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**CHAPTER 14B:  
LOCAL BUSINESS ENTERPRISE UTILIZATION AND NON-  
DISCRIMINATION IN CONTRACTING ORDINANCE**

**(Effective July 1, 2015)**

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

(A) **Short Title.** This Chapter shall be entitled "Local Business Enterprise Utilization and Non-Discrimination in Contracting Ordinance."

(B) **Findings.**

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

(2) Because San Francisco's small businesses experience higher costs than large businesses or businesses located outside the City, they suffer disadvantage in any competition with those businesses. The Board finds that small local businesses are at a competitive disadvantage in competing for work on public contracts. Because of their size, very small, or "micro," local businesses are at an even greater competitive disadvantage in competing for work on public contracts.

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

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

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

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

Since that time, this Board and the City's Human Rights Commission have actively and extensively documented and studied discrimination against and disadvantages faced by these groups to gauge the effectiveness of the prior Minority, Women and Local Business Enterprise Ordinances (the "M/W/LBE Ordinances") and to assess the need for further and continuing action. The earlier studies are documented in the legislative history of the previous amendments and re-enactments of the ordinance, including Ordinance Nos. 175-89, 155-92, 210-97, 457-97, 82-98, 296-98, 210-99, 283-99, and 134-03. The findings underlying these ordinances have been reviewed and analyzed in the preparation of this Chapter and are hereby incorporated by reference into the legislative history of this Chapter. These materials include disparity studies, transcripts of live testimony by dozens of witnesses, case studies of discrimination, and voluminous other materials. An index and a separate synopsis of this material are on file with the Clerk of this Board in File No. 98-0612. These materials are all incorporated by reference into

the legislative history of this Chapter. The collection and analysis of relevant information is ongoing.

On July 26, 2004, in *Coral Construction, Inc. v. City and County of San Francisco* (Sup. Ct. No. 421249), the San Francisco Superior Court enjoined the City from enforcing certain provisions of the M/W/LBE Ordinance. In a subsequent order, the court clarified that the injunction applied to Sections 12D.A.6, 12D.A.7, 12D.A.8, 12D.A.9, 12D.A.10, 12D.A.14, and 12D.A.17 of the Administrative Code, for all contracts for which bids or proposals are advertised or solicited on or after July 26, 2004. The injunction became effective immediately.

In issuing its injunction, the Superior Court did not dispute the accuracy of the City's disparity studies or otherwise take issue with the City's underlying findings of discrimination and disparity. However, the Court ruled that California's Proposition 209 does not allow the City to address the identified problem through its prior methods. The Board finds and declares that the need for the City to identify, rectify, and prevent discrimination in its public contracting still exists, and the City is committed to ensuring that neither MBEs nor WBEs nor any other business is arbitrarily or unfairly excluded from contracting opportunities. The City remains committed to addressing discrimination in public contracting to the fullest extent allowed by law, in a manner that is consistent with all requirements of Federal and State law.

(6) The Board further finds that the public interest is served well if the City is self-sustaining. Stimulating the expansion of small firms or development of new enterprises fosters economic growth and independence for San Francisco and its taxpayers. This expansion of local small businesses advances the public interest, contributes to the economic well-being of all San Franciscans, and tends to minimize the burden on the General Fund to provide for general welfare.

**(C) Purpose.**

(1) **Assistance to Small Local Businesses.** This Chapter is intended to improve the ability of certified Local Business Enterprises (LBE) to compete effectively for the award of City contracts. The Mayor shall establish Citywide goals for participation by small and micro local businesses in contracting. The City shall use Discounts, set asides, and LBE subcontracting participation requirements set forth in this Chapter, information and training, and other assistance in order to reach these goals. The City Administrator and Director of the Contract Monitoring Division shall oversee and assist other City departments in implementing this Chapter and otherwise promoting the goal of increasing LBE participation in City contracts.

(2) The City, as a municipal corporation, shall strive to be economically self-sustaining.

(3) **Nondiscrimination.** Neither the City nor any of its officers or employees shall discriminate against any person or business on any basis prohibited by law in the award or administration of City contracts. Persons or businesses that are awarded City contracts shall not discriminate against any person or business on any basis prohibited by law in the performance or administration of any City Contract, including in the selection of subcontractors.

**(D) Rules and Regulations.** The City Administrator shall adopt rules, regulations, guidelines, and forms and take any and all other actions reasonable and necessary to implement and enforce this Chapter.

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## **SEC. 14B.2. DEFINITIONS.**

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

"Back Contracting" shall mean any agreement or other arrangement between a prime Contractor and its Subcontractor that requires the prime Contractor to perform or to secure the performance of the subcontract in such a fashion and/or under such terms and conditions that the prime contractor enjoys the financial benefits of the subcontract. Such agreements or other arrangements include, but are not limited to, situations in which either a prime Contractor or Subcontractor agrees that any term, condition, or obligation imposed upon the Subcontractor by the subcontract shall be performed by or be the responsibility of the prime Contractor.

