

CITY AND COUNTY OF SAN FRANCISCO
BOARD OF SUPERVISORS

BUDGET AND LEGISLATIVE ANALYST
1390 Market Street, Suite 1150, San Francisco, CA 94102
PHONE (415) 552-9292 FAX (415) 252-0461

Policy Analysis Report

To: Supervisor Rafael Mandelman
From: Budget and Legislative Analyst's Office
Re: Impact of the Chapter 12X Contracting Ban
Date: October 18, 2022



Summary of Requested Action

Your office requested that the Budget and Legislative Analyst conduct an analysis of the impact of the implementation of the contracting prohibitions applicable to states on the Covered State List, pursuant to Chapter 12X of the Administrative Code. You also requested that we prepare an estimate of costs the City has incurred in implementing this legislation and a report on the nature and impacts of a similar ban by the State of California.

For further information about this report, contact Fred Brousseau, Director of Policy Analysis, at the Budget and Legislative Analyst's Office.

Executive Summary

- In October 2016, the San Francisco Board of Supervisors approved an ordinance (later codified in the Administrative Code as Chapter 12X) prohibiting City-funded travel to states with laws that reduced protections for the LGBT community against discrimination. This ordinance also prohibits City contracting with companies headquartered in these states, or where work on the contract would be performed in these states. The ordinance has since been amended twice: in 2019 to expand the travel and contracting ban to include states with restrictive abortion laws; and in 2022 to include states with restrictive voting laws
- There are currently 30 “covered” states, as identified semiannually by the City Administrator, in consultation with the Office of Transgender Initiatives, Department on the Status of Women, and Department of Elections.
- The implementation guidelines promulgated by the City Administrator's Office related to Chapter 12X specify that contracting departments may only enter into new contracts with businesses headquartered in Chapter 12X covered states under six exceptions, which are listed in the Administrative Code. Prior to July 2021, all

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contracting departments were required to report to the City Administrator annually on 12X waivers granted in the prior year based on the six allowed exceptions.

- Our review found poor compliance with this waiver reporting requirement between 2017 and 2021. However, since July 2021 and through the preparation of this report, departments have been required to enter waiver information into ServiceNow, an automated system through which the City Administrator's Office can generate a report that identifies waiver information for all departments.
- Between February 2017, when Chapter 12X became effective, and June 2022, City records show that 478,304 contracts and purchase orders with a value of \$62.9 billion were issued by the City and County of San Francisco. However, in spite of the new law and the substantial value of the City's contracts and purchase orders, a system was not established to identify whether departments were complying with the Chapter 12X bans or whether they had issued waivers from the requirements when their contractors and vendors were headquartered in banned states.
- Due to limitations in readily available records, only a partial assessment can be made of Citywide compliance with Chapter 12X during its first years. It is not possible to tell how many contracts were issued to contractors and vendors in banned states, but it is certain that this did occur. But there is a secondary problem in not being able to systematically determine if waivers were granted to such contracts.
- Of all 478,304 contracts and purchase orders executed between February 2017 and June 2022, available records do show that at least 150,126 were issued to companies with headquarters in California and were therefore consistent with the terms of Chapter 12X. However, for another 246,644 contracts and purchase orders from that period, the companies were located outside California including some in banned states. However, it is not possible to determine if waivers for all such contracts and purchase orders were compliant with Chapter 12X because records of all such waivers are not readily available for those years.
- Of the 246,644 contracts and purchase orders with companies located out of state, limited City records show that at least 9,407 contracts and purchase orders, with a value of \$4.1 billion, were issued to vendors with headquarters in banned states between 2017 and 2022. It is unknown how many of those contracts were waived from Chapter 12X requirements since that data was not recorded centrally until May 2021.
- Finally, there were 81,534 contracts and purchase orders for which headquarters locations were not recorded in the City's financial system at all, meaning these could also include some vendors in banned states. The number of these organizations that

received waivers from Chapter 12X requirements cannot be determined due to the lack of centrally collected waiver documentation prior to May 2021.

**Exhibit A: All City Contracts and Purchase Orders Executed
February 2017 – June 2022**

Headquarters	# of Contracts	% of Total #	\$ Value	% of Total Value
California	150,126	31.4%	\$40,259,273,936	64.0%
Outside California	246,644	51.6%	16,880,020,806	26.8%
Not in records	81,534	17.0%	5,767,368,868	9.2%
Total	478,304	100.0%	\$62,906,663,610	100.0%

- We analyzed the City’s contracting records in two phases: Phase 1 covered the period between February 2017, when Chapter 12X was first enacted, through 2020. This was before contract companies’ headquarters locations and Chapter 12X waivers granted began being systemically recorded in the City’s financial system. Due to those limitations, we reviewed contracts and purchase orders for a sample of six City departments for our Phase 1 review.
- Phase 2 of our analysis covered July 2021 through July 2022, after the City Administrator had established new reporting requirements to ensure that City departments reported the headquarters locations of their contractors in the City’s financial system to allow the contractors to be paid and that all waivers granted by contracting departments be centrally reported.
- **Phase 1 results (February 2017 – 2020)** In our Phase 1 analysis, we surveyed six City departments on the number of contracts issued to companies with headquarters in banned states or the number of waivers issued for such contracts. We found that between 2017 and 2020, these six sample departments granted a total of 47 waivers with a value of \$75.8 million to allow for contracts with companies in banned states. Although one of the departments provided us with copies of its annual reports to the City Administrator’s Office, the Office reports that none of these departments were compliant with the Chapter 12X requirement to report their waivers to the City Administrator’s Office in FY 2019-20.
- **Phase 2 results (July 2021– July 2022)** In July 2021, based on a recommendation from our office, the Office of Contract Administration began collecting and tracking Chapter 12X waiver requests Citywide. From July 2021 to July 2022, 35 departments Citywide approved a total of 538 waivers from Chapter 12X requirements for

contracts and purchase orders with companies in banned states totaling over \$791 million. Of just the six departments we reviewed in our Phase 2 work, four of them granted more waivers to the contracting ban in just the one year between July 2021 to July 2022 than they had in the three-year period we reviewed in our Phase 1 work.

