

1 [Reauthorizing the Minority/Women/Local Business Utilization Ordinance.]

2

3 **Ordinance amending the San Francisco Administrative Code by amending Chapter**

4 **12D.A. thereof (1) to extend the Minority/Women/Local Business Utilization Ordinance**

5 **to June 30, 2008 in order to remedy identified discrimination against certain Prime**

6 **MBE/WBE Contractors in City Contracting, to continue the City's policy of protecting**

7 **Prime LBE Contractors from the economic competitive disadvantage of doing business**

8 **in San Francisco, and to continue to require City contracting departments to implement**

9 **MBE/WBE programs mandating Prime Contractors to use good faith efforts to use**

10 **MBE/WBEs when there are subcontracting opportunities in City Contracts; (2) to repeal**

11 **Sections 12D.A.6(B)(9), 12D.A.8(3) and 12D.A.9(F) to eliminate the contract set aside**

12 **program; (3) to revise section 12D.A.17 to include prime general services contracts in**

13 **the subcontracting program; and (4) to make various technical revisions to the**

14 **Minority/Women/Local Business Utilization Ordinance to conform it with existing City**

15 **ordinances and administrative practices.**

16 Note: Additions are *single-underline italics Times New Roman*;

17 deletions are *strikethrough italics Times New Roman*.

18 Board amendment additions are double underlined.

19 Board amendment deletions are ~~strikethrough normal~~.

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

20 Section 1. The San Francisco Administrative Code is hereby amended by amending

21 Sections 12D.A.1, 12D.A.2, 12D.A.5, 12D.A.6, 12D.A.8, 12D.A.9, 12D.A.10, 12D.A.11,

22 12D.A.12, 12D.A.13, 12D.A.14, 12D.A.15, 12D.A.16, 12D.A.17, 12D.A.18, 12D.A.20, and

23 12D.A.21 to read as follows:

1 **SEC. 12D.A.1. SHORT TITLE.**

2 This ordinance shall be entitled the “Minority/ Women/Local Business Utilization Ordinance”
3 and may be cited as the “MBE/WBE/LBE Ordinance – ~~IV~~V.”

4 **SEC. 12D.A.2. GENERAL FINDINGS.**

5 This Board initially passed Ordinance No. 139-84 on April 2, 1984 to combat the City and
6 County of San Francisco's own active and passive participation in discrimination against
7 minority- and women- owned businesses, both in its own contracting for goods and services
8 and in the private market for such goods and services. At the time of passage, women- and
9 minority-owned businesses were virtually excluded as contractors on prime City contracts.
10 The ordinance also sought to offset economic disadvantages faced by local businesses that
11 are not shared by nonlocal businesses, and to increase employment in the City and County of
12 San Francisco by encouraging the participation of local business enterprises in City
13 contracting.

14 Since that time, this Board and the City's Human Rights Commission have actively and
15 extensively documented and studied discrimination against and disadvantages faced by these
16 groups to gauge the effectiveness of the prior Minority, Women and Local Business Enterprise
17 Ordinances (the “M/W/LBE Ordinances”) and to assess the need for further and continuing
18 action.

19 The earlier studies are documented in the legislative history of the previous amendments and
20 re- enactments of the ordinance, including Ordinance 175-89, enacted on May 30, 1989, and
21 ordinance Nos. 155-92, 210-97, 457-97 and 82-98. The 1989 Ordinance was challenged in
22 federal court and upheld by the Ninth Circuit Court of Appeals. *See Associated General*
23 *Contractors of California v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991).

24 The findings underlying the 1984 and 1989 ordinances have been reviewed and analyzed in
25 the preparation of the current ordinance and are hereby incorporated by reference into the

1 legislative history of this ordinance. These materials, prepared up to and including May 1989,
2 include disparity studies, transcripts of live testimony by dozens of witnesses, case studies of
3 discrimination, and voluminous other materials. An index and a separate synopsis of this
4 material are on file with the Clerk of this Board in File No. 98-0612.

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

19 In its hearings on the MBE/WBE/LBE ordinance since 1989, this Board has given close
20 consideration to the need for adding Native Americans and Arab Americans to the list of
21 minority groups covered by the ordinance. As part of this process, the Board and the Human
22 Rights Commission have heard or reviewed testimony from 47 individuals (including those
23 individuals interviewed in connection with the preparation of the Mason Tillman Disparity
24 Study) concerning discrimination against Arab Americans and Native Americans. In addition,
25 as discussed in greater detail below, the Mason Tillman Associates study covering City

1 contracting in the years 1992 through 1995 found statistically significant evidence of
2 discrimination against Native Americans and Arab Americans in several categories of
3 contracting. That study also closely reviewed testimonial evidence of discrimination against
4 these groups.

5 In 1997 and 1998 alone, this Board and the Human Rights Commission have held eight public
6 hearings at which testimony was given by 170 individuals concerning discrimination against
7 Minority and Women Business Enterprises, the transcripts of which and the written submittals
8 accompanying same are hereby incorporated by reference. In addition, on January 12, 1997,
9 the Human Rights Commission hired Mason Tillman Associates to assist in conducting a
10 disparity study for the years 1992-1995, including an evaluation of both statistical and
11 testimonial evidence of discrimination. In January 1998, Mason Tillman Associates produced
12 its study, which the Board has closely reviewed. In addition, in February of 1998, the staff of
13 the Human Rights Commission was directed to expand the disparity study to cover the years
14 1996-1997. The staff of the Human Rights Commission has issued its report on those years,
15 which reveals findings consistent with those of Mason Tillman, and this Board has reviewed
16 the report closely.

17 On January 4, 1999 and June 30, 1999, the Human Rights Commission issued reports
18 regarding discrimination in City contracting against Iranian Americans. That report recounted
19 testimony from HRC hearings regarding discrimination against Iranian American contractors.
20 In addition, the Board considered and reviewed oral histories from many persons involved in
21 the bidding and compliance process taken in the summer of 1998. Many of the oral histories
22 have been preserved on videotape. These oral histories recount personal incidences of
23 discrimination as well as compliance difficulties. The oral histories were taken in this manner
24 because many of the individuals were fearful of retaliation and further discrimination if they
25 testified at a public forum. In fact, this fear caused some of the oral histories to be given in a

1 manner in which the identities of those testifying were not identified. An index and a separate
2 synopsis of the oral histories are on file with the Clerk of this Board in File No. 98-0612.

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

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

9 · From 1980-1988, there were 68 white male department heads and general and deputy
10 managers, constituting 92 percent of the total. During the same period, there were three male
11 minority department heads and general and deputy managers, constituting four percent of the
12 total, and three white female department heads and general and deputy managers,
13 constituting four percent of the total. There were no female minority department heads or
14 managers during this period.

15 · From 1988 to 1991, there were 66 white male department heads and general and deputy
16 managers, constituting 89 percent of the total. During the same period, there were five male
17 minority department heads and general and deputy managers, constituting seven percent of
18 the total, and three white female department heads and general and deputy managers,
19 constituting four percent of the total. There were no female minority department heads or
20 managers during this period.

21 · From 1992 to 1995, there were 65 white male department heads and general and deputy
22 managers, constituting 88 percent of the total. During the same period, there were five male
23 minority department heads and general and deputy managers, constituting seven percent of
24 the total, and three white female department heads and general and deputy managers,
25

1 constituting four percent of the total. There was one female minority department head or
2 manager, constituting one percent of the total.

3 · From 1996 to the present, there were 48 white male department heads and general and
4 deputy managers, constituting 65 percent of the total. During the same period, there were 14
5 male minority department heads and general and deputy managers, constituting 19 percent of
6 the total, five white female department heads and general and deputy managers, constituting
7 four percent of the total, and seven female minority department heads or managers,
8 constituting 10 percent of the total.

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

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

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

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

11 · For prime construction contracts, women and all minority groups received fewer construction
12 prime-contracting dollars than would be expected given their availability. Arab Americans did
13 not receive any contract dollars at all. The disparity was statistically significant for Asian
14 Americans. In addition, there was statistically significant evidence of discrimination in favor of
15 Caucasian men. Although African Americans represent 10.24 percent of the available
16 construction firms, they received only 1.44 percent of the construction contract dollars.
17 Although Arab Americans represent 0.8 percent of the available construction firms, they
18 received no construction contract dollars at all. Although Asian Americans represent 20.71
19 percent of the available construction firms, they received only 3.0 percent of the construction
20 contract dollars. Although Latino Americans represent 9.67 percent of the available
21 construction firms, they received 5.28 percent of the construction contract dollars. Although
22 Native Americans represent 0.8 percent of the available construction firms, they received no
23 construction contract dollars at all. Although Caucasian women represent 8.08 percent of the
24 available construction firms, they received only 1.37 percent of the construction contract
25

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

3 · For architecture and engineering prime contracts between 1992 and 1995, Arab Americans,
4 Asian Americans, Native Americans, and Caucasian women received fewer contracts than
5 would be expected given their availability. More than 60 percent of the contracts in this area
6 went to Caucasian male-owned businesses. The disparity was statistically significant for
7 Caucasian women. There was a statistically significant disparity in favor of Caucasian men.

