

AMENDMENT OF THE WHOLE - 8/3/05

FILE NO. 050784

ORDINANCE NO.

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 (A) *This Chapter 14A, which was initially enacted by the Board of Supervisors as an*
15 *emergency ordinance, is hereby enacted as a non-emergency ordinance. Chapter 14A shall apply to all*
16 *contracts initiated on or after July 26, 2004 and before September 1, 2005, and any*
17 *amendments to such contracts, whenever those amendments occur. Chapter 14A shall also*
18 *apply to any Amendment to a Pre-existing Contract (predating July 26, 2004) as that term is*
19 *defined in Section 14A.4 and as those contracts are governed by Section 14A.16(K), provided*
20 *that the Amendment to a Pre-existing Contract is initiated before September 1, 2005. (1) all*
21 *contracts in which the Contractor agreed to comply with Chapter 14A and any amendment to*
22 *those contracts and (2) all contracts initiated on or after July 26, 2004 and before January 1,*
23 *2006 and any amendment to such contracts; provided, however, that if a competitive*
24 *solicitation for an agreement to the proposed changes to the contract is required by law, or*
25

1 the law would otherwise require execution of a new contract, rather than an amendment to an
2 existing contract, the provisions of Chapter 14B and not Chapter 14A shall apply .

3 (B) Any amendment to a contract initiated before July 26, 2004 in which the
4 Contractor agreed to comply with Chapter 12D.A shall be governed by Chapter 12D.A;
5 provided, however, that if a competitive solicitation for an agreement to the proposed changes
6 to the contract is required by law, or the law would otherwise require execution of a new
7 contract, rather than an amendment to an existing contract, the provisions of Chapter 14B and
8 not Chapter 12D.A shall apply.

9 (C) All contracts initiated on or after January 1, 2006 shall be governed by Chapter
10 14B.

11
12 Section 2. The San Francisco Administrative Code is hereby amended by adding
13 Chapter 14B to read as follows:

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

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

17 (B) **Findings.**

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

23 (2) Because San Francisco's small businesses experience higher costs than large businesses
24 or businesses located outside the City, they suffer disadvantage in any competition with those
25 businesses. The Board finds that small local businesses are at a competitive disadvantage in competing

1 for work on public contracts. Because of their size, ~~very small,~~ or "micro," local businesses are at
2 an even greater competitive disadvantage in competing for work on public contracts.

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

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

12 (5) San Francisco has a long history of working to end discrimination in all aspects of
13 public contracting. The City must continue to award and administer its public contracts in a manner
14 that is fair and provides equal opportunity to all local businesses, regardless of race, gender or other
15 category protected by law. San Francisco must ensure that it does not discriminate and does not
16 contract with any business that discriminates on the basis of race, gender or other protected category.

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

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

1 are documented in the legislative history of the previous amendments and re-enactments of the
2 ordinance, including Ordinance Nos. 175-89, 155-92, 210-97, 457-97, 82-98, 296-98, 210-99, 283-99
3 and [NEED MOST RECENT ORDINANCE NUMBER] 134-03. The findings underlying these
4 ordinances have been reviewed and analyzed in the preparation of the current this ordinance and are
5 hereby incorporated by reference into the legislative history of this ordinance. These materials include
6 disparity studies, transcripts of live testimony by dozens of witnesses, case studies of discrimination,
7 and voluminous other materials. An index and a separate synopsis of this material are on file with the
8 Clerk of this Board in File No. 98-0612. These materials are all incorporated by reference into the
9 legislative history of this ordinance. The collection and analysis of relevant information is ongoing.

10 On July 26, 2004, the San Francisco Superior Court entered the following order in Coral
11 Construction, Inc. v. City and County of San Francisco (Sup. Ct. No. 421249), the San Francisco
12 Superior Court enjoined the City from enforcing certain provisions of the M/W/LBE
13 Ordinance.: “[T]he City is hereby permanently enjoined and prohibited from enforcing or
14 attempting to enforce the race and gender conscious provisions of the MBE/WBE Ordinance
15 or any other public contracting program that discriminates against or grants preferential
16 treatment to any individual or group on the basis of race, sex, color, ethnicity, or national
17 origin in the operation of public contracting now and in the future.” In a subsequent order, the
18 court clarified that the injunction applied to Sections 12D.A.6, 12D.A.7, 12D.A.8, 12D.A.9,
19 12D.A.10, 12D.A.14, and 12D.A.17 of the Administrative Code, for all contracts for which bids
20 or proposals are advertised or solicited on or after July 26, 2004. The injunction became
21 effective immediately.

22 In issuing its injunction, the Superior Court did not dispute the accuracy of the City’s disparity
23 studies or otherwise take issue with the City’s underlying findings of discrimination and disparity.
24 However, the Court ruled that California’s Proposition 209 does not allow the City to address the
25 identified problem through its prior methods. The Board finds and declares that the need for the City

1 to identify, rectify, and prevent discrimination in its public contracting still exists, and the City is
2 committed to ensuring that neither MBEs nor WBEs nor any other business is arbitrarily or unfairly
3 excluded from contracting opportunities. The City remains committed to addressing discrimination in
4 public contracting to the fullest extent allowed by law, in a manner that is consistent with all
5 requirements of federal and state law.