"Bid" means a quotation, proposal, solicitation, or offer by a Bidder or Contractor to perform or provide labor, materials, equipment, supplies, or services to the City for a price.

"Bidder" means any business that submits a Bid or proposal.

"City" means the City and County of San Francisco.

"City-wide LBE Participation Goal" means the overall, aspirational City-wide LBE participation goal set by the Mayor each fiscal year as a percentage of the overall dollar value of Contracts anticipated to be awarded in the upcoming fiscal year subject to this Chapter.

"CMD" means Contract Monitoring Division.

"Commercially Useful Function" shall mean that the business is directly responsible for providing the materials, equipment, supplies or services to the City as required by the solicitation or request for quotes, Bids or proposals. Businesses that engage in the business of providing brokerage, referral or temporary employment services shall not be deemed to perform a "Commercially Useful Function" unless the brokerage, referral or temporary employment services are those required and sought by the City. When the City requires and seeks specialty products made to order for the City or otherwise seeks products which, by industry practice, are not regularly stocked in warehouse inventory but instead are purchased directly from the manufacturer, no more than five percent of the cost of the product shall be credited towards LBE subcontracting participation requirements. When the City requires and seeks products which are, by industry practice, stocked in warehouse inventory and are, in fact, regularly stocked by the listed supplier or distributor, no more than sixty percent of the cost of the product shall be credited towards subcontracting participation requirements. If the listed supplier or distributor does not regularly stock the required product, no more than five percent of the cost of the product shall be credited towards LBE subcontracting participation requirements.

"Commodities Contract" means an agreement to purchase any product, including materials, equipment, and supplies, including associated incidental services.

"Contract" means any agreement between the City and a person to provide or procure labor, materials, equipment, supplies, or services to, for, or on behalf of the City for a price to be paid out of monies deposited in the City Treasury or out of trust monies under the control of or collected by the City. "Trust monies" include, without limitation, all monies to which the City is entitled to receive or deposit in the City Treasury. A "Contract" includes an agreement between a non-profit or public entity and a Contractor for the performance of construction or construction-

related services, where the Contract is funded by the City. A "Contract" includes any agreement between the City and a person to provide or procure labor, materials, equipment, supplies, or services to, for, or on behalf of the City for PUC Regional Projects. A "Contract" does not include: (1) grants, whether funded by the City or by Federal or State grant funds, to a nonprofit entity to provide services to the community; (2) sales of the City's personal or real property; (3) loan transactions, whether the City is a debtor or creditor; (4) lease, franchise, or concession agreements; (5) agreements to use City real property; (6) gifts of materials, equipment, supplies or services to the City; (7) agreements with a public agency except for contracts or other agreements between the City and persons or entities, public or private, in which such persons or entities receive money from or through the City for the purpose of contracting with businesses to perform public improvements; or (8) agreements awarded under the emergency provisions of Administrative Code Sections 6.60 or 21.15 where there is either (a) no time to apply Discounts or establish subcontracting participation requirements, or (b) no immediately available LBEs are certified for the needed emergency work.

"Contract Awarding Authority" means any City officer, department, commission, employee, or board authorized to enter into Contracts on behalf of the City. A non-profit or public entity that receives funds from the City to pay for construction or construction related services is a "Contract Awarding Authority" for the purposes of contracting for the performance of those services.

"Contract Monitoring Division (CMD)" means the Contract Monitoring Division of the Office of the City Administrator to which the City Administrator has delegated responsibility to implement this Chapter, and shall also mean and include any department or division of the Office of the City Administrator that the City Administrator may in the future designate as successor to the Contract Monitoring Division to assume the duties of the Contract Monitoring Division set forth in this Chapter.

"Contractor" means any person who enters into a Contract with the City.

"Control" means a person possesses the legal authority to manage business assets, good will, and the day-to-day operations of a business and actively and continuously exercises such authority.

"Design-Build Contracts" means Public Works/Construction Contracts authorized under Administrative Code Section 6.61.

"Director" means the Director of the Contract Monitoring Division, or his or her designee.

"Discount" means a downward adjustment in price or upward adjustment in rating of a proposal, whichever applies, that is made under Section 14B.7.

"Eligible Public Works/Construction Contract" means a Contract with (1) an estimated cost which exceeds \$10,000 but is less than or equal to the Threshold Amount, and (2) a scope of work which, based on CMD Micro-LBE availability data, would attract bids from at least two qualified Micro-LBEs. Eligible Public Works/Construction Contracts include Job Order Contracts set aside for Micro-LBEs under Administrative Code Section 6.62(C).