- Though improvements have been made in monitoring Chapter 12X compliance, an effective enforcement mechanism for Chapter 12X is not in place. The City Administrator's Office was not delegated authority in the Chapter 12X contracting ban ordinance to implement or enforce the program, including ensuring that waivers are sufficiently justified and documented. Instead, department heads for the contracting departments grant waivers to their own departments.
- The most common justification for Chapter 12X waivers between July 2021 and July 2022 was that application of the ban, "...would have an adverse impact on services or a substantial adverse financial impact on the City." Adverse impacts are not defined in the ordinance and, at least in our sample contracts reviewed from between 2017 and 2020, required written justifications for department exemptions that may have explained the adverse impacts were not prepared for 26 of the 47 contracts we reviewed.
- While it is difficult to measure how the City's contracting costs have been affected by the 12X legislation, researchers have found that full and open competition for contracts can result in savings up to 20 percent. Since the legislation reduces the number of companies that could potentially bid on City contracts, we have estimated the impact of a reduced number of bids on at least some City contracts.
- Based on this research, we applied a range of 10 to 20 percent savings to 13 low-bid contracts awarded in 2016, before the Chapter 12X ban was enacted, with a value of \$234,605,460. This results in potential additional costs to the City if these same contracts had been bid after the Chapter 12X restrictions were in place of between \$23,460,546 and \$46,921,092. Losses could be greater in the ensuing years to the extent fewer contractors and vendors submitted bids due to the ban.
- Based on information provided by specific City departments and estimating department-level costs for submitted Chapter 12X waivers in ServiceNow, we estimate that the implementation of Chapter 12X has cost the City an additional \$474,283 since FY 2017. While some of these were one-time startup costs, ongoing costs for interpreting and administering Chapter 12X can be expected.
- The State of California adopted a ban in 2016 on State employees travelling to states that have adopted anti-LGBT laws or have removed protections against discrimination against same-sex couples or their families or on the basis of sexual

orientation, gender identity, or gender expression. We did not find any documentation by the State or other organizations on the economic impact of this ban on other states. The State ban is on travel only; it does not apply to contracting like the City and County of San Francisco ban.

Policy Options

The Board of Supervisors should:

1. Request that the City Administrator continue to develop stronger internal controls to ensure the sufficient justification for waivers is provided by City departments related to Chapter 12X implementation and waivers, consistent with Chapter 12X. This might include hosting a virtual training with contracting officers within departments to review Chapter 12X protocols, forms and documentation, and reporting requirements.
2. Request that the City Administrator present an annual 12X waiver report to the Board of Supervisors, within 90 days of the end of the fiscal year, to allow for effective monitoring and oversight of trends and impacts.
3. With input from the City Attorney and City Administrator, consider amending the Administrative Code to give the City Administrator authority to approve Chapter 12X waivers so that department heads are not the ultimate authority for granting waivers on their own department contracts and purchase orders.
4. If the Board of Supervisors concludes that Chapter 12X's contracting provisions are not effective at achieving the original policy goals of the legislation, it could consider adopting an approach like the State of California which bans travel to states with anti-LGBTQ laws, but not contracting with companies headquartered in those states. According to the authorizing bill's sponsor, this was intended to protect State workers from having to travel to states where they might be discriminated against.

Project Staff: Fred Brousseau, Amanda Guma, Karrie Tam, Reuben Holober

Chapter 12X of the Administrative Code

Following the Supreme Court decision in 2015 recognizing the constitutional right of same-sex couples to marry, the states of North Carolina and Mississippi enacted laws aimed at reducing the legal protections for the lesbian/gay/bisexual/transgender (LGBT) community.

In response to these acts of discrimination, in October 2016 the San Francisco Board of Supervisors approved an ordinance prohibiting City-funded travel to states that enacted anti-LGBT laws after June 26, 2015; this ordinance (Article I) was added as Chapter 12X to the City's Administrative Code. Specifically, the prohibition refers to "any state that after June 26, 2015, has enacted a law that, (a) voids or repeals existing state or local protections against discrimination on the basis of Sexual Orientation, Gender Identity, or Gender Expression; or (b) authorizes or requires discrimination on the basis of Sexual Orientation, Gender Identity, or Gender Expression, including any law that creates an exemption to antidiscrimination laws in order to permit discrimination against same-sex couples or their families on the basis of Sexual Orientation, Gender Identity, or Gender Expression."

The ordinance also prohibits City contracting with companies headquartered in these states, or where work on the contract would be performed in these states.

In July 2019, the Board of Supervisors approved an ordinance (Article II) amending Chapter 12X to expand the travel and contracting ban to include states with restrictive abortion laws. These are specifically defined as states that have enacted "a law that prohibits abortion prior to the viability of the fetus, regardless of whether there are exceptions to such prohibition." The respective travel and contracting bans became effective on January 1, 2020.

In October 2021, the Board of Supervisors approved another ordinance (Article III) amending Chapter 12X to expand the travel and contracting ban to include states that have adopted laws suppressing voting rights on or after January 1, 2021. This ban became effective on March 6, 2022.

Covered States List

According to Chapter 12X, the City Administrator will maintain the list of Covered States, which refers to any state that has enacted laws that reduce or eliminate protections against LGBT discrimination and/or restrict access to abortion and/or suppress voting rights. The ordinance requires that the list be posted on the City Administrator's website, and updated at least semiannually.

As of April 2022, Chapter 12X covers the following 30 states: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma,

Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin and Wyoming.

Contracting Ban

Articles I, II and III of the ordinance detail the prohibitions relevant to City contracting, which apply to all contracts for goods and services procured by the City under Chapters 6 and 21 of the Administrative Code. Unless exempted, the ban applies to all City contracts that were first advertised, solicited, or initiated on or after the operative date on which the applicable Article went into effect. Pre-existing contracts were not impacted by this legislation. As shown in Appendix 1, states can gain or lose “Covered” status throughout the year, as a result of legislative action taken, so the operative date of each state’s Covered status may vary.

Exceptions and Waivers

Granted the authority to adopt rules and guidelines to implement the ordinance, the City Administrator has published eight guidance memoranda¹ since February 2017 for City departments relative to Chapter 12X. These guidelines specify that contracting departments may enter into new contracts with businesses headquartered in Chapter 12X covered states under the following exceptions, as specified in the legislation:

1. Needed services are available from only one source;
2. Contract is necessary to respond to an emergency which endangers public health or safety and no compliant company is immediately available to perform required services;
3. There are no compliant/qualified responsive bidders and the contract is for a service, project, or property that is essential to the City or public;
4. Public interest warrants the granting of a waiver because application would have an adverse impact on services or a substantial adverse financial impact on the City;
5. Services to be purchased are available under a bulk purchasing agreement with a federal, state, or local government entity or a group purchasing organization, which will substantially reduce the City’s cost; or
6. Not entering into the subject contract would violate or is inconsistent with the terms or conditions of a grant, subvention, or agreement with a public agency, provided

¹ The City Administrator published memoranda related to the implementation of Chapter 12X on February 10, 2017, June 30, 2017, August 31, 2017, June 4, 2018, April 17, 2019, September 18, 2019, October 16, 2019, November 27, 2019, and September 26, 2022.

the contracting officer has made a good faith attempt to change the terms or conditions.

