

1 [Establishing a Small Local Business Enterprise Program; Prohibiting Discrimination in
2 Contracting and Subcontracting.]

3 **Ordinance amending the San Francisco Administrative Code by adding Chapter 14B to**
4 **establish a Small and Micro Local Business Enterprise Program, prohibit**
5 **discrimination in City contracting, and suspend Chapter 12D.A.**

6 Note: Additions are *single-underline italics Times New Roman*;
7 deletions are *strikethrough italics Times New Roman*.
8 Board amendment additions are double underlined.
9 Board amendment deletions are ~~strikethrough normal~~.

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

11 Section 1. The San Francisco Administrative Code is hereby amended by adding
12 Section 14A.04 to read as follows:

13 **SEC. 14A.04 ENACTING CHAPTER 14A AS A NON-EMERGENCY ORDINANCE.**

14 *This Chapter 14A, which was initially enacted by the Board of Supervisors as an emergency*
15 *ordinance, is hereby enacted as a non-emergency ordinance. Chapter 14A shall apply to all contracts*
16 *initiated on or after July 26, 2004 and before September 1, 2005, and any amendments to such*
17 *contracts, whenever those amendments occur. Chapter 14A shall also apply to any Amendment to a*
18 *Pre-existing Contract (predating July 26, 2004) as that term is defined in Section 14A.4 and as those*
19 *contracts are governed by Section 14A.16(K), provided that the Amendment to a Pre-existing Contract*
20 *is initiated before September 1, 2005.*

21
22 Section 2. The San Francisco Administrative Code is hereby amended by adding
23 Chapter 14B to read as follows:

24 **SEC. 14B.1 PURPOSE AND FINDINGS.**

1 (A) Short Title. *This ordinance shall be entitled “Local Business Enterprise and Non-*
2 *Discrimination in Contracting Ordinance.”*

3 (B) Findings.

4 (1) The Board finds that San Francisco's small businesses are a significant sector of the
5 local economy and form the backbone of our neighborhoods. Small businesses contribute hundreds of
6 millions of dollars to San Francisco's economy each year. Through payroll taxes alone, small
7 businesses make a significant investment in the economic health of our City and the quality of life of its
8 citizens and visitors.

9 (2) Because San Francisco's small businesses experience higher costs than large businesses
10 or businesses located outside the City, they suffer disadvantage in any competition with those
11 businesses. The Board finds that small local businesses are at a competitive disadvantage in competing
12 for work on public contracts. Very small local businesses are at an even greater competitive
13 disadvantage in competing for work on public contracts.

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

17 (4) The Board finds that the disadvantages suffered by very small and very small local
18 businesses in competing as prime contractors on public contracts can be reduced by discounting their
19 bids and ratings by ten percent. Granting a ten percent discount does not unduly burden businesses not
20 eligible for such discounts, and is similar to the corrective adjustments given to small and very local
21 businesses in other jurisdictions.

22 (5) San Francisco has a long history of working to end discrimination in all aspects of
23 public contracting. The City must continue to award and administer its public contracts in a manner
24 that is fair and provides equal opportunity to all local businesses, regardless of race, gender or other
25

1 category protected by law. San Francisco must ensure that it does not discriminate and does not
2 contract with any business that discriminates on the basis of race, gender or other protected category.

3 Specifically, this Board initially passed Ordinance No. 139-84 on April 2, 1984 to combat the
4 City and County of San Francisco's own active and passive participation in discrimination against
5 minority- and women- owned businesses, both in its own contracting for goods and services and in the
6 private market for such goods and services. At the time of passage, women- and minority-owned
7 businesses were virtually excluded as contractors on prime City contracts.

8 Since that time, this Board and the City's Human Rights Commission have actively and
9 extensively documented and studied discrimination against and disadvantages faced by these groups to
10 gauge the effectiveness of the prior Minority, Women and Local Business Enterprise Ordinances (the
11 "M/W/LBE Ordinances") and to assess the need for further and continuing action. The earlier studies
12 are documented in the legislative history of the previous amendments and re- enactments of the
13 ordinance, including Ordinance Nos. 175-89,155-92, 210-97, 457-97, 82-98, 296-989, 210-99, 283-99
14 and [NEED MOST RECENT ORDINANCE NUMBER]. The findings underlying these ordinances have
15 been reviewed and analyzed in the preparation of the current ordinance and are hereby incorporated
16 by reference into the legislative history of this ordinance. These materials include disparity studies,
17 transcripts of live testimony by dozens of witnesses, case studies of discrimination, and voluminous
18 other materials. An index and a separate synopsis of this material are on file with the Clerk of this
19 Board in File No. 98-0612. These materials are all incorporated by reference into the legislative
20 history of this ordinance. The collection and analysis of relevant information is ongoing.