6 **(C) Purpose.**

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

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

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

22 **SEC. 14B.2 DEFINITIONS.**

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

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

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

11 “Bidder” means any business that submits a bid or proposal.

12 “City” means the City and County of San Francisco.

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

1 stock the required product, no more than five percent of the cost of the product shall be
2 credited towards LBE participation goals.

3 “Commission” means the Human Rights Commission.

4 “Commodity Contract” means an agreement to purchase any product, including materials,
5 equipment and supplies.

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

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

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

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

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

1 "General services contract" means an agreement for those services that are not professional
2 services. Examples of "general services" include: janitorial, security guard, pest control, parking lot
3 management and landscaping services.

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

10 "Local Business Enterprise (LBE)" means a business that is certified as an LBE under Section
11 14B.3(B). LBEs are either Small-LBEs or Micro-LBEs, and are either MBEs, WBEs, or OBEs.

12 "Minority business enterprise (MBE)" means a business that is certified as an MBE under
13 Section 14B.3(BD).

14 "Other Business Enterprise (OBE)" means a business that is certified as an OBE under Section
15 14B.3(BE).

16 "Person" means any individual or group of individuals, including but not limited to
17 partnerships, associations, and corporations, and non-profit entities.

18 "Professional services contract" means an agreement for services that require extended
19 analysis, the exercise of discretion and independent judgment, or the application of an advanced,
20 specialized type of knowledge, expertise, or training customarily acquired either by a prolonged course
21 of study or equivalent experience in the field. Examples of professional service providers include
22 licensed professionals such as accountants, and non-licensed professionals such as software developers
23 and financial consultants. For the purpose of this ordinance, a contract for architectural, engineering,
24 or other professional design, consulting or construction management services for a public work project
25 shall be considered an architect/engineering contract and not a professional services contract.

1 "Public works/construction contract" means an agreement for the construction, alteration or
2 demolition of any public building, structure, or facility the erection, construction, renovation,
3 alteration, improvement, demolition, excavation, installation, or repair of any public building,
4 structure, infrastructure, bridge, road, street, park, dam, tunnel, utility or similar public facility
5 that is performed by or for the City, and the cost of which is to be paid wholly or partially out of
6 moneys deposited in the City treasury. For purposes of this ordinance only, "public works/construction
7 contract" includes contracts between a person, including a non-profit entity or public agency, and a
8 contractor for construction or construction-related services, where 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(BE).

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

1 ~~and sought by the City.~~

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

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

16 Suppliers must maintain a warehouse in the City that is continuously stocked with
17 inventory consistent with their certification. Truckers must park their registered vehicles and
18 trailers within the City. For architecture/engineering firms, the San Francisco office must be
19 the firm's principal place of business, where the majority of the firm's principals are based and
20 from which at least 51 percent of the firm's payroll tax is paid.

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

22 (7) The business' ~~principal place of business~~ has been located and doing business in
23 San Francisco for at least six months preceding the application for certification.

24 (8) The business owner has licenses or other relevant trade or professional certifications,
25 or, where licensing is not required, relevant training and experience, that are appropriate for the

1 type of business for which the business seeks certification.

2 (9) The business has average gross annual receipts in the prior three fiscal years that do not
3 exceed the following limits: (1) public works/ construction - \$14,000,000; (2) specialty construction
4 contractors - \$7,000,000; (3) goods/ materials/ equipment and general services - \$7,000,000; (4)
5 professional services and architect/engineering - \$2,500,000; and (5) trucking - \$3,500,000. Gross
6 receipts shall be determined by the City, according to recognized accounting methodologies that the
7 City determines most accurately reflect the actual money that the business received during the relevant
8 period. Any business under common ownership, in whole or in part, with any other business meets the
9 requirements of this subparagraph only if the aggregate gross annual receipts of all of the businesses
10 under such common ownership do not exceed these limits. All businesses owned by ~~family members,~~
11 ~~including married spouses or domestic partners, siblings, or parents and children,~~ are considered
12 under common ownership unless the businesses are in unrelated industries and no community property
13 or other jointly owned assets were used to establish or are used to operate either business.

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

16 (C) **Micro – LBE.** The Director shall certify as a "Micro – LBE" any business that meets
17 the requirements in 14B.3(A) and also has average gross annual receipts in the prior three fiscal years
18 that do not exceed the following limits: (1) public works/ construction - \$7,000,000; specialty
19 construction contractors - \$3,500,000; (2) goods/ materials/ equipment and general services -
20 \$3,500,000; (3) professional services and architect/engineering - \$1,250,000; and (4) trucking -
21 \$1,750,000. Any business under common ownership, in whole or in part, with any other business meets
22 the requirements of this subparagraph only if the aggregate gross annual receipts of all of the
23 businesses under such common ownership do not exceed these limits. All businesses owned by married
24 spouses or domestic partners are considered under common ownership unless the businesses are in
25 unrelated industries and no community property or other jointly owned assets were used to establish or

1 are used to operate either business.

