstances as described and defined in Administrative Code Section 6.60 or Administrative Code
2 Section 21.15 and (b) (i) there is no time to apply bid/ratings discounts or establish subcontracting
3 goals, or (ii) there are no immediately available DBEs that are capable of performing the emergency
4 work.

5 (B) The Director shall waive the DBE bid/rating discount for contracts in excess of
6 \$5,000,000 whenever a contract awarding authority establishes that:

7 1. Sufficient qualified DBEs capable of providing the needed goods and services required
8 by the contract are unavailable and sufficient qualified businesses located outside San Francisco
9 capable of providing the needed goods and services required by the contract are available; or

10 2. The application of the DBE discount will result in significant additional costs to the City
11 if the waiver of the bid discount is not granted.

12 (C) The bid/rating discount provisions of this ordinance are not applicable to any contract
13 estimated by the contract awarding authority to cost in excess of \$10,000,000.

14 **SEC. 14A.13. MONITORING AND COMPLIANCE.**

15 (A) The Director shall monitor the City's utilization of DBEs in City contracting. The
16 Director shall issue an exit report for any contract that includes DBE subcontracting participation or
17 DBE prime contract participation as a joint venture partner. The purpose of this exit report is to ensure
18 that prime contractors are complying with their commitments to use DBE subcontractors and DBEs are
19 performing services as set forth in the bid/proposal and contract documents for the joint ventures.

20 (B) Noncompliance By Contractors.

21 In cases in which the Director has cause to believe that a contractor has failed to comply with
22 any of the requirements of this ordinance, rules and regulations adopted pursuant to this ordinance or
23 contract provisions pertaining to DBE participation, the Director shall notify the contract awarding
24 authority and shall attempt to resolve the noncompliance through conference and conciliation. If the
25 noncompliance cannot be resolved, the Director shall conduct an investigation and, where the Director

1 so finds, issue a written finding of noncompliance. The Director's finding shall indicate whether the
2 contractor acted in good faith or whether noncompliance was based on willful or bad faith
3 noncompliance with requirements of this ordinance, rules and regulations adopted pursuant to this
4 ordinance or contract provisions pertaining to DBE participation. Where the Director finds that the
5 contractor acted in good faith, after affording the contractor notice and an opportunity to be heard, the
6 Director shall recommend that the contract awarding authority take appropriate action. Where the
7 Director finds willful or bad faith noncompliance, after affording the contractor notice and an
8 opportunity to be heard, the Director shall impose sanctions for each violation of the ordinance, rules
9 and regulations adopted pursuant to this ordinance or contract provisions pertaining to DBE
10 participation that may include:

11 1. Declaring the bidder or contractor nonresponsive and ineligible to receive the award of
12 any pending contract;

13 2. Declaring the bidder or contractor to be an irresponsible bidder and disqualifying the
14 bidder or contractor from eligibility for providing goods or services to the City for a period of up to
15 five years, with a right of review and reconsideration by the Commission after two years upon a
16 showing of corrective action indicating violations are not likely to recur;

17 3. If the bidder or contractor is a DBE, revoking that business' certification as a DBE;

18 4. Determining that the bidder or contractor has willfully failed to comply with the
19 provisions of this ordinance and, pursuant to the provision in the contract required by Section
20 14A8.(B)3 of this ordinance, calculating the liquidated damages for which the bidder or contractor
21 shall be liable. Thereafter the Director shall send a written notice to the Controller, the Mayor and all
22 contract awarding authorities overseeing any contract with the bidder or contractor, that a
23 determination of willful or bad-faith noncompliance has been made and that all payments due the
24 bidder or contractor shall be withheld as agreed by the bidder or contractor and the City pursuant to
25 Section 14A.8(B)3.

1 (C) The bidder or contractor may appeal the Director's decision to the Commission. The
2 Commission may sustain, reverse or modify the Director's findings and sanctions imposed or take such
3 other action to effectuate the purpose of this ordinance. An appeal by a contractor under this
4 subsection shall not stay the Director's findings.

5 (D) The Director may require such reports, information and documentation from
6 contractors, subcontractors, bidders, contract awarding authorities, and heads of departments,
7 divisions, and offices of the City as are reasonably necessary to determine compliance with the
8 requirements of this ordinance.

9 (E) Willful Noncompliance by Contract Awarding Authority. Whenever the Director finds
10 after investigation that a contract awarding authority has willfully failed to comply with its duties
11 pursuant to Section 14A.8, the Director shall transmit a written finding of noncompliance specifying
12 the nature of the noncompliance, to the contract awarding authority, the Commission, the Mayor and
13 this Board.

