

[Minority/Women/Local Business Utilization Ordinance - IV]

AMENDING THE SAN FRANCISCO ADMINISTRATIVE CODE BY AMENDING CHAPTER 12D THERETO TO ESTABLISH A NEW MBE/WBE/LBE ORDINANCE (1) TO REMEDY IDENTIFIED DISCRIMINATION AGAINST CERTAIN PRIME CONTRACTOR MBE/WBES IN THE CITY'S PROCUREMENT PROCESS AND TO ELIMINATE THE COMPETITIVE DISADVANTAGE PRIME CONTRACTOR LBES LABOR UNDER IN THE CITY'S PROCUREMENT PROCESS, AND (2) TO REQUIRE CITY CONTRACTING DEPARTMENTS TO IMPLEMENT MBE/WBE PROGRAMS MANDATING PRIME CONTRACTORS TO USE GOOD FAITH EFFORTS TO USE MBE/WBES WHEN THERE ARE SUBCONTRACTING OPPORTUNITIES IN PUBLIC WORKS AND PROFESSIONAL SERVICE CONTRACTS.

Note: The entire section is new.

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

Section 1. Chapter 12D of the San Francisco Administrative Code is hereby amended by adding Sections 12D.A.1 through 12.D.A.21 to read as follows:

**SEC. 12D.A.1. SHORT TITLE.** This Ordinance shall be entitled the "Minority/Women/Local Business Utilization Ordinance" and may be cited as the "MBE/WBE/LBE Ordinance — IV."

**SEC. 12D.A.2. GENERAL FINDINGS.** This Board initially passed Ordinance No. 139-84 on April 2, 1984 to combat the City and County of San Francisco's own active and passive participation in discrimination against minority- and women-owned businesses, both

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1 in its own contracting for goods and services and in the private market for such goods and  
2 services. At the time of passage, women- and minority-owned businesses were virtually  
3 excluded as contractors on prime City contracts. The Ordinance also sought to offset  
4 economic disadvantages faced by local businesses that are not shared by non-local  
5 businesses, and to increase employment in the City and County of San Francisco by  
6 encouraging the participation of local business enterprises in City contracting.

7 Since that time, this Board and the City's Human Rights Commission have actively and  
8 extensively documented and studied discrimination against and disadvantages faced by  
9 these groups to gauge the effectiveness of the prior Minority, Women and Local Business  
10 Enterprise Ordinances (the "M/W/LBE Ordinances") and to assess the need for further and  
11 continuing action.

12 The earlier studies are documented in the legislative history of the previous  
13 amendments and re-enactments of the Ordinance, including Ordinance 175-98, enacted on  
14 May 30, 1989, and Ordinance Nos. 155-92, 210-97, 457-97 and 82-98. The 1989 Ordinance  
15 was challenged in federal court and upheld by the Ninth Circuit Court of Appeals. See  
16 *Associated General Contractors of California v. Coalition for Economic Equity*, 950 F.2d 1401  
17 (9th Cir. 1991).

18 The findings underlying the 1984 and 1989 Ordinances have been reviewed and  
19 analyzed in the preparation of the current Ordinance and are hereby incorporated by  
20 reference into the legislative history of this Ordinance. These materials, prepared up to and  
21 including May 1989, include disparity studies, transcripts of live testimony by dozens of  
22 witnesses, case studies of discrimination, and voluminous other materials. An index and a  
23 separate synopsis of this material are on file with the Clerk of this Board in File No.

24 98-0612  
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1           Since 1989, the City has devoted substantial additional resources to the task of  
2 understanding and documenting discrimination against women and minorities in awarding  
3 City contracts and in the private market for such contracts. Given the prior findings of  
4 discrimination and the need for this Ordinance, this Board examined whether the identified  
5 discrimination had been eradicated. Together this Board and the Human Rights Commission  
6 have held 14 hearings on the subject of women- and minority-owned business enterprises,  
7 have heard live testimony from 254 witnesses, have reviewed videotaped oral histories by  
8 numerous witnesses, have reviewed many volumes of social science materials, three  
9 disparity studies undertaken by the City and County of San Francisco and numerous other  
10 relevant statistical disparity studies undertaken by the City agencies and various other groups  
11 and governments from around the Bay Area. The Board has also reviewed case studies and  
12 other statistical information gathered by the Human Rights Commission. These materials are  
13 all incorporated by reference into the legislative history of this Ordinance. The collection and  
14 analysis of relevant information is ongoing.

15           In its hearings on the MBE/WBE/LBE Ordinance since 1989, this Board has given  
16 close consideration to the need for adding Native Americans and Arab Americans to the list of  
17 minority groups covered by the Ordinance. As part of this process, the Board and the Human  
18 Rights Commission have heard or reviewed testimony from 47 individuals (including those  
19 individuals interviewed in connection with the preparation of the Mason Tillman Disparity  
20 Study) concerning discrimination against Arab Americans and Native Americans. In addition,  
21 as discussed in greater detail below, the Mason Tillman Associates study covering City  
22 contracting in the years 1992 through 1995 found statistically significant evidence of  
23 discrimination against Native Americans and Arab Americans in several categories of  
24 contracting. That study also closely reviewed testimonial evidence of discrimination against  
25 these groups.

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1 In 1997 and 1998 alone, this Board and the Human Rights Commission have held  
2 eight public hearings at which testimony was given by 170 individuals concerning  
3 discrimination against Minority and Women Business Enterprises, the transcripts of which and  
4 the written submittals accompanying same are hereby incorporated by reference. In addition,  
5 on January 12, 1997, the Human Rights Commission hired Mason Tillman Associates to  
6 assist in conducting a disparity study for the years 1992-1995, including an evaluation of both  
7 statistical and testimonial evidence of discrimination. In January 1998, Mason Tillman  
8 Associates produced its study, which the Board has closely reviewed. In addition, in  
9 February of 1998, the staff of the Human Rights Commission was directed to expand the  
10 disparity study to cover the years 1996-1997. The staff of the Human Rights Commission has  
11 issued its report on those years, which reveals findings consistent with those of Mason  
12 Tillman, and this Board has reviewed the report closely.

13 In addition, the Board considered and reviewed oral histories from many persons  
14 involved in the bidding and compliance process taken in the summer of 1998. Many of the  
15 oral histories have been preserved on video tape. These oral histories recount personal  
16 incidences of discrimination as well as compliance difficulties. The oral histories were taken  
17 in this manner because many of the individuals were fearful of retaliation and further  
18 discrimination if they testified at a public forum. In fact, this fear caused some of the oral  
19 histories to be given in a manner in which the identities of those testifying were not identified.  
20 An index and a separate synopsis of the oral histories are on file with the Clerk of this Board  
21 in File No. 98-0612.

22 As a result of these hearings and review of these materials and the materials archived  
23 by the Human Rights Commission and the relevant statistical and social science data, oral  
24 histories, articles and studies, the Board makes the following findings:  
25

1           1.       The Board finds that the decision makers in the City contracting process -- the  
2 City department heads and general and deputy managers -- have been and continue to be  
3 overwhelmingly Caucasian males. Data compiled according to mayoral term show that:

- 4           • From 1980-1988, there were 68 white male department heads and general and  
5           deputy managers, constituting ninety-two percent (92%) of the total. During the  
6           same period, there were 3 male minority department heads and general and deputy  
7           managers, constituting four percent (4%) of the total, and 3 white female  
8           department heads and general and deputy managers, constituting four percent  
9           (4%) of the total. There were no female minority department heads or managers  
10          during this period.
- 11          • From 1988 to 1991, there were 66 white male department heads and general and  
12          deputy managers, constituting eighty-nine percent (89%) of the total. During the  
13          same period, there were 5 male minority department heads and general and deputy  
14          managers, constituting seven percent (7%) of the total, and 3 white female  
15          department heads and general and deputy managers, constituting four percent  
16          (4%) of the total. There were no female minority department heads or managers  
17          during this period.
- 18          • From 1992 to 1995, there were 65 white male department heads and general and  
19          deputy managers, constituting eighty-eight percent (88%) of the total. During the  
20          same period, there were 5 male minority department heads and general and deputy  
21          managers, constituting seven percent (7%) of the total, and 3 white female  
22          department heads and general and deputy managers, constituting four percent  
23          (4%) of the total. There was one female minority department head or manager,  
24          constituting one percent (1%) of the total.

- 1           • From 1996 to the present, there were 48 white male department heads and general  
2           and deputy managers, constituting sixty-five percent (65%) of the total. During the  
3           same period, there were 14 male minority department heads and general and  
4           deputy managers, constituting nineteen percent (19%) of the total, 5 white female  
5           department heads and general and deputy managers, constituting four percent  
6           (4%) of the total, and 7 female minority department heads or managers,  
7           constituting ten percent (10%) of the total.

8           Based on these statistics and the evidence presented by numerous witnesses, the  
9           Board finds that many City departments continue to operate under an “old boy network,”  
10          dominated by Caucasian males, that creates a barrier to the entry of women- and minority-  
11          owned businesses and puts those firms at a competitive disadvantage in their efforts to  
12          secure City contracts.

13          2.       The City has conducted two comprehensive disparity studies to gauge  
14          discrimination against women- and minority-owned businesses in the City’s contracting.  
15          These two studies, one conducted by Mason Tillman Associates and covering the years  
16          1992-1995, and a second conducted by the City’s Human Rights Commission staff and  
17          covering the years 1996-1997, have thoroughly and conclusively documented the fact that  
18          women- and minority-owned business enterprises continue to receive a smaller share of  
19          contracts for the purchases of goods and services by the City than would be expected based  
20          on the number of able and available women- and minority-owned businesses. This poor  
21          utilization cannot be attributed to chance. This Board finds, based on these statistical studies  
22          and on all of the other evidence of persistent discrimination presented to the Board, that the  
23          disproportionately small share of City contracting and subcontracting that goes to women-  
24          and minority-owned businesses is due to discrimination by the City and discrimination in the  
25          private market.

1           3.       The Mason Tillman Study analyzed the City contracting data for various groups  
2 for the years 1992 through 1995. Under a fair and equitable system of awarding contracts,  
3 the proportion of contract dollars awarded to minority- and women-owned business  
4 enterprises would be equal to the proportion of willing and able minority- and women-owned  
5 enterprises in the relevant market area. If these proportions are not equal, or if a disparity  
6 exists between these proportions, the probability that the disparity is due to chance is  
7 determined using a statistical test. If there is a very low probability that the disparity is due to  
8 chance, the Supreme Court has stated that an inference of discrimination can be made.

9           The Mason Tillman Study reviewed contracts entered into by the City and County of  
10 San Francisco in a variety of areas and categories and determined the following:

- 11           • For prime construction contracts, women and all minority groups received fewer  
12 construction prime-contracting dollars than would be expected given their  
13 availability. Arab Americans did not receive any contract dollars at all. The  
14 disparity was statistically significant for Asian Americans. In addition, there was  
15 statistically significant evidence of discrimination in favor of Caucasian men.  
16 Although African Americans represent 10.24% of the available construction firms,  
17 they received only 1.44% of the construction contract dollars. Although Arab  
18 Americans represent 0.8 percent of the available construction firms, they received  
19 no construction contract dollars at all. Although Asian Americans represent 20.71  
20 percent of the available construction firms, they received only 3.0 percent of the  
21 construction contract dollars. Although Latino Americans represent 9.67 percent of  
22 the available construction firms, they received 5.28 percent of the construction  
23 contract dollars. Although Native Americans represent 0.8 percent of the available  
24 construction firms, they received no construction contract dollars at all. Although  
25 Caucasian women represent 8.08 percent of the available construction firms, they

1 received only 1.37 percent of the construction contract dollars. Although  
2 Caucasian men represent 49.72 percent of available construction firms, they  
3 received 88.92 percent of the construction contract dollars.