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

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

5 (a) Possesses a record ownership interest, such as partnership interest or stock interest, of
6 at least 51 percent of the business;

7 (b) Possesses incidents of ownership, including an interest in profit and loss, equal to at
8 least the required record ownership interest;

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

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

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

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

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

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

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

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

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

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

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

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

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

16 (H) Period of Certification. The Director shall certify ~~Small~~—LBEs for a period of not to
17 exceed three years. ~~The Director shall certify Micro~~—LBEs every year. Businesses must
18 continuously meet the criteria in this Section throughout the period of certification.

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

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

25 (1) Arranging contracts by size and type of work to maximize the opportunities for LBEs to

1 participate. This includes dividing projects into smaller parts. As soon as practical before soliciting
2 bids or proposals, contract awarding authorities shall submit large contract proposals to the Director
3 for review. The Director shall determine whether the proposed contract can be divided into smaller
4 contracts so as to enhance the opportunity for participation by LBEs. For purposes of this paragraph,
5 “large project” means any public works/construction contract estimated to cost more than \$5,000,000
6 and any professional services contract estimated to cost more than \$100,000. If the Director
7 determines, after consulting with the contract awarding authority, that the contract can be divided into
8 smaller contracts, the contract awarding authority shall comply with the Director's determination and
9 issue the solicitation for bids or proposals in accordance with the Director's determination.

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

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

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

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

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

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

23 (B) **Best Efforts on Contracts Not Otherwise Subject to this Ordinance.** In the award of
24 leases, franchises, concessions, and other contracts not subject to the discount provisions of this
25 ordinance, contract awarding authorities shall utilize the good faith efforts steps unless impracticable

1 to do so. At a minimum, contract awarding authorities should notify LBEs that are certified to perform
2 the work contemplated in a contract and solicit their interest in the contract.

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

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

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

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

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

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

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

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

19 (F). **Joint Ventures For Professional Services and Architecture/Engineering.**
20 Unless otherwise indicated in this ordinance, contract awarding authorities shall extend the
21 following bid/rating discount to all bids, proposals and contracts from LBEs on professional
22 services and architecture/engineering contracts: (1) five percent to a joint venture with LBE
23 participation that equals or exceeds 35 percent but is under 40 percent; (2) seven and one-
24 half percent to a joint venture with LBE participation that equals or exceeds 40 percent; (3) ten
25 percent to a LBE or a joint venture among LBEs. Contract awarding authorities shall apply

1 the bid/rating discount to each stage of the selection process, including qualifications,
2 proposals and interviews.

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

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

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

20 ~~INCLUDING:~~

- 21 ~~● NONDISCRIMINATION AGAINST SUBS~~
- 22 ~~● WILLFUL FAILURE IS A MATERIAL BREACH~~
- 23 ~~● PENALTIES~~
- 24 ~~● REQUIREMENT TO MAINTAIN RECORDS AND MAKE AVAILABLE AT ANY~~
25 ~~TIME FOR PURPOSES OF COMPLIANCE WITH THIS ORDINANCE~~

1 • ~~REQUIREMENT TO PAY SUBS PROMPTLY.}}~~

2 All contractors and subcontractors shall include in their contracts with subcontractors the
3 following requirements. For the purposes of this section, "contractor" includes all
4 subcontractors.

5 (1) Each contract shall incorporate this ordinance by reference and shall provide
6 that the willful failure of any bidder or contractor to comply with the requirements of this
7 ordinance or rules and regulations implementing this ordinance shall be deemed a material
8 breach of contract.

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

20 (3) Contracts shall require all contractors to maintain records, including such
21 information requested by the Director or Commission, necessary for monitoring their
22 compliance with this ordinance. Contracts shall require prime contractors to include in any
23 subcontract with a LBE a provision requiring the subcontractor to maintain the same records.

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

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

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

19 (7) Contracts shall require prime contractors to submit to the Director for approval
20 all contract amendments, modifications, supplements, and change orders that cumulatively
21 increase by more than 20 percent the total dollar value of all contracts originally valued at
22 \$50,000 or more. The Director shall review the proposed amendment, modification,
23 supplement or change order to correct any contracting practices that exclude any category of
24 LBEs from new contracting opportunities.

25 (8) Contracts in which subcontracting is used shall prohibit back contracting to the

1 prime contractor or lower-tier subcontracting for any purpose inconsistent with the provisions
2 of this ordinance, rules and regulations adopted pursuant to this ordinance, or contract
3 provisions pertaining to LBE utilization.

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

17 (10) Contracts shall require contractors and subcontractors to maintain records
18 necessary for monitoring their compliance with this ordinance for three years following
19 completion of the project and shall permit the Commission and Controller to inspect and audit
20 such records.