"Eligible Services/Commodities Contract" means a Professional Services, General Services, Architect/Engineering or Commodities Contract with (1) an estimated cost which exceeds \$10,000 but is less than or equal to the Minimum Competitive Amount, and (2) a scope of work

which, based on CMD Micro-LBE availability data, would attract bids from at least two qualified Micro-LBEs.

"General Manager" means the General Manager of the San Francisco Public Utilities Commission, or his or her designee.

"General Services Contract" means an agreement for those services that are not professional services. Examples of "general services" include, but are not limited to, janitorial, security guard, pest control, and landscaping services.

"Integrated Project Delivery Contracts" means Public Works/Construction Contracts authorized under Administrative Code Section 6.68.

"Joint Venture" means an association of two or more professional services or architect/engineering businesses acting as a Contractor and performing or providing services on a Professional Services or Architect/Engineering Contract, in which each Joint Venture partner combines property, capital, efforts, skill, and/or knowledge and each Joint Venture partner shares in the Ownership, Control, management responsibilities, risks, and profits of the Joint Venture in proportion to its claimed level of participation. Joint Venture partners may be in different industries provided that each joint venture partner meets the minimum qualifications in the Bid, and each is acting as a prime contractor and otherwise meets the definition of a Joint Venture.

"LBE" means Local Business Enterprise.

"Local Business Enterprise (LBE)" means a business that is certified as an LBE under Section 14B.3.

"MBE" means Minority Business Enterprise.

"Minimum Competitive Amount" means (1) for the procurement of commodities, professional services, and architect/engineering services, the "Minimum Competitive Amount" as defined in Section 6.40(A) of the Administrative Code, which shall be \$100,000 and (2) for the procurement of general services, an amount equivalent to the "Threshold Amount" as defined in Chapter 6.1(M) of the Administrative Code which shall be \$400,000, provided that on January 1, 2015, and every five years thereafter, the Controller shall recalculate the applicable Minimum Competitive Amount (and the Threshold Amount from which the Minimum Competitive Amount for general services is calculated) to reflect any proportional increase in the Urban Regional Consumer Price Index from January 1, 2010, rounded to the nearest \$1,000.

"Minority Business Enterprise (MBE)" means a business that is certified as an MBE under Section 14B.3(E)(1).

"OBE" means Other Business Enterprise.

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

"Owns" or "Ownership" means a Person who:

(a) possesses a record ownership interest, such as partnership interest or stock interest, of at least fifty-one percent (51%) of the business or such lesser amount as the CMD determines, under the circumstances of the particular business' overall ownership and control structure, constitutes a significant ability to influence business operations and a strong personal stake in the business's viability;

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

(c) contributes capital to the business equal to at least the record ownership percentage (unsecured promissory notes or notes secured by the business or business assets are not sufficient to constitute capital contributions); and

(d) actively and continuously devotes expertise to the operations of the business relevant to the business's "Commercially Useful Function" of a quality and quantity proportionate to the record ownership interest.

"Owns" or "Ownership" for purposes of determining whether a business is an MBE means that a minority Person possesses all of the above indicia of ownership, and either individually, or in combination with the interests of other owners who are minority Persons, the ownership by minority Persons constitutes at least fifty-one percent (51%) of the overall business ownership.

"Owns" or "Ownership" for purposes of determining whether a business is a WBE means that a woman possesses all of the above indicia of ownership, and that either individually, or in combination with the interests of other owners who are women, the ownership by women constitutes at least fifty-one percent (51%) of the overall business ownership.

"Person" means any individual or group of individuals, including but not limited to partnerships, associations, and corporations.

"Professional Services Contract" means an agreement for services that require extended analysis, the exercise of discretion and independent judgment, or the application of an advanced, specialized type of knowledge, expertise, or training customarily acquired either by a prolonged course of study or equivalent experience in the field. Examples of professional service providers include, but are not limited to, licensed professionals such as accountants, and non-licensed professionals such as parking lot management, software developers and financial consultants. For the purpose of this Chapter, a Contract for architectural, engineering, or other professional design, consulting or construction management services for a public work project shall be considered an Architect/Engineering Contract and not a Professional Services Contract.

"Public Works/Construction Contract" means a Contract for the erection, construction, renovation, alteration, improvement, demolition, excavation, installation, or repair of any public building, structure, infrastructure, bridge, road, street, park, dam, tunnel, utility, or similar public facility that is performed by or for the City, and the cost of which is to be paid wholly or partially out of moneys deposited in the City Treasury or out of trust monies under the control of or collected by the City. For purposes of this Chapter only, "Public Works/Construction Contract" includes Contracts between a Person, including a non-profit entity or public agency, and a Contractor for construction or construction-related services, where the Contract is funded by the City.

"PUC" or "Public Utilities Commission" means the San Francisco Public Utilities Commission (SFPUC), the City Department that provides water, wastewater, and municipal power services to San Francisco and, under contractual agreement with 29 wholesale water agencies, also supplies water to 1.6 million additional customers within three Bay Area counties.

