

LEGISLATIVE DIGEST

(Amended in Committee - 11/24/2014)

[Administrative Code - 14B Local Business Enterprise Program]

Ordinance amending the Administrative Code to comprehensively revise the Local Business Enterprise (LBE) and Non-Discrimination in Contracting Ordinance (Chapter 14B) to: 1) codify the transfer of implementation and enforcement of Chapter 14B from the Human Rights Commission to the City Administrator and Contract Monitoring Division; 2) require the Mayor to annually set an overall City-wide Local Business Enterprise (LBE) participation goal of not less than 40% of the value of upcoming contracts; 3) increase the LBE certification size thresholds for small and micro LBEs; 4) increase the bid discount allowed to SBA-LBEs on contracts between \$10,000 and \$10,000,000 Million; 5) require Administrative Code, Chapter 56, development agreements to include an LBE utilization plan and be subject to certain Chapter 14B provisions; 6) authorize preparation of an implementation plan for a LBE contractor advance program to fund loans to subcontractors; 7) increase the Surety Bond Program limit from \$750,000 to \$1,000,000; ~~87~~ **87) require the City to make good faith efforts to obtain at least three bids from micro or small LBEs for contracts under the threshold or minimum competitive amounts; ~~98~~ **98) to establish a Mentor-Protégé Program between established successful contractors and LBEs; ~~109~~ **109) require separate LBE participation on design and construction portions of design-build construction contracts; ~~110~~ **110) repeal Ordinance No. 97-10 relating to completion of the Bayview Branch Library Construction Project; and ~~211~~ **211) make various other changes in Chapter 14B.**********

Existing Law

The Local Business Enterprise (LBE) and Non-Discrimination in Contracting Ordinance (Chapter 14B) is a race-and-gender neutral, small, local business contracting preference program and non-discrimination program. One of the goals of Chapter 14B is to help small local business that are at a competitive disadvantage in competing for work on public contracts because San Francisco small businesses experience higher costs than larger businesses. The preference program, for purposes of bid comparison, adds “points” to contract proposals from qualified small, local businesses where contracts will be awarded based on the highest score or applies “discounts” to bids from qualified small, local businesses for comparison where contracts will be awarded based on lowest costs.

In addition to the preference program, Chapter 14B provides other programs including contracting set asides, subcontracting requirements, prompt payment provisions, and training to assist small, local businesses to increase their ability to compete effectively for the award of City contracts.

Amendments to Current Law

This Ordinance would comprehensively revise Chapter 14B. Specifically, the Ordinance would:

General/Definitions

- **Codify transfer of functions** - Update all relevant provisions in 14B to codify the transfer of functions from the HRC to the City Administrator/CMD, and clarify jurisdiction over discrimination-related complaints/investigations remains with HRC.
- Allow joint venture partners to be in different industries as long as both partners are acting in the capacity as a Prime contractor.
- Make various changes to correct and clarify existing provisions of Chapter 14B.

Sections 14B.3, 14B.4, and 14B.5 LBE Certification/Term/Denials and Appeals

- **LBE Certification Business Size Thresholds** - Increase the certification thresholds for Small-LBEs from \$14 Million to \$20 Million for public works/construction businesses, and from \$7 Million to \$10 Million for specialty construction contractors and goods, materials, equipment or general services providers; and increase the thresholds for micro-LBEs from \$7 Million to \$10 million for public works/construction businesses, and from \$3.5 Million to \$ 5 Million for specialty construction contractors and goods, materials, equipment or general services providers. The certification size thresholds would remain the same for professional services and trucking businesses and all SBA-LBEs.
- Remove rebuttable presumption provision concerning San Francisco payroll taxes from criteria needed to establish a principal place of business in San Francisco.
- Clarify that for purposes of LBE certification, any business under common ownership must be in a related industry.
- Provide Director with discretion to certify or renew a certification of a business for a shorter period based on the unique attributes of the particular business.
- Allow Director to suspend or revoke the certification of any LBE that fails to submit requested documentation in a timely fashion or otherwise fails to cooperate in any investigation of that business' continued eligibility for certification.
- Extend PUC-LBE certification to professional services firms.
- Change the category of projects where PUC-LBEs receive bid discounts from PUC Regional Projects performed 70 miles or more outside of San Francisco and where there is no cost shared by members of BAWSCA to PUC Regional Projects: i) performed 70 miles or more outside of San Francisco, or ii) for which some or all of the costs will be shared by members of BAWSCA.