21 (11) All contracts or other agreements between the City and persons or entities,
22 public or private, in which such persons or entities receive money from or through the City for
23 the purpose of contracting with businesses to perform public improvements, shall require such
24 persons or entities to comply with the provisions of this ordinance in awarding and
25 administering such contracts.

1 (F) **Exceptions.**

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

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

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

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

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

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

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

1 setting aside 25% of all contracts under \$100,000 in each fiscal year.

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

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

12 **SEC. 14B.5 SUBCONTRACTING.**

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

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

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

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

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

25 (1) The contract awarding authority shall require bidders or proposers on the

1 contracts to contact a LBE before listing that LBE as a subcontractor in the bid or proposal.
2 The contract awarding authority shall declare bids or proposals that fail to satisfy this
3 requirement nonresponsive.

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

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

9 (34) Any bidder that is required to conduct outreach to LBEs shall document that outreach
10 and submit the documentation with its bid. Such documentation shall include: (a) the dollar amount of
11 each subcontract and a statement of the scope of work to be performed under the subcontract; and (b)
12 the identification of each subcontract awarded to an LBE. Bidders shall also maintain the following
13 documentation, which shall be submitted upon request of the Director: (a) for each subcontract, copies
14 of the subcontractor bids submitted. Such documentation shall contain at least the bid amount and a
15 description of the scope of work. If no written bids were submitted by some or all of the subcontractors
16 who bid the job, the bidder shall maintain a written statement containing the amount of each oral bid;
17 and (b) separately, for each subcontract, a full and complete statement of the reason(s) for selection of
18 the subcontractor. If the reason is based on relative qualifications, the statement must address the
19 particular qualifications at issue. If the reason is the respective dollar amounts bid, the statement must
20 state the amounts and describe the similarities and/or dissimilarities in the scope of work covered by
21 the bids. Bidders shall maintain the documentation described in this paragraph for five three years
22 following submission of the bid or completion of the contract, whichever is later.

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

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

25 (a) Attending any presolicitation or prebid meetings scheduled by the City to inform all

1 bidder of LBE program requirements for the project for which the contract is awarded;

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

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

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

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

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

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

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

15 (D) During the term of the contract, willful failure to comply with the level of LBE
16 subcontractor participation specified in the contract shall be deemed a material breach of
17 contract.

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

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

21 (B) **Availability Data.** In order to prevent unlawful discrimination in the selection of
22 subcontractors, and to identify and correct unlawful practices, the City will monitor the administration
23 of City contracts, including the selection of subcontractors, as provided in this Section. For public
24 work/construction, architect/engineering, professional service, and general service contracts which the
25 contract awarding authority reasonably anticipates will include subcontractor participation, prior to

1 the solicitation of bids or proposals, the Director shall assemble data regarding the availability of
2 MBEs, WBEs and OBEs to provide work that is likely to be subcontracted. The Director, in the
3 Director's sole discretion, shall determine the appropriate methodology.

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

10 (D) **Review of Bid.** The Director may review or investigate any bid, including the selection
11 of the bidder's subcontractors, to determine whether discrimination may have occurred. The Director
12 shall review bids, during the bid protest period, to determine whether: (1) a potential subcontractor or
13 other person has filed a complaint of discrimination; (2) there is a significant difference between the
14 percentages of MBEs, WBEs, or OBEs available to provide goods and services as subcontractors on
15 the contract and the percentages of the bidder's subcontractors who are MBEs, WBEs, or OBEs; or (3)
16 other facts and circumstances suggest that further inquiry is warranted. The Director, in the Director's
17 sole discretion, shall determine whether and when to investigate further the conduct of a bidder or
18 contractor. Investigations will be conducted under the procedures in Section 14B.914.

19 **SEC. 14B.7 POWERS AND DUTIES OF THE COMMISSION AND THE DIRECTOR.**

20 (A) **Human Rights Commission.** In addition to the duties and powers given to the
21 Human Rights Commission elsewhere, the Commission shall:

22 (1) When necessary, subpoena persons and records, books and documents for a
23 proceeding of the Commission or an investigation by the Director or an audit pursuant to
24 Section 14B.7(B)(5) conducted to further the purposes of this ordinance.

25 (2) Adopt rules and regulations establishing standards and procedures for

1 effectively carrying out this ordinance.

2 (3) Issue forms for the Controller or contract awarding departments to collect
3 information from contractors as prescribed by this ordinance.

4 (4) Hear appeals challenging: (i) the Director's disqualification of a bidder or
5 Contractor, (ii) the Director's denial of an application for or revocation of the certification of a
6 business as an LBE, MBE, WBE, OBE, or Micro-LBE, or (iii) the Director's denial of a request
7 to waive or to reduce subcontractor participation goals.