A waiver is not required under the following circumstances:

- Transactions for which “local preferences” are not permitted (e.g., Federally or State funded contracts).
- Transactions that do not meet the definition of Commodity, Service and/or Contract under Chapters 21 and 6.
- Transactions that fall under Chapter 21G (Grants).
- Transactions that fall under Chapter 83 (Property Contracts).

While the ordinance grants authority to the City Administrator to adopt rules and guidelines for the contracting ban program, it does not convey authority to the City Administrator to administer the program or to assume accountability for non-compliance.

Waiver/Exception Compliance Requirements

As stated in Chapter 12X:

For any determination of nonapplicability, exception, or waiver pursuant to subsection (b), the Contracting Department shall maintain a record documenting the basis for such decision. Each Contracting Department that makes a determination of nonapplicability, exception, or waiver pursuant to subsection (b) shall submit a report to the City Administrator summarizing the Contract and the basis for inapplicability. Such reports shall be submitted annually within 30 days of the end of the fiscal year.

Until July 2021, contracting departments were required to document their Chapter 12X waiver determinations using a form called “P-12X.5” or “P-12X.15”, which they submitted to the Office of Contract Administration (OCA) for purchases requiring OCA review, or saved in the department’s contract file if OCA review was not required. Per the City Administrator’s implementation guidance, an annual report listing all Chapter 12X waivers granted for the fiscal year, including the reason for each waiver, was required to be submitted to OCA by all contracting departments. Waivers are granted by the contracting department’s own department head, not OCA or the City Administrator. As discussed below, the waiver process was replaced in July 2021; since then, departments have been entering waiver information into the ServiceNow electronic system, through which OCA generates Citywide reports on Chapter 12X waivers.

Our office reviewed City compliance with Chapter 12X and related OCA administrative processes in late 2020 and early 2021. Based on that analysis, we developed draft findings and recommendations which we shared with OCA. Beginning in July 2021, and consistent with our

Phase 1 recommendations, OCA created a webpage on OCA's website regarding Chapter 12X waiver requirements and applicability, which includes an updated list of covered states, a 12X Waivers User Guide, and a link to submit online waiver requests. Previously, there was no website and waiver requests were submitted to OCA manually, if at all.

Analysis of Chapter 12X Implementation

To understand the impact of Chapter 12X on City contracting, we sought to answer the following questions:

1. How does the City implement the requirements?
 - a. How are business headquarters identified and reported?
 - b. How are waivers requested or authorized and reported?
2. How has the contracting process been impacted by the contracting ban?
 - a. Has the pool of bidders been reduced?
 - b. Have costs for services been affected?

Methodology

To answer the questions above, our office collected and reviewed data from the Office of Contract Administration for all contracts procured by City departments in calendar year 2016 (to establish contracting baselines from before the February 2017 effective date of Chapter 12X), as well as contract data from between July 2017 through July 2022. The analysis for this report was conducted in two phases: the first of which concluded in May 2021, covering contracts in place and awarded between July 2017 and December 2020 and a second phase, which concluded in July 2022 and covered pertinent contracts between May 2021 and July 2022.

We shared our recommendations with OCA for improving the collection and tracking of Chapter 12X waivers following Phase 1 since, at that time, there was no centralized compilation and oversight of Citywide contracting ban compliance or contract waiver activity by OCA or any other City department. Some of our recommendations had been implemented by OCA by the beginning of our Phase 2 work in July 2022. We provide the results of our analysis for both phases in this report.

In Phase 1, because Citywide waiver data was unavailable at that time, we selected six departments for more in-depth review of the waiver determination process and contracting activities before and after the implementation of Chapter 12X to understand its impact on contracting for the larger City departments. We selected the departments based on the size and scope of their contracts, targeting the departments who typically procure higher valued contracts through a lowest-bidder process.

The selected departments were the Airport, Department of Technology, Municipal Transportation Agency, Port, Public Utilities Commission, and the Department of Public Works.

In Phase 2, we reviewed waiver data for all City departments, since it was then being centrally collected and could be reported by OCA.

City Contracts

According to data provided by the Controller's Office, since the Chapter 12X ordinance was enacted in February 2017 and through 2022, City departments have entered into 478,304 contracts and purchase orders for goods and services totaling nearly \$63 billion.

Data Limitations

Until 2022, vendor headquarters information was self-reported, if at all, in the City's financial system. Reporting of headquarters locations in the financial system was not required for the contract to be executed, become active in the system, and for vendor payments to be made even if the vendor was headquartered in a banned state. Based on recommendations from our office as a part of this report, the Office of Contract Administration worked with the Controller's Office to adapt the financial system to begin requiring headquarters information. However, as of July 14, 2022, headquarters locations remained unspecified for 81,534 contracts and purchase orders that were procured by the City since July 2017, mostly before July 2021 when the Controller's Office added the control to require headquarters information in the financial system.

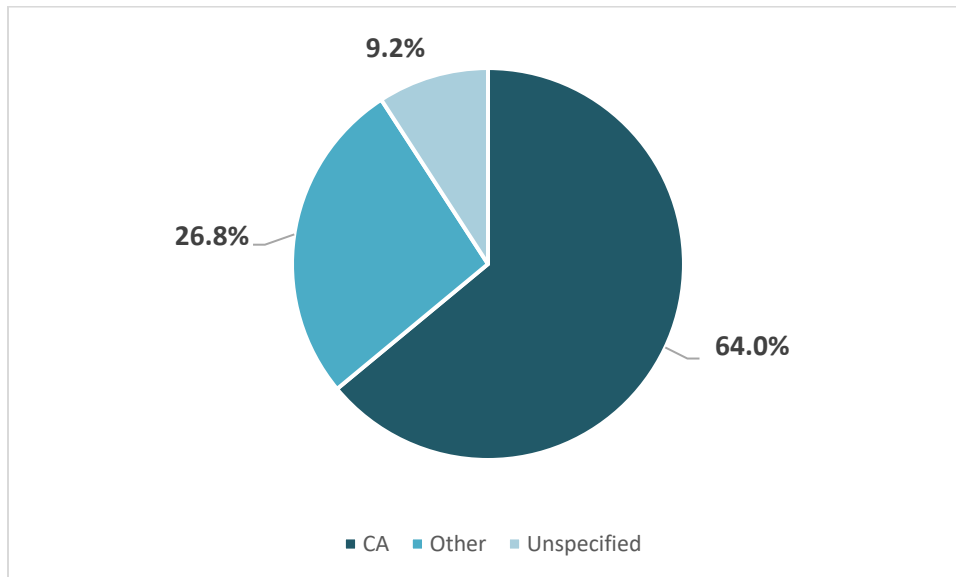
As Exhibit 1 shows, these contracts and purchase orders with headquarters locations not specified in the records represent 17.0 percent of the contracts and purchase orders executed since the Chapter 12X effective date. Another 31.4 percent of those contacts were awarded to companies with headquarters in California and 51.6 percent, or 246,644 of the contracts and purchase orders since February 2017, were made to suppliers located outside of California. This included contracts and purchase orders with companies headquartered in banned states since some of those were granted waivers by the contracting departments and others may not have been identified as such since contracting departments did not identify headquarters cities for their contracts and purchase orders in many cases between February 2017 and May 2021. These could also include contracts and purchase orders exempted in Chapter 12X such as for grants and property, but these are not readily identifiable in records from that period. As of June 2021, new controls were established by the Controller requiring vendor company headquarters information to be entered in the City's financial system to enable payments.