21 On July 26, 2004, the San Francisco Superior Court entered the following order in Coral
22 Construction, Inc. v. City and County of San Francisco (Sup. Ct. No. 421249): "[T]he City is hereby
23 permanently enjoined and prohibited from enforcing or attempting to enforce the race and gender
24 conscious provisions of the MBE/WBE Ordinance or any other public contracting program that
25 discriminates against or grants preferential treatment to any individual or group on the basis of race,

1 sex, color, ethnicity, or national origin in the operation of public contracting now and in the future.”

2 The injunction became effective immediately.

3 In issuing its injunction, the Superior Court did not dispute the accuracy of the City’s disparity
4 studies or otherwise take issue with the City’s underlying findings of discrimination and disparity.

5 However, the Court ruled that California’s Proposition 209 does not allow the City to address the
6 identified problem through its prior methods. The Board finds and declares that the need for the City
7 to identify, rectify, and prevent discrimination in its public contracting still exists, and the City is
8 committed to ensuring that neither MBEs nor WBEs nor any other business is arbitrarily or unfairly
9 excluded from contracting opportunities. The City remains committed to addressing discrimination in
10 public contracting to the fullest extent allowed by law, in a manner that is consistent with all
11 requirements of federal and state law.

12 (C) **Purpose.**

13 (1) Assistance to Small Local Businesses. The City shall assist small and very small local
14 businesses to increase their ability to compete effectively for the award of City contracts. The Mayor
15 shall establish City-wide and department-specific goals for participation by small and very small local
16 businesses in contracting. The City shall provide the bid discounts set forth in this ordinance,
17 information and training, and other assistance to small local businesses in order to reach these goals.
18 The Human Rights Commission and Director shall assist other City departments to implement the goal
19 of increasing participation in City contracts by small local businesses.

20 (2) Nondiscrimination. Neither the City nor any of its officers or employees shall
21 discriminate against any person or business on any basis prohibited by law in the award or
22 administration of City contracts. Persons or businesses that are awarded City contracts shall not
23 discriminate against any person or business on any basis prohibited by law in the performance or
24 administration of any City contract, including in the selection of subcontractors.

1 (3) Human Rights Commission. The Human Rights Commission shall adopt rules and
2 regulations necessary to carry out this ordinance.

3 **SEC. 14B.2 DEFINITIONS.**

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

6 "Bid" means a quotation, proposal, solicitation or offer by a bidder or contractor to perform
7 or provide labor, materials, equipment, supplies or services to the City and County of San Francisco
8 for a price.

9 "Bidder" means any business that submits a bid.

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

11 "Commission" means the Human Rights Commission.

12 "Commodity Contract" means an agreement to purchase any product, including materials,
13 equipment and supplies.

14 "Contract" means any agreement between the City and a person to provide or procure labor,
15 materials, equipment, supplies, or services to, for, or on behalf of the City for a price to be paid out of
16 monies deposited in the City treasury or out of trust monies under the control of or collected by the
17 City. A "contract" includes an agreement between a non-profit or public entity and a contractor for
18 the performance of construction or construction-related services, where the contract is funded by the
19 City. A "contract" does not include: (1) grants, whether funded by the City or by federal or state grant
20 funds, to a nonprofit entity to provide services to the community; (2) sales of the City's personal or real
21 property; (3) loan transactions, whether the City is a debtor or creditor; (4) lease, franchise, or
22 concession agreements; (5) agreements to use City real property; (6) gifts of materials, equipment,
23 supplies or services to the City; or (7) agreements with a public agency except for construction projects
24 as provided above.

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

5 “Contractor” means any person who enters into a contract with the City.

6 “Director” means the Director of the Human Rights Commission, or his or her designee.

7 “Discount” means a downward adjustment in price or upward adjustment in rating of a
8 proposal, whichever applies, that is made under Section 14B.4.

9 “General services contract” means an agreement for those services that are not professional
10 services. Examples of "general services" include: janitorial, security guard, pest control, parking lot
11 management and landscaping services.

12 “Local Business Enterprise (LBE)” means a business that is certified as an LBE under Section
13 14B.3(B). LBEs are either Small-LBEs or Micro-LBEs.

14 “Minority business enterprise (MBE)” means a business that is certified as an MBE under
15 Section 14B.3(B).

16 “Other Business Enterprise (OBE)” means a business that is certified as an OBE under Section
17 14B.3(B).

18 “Person” means any individual or group of individuals, including but not limited to
19 partnerships, associations, corporations, and non-profit entities.