8 (5) By regulation require contract awarding authorities, departments and the
9 Controller to provide to the Director such information as will be necessary to enable the
10 Director to report to the Mayor and the Board of Supervisors at the end of each fiscal year on
11 the progress each City department has made towards the achievement of LBE and Micro-LBE
12 participation goals and towards the goal of ensuring against discrimination and exclusion of
13 MBEs, WBEs, or OBEs, and to perform his/her other duties. The database is a public record
14 available to the public as provided by state and local law;

15 (6) Adopt rules and regulations as deemed necessary by the Director to ensure that
16 the joint venture bid/rating discount is applied only to joint ventures where the LBE has
17 sufficient skill, experience, and financial capacity to perform the portion of the work identified
18 for the LBE.

19 (B) **HRC Director.** In addition to the duties and powers given to the HRC Director
20 elsewhere, the Director shall:

21 (1) Levy the same sanctions that a contracting awarding authority may levy as
22 specified in Section 14B.14.

23 (2) Ensure that the necessary data is collected and analyzed. Annually, and more
24 often if the Director deems necessary, the Director shall identify areas of contracting where
25 the City or any of its departments are failing to meet LBE or Micro-LBE participation goals or

1 are contracting with MBEs, WBEs, or OBEs at rates less than would be expected in the
2 absence of discrimination. The results of this study shall be included in the Commission's
3 annual report required by Section 14B.12(B).

4 (3) Provide information and other assistance to LBEs to increase their ability to
5 compete effectively for the award of City contracts.

6 (4) Grant waivers as set forth in Sections 14B.4(J) and 14B.5(A), and disqualify a
7 bidder or contractor as set forth in Section 14B.14.

8 (5) In cooperation with the Controller, randomly audit at least three prime
9 contractors each fiscal year in order to insure their compliance with the provisions of this
10 ordinance. The Director, in cooperation with the Controller, shall furthermore randomly audit
11 10 percent of the joint ventures granted bid discounts in each fiscal year. The Controller shall
12 have the right to audit the books and records of the contractors, joint venture participants, and
13 any and all subcontractors to insure compliance with the provisions of this ordinance.

14 (6) Take actions to ensure compliance with the provisions of this ordinance,
15 including, without limitation, intervening in the selection process, by modifying the criteria used
16 for selecting selection panelists or contractors to correct any practices that hinder equal
17 business opportunities for LBEs, MBEs, WBEs, OBEs, or Micro-LBEs.

18 **SEC. 14B.8 POWERS AND DUTIES OF THE CONTROLLER.**

19 (A) In addition to the duties given to the Controller elsewhere, the Controller shall
20 work cooperatively with the Director to provide such contractual encumbrance and payment
21 data as the Director advises are necessary to monitor the participation of LBEs, MBEs, WBEs,
22 OBEs and Micro-LBEs in City prime contracts. If any department refuses or fails to provide the
23 required data to the Controller, the Controller shall immediately notify the Mayor, this Board
24 and the Director.

25 (B) The Controller shall not certify the award of any contract subject to this

1 ordinance where the Director has notified the Controller that the contract awarding authority
2 has not provided the information the Director advises is necessary under this ordinance.

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

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

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

1 contractor fails to submit this affidavit, the contract awarding authority shall notify the Director
2 who shall take appropriate action as authorized under Section 14B.14.

3 **SEC. 14B.9 POWERS AND DUTIES OF THE MAYOR.**

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

5 (A) 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 LBE and Micro-LBE participation goals that departments are expected to use
8 good-faith efforts to attain during the fiscal year and that a department's failure to use good-
9 faith efforts to attain the participation goals shall be reported to this Board in the Commission's
10 annual report; (2) the availability of MBEs, WBEs, and OBEs to perform City contracting and
11 that departments are expected to take all steps necessary to ensure against illegal or arbitrary
12 discrimination or exclusion of any certified business; and (3) the data each department is
13 required to provide the Controller on each contract award.

14 (B) Coordinate and enforce cooperation and compliance by all departments with this
15 ordinance.

16 **SEC. 14B.10 POWERS AND DUTIES OF CONTRACT AWARDING AUTHORITIES.**

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

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

22 (2) Use the City's Surety Bonding Program set forth in Section 14B.13 to assist
23 LBEs bidding on and performing City public works and construction contracts to meet bonding
24 requirements and/or obtain construction loans.

25 (3) Submit to the Office of Contract Administration (OCA) in electronic format or a

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

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

8 (a) Refuse to award a contract,

9 (b) Order the suspension of a contract,

10 (c) Order the withholding of funds,

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

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

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

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

23 (7) Maintain accurate records as required by the Director and the Commission for
24 each contract awarded, its dollar value, the nature of the goods or services to be provided, the
25 name of the contractor awarded the contract, its identity as an LBE, the efforts made by the

1 contract awarding authority to solicit bids from and award contracts to LBEs, including
2 responses received from such businesses, and a full and complete statement of the reason(s)
3 for selection of the contractor addressing the particular qualifications at issue.

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

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

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

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

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

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

25 (C) For the purpose of determining LBE participation, contracts awarded to joint

1 ventures in which one or more LBEs are combined with one or more business that are not
2 LBEs shall be deemed by the contract awarding authority to be awarded to LBEs only to the
3 extend of the LBE participation in the joint venture.