8 · For professional services prime contracts in the years 1992-1995, African Americans, Arab
9 Americans, Asian Americans, Latino Americans, Native Americans, and Caucasian women all
10 received fewer contracts than expected. More than 78 percent of the professional service
11 contracts for the years 1992-1995 went to Caucasian male-owned businesses. The disparity
12 is statistically significant for Caucasian women. In addition, there is a statistically significant
13 disparity in favor of Caucasian men. African Americans, who represent 10.65 percent of the
14 available professional service firms, received only 5.08 percent of the contract dollars. Arab
15 Americans, who represent 4.66 percent of the available professional service firms, received
16 none of the professional service dollars. Asian Americans, who represent 16.32 percent of the
17 available professional services firms, received 11.92 percent of the professional services
18 contract dollars. Latino Americans, who represent 5.77 percent of the available professional
19 services firms, received 0.95 percent of the professional services dollars. Caucasian women,
20 who represent 21.75 percent of the available professional services firms, received 3.22
21 percent of the professional services dollars. On the other hand, Caucasian men, who
22 represent 40.7 percent of the available professional services firms, received 78.83 percent of
23 the professional services dollars.

24 · For purchases of goods and services prime contracts for 1992-1995, all minorities received
25 fewer contract dollars than expected. More than 89 percent of all goods and services contract

1 dollars went to Caucasian male-owned businesses. The disparity is statistically significant for
2 each ethnic group except Native Americans.

3 · For construction contract dollars below \$500,000 for the years 1992-1995, minorities and
4 females received fewer contract dollars than expected, given their availability. The finding was
5 statistically significant for African Americans, Arab Americans, Asian Americans and Native
6 Americans. Caucasian men received a statistically significant greater number of contract
7 dollars than expected.

8 · For architecture and engineering contract dollars below \$500,000 for the years 1992-1995,
9 minorities and women received fewer contract dollars than expected, given their availability.
10 The findings are statistically significant for Latino Americans and Caucasian females.
11 Caucasian men received a statistically significant greater number of contract dollars than
12 expected.

13 · For small professional service contract dollars below \$500,000 for the years 1992-1995, all
14 minorities and female Caucasians received statistically significantly fewer of the contract
15 dollars than expected. Caucasian males received statistically significantly greater contract
16 dollars than expected.

17 · For purchases of goods and supplies contracts below \$500,000 for the years 1992-1995, all
18 minorities and female Caucasians received fewer contract dollars than would be expected
19 based on their availability. The figures were statistically significant for all groups except Native
20 Americans.

21 4. In addition to statistical analysis, the Mason Tillman study also reviewed testimonial
22 evidence of discrimination from 35 individuals including five African Americans, seven Asian
23 Americans, three Latino Americans, four Native Americans, eight Arab Americans, and eight
24 Caucasian women. The report also reviewed written testimony of discrimination and testimony
25 from public hearings. The report found, based on this testimonial evidence, that minorities and

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

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

21 5. In February 1998, the Human Rights Commission instructed its staff to review statistical
22 evidence available for the years 1996-1997 to determine if the evidence demonstrates that the
23 discrimination identified in the Mason Tillman study is still present. The HRC study determined
24 that the discrimination identified in the Mason Tillman study was still present in 1996 and
25 1997, in that women- and minority- owned business enterprises continued to be used at rates

1 substantially below what would be expected based on the availability of such firms. In
2 addition, the HRC report reviewed extensive other evidence, including testimonial evidence,
3 about the presence of discrimination in the City and County's contracting processes. The HRC
4 report also documents hostility and active resistance to the W/MBE program by various City
5 departments and agencies. The HRC report also found the following discriminatory practices
6 at work in City contracting: (1) listing minority- and women-owned enterprises as
7 subcontractors but never using the listed minority- and women-owned subcontracting firms,
8 (2) the use of additional nonminority, male subcontractors never listed on the relevant HRC
9 forms, and (3) the creation of fraudulent joint ventures involving minority-or women-owned
10 and majority, men-owned firms. In particular, the HRC's investigation found that in at least
11 four out of 86 contracts involving joint ventures, the minority- or women-owned firms listed in
12 the joint venture did not perform any work on the project.

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

17 These deficiencies have proved especially problematic with respect to implementing the 12D
18 ordinance as to subcontractors. The City has encountered persistent difficulties in securing
19 information regarding compliance at the subcontracting level. For this reason, this ordinance
20 includes additional enforcement measures to assure full and appropriate reporting of
21 information pertaining to subcontractors to determine if there is compliance at the
22 subcontracting level.

23 The City has also found that one method used to circumvent the intent and purpose of this
24 ordinance is the change order process. To assure the change order process is not used as a
25 tool to circumvent this ordinance, departments and contractors seeking to submit contract

1 amendments, modifications, supplements, or change orders shall be required to prove
2 continued compliance with the ordinance.

3 7. The 1996-97 disparity study prepared by the HRC also includes the transcript of a public
4 hearing held on March 30, 1998 at which 44 individuals testified about their experiences of
5 discrimination in City contracting.

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

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

16 · In 1991, the San Francisco Unified School District undertook a disparity study of its
17 contracting in various categories. The study found “substantial evidence of statistically
18 significant disparities between utilization and availability of minority and women contractors.”
19 For prime contracts over \$15,000 in value, the study found statistically significant evidence of
20 discrimination against African Americans, Latino Americans, and other minorities, in the
21 number of contracts willing and able firms owned by these groups were able to obtain. For
22 prime contracts under \$15,000 in total value, the study found statistically significant evidence
23 of discrimination against Asian Americans, Latino Americans, minorities in general, and
24 women, in the number of contracts willing and able firms owned by members of these groups
25 were able to obtain. For subcontracts, the study found statistically significant evidence of

1 discrimination in the number of subcontracts that African American, Asian American, Latino
2 American, and minority firms in general were able to obtain. In a review of contracts under its
3 Earthquake program, the study found statistically significant evidence of discrimination against
4 Asian Americans, minorities in general, and women in the number of contracts businesses
5 owned by members of these groups were able to obtain. In construction- related professional
6 services, the study found statistically significant evidence of discrimination against African
7 Americans, Asian Americans, minorities in general and women. In printing and publishing
8 contracts, the study found statistically significant discrimination against African Americans,
9 Asian Americans, Latino Americans, minorities in general, and women. The study also
10 reviewed testimonial evidence of discrimination that supported its findings of discrimination.
11 · In November 1992, the San Francisco Redevelopment Agency (“SFRA”) issued a study of
12 its use of minority- and women-owned business enterprises. The comprehensive study found
13 that women- owned business enterprises received none of the publicly funded prime contract
14 dollars and only 24 percent of the privately funded contract dollars SFRA would have
15 expected given their availability. The study found from a survey of private construction
16 contractors that minority- and women-owned businesses received none of the prime contracts
17 and only 2.32 percent of the subcontract dollars. The study also surveyed 95 local minority-
18 and women-owned construction firms, out of which 75 percent reported that prime contractors
19 who use their firms on public contracts with W/MBE requirements never use their firms on
20 private contracts.
21 · In May 1993, the Regional Transit Association of the San Francisco Bay Area issued a
22 report entitled “The Utilization of Minority and Women-Owned Business Enterprises by
23 Member Agencies of the Regional Transit Association.” The study found significant
24 underutilization of minority- and women-owned enterprises in those jurisdictions in the Bay
25 Area without programs designed to increase minority and women participation. The study also

1 found that for each transit agency, including San Francisco's Municipal Railway, "M/WBEs
2 were used less than we would expect given their availability." The study also examined
3 anecdotal evidence of discrimination from 502 minority- and women-owned enterprises in the
4 Bay Area.

5 · In March 1992, the Human Rights Commission issued a study entitled "MBE/WBE Progress
6 Report for FY 1990-1991" that documents some improvement over earlier years in the total
7 number of City contracts awarded to minority- and women-owned enterprises, but that found
8 that (1) "departments must do more to increase the contracts they award to MBEs/WBEs," (2)
9 that there should be more closely focused outreach by City departments to MBE/WBEs, (3)
10 that there needed to be greater monitoring and enforcement of the ordinance by the HRC, and
11 (4) there needed to be greater education of City contract personnel to combat discrimination.
12 The 1992 Sunset Report on the MBE/WBE Ordinance issued by the Human Rights
13 Commission, which includes summaries of testimony from 84 individuals, supports the
14 Board's finding that there is an ongoing need for a M/WBE Ordinance.

15 · In 1995, the Human Rights Commission issued a progress report on the M/WBE Program
16 covering the years 1994-95. The report supports the finding of a continued need for an
17 M/WBE Ordinance.

18 · In July 1998, the Human Rights Commission prepared a budget comparison graphing the
19 annual budget of the HRC against that of other City departments. That comparison is
20 contained in Tab 10 of the evidence, prepared to support this ordinance and contained in the
21 files of this Board.