- 4 • For architecture and engineering prime contracts between 1992 and 1995, Arab  
5 Americans, Asian Americans, Native Americans, and Caucasian women received  
6 fewer contracts than would be expected given their availability. More than 60  
7 percent of the contracts in this area went to Caucasian male-owned businesses.  
8 The disparity was statistically significant for Caucasian women. There was a  
9 statistically significant disparity in favor of Caucasian men.
- 10 • For professional services prime contracts in the years 1992-1995, African  
11 Americans, Arab Americans, Asian Americans, Latino Americans, Native  
12 Americans, and Caucasian women all received fewer contracts than expected.  
13 More than 78 percent of the professional service contracts for the years 1992-1995  
14 went to Caucasian male-owned businesses. The disparity is statistically significant  
15 for Caucasian women. In addition, there is a statistically significant disparity in  
16 favor of Caucasian men. African Americans, who represent 10.65 percent of the  
17 available professional service firms, received only 5.08 percent of the contract  
18 dollars. Arab Americans, who represent 4.66 percent of the available professional  
19 service firms, received none of the professional service dollars. Asian Americans,  
20 who represent 16.32 percent of the available professional services firms, received  
21 11.92 percent of the professional services contract dollars. Latino Americans, who  
22 represent 5.77 percent of the available professional services firms, received 0.95  
23 percent of the professional services dollars. Caucasian women, who represent  
24 21.75 percent of the available professional services firms, received 3.22 percent of  
25 the professional services dollars. On the other hand, Caucasian men, who



1 represent 40.7 percent of the available professional services firms, received 78.83  
2 percent of the professional services dollars.

- 3 • For purchases of goods and services prime contracts for 1992-1995, all minorities  
4 received fewer contract dollars than expected. More than 89 percent of all goods  
5 and services contract dollars went to Caucasian male-owned businesses. The  
6 disparity is statistically significant for each ethnic group except Native Americans.
- 7 • For construction contract dollars below \$500,000 for the years 1992-1995,  
8 minorities and females received fewer contract dollars than expected, given their  
9 availability. The finding was statistically significant for African Americans, Arab  
10 Americans, Asian Americans and Native Americans. Caucasian men received a  
11 statistically significant greater number of contract dollars than expected.
- 12 • For architecture and engineering contract dollars below \$500,000 for the years  
13 1992-1995, minorities and women received fewer contract dollars than expected,  
14 given their availability. The findings are statistically significant for Latino Americans  
15 and Caucasian females. Caucasian men received a statistically significant greater  
16 number of contract dollars than expected.
- 17 • For small professional service contract dollars below \$500,000 for the years 1992-  
18 1995, all minorities and female Caucasians received statistically significantly fewer  
19 of the contract dollars than expected. Caucasian males received statistically  
20 significantly greater contract dollars than expected.
- 21 • For purchases of goods and supplies contracts below \$500,000 for the years 1992-  
22 1995, all minorities and female Caucasians received fewer contract dollars than  
23 would be expected based on their availability. The figures were statistically  
24 significant for all groups except Native Americans.

1           4.     In addition to statistical analysis, the Mason Tillman study also reviewed  
2 testimonial evidence of discrimination from 35 individuals including 5 African Americans, 7  
3 Asian Americans, 3 Latino Americans, 4 Native Americans, 8 Arab Americans, and 8  
4 Caucasian women. The report also reviewed written testimony of discrimination and  
5 testimony from public hearings. The report found, based on this testimonial evidence, that  
6 minorities and women continuously face racial prejudice in both the public and private sector  
7 markets in San Francisco. The prejudice against minorities takes the form of stereotyping,  
8 prejudging, discomfort in working with minorities, an absence of opportunities to prove one's  
9 skill and ability, exclusion, networking difficulties, and racial slurs. Women also face  
10 prejudging and stereotyping. Women are often made to feel that they are not qualified to be  
11 running a company and that they are innately incapable of certain tasks. Women also  
12 sometimes face questions as to whether they are really running their firms. Women- and  
13 minority-owned firms also face overt hostility from majority-male firms, reporting harassment,  
14 intimidation, and undue pressure during the course of doing business with majority-male  
15 firms. Women interviewed in the study reported sexual harassment. Women- and minority-  
16 owned businesses also are subjected to increased and higher standards of review of their  
17 work than Caucasian, male-owned firms. Minorities and women also reported difficulties and  
18 discrimination in obtaining financing and credit for their firms, difficulty obtaining bonding and  
19 insurance, and other forms of business institutional discrimination. Minority- and women-  
20 owned businesses also reported being discriminated against by prime contractors, by, for  
21 example, being given inadequate lead time to bid on projects, being paid late after a bid  
22 award, being listed on a bid without permission, and having the scope of their work reduced  
23 or canceled after the bid award.

1           The report also documents numerous specific instances of discrimination against  
2 minority- and women-owned businesses and hostility in the industry toward the M/WBE  
3 program.

4           5.       In February 1998, the Human Rights Commission instructed its staff to review  
5 statistical evidence available for the years 1996-1997 to determine if the evidence  
6 demonstrates that the discrimination identified in the Mason Tillman study is still present. The  
7 HRC study determined that the discrimination identified in the Mason Tillman study was still  
8 present in 1996 and 1997, in that women- and minority-owned business enterprises  
9 continued to be used at rates substantially below what would be expected based on the  
10 availability of such firms. In addition, the HRC report reviewed extensive other evidence,  
11 including testimonial evidence, about the presence of discrimination in the City and County's  
12 contracting processes. The HRC report also documents hostility and active resistance to the  
13 W/MBE program by various City departments and agencies. The HRC report also found the  
14 following discriminatory practices at work in City contracting: (1) listing minority- and women-  
15 owned enterprises as subcontractors but never using the listed minority- and women-owned  
16 subcontracting firms, (2) the use of additional non-minority, male subcontractors never listed  
17 on the relevant HRC forms, and (3) the creation of fraudulent joint ventures involving minority-  
18 or women-owned and majority, men-owned firms. In particular, the HRC's investigation found  
19 that in at least 4 out of 86 contracts involving joint ventures, the minority- or women-owned  
20 firms listed in the joint venture did not perform any work on the project.

21           6.       The 1996-97 Disparity Study prepared by the HRC also includes evidence  
22 concerning historically ineffective enforcement of the W/MBE program by the HRC due to  
23 resistance from other City departments. The annual budget for the HRC has ranged from  
24 \$500,000 for fiscal year 1983/84 to slightly less than \$4,000,000 for fiscal year 1997/98.  
25

1           These deficiencies have proved especially problematic with respect to implementing  
2 the 12D Ordinance as to subcontractors. The City has encountered persistent difficulties in  
3 securing information regarding compliance at the subcontracting level. For this reason, this  
4 Ordinance includes additional enforcement measures to assure full and appropriate reporting  
5 of information pertaining to subcontractors to determine if there is compliance at the  
6 subcontracting level.

7           The City has also found that one method used to circumvent the intent and purpose of  
8 this Ordinance is the change order process. To assure the change order process is not used  
9 as a tool to circumvent this Ordinance, departments and contractors seeking to submit  
10 contract amendments, modifications, supplements, or change orders shall be required to  
11 prove continued compliance with the Ordinance.

12           7.       The 1996-97 Disparity Study prepared by the HRC also includes the transcript  
13 of a public hearing held on March 30, 1998 at which 44 individuals testified about their  
14 experiences of discrimination in City contracting.

15           8.       The Board finds that these two disparity studies demonstrate that the City and  
16 County of San Francisco is actively discriminating against women and minority groups in its  
17 contracting, and is passively participating in discrimination in the private sector. This Board  
18 finds that these studies establish that the City's current contracting practices are in violation of  
19 federal law and that as a result, this Ordinance is required by federal law to bring the City into  
20 compliance with federal civil rights law in its contracting practices.

21           9.       In addition to the disparity studies undertaken by the City and County of San  
22 Francisco, the Board has reviewed numerous studies by San Francisco-based agencies.  
23 These studies, although narrower in scope, support the findings of the disparity studies  
24 undertaken by the City to assess discrimination against women and minorities in City  
25 contracting:

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- 1           • In 1991, the San Francisco Unified School District undertook a disparity study of its  
2           contracting in various categories. The study found “substantial evidence of  
3           statistically significant disparities between utilization and availability of minority and  
4           women contractors.” For prime contracts over \$15,000 in value, the study found  
5           statistically significant evidence of discrimination against African Americans, Latino  
6           Americans, and other minorities, in the number of contracts willing and able firms  
7           owned by these groups were able to obtain. For prime contracts under \$15,000 in  
8           total value, the study found statistically significant evidence of discrimination  
9           against Asian Americans, Latino Americans, minorities in general, and women, in  
10          the number of contracts willing and able firms owned by members of these groups  
11          were able to obtain. For subcontracts, the study found statistically significant  
12          evidence of discrimination in the number of subcontracts that African American,  
13          Asian American, Latino American, and minority firms in general were able to obtain.  
14          In a review of contracts under its Earthquake program, the study found statistically  
15          significant evidence of discrimination against Asian Americans, minorities in  
16          general, and women in the number of contracts businesses owned by members of  
17          these groups were able to obtain. In construction related professional services, the  
18          study found statistically significant evidence of discrimination against African  
19          Americans, Asian Americans, minorities in general and women. In printing and  
20          publishing contracts, the study found statistically significant discrimination against  
21          African Americans, Asian Americans, Latino Americans, minorities in general, and  
22          women. The study also reviewed testimonial evidence of discrimination that  
23          supported its findings of discrimination.
- 24          • In November 1992, the San Francisco Redevelopment Agency (“SFRA”) issued a  
25          study of its use of minority- and women-owned business enterprises. The

1 comprehensive study found that women-owned business enterprises received none  
2 of the publicly funded prime contract dollars and only 24% of the privately funded  
3 contract dollars SFRA would have expected given their availability. The study found  
4 from a survey of private construction contractors that minority- and women-owned  
5 businesses received none of the prime contracts and only 2.32% of the subcontract  
6 dollars. The study also surveyed 95 local minority- and women-owned construction  
7 firms, out of which 75% reported that prime contractors who use their firms on  
8 public contracts with W/MBE requirements never use their firms on private  
9 contracts.