Exhibit 1: All City Contracts and Purchase Orders Procured February 2017 – June 2022

Headquarters	# of Contracts	% of Total #	Value of Contracts	% of Total Value
California	150,126	31.4%	\$40,259,273,936	64.0%
Outside California	246,644	51.6%	16,880,020,806	26.8%
Not in Records	81,534	17.0%	5,767,368,868	9.2%
Total	478,304	100.0%	\$62,906,663,610	100.0%

Source: Controller’s Office

Exhibit 2: Percentage of Total Contract Value for City Contracts Procured Between February 2017 and June 2022



Sources: BLA Analysis, Controller’s Office Data

According to data from the Controller’s Office in which vendor headquarters locations were identified, since the implementation² of Chapter 12X, the City procured at least 9,407 contracts for goods and services with a value totaling \$4,125,661,691 from vendors with headquarters in banned states between July 2017 and July 2022. This includes those that were granted waivers

² Chapter 12X became effective in February 2017, but the data from the Controller’s Office captures records beginning July 1, 2017.

by the contracting departments though the number with waivers cannot be readily determined prior to July 2021 because waiver records were not centrally collected before that time.

Exhibit 3: City Contracts with Vendors in Banned States, July 2017 to July 2022

HQ State	# of Contracts	Value of Contracts
Alabama	20	\$13,557,523
Arkansas	2	8,700,000
Arizona	221	537,575,854
Florida	1,503	452,989,219
Georgia	162	127,714,309
Iowa	159	837,990
Idaho	62	2,050,021
Indiana	1,255	2,539,214
Kansas	57	122,598,680
Kentucky	218	22,313,577
Louisiana	30	9,878,130
Massachusetts	784	150,717,528
Montana	1	10,000
North Carolina	1,150	107,081,897
North Dakota	6	64,273
Nebraska	13	87,941,753
New Hampshire	48	3,802,170
Nevada	649	21,924,611
Ohio	542	97,984,031
Oklahoma	5	438,932
Pennsylvania	1,034	343,706,842
South Carolina	131	32,798,678
South Dakota	8	1,465,275
Tennessee	46	29,015,107
Texas	1,111	1,613,507,663
Wisconsin	190	334,448,414
Total	9,407	\$4,125,661,691

Sources: BLA Analysis, Controller's Office Data

Use of Waivers

As discussed above, contracting departments seeking to enter into a contract or make a purchase otherwise prohibited by Chapter 12X can make a determination of non-applicability, exception or waiver as authorized by subsection Chapter 12X.5(b). If a department makes such a determination, it previously was required to document the basis for this determination using Form P-12X.5/12X.15. All contracting departments were required to submit an annual report on

their Chapter 12X waivers issued to the City Administrator, within 30 days of the end of the fiscal year.

Since our office began this report in 2021, the City Administrator's Office has adopted new practices for tracking waivers, based on recommendations made by our office in the first phase of this analysis. Note that waivers related to Chapter 12X only apply to contracting; 12X restrictions on travel can never be waived. Travel to a 12X covered state is only permitted when it is first deemed "exempt" by the department head of the requesting department. In such instances, the requesting department must (A) determine how it will document its department head's determination that the travel was exempt and (B) internally track the expenses incurred for that exempt travel. These 12X travel exemptions are not tracked by OCA or by the City Administrator's Office.

For contracting with vendors headquartered in a 12X covered state, OCA implemented new procedures in July 2021 for waivers. If the contract is not "exempt", a waiver is required, and departments must document the waiver request in ServiceNow.³ This waiver request must include the department's justification for the waiver request. After the request is reviewed and approved by the relevant department head, the department uploads a copy of the waiver to PeopleSoft. Neither the City Administrator's Office nor OCA approves the waivers, but OCA does receive a copy of the waiver when it is approved by the department head and, according to staff, will request additional information if there is anything out of the ordinary. Because 12X Contracting Waivers are now managed in ServiceNow, the City Administrator's Office and OCA can now collect and report on 12X waivers Citywide.

Phase 1 Waiver Data Review and Results (covering February 2017 through 2020)

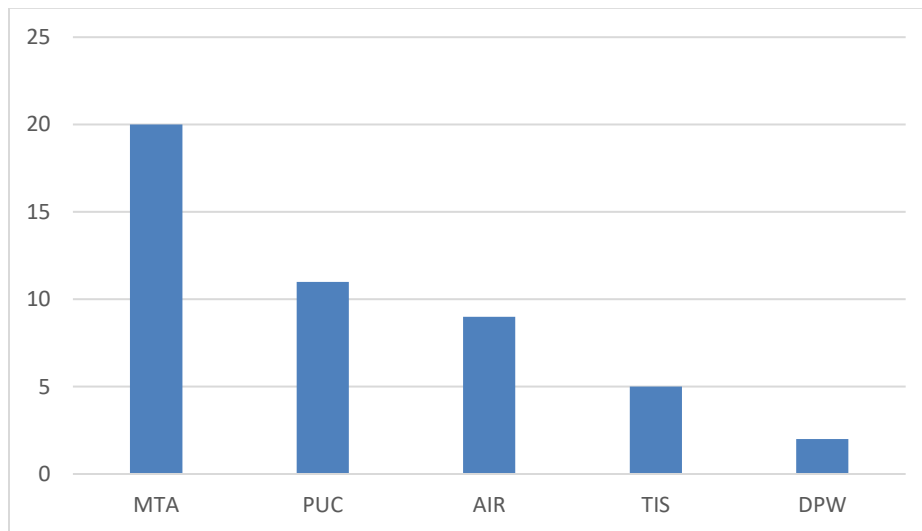
During Phase 1 of this report, our office requested copies of the annual waiver reports required by the ordinance to be prepared by each department, as well as copies of submitted P-12X.5 and P-12X.15 forms, from the City Administrator for the fiscal year ending 2020. At that time, according to the City Administrator's Office, only two departments had submitted the required reports: the Mayor's Office (which authorized three waivers for contracts totaling over \$700,000) and the Health Services System (which reported that they did not authorize any Chapter 12X

³ ServiceNow is an online application used by various City departments for different purposes. The City Administrator's Office uses it to track departments' requests received to waive the requirements of programs that fall under the City Administrator's Office: 12B, 12X, 12T, 14B, HCAO, MCO and OCA Solicitation Waivers. ServiceNow enables departments to share information, without manually exchanging documents through email. Changes in City Administrator's Chapter 12X guidance in September 2022 dropped the requirement that exempted contracts submit waiver data in ServiceNow though these were then required to be denoted in PeopleSoft.

waivers in FY 2020). Note that the Airport provided our office with the waiver reports that were sent to the City Administrator’s Office, for FYs 2017-18 and 2019-20.