22 · In July 1998, contract compliance officer of the Human Rights Commission issued a report
23 on the labor force used in City contracted work totaling \$790,000,000 pursuant to the San
24 Francisco International Airport Master Plan Expansion Program. The report illustrates the
25

1 severe underrepresentation of women, minorities, and San Francisco residents on the airport
2 expansion project.

3 · On May 13, 1993, the Human Rights Commission issued a report on the Trucking Industry
4 and minority- and women-owned enterprises. The report supports the inclusion of trucking
5 services in the current ordinance.

6 · In February 1993, the Human Rights Commission issued a report entitled “The Unfinished
7 Agenda: The Economic Status of African Americans in San Francisco 1964-1990.” This report
8 also supports the finding of the Board that an ordinance encouraging minority- and women-
9 owned enterprise participation in City contracting is necessary, and also gives important
10 historical information concerning African Americans in San Francisco.

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

13 · In May 1992, the Board of Supervisors of Contra Costa County issued a comprehensive
14 study of the use of women- and minority-owned businesses by that county. The study
15 examined Contra Costa's own contracts, data about subcontractors collected from prime
16 contractors, data on Contra Costa's payments to vendors, data on 7,993 minority- and
17 women-owned vendors in the Bay Area identified from various directories, questionnaires on
18 purchasing practices by Contra Costa officials and census data, testimony Contra Costa
19 solicited in public hearings in Alameda and San Francisco, and Bay Area wide mail surveys of
20 540 women- and minority-owned businesses. The study found that minorities received a
21 smaller share of Contra Costa County contracts than would be expected given their
22 availability. The study also examined the private sector for construction in San Francisco,
23 Oakland, and San Jose and found that minority- and women-owned businesses received a
24 smaller share of prime and subcontracts than would be expected given their availability. The
25

1 study also found strong evidence of discrimination against women and minority firms in Contra
2 Costa's professional services contracting and commodity purchases.

3 · In 1995 the California Senate Office of Research issued a report entitled "The Status of
4 Affirmative Action in California." The report explained, in part, that "[c]ities and counties have
5 affirmative action programs as a matter of public policy, as a requirement for contracting with
6 the State, or because they receive federal money that requires attention to nondiscrimination
7 hiring." The report concluded that despite past affirmative action efforts, "salaries remain
8 disparate among racial and ethnic groups and between men and women."

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

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

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

1 contracts worth less than \$500,000, and for purchases of goods and supplies contracts worth
2 less than \$500,000.

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

10 · The historical overview of the Arab American experience in San Francisco contained in the
11 Mason Tillman study.

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

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

25

1 · Testimonial evidence concerning discrimination against Native Americans in the form of the
2 testimony of five Native Americans at a public hearing in January 1990, the testimony of four
3 Native American interviewees in the Mason Tillman study, and the testimony of nine Native
4 Americans at a public meeting before the Human Rights Commission on May 7, 1997, and the
5 testimony of a representative of Native Americans at the May 8, 1997 hearing of the Board of
6 Supervisors Health, Family and Environment Committee.

7 · The historical overview of the Native American experience in San Francisco contained in the
8 Mason Tillman study.

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

16 · Testimonial evidence concerning discrimination against Iranian American owned firms.

17 · The historical overview of the Iranian American experience in San Francisco attached as
18 exhibits to the January 4, 1999 and June 30, 1999 Human Rights Commission Report. That
19 testimony recounted several experiences of Iranian Americans who were being considered for
20 subcontracting with prime City contractors. When the prime contractors learned that the
21 Iranian American contractors were not certified MBEs, the prime contractors had no further
22 interest in continuing contracting with the Iranian American contractors even though they were
23 fully qualified to do the work.

24 • The findings indicate that Iranian American firms have been virtually excluded from City
25 contracting. Although the availability of Iranian American contractors is 4.2%, their utilization

1 rate on City prime contracting was .02% of the total dollars awarded during calendar year
2 1996-97.

3 14. The Board further finds that although Iranian Americans are not Arab Americans and have
4 cultural differences from Arab Americans, Iranian Americans nevertheless suffer from the
5 same or similar discrimination as Arab Americans in City contracting. The Board finds that this
6 similarity in discrimination occurs because those who discriminate against Iranian Americans
7 and Arab Americans in City contracting do not distinguish these groups as separate. The
8 Board thus finds it necessary to group Iranian Americans with Arab Americans for purposes of
9 remedying the discrimination these two groups suffer in City contracting programs.

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

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

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

25

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

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

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

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

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

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

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

18 **SEC. 12D.A.3. DECLARATION OF POLICY.**

19 It is the policy of the City and County of San Francisco to ensure full and equitable
20 opportunities for minority business enterprises, woman business enterprises, and local
21 business enterprises to participate as prime contractors in providing goods and services to the
22 City. This program is intended to correct identified discriminatory practices inherent in the
23 City's procurement process and in the award of prime contracts to MBE/WBEs. Another goal
24 of this ordinance is to offset some of the economic disadvantages local businesses continue
25 to face that are not shared by nonlocal businesses.

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

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

16 **SEC. 12D.A.4. SCOPE.**

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

24

25

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

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

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

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

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

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

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

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

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

1 deemed to perform a “commercially useful function” unless the brokerage, referral or
2 temporary employment services are those required and sought by the City. When the City
3 requires and seeks specialty products made to order for the City or otherwise seeks products which, by
4 industry practice, are not regularly stocked in warehouse inventory but instead are purchased directly
5 from the manufacturer, the value of the "commercially useful function" provided by a supplier or
6 distributor shall be valued at no more than five percent of the cost of the product. When the City
7 requires and seeks products which are, by industry practice, stocked in warehouse inventory and are in
8 fact, regularly stocked by the listed supplier or distributor, the value of the "commercially useful
9 ,function" provided by the supplier or distributor shall not exceed sixty percent of the cost of the
10 product. If the listed supplier or distributor does not regularly stock the required product, the value of
11 the "commercially useful function" provided by the supplier or distributor shall be valued at no more
12 than five percent of the cost of the product

13 “Commission” shall mean the Human Rights Commission of the City and County of San
14 Francisco.

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

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

19 “Contract” shall mean and include any agreement between the City and a person to provide or
20 procure labor, materials, equipment, supplies or services to, for or on behalf of the City. A

21 “contract” shall include an agreement between the City and a person or nonprofit entity to
22 perform construction-related services or fund the performance of such services. A “contract”
23 does not include: (1) awards made by the City with federal/State grant or City *general fund*
24 *monies funds* to a nonprofit entity where the City offers assistance, guidance, or supervision on
25 a project or program and the recipient of the grant award uses the grant monies to provide

1 services to the community; (2) sales transactions where the City sells its personal or real
2 property; (3) a loan transaction where the City is acting as a debtor or a creditor; (4) lease,
3 franchise, or concession agreements; (5) agreements to use City real property; (6) gifts of
4 materials, equipment, supplies or services to the City; or (7) agreements with a public agency
5 except as provided in Section ~~12D.A.9~~ 12D.A.9(E).

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

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

18 “Control” of a business shall refer to the possession of the legal authority and power to
19 manage business assets, good will and daily operations of the business, and the active and
20 continuous exercise of such authority and power in determining the policies and directing the
21 operations of the business.

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

23 “Discount” shall mean an upward or downward price adjustment, according to the context, that
24 is made for the purpose of remedying, in the case of MBEs and WBEs, identified

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1 discrimination, and, in the case of LBEs, the competitive disadvantage caused by the higher
2 administrative costs of doing business in the City.

3 “Economically disadvantaged business” shall mean a business whose average gross annual
4 receipts in the three fiscal years immediately preceding its application for certification as a
5 MBE, WBE or LBE do not exceed the following limits: (1) public works/ construction -
6 \$14,000,000; specialty construction contractors - \$5,000,000 ; (2) goods/ materials/
7 equipment and general services suppliers - \$5,000,000; (3) professional services - \$2,000,000;
8 (4) trucking - \$3,500,000; and (5) telecommunications - \$5,000,000. Any business under
9 common ownership, in whole or in part, with any other business(s) shall be considered an
10 "economically disadvantaged business" only if the aggregate gross annual receipts of all of the
11 businesses under such common ownership do not exceed the limits specified in this section. All
12 businesses owned by married spouses or domestic partners shall be considered under common
13 ownership unless the businesses are in unrelated industries and no community property or other jointly
14 owned assets were used to establish or are used to operated either business.