20 “Professional services contract” means an agreement for services that require extended
21 analysis, the exercise of discretion and independent judgment, or the application of an advanced,
22 specialized type of knowledge, expertise, or training customarily acquired either by a prolonged course
23 of study or equivalent experience in the field. Examples of professional service providers include
24 licensed professionals such as accountants, and non-licensed professionals such as software developers
25 and financial consultants. For the purpose of this ordinance, a contract for architectural, engineering,

1 or other professional design, consulting or construction management services for a public work project
2 shall be considered an architect/engineering contract and not a professional services contract.

3 “Public works/construction contract” means an agreement for the construction, alteration or
4 demolition of any public building, structure, or facility that is performed by or for the City, and the cost
5 of which is to be paid wholly or partially out of moneys deposited in the City treasury. For purposes of
6 this ordinance only, "public works/construction contract" includes contracts between a person,
7 including a non-profit entity, and a contractor for construction or construction-related services, where
8 the contract is funded by the City.

9 “Subcontractor” means any person providing goods or services to a contractor or
10 subcontractor in fulfillment of the contractor's or subcontractor's obligations arising from a contract
11 with the City.

12 "Woman Business Enterprise (WBE)" means a business that is certified as a WBE under Section
13 14B.3(B).

14 **SEC. 14B.3 CERTIFICATION.**

15 (A) **LBE Certification.** The Director shall certify as an LBE any business that meets all of
16 the following criteria.

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

19 (2) The business is continuously in operation.

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

21 (4) The business performs a commercially useful function. A commercially useful function
22 is a function required by the City as described in a request for proposals, request for qualifications or
23 other solicitation. Contractors or subcontractors providing brokerage, referral or temporary
24 employment services shall not be deemed to perform a commercially useful function unless the
25 brokerage, referral or temporary employment services are those required and sought by the City.

1 (5) The business has a fixed office within the geographic boundaries of the City. The office
2 must provide all of the services for which LBE certification is sought, other than work required to be
3 performed at a job site. Suppliers must maintain a warehouse in the City that is continuously stocked
4 with inventory consistent with their certification. Truckers must park their registered vehicles and
5 trailers within the City.

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

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

16 (7) The business' principal place of business has been located in San Francisco for at least
17 six months preceding the application for certification.

18 (8) The business owner has licenses or other relevant trade or professional certifications
19 that are appropriate for the type of business for which the business seeks certification.

20 (9) The business has average gross annual receipts in the prior three fiscal years that do not
21 exceed the following limits: (1) public works/ construction - \$14,000,000; (2) specialty construction
22 contractors - \$7,000,000; (3) goods/ materials/ equipment and general services - \$7,000,000; (4)
23 professional services and architect/engineering - \$2,500,000; and (5) trucking - \$3,500,000. Gross
24 receipts shall be determined by the City, according to recognized accounting methodologies that the
25 City determines most accurately reflect the actual money that the business received during the relevant

1 period. Any business under common ownership, in whole or in part, with any other business meets the
2 requirements of this subparagraph only if the aggregate gross annual receipts of all of the businesses
3 under such common ownership do not exceed these limits. All businesses owned by family members,
4 including married spouses or domestic partners, siblings, or parents and children, are considered
5 under common ownership unless the businesses are in unrelated industries and no community property
6 or other jointly owned assets were used to establish or are used to operated either business.

7 (B) **Small – LBE.** The Director shall certify as a "Small – LBE" any business that meets the
8 requirements of 14B.3(A).

9 (C) **Micro – LBE.** The Director shall certify as a "Micro – LBE" any business that meets
10 the requirements in 14B.3(A) and also has average gross annual receipts in the prior three fiscal years
11 that do not exceed the following limits: (1) public works/ construction - \$7,000,000; specialty
12 construction contractors - \$3,500,000; (2) goods/ materials/ equipment and general services -
13 \$3,500,000; (3) professional services and architect/engineering - \$1,250,000; and (4) trucking -
14 \$1,750,000. Any business under common ownership, in whole or in part, with any other business meets
15 the requirements of this subparagraph only if the aggregate gross annual receipts of all of the
16 businesses under such common ownership do not exceed these limits. All businesses owned by married
17 spouses or domestic partners are considered under common ownership unless the businesses are in
18 unrelated industries and no community property or other jointly owned assets were used to establish or
19 are used to operated either business.

20 (D) **MBE Certification.** The Director shall certify as an MBE any business that is certified
21 as an LBE and is owned and controlled by one or more minority persons.

22 (1) An individual owns a business if that individual:

23 (a) Possess a record ownership interest, such as partnership interest or stock interest, of at
24 least 51 percent of the business;

1 (b) Possess incidents of ownership, including an interest in profit and loss, equal to at least
2 the required record ownership interest;

3 (c) Contributes capital to the business equal to at least the required record ownership
4 percentage. Unsecured promissory notes or notes secured by the business or business assets are not
5 sufficient to constitute capital contributions; and

6 (d) Contributes expertise relevant to the business' commercially useful functions
7 proportionate to the stated ownership interest.