As shown in Exhibit 4 below, since the Chapter 12X ordinance was enacted in February 2017 through 2020, a total of 47 waivers were granted across our six sample departments reviewed as of December 2020, ranging from 20 waivers at the Municipal Transportation Agency to zero at the Port as depicted in Exhibit 4.⁴

**Exhibit 4: Total Chapter 12X Waivers Granted by Six Selected Departments
2017 through 2020**



Source: Budget and Legislative Analyst analysis of department data.

Note: the data collected from the six departments is for calendar, not fiscal, years. The Port is not included in this chart since it did not grant any waivers during this period.

Between February 2017 and May 2020, the total number of annual waivers, as provided to our office by the six departments, increased from 4 to 28 waivers per year, or by 600 percent, for a grand total of 47 waivers over the four-year period.

⁴ The Port issued a waiver in January 2021 for a contract valued at \$1,508. We did not include this in our Phase 1 analysis since it is outside of the scope of our review.

**Exhibit 5: Annual Chapter 12X Waivers Granted by Six Selected Departments
 2017 through 2020**

Department	2017	2018	2019	2020	Total
Airport	3		4	2	9
Public Works			1	1	2
MTA		5	5	10	20
Port					0
Public Utilities Commission				11	11
Technology	1			4	5
Total	4	5	10	28	47

Source: Budget and Legislative Analyst analysis of department data

As shown in Exhibit 6 below, since the Chapter 12X ordinance was enacted in February 2017, the contract value of the granted waivers for the Municipal Transportation Agency, Public Utilities Commission, Airport, Department of Technology, Public Works, and the Port totaled \$75,774,809 as of May 2020. The average contract value of waivers granted for the six departments during this same period was \$12,629,386 per department. Between 2017 and 2020, the total annual contract value of waivers granted for these departments increased by \$33,105,987, or 241.7 percent—from \$13,697,606 in 2017 to \$46,805,101 in 2020.

**Exhibit 6: Contract Value of Chapter 12X Waivers Granted by Six Selected Department
 2017 to 2020**

Department	2017	2018	2019	2020	Total
MTA		\$11,333,000	\$1,869,657	\$23,406,375	\$36,609,032
Technology	300,000			19,020,087	19,320,087
Airport	13,397,606		1,640,311	739,900	15,777,817
Port					0
Public Utilities Commission				3,447,652	3,447,652
Public Works			430,642	189,579	620,221
Total	\$13,697,606	\$11,333,000	\$3,940,610	\$46,805,101	\$75,774,809

Source: Budget and Legislative Analyst analysis of department data

Waiver Form and Exceptions

In accordance with Administrative Code Chapter 12X, the Form P-12X.5/12X.15 was required for every transaction, contract, or contract modification requiring the waiver during the review period. In addition, the contracting department was required to attach a written memo/justification to the form with supporting documentation. Among the 47 waivers reviewed

across the six selected departments, only two⁵ did not include the Form P-12X.5/12X.15. However, as shown in Exhibit 7 below, for the waivers that included the form, 26 waivers, or more than half submitted (58.7 percent), did not include the additional required supporting documentation.

Exhibit 7: Number of Waivers Granted Without Supporting Documentation by Department 2017 to 2020

Department	Number of Waivers Submitted with Form P-12X.5/12X.15 but without Supporting Documentation	% Total
Municipal Transportation Agency	14	54%
Public Utilities Commission	6	23%
Technology	4	15%
Public Works	2	8%
Total	26	100.0%

Source: Budget and Legislative Analyst analysis of waiver forms P-12X.5/12X.15 submitted by department

As described above, the exceptions to the contracting ban listed within the Chapter 12X ordinance for which contracting departments may enter into new contracts with businesses otherwise headquartered in the covered states are:

1. Needed services are available only from one source.
2. Contract is necessary to respond to an emergency which endangers public health or safety and no compliant company is immediately able to perform required services.
3. There are no compliant/qualified responsive bidders and the contract is for a service, project or property that is essential to the City or public (only one responsive bidder from a banned state)
4. Public interest warrants the granting of a waiver because application would have an adverse impact on services or a substantial adverse financial impact on the City.
5. Services to be purchased are available under a bulk purchasing agreement with a federal, state or local government entity or a group purchasing organization, which will substantially reduce the City's cost.

⁵ This includes one each from the Municipal Transportation Agency and the Airport. Note that the waivers approved by the Mayor's Office of Housing (which we received through the City Administrator's Office) also did not include the Form P-12X.5/12X.15.

6. Violates or is inconsistent with the terms or conditions of a grant, subvention, or agreement with a public agency, provided that the contracting officer has made a good faith attempt to change the terms or conditions.

Exhibit 8 below shows the exceptions used by department and type, according to the waiver documentation provided from our six selected departments for the period between 2017 and 2020. Of the six types of exceptions, the “needed services are available only from one source” (30.9 percent) and “there are no compliant/qualified responsive bidders and the contract is for a service, project or property that is essential to the City or public”, or the only responsive bidder is in a banned state (27.3 percent) were used most frequently by the selected departments.⁶ The least used exception was “violates or inconsistent with the terms or conditions of a grant, subvention, or agreement with a public agency, provided that the contracting officer has made a good faith attempt to change the terms or conditions” (1.8 percent).