- 10 • In May 1993, the Regional Transit Association of the San Francisco Bay Area  
11 issued a report entitled "The Utilization of Minority and Women-Owned Business  
12 Enterprises by Member Agencies of the Regional Transit Association." The study  
13 found significant underutilization of minority- and women-owned enterprises in  
14 those jurisdictions in the Bay Area without programs designed to increase minority  
15 and women participation. The study also found that for each transit agency,  
16 including San Francisco's Municipal Railway, "M/WBEs were used less than we  
17 would expect given their availability." The study also examined anecdotal evidence  
18 of discrimination from 502 minority- and women-owned enterprises in the Bay Area.
- 19 • In March 1992, the Human Rights Commission issued a study entitled "MBE/WBE  
20 Progress Report for FY 1990-1991" that documents some improvement over earlier  
21 years in the total number of City contracts awarded to minority- and women-owned  
22 enterprises, but that found that (1) "departments must do more to increase the  
23 contracts they award to MBEs/WBEs," (2) that there should be more closely  
24 focused outreach by City departments to MBE/WBEs, (3) that there needed to be  
25 greater monitoring and enforcement of the Ordinance by the HRC, and (4) there

1 needed to be greater education of City contract personnel to combat discrimination.  
2 The 1992 Sunset Report on the MBE/WBE Ordinance issued by the Human Rights  
3 Commission, which includes summaries of testimony from 84 individuals, supports  
4 the Board's finding that there is an ongoing need for a M/WBE Ordinance.

- 5 • In 1995, the Human Rights Commission issued a progress report on the M/WBE  
6 Program covering the years 1994-95. The report supports the finding of a continued  
7 need for an M/WBE Ordinance.
- 8 • In July 1998, the Human Rights Commission prepared a budget comparison  
9 graphing the annual budget of the HRC against that of other City departments.  
10 That comparison is contained in Tab 10 of the evidence, prepared to support this  
11 Ordinance and contained in the files of this Board.
- 12 • In July 1998, contract compliance officer of the Human Rights Commission issued a  
13 report on the labor force used in City contracted work totaling seven hundred and  
14 ninety million dollars (\$790,000,000) pursuant to the San Francisco International  
15 Airport Master Plan Expansion Program. The report illustrates the severe  
16 underrepresentation of women, minorities, and San Francisco residents on the  
17 airport expansion project.
- 18 • On May 13, 1993, the Human Rights Commission issued a report on the Trucking  
19 Industry and minority- and women-owned enterprises. The report supports the  
20 inclusion of trucking services in the current Ordinance.
- 21 • In February 1993, the Human Rights Commission issued a report entitled "The  
22 Unfinished Agenda: The Economic Status of African Americans in San Francisco  
23 1964-1990." This report also supports the finding of the Board that an Ordinance  
24 encouraging minority- and women-owned enterprise participation in City contracting  
25

1 is necessary, and also gives important historical information concerning African  
2 Americans in San Francisco.

3 10. A number of broad disparity studies undertaken by state and other local  
4 governments and agencies also support the findings of discrimination in San Francisco's  
5 studies, including:

- 6 • In May 1992, the Board of Supervisors of Contra Costa County issued a  
7 comprehensive study of the use of women- and minority-owned businesses by that  
8 County. The study examined Contra Costa's own contracts, data about  
9 subcontractors collected from prime contractors, data on Contra Costa's payments  
10 to vendors, data on 7,993 minority- and women-owned vendors in the Bay Area  
11 identified from various Directories, questionnaires on purchasing practices by  
12 Contra Costa officials and census data, testimony Contra Costa solicited in public  
13 hearings in Alameda and San Francisco, and Bay Area wide mail surveys of 540  
14 women- and minority-owned businesses. The study found that minorities received  
15 a smaller share of Contra Costa County contracts than would be expected given  
16 their availability. The study also examined the private sector for construction in San  
17 Francisco, Oakland, and San Jose and found that minority- and women- owned  
18 businesses received a smaller share of prime and subcontracts than would be  
19 expected given their availability. The study also found strong evidence of  
20 discrimination against women- and minority firms in Contra Costa's Professional  
21 Services Contracting and commodity purchases.
- 22 • In 1995 the California Senate Office of Research issued a report entitled "The  
23 Status of Affirmative Action in California." The report explained, in part, that "[c]ities  
24 and counties have affirmative action programs as a matter of public policy, as a  
25 requirement for contracting with the state, or because they receive federal money



1 that requires attention to nondiscrimination hiring." The report concluded that  
2 despite past affirmative action efforts, "salaries remain disparate among racial and  
3 ethnic groups and between men and women."

- 4 • In April 1996, the California Senate Office of Research issued a report entitled  
5 "Exploring the Glass Ceiling and Salary Disparities in California State Government."  
6 The report examined the salary levels of 164,000 state civil service employees and  
7 compared compensation according to gender, race and ethnicity. The study found  
8 that women of equal educational attainment earn only \$.74 for every dollar earned  
9 by their male counterparts.

10 11. This Board finds that Arab Americans who seek prime and subcontracting  
11 opportunities have been underutilized in the award of such contracts by City Departments,  
12 and that such underutilization is attributable to discrimination both in the private sector and in  
13 the City's procurement practices. This Board finds, based on the historical record of  
14 discrimination against Arab Americans, the current disparity analysis, and the testimonial  
15 evidence given at public hearings, that there is ample evidence of discrimination to support  
16 the addition of Arab Americans to the MBE program and to justify remedial measures on their  
17 behalf. The evidence supporting this finding includes:

- 18 • The findings in the Mason Tillman Associates 1992-1995 study that Arab  
19 American business enterprises continue to be used at rates less than would  
20 be expected given their availability. The study found the disparity to be  
21 statistically significant for purchases of goods and services prime contracts,  
22 for construction contracts worth less than five hundred thousand dollars  
23 (\$500,000), for professional services contracts worth less than five hundred  
24 thousand dollars (\$500,000), and for purchases of goods and supplies  
25 contracts worth less than five hundred thousand dollars (\$500,000).

- 1 • Testimonial evidence concerning discrimination against Arab American  
2 owned firms in the form of testimony from 8 Arab Americans interviewed as  
3 part of the Mason Tillman disparity study, one Arab American business  
4 owner who testified at the January 29, 1997 public hearing before the  
5 Human Rights Commission, one Arab American business representative  
6 who testified before the Board of Supervisors' Health, Family and  
7 Environment Committee on April 24, 1997, and from 14 Arab Americans who  
8 testified at a public hearing before the Human Rights Commission on April  
9 29, 1997.
- 10 • The historical overview of the Arab American experience in San Francisco  
11 contained in the Mason Tillman study.

12 12. This Board finds that Native Americans who seek prime and subcontracting  
13 opportunities have been underutilized in the award of such contracts by City departments,  
14 and that such underutilization is attributable to discrimination both in the private sector and in  
15 the City's procurement practices. This Board finds, based on the historical record of  
16 discrimination against Native Americans, the current disparity analysis, and the testimonial  
17 evidence given at public hearings, that there is ample evidence of discrimination to support  
18 the addition of Native Americans to the MBE program and to justify remedial measures on  
19 their behalf. The evidence supporting this finding includes:

- 20 • The findings in the Mason Tillman Associates 1992-1995 study that Native  
21 American business enterprises continue to be used at rates less than would  
22 be expected given their availability. The study found the disparity to be  
23 statistically significant for construction contracts worth less than five hundred  
24 thousand dollars (\$500,000) for the years 1992-1995, and professional  
25 services contracts below five hundred thousand dollars.

- 1 • Testimonial evidence concerning discrimination against Native Americans in  
2 the form of the testimony of 5 Native Americans at a public hearing in  
3 January 1990, the testimony of 4 Native American interviewees in the Mason  
4 Tillman study, and the testimony of 9 Native Americans at a public meeting  
5 before the Human Rights Commission on May 7, 1997, and the testimony of  
6 a representative of Native Americans at the May 8, 1997 hearing of the  
7 Board of Supervisors Health, Family and Environment Committee.
- 8 • The historical overview of the Native American experience in San Francisco  
9 contained in the Mason Tillman study.

10 13. The Board has also reviewed and considered several volumes of collected  
11 social science materials concerning discrimination against women and minorities in the Bay  
12 Area and in public contracting. These social science materials strongly support, and are  
13 consistent with, the findings in the statistical and testimonial evidence that discrimination  
14 exists against women and minorities in the City's contracting and in the private market for  
15 similar contracts.

16 14. The Board has considered a substantial body of evidence in enacting the  
17 Ordinance. The findings set forth herein represent certain salient portions derived from the  
18 evidence and hearings. These findings, however, are intended to be representative and  
19 nonexhaustive of the evidence and reasons supporting the enactment herein. The Board will  
20 consider relevant evidence that continues to be collected.

21 15. In enacting this Ordinance, the Board considered and relied on (a) the fact that  
22 a substantial percentage of City agencies receive federal funds, a vast portion of which is  
23 expended in city contracts, (b) the federal requirements for eradication of discrimination,  
24 including the evidence supporting those requirements, and (c) all applicable constitutional  
25 standards including those that apply to federally-funded projects.

1           16. This Board finds that the testimony of minority and women business owners  
2 who seek to enter into contracts with the City or are doing business with the City, as  
3 presented to this Board and the Human Rights Commission, offer clear and persuasive  
4 evidence of discrimination to such an extent that the disparity of contract dollars awarded to  
5 minority- and women-owned enterprises can only be explained by discrimination. The  
6 statistical evidence, oral histories, and social science evidence reviewed by this Board also  
7 support this finding. Accordingly, this Board adopts this Ordinance to remedy the specifically  
8 identified City contracting practices and conditions in the Community and industries that  
9 cause the exclusion or reduction of contracting opportunities for minority- and women-owned  
10 businesses in City Prime and subcontracting programs.

11           17. Based on a comparative review of the use of minority- and women-owned  
12 businesses in the public and private sectors in the City, oral histories and additional evidence,  
13 this Board finds that there is a substantial reduction in the use of minority- and women-owned  
14 firms in private sector contracting in the absence of MBE/WBE requirements such as those  
15 found in this Ordinance. In the private sector, substantial evidence demonstrates that  
16 minority- and women-owned businesses are seldom or never used by prime contractors for  
17 projects that do not have MBE/WBE goal requirements. Therefore, this Board finds that if this  
18 Ordinance were not enacted and the MBE/WBE goal requirements eliminated, the  
19 discrimination against and non-utilization of minority- and women-owned businesses now  
20 existing in the private sector would occur immediately in the awarding of City contracts.

21           18. This Board further finds that local businesses that seek prime contracting and  
22 subcontracting opportunities in City contracting continue to labor under a competitive  
23 disadvantage with businesses from other areas because of the higher administrative costs of  
24 doing business in the City (e.g. higher taxes, higher rents, higher wages and benefits for  
25 labor, higher insurance rates, etc.).

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1           19. This Board finds that public interest is served by encouraging economically  
2 disadvantaged businesses to locate and to remain in San Francisco through the provision of  
3 bid discounts to such San Francisco businesses in the award of City contracts and by  
4 requiring prime contractors to use good faith efforts to use such businesses as subcontractors  
5 when there are subcontracting opportunities available on City contracts.

6           20. Additionally, this Board finds that policies and programs that enhance the  
7 opportunities and entrepreneurial skills of local businesses will best serve the public interest  
8 because the growth and development of such businesses will have a significant positive  
9 impact on the economic health of San Francisco by, among other things, the creation of local  
10 jobs and increased tax revenue.