8 (2) An individual controls a business if that individual possess the legal authority to manage
9 business assets, good will and the daily operations of a business, and actively and continuously
10 exercises such authority. To control a business under this ordinance, a person must reside in the
11 United States or its territories.

12 (3) A minority person is a member of one or more of the following ethnic groups:

13 (a) African Americans, defined as persons whose ancestry is from any of the Black racial
14 groups of Africa or the Caribbean;

15 (b) Arab Americans, defined as persons whose ancestry is from an Arabic speaking country
16 that is a current or former member of the League of Arab States;

17 (c) Asian Americans, defined as persons with Chinese, Japanese, Korean, Pacific Islander,
18 Samoan, Filipino, Asian Indian, and Southeast Asian ancestry;

19 (d) Iranian Americans, defined as persons whose ancestry is from the country of Iran;

20 (e) Latino Americans, defined as persons with Mexican, Puerto Rican, Cuban, Central
21 American or South American ancestry. Persons with European Spanish ancestry are not included as
22 Latino Americans; and

23 (f) Native Americans, defined as any person whose ancestry is from any of the original
24 peoples of North America, and who maintains cultural identification through tribal affiliation or
25 community recognition.

1 (E) **WBE Certification.** The Director shall certify as a WBE any business that is certified as
2 an LBE and is owned and controlled, as provided in Section 14B.3(D)(1) and (2) above, by one or more
3 women.

4 (F) **OBE Certification.** The Director shall certify as an OBE any business that is certified
5 as an LBE and is not certified as owned and controlled by one or more women or one or more minority
6 persons.

7 (G) **Exception.** Notwithstanding the criteria in this Section 14B.3, no business that is owned
8 in part or in whole by a full time City employee or by a full or part time City officer is eligible for
9 certification as an LBE.

10 (H) **Period of Certification.** The Director shall certify Small – LBEs for a period of not to
11 exceed three years. The Director shall certify Micro – LBEs every year. Businesses must continuously
12 meet the criteria in this Section throughout the period of certification.

13 **SEC. 14B.4 PRIME CONTRACTS.**

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

19 (1) Arranging contracts by size and type of work to maximize the opportunities for LBEs to
20 participate. This includes dividing projects into smaller parts. As soon as practical before soliciting
21 bids or proposals, contract awarding authorities shall submit large contract proposals to the Director
22 for review. The Director shall determine whether the proposed contract can be divided into smaller
23 contracts so as to enhance the opportunity for participation by LBEs. For purposes of this paragraph,
24 “large project” means any public works/construction contract estimated to cost more than \$5,000,000
25 and any professional services contract estimated to cost more than \$100,000. If the Director

1 determines, after consulting with the contract awarding authority, that the contract can be divided into
2 smaller contracts, the contract awarding authority shall comply with the Director's determination and
3 issue the solicitation for bids or proposals in accordance with the Director's determination.

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

6 (3) Advertising in general circulation media, trade association publications and local business
7 media, and posting the contacting opportunity on the department's website or other centralized City
8 website.

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

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

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

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

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

22 (C) **Non-Discrimination in Prime Contracting.** Contract awarding authorities shall ensure
23 that all aspects of the contracting process are free from discrimination against any person on any basis
24 prohibited by law, and ensure broad contracting opportunities for all categories of LBEs. Contract
25

1 awarding authorities shall maintain such documentation of their selection process as required by the
2 Director to monitor and ensure compliance with this provision.

3 (D) **Contracts Subject to Prime Bidding Discounts.** Contract awarding authorities shall
4 apply discounts to the following contracts:

5 (1) Public works/construction contracts the estimated cost of which exceeds \$10,000;

6 (2) Commodities contracts the estimated cost of which exceeds \$2,500;

7 (3) General services contracts the estimated cost of which exceeds \$10,000;

8 (4) Architect/engineering contracts the estimated cost of which exceeds \$10,000; and

9 (5) Professional service contracts the estimated cost of which exceeds \$10,000.

10 (E) **Amount of Discount.** Unless otherwise provided in this ordinance, contract awarding
11 authorities shall apply a 10% discount to any bid from a Small – LBE or Micro – LBE. Contract
12 awarding authorities shall apply these discounts to each stage of the selection process, including
13 qualifications, proposals and interviews.