**Exhibit 8: Justifications Used in Waivers Granted by Selected Departments
2017 to 2020**

Waiver Justification	Public					Total	% of Total
	Airport	Public Works	SFMTA	Public Utilities Commission	Technology		
12X.5(b)(1) (Sole Source)	5	0	7	3	2	17	30.9%
12X.5(b)(2) (Declared Emergency)	0	0	1	1	0	2	3.6%
12X.5(b)(3) (Only Responsive Bidder(s) from Banned State(s))	3	1	8	2	1	15	27.3%
12X.5(b)(4) (Adverse Impact)	0	1	9	3	0	13	23.6%
12X.5(b)(5) (Bulk Purchasing)	0	0	1	0	2	3	5.5%
12X.5(b)(6) (Conflicting Grant Terms)	0	0	1	0	0	1	1.8%
Other (Travel/Training)	1	0	0	0	0	1	1.8%
N/A or Not Listed	0	0	1	2	0	3	5.5%
Total	9	2	28	11	5	55	100.0%

Source: Budget and Legislative Analyst analysis of waiver forms P-12X.5/12X.15 submitted by department

As shown in Exhibit 8 above, four waivers were allowed by departments for reasons other than the six provided in the Administrative Code—“N/A or not listed”, and “travel/training”. It was unclear at the time of our Phase 1 analysis if anyone outside of the contracting department reviews or approves waiver forms for contracts with vendors in banned states to confirm sufficient justification. In addition, only one of the selected departments provided an annual report to the City Administrator as required.

⁶ Some waivers included more than one exception; consequently, the number of exceptions does not equal the number of waivers granted and submitted with a Form P-12X.5/12X.15.

Interviews with department staff indicate inconsistent interpretations of the implementation requirements, with some departments appearing to utilize the waiver option more liberally than others.

Phase 2 Waiver Data Review and Results (covering July 2021 through July 2022)

As noted, OCA adopted new practices to track waiver requests in July 2021 consistent with our Phase 1 work recommendations. These include an online waiver request form, a dedicated website with links to eligibility information and a User Guide.

According to data provided by OCA, between July 2021 and July 2022, 538 waivers were requested and approved by 33 departments Citywide for contracts and purchase orders totaling over \$791 million. Exhibit 9 below shows the number and value of all waivers requested during this period, by department.

**Exhibit 9: 12X Waivers and Value of Contracts by Department
 July 2021 to July 2022 (Phase 2 analysis)**

Dept	Number of 12X Waivers	Total Value of Contracts/POs
ADM	49	\$89,952,647
ADP	3	154,285
AIR	12	161,500,260
ASR	1	1,200
BOS	1	2,000
CAT	1	207,761
CII	2	57,493
CON	6	176,764
CPC	1	261
CSS	1	400
DAT	3	46,500
DBI	1	130
DEM	9	1,862,095
DPA	1	58
DPH	247	310,272,700
DPW	11	315,498
FAM	4	44,460
FIR	4	1,750,000
HOM	4	1,069,197
HSA	31	25,936,765
JUV	1	2,700
LIB	54	45,261,239
MTA	9	8,997,855
MYR	1	25,000
POL	22	12,439,597
PRT	9	30,650
PUC	16	48,388,924
REC	17	5,439,967
REG	1	22,056
SHF	5	21,673,364
TIS	7	16,518,680
TTX	3	39,067,252
WAR	1	3,150
Total	538	\$791,220,908

Source: OCA and SFMTA data

As shown, the Department of Public Health (DPH) issued the most waivers during this time—247, or 45.9 percent of all waivers issued. The value of the contracts and purchase orders for which DPH issued waivers also represented the largest amount—\$310.3 million, or 39.2 percent of all contracts and purchase orders granted 12X waivers from July 2021 to July 2022.

As discussed above, the ordinance establishes six justifications to waive Chapter 12X requirements. According to the data provided by OCA, between July 2021 and July 2022, more than half of the waivers issued (281 out of 538) were justified by the adverse impact that application of Chapter 12X would have on services or City finances. This was a change from our Phase 1 review of waivers for 2017 – 2020 when adverse impact was the explanation for only 13 of the 55 waivers we reviewed, or 23.6 percent.

Exhibit 10: 12X Waivers by Justification, July 2021 to July 2022 (Phase 2 analysis)

Waiver Justification	Number Contracts/ PO's	% of Total	Value of Contracts/ PO's	% of Total
12X.5(b)(1) Sole Source	109	20.3%	\$52,296,605	6.6%
12X.5(b)(2) Declared Emergency	10	1.9%	10,343,548	1.3%
12X.5(b)(3) Only Responsive Bidder(s) from Banned State(s)	48	8.9%	18,210,538	2.3%
12X.5(b)(4) Adverse Impact	281	52.2%	162,975,432	20.6%
12X.5(b)(5) Bulk Purchasing	2	0.4%	1,550,000	0.2%
12X.5(b)(6) Conflicting Grant Terms	8	1.5%	8,849,839	1.1%
Exemption - Pre 12X Operative Date	80	14.9%	536,994,943	67.9%
Total	538	100.0%	\$791,220,906	100.0%

Source: OCA data

Of the six departments we reviewed in our Phase 1 work, all except for the Municipal Transportation Agency granted themselves more waivers in just the one-year period between July 2021 and July 2022 than they had in the three-year period between 2017 and 2020 that we reviewed in Phase 1. For at least these five large departments, the use of Chapter 12X waivers has increased over the years since Chapter 12X was adopted.

In addition to an apparent increase in the use of waivers to the contract ban by City departments after 2021, it is unclear what standards are used to establish the adverse impact, or to verify any of the waiver justifications identified by departments. While the submission of 12X waivers is referred to as a “request”, OCA does not actually approve them or otherwise review the applications to confirm the validity of the justification. Waivers are approved by department heads of the same departments that are “requesting” the waiver.

To ensure consistent implementation and effective oversight of Chapter 12X, the Board of Supervisors should request that the City Administrator develop stronger internal controls to ensure the sufficient justification for waivers from City departments. This might include hosting a virtual training with contracting officers within departments to review Chapter 12X protocols, forms and documentation, and reporting requirements. The Board of Supervisors should request that the City Administrator present an annual Chapter 12X waiver report, within 90 days of the end of the fiscal year, to allow for effective monitoring and oversight of trends and impacts.

Estimating Cost Impact

It is difficult to measure the actual cost impact to the City resulting from the implementation of Chapter 12X. There are a significant number of complicating variables: the type of services being solicited, the state of the national economy, the contracting opportunities in other jurisdictions, etc. However, City department officials do report that certain vendors who previously won contracts through the competitive bidding process but are no longer eligible (absent a waiver) due to the location of their headquarters simply do not bid on City contracts. In these cases, it could mean a reduction in the eligible pool of vendors for those services, which would possibly result in increased costs to the City.

Studies show that competitive bidding in the public sector results in cost savings. A 2014 study⁷ titled “The Value of Competitive Contracting”, conducted by the Naval Postgraduate School, analyzed over 50 competitive contract actions at the U.S. Department of Defense (DOD) to determine actual cost savings achieved from competition. The DOD study found an average cost savings of 20 percent for contracts that were competitively bid in a full and open solicitation.