11           21. The Board finds that affording a five percent (5%) bid discount for economically  
12 disadvantaged local businesses bidding on City contracts reduces the disadvantages under  
13 which these businesses compete.

14           22. The bid discount mechanism in this Ordinance is used to assure equality in the  
15 treatment of opportunities to any bidder for City contracts. This Board further finds that the  
16 failure to use such a bid discount would result in discrimination against or preferential  
17 treatment to certain individuals and/or groups.

18  
19           **SEC. 12D.A.3. DECLARATION OF POLICY.** It is the policy of the City and County of  
20 San Francisco to ensure full and equitable opportunities for Minority Business Enterprises,  
21 Woman Business Enterprises, and Local Business Enterprises to participate as prime  
22 contractors in providing goods and services to the City. This program is intended to correct  
23 identified discriminatory practices inherent in the City's procurement process and in the award  
24 of prime contracts to MBE/WBEs. Another goal of this Ordinance is to offset some of the  
25 economic disadvantages local businesses continue to face that are not shared by non-local

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1 businesses.

2 The City will continue to rely on the relationship between the percentages of  
3 MBEs/WBEs in the relevant sector of the San Francisco business community and their  
4 respective shares of City contract dollars as a measure of the effectiveness of this Ordinance  
5 in remedying the effects of the aforementioned discrimination.

6 The City is continuing to use a discount for local business in the award of City  
7 contracts in order to encourage businesses to locate and to remain in San Francisco and  
8 thereby enhance employment opportunities for persons living in San Francisco. The cost of  
9 locating and doing business in San Francisco continues to be as much as 15 percent and  
10 greater than the cost of doing businesses in the surrounding communities. Providing a five-  
11 percent bid discount for local businesses bidding on City contracts reduces the disadvantages  
12 under which City-located businesses labor when competing for City contracts. For that  
13 reason, affording them a five-percent bid discount makes good sense. In effect, the bid  
14 discount assists these businesses in contributing to the economic health of the City. The five-  
15 percent bid discount does not unduly hamper non-local businesses in the contracting  
16 process, and parallels the discounts awarded in many other local jurisdictions.

17  
18 **SEC. 12D.A.4. SCOPE.** The race- and gender-conscious bid discounts of this  
19 Ordinance shall be afforded only to economically disadvantaged minority- and women- owned  
20 businesses in all specifically enumerated categories of City contracts for the procurement of  
21 goods and services subject to exemptions hereinafter specifically enumerated. The local  
22 business bid discount shall be afforded to all economically disadvantaged local businesses in  
23 the award of all City contracts for the procurement of goods and services subject to  
24 exceptions hereinafter specifically enumerated in Section 12D.A.15.

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1           **SEC. 12D.A.5. DEFINITIONS.**

2           “Award of a contract” occurs when a contract is certified by the Controller of the City  
3 and County of San Francisco.

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

12           “Best efforts” when required of contract awarding authority shall mean reasonable  
13 efforts to include minorities, MBEs, women, or WBEs in City contracting.

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

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

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

20           “Commercially useful function” shall mean that the business is directly responsible for  
21 providing the materials, equipment, supplies or services to the City as required by the  
22 solicitation or request for quotes, bids or proposals. MBEs, WBEs or LBEs that engage in the  
23 business of providing brokerage, referral or temporary employment services shall not be  
24 deemed to perform a “commercially useful function” unless the brokerage, referral or  
25 temporary employment services are those required and sought by the City.

1 "Commission" shall mean the Human Rights Commission of the City and County of  
2 San Francisco.

3 "Concession" shall mean any privilege conferred by the City on a person to engage in  
4 business on property owned or leased by the City.

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

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

23 "Contractor" shall mean any person(s), firm, partnership, corporation, or combination  
24 thereof, who submits a bid to perform, performs any part of, agrees with a person to provide  
25 services relating to and/or enters into a contract with department heads and officers or



1 contract awarding authorities empowered by law to enter into contracts on the part of the City  
2 for public works or improvements to be performed, or for goods or services or supplies to be  
3 purchased at the expense of the City or to be paid out of monies deposited in the treasury or  
4 out of trust monies under the control of or collected by the City.

5 "Control" of a business shall refer to the possession of the legal authority and power to  
6 manage business assets, good will and daily operations of the business, and the active and  
7 continuous exercise of such authority and power in determining the policies and directing the  
8 operations of the business.

9 "Director" shall mean the Director of the Human Rights Commission of San Francisco.

10 "Discount" shall mean an upward or downward price adjustment, according to the  
11 context, that is made for the purpose of remedying, in the case of MBEs and WBEs, identified  
12 discrimination, and, in the case of LBEs, the competitive disadvantage caused by the higher  
13 administrative costs of doing business in the City.

14 "Economically disadvantaged business" shall mean a business whose average gross  
15 annual receipts in the three fiscal years immediately preceding its application for certification  
16 as a MBE, WBE or LBE do not exceed the following limits: (1) Public works/construction —  
17 \$14,000,000; Specialty Construction Contractors — \$5,000,000; (2) Goods/materials/  
18 equipment and general services suppliers — \$5,000,000; (3) Professional services —  
19 \$2,000,000; (4) Trucking — \$3,500,000; and (5) Telecommunications — \$5,000,000.

20 "Equipment and supplies contract" shall mean a term purchase agreement, contract  
21 order, purchase order and any other agreement for the purchase of transportation equipment,  
22 office supplies, data processing and office equipment, hospital and medical equipment and  
23 supplies, food, restaurants, building supplies, fire/safety equipment and supplies, clothing,  
24 miscellaneous and electrical equipment and supplies. The term "equipment and supplies  
25 contract" shall not include contracts for fuels, lubricants and illuminants.

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

5 "General services contract" shall mean a purchase agreement, contract order,  
6 purchase order and any other agreement for the procurement of janitorial, security,  
7 equipment and computer maintenance, miscellaneous, printing and graphics services.

8 "Good-faith efforts" when required of a contract awarding authority or department shall  
9 mean the actions undertaken by a department to obtain MBE or WBE participation in a  
10 contract as prime contractors, and shall include the following efforts: (1) encouraging  
11 MBE/WBEs to attend pre-bid meetings scheduled by a department or the Commission to  
12 inform potential contractors of contracting opportunities; (2) advertising in general circulation  
13 media, trade association publications and minority/woman business focused media; (3)  
14 notifying MBE/WBEs that are available to perform the work contemplated in a contract and  
15 soliciting their interest in the contract; (4) dividing the contract work into economically feasible  
16 units to facilitate MBE/WBE participation in the contract; (5) pursuing solicitations of interest  
17 by contacting MBE/WBEs to determine whether these businesses are interested in  
18 participating on the contract; (6) providing MBE/WBEs with adequate information about the  
19 plan, specifications and requirements of the contract; (7) where applicable, negotiating with  
20 MBE/WBEs in good faith and demonstrating that MBE/WBEs were not rejected as unqualified  
21 without sound reasons based on a thorough investigation of their capabilities; and (8) using  
22 the services of available community and contractors' groups, local, State or Federal minority  
23 and woman business assistance offices that provide assistance in the recruitment of  
24 MBE/WBEs for public sector contracts.

25 "Good-faith efforts" when required of a prime public works/construction contractor or

1 professional services provider shall mean the steps undertaken to comply with the goals and  
2 requirements imposed by the City for participation by MBE/WBEs as subcontractors, and  
3 shall include the following:

4 (1) Attending any presolicitation or prebid meetings scheduled by the City to inform  
5 all bidders of MBE/WBE program requirements for the project for which the contract will be  
6 awarded;

7 (2) Identifying and selecting specific items of the project for which the contract will  
8 be awarded to be performed by MBE/WBEs to provide an opportunity for participation by  
9 those enterprises;

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

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

21 (5) Following up initial solicitations of interest by contacting potential MBE/WBE  
22 subcontractors to determine with certainty whether those enterprises were interested in  
23 performing specific items of the project;

24 (6) Providing interested MBE/WBEs with information about the plans,  
25 specifications, and requirements for the selected subcontracting or material supply work;

1 (7) Requesting assistance from minority and women community organizations;  
2 minority and women contractor or professional groups; local, State or Federal minority and  
3 women business assistance offices; or other organizations that provide assistance in the  
4 recruitment and placement of minority or women business enterprises, if any are available;

5 (8) Negotiating in good faith with interested MBEs or WBEs, and not unjustifiably  
6 rejecting as unsatisfactory bids or proposals prepared by any MBEs or WBEs, as determined  
7 by the City;

8 (9) Where applicable, advising and making efforts to assist interested MBE/WBEs  
9 in obtaining bonds, lines of credit, or insurance required by the City or contractor;

10 (10) Making efforts to obtain MBE/WBE participation that the City could reasonably  
11 expect would produce a level of participation sufficient to meet the City's goals and  
12 requirements.

13 "Human Rights Commission (HRC)" shall mean the Human Rights Commission of San  
14 Francisco, hereinafter referred to as the "Commission."

15 "Joint venture" shall mean an association of two or more businesses acting as a  
16 contractor and performing or providing services on a contract, in which each joint venture  
17 partner combines property, capital, efforts, skill, and/or knowledge.

18 "Lease" shall mean and include an agreement by which the City or any contracting  
19 agency thereof, grants to a person the temporary possession and use of property for  
20 consideration.

21 "Local business" or "Local business enterprise (LBE)" shall mean an economically  
22 disadvantaged business that is an independent and continuing business for profit, performs a  
23 commercially useful function and is a firm that:

24 (1) Has fixed offices or distribution points located within the geographical  
25 boundaries of the City where a commercially useful function is performed. Post office box

1 numbers or residential addresses shall not suffice to establish status as a "Local Business";

2 (2) Is listed in the Permits and License Tax Paid File with a San Francisco business  
3 street address; and

4 (3) Possesses a current Business Tax Registration Certificate at the time of the  
5 application for certification as a local business.

6 (4) Has been located and doing business in the City for at least six months  
7 preceding its application for certification as a local business; and

8 (5) Is certified as an LBE pursuant to 12D.A.6(B)(1).

9 "Lower-tier subcontracting" shall mean any agreement or other arrangement between  
10 a subcontractor and a prime contractor that requires the prime contractor to perform any term,  
11 condition or obligation imposed by the subcontract upon the subcontractor.

12 "Minority," "minorities," or "minority person" shall mean members of one or more of the  
13 following ethnic groups:

- 14 • Asian Americans (defined as Chinese, Japanese, Koreans, Pacific Islanders,  
15 Samoans, Filipinos, Asian Indians, and Southeast Asians);
- 16 • African Americans;
- 17 • Latino Americans (defined as Mexicans, Puerto Ricans, Cubans, Central or South  
18 Americans);
- 19 • Arab Americans (defined as individuals whose ancestry is from an Arabic speaking  
20 country that is a member of the League of Arab States); and
- 21 • Native Americans.

22 "Minority Business Enterprise (MBE)" shall mean an economically disadvantaged local  
23 business that is an independent and continuing business for profit, performs a commercially  
24 useful function, is owned and controlled by one or more minority persons residing in the  
25 United States or its territories and is certified as an MBE pursuant to Section 12D.A.6(B).

1 "Miscellaneous professional services" shall mean all professional services except legal,  
2 architect/engineer, computer systems, management consulting and medical services.