15 ~~“Equipment and supplies contract” shall mean a term purchase agreement, contract order, purchase~~
16 ~~order and any other agreement for the purchase of transportation equipment, office supplies, data~~
17 ~~processing and office equipment, hospital and medical equipment and supplies, food, restaurants,~~
18 ~~building supplies, fire/safety equipment and supplies, clothing, miscellaneous and electrical equipment~~
19 ~~and supplies. The term “equipment and supplies contract” shall not include contracts for fuels,~~
20 ~~lubricants and illuminants.~~

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

1 "General services contract" shall mean ~~a purchase agreement, contract order, purchase order and~~
2 ~~any other agreement for the procurement of~~ an agreement for those services that are not professional
3 services. Examples of "General Services" include: janitorial, security guard, pest control, parking lot
4 management and landscaping services ~~equipment and computer maintenance, miscellaneous, printing~~
5 ~~and graphics services.~~

6 "Good-faith efforts" when required of a contract awarding authority or department shall mean
7 the actions undertaken by a department to obtain MBE or WBE participation in a contract as
8 prime contractors, and shall include the following efforts: (1) encouraging MBE/WBEs to
9 attend prebid meetings scheduled by a department or the Commission to inform potential
10 contractors of contracting opportunities; (2) advertising in general circulation media, trade
11 association publications and minority/woman business focused media and posting the
12 contacting opportunity on the Office of Contract Administration's website pursuant to Section
13 12.D.A9(A)6;(3) notifying MBE/WBEs that are available to perform the work contemplated in a
14 contract and soliciting their interest in the contract; (4) dividing the contract work into
15 economically feasible units to facilitate MBE/WBE participation in the contract; (5) pursuing
16 solicitations of interest by contacting MBE/WBEs to determine whether these businesses are
17 interested in participating on the contract; (6) providing MBE/WBEs with adequate information
18 about the plan, specifications and requirements of the contract; (7) where applicable,
19 negotiating with MBE/WBEs in good faith and demonstrating that MBE/WBEs were not
20 rejected as unqualified without sound reasons based on a thorough investigation of their
21 capabilities; and (8) using the services of available community and contractors' groups, local,
22 State or federal minority and woman business assistance offices that provide assistance in
23 the recruitment of MBE/WBEs for public sector contracts.

24 "Good-faith efforts" when required of a prime ~~public works/construction~~ city contractor ~~or~~
25 ~~professional services provider~~ shall mean the steps undertaken to comply with the goals and

1 requirements imposed by the City for participation by MBE/WBEs as subcontractors, and shall
2 include the following:

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

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

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

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

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

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

24 (7) Requesting assistance from minority and women community organizations; minority and
25 women contractor or professional groups; local, State or federal minority and women business

1 assistance offices; or other organizations that provide assistance in the recruitment and
2 placement of minority or women business enterprises, if any are available;

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

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

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

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

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

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

18 “Local business” or “Local business enterprise (LBE)” shall mean an economically
19 disadvantaged business that is an independent and continuing business for profit, performs a
20 commercially useful function and is a firm that:

21 (1) Has fixed offices or distribution points located within the geographical boundaries of the
22 City where a commercially useful function is performed. Businesses that supply commodities must
23 continuously maintain warehouses stocked with inventory within the geographical boundaries of the
24 City. Truckers must park their registered vehicles and trailers within the geographical boundaries of
25

1 the City. Post office box numbers or residential addresses shall not suffice to establish status
2 as a “Local Business”;

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

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

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

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

10 “Lower-tier subcontracting” shall mean any agreement or other arrangement between a sub-
11 contractor and a ~~prime contractor that requires the prime contractor to~~ person as defined herein
12 where it is agreed that said person shall perform any term, condition or obligation imposed by the
13 subcontract upon the subcontractor.

14 “Minority,” “minorities,” or “minority person” shall mean members of one or more of the
15 following ethnic groups:

16 African Americans: (defined as persons whose ancestry is from any of the Black racial groups of Africa
17 or the Caribbean);

18 Arab Americans: (defined as persons whose ancestry is from an Arabic speaking country that is a
19 current or former member of the League of Arab States);

20 Asian Americans (defined as persons with Chinese, Japanese, Korean ~~Koreans~~, Pacific
21 ~~Islanders~~ Islander, ~~Samoans~~ Samoan, ~~Filipinos~~ Filipino, Asian ~~Indians~~ Indian, and Southeast
22 ~~Asians~~ Asian ancestry);

23 ~~African Americans;~~

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

25

1 ·Latino Americans (defined as persons with ~~Mexicans~~ Mexican, Puerto ~~Ricans~~ Rican, Cubans
2 Cuban, Central ~~Americans~~ American or South ~~Americans~~ American ancestry origins. Persons with European
3 Spanish ancestry are not included as Latino Americans.);

4 ~~Arab Americans (defined as all individuals whose ancestry is from an Arabic speaking country that is~~
5 ~~a member of the League of Arab States as well as all individuals whose ancestry is from a country~~
6 ~~bordering an Arabic speaking country that is a member of the League of Arab States and who are~~
7 ~~regarded as having ancestry from an Arab speaking country that is a member of the League of Arab~~
8 ~~States); and~~

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

11 “Minority business enterprise (MBE)” shall mean an economically disadvantaged local
12 business that is an independent and continuing business for profit, performs a commercially
13 useful function, is owned and controlled by one or more minority persons residing in the
14 United States or its territories and is certified as an MBE pursuant to Section 12D.A.6(B).

15 ~~“Miscellaneous professional services” shall mean all professional services except legal, architect/
16 engineer, computer systems, management consulting and medical services.~~

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

25

1 “Owned,” for purposes of determining whether a business is a MBE or WBE shall mean that
2 minorities or women, as the context requires:

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

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

6 (3) Contribute capital, equipment ~~and expertise~~ to the business equal to at least the required
7 ownership percentage. Promissory notes are not sufficient to constitute capital contributions.

8 (4) Contribute expertise relevant to the business' essential functions at least equivalent to the
9 ownership interest.

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

16 “Participation commitment” shall mean the targeted level of MBE/WBE subcontractor
17 participation that each prime ~~public works/construction~~ city contractor ~~or professional service~~
18 ~~provider~~ has designated in its bid.

19 “Participation goals” shall mean the targeted levels of City-wide MBE/WBE participation in City
20 prime contracts that reflect the relevant share of MBEs or WBEs in a given industry or
21 profession referred to as “percent availability” in the utilization indices contained on file with
22 the Clerk of this Board in File No. 98-0612.

23 “Percent availability” shall mean the relevant share of MBEs or WBEs in a given industry or
24 profession.

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

5 "Professional services contract" shall mean an agreement for services which require extended
6 analysis, the exercise of discretion and independent judgment in their performance, and/or the
7 application of an advanced, specialized type of knowledge, expertise, or training customarily acquired
8 either by a prolonged course of study or equivalent experience in the field. Examples of professional
9 service providers include licensed professionals such as accountants, and non-licensed professionals
10 such as software developers and financial and other consultants, except that services of architects,
11 engineers, and other outside temporary professional design, consultant or construction management
12 services for a public work project shall be considered architect/engineering contracts and shall not be
13 considered professional services contracts for the purpose of this Ordinance. ~~the procurement of legal,~~
14 ~~architect/engineer, computer systems, management consulting, medical services and miscellaneous~~
15 ~~professional services.~~

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

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

24 "Services" shall mean Professional Services and General Services.

25

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

4 “Subcontractor participation goals” shall mean the targeted level of MBE/WBE subcontractor
5 participation designated by the Director for prime ~~public works/construction and professional~~
6 ~~services~~ city contracts.

7 “Woman business enterprise (WBE)” shall mean an economically disadvantaged local
8 business that is an independent and continuing business for profit, performs a commercially
9 useful function, is owned and controlled by one or more women residing in the United States
10 or its territories and is certified as a WBE pursuant to Section 12D.A.6(B).

11 ~~“Woman/minority man business enterprise (W/MBE)” shall mean an economically disadvantaged local~~
12 ~~business that meets the definition of both an MBE and WBE, except that the ownership interest and~~
13 ~~control by women alone and minorities alone is less than 51 percent of the business, but for which the~~
14 ~~aggregate ownership interest and control by women and minorities equals or exceeds 51 percent of the~~
15 ~~business. A MBE/WBE shall qualify and be deemed by a department, either as an MBE or WBE, but not~~
16 ~~both. Any reference in the ordinance to MBE or WBE includes a W/MBE.~~

17 **SEC. 12D.A.6. POWERS AND DUTIES OF THE COMMISSION AND THE DIRECTOR.**

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

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

- 1 2. Levy the same sanctions that a contracting awarding authority may levy as specified in
2 Section 12D.A.9(A)(7);
- 3 3. When necessary, subpoena persons and records, books and documents for a proceeding
4 of the Commission or an investigation by the Director or an audit pursuant to Section 12D.A.6(E)
5 conducted to further the purposes of this ordinance;
- 6 4. Adopt rules and regulations establishing standards and procedures for effectively carrying
7 out this ordinance. Among other things, the rules and regulations shall provide for
8 administrative procedures that will allow a business to prove and the Commission to
9 recommend to this Board that the ordinance's remedial measures should not be applied to an
10 industry or profession because MBE/WBE participation in City prime contracts has reached
11 parity with MBE/WBE participation in the relevant business community and that MBE/WBEs
12 no longer suffer from a discrimination-induced competitive disadvantage in the applicable
13 industry or profession. The regulations shall also provide a mechanism for contractors to seek
14 a determination by the Director that a MBE or WBE may not be granted a race- or gender-
15 conscious bid discount where it is demonstrated that the MBE's or WBE's bid price is not
16 attributable to the effects of past discrimination;
- 17 5. Issue forms for the Controller or contract awarding departments to collect information from
18 contractors as prescribed by this ordinance;
- 19 6. Hear appeals challenging: (i) the Director's disqualification of a bidder or Contractor as
20 specified in Section ~~12D.A.16(c)~~ 12D.A.16(b), (ii) challenging the Director's denial of an
21 application for or revocation of the certification of a business as an MBE, WBE, or LBE, as
22 specified in Section 12D.A.6(B)(2), or (iii) challenging the Director's denial of a request to
23 waive or to reduce subcontractor participation goals as specified in Section 12D.A.17(H);
- 24 7. By regulation require contract awarding authorities, departments and the Controller to
25 provide to the Director such information as will be necessary to enable the Director to keep a

1 database from which discrimination can be identified, to report to the Mayor and the Board of
2 Supervisors at the end of each fiscal year on the progress each City department has made
3 towards the achievement of MBE and WBE participation goals and to perform his/her other
4 duties. The database is a public record available to the public as provided by state and local
5 law;

6 8. Adopt rules and regulations as deemed necessary by the Director to ensure that the joint venture
7 bid/ratings discount is applied only to joint ventures where the MBE, WBE or LBE has sufficient skill,
8 experience, and financial capacity to perform the portion of the work identified for the MBE, WBE or
9 LBE.