14 (F) **Required Contract Terms.** Contract awarding authorities shall ensure that all
15 contracts subject to this ordinance include the following requirements, in addition to other
16 requirements set forth in the municipal code. ~~[[INSERT REQUIRED CONTRACT TERMS,~~
17 **INCLUDING:**

- 18 • NONDISCRIMINATION AGAINST SUBS
- 19 • WILLFUL FAILURE IS A MATERIAL BREACH
- 20 • PENALTIES
- 21 • REQUIREMENT TO MAINTAIN RECORDS AND MAKE AVAILABLE AT ANY TIME
22 FOR PURPOSES OF COMPLIANCE WITH THIS ORDINANCE
- 23 • REQUIREMENT TO PAY SUBS PROMPTLY.]]

24 (F) **Exceptions.**

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

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

7 (G) **Waivers.** The Director shall waive the LBE discounts, and report the waiver to the
8 Commission, if:

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

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

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

21 (H) **Pilot Set-Aside Program.** The Director may set aside any contract under \$100,000 for
22 competitive award to Micro – LBEs. The Director may set aside a contract provided that at least two
23 certified businesses submit bids and the contract awarding authority determines that the contract can
24 be awarded at a fair market price. Contract awarding authorities shall have a goal of setting aside
25 25% of all contracts under \$100,000 in each fiscal year.

1 Micro – LBEs must serve a commercially-useful function based on the contract's scope of work,
2 and must perform at least 50% of the contract work.

3 (I) **Prompt payment.** The City shall pay LBEs within 30 days of the date on which the City
4 receives an invoice for work performed for and accepted by the City. The Controller shall work with
5 the Director and contract awarding authorities to implement this City-wide prompt-payment policy.

6 **SEC. 14B.5 SUBCONTRACTING.**

7 (A) **LBE Participation Goals.** Prior to soliciting bids or proposals, contract awarding
8 authorities shall provide the Director with a proposed job scope for all public work/construction,
9 architect/engineering, professional service and general service contracts. The contract awarding
10 authority may ask the Director to waive subcontracting goals where it anticipates that there are no
11 subcontracting opportunities or there are not sufficient LBEs available to perform the subcontracting
12 work available on the contract.

13 The Director shall set LBE participation goals for each contract, where appropriate, based on
14 the following factors:

15 (1) The extent of subcontracting opportunities presented by the contract;

16 (2) The availability of LBE subcontractors capable of providing goods and services on the
17 contract.

18 (B) **Requirements for Bids on Contracts with LBE Goals.**

19 (1) All bidders shall use good faith outreach, as set forth below, to select subcontractors to
20 meet any LBE goals that are set under Section 14B.5(A).

21 (2) Bids that do not meet an LBE participation goal set under 14B.5(A) will be rejected as
22 non-responsive. Bids that do not contain the required documentation of outreach will be rejected as
23 non-responsive.

24 (3) Any bidder that is required to conduct outreach to LBEs shall document that outreach
25 and submit the documentation with its bid. Such documentation shall include: (a) the dollar amount of

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

13 (C) **Good Faith Outreach.**

14 (1) Good faith outreach to LBEs shall include:

15 (a) Attending any presolicitation or prebid meetings scheduled by the City to inform all
16 bidders of LBE program requirements for the project for which the contract is awarded;

17 (b) Identifying and selecting subcontracting opportunities to meet LBE goals;

18 (c) Advertising for LBE subcontractors by posting the opportunity in an accessible location,
19 specified by the City, not less than 10 calendar days before the date the bids can first be submitted.

20 This paragraph applies only if the City gave public notice of the project not less than 15 calendar days
21 prior to the date the bids can first be submitted;

22 (d) Contacting LBEs certified to perform the identified work;

23 (e) Providing LBEs that have notified the bidder of their interest with adequate information
24 about the plans, specifications, and requirements for the work, provided that the Director may cap the
25 number of contacts required;

1 (d) Negotiating in good faith with LBEs, and not unjustifiably rejecting their bids or
2 proposals; and

3 (e) Advising and assisting interested LBEs to obtain bonds, lines of credit, or insurance
4 required by the City or the bidder.

5 **SEC. 14B.6 ENSURING NON-DISCRIMINATION IN SUBCONTRACTING.**

6 (A) **Prohibition on Discrimination.** A bidder may not discriminate in its selection of
7 subcontractors against any person on the basis of race, gender, or any other basis prohibited by law.

8 (B) **Availability Data.** In order to prevent unlawful discrimination in the selection of
9 subcontractors, and to identify and correct unlawful practices, the City will monitor the administration
10 of City contracts, including the selection of subcontractors, as provided in this Section. For public
11 work/construction, architect/engineering, professional service, and general service contracts which the
12 contract awarding authority reasonably anticipates will include subcontractor participation, prior to
13 the solicitation of bids or proposals, the Director shall assemble data regarding the availability of
14 MBEs, WBEs and OBEs to provide work that is likely to be subcontracted. The Director, in the
15 Director's sole discretion, shall determine the appropriate methodology.