"PUC Regional Projects" means (1) projects to be performed outside of the jurisdictional boundaries of San Francisco that are identified as regional projects and included in the formally approved Capital Improvement Program of the San Francisco Public Utilities Commission's

approximately \$4.6 billion project to seismically reinforce and otherwise enhance the Hetch Hetchy water supply system, also known as the Water System Improvement Program ("WSIP"), as it may be amended from time to time; (2) projects to be performed exclusively outside of the jurisdictional boundaries of San Francisco for which some or all of the cost will be shared by members of the Bay Area Water Supply and Conservation Agency ("BAWSCA"); or (3) projects under Contracts with the SFPUC to be performed exclusively 70 miles or more beyond the jurisdictional boundaries of San Francisco. "PUC Regional Projects" shall include, but are not limited to, Repair and Replacement work ("R&R") to be performed in association with a regional Capital Improvement Program or other BAWSCA cost sharing project, or to be performed exclusively 70 miles or more beyond the jurisdictional boundaries of San Francisco.

"Risk Manager" means the Director of Risk Management, a division of the Office of the City Administrator.

"Subcontractor" means any LBE providing goods or services to a Contractor or a lower tier Subcontractor in fulfillment of the Contractor or Subcontractor's LBE utilization obligations arising from a Contract.

"Threshold Amount" means, for public works/construction projects, the "Threshold Amount" as defined in Section 6.1(M) of the Administrative Code which shall be \$400,000 provided that on January 1, 2015, and every five years thereafter, the Controller shall recalculate the Threshold Amount to reflect any proportional increase in the Urban Regional Consumer Price Index from January 1, 2010, rounded to the nearest \$1,000.

"Woman Business Enterprise (WBE)" means a business that is certified as a WBE under Section 14B.3(E)(2).

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## **SEC. 14B.3. LBE CERTIFICATION.**

(A) **Criteria for LBE Certification.** The Director shall certify as an LBE any business that meets all of the following criteria and also meets the criteria set forth in Section 14B.3(B), Section 14B.3(C) or Section 14B.3(D):

(1) The business is financially and operationally independent from, and operates at arm's length to, any other business.

(2) The business is continuously in operation.

(3) The business is a for-profit enterprise.

(4) The business performs a Commercially Useful Function.

(5) The business maintains its principal place of business in a fixed office within the geographic boundaries of the City that provides all of the services for which LBE certification is sought, other than work required to be performed at a job site; provided, however, that suppliers are not required to maintain their principal place of business in San Francisco, but are required to maintain a fixed office in San Francisco that meets all of the requirements of this Section other than the principal place of business requirement.



An office is a fixed and established place of business, as determined by the Director, including a qualified home office, where business is conducted on a regular basis of the type for which certification is sought. A residence qualifies as an office only if the residence is situated within the geographic boundaries of the City, and none of the business owners also maintain an office outside the residence in the same or related field, and a business owner claimed the home office as a business deduction on the prior year's income tax return, or for businesses started after the last tax return, would qualify for a deduction on the next tax return. None of the following constitutes an office: a post office box, a temporary location, a movable property, a location that was established to oversee a project such as a construction project office, or a work space provided in exchange for services as opposed to monetary rent.

To establish a principal place of business in San Francisco, a business must demonstrate that the majority of its principals are based in the San Francisco office.

Suppliers must maintain a warehouse in the City that is continuously stocked with inventory consistent with their certification. Truckers must park their registered vehicles and trailers within the City.

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

(7) The business has been located and doing business in San Francisco for at least six (6) months preceding the application for certification.

(8) At least one business owner has valid licenses or other relevant trade or professional certifications or, where licensing is not required, the business owners individually and collectively have relevant training and experience that are appropriate for the type of business for which the business seeks certification.

(9) The business is Owned and Controlled as defined herein by individuals who reside in the United States or its territories.

(10) The business has average gross annual receipts in the prior three (3) fiscal years that satisfy the criteria set forth in Section 14B.3(B), Section 14B.3(C), or Section 14B.3(D).

(11) The business is not Owned or Controlled as defined herein in part or in whole by a full time City employee.

**(B) Criteria for Small-LBE.** The Director shall certify as a "Small-LBE" any business that meets the requirements of 14B.3 (A) and has average gross annual receipts in the prior three (3) fiscal years that do not exceed the following limits: (1) public works/construction - \$20,000,000; (2) specialty construction contractors - \$10,000,000; (3) goods/materials/equipment and general services - \$10,000,000; (4) professional services and architect/engineering - \$2,500,000; and (5) trucking - \$3,500,000. The Director shall determine gross receipts according to recognized accounting methodologies that the Director determines most accurately reflect the actual money that the business received during the relevant period. Any business under common ownership, in whole or in part, with any other business in a related industry meets the requirements of this subparagraph only if the aggregate gross annual receipts of their percentage of ownership added together of all of the businesses under such common ownership do not exceed these limits. All businesses owned by married spouses or domestic partners are considered under common ownership unless the businesses are in unrelated industries and no community property or other jointly owned assets were used to establish or are used to operate either business.