10 9. Consistent with the provisions of the ordinance make such other rules and regulations as
11 are necessary to guide its implementation.

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

14 1. Through appropriately promulgated procedures, the Director shall certify businesses as
15 bona fide MBEs/WBEs/LBEs. These procedures shall provide that any business seeking
16 certification as an LBE shall meet the definition of an LBE and possess or establish all of the
17 following: (1) business cards for the San Francisco office; (2) business stationery for the San
18 Francisco office; (3) a written agreement for occupancy of a San Francisco office *including*
19 *documentation of payment of monetary rent (receipts and copies of cancelled checks)*; (4) a listing of
20 the business in an appropriate business buyers guide such as a telephone yellow pages
21 listing San Francisco based businesses; (5) a San Francisco office in which business is
22 transacted that is appropriately equipped for the type of business for which the enterprise
23 seeks certification as an LBE; (6) a conspicuously displayed business sign at the San
24 Francisco business premises except where the business operates out of a residence; and (7)
25 licenses issued to the business owner appropriate for the type of business for which the

1 enterprise seeks certification. These procedures may restrict or deny eligibility for certification to
2 any business owned in full or in part by an employee of the City and County of San Francisco;
3 2. Except where the Director cannot certify a business because the business has not been
4 established in San Francisco for the requisite six months, whenever the Director denies an
5 application for or revokes the certification of a business as a MBE, WBE, LBE because the
6 business is not eligible to be certified as a bona fide MBE, WBE, LBE, the Director shall, within
7 three working days of his/her decision, notify the aggrieved business in writing of the basis for
8 revocation or denial of certification and the date on which the business will be eligible to
9 reapply for certification. The notice shall be transmitted to the business via certified mail or via
10 facsimile. The Director shall require a business to wait at least six months but not more than
11 two years after the denial or revocation before reapplying to the Director for certification as a
12 MBE, WBE or LBE. The Director shall provide any business whose certification is revoked an
13 opportunity to be heard within three business days of the revocation. ~~The~~ A business may appeal
14 the Director's denial or revocation of certification of a business as an MBE, WBE, or LBE to
15 the Commission. The appeal must be filed with the Commission within three business days
16 following receipt of the Director's decision. Notice by the Director to the business of denial or
17 revocation of certification as an MBE, WBE or LBE shall apprise the business of its right to
18 appeal the decision. ~~The Commission shall resolve any such appeal within a reasonable period of~~
19 ~~time taking into account the contract awarding authority's need for an expedient award of the~~
20 ~~particular contract;~~
21 3. The Director shall have the ultimate responsibility for ensuring that the necessary data is
22 collected and analyzed. Annually, and more often if the Director deems necessary, the
23 Director shall analyze the most recently available data of MBEs and WBEs in the various
24 industries and professions doing business with the City. Applying statistically sound methods
25 of analysis and considering other evidence of discrimination, the Director shall identify areas

1 of contracting where the City or any of its departments (a) is failing to meet the participation
2 goals to such an extent that an inference of discrimination can be made, or (b) is otherwise
3 discriminating in its contracts. In addition, the Director shall identify areas of contracting where
4 the City is meeting and/or exceeding participation goal to such an extent that the MBE or
5 WBE bid discounts can no longer be justified. The results of this study shall be included in the
6 Commission's annual report required by Section 12D.A.18(B);

7 4. Not later than ~~March~~ July 1st of each fiscal year, the Director shall transmit to this Board
8 proposed amendments to this ordinance that the Director deems necessary to ensure that the
9 ordinance provides adequate remedies for identified discrimination while going no further than
10 necessary to remedy the identified discrimination;

11 5. The Director shall work with the Controller and City departments to implement a City-wide
12 prompt-payment policy requiring that MBEs, WBEs and LBEs be paid by the City, within 30
13 days after the date on which the City receives an invoice from an MBE, WBE or LBE for work
14 performed for the City;

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

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

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

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

1 ~~10.~~ 9. The Director shall grant waivers as set forth in Sections 12D.A.15 and 12D.A.17(E)
2 through (H), and may disqualify a bidder or contractor as set forth in Section ~~12.D.A.16(e)~~
3 12.D.A.16(b).

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

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

17 (E) The Director, in cooperation with the Controller, shall ~~conduct random audits~~ randomly audit
18 at least three ~~of~~ prime contractors each fiscal year in order to insure their compliance with the
19 provisions of this ordinance. ~~Further, the~~ The Director, in cooperation with the Controller, shall
20 furthermore randomly audit 10 percent of the joint ventures granted bid discounts in each
21 fiscal year. The Controller shall have the right to audit the books and records of the contractors, joint
22 venture participants, and any and all subcontractors to insure compliance with the provisions of this
23 ordinance. ~~The Director shall also establish a joint task force, with representatives from the HRC, the~~
24 ~~City Attorney, the District Attorney, community members, and other interested entities, to explore~~
25 ~~interagency means of enforcing this ordinance more fully.)~~

1 **SEC. 12D.A.7. POWERS AND DUTIES OF THE CONTROLLER.**

2 (A) In addition to the duties given to the Controller elsewhere, the Controller shall work
3 cooperatively with the Director to ~~assemble and to maintain the~~ provide such contractual
4 encumbrance and payment data as the Director advises are necessary to form the basis of the
5 Commission's report to the Mayor, this Board and the public on the participation of MBEs and
6 WBEs in City prime contracts. If any department refuses or fails to provide the required data to
7 the Controller, the Controller shall immediately notify the Mayor, this Board and the Director.

8 (B) The Controller shall not certify the award of any contract subject to this ordinance where
9 the Director has notified the Controller that the contract awarding authority has not provided ~~until the~~
10 ~~department requesting certification of the award of the contract has provided the Controller with~~ the
11 information the Director advises is necessary under this ordinance.

12 (C) Each request for payment to a City contractor submitted to the ~~Controller~~ contract awarding
13 authority shall be accompanied by a subcontractor participation form approved by the
14 Commission. That form shall contain information that the Commission has determined is
15 necessary to enable the Commission and the Director (1) to monitor compliance by City
16 departments and their prime contractors with their obligations under this ordinance (2) to
17 determine whether City departments are achieving their prime and subcontracting goals under
18 this ordinance, (3) to determine whether to recommend changes in this ordinance to ensure
19 that the ordinance continues to serve as a remedy for discrimination in contracting while going
20 no further than necessary to remedy that discrimination, and (4) to make such other reports
21 and analyses as are required by this ordinance. ~~The Controller shall furnish to the Director a list~~
22 ~~of contracts newly posted and shall provide a cross check on the City department's reporting.~~

23 In the event that a request for payment fails to include the information required pursuant to
24 this Section, the ~~Controller~~ contract awarding authority shall, within two working days, notify the
25 ~~contract awarding authority, the~~ Director and the affected prime contractor[s] of the failure and

1 afford each affected prime contractor an opportunity to be heard promptly. That notice shall
2 inform the contractor that the ~~Controller~~ contract awarding authority has tentatively determined
3 that the information has not been provided, what information is missing and that if this failure
4 is substantiated, then the Controller will be ~~required~~ notified to withhold 20 percent of the
5 payment until the information is provided. If the Controller finds, after consultation with the
6 Director ~~or the Director's representative~~ and the notice and opportunity to be heard, that the
7 information has not been provided, the Controller shall withhold 20 percent of the payment
8 otherwise due until the information is provided.

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

13 (E) The contract awarding authority ~~Controller~~ shall require all prime contractors to submit,
14 within 10 days following payment to the prime contractor of moneys owed for work completed
15 on a project, an affidavit under penalty of perjury, that all subcontractors on the project or job
16 have been paid and the amounts of each of those payments. The name, telephone number
17 and business address of every subcontractor shall be listed on the affidavit. If a prime
18 contractor fails to submit this affidavit, the contract awarding authority ~~Controller~~ shall notify the
19 ~~contract awarding authority and~~ Director who shall take appropriate action as authorized under
20 Section 12D.A.16(B) and (F) ~~12D.A.16(C) and (F)~~.