14 The Director shall attempt to resolve any noncompliance through conference and conciliation.
15 Should such attempt fail to resolve the noncompliance, the Director shall transmit a copy of the finding
16 of noncompliance along with a finding that conciliation was attempted and failed to the Commission
17 and this Board.

18 The finding of noncompliance shall be communicated to the Mayor for appropriate action to
19 secure compliance pursuant to Section 14A.7.

20 (F) If the Director has reason to believe that any person has knowingly made, filed, or
21 caused to be filed with the City any materially false or misleading statement or report made in
22 connection with this ordinance, the Director shall report that information to the City Attorney or the
23 District Attorney for appropriate action. The Director shall be empowered to conduct an investigation
24 and for each violation of this Subsection 14A.13(F), to impose sanctions as set forth in Subsection
25 14A.13.

1 **SEC. 14A.14. SUBCONTRACTING PROGRAM.**

2 (A) For all public works/construction, architect/engineering, professional service, and
3 general service contracts which the contract awarding authority reasonably anticipates will include
4 subcontractor participation, prior to the solicitation of bids or proposals, the contract awarding
5 authority shall provide the Director with a proposed job scope, and may submit written
6 recommendations to the Director regarding DBE subcontractor participation goals to be set for the
7 contract.

8 (B) Upon receipt of a proposed job scope and/or a written recommendation from a
9 contracting awarding authority pursuant to Section 14A.13(A), the Director shall set the DBE
10 participation goals for each public works/ construction, architect/engineering, professional service,
11 and general service contract based upon the following factors:

12 1. The extent of subcontracting opportunities presented by the contract;

13 2. The availability of DBE subcontractors capable of providing goods and services on the
14 contract.

15 (C) The Director shall set these goals within 10 working days of the date the Director
16 receives from a contract awarding authority a proposed job scope and/or written recommendation. If
17 the Director fails to act within 10 days, and the contract awarding authority submitted to the Director
18 recommended goals, the recommended goals shall be deemed approved by the Director, provided the
19 goals are based upon the factors identified above.

20 (D) All solicitations for bidders on prime public works/construction, architect/engineering,
21 professional service, and general service contracts shall require each bidder to do the following:

22 1. Demonstrate in its bid that it has used good-faith efforts (as defined in Section 14A.4) to
23 use DBE subcontractors; and

1 2. Identify the particular DBE subcontractors to be used in performing the contract,
2 specifying for each the dollar value of the participation, the type of work to be performed and such
3 information as may reasonably be required to determine the responsiveness of the bid.

4 Except as provided in Section 14A.14, bids not meeting the requirements of Section 14A.14 shall
5 be declared nonresponsive.

6 (E) A contract awarding authority may request that the Director waive or reduce the DBE
7 subcontractor participation goals by submitting the reasons therefor in writing to the Director prior to
8 the solicitation of bids.

9 (F) A bidder or contractor may request that the Director waive or reduce the DBE
10 subcontractor participation goals by submitting in writing with its bid to the contract awarding
11 authority the reasons therefor.

12 (G) The Director may grant the request for waiver or reduction made pursuant to Sections
13 14A.14(E) and (F) upon a determination that:

14 1. The reasonable and necessary requirements of the contract render subcontracting or the
15 participation of businesses other than the public works/bidder unfeasible;

16 2. Qualified DBEs capable of providing the goods or services required by the contract are
17 unavailable, despite the prime contractor's or the department's good-faith efforts to locate DBEs to
18 meet the participation goals; or

19 3. The available DBEs have given price quotes that exceed competitive levels beyond
20 amounts that can be attributed to the increased costs faced by small local businesses.

21 (H) Whenever the Director denies a contractor's request to waive or reduce the
22 participation goals, the contractor may appeal that denial to the Commission. The Commission's
23 decision on the request shall be final. In reviewing the Director's denial of a contractor's request to
24 waive or to reduce participation goals, the Commission shall consider the extent of subcontracting
25 opportunities presented by the contract and the availability of DBE subcontractors capable of

1 providing goods and services on the contract. The Commission may overrule, sustain or modify the
2 Director's decision by applying the same standards that the Director is required to apply, as set forth in
3 Subsection (G) above.

4 (I) The contract awarding authority shall require bidders or proposers on the contracts to
5 contact DBEs before listing them as subcontractors in the bid or proposal. The contract awarding
6 authority shall declare bids or proposals that fail to satisfy this requirement nonresponsive.

7 (J) During the term of the contract, any failure to comply with the level of DBE
8 subcontractor participation specified in the contract shall be deemed a material breach of contract.