3 "Office" or "offices" shall mean a fixed and established place where work is performed  
4 of a clerical, administrative, professional or production nature directly pertinent to the  
5 business being certified. A temporary location or movable property or one that was  
6 established to oversee a project such as a construction project office does not qualify as an  
7 "office" under the Ordinance. The office is not required to be the headquarters for the  
8 business.

9 "Owned," for purposes of determining whether a business is a MBE or WBE shall  
10 mean that minorities or women, as the context requires:

11 (1) Possess an ownership interest of at least 51 percent of the business;

12 (2) Possess incidents of ownership, such as an interest in profit and loss, equal to  
13 at least the required ownership interest percentage; and

14 (3) Contribute capital, equipment and expertise to the business equal to at least the  
15 required ownership percentage.

16 For an individual seeking MBE or WBE certification, ownership shall be measured as  
17 though the applicant's ownership were not subject to the community property interest of a  
18 spouse, if both spouses certify that (a) only the woman or minority spouse participates in the  
19 management of the business and the nonparticipating spouse relinquishes control over  
20 his/her community property interest in the subject business or (b) both spouses have bona  
21 fide management and control of the business.

22 "Participation commitment" shall mean the targeted level of MBE/WBE subcontractor  
23 participation that each prime public works/construction contractor or professional service  
24 provider has designated in its bid.

25 "Participation goals" shall mean the targeted levels of City-wide MBE/WBE

1 participation in City prime contracts that reflect the relevant share of MBEs or WBEs in a  
2 given industry or profession referred to as "percent availability" in the utilization indices  
3 contained on file with the Clerk of this Board in File No. 98-0612.

4 "Percent availability" shall mean the relevant share of MBEs or WBEs in a given  
5 industry or profession.

6 "Person" includes one or more individuals, partnerships, associations, organizations,  
7 trade or professional associations, corporations, cooperatives, legal representatives, trustees,  
8 trustees in bankruptcy, receivers, or any group of persons, including any official, agent or  
9 employee of the City.

10 "Professional services contract" shall mean an agreement for the procurement of legal,  
11 architect/engineer, computer systems, management consulting, medical services and  
12 miscellaneous professional services.

13 "Public works/construction contract" shall mean an agreement for the construction,  
14 reconstruction or repair of public buildings, streets, utilities or other public works or  
15 improvements.

16 "Set-aside" when referring to a contract or project shall mean a procurement or  
17 contract award process where competition for a contract or project is limited to MBEs, WBEs  
18 and/or joint ventures with MBE/WBEs.

19 "Subcontractor" shall mean any business providing goods or services to a contractor  
20 for profit, if such goods or services are procured or used in fulfillment of the contractor's  
21 obligations arising from a contract with the City.

22 "Subcontractor participation goals" shall mean the targeted level of MBE/WBE  
23 subcontractor participation designated by the Director for prime public works/construction and  
24 professional services contracts.

25 "Woman Business Enterprise (WBE)" shall mean an economically disadvantaged local

1 business that is an independent and continuing business for profit, performs a commercially  
2 useful function, is owned and controlled by one or more women residing in the United States  
3 or its territories and is certified as a WBE pursuant to 12D.A.6(B).

4 "Woman/Minority Man Business Enterprise (W/MBE)" shall mean an economically  
5 disadvantaged local business that meets the definition of both an MBE and WBE, except that  
6 the ownership interest and control by women alone and minorities alone is less than 51  
7 percent of the business, but for which the aggregate ownership interest and control by  
8 women and minorities equals or exceeds 51 percent of the business. A MBE/WBE shall  
9 qualify and be deemed by a department, either as an MBE or WBE, but not both. Any  
10 reference in the Ordinance to MBE or WBE includes a W/MBE.

11  
12 **SEC. 12D.A.6. POWERS AND DUTIES OF THE COMMISSION AND THE**  
13 **DIRECTOR.** (A) In addition to the duties and powers given to the Human Rights Commission  
14 elsewhere, the Commission shall:

15 1. Collect, analyze and periodically report to this Board relevant data that will  
16 assist this Board in determining whether (a) the scope of this Ordinance in terms of race- or  
17 gender-conscious remedies shall be expanded to include new contract areas or minority  
18 groups and (b) whether the scope of this Ordinance should be limited because the City has  
19 met its obligation to adopt and to implement necessary measures to remedy both its active  
20 discrimination and its passive perpetuation of private discrimination;

21 2. Levy the same sanctions that a contracting awarding authority may levy as  
22 specified in Section 12D.A.9(B)(7);

23 3. When necessary, subpoena persons and records, books and documents for a  
24 proceeding of the Commission or an investigation by the Director conducted to further the  
25 purposes of this Ordinance;

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1           4.     Adopt rules and regulations establishing standards and procedures for  
2 effectively carrying out this Ordinance. Among other things, the rules and regulations shall  
3 provide for administrative procedures that will allow a business to prove and the Commission  
4 to recommend to this Board that the Ordinance's remedial measures should not be applied to  
5 an industry or profession because MBE/WBE participation in City prime contracts has  
6 reached parity with MBE/WBE participation in the relevant business community and that  
7 MBE/WBEs no longer suffer from a discrimination-induced competitive disadvantage in the  
8 applicable industry or profession. The regulations shall also provide a mechanism for  
9 contractors to seek a determination by the Director that a MBE or WBE may not be granted a  
10 race- or gender-conscious bid discount where it is demonstrated that the MBE's or WBE's bid  
11 price is not attributable to the effects of past discrimination.

12           5.     Issue forms for the Controller to collect information from contractors as  
13 prescribed by this Ordinance.

14           6.     Hear appeals challenging the Director's disqualification of a bidder or Contractor  
15 as specified in Section 12D.A.16(C), challenging the Director's denial of an application for or  
16 revocation of the certification of a business as an MBE, WBE, or LBE, as specified in Section  
17 12D.A.6(b)(2), or challenging the Director's denial of a request to waive or to reduce  
18 subcontractor participation goals as specified in Section 12D.A.17(H).

19           (7)    By regulation require contract awarding authorities, departments and the  
20 Controller to provide to the Director such information as will be necessary to enable the  
21 Director to keep a data base from which discrimination can be identified, to report to the  
22 Mayor and the Board of Supervisors at the end of each fiscal year on the progress each City  
23 Department has made towards the achievement of MBE and WBE participation goals and to  
24 perform his/her other duties.

25  
  
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1 (8) Consistent with the provisions of the Ordinance make such other rules and  
2 regulations as are necessary to guide its implementation.

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

5 1. Through appropriately promulgated procedures, the Director shall certify  
6 businesses as bona fide MBEs/WBEs/LBEs. These procedures shall provide that any  
7 business seeking certification as an LBE shall meet the definition of an LBE and possess or  
8 establish all of the following: (1) business cards for the San Francisco office; (2) business  
9 stationery for the San Francisco office; (3) a written agreement for occupancy of a San  
10 Francisco office; (4) a listing of the business in an appropriate business buyers guide such as  
11 a telephone yellow pages listing San Francisco based businesses; (5) a San Francisco office  
12 in which business is transacted that is appropriately equipped for the type of business for  
13 which the enterprise seeks certification as an LBE; (6) a conspicuously displayed business  
14 sign at the San Francisco business premises except where the business operates out of a  
15 residence; and (7) licenses issued to the business owner appropriate for the type of business  
16 for which the enterprise seeks certification.

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

1 MBE, WBE or LBE. The business may appeal the Director's denial or revocation of  
2 certification of a business as an MBE, WBE, or LBE to the Commission. The appeal must be  
3 filed with the Commission within three business days following receipt of the Director's  
4 decision. Notice by the Director to the business of denial or revocation of certification as an  
5 MBE, WBE or LBE shall apprise the business of its right to appeal the decision. The  
6 Commission shall resolve any such appeal within a reasonable period of time taking into  
7 account the contract awarding authority's need for an expedient award of the particular  
8 contract.

9 3. The Director shall have the ultimate responsibility for ensuring that the  
10 necessary data is collected and analyzed. Annually, and more often if the Director deems  
11 necessary, the Director shall analyze the most recently available data of MBEs and WBEs in  
12 the various industries and professions doing business with the City. Applying statistically  
13 sound methods of analysis and considering other evidence of discrimination, the Director  
14 shall identify areas of contracting where the City or any of its departments (a) is failing to  
15 meet the participation goals to such an extent that an inference of discrimination can be  
16 made, or (b) is otherwise discriminating in its contracts. In addition, the Director shall identify  
17 areas of contracting where the City is meeting and/or exceeding participation goals to such an  
18 extent that the MBE or WBE bid discounts can no longer be justified. The results of this study  
19 shall be included in the Commission's annual report required by Section 12D.A.18(B).

20 4. Not later than March 1st of each fiscal year, the Director shall transmit to this  
21 Board proposed amendments to this Ordinance that the Director deems necessary to ensure  
22 that the Ordinance provides adequate remedies for identified discrimination while going no  
23 further than necessary to remedy the identified discrimination;

24 5. The Director shall work with the Controller and City departments to implement a  
25 City-wide prompt-payment policy requiring that MBEs, WBEs and LBEs be paid by the City,

1 within 30 days after the date on which the City receives an invoice from an MBE, WBE or LBE  
2 for work performed for the City;

3 6. The Director shall provide information and other assistance to MBEs and WBEs  
4 to increase their ability to compete effectively for the award of City contracts;

5 7. The Director shall assist the City to increase participation by MBEs and WBEs in  
6 City contracts;

7 8. The Director shall continue to develop and to strengthen education and training  
8 programs for MBEs and WBEs and City contract awarding personnel;

9 9. Where after determining that a department, despite its good-faith efforts and  
10 application of the bid discounts, has failed to eliminate the exclusion of MBEs and/or WBEs  
11 from City contracting, the Director, after consulting with the department responsible for the  
12 project(s), may request the Review Committee established in Section 12D.A.8.(A)(3) to  
13 review and to approve the proposed project(s) for a set-aside;

14 10. The Director shall grant waivers as set forth in Sections 12D.A.15 and  
15 12D.A.17(E)-(H), and may disqualify a bidder or contractor as set forth in Section  
16 12.D.A.16(C).

17 (C) The requirements of this Ordinance are in addition to those imposed by the  
18 United States or the State of California as a condition of financial assistance or otherwise.  
19 The Director, however, may authorize the substitution of such State or federal minority  
20 Business Enterprise and Women Business Enterprise requirements for the requirements of  
21 this Ordinance whenever such State or federal requirements are substantially the same as  
22 those of this Ordinance.

23 (D) The Director, with the approval of the Commission, may enter into cooperative  
24 agreements with agencies, public and private, concerned with increasing the use of MBEs  
25 and WBEs in government contracting, subject to the approval of this Board.

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1 (E) The Director, in cooperation with the Controller, shall conduct random audits of  
2 prime contractors in order to insure their compliance with the provisions of this Ordinance.  
3 Further, the Director, in cooperation with the Controller, shall furthermore randomly audit ten  
4 percent (10%) of the joint ventures granted bid discounts in each fiscal year. The Director  
5 shall also establish a joint task force, with representatives from the HRC, the City Attorney,  
6 the District Attorney, community members, and other interested entities, to explore inter-  
7 agency means of enforcing this Ordinance more fully.