21 **SEC. 12D.A.8. POWERS AND DUTIES OF THE MAYOR.**

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

23 1. By July 1st of each fiscal year, issue notices to all City departments informing them of their
24 duties under this ordinance. The notice shall contain the following information: (1) the City-
25 wide MBE/WBE participation goals that departments are expected to use good-faith efforts to

1 attain during the fiscal year and that a department's failure to use good-faith efforts to attain
2 the MBE/WBE participation goals shall be reported to this Board in the Commission's annual
3 report; and (2) the data each department is required to provide the Controller on each contract
4 award;

5 2. Coordinate and enforce cooperation and compliance by all departments with this ordinance;

6 ~~3. Establish a three-member Review Committee that shall have the authority to review contracts~~
7 ~~proposed by the Director or a department to be set aside. The three-member Review Committee shall~~
8 ~~be composed of an individual appointed by the Commission, an individual appointed by the Mayor, and~~
9 ~~an individual appointed by the contract awarding authority. The Commission, the Mayor, and the~~
10 ~~contract awarding authority shall appoint individuals who are knowledgeable about the City's~~
11 ~~contracting and subcontracting practices, the industry or profession affected by the proposed contract~~
12 ~~to be set aside, and the certification requirements under this ordinance. The Commission, the Mayor,~~
13 ~~and the contract awarding authority may not appoint to the Review Committee the Director or any~~
14 ~~employee of the Commission. Any appeal to the Review Committee shall be heard and decided within~~
15 ~~10 business days of its receipt. (Added by Ord. 296-98, App. 10/5/98)~~

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

17 (A) Contract awarding authorities shall:

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

20 2. Unless otherwise indicated in this ordinance, extend a discount in all bids, proposals and
21 contracts and in the composition of rating scales as follows: (1) a five percent discount to (i) ~~a~~
22 ~~local business~~ an LBE or (ii) a joint venture with ~~local~~ MBE or ~~local~~ WBE participation that
23 equals or exceeds 35 percent but is under 40 percent; or (iii) where a joint venture is
24 composed of only ~~local businesses~~ LBEs with no ~~local~~ MBE or WBE participation or where the
25 ~~local~~ MBE or ~~local~~ WBE participation is less than 35 percent; (2) a seven and one-half percent

1 bid discount to a joint venture with ~~local~~ MBE or WBE participation that equals or exceeds 40
2 percent; (3) a 10 percent discount to (i) a ~~local~~ MBE or ~~local~~ WBE or (ii) a joint venture
3 between or among ~~local~~ MBEs or/and ~~local~~ WBEs.

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

14 3. Arrange contracting by size and type of work to be performed so as most effectively to
15 enhance the opportunity for participation by MBEs and WBEs to the maximum extent feasible.
16 As soon as practical before soliciting quotes, bids or proposals, all contract awarding
17 authorities or in the case of a professional services contract, the department making the
18 contract award recommendation, shall submit all large proposals to the Director for review.
19 The purpose of the Director's review is to determine whether the proposed project can be
20 divided into smaller projects so as to enhance the opportunity for participation by MBEs and
21 WBEs in the project. For purposes of this subsection, the term "large project" shall mean the
22 following: (1) any public works/construction project estimated to cost more than \$5,000,000;
23 and (2) any professional services contract estimated to cost more than ~~\$50,000~~ \$100,000. If the
24 Director determines, after consulting with the contract awarding authority or department
25 responsible for the project, that the project can be divided into smaller projects, the contract

1 awarding authority or department shall comply with the Director's determination and issue the
2 solicitation for quotes, bids or proposals in accordance with the Director's determination;
3 4. Adjust bid bonding and insurance requirements ~~as recommended by~~ in accordance with the
4 ~~most current version of the City's City Risk Manager in the May 2, 1989~~ "Contract Insurance
5 Manual" or as otherwise authorized by the City Risk Manager, Department of Administrative Services;
6 5. Use the City's Surety Bonding Program set forth in Administrative Code Section 12D.A.10
7 to assist MBEs, WBEs and LBEs bidding on and performing City public works contracts to meet
8 bonding, ~~insurance and other fee-related~~ requirements and/or obtain construction loans;
9 6. Submit to the Office of Contract Administration (OCA) Purchaser of Supplies of the City and
10 ~~County of San Francisco~~ in electronic format or a format specified by the OCA Purchaser of
11 ~~Supplies of the City and County of San Francisco~~ all bid opportunities, requests for proposals and
12 Solicitations for which published notice or advertising is required, no later than 10 calendar
13 days prior to the announcement of the bid opportunity, request for proposal or Solicitation. A
14 contract awarding authority must obtain a waiver from its commission, or in the case of a
15 department that has no commission, from the Board of Supervisors, if it cannot meet the
16 requirements of this Section 12D.A.9(A)6. The OCA Purchaser of Supplies of the City and County
17 ~~of San Francisco~~ shall cause to be posted upon a website the following information concerning
18 current bids, requests for proposals and Solicitations: the title and number; the name of the
19 contract awarding authority; and the name and telephone number of the person to be
20 contacted for further information. Such information shall be posted with sufficient lead time to
21 provide adequate notice and opportunity to potential City contractors and vendors to
22 participate in the bid opportunity, request for proposals or Solicitation, but in no event less
23 than 10 calendar days prior to the due date for such bid opportunity, request for proposals or
24 Solicitation;
25

- 1 7. Impose such sanctions or take such other actions as are designed to ensure compliance
2 with the provisions of this ordinance, which shall include, but are not limited to:
- 3 (a) Refuse to ~~grant the~~ award of a contract,
 - 4 (b) Order the suspension of a contract,
 - 5 (c) Order the withholding of funds,
 - 6 (d) Order the revision of a contract based upon a material breach of contract provisions
7 pertaining to MBE or WBE participation,
 - 8 (e) Disqualify a bidder, contractor, subcontractor, or other business from eligibility for
9 providing goods or services to the City for a period not to exceed five years, based on the
10 standards set forth in this ordinance and rules and regulations promulgated by the
11 Commission. Any business disqualified under this subsection shall have a right to review and
12 reconsideration by the Commission after two years upon a showing of corrective action
13 indicating that violations are not likely to recur;
- 14 8. Not award any contract to a person or business that is disqualified from doing business with
15 the City under the provisions of this ordinance;
- 16 9. Designate a staff person to be responsible for responding to the Director and Commission
17 regarding the requirements of this ordinance;
- 18 10. Maintain accurate records as required by the Director and the Commission for each
19 contract awarded, its dollar value, the nature of the goods or services to be provided, the
20 name of the contractor awarded the contract, the efforts made by a contractor to solicit bids
21 from and award subcontracts to MBEs and WBEs and LBEs;
- 22 11. Where feasible, provide technical assistance to MBEs and WBEs to increase their ability
23 to compete effectively for the award of City contracts;
- 24
25

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

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

8 14. Whenever contract amendments, modifications, supplements or change orders
9 cumulatively increase the total dollar value of a contract by more than 10 percent, the contract
10 awarding authority shall require compliance with those MBE and WBE provisions of this
11 ordinance that applied to the original contract;

12 15. All contract amendments, modifications, supplements or change orders that cumulatively
13 increase by more than 20 percent the total dollar value of all contracts originally valued at
14 \$50,000 or more shall be subject to prior approval of the Director, who shall review the
15 proposed amendment, modification, supplement or change order to correct contracting
16 practices that exclude women or minorities from new contracting opportunities.

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

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

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

4 1. Each bidder, proposer and contractor ~~on all contracts~~ shall be required to sign ~~before a notary~~ an
5 affidavit ~~prepared by the City Attorney~~, declaring under penalty of perjury, attesting to its intention to
6 comply fully with the provisions of this ordinance and attesting to the truth and accuracy of all
7 information provided regarding such compliance;

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

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

22 4. Contracts shall require ~~all contractors-bidders, contractors and subcontractors~~ to maintain
23 records, including such information requested by the Director or Commission, necessary for
24 monitoring their compliance with this ordinance and shall require prime contractors to include in
25

1 any subcontract with an MBE or WBE a provision requiring the subcontractor to maintain the same
2 records;

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

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

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

24 8. Contracts shall require prime contractors to submit to the Director for approval all contract
25 amendments, modifications, supplements, and change orders that cumulatively increase by

1 more than 20 percent the total dollar value of all contracts originally valued at \$50,000 or
2 more. The Director shall review the proposed amendment, modification, supplement or
3 change order to correct any contracting practices that exclude women and minorities from
4 new contracting opportunities;

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

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

22 11. Contracts shall require ~~bidders~~, contractors and subcontractors to maintain records
23 necessary for monitoring their compliance with this ordinance for three years following
24 completion of the project and shall permit the Commission and Controller to inspect and audit such
25 records.