(C) **Criteria for Micro-LBE.** The Director shall certify as a "Micro-LBE" any business that meets the requirements of 14B.3 (A) and also has average gross annual receipts in the prior three (3) fiscal years that do not exceed the following limits: (1) public works/construction - \$10,000,000; (2) specialty construction contractors - \$5,000,000; (3) goods/materials/equipment and general services - \$5,000,000; (4) professional services and architect/engineering - \$1,250,000; and (5) trucking - \$1,750,000. The Director shall determine gross receipts according to recognized accounting methodologies that the Director determines most accurately reflect the actual money that the business received during the relevant period. Any business under common ownership, in whole or in part, with any other business in a related industry meets the requirements of this subparagraph only if the aggregate gross annual receipts their percentage of ownership added together of all of the businesses under such common ownership do not exceed these limits. All businesses owned by married spouses or domestic partners are considered under common ownership unless the businesses are in unrelated industries and no community property or other jointly owned assets were used to establish or are used to operate either business.

(D) **Criteria for SBA-LBE.** The Director shall certify as a "SBA-LBE" any business that: (1) meets the requirements of 14B.3 (A) and also has average gross annual receipts in the prior three (3) fiscal years that do not exceed the following limits: (1) public works/construction - \$33.5 million; (2) specialty construction contractors - \$17 million; (3) goods/materials/equipment and general services - \$17 million; (4) professional services and architect/engineering - \$7 million and (5) trucking - \$8.5 million. The Director shall determine gross receipts according to recognized accounting methodologies that the Director determines most accurately reflect the actual money that the business received during the relevant period. Any business under common ownership, in whole or in part, with any other business in a related industry meets the requirements of this subparagraph only if the aggregate gross annual receipts of their percentage of ownership added together of all of the businesses under common ownership do not exceed these limits. All businesses owned by married spouses or domestic partners are considered under common ownership unless the businesses are in unrelated industries and no community property or other jointly owned assets were used to establish or are used to operate either business.

(E) For purposes of ensuring nondiscrimination in City contracting and subcontracting, the Director shall further certify all LBEs as MBEs, WBEs and OBEs according to the Ownership and Control of the LBE and shall maintain data on the availability and utilization of MBEs, WBEs, and OBEs in City Contracting.

(1) **MBE Certification.** The Director shall certify as an MBE any business that is certified as an LBE and is Owned and Controlled by a Person or Persons who is a member of one or more of the following ethnic groups:

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

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

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

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

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

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

(2) **WBE Certification.** The Director shall certify as a WBE any business that is certified as an LBE and is Owned and Controlled by one or more women.

(3) **OBE Certification.** The Director shall certify as an OBE any business that is certified as an LBE and (i) does not demonstrate to the satisfaction of the Director that it is Owned and Controlled by one or more women or one or more minority Persons or (ii) is not certified as an MBE or a WBE.

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## **SEC. 14B.4. TERM OF CERTIFICATION, CERTIFICATION DENIAL PROTESTS AND APPEALS.**

(A) **Period of Certification.** Certification for all categories of LBE shall be effective for a three (3) year period provided that (1) businesses must at all times throughout the certification period meet the criteria in Section 14B.3 as applicable; and (2) the Director may, in his or her discretion, certify a business for a shorter period based on the unique attributes of any applicant or renewal applicant that relate to such business's eligibility or continued eligibility for certification. The Director may require certified businesses annually to submit copies of their federal income tax returns and other documentation for the purpose of verifying continuing eligibility for any certification status hereunder. The Director may suspend or revoke the certification of any LBE that fails to submit requested tax returns or other documentation in a timely fashion or otherwise fails to cooperate with the Director in any investigation of that business's continued eligibility for certification.

(B) **Certification or Re-Certification Denial.** Whenever the Director determines that an applicant or a certified business whose certification period is expiring (renewal applicant) is not eligible for any requested certification, the Director shall notify the applicant or renewal applicant in writing of the basis for such decision, and the date on which the business will be eligible to reapply for the same certification; provided, however, that in all cases, the applicant or renewal applicant has the right to notice of the Director's determination and a full and adequate opportunity to be heard before the Director's decision is final. The Director shall require a business to wait at least six months but not more than two years after the denial before reapplying for certification in the same category.

(C) **Appeals.** Applicants and renewal applicants may appeal a Director's denial or refusal to renew certification, or length of waiting period for reapplication imposed hereunder to the City Administrator, or Hearing Officer appointed by the City Administrator, for a *de novo* determination of the matter appealed. After affording the applicant a full and adequate opportunity to be heard, the City Administrator's or Hearing Officer's decision shall be the City's final administrative decision on the matter. Unless the City Administrator or Hearing Officer

issues an order to the contrary, the Director's determination shall not be stayed during the appeal process.