8  
9 **SEC. 12D.A.7. POWERS AND DUTIES OF THE CONTROLLER.** (A) In addition  
10 to the duties given to the Controller elsewhere, the Controller shall work cooperatively with  
11 the Director to assemble and to maintain the data the Director advises are necessary to form  
12 the basis of the Commission's report to the Mayor, this Board and the public on the  
13 participation of MBEs and WBEs in City prime contracts. If any department refuses or fails to  
14 provide the required data, the Controller shall immediately notify the Mayor, this Board and  
15 the Director.

16 (B) The Controller shall not certify the award of any contract subject to this  
17 Ordinance until the department requesting certification of the award of the contract has  
18 provided the Controller with the information the Director advises is necessary under this  
19 Ordinance.

20 (C) Each request for payment to a City contractor submitted to the Controller shall  
21 be accompanied by a subcontractor participation form approved by the Commission. That  
22 form shall contain information that the Commission has determined is necessary to enable  
23 the Commission and the Director (1) to monitor compliance by City departments and their  
24 prime contractors with their obligations under this Ordinance (2) to determine whether City  
25 departments are achieving their prime and subcontracting goals under this Ordinance, (3) to

1 determine whether to recommend changes in this Ordinance to ensure that the Ordinance  
2 continues to serve as a remedy for discrimination in contracting while going no further than  
3 necessary to remedy that discrimination, and (4) to make such other reports and analyses as  
4 are required by this Ordinance. The Controller shall furnish to the Director a list of contracts  
5 newly posted and shall provide a cross check on the City department's reporting.

6 In the event that a request for payment fails to include the information required  
7 pursuant to this section, the Controller shall, within two working days, notify the contract  
8 awarding authority, the Director and the affected prime contractor[s] of the failure and afford  
9 each affected prime contractor an opportunity to be heard promptly. That notice shall inform  
10 the contractor that the Controller has tentatively determined that the information has not been  
11 provided, what information is missing and that if this failure is substantiated, then the  
12 Controller will be required to withhold 20% of the payment until the information is provided. If  
13 the Controller finds, after consultation with the Director or the Director's representative and  
14 the notice and opportunity to be heard, that the information has not been provided, the  
15 Controller shall withhold 20% of the payment otherwise due until the information is provided.

16 (D) It is the City's policy that MBEs, WBEs and LBEs should be paid by the City  
17 within 30 days of the date on which the City receives an invoice from an MBE, WBE or LBE  
18 for work performed for the City. The Controller shall work with the Director and  
19 representatives of City departments to implement this City-wide prompt-payment policy.

20 (E) The Controller shall require all prime contractors to submit, within ten (10) days  
21 following payment to the Prime Contractor of moneys owed for work completed on a project,  
22 an affidavit under penalty of perjury, that all subcontractors on the project or job have been  
23 paid and the amounts of each of those payments. The name, telephone number and  
24 business address of every subcontractor shall be listed on the affidavit. If a prime contractor  
25 fails to submit this affidavit, the Controller shall notify the contract awarding authority and

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1 Director who shall take appropriate action as authorized under 12D.A.16(C) and (F).

2  
3 **SEC. 12D.A.8. POWERS AND DUTIES OF THE MAYOR.** In addition to the duties  
4 given to the Mayor elsewhere, the Mayor shall:

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

12 2. Coordinate and enforce cooperation and compliance by all departments with  
13 this Ordinance;

14 3. Establish a three-member Review Committee that shall have the authority to  
15 review contracts proposed by the Director or a department to be set-aside. The three-  
16 member Review Committee shall be composed of an individual appointed by the  
17 Commission, an individual appointed by the Mayor, and an individual appointed by the  
18 contract awarding authority. The Commission, the Mayor, and the contract awarding authority  
19 shall appoint individuals who are knowledgeable about the City's contracting and  
20 subcontracting practices, the industry or profession affected by the proposed contract to be  
21 set-aside, and the certification requirements under this Ordinance. The Commission, the  
22 Mayor, and the contract awarding authority may not appoint to the Review Committee the  
23 Director or any employee of the Commission. Any appeal to the Review Committee shall be  
24 heard and decided within ten business days of its receipt.

1           **SEC. 12D.A.9. POWERS AND DUTIES OF CONTRACT AWARDING**

2           **AUTHORITIES.**

3           (A)     Contract awarding authorities shall:

4           1.     Use good-faith efforts to solicit and to obtain quotes, bids or proposals from  
5           MBEs and WBEs on all solicitations, or document their unavailability;

6           2.     Unless otherwise indicated in this Ordinance, extend a discount in all bids and  
7           contracts and in the composition of rating scales as follows: (1) a five-percent (5%) discount  
8           to (i) a local business or (ii) a joint venture with local MBE or local WBE participation that  
9           equals or exceeds 35 percent (35%) but is under 40 percent (40%); or (iii) where a joint  
10          venture is composed of only local businesses with no local MBE or WBE participation or  
11          where the local MBE or local WBE participation is less than 35 percent (35%); (2) a seven  
12          and one-half percent (7.5%) bid discount to a joint venture with local MBE or WBE  
13          participation that equals or exceeds 40 percent (40%); (3) a 10-percent (10%) discount to (i) a  
14          local MBE or local WBE or (ii) a joint venture between or among local MBEs <sup>/and</sup> or local WBEs.

15                 The contracting awarding authority shall apply the aforementioned appropriate bid  
16                 discount to a joint venture when the MBE or WBE is an active partner in the joint venture and  
17                 performs work, manages the job and takes financial risks in proportion to the required level of  
18                 participation stated in the bid documents and is responsible for a clearly defined portion of the  
19                 work to be performed, and shares in the ownership, control, management responsibilities,  
20                 risks, and profits of the joint venture. The portion of the MBE or WBE joint venture's work  
21                 shall be set forth in detail separately from the work to be performed by the nonMBE or  
22                 nonWBE joint venture partner. The MBE or WBE joint venture's portion of the contract must  
23                 be assigned a commercially reasonable dollar value;

24           3.     Arrange contracting by size and type of work to be performed so as most  
25           effectively to enhance the opportunity for participation by MBEs and WBEs to the maximum

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1 extent feasible. As soon as practical before soliciting quotes, bids or proposals, all contract  
2 awarding authorities or in the case of a professional services contract, the department making  
3 the contract award recommendation, shall submit all large proposals to the Director for  
4 review. The purpose of the Director's review is to determine whether the proposed project can  
5 be divided into smaller projects so as to enhance the opportunity for participation by MBEs  
6 and WBEs in the project. For purposes of this subsection, the term "large project" shall mean  
7 the following: (1) any public works/construction project estimated to cost more than  
8 \$5,000,000; and (2) any professional services contract estimated to cost more than \$50,000.  
9 If the Director determines, after consulting with the contract awarding authority or department  
10 responsible for the project, that the project can be divided into smaller projects, the contract  
11 awarding authority or department shall comply with the Director's determination and issue the  
12 solicitation for quotes, bids or proposals in accordance with the Director's determination;

13 4. Adjust bid bonding and insurance requirements as recommended by the City  
14 Risk Manager in the May 2, 1989 "Contract Insurance Manual";

15 5. Use the City's Surety Bonding Program set forth in Administrative Code Section  
16 6.20-2 to assist MBEs, WBEs and LBEs to meet bonding, insurance and other fee-related  
17 requirements.

18 6. Submit to a central office all current bids, requests for proposals, and  
19 solicitations with sufficient lead time to provide adequate notice and opportunity to MBEs and  
20 WBEs to participate;

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

- 23 (a) Refuse to grant the award of a contract;  
24 (b) Order the suspension of a contract;  
25 (c) Order the withholding of funds;

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1 (d) Order the revision of a contract based upon a material breach of contract  
2 provisions pertaining to MBE or WBE participation;

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

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

11 9. Designate a staff person to be responsible for responding to the Director and  
12 Commission regarding the requirements of this Ordinance;

13 10. Maintain accurate records as required by the Director and the Commission for  
14 each contract awarded, its dollar value, the nature of the goods or services to be provided,  
15 the name of the contractor awarded the contract, the efforts made by a contractor to solicit  
16 bids from and award subcontracts to MBEs and WBEs and LBEs;

17 11. Where feasible, provide technical assistance to MBEs and WBEs to increase  
18 their ability to compete effectively for the award of City contracts;

19 12. Work with the Director and the Controller to implement a City-wide prompt-  
20 payment policy requiring that MBEs, WBEs and LBEs be paid by the City within 30 days of  
21 the date on which the City receives an invoice from an MBE, WBE or LBE for work performed  
22 for the City;

23 13. Provide the Director with written notice of all contract amendments,  
24 modifications, supplements and change orders that cumulatively result in an increase or  
25 decrease of the contract's dollar amount of more than 10 percent. Such notice shall be

1 provided within 10 days of each such contract modification.

2 14. Whenever contract amendments, modifications, supplements or change orders  
3 cumulatively increase the total dollar value of a contract by more than 10%, the contract  
4 awarding authority shall require compliance with those MBE and WBE provisions of this  
5 Ordinance that applied to the original contract.

6 15. All contract amendments, modifications, supplements or change orders that  
7 cumulatively increase by more than 20% the total dollar value of all contracts originally valued  
8 at \$50,000 or more shall be subject to prior approval of the Director, who shall review the  
9 proposed amendment, modification, supplement or change order to correct contracting  
10 practices that exclude women or minorities from new contracting opportunities.

11 (B) Contract awarding authorities or departments may invite, encourage or request  
12 businesses to joint venture on any contract to promote MBE or WBE participation.

13 (C) For the purpose of determining MBE and WBE participation, contracts awarded  
14 to joint ventures in which one or more MBEs or WBEs are combined with one or more  
15 businesses that are not MBEs or WBEs shall be deemed by the contract awarding authority  
16 to be awarded to MBEs or WBEs only to the extent of the MBEs or WBEs participation in the  
17 joint venture. MBE and/or WBE participation in the supply of goods shall be included in  
18 determining MBE and/or WBE participation in a joint venture if the goods are supplied in  
19 accordance with established general industry practice.

20 (D) Contract awarding authorities shall ensure that all contracts subject to this  
21 Ordinance include the following requirements, in addition to such other requirements as may  
22 be set forth elsewhere:

23 1. Each bidder and contractor on all contracts shall be required to sign before a  
24 notary an affidavit prepared by the City Attorney, declaring under penalty of perjury, its  
25 intention to comply fully with the provisions of this Ordinance;

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

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

15           4.     Contracts shall require bidders, contractors and subcontractors to maintain  
16 records, including such information requested by the Director or Commission, necessary for  
17 monitoring their compliance with this Ordinance;

18           5.     Contracts shall require prime contractors, during the term of the contract, to  
19 fulfill the MBE and WBE participation commitments submitted with their bids;

20           6.     Contracts shall require prime contractors to include in any subcontract with an  
21 MBE or WBE a provision requiring the prime contractor to compensate any MBE or WBE  
22 subcontractor if the prime contractor fails to comply with its commitment to use MBE and  
23 WBE subcontractors. Contracts shall also require prime contractors to compensate any MBE  
24 or WBE subcontractor if the prime contractor does not fulfill its commitment to use the MBE or  
25 WBE subcontractor. This provision shall also state that it is enforceable in a court of

1 competent jurisdiction;

2 7. Contracts shall require prime contractors, whenever amendments,  
3 modifications, supplements, or change orders cumulatively increase the total dollar value of a  
4 construction contract by more than 10 percent, to comply with those MBE and WBE  
5 provisions of this Ordinance that applied to the original contract with respect to the  
6 amendment, modification, supplement or change order;

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

13 9. Contracts in which subcontracting is used shall prohibit back contracting to the  
14 prime contractor or lower-tier subcontracting for any purpose inconsistent with the provisions  
15 of this Ordinance, rules and regulations adopted pursuant to this Ordinance, or contract  
16 provisions pertaining to MBE and WBE utilization.