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

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

11 ~~(G) City department heads and commissioners shall attend a mandatory training session on an annual~~
12 ~~basis. The training session shall be organized and conducted by the Director, or his or her designee,~~
13 ~~and shall inform City department heads and commissioners of the requirements of this ordinance.~~

14 **SEC. 12D.A.10. PUBLIC WORKS CONTRACTS.**

15 (A) In addition to the general findings set forth in Section 12D.A 2, and based upon the record
16 before this Board, the Board hereby finds that the evidence before the Board relating to the
17 award of prime public works contracts for fiscal years 1992-93, 1993-94, 1994-95, 1996-97,
18 ~~and 1997-98~~ and 1998-2003 reflects that MBEs and WBEs continue to be disadvantaged by
19 discriminatory practices when competing for City prime public works contracts. Further, the
20 Board finds that race-neutral measures employed by the City have not prevented such
21 discrimination against MBEs and WBEs from occurring.

22 (B) Contract awarding authorities shall apply bid discounts as enumerated in Section
23 12D.A.9(A) to all public work contracts the estimated cost of which exceeds \$10,000.

24 (C) **Bonding and Financial Assistance Program.**

25

1 **1. Program Description.** The City and County of San Francisco, acting through its Human
2 Rights Commission ("HRC"), intends to provide guarantees to private bonding companies and
3 financial institutions in order to induce those entities to provide required bonding and financing
4 to eligible contractors and subcontractors bidding on and performing City public work contracts.
5 This bonding and financial assistance program is subject to the provisions of this Subsection
6 12D.A.10(C).

7 **2. Eligible Contracts.** The assistance described in this Subsection 12D.A.10(C) shall be
8 available for any City public works contract awarded in accordance with San Francisco
9 Administrative Code Chapter 6.

10 **3. Eligible ~~Contractors~~ Businesses.** ~~Contractors~~ Businesses must meet the following criteria to
11 qualify for assistance under this Subsection 12D.A.10(C):

12 (a) The ~~contractor~~ business may be either a prime contractor or subcontractor ~~construction firm~~;
13 and

14 (b) The ~~contractor~~ business must be certified by the HRC as a Minority Business Enterprise
15 ("MBE"), Woman Business Enterprise ("WBE") or Local Business Enterprise ("LBE")
16 according to the requirements of San Francisco Administrative Code Chapter 12D.A;

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

- 19 (i) Bond application assistance,
- 20 (ii) Assistance in developing financial statements,
- 21 (iii) Assistance in development of a pre-bond surety profile,
- 22 (iv) Identification of internal financial control systems,
- 23 (v) Development of accurate financial reporting tools, and

24
25

1 **4. Agreements Executed by the Human Rights Commission.** The HRC is hereby
2 authorized to enter into the following agreements in order to implement the bonding and
3 financial assistance program described in this Subsection 12D.A.10(C):

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

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

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

14 **5. Monitoring and Enforcement.** The HRC shall maintain records on the use and
15 effectiveness of this program, including but not limited to (1) the identities of the *contractors*
16 *businesses* and bonding companies participating in this program, (2) the types and dollar
17 amounts of public work contracts for which the program is utilized, and (3) the types and dollar
18 amounts of losses which the City is required to fund under this program. The HRC shall
19 submit written reports to the Board of Supervisors every six months beginning January 1,
20 2001, advising the Board of the status of this program and its funding capacity, and an
21 analysis of whether this program is proving to be useful and needed.

22 **6. Funding and Accounts.** As of July 1, 2001, funding for this program may be derived from
23 the following sources:

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

1 (b) Each Department authorized to contract for public works or improvements pursuant to San
2 Francisco Administrative Code Chapter 6 shall commit to this program up to ten percent
3 (10%), but not less than one percent (1%), of the budget for every public work or improvement
4 undertaken. (A "public work or improvement" is defined in San Francisco Administrative Code
5 Chapter 6.) This subsection is effective for those public works or improvements where the
6 award of the construction contract (as defined and regulated by Administrative Code Chapter
7 6) occurs after July 1, 2001.

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

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

16 **7. Term of Bonding Assistance Program.** The HRC is authorized to enter into the
17 agreements described in this Subsection for a period ending on the earlier of (1) June 30,
18 ~~2005~~ 2008 or (2) the date on which the Controller is no longer able to certify the availability of
19 funds for any new guarantee agreement.

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

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1 **SEC. 12D.A.11. PURCHASING CONTRACTS.**

2 (A) In addition to the general findings set forth in Section 12D.A.2, and based upon the record
3 before this Board, the Board finds that the evidence before the Board relating to the award of
4 prime ~~purchasing~~ contracts for commodities and general services for fiscal years 1992-93, 1993-
5 94, 1994-95, 1996-97, ~~and~~ 1997-98 and 1998-2003 reflects that MBEs and WBEs continue to
6 be disadvantaged by discriminatory practices when competing for ~~prime City purchasing such~~
7 contracts. The Board further finds that race-neutral measures employed by the City have not
8 prevented such discriminatory practices from occurring.

9 (B) Contract awarding authorities shall apply all bid discounts as enumerated in Section
10 12D.A.9(A) to all commodities equipment and supplies contracts the estimated cost of which
11 exceeds \$2,500 ~~or~~ and general services contracts the estimated cost of which exceeds \$10,000.

12 (C) In addition to the duties given the ~~purchaser~~ Office of Contract Administration elsewhere in
13 this Section, the ~~purchaser~~ Office of Contract Administration shall maintain, with the assistance
14 of the Director, a current list of MBEs and WBEs to provide each of those commodities or
15 services subject to this ordinance that the ~~purchaser~~ Office of Contract Administration indicates
16 are required by the City.

17 (D) The ~~purchaser~~ Office of Contract Administration shall also maintain a central office where all
18 bids, requests for proposals and solicitations will be listed and kept current.

19 **SEC. 12D.A.12. ARCHITECT/ENGINEERING CONTRACTS.**

20 (A) In addition to the general findings set forth in Section 12D.A.2, and based upon the record
21 before this Board, the Board hereby finds that the evidence before this Board relating to the
22 award of prime architect/engineering contracts for fiscal years 1992-93, 1993-94, 1994-95,
23 1996-97, ~~and~~ 1997-98 and 1998-2003 reflects that MBEs and WBEs continue to be
24 disadvantaged by discriminatory practices when competing for City prime
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1 architect/engineering contracts. The Board further finds that race-neutral measures employed
2 by the City have not prevented these discriminatory practices from occurring.

3 (B) Contract awarding authorities and architect/engineering selection panels shall apply all
4 bid/rating discounts as enumerated in Section 12D.A.9(A) to all bids and proposals for
5 architect/engineering contracts, the estimated cost of which exceeds \$10,000. Where
6 Architect/Engineering contracts are formally bid, all consultants selection panels and awarding
7 officers shall apply the bid/rating discounts to each stage of the selection process, e.g., qualifications,
8 proposals and interviews. Minorities and women shall be included on consultant selection
9 panels.

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

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

16 (A) In addition to the general findings set forth in Section 12D.A.2, and based upon the record
17 before this Board, the Board hereby finds that the evidence before the Board relating to the
18 award of professional services contracts for fiscal years 1993-93, 1993-94, 1994-95, 1996-97,
19 ~~and~~ 1997-98 and 1998-2003 reflects that MBEs and WBEs continue to be disadvantaged by
20 discriminatory practices when competing for City prime professional service contracts.
21 Further, the Board finds that race-neutral measures employed by the City do not prevent such
22 discrimination against MBEs and WBEs from occurring.

23 (B) Contract awarding authorities shall apply bid/rating discounts as enumerated in Section
24 12D.A.9(A) to all bids and proposals as enumerated in Section 12D.A.9(A) to all ~~submitted by MBEs~~
25 ~~and WBEs for the~~ professional service contracts the estimated cost of which exceeds \$10,000.

1 Where professional service contracts are formally bid, all consultants selection panels and
2 awarding officers shall apply the bid/rating discounts to each stage of the selection process,
3 e.g., qualifications, proposals and interviews. Minorities and women shall be included on
4 consultant selection panels.

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

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

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

20 **SEC. 12D.A.15. EXCEPTIONS AND WAIVERS.**

21 (A) The Director shall waive the race- and gender-conscious bid discounts and good faith
22 efforts requirements of this ordinance under the following circumstances:

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

3 2. If the contract awarding authority certifies in writing to the Director, prior to the Controller's
4 contract certification, that (a) ~~pursuant to the~~ the contract is being awarded under emergency
5 circumstances as described and defined in Administrative Code ~~Section 6.30~~ Section 6.60 or
6 Administrative Code Section 21.15 ~~the contract is necessary to respond to an emergency that~~
7 ~~endangers the public health or safety~~ and (b) (i) there is no time to apply bid/ratings discounts or
8 establish subcontracting goals, or (ii) there are no immediately available MBEs and WBEs that
9 are capable of performing the emergency work.