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## **SEC. 14B.5. PUC-LBE CERTIFICATION.**

(A) **PUC-LBE Certification.** In order to increase the ability of small businesses that are located within the PUC water system service area but outside of the jurisdictional boundaries of San Francisco to compete for PUC Regional Contracts, the Director shall certify businesses as PUC-LBEs, including as either Small-PUC-LBEs or Micro-PUC-LBEs, and as either PUC-MBEs, PUC-WBEs, or PUC-OBES, that meet all of the following criteria:

(1) Only established small public works/construction, construction material supplies, construction equipment rental, trucking, and professional services firms including architecture or engineering firms may be certified as PUC-LBEs or any subcategory of PUC-LBE. Only firms located within the PUC water system service area may be certified as PUC-LBEs or any subcategory of PUC-LBE.

(2) Only firms with average gross annual receipts in the prior three fiscal years that meet the requirements of Section 14B.3(B) or Section 14B.3(C) for Small-LBEs or Micro-LBEs, respectively may be certified as PUC-Small-LBEs or PUC-Micro-LBEs.

(3) PUC-LBEs owned and controlled by one or more minority persons or women according to all of the criteria set forth in Section 14B.3(B) or 14B.3(C), respectively, shall be certified as PUC-MBEs or PUC-WBEs. PUC-LBEs that do not demonstrate qualifying ownership and control by minority persons or women shall be certified as PUC-OBES.

(4) Firms shall meet all criteria that the City Administrator shall by rule adopt to the end that firms certified as PUC-LBEs shall be similarly situated to LBEs to the extent practicable, taking into account the special circumstances of their location and the needs of the PUC Regional Projects.

(B) **PUC Small Firm Advisory Committee.** There is hereby established a PUC Small Firm Advisory Committee as follows:

(1) The PUC Small Firm Advisory Committee shall have five (5) members who shall be appointed by the PUC General Manager to represent the interest of individuals and businesses that are or may be eligible for PUC-LBE certification. Members shall serve at the pleasure of the PUC General Manager. Members of the PUC Small Firm Advisory Committee shall not be compensated, but shall be reimbursed for expenses in accordance with the Controller's published policies.

(2) The purposes and duties of the PUC Small Firm Advisory Committee are:

(a) To adopt rules and procedures within the Advisory Committee's responsibilities;

(b) To assist the Director in verifying the eligibility for certification of PUC-LBE applicants by conducting site visits or undertaking other local or regional fact gathering to ensure that applications for PUC-LBE certification undergo substantially the same scrutiny as applications for other LBE certification;

(c) To outreach to the business community about PUC-LBE certification and contracting opportunities and to provide information to the Director regarding the availability of potential PUC-LBEs;

(d) To receive reports from the City, to publicly discuss, and make recommendations for rules and procedures regarding the implementation of this Chapter for PUC regional projects to the Director and the PUC;

(e) To make recommendations to the SFPUC General Manager to study the feasibility of additional programs that will increase the participation of eligible firms for the regional program;

(f) To provide status reports on the Advisory Committee's activities to the SFPUC General Manager and the Director.

(3) The PUC Small Firm Advisory Committee shall establish bylaws, rules and/or regulations for the conduct of its business. Administrative assistance and staffing for the PUC Small Firm Advisory Committee shall be provided at the discretion of the PUC.

(4) Except for the PUC Small Firm Advisory Committee's authority as provided in Section 14B.5(B)(2), the Director shall have the authority over the implementation of this Chapter for PUC Regional Projects to the same extent as all other Bids, proposals, and Contracts subject to the Chapter.

(C) **PUC-LBE Status.** Except as provided in Subsection 14B.5(D), PUC-LBEs shall have the status of LBEs for all purposes of this Chapter for construction, specialty construction, construction material suppliers, construction equipment rental firms, trucking, and professional services including architectural and engineering for PUC Regional Projects. PUC-LBEs shall not have the status of LBEs for PUC Regional Contracts for general services or for any other Bid, proposal, or Contract subject to this Chapter.

(D) **Bid Discounts.** Contract Awarding Authorities shall only apply Discounts to Bids from PUC-LBEs for the purpose of determining the apparent highest ranked proposal or the apparent lowest Bid, for PUC Regional Projects that will be performed exclusively 70 miles or more beyond the jurisdictional boundaries of San Francisco, or for which some or all of the cost will be shared by members of BAWSCA, where application of the Discount will not adversely impact the ranking for negotiation or award process of a Bid submitted by any Micro-LBE, Small-LBE, or SBA-LBE certified under Section 14B.3.