17 10. Contracts in which subcontracting is used shall require the prime contractor to  
18 pay its subcontractors within three working days after receiving payment from the City unless  
19 the prime contractor notifies the Director in writing within 10 working days prior to receiving  
20 payment from the City that there is a bona fide dispute between the prime contractor and the  
21 subcontractor. The Director may, upon making a determination that a bona fide dispute exists  
22 between the prime contractor and subcontractor, waive this three day payment requirement.  
23 In making the determination as to whether a bona fide dispute exists, the Director shall not  
24 consider the merits of the dispute. Contracts in which subcontracting is used shall also  
25 require the contractor/consultant, within 10 working days following receipt of payment from

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1 the City, to file an affidavit, under penalty of perjury, that he or she has paid all  
2 subcontractors. The affidavit shall provide the names and address of all subcontractors and  
3 the amount paid to each.

4 11. Contracts shall require bidders, contractors and subcontractors to maintain  
5 records necessary for monitoring their compliance with this Ordinance for three years  
6 following completion of the project.

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

12 (F) Where a department can demonstrate, despite its good-faith efforts and  
13 application of the bid discount(s), that it has failed substantially to eliminate the exclusion of  
14 MBEs or WBEs from City contracting, the department, after consulting with the Director, may  
15 request the Review Committee established in Section 12D.8(A)(3) to review and to approve  
16 the proposed project(s) selected by the department for a set-aside.

17 (G) City department heads and commissioners shall attend a mandatory training  
18 session on an annual basis. The training session shall be organized and conducted by the  
19 Director, or his or her designee, and shall inform City department heads and commissioners  
20 of the requirements of this Ordinance.

21  
22 **SEC. 12D.A.10. PUBLIC WORK CONTRACTS.**

23 (A) In addition to the general findings set forth in Section 12D.A.2, and based upon  
24 the record before this Board, the Board hereby finds that the evidence before the Board  
25 relating to the award of prime public works contracts for fiscal years 1992-93, 1993-94, 1994-

1 95, 1996-97, and 1997-98 reflects that MBEs and WBEs continue to be disadvantaged by  
2 discriminatory practices when competing for City prime public works contracts. Further, the  
3 Board finds that race-neutral measures employed by the City have not prevented such  
4 discrimination against MBEs and WBEs from occurring.

5 (B) Contract awarding authorities shall apply bid discounts as enumerated in  
6 Section 12D.A.9(A) to all public work contracts.

7  
8 **SEC. 12D.A.11. PURCHASING CONTRACTS.** (A) In addition to the general  
9 findings set forth in Section 12D.A.2, and based upon the record before this Board, the Board  
10 finds that the evidence before the Board relating to the award of prime purchasing contracts  
11 for fiscal years 1992-93, 1993-94, 1994-95, 1996-97, and 1997-98 reflects that MBEs and  
12 WBEs continue to be disadvantaged by discriminatory practices when competing for prime  
13 City purchasing contracts. The Board further finds that race-neutral measures employed by  
14 the City have not prevented such discriminatory practices from occurring.

15 (B) Contract awarding authorities shall apply all bid discounts as enumerated in  
16 Section 12D.A.9(A) to all equipment and supplies contracts or general services contracts.

17 (C) In addition to the duties given the purchaser elsewhere in this Section, the  
18 purchaser shall maintain, with the assistance of the Director, a current list of MBEs and WBEs  
19 to provide each of those commodities or services subject to this Ordinance that the purchaser  
20 indicates are required by the City.

21 (D) The purchaser shall also maintain a central office where all bids, requests for  
22 proposals and solicitations will be listed and kept current.

23  
24 **SEC. 12D.A.12. ARCHITECT/ENGINEERING CONTRACTS.** (A) In addition to the  
25 general findings set forth in Section 12D.A.2, and based upon the record before this Board,

1 the Board hereby finds that the evidence before this Board relating to the award of prime  
2 architect/engineering contracts for fiscal years 1992-93, 1993-94, 1994-95, 1996-97, and  
3 1997-98 reflects that MBEs and WBEs continue to be disadvantaged by discriminatory  
4 practices when competing for City prime architect/engineering contracts. The Board further  
5 finds that race-neutral measures employed by the City have not prevented these  
6 discriminatory practices from occurring.

7 (B) Contract awarding authorities and architect/engineering selection panels shall  
8 apply all bid discounts as enumerated in Section 12D.A.9(A) to all architect/engineering  
9 contracts, the estimated cost of which exceeds \$10,000. Minorities and women shall be  
10 included on consultant selection panels.

11 (C) The Director is empowered to take actions to ensure compliance with the  
12 provisions of this Section, including, without limitation, intervening in the selection process, by  
13 modifying the criteria used for selecting selection panelists or prime architect/engineering  
14 contractors to correct any contracting practices that hinder equal business opportunities for  
15 MBEs and WBEs.

16  
17 **SEC. 12D.A.13. CONSULTANTS AND PROFESSIONAL SERVICES CONTRACTS.**

18 (A) In addition to the general findings set forth in Section 12D.A.2, and based upon  
19 the record before this Board, the Board hereby finds that the evidence before the Board  
20 relating to the award of professional services contracts for fiscal years 1993-93, 1993-94,  
21 1994-95, 1996-97, and 1997-98 reflects that MBEs and WBEs continue to be disadvantaged  
22 by discriminatory practices when competing for City prime professional service contracts.  
23 Further, the Board finds that race-neutral measures employed by the City do not prevent such  
24 discrimination against MBEs and WBEs from occurring.

25 (B) Contract awarding authorities shall apply bid discounts as enumerated in



1 Section 12D.A.9(A) to all bids submitted by MBEs and WBEs for the professional service  
2 contracts. All consultants selection panels and awarding officers shall apply the bid/rating  
3 discounts to each stage of the selection process, e.g., qualifications, proposals and  
4 interviews.

5 (C) The Director is empowered to take actions to ensure compliance with the  
6 provisions of this Section, including, without limitation, intervening in the selection process by  
7 modifying the criteria used to select selection panelists or prime professional service  
8 contractors to correct any contracting practice that hinders equal business opportunities for  
9 MBEs and WBEs.

10  
11 **SEC. 12D.A.14. BEST EFFORTS REQUIRED FOR OTHER CONTRACTS.**

12 All City departments, commissions, boards, officers and employees, in the  
13 performance of their duties, and in the award of leases, franchises, concessions, and other  
14 contracts not subject to the race and gender-conscious bid discounts of this Ordinance, shall  
15 make best efforts to use the services of MBEs, WBEs and LBEs. Such services shall  
16 include, but are not limited to, the financial services of banks, savings and loan companies  
17 and other commercial financial institutions, the arrangement of travel and accommodations  
18 for official City travel and such other personal and professional services needed by City  
19 departments. All City departments, commissions and boards shall submit to the Director on  
20 an annual basis a written report on the efforts made pursuant to this subsection.

21  
22 **SEC. 12D.A.15. EXCEPTIONS AND WAIVERS.** (A) The Director shall waive the

23 race and gender-conscious bid discounts and good faith efforts requirements of this  
24 Ordinance under the following circumstances:

25 1. Whenever the Director finds, with the advice of the contract awarding authority,

1 that needed goods or services are available from a sole source and the prospective  
2 contractor is not currently disqualified from doing business with the City.

3 2. If the contract awarding authority certifies in writing to the Director, prior to the  
4 Controller's contract certification, that (a) pursuant to the Administrative Code Section 6.30  
5 the contract is necessary to respond to an emergency that endangers the public health or  
6 safety and (b) there is no time to apply bid discounts or there are no immediately available  
7 MBEs and WBEs that are capable of performing the emergency work.

8 (B) The Director shall waive the five-percent LBE bid discount for contracts in  
9 excess of \$5,000,000 whenever a contract awarding authority establishes that:

10 1. Sufficient qualified LBEs capable of providing the needed goods and  
11 services required by the contract are unavailable and sufficient qualified businesses located  
12 outside San Francisco capable of providing the needed goods and services required by the  
13 contract are available; or

14 2. The application of the five-percent LBE discount will result in significant  
15 additional costs to the City if the waiver of the bid discount is not granted.

16 (C) Pursuant to Administrative Code Section 6.29-2, the bid discount provisions of  
17 this Ordinance are not applicable to any contract for the construction, reconstruction or repair  
18 of public buildings, streets, utilities or other public work or improvement estimated by the  
19 contract awarding authority to cost in excess of \$10,000,000.

20 (D) Pursuant to Administrative Code Section 21.11-2, the bid discount provisions of  
21 this Ordinance are not applicable to any contract for the purchase of materials, supplies or  
22 equipment estimated by the contract awarding authority to cost in excess of \$10,000,000.

23  
24 **SEC. 12D.A.16. MONITORING AND COMPLIANCE.** (A) The Director shall monitor  
25 the City's progress toward achievement of the goals stated in section 12D.A.3. The Director

1 shall issue an exit report for any contract that includes MBE/WBE prime contract participation  
2 as a joint venture partner. The purpose of this exit report is to ensure that MBE/WBEs are  
3 actually performing services on joint ventures.

4 (B) **Noncompliance By Contractors After Contract Award.** In cases in which the  
5 Director has cause to believe that a contractor, acting in good-faith after a contract award,  
6 has failed to comply with any of the race and/or gender-conscious requirements of this  
7 Ordinance, rules and regulations adopted pursuant to this Ordinance or contract provisions  
8 pertaining to MBE or WBE participation, the Director shall notify the contract awarding  
9 authority and shall attempt to resolve the noncompliance through conciliation. If the  
10 noncompliance cannot be resolved, the Director shall submit to the Commission and the  
11 contractor a written Finding of Noncompliance. The Commission shall give the contractor an  
12 opportunity to appeal the Finding, and if the Commission concurs with the finding of the  
13 Director, it shall recommend that the contract awarding authority take appropriate action  
14 pursuant to Section 12D.A.9(A) 7.