4 **SEC. 14B.11 POWERS AND DUTIES OF THE OFFICE OF CONTRACT ADMINISTRATION.**

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

7 (A) Maintain, with the assistance of the Director, a current list of LBEs, MBEs,
8 WBEs, OBEs, and Micro-LBEs to provide each of those commodities or services subject to
9 this ordinance that the Office of Contract Administration indicates are required by the City.

10 (B) Maintain a central office where all bids, requests for proposals and solicitations
11 will be listed and kept current.

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

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

20 ~~[[[INSERT MONITORING AND COMPLIANCE PROCESSES, INCLUDING:~~

- 21 ~~• DIRECTOR'S SANCTION AUTHORITY (OVER BOTH CONTRACTOR AND~~
- 22 ~~DEPARTMENTS)~~
- 23 ~~• DIRECTOR'S ANNUAL REPORT TO THE BOARD~~
- 24 ~~• DATA TO BE COLLECTED AND MAINTAINED BY THE DIRECTOR~~
- 25 ~~(CERTIFIED BUSINESSES, EVALUATION OF ACHIEVEMENT OF LBE~~

1 GOALS, DISCRIMINATION TRACKING SYSTEM)

- 2 ● ~~DATA TO BE MAINTAINED BY CONTRACT AWARDING AUTHORITIES~~
- 3 ~~(INCLUDING REPORTS ON SET-ASIDES)~~
- 4 ● ~~CONTRACTORS AND SUBS MUST MAINTAIN RECORDS~~
- 5 ● ~~POWER TO AUDIT FOR PURPOSES OF ORDINANCE (AND DUTY TO AUDIT~~
- 6 ~~A MINIMUM NUMBER OF CONTRACTS ANNUALLY)~~
- 7 ● ~~CONTRACTOR OBLIGATION TO PAY SUBS~~
- 8 ● ~~DIRECTOR'S REVIEW OF CONTRACTS MODS~~
- 9 ● ~~MONITORING COMPLIANCE DURING CONTRACT PERFORMANCE PERIOD~~
- 10 ● ~~CONTRACT CLOSURE REPORT~~
- 11 ● ~~DIRECTOR ASSISTANCE TO DEPARTMENTS IN SELECTION PROCESSES~~
- 12 ~~(AND THE ABILITY OF THE DIRECTOR TO INTERVENE IN THE SELECTION~~
- 13 ~~PROCESS)~~
- 14 ● ~~REPORTS OF NONCOMPLIANCE TO COMMISSION AND BOARD~~
- 15 ● ~~WAIVER REPORTS~~
- 16 ● ~~CONTROLLER'S DUTIES~~
- 17 ● ~~DUTIES OF THE OFFICE OF CONTRACT ADMINISTRATION~~
- 18 ● ~~DUTIES OF THE MAYOR (INCLUDING GOAL-SETTING AND~~
- 19 ~~COORDINATING/ENFORCING DEPARTMENTAL COMPLIANCE)]]~~

20 **SEC. 14B.12 REPORTING AND REVIEW.**

21 (A) Reporting by the Director. Commencing April 1, 2006. and no later than the

22 first day of every third month thereafter, the Director shall issue a written report to this Board.

23 That report shall document each City department's performance under the terms of this

24 ordinance, including, among other things, each City department's progress in meeting LBE

25 and Micro-LBE goals and ensuring non-discrimination against MBEs, WBEs, and OBEs, and

1 the success of each department's prime contractors in complying with the LBE subcontracting
2 provisions of this ordinance and ensuring non-discrimination against MBEs, WBEs, and
3 OBEs. That report shall also state whether or not each City department has fully reported all
4 data required by this ordinance or requested by HRC or the Controller.

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

23 (2) The Director shall report to the Commission all waivers acted upon pursuant to
24 Section 14B.4(J) and 14B.5(A). Such report shall be made on a monthly basis following the
25 granting of the waiver.

1 (B) Reporting by the Commission. By July 1st of each fiscal year subject to this
2 ordinance, the Commission shall submit an annual report to the Mayor and this Board on the
3 progress of the City toward the goals of this ordinance, together with an identification of
4 problems and specific recommendations for: (1) improving the City's performance in fostering
5 LBE participation in City contracting, and (2) ensuring non-discrimination against MBEs,
6 WBEs, and OBEs.

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

9 (D) By the last day of each fiscal year, all contract awarding authorities and City
10 departments shall report annually to the Mayor on their progress in the preceding fiscal year
11 toward the achievement of the LBE and Micro-LBE participation goals and their steps to
12 ensure non-discrimination against MBEs, WBEs, and OBEs.

13 **SEC. 14B.813 BONDING AND OTHER ASSISTANCE.**

14 (A) Bonding and Financial Assistance Program.