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## **SEC. 14B.6. NON-PROFIT LBE CERTIFICATION.**

(A) Notwithstanding any other provisions of this Chapter, in order to increase the ability of small, local non-profit enterprises to compete for City Contracts on an equal basis with small, local for-profit enterprises, the Director shall certify as Non-profit LBEs, enterprises that meet all of the following criteria:

(1) The non-profit is financially and operationally independent from, and operates at arm's length to, any other non-profit or for-profit enterprise.

(2) The non-profit is continuously in operation.

(3) The non-profit is a California Nonprofit Organization that is both

(a) regulated as either a Nonprofit Public Benefit Corporation under California Corporations Code Sections 5110-6815 or a Nonprofit Religious Corporation under California Corporations Code Sections 9110-9690, and

(b) tax-exempt under section 501(c)(3) of the Internal Revenue Code.

(4) The non-profit performs a Commercially Useful Function. In the case of non-profits, the Commercially Useful Function may be related or unrelated to its stated charitable mission. The tax, or other implications, including forfeiture of tax-exempt status, that a certified non-profit may incur for engaging in substantial business operations unrelated to its charitable mission are solely the responsibility of the non-profit and not a criteria for certification hereunder.

(5) The non-profit maintains its principal place of business in a fixed office within the geographic boundaries of the City.

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

To establish a principal place of business in San Francisco, a non-profit must demonstrate that the majority of its paid and volunteer staff are based in the San Francisco office.

Suppliers must maintain a warehouse in the City that is continuously stocked with inventory consistent with their certification. Truckers must park their registered vehicles and trailers within the City.

(6) The non-profit has applicable current filings with State and Federal agencies, including the California Attorney General (Form RRF-1), the California Franchise Tax Board (Forms 199 and 109), the California Secretary of State (Form S1-100) and the Internal Revenue Service (Form 990).

(7) The non-profit has been located and doing the same type of business activity as the type (s) for which certification is sought in San Francisco for at least six months preceding the application for certification.

(8) The non-profit has staff under continuous contractual commitment with licenses or other relevant trade or professional certifications, or, where licensing is not required, relevant training and experience that are appropriate for the type of business for which the non-profit seeks certification.

(9) The Board of Directors or other governing body of the non-profit consists exclusively of individuals who reside in the United States or its territories.

(10) The non-profit has average gross annual receipts in the prior three fiscal years that satisfy the criteria set forth in either Section 14B.3(B) or 14B.3(C).

(11) (a) Full time City employees, if any, who serve on the Board of Directors or other governing body of the non-profit shall not constitute a majority of the membership of such body or be capable of exercising a controlling number of votes for such body, and

(b) any non-profit that includes any full time City employees on its Board of Directors or other governing body shall be ineligible for award, as a prime Contractor or Subcontractor, of any Contract to be awarded by, and/or overseen by, the City Department or entity that employs such Board or other governing body member.

(B) Only firms with average gross annual receipts in the prior three fiscal years that meet the requirements of Section 14B.3(B) or Section 14B.3(C) for Small-LBEs or Micro-LBEs, respectively, may be certified as Non-profit Small-LBEs or Non-profit Micro-LBEs. The Director shall determine gross receipts according to recognized accounting methodologies that the Director determines most accurately reflect the actual money that the non-profit received or was entitled to receive during the relevant period.

(C) **Certification as OBE.** All Non-profit LBEs shall be certified as OBEs. Non-profits shall not be eligible for certification as MBEs or WBEs. Non-profit LBEs shall have the status of LBEs for all purposes of this Chapter, including but not limited to Bid Discounts and subcontracting participation credit.

(D) **Additional Requirements.** Certification of Non-profit LBEs shall be subject to such requirements, if any, that the City Administrator shall by rule adopt, to the end that eligibility requirements for certification for Non-profit LBEs shall conform to eligibility requirements for certification for-profit LBEs to the extent practicable taking into consideration the differences in their ownership and operational structures.

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## SEC. 14B.7. PRIME CONTRACTS

(A) **Good Faith Efforts by Awarding Authorities to Obtain LBE Bids on Prime Contracts.** Contract Awarding Authorities shall use good-faith efforts for all Contracts subject to the Discount provisions of this Chapter to solicit and obtain Bids from the broadest possible diversity of LBEs and to ensure that MBEs, WBEs, and OBEs are not arbitrarily excluded from participation. Good faith efforts shall include the following:

(1) Arranging Contracts by size and type of work to maximize the opportunities for LBEs to participate. This includes dividing projects into smaller parts.

(a) As soon as practical before soliciting Bids, Contract Awarding Authorities shall submit Large Contract Proposals to the Director for review. The Director shall determine whether the proposed Contract can be divided into smaller Contracts so as to enhance the opportunity for participation by LBEs. For purposes of this paragraph, "Large Contract Proposals" means any Public Works/Construction Contract estimated to cost more than \$5,000,000, any Professional Services Contract estimated to cost more than \$1,000,000, and any Commodities Contract with a term greater than one year, including any options to renew or extend.