15 (C) **Willful or Bad Faith Noncompliance by Bidders or Contractors.**

16 1. In cases where the Director has cause to believe that any bidder or contractor has  
17 willfully failed to comply with any of the race and/or gender-conscious provisions of this  
18 Ordinance, rules and regulations adopted pursuant to this Ordinance or contract provisions  
19 pertaining to MBE or WBE participation, the Director shall conduct an investigation.  
20 Additionally, after affording the contractor notice and an opportunity to be heard, the Director  
21 may impose sanctions for each violation of this subsection. Such sanctions shall include but  
22 are not limited to:

23 (a) Declaring the bidder or contractor nonresponsive and ineligible to receive the  
24 award of any pending contract;

25 (b) Declaring the bidder or contractor to be an irresponsible bidder and disqualifying

1 the bidder or contractor from eligibility for providing goods or services to the City for a period  
2 of up to five years, with a right of review and reconsideration by the Commission after two  
3 years upon a showing of corrective action indicating violations are not likely to recur;

4 (c) If the bidder or contractor is a MBE, WBE and/or LBE, revoking that business'  
5 certification as a MBE, WBE and/or LBE;

6 (d) Determining that the bidder or contractor has willfully failed to comply with the  
7 provisions of this Ordinance and, pursuant to the provision in the contract contemplated by  
8 Section 12D.A.9(D)3 of this Ordinance, calculating the liquidated damages for which the  
9 bidder or contractor shall be liable.

10 2. Thereafter the Director shall send a written notice to the Controller, the Mayor and  
11 all contract awarding authorities overseeing any contract with the bidder or contractor, that a  
12 determination of a bad-faith compliance has been made and that all payments due the bidder  
13 or contractor shall be withheld as agreed by the bidder or contractor and the City pursuant to  
14 Section 12D.A.9(D) 3.

15 3. The bidder or contractor may appeal the Director's decision to the Commission.  
16 The Commission may sustain, reverse or modify the Director's findings and sanctions  
17 imposed or take such other action to effectuate the purpose of this Ordinance. An appeal by  
18 a contractor under this subsection shall not stay the Director's findings.

19 (D) The Director may require such reports, information and documentation from  
20 contractors, bidders, contract awarding authorities, and heads of departments, divisions, and  
21 offices of the City as are reasonably necessary to determine compliance with the  
22 requirements of this Ordinance.

23 (E) **Willful Noncompliance by Contract Awarding Authority.** Whenever the  
24 Director finds after investigation that a contract awarding authority has willfully failed to  
25 comply with its duties pursuant to 12D.A.9, the Director shall transmit a written Finding of

1 Noncompliance specifying the nature of the noncompliance, to the contract awarding  
2 authority, the Commission, the Mayor and this Board.

3 The Director shall attempt to resolve any noncompliance through conference and  
4 conciliation. Should such attempt fail to resolve the noncompliance, the Director shall  
5 transmit a copy of the Finding of Noncompliance along with a finding that conciliation was  
6 attempted and failed to the Commission and this Board.

7 The Finding of Noncompliance shall be communicated to the Mayor for appropriate  
8 action to secure compliance pursuant to Section 12D.A.8(A) (2).

9 (F) If the Director has reason to believe that any person has knowingly made, filed,  
10 or caused to be filed with the City any materially false or misleading statement or report made  
11 in connection with this Ordinance, the Director shall report that information to the City  
12 Attorney or the District Attorney for appropriate action. The Director shall be empowered to  
13 conduct an investigation and for each violation of this subsection, 12D.A.16(F), to impose  
14 sanctions as set forth in subsection 12D.A.16(C).

15  
16 **SEC. 12D.A.17. SUBCONTRACTOR PARTICIPATION GOALS - PUBLIC WORKS,  
17 CONSTRUCTION AND PROFESSIONAL SERVICES; SUBCONTRACTING PROGRAM.**

18 (A) The findings set forth in section 12D.A.2 that relate to MBEs, WBEs are hereby  
19 incorporated by reference. This Board further finds that requiring prime contractors to  
20 demonstrate good faith efforts to use MBEs and WBEs as subcontractors on the City's public  
21 works/construction and professional services contracts would offset some of the  
22 disadvantages that such businesses face and would promote competition by requiring prime  
23 contractors to solicit the participation of MBEs and WBEs that they might not otherwise solicit.

24 (B) For all public works/construction and professional service contracts which the  
25 contract awarding authority reasonably anticipates will include subcontractor participation,

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1 prior to the solicitation of bids or proposals, the contract awarding authority shall provide the  
2 Director with a proposed job scope, and may submit written recommendations to the Director  
3 regarding MBE and WBE subcontractor participation goals to be set for the contract.

4 (C) Upon receipt of a proposed job scope and/or a written recommendation from a  
5 contracting awarding authority pursuant to Section 12D.A.9.(A)(3), the Director shall set the  
6 MBE and WBE participation goals for each public works/construction and professional  
7 services contract based upon the following factors:

8 1. The extent of subcontracting opportunities presented by the contract;  
9 2. The availability of MBE/WBE subcontractors capable of providing goods and  
10 services on the public works/construction or professional services contract.

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

17 (D) All solicitations for bidders on prime public works/construction and professional  
18 services contracts shall require each bidder to do the following:

19 1. Demonstrate in its bid that it has used good-faith efforts to use MBE and WBE  
20 subcontractors; and  
21 2. Identify the particular MBEs and WBEs subcontractors to be used in performing  
22 the contract, specifying for each the dollar value of the participation, the type of work to be  
23 performed and such information as may reasonably be required to determine the  
24 responsiveness of the bid.

25 Except as provided in Section 12D.A.17, bids not meeting the requirements of Section

1 12D.A.17 shall be declared non-responsive.

2 (E) A contract awarding authority may request that the Director waive or reduce the  
3 MBE and WBE subcontractor participation goals on public works/construction,  
4 architect/engineering and professional services contracts by submitting the reasons therefor  
5 in writing to the Director prior to the solicitation of bids.

6 (F) A bidder or contractor may request that the Director waive or reduce the amount  
7 of MBE or WBE subcontractor participation goals on a public works/construction and  
8 professional services contract by submitting in writing with its bid to the contract awarding  
9 authority the reasons therefor.

10 (G) The Director may grant the request for waiver or reduction made pursuant to  
11 Sections 12D.A.17(E) and (F) upon a determination that:

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

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

18 3. The available MBEs and WBEs have given price quotes that exceed  
19 competitive levels beyond amounts that can be attributed to cover costs inflated by the  
20 present effects of discrimination.

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  
23 Commission's decision on the request shall be final. In reviewing the Director's denial of a  
24 contractor's request to waive or to reduce participation goals, the Commission shall consider  
25 the extent of subcontracting opportunities presented by the contract and the availability of

1 MBE/WBE subcontractors capable of providing goods and services on the construction  
2 contract.

3 The Commission may overrule, sustain or modify the Director's decision by applying  
4 the same standards that the Director is required to apply, as set forth in subsection (G)  
5 above.

6 (I) Prior to entering into any prime public works/construction and professional  
7 services contract, the contract awarding authority shall require bidders on the contracts to  
8 contact MBEs and WBEs before listing them as subcontractors in the bid.

9 (J) During the term of the contract, any failure to comply with the level of MBE and  
10 WBE subcontractor participation specified in the contract shall be deemed a material breach  
11 of contract.

12  
13 **SEC. 12D.A.18. REPORTING AND REVIEW.** (A) Reporting by the Director.  
14 Commencing March 1, 1999 and no later than the first day of every third month thereafter, the  
15 Director shall issue a written report to this Board. That report shall document each City  
16 department's performance under the terms of this Ordinance, including, among other things,  
17 each City department's progress in meeting its MBE/WBE goals and the success of each  
18 department's prime contractors complying with its best efforts obligations to meet MBE/WBE  
19 subcontracting goals. That report shall also state whether or not each City Department has  
20 fully reported all data required by this Ordinance or requested by HRC or the Controller.

21 Whenever the Director's report concludes that a department management's intentional  
22 disregard or negligent performance of obligations imposed by this Ordinance has contributed  
23 to that department's failure to meet its prime contracting goals or the failure of its prime  
24 contractors to use their best efforts to meet their subcontracting goals or whenever the  
25 Director's report concludes that a City department has failed to provide any data required by



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

13           2.       The Director shall report to the Commission all waivers acted upon pursuant to  
14 Section 12D.A.15. Such report shall be made at the first Commission meeting following the  
15 granting of the waiver.

16           (B)     Reporting by the Commission. By March 1st of each fiscal year subject to this  
17 Ordinance, the Commission shall submit an annual report to the Mayor and this Board on the  
18 progress of the City toward the goals stated in Section 12D.A.3 of this Ordinance, together  
19 with an identification of problems and specific recommendations for: (1) discontinuing the  
20 race or gender-conscious bid discounts in those cases where the bid discounts have  
21 remedied the identified discrimination against MBEs and WBEs; and (2) improving the City's  
22 performance in remedying the identified discrimination against MBEs and WBEs.

23           (C)     This Board shall act upon the Commission's recommendations by the third  
24 Board meeting of May in each fiscal year subject to this Ordinance.

25           (D)     By the last day of each fiscal year, all contract awarding authorities and City

1 departments shall report annually to the Mayor on their progress in the preceding fiscal year  
2 toward the achievement of the MBE and WBE participation goals.

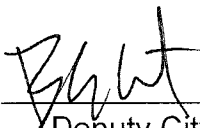
3  
4 **SEC. 12D.A.19. SEVERABILITY.** The provisions of this Ordinance are declared to be  
5 separate and severable. The invalidity of any clause, sentence, paragraph, subdivision,  
6 section or portion of this Ordinance, or the invalidity of the application thereof to any person  
7 or circumstances shall not affect the validity of the remainder of this Ordinance, or the validity  
8 of its application to other persons or circumstances.

9  
10 **SEC. 12D.A.20. OPERATIVE DATE.** This Ordinance shall become operative on  
11 November 1, 1998, and shall govern all contracts for which a bid or proposal has not been  
12 solicited by the operative date.

13  
14 **SEC. 12D.A.21. EXPIRATION.** This Ordinance shall expire June 30, 2003. If,  
15 however, the Commission, after conducting public hearings, finds that the purposes identified  
16 in Section 12D.A.3 have not yet been achieved, the Commission shall certify that finding to  
17 this Board no later than 120 days prior to the expiration date. Thereafter, upon finding a good  
18 cause, this Board may extend the Ordinance for additional three-year periods.

19  
20 APPROVED AS TO FORM:

21 LOUISE H. RENNE, City Attorney

22  
23  
24 By:  \_\_\_\_\_  
25 Deputy City Attorney

SUPERVISOR BROWN  
BOARD OF SUPERVISORS

Board of Supervisors, San Francisco

Passed on First Reading

§ Finally Passed

September 28, 1998

§ October 5, 1998

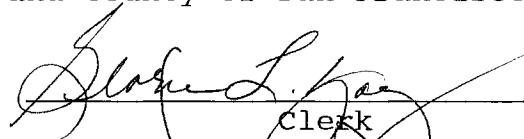
Ayes: Supervisors Ammiano Brown  
Katz Kaufman Leno Medina Newsom  
Teng Yaki Yee


§ Ayes: Supervisors Ammiano Brown  
§ Kaufman Leno Newsom Teng Yee

Absent: Supervisor Bierman

§ Absent: Supervisors Bierman Katz  
§ Medina Yaki

I hereby certify that the foregoing ordinance  
was finally passed by the Board of Supervisors  
of the City and County of San Francisco

  
Clerk

  
Mayor

File No.  
98-0612

OCT -5 1998

Date Approved