15 (1) Program Description. *The City and County of San Francisco, acting through the*
16 *Commission, intends to provide guarantees to private bonding companies and financial institutions in*
17 *order to induce those entities to provide required bonding and financing to eligible contractors and*
18 *subcontractors bidding on and performing City public work and construction contracts. This bonding*
19 *and financial assistance program is subject to the provisions of this Section 14B.813(A).*

20 (2) Eligible Contracts. *The assistance described in this Section 14B.813(A) shall be*
21 *available for any City public works or construction contract ~~awarded in accordance with San~~*
22 *~~Francisco Administrative Code Chapter 6~~ to which this ordinance applies.*

23 (3) Eligible Businesses. *Businesses must meet the following criteria to qualify for*
24 *assistance under this Section 14B.813(A).*

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

1 (b) The business must be certified by the Director as an LBE according to the requirements
2 of Section 14AB.3;

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

5 (i) Bond application assistance,

6 (ii) Assistance in developing financial statements,

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

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

9 (v) Development of accurate financial reporting tools.

10 (4) Agreements Executed by the Human Rights Commission. The Director is hereby
11 authorized to enter into the following agreements in order to implement the bonding and financial
12 assistance program described in this Section 14B.~~8~~13(A):

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

15 (b) With respect to a construction loan to be made to a contractor or subcontractor, an
16 agreement to guaranty up to 50 percent of the original principal amount of the construction loan or 50
17 percent of the actual loss suffered by the financial institution as a result of a loan default, whichever is
18 less; provided that in any event the City's obligations with respect to a guaranty shall not exceed
19 \$750,000;

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

23 (5) Monitoring and Enforcement. The Director shall maintain records on the use and
24 effectiveness of this program, including but not limited to (1) the identities of the businesses and
25 bonding companies participating in this program, (2) the types and dollar amounts of public work

1 contracts for which the program is utilized, and (3) the types and dollar amounts of losses which the
2 City is required to fund under this program. The Director shall submit written reports to the Board of
3 Supervisors every six months beginning January 1, 2006, advising the Board of the status of this
4 program and its funding capacity, and an analysis of whether this program is proving to be useful and
5 needed.

6 (6) Funding and Accounts. As of ~~September 1, 2005~~ January 1, 2006, funding for this
7 program may be derived from the following sources:

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

10 (b) Each Department authorized to contract for public works or improvements pursuant to
11 San Francisco Administrative Code Chapter 6 ~~shall~~ may commit to this program up to ten percent
12 (10%), but not less than one percent (1%), of the budget for every public work or improvement
13 undertaken. (A "public work or improvement" is defined in San Francisco Administrative Code
14 Chapter 6.) This subsection is effective for those public works or improvements where the award of the
15 construction contract (as defined and regulated by Administrative Code Chapter 6) occurs after
16 September 1, 2005-January 1, 2006.

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

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

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

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

9 (~~C~~B) Education and Training. The Director shall continue to develop and to strengthen
10 education and training programs for LBEs and City contract awarding personnel.

11 (~~D~~C) Cooperative Agreements. With the approval of the Commission and the Board of
12 Supervisors, the Director may enter into cooperative agreements with agencies, public and private,
13 concerned with increasing the use of LBEs in government contracting.

14 **SEC. 14B.914 ENFORCEMENT.**

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

21 (~~A~~B) Investigations. The Director shall investigate potential violations of this ordinance.
22 Bidders, contractors, subcontractors and applicants for certification shall provide to the City
23 any information that the City deems relevant, and shall cooperate in all other respects with such an
24 investigation. A request for information from a bidder, contractor, subcontractor or applicant shall
25 identify the records required and the time for response. If the bidder, contractor, subcontractor or

1 applicant fails to respond to the request for information, or otherwise fails to cooperate in the
2 investigation, appropriate sanctions, as provided in Section 14B.914(C), may be imposed. In an
3 investigation of potential discrimination by a prime bidder prior to contract award, if the bidder fails to
4 respond to the request for information, or otherwise fails to cooperate in the investigation, the bid will
5 be rejected as non-responsive, and additional sanctions may be imposed.

6 **(BC) Conference and Conciliation.**

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

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

- 14 (1) Reject all bids;
- 15 (2) Declare a bid non-responsive;
- 16 (3) Suspend a contract;
- 17 (4) Withhold funds;
- 18 (5) Assess penalties;
- 19 (6) Debar a bidder;
- 20 (7) Deny certification;
- 21 (8) Revoke certification.

22 **(DE) Procedures for Denials or Revocation of Certification.** Whenever the Director
23 proposes to deny an application for or revoke the certification of a business, the Director shall notify
24 the applicant or certified business in writing of the basis for the denial or revocation, and the date on
25 which the business will be eligible to reapply for certification. The Director shall provide the applicant

1 or certified business with an opportunity to be heard before a final determination is made. The
2 Director shall require a business to wait at least six months but not more than two years after the
3 denial or revocation before reapplying for certification in the same category.

4 (~~E~~F) **Procedures for Director Findings of Discrimination.**

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

12 Whenever the Director proposes to issue a finding of discrimination against any bidder,
13 contractor or subcontractor, the Director shall notify the bidder, contractor or subcontractor in writing
14 of the basis for the finding, provided that any proposal to debar a business shall be governed by Section
15 14B.9(~~F~~)14(G). The Director shall provide the bidder, contractor or subcontractor with an
16 opportunity to be heard before a final determination is made.

