

1 [Workforce Development – First Source Hiring Program.]

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3 **Ordinance amending Administrative Code Chapter 83, Section 83.18 to eliminate the**  
4 **expiration date of the First Source Hiring Program, and Section 83.10 to eliminate the**  
5 **attorneys fees provision.**

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~~.

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

10 Section 1. The San Francisco Administrative Code is hereby amended by amending  
11 Section 83.10 and 83.18, to read as follows:

12 **SEC. 83.10. VIOLATION OF FIRST SOURCE HIRING REQUIREMENTS IN**  
13 **CONTRACTS AND PROPERTY CONTRACTS.**

14 (a) Every contract covered by this Chapter shall contain a provision in which the  
15 Contractor agrees:

16 (1) To be liable to the City for liquidated damages as provided in this section;

17 (2) To be subject to the procedures governing enforcement of breaches of contracts  
18 based on violations of contract provisions required by this Chapter as set forth in this section;

19 (3) That the contractor's commitment to comply with this Chapter is a material element  
20 of the City's consideration for this contract; that the failure of the contractor to comply with the  
21 contract provisions required by this Chapter will cause harm to the City and the public which is  
22 significant and substantial but extremely difficult to quantify; that the harm to the City includes  
23 not only the financial cost of funding public assistance programs but also the insidious but  
24 impossible to quantify harm that this community and its families suffer as a result of  
25 unemployment; and that the assessment of liquidated damages of up to \$5,000.00 for every

1 notice of a new hire for an entry level position improperly withheld by the contractor from the  
2 first source hiring process, as determined by the FSHA during its first investigation of a  
3 contractor, does not exceed a fair estimate of the financial and other damages that the City  
4 suffers as a result of the contractor's failure to comply with its first source referral contractual  
5 obligations.

6 (4) That the continued failure by a contractor to comply with its first source referral  
7 contractual obligations will cause further significant and substantial harm to the City and the  
8 public, and that a second assessment of liquidated damages of up to \$10,000.00 for each  
9 entry level position improperly withheld from the FSHA, from the time of the conclusion of the  
10 first investigation forward, does not exceed the financial and other damages that the City  
11 suffers as a result of the contractor's continued failure to comply with its first source referral  
12 contractual obligations;

13 (5) That in addition to the cost of investigating alleged violations under this Section, the  
14 computation of liquidated damages for purposes of this section is based on the following data:

15 A. The average length of stay on public assistance in San Francisco's County Adult  
16 Assistance Program is approximately 41 months at an average monthly grant of \$348.00 per  
17 month, totaling approximately \$14,379.00; and

18 B. In 2004, the retention rate of adults placed in employment programs funded under  
19 the Workforce Investment Act for at least the first six months of employment was 84.4%.  
20 Since qualified individuals under the First Source program face far fewer barriers to  
21 employment than their counterparts in programs funded by the Workforce Investment Act, it is  
22 reasonable to conclude that the average length of employment for an individual whom the  
23 First Source Program refers to an employer and who is hired in an entry level position is at  
24 least one year;

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1           Therefore, liquidated damages that total \$5,000.00 for first violations and \$10,000.00  
2 for subsequent violations as determined by FSHA constitute a fair, reasonable, and  
3 conservative attempt to quantify the harm caused to the City by the failure of a contractor to  
4 comply with its first source referral contractual obligations.

5           (6) That the failure of contractors to comply with this Chapter, except property  
6 contractors, may be subject to the debarment and monetary penalties set forth in Sections  
7 6.80 et seq. of the San Francisco Administrative Code, as well as any other remedies  
8 available under the contract or at law. ~~and~~

9           ~~(7) That in the event the City is the prevailing party in a civil action to recover liquidated~~  
10 ~~damages for breach of a contract provision required by this Chapter, the contractor will be liable for~~  
11 ~~the City's costs and reasonable attorneys fees.~~

12           (b) The FSHA shall promulgate appropriate guidelines or rules for the enforcement of  
13 this Chapter. Such guidelines or rules may establish procedures for ensuring fair, efficient,  
14 and cost-effective implementation of this Chapter, including mechanisms to monitor contractor  
15 compliance with the contract provisions required by this Chapter, and for determining whether  
16 a contractor has failed to comply with its first source referral contractual obligations.

17           (c) The FSHA may investigate possible violations of contract provisions required by  
18 this Chapter. Where the FSHA, after providing the contractor with the opportunity to respond  
19 to the alleged violation, determines that a contractor failed to make available entry level  
20 positions to the FSHA for referral of qualified economically disadvantaged individuals, as  
21 required by the applicable first source hiring agreement, the FSHA shall provide written notice  
22 to the contractor as follows:

- 23           (1) The factual basis for the determination;  
24           (2) The corrective action that the contractor must take to remedy the violation;

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1 (3) The amount of liquidated damages that the FSHA has assessed for the  
2 contractor's violation of this Chapter;

3 (4) Notice that the contractor has 15 days to either take the required corrective action,  
4 including payment of liquidated damages, or to file an appeal consistent with subsection (5),  
5 below;

6 (5) That the contractor has the right to appeal the FSHA's final determination to the  
7 OLSE, including the assessment of liquidated damages and the amount assessed, but that  
8 any such appeal must be filed in writing with the OLSE within 15 days of the date of the  
9 issuance of FSHA's determination and that a contractor must file an appeal with the OLSE in  
10 order to exhaust administrative remedies;

11 (6) That if the contractor fails to take the required corrective action or file on appeal in  
12 writing with the OLSE within 15 days as set forth above, the FSHA's determination shall be  
13 the City's final and binding decision which the City may enforce in a court of law, and

14 (7) That the contractor will be required to comply with the decision within 5 business  
15 days of the FSHA's decision becoming final, including payment of liquidated damages, if any,  
16 together with simple annual interest of 10% from the date that payment should have been  
17 made.