16 (C) **Requirements for Solicitations.** In all solicitations of public work/construction,
17 architect/engineering, professional service, and general service contracts which the contract awarding
18 authority reasonably anticipates will include subcontractor participation, the contract awarding
19 authority shall include the availability data described above. Bidders shall undertake all required
20 good faith efforts outreach steps in such a manner as to ensure that neither MBEs nor WBEs nor OBEs
21 are unfairly or arbitrarily excluded from the required outreach.

22 (D) **Review of Bid.** The Director may review or investigate any bid, including the selection
23 of the bidder's subcontractors, to determine whether discrimination may have occurred. The Director
24 shall review bids, during the bid protest period, to determine whether: (1) a potential subcontractor or
25 other person has filed a complaint of discrimination; (2) there is a significant difference between the

1 percentages of MBEs, WBEs, or OBEs available to provide goods and services as subcontractors on
2 the contract and the percentages of the bidder's subcontractors who are MBEs, WBEs, or OBEs; or (3)
3 other facts and circumstances suggest that further inquiry is warranted. The Director, in the Director's
4 sole discretion, shall determine whether and when to investigate further the conduct of a bidder or
5 contractor. Investigations will be conducted under the procedures in Section 14B.9.

6 **SEC. 14B.7 DATA, MONITORING AND COMPLIANCE.**

7 [[INSERT MONITORING AND COMPLIANCE PROCESSES, INCLUDING:

- 8 • DIRECTOR'S SANCTION AUTHORITY (OVER BOTH CONTRACTOR AND
9 DEPARTMENTS)
- 10 • DIRECTOR'S ANNUAL REPORT TO THE BOARD
- 11 • DATA TO BE COLLECTED AND MAINTAINED BY THE DIRECTOR (CERTIFIED
12 BUSINESSES, EVALUATION OF ACHIEVEMENT OF LBE GOALS,
13 DISCRIMINATION TRACKING SYSTEM)
- 14 • DATA TO BE MAINTAINED BY CONTRACT AWARDING AUTHORITIES
15 (INCLUDING REPORTS ON SET-ASIDES)
- 16 • CONTRACTORS AND SUBS MUST MAINTAIN RECORDS
- 17 • POWER TO AUDIT FOR PURPOSES OF ORDINANCE (AND DUTY TO AUDIT A
18 MINIMUM NUMBER OF CONTRACTS ANNUALLY)
- 19 • CONTRACTOR OBLIGATION TO PAY SUBS
- 20 • DIRECTOR'S REVIEW OF CONTRACTS MODS
- 21 • MONITORING COMPLIANCE DURING CONTRACT PERFORMANCE PERIOD
- 22 • CONTRACT CLOSURE REPORT
- 23 • DIRECTOR ASSISTANCE TO DEPARTMENTS IN SELECTION PROCESSES (AND
24 THE ABILITY OF THE DIRECTOR TO INTERVENE IN THE SELECTION PROCESS)
- 25 • REPORTS OF NONCOMPLIANCE TO COMMISSION AND BOARD

- 1 • WAIVER REPORTS
- 2 • CONTROLLER'S DUTIES
- 3 • DUTIES OF THE OFFICE OF CONTRACT ADMINISTRATION
- 4 • DUTIES OF THE MAYOR (INCLUDING GOAL-SETTING AND
- 5 COORDINATING/ENFORCING DEPARTMENTAL COMPLIANCE)]]

6 **SEC. 14B.8 BONDING AND OTHER ASSISTANCE.**

7 **(A) Bonding and Financial Assistance Program.**

8 (1) Program Description. The City and County of San Francisco, acting through the
9 Commission, intends to provide guarantees to private bonding companies and financial institutions in
10 order to induce those entities to provide required bonding and financing to eligible contractors and
11 subcontractors bidding on and performing City public work contracts. This bonding and financial
12 assistance program is subject to the provisions of this Section 14B.8(A).

13 (2) Eligible Contracts. The assistance described in this Section 14B.8(A) shall be available
14 for any City public works contract awarded in accordance with San Francisco Administrative Code
15 Chapter 6.

16 (3) Eligible Businesses. Businesses must meet the following criteria to qualify for
17 assistance under this Section 14B.8(A):

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

19 (b) The business must be certified by the Director as an LBE according to the requirements
20 of Section 14A.3;

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

23 (i) Bond application assistance,

24 (ii) Assistance in developing financial statements,

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

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

2 (v) Development of accurate financial reporting tools.