9 (K) The provisions of this subsection (K) shall govern any Amendment to a Pre-
10 existing Contract as that term is defined in Section 14A.4 for types of contracts enumerated in
11 subsection (A) of this Section. The Contract Awarding authority shall notify the Director of the
12 proposed Amendment to a Pre-Existing Contract and the Director shall set the DBE
13 participation goals for the contract based on the factors set forth in subsection (B) of this
14 Section. The Director may grant a request for a waiver or reduction based on the factors set
15 forth in subsection (G) of this Section. The DBE participation goals shall apply when the
16 Contractor hires new subcontractors. The Director or the Commission may adopt regulations
17 governing the application of DBE participation goals under this subsection.

18 **SEC. 14A.15. REPORTING AND REVIEW.**

19 (A) Reporting by the Director. Commencing October 1, 2004 and no later than the first day
20 of every third month thereafter, the Director shall issue a written report to this Board. That report shall
21 document each City department's performance under the terms of this ordinance, including, among
22 other things, each City department's progress in meeting its DBE goals and the success of each
23 department's prime contractors complying with its best efforts obligations to meet DBE subcontracting
24 goals. That report shall also state whether or not each City department has fully reported all data
25 required by this ordinance or requested by HRC or the Controller.

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

17 2. The Director shall report to the Commission all waivers acted upon pursuant to Section
18 14A.12. Such report shall be made on a monthly basis following the granting of the waiver.

19 (B) Reporting by the Commission. By July 1st of each fiscal year subject to this ordinance, the
20 Commission shall submit an annual report to the Mayor and this Board on the progress of the City
21 toward the goals of this ordinance, together with an identification of problems and specific
22 recommendations for: (1) discontinuing the DBE bid discounts in those cases where the bid discounts
23 are no longer needed; and (2) improving the City's performance in fostering DBE participation in City
24 contracting.

1 (C) This Board shall act upon the Commission's recommendations by the first Board meeting of
2 January in each fiscal year subject to this ordinance.

3 (D) By the last day of each fiscal year, all contract awarding authorities and City departments
4 shall report annually to the Mayor on their progress in the preceding fiscal year toward the
5 achievement of the DBE participation goals

6 **SEC. 14A.16. SEVERABILITY.**

7 The provisions of this ordinance are declared to be separate and severable. The invalidity of
8 any clause, sentence, paragraph, subdivision, section or portion of this ordinance, or the invalidity of
9 the application thereof to any person or circumstances shall not affect the validity of the remainder of
10 this ordinance, or the validity of its application to other persons or circumstances.

11 **SEC. 14A.17. GENERAL WELFARE CLAUSE.**

12 In undertaking the enforcement of this ordinance, the City is assuming an undertaking only to
13 promote the general welfare. It is not assuming, nor is it imposing on its officers and employees, an
14 obligation for breach of which it is liable in money damages to any person who claims that such breach
15 proximately caused injury.

16 **~~SEC. 14A.18 SUSPENSION OF CHAPTER 12D.A.~~**

17 ~~Effective immediately upon the passage of this ordinance, all provisions of~~
18 ~~Administrative Code Chapter 12D.A shall be and are suspended and are of no force and~~
19 ~~effect.~~

20 **~~SEC. 14A.19 OPERATIVE DATE; APPLICABILITY.~~**

21 ~~This ordinance shall become effective and operative immediately upon passage, and~~
22 ~~shall expire on the 61st day following passage unless reenacted as provided by Section 2.107~~
23 ~~of the San Francisco Charter.~~

24 ~~The provisions of this ordinance are intended to substitute a DBE program for the MBE~~
25 ~~and WBE programs that the Superior Court invalidated in its order of July 26, 2004 in Coral~~

1 ~~Construction Inc. v. City and County of San Francisco (Sup. Ct. No. 421249). When any~~
2 ~~provision of the San Francisco Municipal Code refers to Chapter 12D.A of the San Francisco~~
3 ~~Administrative Code, it shall be read as referring instead to Chapter 14A as set forth in this~~
4 ~~emergency ordinance.~~

5 ~~This ordinance shall govern all contracts initiated on or after July 26, 2004.~~

6
7 Section 2. Declaration of Emergency under Section 2.107 of the San Francisco
8 Charter.

9 Section 2.107 of the San Francisco Charter authorizes passage of an emergency
10 ordinance in cases of public emergency affecting life, health, property, or for the uninterrupted
11 operation of any City or County department or office required to comply with time limitations
12 as established by law. The Board of Supervisors hereby finds and declares that an actual
13 emergency exists that requires the passage of this Emergency Ordinance. This emergency
14 declaration is based on the following:

15 1. The City and County of San Francisco and its departments are currently
16 engaged in a large number of public services and projects that are vital to the health, safety
17 and welfare of San Francisco and its citizens, such as the construction and repair of energy,
18 water, and transportation equipment and facilities, and the provision of social, medical, public
19 safety and other services to San Franciscans. Many of these services and projects are
20 required or authorized by law.