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

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

1 (H) **Referral to Other Agencies.** No person shall knowingly make, file or cause to be
2 filed with the City any materially false or misleading statement or report in connection with this
3 ordinance. If the Director has reason to believe that any person has knowingly made, filed, or caused
4 to be filed with the City any materially false or misleading statement or report made in connection with
5 this ordinance, the Director shall report that information may impose any sanction described in
6 this Section 14B.14, or may refer the matter to the City Attorney or the District Attorney for
7 appropriate action.

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

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

17 The finding of noncompliance shall be communicated to the Mayor for appropriate
18 action to secure compliance.

19 **SEC. 14B.1015 APPLICABILITY, OPERATIVE DATE AND TRANSITION PROVISIONS.**

20 (A) **Suspension of Chapter 12D.A.** All provisions of Administrative Code Chapter 12D.A
21 that were invalidated by the Superior Court orders dated July 26 and August 23, 2004, in Coral
22 Construction, Inc. v. City and County of San Francisco (Sup. Ct. No. 421249) shall be and are
23 suspended and are of no force and effect; provided, however, the provisions of Chapter 12D.A that
24 were invalidated by the court's orders shall be suspended only so long as, and only to the extent that,
25 the City is enjoined by the court from enforcing the provisions of Chapter 12D.A. If the injunction is

1 lifted or stayed in its entirety, Chapter 12D.A shall automatically become effective and enforceable,
2 and this Chapter 14B shall be suspended.

3 (B) Operative date of this Chapter. Chapter 14B shall become operative on September 1,
4 2005-January 1, 2006, and shall govern all contracts initiated on or after that date.

5 (C) Applicability.

6 Chapters 12D.A, 14A and 14B shall apply as follows.

7 (1) Any amendment to a contract initiated before July 26, 2004 in which the
8 Contractor agreed to comply with Chapter 12D.A shall be governed by Chapter 12D.A;
9 provided, however, that if a competitive solicitation for an agreement to the proposed changes
10 to the contract is required by law, or the law would otherwise require execution of a new
11 contract, rather than an amendment to an existing contract, the provisions of Chapter 14B and
12 not Chapter 12D.A shall apply.

13 (2) This Chapter 14B shall govern any substantive amendment to a contract
14 initiated before July 26, 2004, the term of which has not expired on or before September 1,
15 2005, other than an amendment to decrease the scope of work or decrease the amount to be
16 paid under a contract. The contract awarding authority shall notify the Director of the
17 proposed amendment and the Director shall assemble and transmit the data described in
18 Section 14B.6 for any such amendment. If the contract was subject to Chapter 12D.A, the
19 amendment shall provide that the contractor shall comply instead with this Chapter 14B.
20 Chapter 14A shall apply to (1) all contracts in which the Contractor agreed to comply with
21 Chapter 14A and any amendment to those contracts and (2) all contracts initiated on or after
22 July 26, 2004 and before January 1, 2006 and any amendment to such contracts; provided,
23 however, that if a competitive solicitation for an agreement to the proposed changes to the
24 contract is required by law, or the law would otherwise require execution of a new contract,
25

1 rather than an amendment to an existing contract, the provisions of Chapter 14B and not
2 Chapter 14A shall apply .

3 (43) This Chapter 14B shall govern all contracts initiated on or after September 1, 2005
4 January 1, 2006, and any amendments thereto.

5 (34) For all contracts described in 14B.105(C)(1) and, (2), or (3) to which this Chapter
6 14B applies, when any provision of the San Francisco Municipal Code or other local law refers to
7 Chapter 12D.A or 14A of the San Francisco Administrative Code, it shall be read as referring instead
8 to Chapter 14B.

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

17 In order to effect an orderly transition from Chapter 14A to this ordinance, any business
18 certified as an LBE under Chapter 12D.A or a DBE under Chapter 14A shall be deemed an
19 LBE under this Chapter 14B until the earlier of (1) the expiration of the business' certification
20 under 12D.A or 14A, (2) the business' failure to maintain the certification criteria under which it
21 was certified, or (3) April 1, 2006. The Director may, by appropriate rules and regulations,
22 establish procedures to allow such businesses certified as LBEs or DBEs under 12D.A or 14A
23 to demonstrate their eligibility for certification under Section 14B.3 of this ordinance on an
24 expedited basis, prior to the expiration of their existing certification.

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

3 (E) **State or Federal Provisions.** In contracts which involve the use of any funds furnished,
4 given or loaned by the government of the United States or the State of California, all laws, rules and
5 regulations of the government of the United States or the State of California or of any of its
6 departments relative to the performance of such work and the conditions under which the work is to be
7 performed, shall prevail over the requirements of this ordinance when such laws, rules or regulations
8 are in conflict.

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

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

18
19 APPROVED AS TO FORM:
20 DENNIS J. HERRERA, City Attorney

21 By: _____
22 Deputy City Attorney