3 (4) Agreements Executed by the Human Rights Commission. The Director is hereby
4 authorized to enter into the following agreements in order to implement the bonding and financial
5 assistance program described in this Section 14B.8(A):

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

8 (b) With respect to a construction loan to be made to a contractor or subcontractor, an
9 agreement to guaranty up to 50 percent of the original principal amount of the construction loan or 50
10 percent of the actual loss suffered by the financial institution as a result of a loan default, whichever is
11 less; provided that in any event the City's obligations with respect to a guaranty shall not exceed
12 \$750,000;

13 (c) Any other documents deemed necessary by the Director to carry out the objectives of
14 this program, provided that such documents shall be subject to review and approval by the City
15 Attorney's Office.

16 (5) Monitoring and Enforcement. The Director shall maintain records on the use and
17 effectiveness of this program, including but not limited to (1) the identities of the businesses and
18 bonding companies participating in this program, (2) the types and dollar amounts of public work
19 contracts for which the program is utilized, and (3) the types and dollar amounts of losses which the
20 City is required to fund under this program. The Director shall submit written reports to the Board of
21 Supervisors every six months beginning January 1, 2006, advising the Board of the status of this
22 program and its funding capacity, and an analysis of whether this program is proving to be useful and
23 needed.

24 (6) Funding and Accounts. As of September 1, 2005, funding for this program may be
25 derived from the following sources:

1 (a) The Board of Supervisors has appropriated or will appropriate funds for the operation
2 of this program.

3 (b) Each Department authorized to contract for public works or improvements pursuant to
4 San Francisco Administrative Code Chapter 6 shall commit to this program up to ten percent (10%),
5 but not less than one percent (1%), of the budget for every public work or improvement undertaken. (A
6 "public work or improvement" is defined in San Francisco Administrative Code Chapter 6.) This
7 subsection is effective for those public works or improvements where the award of the construction
8 contract (as defined and regulated by Administrative Code Chapter 6) occurs after September 1, 2005.

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

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

17 (7) Term of Bonding Assistance Program. The Director is authorized to enter into the
18 agreements described in this Subsection for a period ending on the earlier of (1) June 30, 2008 or (2)
19 the date on which the Controller is no longer able to certify the availability of funds for any new
20 guarantee agreement.

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

1 (C) **Education and Training.** The Director shall continue to develop and to strengthen
2 education and training programs for LBEs and City contract awarding personnel.

3 (D) **Cooperative Agreements.** With the approval of the Commission and the Board of
4 Supervisors, the Director may enter into cooperative agreements with agencies, public and private,
5 concerned with increasing the use of LBEs in government contracting.

6 **SEC. 14B.9 ENFORCEMENT.**

7 (A) **Investigations.** The Director shall investigate potential violations of this ordinance.
8 Bidders, contractors, subcontractor and applicants for certification shall provide to the City
9 any information that the City deems relevant, and shall cooperate in all other respects with such an
10 investigation. A request for information from a bidder, contractor, subcontractor or applicant shall
11 identify the records required and the time for response. If the bidder, contractor, subcontractor or
12 applicant fails to respond to the request for information, or otherwise fails to cooperate in the
13 investigation, appropriate sanctions, as provided in Section 14B.9(C), may be imposed. In an
14 investigation of potential discrimination by a prime bidder prior to contract award, if the bidder fails to
15 respond to the request for information, or otherwise fails to cooperate in the investigation, the bid will
16 be rejected as non-responsive, and additional sanctions may be imposed.

17 (B) **Conference and Conciliation.**

18 In the Director's sole discretion, the Director may attempt to resolve noncompliance with this
19 ordinance by any applicant for certification, bidder, contractor or subcontractor through informal
20 processes, including conference and conciliation.

21 (C) **Sanctions.** The City, including the Director and contract awarding authorities, as
22 appropriate, may impose any of the following sanctions on a bidder, contractor, subcontractor or
23 applicant for certification who fails to comply with this ordinance, provided that any violation related
24 to certification must be based on a finding by the Director:

25 (1) **Reject all bids;**

1 (2) Declare a bid non-responsive;

2 (3) Suspend a contract;

3 (4) Withhold funds;

4 (5) Assess penalties;

5 (6) Debar a bidder;

6 (7) Deny certification;

7 (8) Revoke certification.

8 **(D) Procedures for Denials or Revocation of Certification.** Whenever the Director
9 proposes to deny an application for or revoke the certification of a business, the Director shall notify
10 the applicant or certified business in writing of the basis for the denial or revocation, and the date on
11 which the business will be eligible to reapply for certification. The Director shall provide the applicant
12 or certified business with an opportunity to be heard before a final determination is made. The
13 Director shall require a business to wait at least six months but not more than two years after the
14 denial or revocation before reapplying for certification.