18 (d) (1) While liquidated damages in the maximum amount set forth in this section are a  
19 reasonable estimate of harm to the City caused by the contractor's non-compliance with  
20 contract provisions required by this Chapter, the FSHA may determine that less than the full  
21 amount is warranted depending on the circumstances of each case. The FSHA shall consider  
22 the following factors in determining the amount of liquidated damages, if any, to impose  
23 against a contractor who fails to comply with contract provisions required by this Chapter:

24 (A) The size of the contractor's business;

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1 (B) The contractor's good faith efforts to comply with contract provisions required by  
2 this Chapter;

3 (C) The gravity of the violation;

4 (D) Whether the contractor has a history of violations of contract provisions required by  
5 this Chapter;

6 (E) Whether the contractor has failed to comply with recordkeeping requirements  
7 imposed by contract provisions under this Chapter; and

8 (F) Whether the imposition of liquidated damages would undermine the purpose of this  
9 Chapter by imposing unreasonable financial burdens on the contractor, thereby imperiling the  
10 contractor's ability to continue complying with contract provisions required by this Chapter.

11 (e) (1) Within 15 days of receiving an appeal from the FSHA's final determination, the  
12 OLSE shall appoint a hearing officer and shall so advise the FSHA and the contractor, and/or  
13 their respective counsel or authorized representative.

14 (2) The hearing officer shall promptly set a date for a hearing. The hearing must  
15 commence within 45 days of the notification of the appointment of the hearing officer and  
16 conclude within 75 days of such notification, not including the issuance of a decision, unless  
17 all parties agree to an extended period. If a contractor appeals the FSHA's initial  
18 determination but fails to attend a hearing set under this subsection, the FSHA's initial  
19 determination shall become final.

20 (3) The FSHA shall have the burden of producing evidence justifying its imposition of  
21 liquidated damages under this Chapter, and of the contractor's violation of contract provisions  
22 required by this Chapter, and shall have the burden of proving that a violation occurred. The  
23 contractor shall have the right to present evidence on its behalf in response to any alleged  
24 violation of contract provisions required by this Chapter.

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1 (4) Within 30 days of the conclusion of the hearing, the hearing officer shall issue a  
2 written decision affirming, modifying, or vacating the FSHA's determination of whether the  
3 contractor violated the first source hiring agreement, of what corrective action that the  
4 contractor must take to remedy any violation, and of the amount of liquidated damages to be  
5 assessed, if any. The hearing officer's decision shall consist of findings and a determination,  
6 which shall be the City's final decision.

7 (5) The contractor shall comply with the hearing officer's decision within 5 business  
8 days of service of the decision. Service shall be made by first class mail to the contractor's  
9 address of record. If the hearing officer imposed liquidated damages, the contractor shall pay  
10 the liquidated damages within 5 business days of the receipt of the decision. Payment of  
11 liquidated damages after that day shall be subject to simple annual interest of 10% from the  
12 day that such damages were due.

13 (6) The contractor may seek review of the hearing officer's decision only by filing in the  
14 San Francisco Superior Court a petition for a writ of mandate under California Code of Civil  
15 Procedure, section 1094.5, as may be amended from time to time.

16 (7) When a contractor fails to take corrective action within the time required by the  
17 provisions of this section, the City may immediately pursue all available remedies against the  
18 contractor for breach of contract, including debarment proceedings where applicable and filing  
19 a civil action to recover liquidated damages due under this section.

20 (8) The failure of the FSHA or OLSE to comply with the time requirements of this  
21 Section shall not cause the OLSE or the hearing officer to lose jurisdiction over an appeal  
22 from the FSHA's determination filed under this Section.

1 (f) If the developer fulfills its obligations as set forth in this Chapter, the developer shall  
2 not be held responsible for the failure of an employer to comply with the requirements of this  
3 Chapter.

4 (g) Liquidated damages obtained under this Chapter shall be deposited in the general  
5 fund.

6 **SEC. 83.18. OPERATIVE DATE AND APPLICATION.**

7 Phase I, as defined in 83.4(r) became operative on October 20, 1998. Phase II, as  
8 defined in Section 83.4(s) of this Chapter became operative on April 1, 2001, 24 (twenty-four)  
9 months after the FSHA adopted a resolution stating that Phase I had been implemented. This  
10 Chapter is intended to have prospective effect only, and shall not be interpreted to impair any  
11 rights under any existing City contract or property contract or permit. *The provisions of this*  
12 *Chapter shall expire on January 1, 2009.*

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

16 By: \_\_\_\_\_  
17 VIRGINIA DARIO ELIZONDO  
18 Deputy City Attorney

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