- Move Director's powers over investigations related to applications or renewal applications for LBE certification from Section 14B.17 Enforcement to Section 14B.4.

Section 14B.7 Prime Contracts

- **Bid Discount** - Increase the bid discount or rating bonus allowed to SBA LBEs from 2% to 5% on contracts between \$10,000 and \$10 Million, so long as no micro- or small-LBE is adversely affected. Allow a 2% discount or rating bonus for micro- or small-LBEs on contracts between \$10 Million and \$20 Million.
- **San Francisco First** – Require departments to use the Section 14B.7(A) good faith efforts to attempt to obtain at least three quotes or proposals from Small or Micro LBEs for public works contracts under the threshold amount (\$400,000) or for professional or general services, or commodities contracts under the minimum competitive amount (\$100,000). If three quotes or proposals are not obtained from at least three LBEs, the department shall make a finding justifying why the three quotes or proposals were not obtained.
- Modify Section 14B.7(A) to require departments to outreach to all LBEs with appropriate certifications for the work or services to be performed to solicit their interest in specific contracting opportunities when not impracticable to do so.
- Increase “Large Contract Proposal” threshold for professional services contracts from \$100,000 to \$1,000,000 for purposes of good faith requirement imposed on Contract Awarding Authorities.
- Move Section 14B.17(I) concerning referral to other agencies for the making of materially false or misleading statements in connection with Chapter 14B to Section 14B.7 for clarity.
- Increase period Contractors and Subcontractors are required to maintain all records necessary for monitoring compliance with Chapter 14B from three years to five years.
- Remove Section 14B.7(I) that provided Contract Awarding Authorities with authority to not apply a discount where to do so would result in a contract being awarded to a business without the capacity to perform it.
- Require the Director to post online any waivers granted under 14B.7(J).

Section 14B.8 Subcontracting

- Require CMD to make a finding justifying, and posting online, the LBE subcontracting requirement set for each Contract subject to 14B.8(A) [the LBE subcontracting requirement] where the LBE subcontracting requirement is set at less than 20%.
- Remove specific good faith outreach steps listed in 14B.8(D) and provides that the good faith outreach will be set forth in the 14B Rules and Regulations, to allow for

greater flexibility in developing innovative programs to foster LBE business development.

Section 14B.9 Ensuring Non-Discrimination in Subcontracting

- Require that the City Administrator or Contract Awarding Authorities refer all formal complaints of discrimination and all other instances where discrimination may have occurred of which they become aware to the Human Rights Commission for investigation; and clarifies that the power and duty to review and investigate a Bid or selection of Subcontractors to determine whether discrimination may have occurred is vested with the Human Rights Commission.

Section 14B.10 -14B.14 Powers and Duties of City Administrator, CMD, Controller, Mayor, and Contract Awarding Authorities

- **City-wide Overall LBE Participation Goal** - Require the Mayor, with reports to the Board of Supervisors, to annually set an overall City-wide LBE aspirational participation goal of not less than 40%, with a subgoal of at least 20% for micro-LBE participation, of the value of all upcoming contracts to be awarded the next fiscal year subject to Chapter 14B.
- Move a portion of Section 14B.10(B)(5) related to the audit power of the Controller to a new Section 14B.11(C).
- Move Sections 14B.11(C) and (D) related to subcontractor participation information to be submitted with each request for payment to the City to Section 14B.13.
- Clarify Section 14B.13(A)(4) to consolidate sanctions available to the City in Section 14B.17 Enforcement.

Section 14B.15 Reporting and Review

- Clarify reporting provisions in Section 14B.15, including removing duplicative provisions.