15 **(E) Procedures for Director Findings of Discrimination.**

16 In determining whether a bidder, contractor or subcontractor has engaged in discrimination in
17 violation of this ordinance, the Director may consider: (1) direct evidence of discrimination, (2)
18 procedures used to select subcontractors, including relative qualifications, (3) significant differences
19 not attributable to any legitimate non-discriminatory business reason between the available
20 percentages of MBEs, WBEs, or OBEs capable of providing goods and services as subcontractors on a
21 contract or a series of contracts and the percentages of the bidder's subcontractors who are MBEs,
22 WBEs, or OBEs, or (4) any other relevant evidence.

23 Whenever the Director proposes to issue a finding of discrimination against any bidder,
24 contractor or subcontractor, the Director shall notify the bidder, contractor or subcontractor in writing
25 of the basis for the finding, provided that any proposal to debar a business shall be governed by Section

1 14B.9(F). The Director shall provide the bidder, contractor or subcontractor with an opportunity to be
2 heard before a final determination is made.

3 (F) **Procedures for Debarment.** The Director shall have the authority to act as a charging
4 official under San Francisco Administrative Code Chapter 28 to debar a bidder or contractor for
5 violations of this Chapter. The debarment procedures of Chapter 28 shall govern.

6 (G) **Commission to Hear Appeals.** Except as provided in Section 14B.9(F), the Commission
7 shall hear appeals challenging any determination of the Director under this section. The Commission
8 may sustain, reverse or modify the Director's findings and sanctions imposed, or take such other action
9 to effectuate the purpose of this ordinance. Unless the Commission so orders, an appeal shall not stay
10 the Director's findings and the imposition of sanctions.

11 (H) **Referral to Other Agencies.** If the Director has reason to believe that any person has
12 knowingly made, filed, or caused to be filed with the City any materially false or misleading statement
13 or report made in connection with this ordinance, the Director shall report that information to the City
14 Attorney or the District Attorney for appropriate action.

15 **SEC. 14B.10 APPLICABILITY, OPERATIVE DATE AND TRANSITION PROVISIONS.**

16 (A) **Suspension of Chapter 12D.A.** All provisions of Administrative Code Chapter 12D.A
17 that were invalidated by the Superior Court orders dated July 26 and August 23, 2004, in Coral
18 Construction, Inc. v. City and County of San Francisco (Sup. Ct. No. 421249) shall be and are
19 suspended and are of no force and effect; provided, however, the provisions of Chapter 12D.A that
20 were invalidated by the court's orders shall be suspended only so long as, and only to the extent that,
21 the City is enjoined by the court from enforcing the provisions of Chapter 12D.A. If the injunction is
22 lifted or stayed in its entirety, Chapter 12D.A shall automatically become effective and enforceable,
23 and this Chapter 14B shall be suspended.

24 (B) **Operative date of this Chapter.** Chapter 14B shall become operative on September 1,
25 2005, and shall govern all contracts initiated on or after that date.

1 (C) **Applicability.**

2 (1) This Chapter 14B shall govern all contracts initiated on or after September 1, 2005, and
3 any amendments thereto.

4 (2) This Chapter 14B shall govern any substantive amendment to a contract initiated before
5 July 26, 2004, the term of which has not expired on or before September 1, 2005, other than an
6 amendment to decrease the scope of work or decrease the amount to be paid under a contract. The
7 contract awarding authority shall notify the Director of the proposed amendment and the Director
8 shall assemble and transmit the data described in Section 14B.6 for any such amendment. If the
9 contract was subject to Chapter 12D.A, the amendment shall provide that the contractor shall comply
10 instead with this Chapter 14B.

11 (3) For all contracts described in 14B.10(C)(1) and (2), when any provision of the San
12 Francisco Municipal Code or other local law refers to Chapter 12D.A of the San Francisco
13 Administrative Code, it shall be read as referring instead to Chapter 14B.

14 (D) **Transition Provisions.** Because San Francisco Administrative Code 14A required a
15 business to meet all of the criteria listed in 14B.3 in order to be certified as a Disadvantaged Business
16 Enterprise ("DBE") under Section 14A, and because every business certified as an DBE under Section
17 14A did meet those criteria, the prior DBE certification under San Francisco Administrative Code 14A
18 shall constitute certification as an LBE under this ordinance, unless the Director determines that any
19 such business no longer meets the criteria set forth for certification in Section 14B.3. LBE certification
20 under this paragraph shall expire on the date that the DBE certification under Section 14A would have
21 expired.

22 The Director shall deem any application for DBE certification under 14A that is pending on the
23 effective date of this ordinance to be an application for certification under Chapter 14B.

24 (E) **State or Federal Provisions.** In contracts which involve the use of any funds furnished,
25 given or loaned by the government of the United States or the State of California, all laws, rules and

1 regulations of the government of the United States or the State of California or of any of its
2 departments relative to the performance of such work and the conditions under which the work is to be
3 performed, shall prevail over the requirements of this ordinance when such laws, rules or regulations
4 are in conflict.

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

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