21 2. In order to perform these services and accomplish these projects, the City often
22 enters into contracts with outside entities. The ability to bid, negotiate, award and enforce
23 contracts in a timely manner is often critical to the accomplishment of public projects and
24 services. In order to receive funding and/or secure or maintain legal authorization to proceed,
25 the City may be under an obligation to execute projects or deliver services according to a

1 determined timeline. Failure to meet these requirements may jeopardize receipt of funding or
2 authority to proceed with a needed project or service. Failure to timely accomplish some
3 pending public projects or deliver public services may jeopardize public health and safety, or
4 damage public property.

5 3. On July 26, 2004, the San Francisco Superior Court entered the following order
6 in *Coral Construction, Inc. v. City and County of San Francisco* (Sup. Ct. No. 421249): "[T]he
7 City is hereby permanently enjoined and prohibited from enforcing or attempting to enforce
8 the race and gender conscious provisions of the MBE/WBE Ordinance or any other public
9 contracting program that discriminates against or grants preferential treatment to any
10 individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation
11 of public contracting now and in the future." The injunction became effective immediately.

12 4. The court's decision invalidated and restrained the City from enforcing a portion
13 of San Francisco's long-established procedures for bidding, negotiating, awarding and
14 enforcing contracts, which had been adopted to remedy identified discrimination against
15 minority- and women-owned businesses and to ensure equal opportunities in public
16 contracting. On the basis of submissions from City departments that are on file with the Clerk
17 of the Board of Supervisors in File No. _____ and which are hereby declared to be a part of
18 this ordinance as if set forth fully herein, the Board finds that there is confusion and
19 uncertainty regarding permissible and appropriate contracting procedures, and that there is an
20 urgent need to resolve these issues in order that contracting may proceed in a timely manner.
21 The ability of the City and County of San Francisco and its departments to comply with time
22 limitations established by law for awarding public contracts, providing public services, and
23 accomplishing public projects is in jeopardy. In addition, the delays in proceeding with some
24 of these contracts could jeopardize public health and safety, or damage public property.

25

1 5. Based on the foregoing, including evidence in the administrative record on file
2 with the Clerk of the Board in File No. ____ and public testimony, the Board finds and
3 declares that an emergency exists that requires this ordinance to become effective
4 immediately. This emergency ordinance will safeguard public health, safety and property, and
5 ensure that the City and its departments are able to comply with time limits established by law
6 for entering into contracts and performing various public works and functions.
7

8 Section 3. Providing for the Use of Emergency Contracting Procedures in Sections
9 6.60 and 21.15 of the San Francisco Administrative Code.

10 The order issued by the Superior Court on July 26, 2004 in *Coral Construction, Inc. v.*
11 *City and County of San Francisco* (Sup. Ct. No. 421249) invalidating and restraining the City
12 from enforcing long-established contracting procedures constitutes an "actual emergency"
13 under Sections 6.60 and 21.15 of the San Francisco Administrative Code sufficient to trigger
14 the contracting procedures under those provisions, provided that the failure to contract poses
15 a risk of loss of, or damage to, life, health, property or essential services under Section 6.60 or
16 provided that contracting is necessary to safeguard the lives or property of citizens or the
17 property of the City or to maintain public health or welfare under Section 21.15.
18

19 Section 4. Providing for Data Collection to Ensure Nondiscrimination in Contracts.

20 The Director of the Human Rights Commission shall have the ultimate responsibility for
21 ensuring that the necessary data is collected and analyzed to ensure nondiscrimination in City
22 contracting on any basis prohibited by law. Annually, and more often if the Director deems
23 necessary, the Director shall analyze the most recently available data regarding the
24 composition of businesses in the various industries and professions doing business with the
25 City. Applying statistically sound methods of analysis and considering other evidence of

1 discrimination, the Director shall identify areas of contracting where an inference can be made
2 that the City or any of its departments is discriminating in its contracts. The results of this
3 study shall be included in the Commission's annual report to the Mayor and the Board of
4 Supervisors.

5 The Human Rights Commission shall by regulation require contract awarding
6 authorities, departments and the Controller to provide to the Director such information as will
7 be necessary to enable the Director to keep a database from which discrimination can be
8 identified, to report to the Mayor and the Board of Supervisors at the end of each fiscal year
9 on discrimination in City contracting, and to perform his/her other duties. The database is a
10 public record available to the public as provided by state and local law.

11

12 APPROVED AS TO FORM:

13 DENNIS J. HERRERA, City Attorney

14

15

16 By:

BURK E. DELVENTHAL
Deputy City Attorney

17

18

19

20

21

22

23

24

25