Section 14B.16 San Francisco Bonding and Other Assistance

- **Subcontractor Advance Program** - Authorize City Administrator, in consultation with the Controller, to investigate a LBE contractor advance payment program to fund loans to subcontractors for approved invoices on City-funded contracts subject to the budgetary and fiscal provisions of the Charter. City Administrator to prepare implementation plan, including feasibility study, with report to Mayor by June 1, 2015.
- **Mentor-Protégé Program** - Allow implementation of new Mentor-Protégé program to foster partnerships between established successful contractors and LBEs by providing the Mentor contractors exemption of good faith outreach requirements.

Section 14B.17 Enforcement

- **Hearings/Appeals** – Require that the City Administrator or City Administrator’s Designee would hear appeals challenging any determination of the Director, including denials of certification.
- **Anti-Retaliation/Whistleblower Provision** - Provide that complaints that a City officer or employee has engaged in improper government activity, including acts of reprisal or retaliation, shall be made in accordance with the Whistleblower provisions of Article IV of the Campaign and Government Code.
- Add provision to Section 14B.17 that specifies that Director and contract awarding authorities shall refer instances of alleged discrimination in contracting to the HRC for investigation and imposition of sanctions as appropriate under Administrative Code Chapter 12A.

Section 14B.19 Design-Build Construction

- Require separate LBE participation requirements on design and construction portions of work for Design-Build construction contracts.
- Clarify existing provisions of Section 14B.19

Development Agreements

- Add new provision requiring development agreements entered into pursuant to Chapter 56 of the Administrative Code to include a LBE utilization plan that requires CMD to set a LBE utilization requirement set in conformance with the City-wide LBE Participation Goal, compliance with the good faith outreach requirements and nondiscrimination provisions of 14B, and a reporting, monitoring, and enforcement program that allows CMD to assess penalties or other sanctions.

Other/Operative Date

- Repeal Ordinance No. 97-10. Ordinance No. 97-10 granted bid discounts to joint venture partnerships with LBE firms for public works construction projects procured under the integrated project delivery provision of Section 6.68 of the Administrative Code. The provisions of Ordinance No. 97-10 purporting to amend the Administrative Code are not presently codified. Further, the purpose of Ordinance No. 97-10 was to facilitate completion of the Bayview Branch Library Construction Project, and the project is complete.
- Become operative on July 1, 2015 and would apply to all Contracts first advertised for Bids or initiated on or after this date.

Background Information

This digest reflects amendments made on November 13, 2014 and November 24, 2014 at the Government Audit and Oversight Committee. The amendments would: 1) keep the limit up to

which the City may guaranty as part of the Surety Bond Program at \$750,000; 2) keep the Mayor as the official who resolves the matter when an awarding authority and the Director are unable to agree on whether to divide a Contract into smaller contracts in order to maximize the opportunities for LBEs to participate; 3) change section 14B.5 to allow bid discounts for PUC-LBEs on PUC Regional Projects that are 70 miles or more outside San Francisco or for which costs are shared with BAWSCA; 4) require Mayor to include a sub-goal of at least 20% participation by Micro-LBEs as part of the City-wide LBE Participation Goal, 5) require CMD to post online any waivers granted under 14B.7(J) and the written justifications required if a subcontracting participation requirement is set under 20% under Section 14B.8(A); 6) add back certain existing language from the Chapter related to non-discrimination; 7) establish two separate working groups to look at LBE participation in City leases and concession agreements and LBE architect participation; and 8) correct various typographical or other mistakes in the version introduced.

Effective July 28, 2012, under the powers granted to the Mayor under Charter Section 4.132, Mayor Lee transferred to the City Administrator all of the duties and functions of the Human Rights Commission (HRC) and the Director of the Human Rights Commission under Chapter 14B, with the exception of the authority of the Director of the HRC set forth in Section 14B.9(D) and 14B.17(E), to investigate and issue findings concerning possible unlawful discrimination by a bidder or City contractor in selecting subcontractors for City contracts.

Pursuant to this transfer of functions, the City Administrator became responsible for implementing and enforcing all aspects of Chapter 14B and duly adopted regulations. Additionally, until Chapter 14B can be amended, all references to the "Director" in 14B and its rules and regulations shall be read as referring to the Deputy City Administrator designated by the City Administrator to oversee the transferred functions, and all references to the "Human Rights Commission" shall be read as referring to the City Administrator.

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