To establish a framework to estimate the potential costs to the City from implementing Chapter 12X, we assume that the contracting ban has resulted in some reduction in the size of the competitive pool of prospective bidders. We reviewed citywide contract data from 2016, the year preceding the effective date of the Chapter 12X ban, to identify the contracts that were awarded in that year to vendors headquartered⁸ in states that were subsequently banned. As shown in Exhibit 9 below, the City entered into 31 contracts with vendors from states in 2016 that were subsequently banned in the Chapter 12X legislation adopted by the Board of Supervisors in 2017.

⁷ “The Value of Competitive Contracting”, Healy, Sok and Ramirez, Naval Postgraduate School, September 2014.

⁸ The original data set included 173 contracts with unidentified headquarters. Our team researched these locations online. We acknowledge possible inaccuracies in our findings, as well as the possibility that vendors’ headquarters may have changed between 2016 and April 2021 (when we conducted this research).

Exhibit 11: City Contracts Awarded in 2016 to Vendors in States Subsequently Banned

	# of	
Headquarters	Contracts	Value of Contracts
FL	2	\$5,200,000
GA	3	16,040,631
IN	1	138,116,759
KS	1	7,319,502
KY	3	16,375,000
LA	1	1,200,000
NC	1	8,087,000
OH	5	14,285,355
PA	4	74,616,384
TN	1	5,000,000
TX	7	76,531,159
WI	2	9,100,000
Total	31	\$371,871,790

Sources: BLA Analysis, OCA Contract Data

Because we did not have access to the full solicitation and bid evaluation documents, it was not possible for us to determine what the exact cost impact would have been to the City, had these procurements occurred after the implementation of Chapter 12X. Professional service contracts are often evaluated using several criteria, of which cost accounts for a smaller percentage of evaluation points. However, based on the description of the type of goods/services procured through each of these contracts, we can identify those contracts that were likely “lowest bidder” contracts—meaning that the bids are evaluated primarily on cost factors (as in most construction contracts). We can then assume that in those cases, the next lowest bidder (headquartered in an eligible state) would have proposed a more expensive contract cost.

While the DOD study found an average of a 20 percent cost increase resulting from a reduced competitive pool, we also included a more conservative cost impact to the City of 10 percent of the final bid price selected as the result of the Chapter 12X, in order to allow for the unknown and potential variables noted above.

Of those 31 contracts, we identified 13 that were likely lowest bid contracts, based on the type of goods/services procured (primarily those identified as construction or maintenance services). The total value of those contracts was \$234,605,460. Based on those total contract costs, we estimate a possible cost increase to the City to procure these same goods and services under Chapter 12X restrictions as:

**Exhibit 12: Estimated Range of Additional Costs due to Chapter 12X
for 13 “Low Bid” Contracts Awarded, 2016**

10% cost increase:	\$23,460,546
20% cost increase:	\$46,921,092

It should be noted that these estimated additional costs could be incurred over multiple years as some City contacts span more than one year. However, each year, a new set of contracts would be awarded and the additional costs would assumedly repeat at a greater or lesser amount depending on the total value of contracts for each particular year. In some cases, when large one-time capital project contracts such as for the Central Subway or the Van Ness Avenue Bus Rapid Transit project (BRT) are awarded, the additional costs could be substantially higher than the estimated amounts above. Losses could be greater in the ensuing years to the extent fewer contractors and vendors submitted bids due to the ban.

City Staff Costs to Implement Chapter 12X

Besides the additional costs associated with contracts awarded with reduced or no competition from other bidders, multiple City departments regularly incur costs or have incurred one-time costs from staff time spent ensuring proper implementation of Chapter 12X. These include:

- Office of City Administrator/Office of Contract Administrator: regularly communicating with departments on 12X matters.
- City Attorney: regularly communicating with OCA and departments on 12X matters.
- Controller’s Office: enhancing PeopleSoft to improve tracking of vendor information to ensure compliance with Chapter 12X, and enhancing Citywide reporting capacity related to Chapter 12X.
- Department of Technology: one-time contract costs for configuration of ServiceNow to track the waiver submissions.
- All City Departments: Chapter 12X waiver submissions.

Based on information provided by the specific City departments identified above and estimating department-level costs for submitted Chapter 12X waivers in ServiceNow, we estimate that the implementation of Chapter 12X has cost the City an additional \$474,283 since FY 2016-17. These costs are shown in the table below. Ongoing administrative costs for staff time in the City Attorney’s Office, the City Administrator’s Office, the Office of Contract Administration, and contracting City departments will continue to be incurred in succeeding years and could increase if more states are banned.

Exhibit 13: Estimated Costs for City Staff Time on Chapter 12X Matters since FY 2016-17

Department	Number of Hours	Estimated Average Hourly Wage	Contract Costs	Total Costs
City Attorney	900	\$141.70		\$127,530
Controller	1,932	99.20		191,655
Technology			\$82,000	82,000
Contract Administrator	208	83.12		17,289
Contract Administrator	208	96.24		20,017
City Administrator	208	96.24		20,017
All City Departments ⁹⁹	269	58.64		15,774
Total Estimated Costs				\$474,283

Source: Data from City departments

California State-Funded Travel Ban

For comparison, we reviewed the history and impact of California’s travel ban, Assembly Bill 1887, codified as California Government Code 11139.8 in 2016, which prohibits state-funded travel to states that after June 26, 2015 enacted laws that: (1) have the effect of voiding or repealing existing state or local protections against discrimination on the basis of sexual orientation, gender identity, or gender expression; (2) authorize or require discrimination against same-sex couples or their families on the basis of sexual orientation, gender identity, or gender expression; or (3) create an exemption to antidiscrimination laws in order to permit discrimination against same-sex couples or their families or on the basis of sexual orientation, gender identity, or gender expression. California’s law tasks the Attorney General with developing, maintaining, and posting the list of states subject to the travel ban.¹⁰ According to Assemblyman Low, the bill’s sponsor, the intention of the law was to protect state workers from having to travel to states where they may experience discrimination.¹¹

It does not appear that a ban on contracting was ever considered by the State. Currently, the City and County of San Francisco appears to be the only government entity that bans contracting with companies headquartered in certain states based on those states’ laws. The State travel ban predates the San Francisco travel and contracting bans.

⁹ To estimate these costs, we used the hourly rate for an 1823 Senior Administrative Analyst at Step 3 and multiplied that by the total number of waivers (538), with 30 minutes estimated for entering the waiver information for each waiver into ServiceNow.