10 (B) The Director shall waive the five-percent LBE bid discount for contracts in excess of
11 \$5,000,000 whenever a contract awarding authority establishes that:

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

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

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

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

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1 **SEC. 12D.A.16. MONITORING AND COMPLIANCE.**

2 (A) The Director shall monitor the City's progress toward achievement of the goals stated in
3 Section 12D.A.3. The Director shall issue an exit report for any contract that includes
4 MBE/WBE subcontracting participation or MBE/WBE prime contract participation as a joint
5 venture partner. The purpose of this exit report is to ensure that prime contractors are complying
6 with their commitments to use MBE and WBE subcontractors and MBE/ WBEs are ~~actually~~
7 performing services as set forth in the bid/proposal and contract documents for the ~~on~~ joint
8 ventures.

9 (B) **Noncompliance By Contractors** ~~After Contract Award.~~ In cases in which the Director has
10 cause to believe that a contractor, ~~acting in good faith after a contract award,~~ has failed to
11 comply with any of the ~~race and/or gender conscious~~ requirements of this ordinance, rules and
12 regulations adopted pursuant to this ordinance or contract provisions pertaining to MBE or
13 WBE participation, the Director shall notify the contract awarding authority and shall attempt to
14 resolve the noncompliance through conference and conciliation. If the noncompliance cannot be
15 resolved, the Director shall conduct an investigation and, where the Director so finds, issue ~~submit to~~
16 ~~the Commission and the contractor~~ a written finding of noncompliance. The Director's finding shall
17 indicate whether the contractor acted in good faith or whether noncompliance was based on willful or
18 bad faith noncompliance with requirements of this ordinance, rules and regulations adopted pursuant
19 to this ordinance or contract provisions pertaining to MBE or WBE participation. ~~The Commission~~
20 ~~shall give the contractor an opportunity to appeal the finding, and if the Commission concurs with the~~
21 ~~finding of the Director~~ Where the Director finds that the contractor acted in good faith, after affording
22 the contractor notice and an opportunity to be heard, the Director shall recommend that the
23 contract awarding authority take appropriate action ~~pursuant to Section 12D.A.9(A)(7).~~ Where the
24 Director finds willful or bad faith noncompliance, after affording the contractor notice and an
25 opportunity to be heard, the Director shall impose sanctions for each violation of the ordinance, rules

1 and regulations adopted pursuant to this ordinance or contract provisions pertaining to MBE or WBE
2 participation that may include:

3 ~~(C) Willful or Bad Faith Noncompliance by Bidders or Contractors.~~

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

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

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

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

18 (d) Determining that the bidder or contractor has willfully failed to comply with the provisions of
19 this ordinance and, pursuant to the provision in the contract contemplated by Section
20 12D.A.9(D)(3) of this ordinance, calculating the liquidated damages for which the bidder or
21 contractor shall be liable.

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

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

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

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

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

20 The finding of noncompliance shall be communicated to the Mayor for appropriate action to
21 secure compliance pursuant to Section 12D.A.8(2).

22 (F) If the Director has reason to believe that any person has knowingly made, filed, or caused
23 to be filed with the City any materially false or misleading statement or report made in
24 connection with this ordinance, the Director shall report that information to the City Attorney or
25 the District Attorney for appropriate action. The Director shall be empowered to conduct an

1 investigation and for each violation of this Subsection 12D.A.16(F), to impose sanctions as set
2 forth in Subsection ~~12D.A.16(C)~~ 12D.A.16.

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

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

11 (B) For all public works/construction ~~and, architect/engineering, professional service, and general~~
12 ~~service~~ contracts which the contract awarding authority reasonably anticipates will include
13 subcontractor participation, prior to the solicitation of bids or proposals, the contract awarding
14 authority shall provide the Director with a proposed job scope, and may submit written
15 recommendations to the Director regarding MBE and WBE subcontractor participation goals
16 to be set for the contract.

17 (C) Upon receipt of a proposed job scope and/or a written recommendation from a contracting
18 awarding authority pursuant to Section 12D.A.9 (A)(3), the Director shall set the MBE and
19 WBE participation goals for each public works/ construction ~~and, architect/engineering,~~
20 professional service, ~~and general service~~ contract based upon the following factors:

- 21 1. The extent of subcontracting opportunities presented by the contract;
- 22 2. The availability of MBE/WBE subcontractors capable of providing goods and services on
23 the ~~public works/construction or professional services~~ contract.
- 24 3. The Director shall set these goals within 10 working days of the date the Director receives
25 from a contract awarding authority a proposed job scope and/or written recommendation. If

1 the Director fails to act within 10 days, and the contract awarding authority submitted to the
2 Director recommended goals, the recommended goals shall be deemed approved by the
3 Director, provided the goals are based upon the factors identified above.

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

6 1. Demonstrate in its bid that it has used good-faith efforts to use MBE and WBE
7 subcontractors; and

8 2. Identify the particular MBEs and WBEs subcontractors to be used in performing the
9 contract, specifying for each the dollar value of the participation, the type of work to be
10 performed and such information as may reasonably be required to determine the
11 responsiveness of the bid.

12 Except as provided in Section 12D.A.17, bids not meeting the requirements of Section
13 12D.A.17 shall be declared nonresponsive.

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

18 (F) A bidder or contractor may request that the Director waive or reduce the amount of MBE
19 or WBE subcontractor participation goals on a public works/construction ~~and~~,
20 architect/engineering, professional service, and general service contract by submitting in writing
21 with its bid to the contract awarding authority the reasons therefor.

22 (G) The Director may grant the request for waiver or reduction made pursuant to Sections
23 12D.A.17(E) and (F) upon a determination that:

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- 1 1. The reasonable and necessary requirements of the public works/construction ~~and~~,
2 architect/engineering, professional service, and general service contract render subcontracting or
3 the participation of businesses other than the public works/ bidder unfeasible;
4 2. Qualified MBEs and/or WBEs capable of providing the goods or services required by the
5 contract are unavailable, despite the prime contractor's or the department's good-faith efforts
6 to locate MBEs and WBEs to meet the participation goals; or
7 3. The available MBEs and WBEs have given price quotes that exceed competitive levels
8 beyond amounts that can be attributed to cover costs inflated by the present effects of
9 discrimination.

10 (H) Whenever the Director denies a contractor's request to waive or reduce the participation
11 goals, the contractor may appeal that denial to the Commission. The Commission's decision
12 on the request shall be final. In reviewing the Director's denial of a contractor's request to
13 waive or to reduce participation goals, the Commission shall consider the extent of
14 subcontracting opportunities presented by the contract and the availability of MBE/WBE
15 subcontractors capable of providing goods and services on the ~~construction~~ contract.
16 The Commission may overrule, sustain or modify the Director's decision by applying the same
17 standards that the Director is required to apply, as set forth in Subsection (G) above.

18 ~~(I) Prior to entering into any prime public works/construction and professional services contract, the~~
19 The contract awarding authority shall require bidders or proposers on the contracts to contact
20 MBEs and WBEs before listing them as subcontractors in the bid or proposal. The contract
21 awarding authority shall declare bids or proposals that fail to satisfy this requirement nonresponsive.

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

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1 **SEC. 12D.A.18. REPORTING AND REVIEW.**

2 (A) Reporting by the Director. Commencing ~~March 1, 1999~~ November 1, 2003 and no later than
3 the first day of every third month thereafter, the Director shall issue a written report to this
4 Board. That report shall document each City department's performance under the terms of
5 this ordinance, including, among other things, each City department's progress in meeting its
6 MBE/WBE goals and the success of each department's prime contractors complying with its
7 best efforts obligations to meet MBE/WBE subcontracting goals. That report shall also state
8 whether or not each City department has fully reported all data required by this ordinance or
9 requested by HRC or the Controller.

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

3 2. The Director shall report to the Commission all waivers acted upon pursuant to Section
4 12D.A.15. Such report shall be made ~~at the first Commission meeting~~ on a monthly basis following
5 the granting of the waiver.

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

13 (C) This Board shall act upon the Commission's recommendations by the ~~third~~ first Board
14 meeting of ~~May~~ January in each fiscal year subject to this ordinance.

15 (D) By the last day of each fiscal year, all contract awarding authorities and City departments
16 shall report annually to the Mayor on their progress in the preceding fiscal year toward the
17 achievement of the MBE and WBE participation goals.

18 **SEC. 12D.A.19. SEVERABILITY.**

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

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1 **SEC. 12D.A.20. GENERAL WELFARE CLAUSE.**

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

6 **SEC. 12D.A.21. OPERATIVE DATE.**

7 This ordinance shall become operative on ~~November 1, 1998~~ July 1, 2003, and shall govern all
8 contracts for which a bid or proposal has not been solicited by the operative date.

9 **SEC. ~~12D.A.21.~~ 12D.A.22. EXPIRATION.**

10 This ordinance shall expire June 30, ~~2003~~ 2008. If, however, the Commission, after conducting
11 public hearings, finds that the purposes identified in Section 12D.A.3 have not yet been
12 achieved, the Commission shall certify that finding to this Board no later than 120 days prior to
13 the expiration date. Thereafter, upon finding a good cause, this Board may extend the
14 ordinance for additional three-year periods.

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16 APPROVED AS TO FORM:

17 DENNIS J. HERRERA, City Attorney

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20 By: _____
21 BURK E. DELVENTHAL
22 Deputy City Attorney

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