¹⁰ <https://oag.ca.gov/ab1887>

¹¹ <https://www.nytimes.com/2022/07/19/us/california-state-funded-travel-bans.html>

Effectiveness of State Ban

While the state travel ban appears to represent a statement of the legislature's values, it has not stopped other states from passing laws objectionable to the California legislature. This is evident in the fact that the list of banned states has grown from four in 2016 to 22 in 2022.¹² The travel ban does not appear to be a significant deterrent in preventing states from enacting laws that would be subject to the ban.

However, California's travel ban, as part of a much larger effort, was effective in persuading North Carolina to repeal HB 2, the law passed in 2016 that prohibited local jurisdictions in that state from adopting anti-discrimination ordinances and required schools and local and state facilities to only allow individuals to use public bathrooms corresponding to the gender on their birth certificates. Six states, as well as several cities and counties, approved bans on travel to North Carolina in response to the law. Several major corporations halted plans to move into or expand in North Carolina. Many conventions, sporting events, concerts, and film productions in the state were cancelled. The Associated Press estimated that the cumulative economic impact to North Carolina would be at least \$3.76 billion over 12 years.¹³ In March 2017, the portion of the law pertaining to restroom use was repealed,¹⁴ and in December 2020, the remainder of the law was repealed through a sunset provision.¹⁵

Fiscal Impact of California State Ban

We could not identify any estimates of the impact of the travel ban on the California state budget or local economy. In January 2020, Oklahoma Governor Kevin Stitt issued a retaliatory executive order banning state-funded travel to California, which could have a modest negative economic impact.¹⁶ This impact could be heightened if other states also enact retaliatory measures.

Most economic impact would likely be felt by other states and cities due to a modest reduction in tourism from California state employees. California does not track the amount of state funding withheld due to the travel ban.¹⁷ The states of Oklahoma, Alabama, Kentucky, and Tennessee report that they are unaware of any impact from the ban.¹⁸ However, the cities of Louisville and

¹²<https://www.latimes.com/opinion/story/2022-07-10/repeal-california-ban-boycott-state-funded-travel-lgbtq-discrimination>

¹³ <https://www.cnn.com/2017/03/27/bathroom-bill-to-cost-north-carolina-376-billion.html>

¹⁴ <https://www.cnn.com/2017/03/30/politics/north-carolina-hb2-agreement/index.html>

¹⁵ <https://abc11.com/house-bill-142-north-carolina-hb2-nc-2/8418288/>

¹⁶ <https://www.usnews.com/news/best-states/articles/2020-02-12/texas-sues-california-for-interstate-travel-ban>

¹⁷ <https://www.nytimes.com/2022/07/19/us/california-state-funded-travel-bans.html>

¹⁸ <https://www.usnews.com/news/best-states/articles/2020-02-12/texas-sues-california-for-interstate-travel-ban>

Nashville report that a few conventions, which were not organized by California-based groups, were cancelled due to the California travel ban.¹⁹

As noted, there are several exemptions to the ban, which largely impact non-essential travel such as attending conventions. Furthermore, public college athletic programs may still travel to banned states using non-state funds.²⁰ This reduces the economic impact to banned states.

Policy Options

The Board of Supervisors should:

1. Request that the City Administrator continue to develop stronger internal controls to ensure the sufficient justification for waivers is provided by City departments related to Chapter 12X implementation and waivers, consistent with Chapter 12X. This might include hosting a virtual training with contracting officers within departments to review Chapter 12X protocols, forms and documentation, and reporting requirements.
2. Request that the City Administrator present an annual 12X waiver report to the Board of Supervisors, within 90 days of the end of the fiscal year, to allow for effective monitoring and oversight of trends and impacts.
3. With input from the City Attorney and City Administrator, consider amending the Administrative Code to give the City Administrator authority to approve Chapter 12X waivers so that department heads are not the ultimate authority for granting waivers on their own department contracts and purchase orders.
4. If the Board of Supervisors concludes that Chapter 12X's contracting provisions are not effective at achieving the original policy goals of the legislation, it could consider adopting an approach like the State of California which bans travel to states with anti-LGBTQ laws, but not contracting with companies headquartered in those states. According to the authorizing bill's sponsor, this was intended to protect State workers from having to travel to states where they might be discriminated against.

¹⁹ <https://www.governing.com/archive/sl-state-employee-travel-bans-lgbt-california.html>

²⁰ <https://www.latimes.com/opinion/story/2022-07-10/repeal-california-ban-boycott-state-funded-travel-lgbtq-discrimination>

Appendix 1: Chapter 12X Covered States

The list below presents all the states on the Covered State List based on the City Administrator’s [memo](#) dated September 26, 2022.

	State	12X Article I: Restrictive LGBTQ Laws Operative Date: 2/11/2017	12X Article II: Restrictive Abortion Laws Operative Date: 1/1/2020	12X Article III: Restrictive Voting Laws Operative Date: 3/6/2022	Operative Date for Determining Exemption from 12X
1	Alabama	Yes	Yes	Yes	2/11/2017
2	Arizona	Yes	Yes	Yes	2/11/2017
3	Arkansas	No	Yes	Yes	1/1/2020
4	Florida	Yes	Yes	Yes	2/11/2017
5	Georgia	Yes	Yes	Yes	2/11/2017
6	Idaho	Yes	Yes	Yes	2/11/2017
7	Indiana	Yes	Yes	Yes	2/11/2017
8	Iowa	Yes	Yes	Yes	2/11/2017
9	Kansas	Yes	Yes	Yes	2/11/2017
10	Kentucky	Yes	Yes	Yes	2/11/2017
11	Louisiana	Yes	Yes	Yes	2/11/2017
12	Mississippi	Yes	Yes	No	2/11/2017
13	Missouri	No	Yes	No	1/1/2020
14	Montana	Yes	Yes	Yes	2/11/2017
15	Nebraska	No	Yes	No	1/1/2020
16	Nevada	No	Yes	Yes	1/1/2020
17	New Hampshire	No	Yes	Yes	1/1/2020
18	North Carolina	Yes	Yes	No	2/11/2017
19	North Dakota	Yes	Yes	No	2/11/2017
20	Ohio	Yes	Yes	No	2/11/2017
21	Oklahoma	Yes	Yes	Yes	2/11/2017
22	Pennsylvania	No	Yes	No	1/1/2020
23	South Carolina	Yes	Yes	No	2/11/2017
24	South Dakota	Yes	Yes	No	2/11/2017
25	Tennessee	Yes	Yes	No	2/11/2017
26	Texas	Yes	Yes	Yes	2/11/2017
27	Utah	No	Yes	No	1/1/2020
28	West Virginia	Yes	Yes	No	2/11/2017
29	Wisconsin	No	Yes	No	1/1/2020
30	Wyoming	No	No	Yes	2/11/2017