(b) If the Director determines, after consulting with the Contract Awarding Authority, that the Contract can be divided into smaller Contracts, then the Director and the Contract Awarding

Authority shall confer regarding all of the costs and benefits of soliciting the Contract as a single Contract or dividing it into smaller Contracts, including but not limited to the potential for enhanced opportunities for LBE participation as Prime Contractors, the potential for LBE participation as Subcontractors, suitability of procuring the work through Micro-LBE Set-Aside under 14B.7(K), relative costs, administrative issues, and any other matters relevant to the accomplishment of the purpose of the subject Contract or Contracts. If, after exchanging information and conferring regarding these issues, the Contract Awarding Authority and the Director are unable to agree on whether to divide the Contract into smaller Contracts or how to divide the Contract, the Mayor or the Mayor's designee shall resolve the matter.

(2) Outreaching 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, and encouraging LBEs to attend prebid meetings.

(3) Posting contracting opportunities on the Department, Office of Contract Administration, and/or other centralized City website, as applicable, with adequate lead time for LBEs to effectively respond to the opportunity.

(4) Providing all Bidders, including LBEs access to adequate information about the plans, specifications, and requirements of the proposed Contract.

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

(6) For Professional Services, General Services, Architect/Engineering and Commodities Contracts, the estimated cost of which exceeds \$10,000 but is less than the Minimum Competitive Amount or for Public Works/Construction Contracts, the estimated cost of which exceeds \$10,000 but is less than the Threshold Amount, Contract Awarding Authorities are not required to undertake the good faith efforts steps set forth in Section 14B.7(A)(3) when it is impracticable to do so.

**(B) Best Efforts on Contracts Not Otherwise Subject to this Chapter.** Contract Awarding Authorities shall adopt the same good faith efforts set forth in Section 14B.7(A) for the award of leases, franchises, concessions, and other Contracts not subject to the Discount provisions of this Chapter, unless impracticable to do so. At a minimum, Contract Awarding Authorities shall notify LBEs that are certified to perform the work contemplated in a Contract and solicit their interest in the Contract.

**(C) Equal Opportunity in Prime Contracting.** Contract Awarding Authorities shall ensure that all aspects of their contracting process are transparent, fair, and do not arbitrarily disadvantage or discriminate against LBEs or any other business or Person on any basis prohibited by law. Contract Awarding Authorities shall document their selection processes as required by the Director to monitor and ensure compliance with this provision. The Director shall report any contracting process by a Contract Awarding Authority that the Director believes may be discriminatory in nature to the Human Rights Commission.

**(D) Contracts Subject to Prime Bid Discounts.** Contract Awarding Authorities shall apply Discounts to all Contracts the estimated cost of which exceeds \$10,000 and is less than \$10,000,000, except that the Bid Discount provisions applicable to SBA-LBEs shall apply only to Contracts (other than Commodities Contracts) with an estimated cost no less than \$400,000 and no greater than \$20,000,000, and to Commodities Contracts with an estimated cost no less than \$400,000 and no greater than \$10,000,000. Discounts shall apply to Bids from LBE Prime



or Joint Ventures only where the LBE Prime or Joint Venture Partner will perform a Commercially Useful Function on the Contract. A LBE Prime or Joint Venture whose Bid receives a Discount and who thereafter fails to perform a Commercially Useful Function under the Contract at least equivalent in scope and value to the role represented in its Bid documents may be subject to sanctions as set forth in Section 14B.17(D) for noncompliance with this Chapter.

(E) **Amount of Discount.** Unless otherwise provided in this Chapter, Contract Awarding Authorities shall apply the following Discounts to each evaluation stage of the selection process, including qualifications, proposals, and interviews:

(1) For Contracts estimated by the Contract Awarding Authority to cost in excess of \$10,000 but less than \$10,000,000, a ten percent (10%) Discount to any Bid from a Small or Micro-LBE. If after the application of the Discounts provided for in this Subsection 14B.7(E)(1) or Subsection 14B.7(F) to any Bid from a Small or Micro-LBE, the apparent low Bidder or highest ranking Proposer is not a Small or Micro-LBE, Contract Awarding Authorities shall apply a 5% Discount to any Bid from an SBA-LBE. Contract Awarding Authorities shall apply this five percent (5%) Discount to Contracts, except that the five percent (5%) Discount for SBA-LBEs shall not be applied at any stage if it would adversely affect a Small or Micro-LBE.

(2) For Contracts estimated by the Contract Awarding Authority to cost in excess of \$10,000,000 but less than \$20,000,000, a two percent (2%) Discount to any Bid from a Small, Micro, or SBA-LBE for Public Works/Construction, Architect/Engineering, Professional Services, or General Services Contracts. Bids from Small, Micro, or SBA-LBEs for Commodities Contracts in excess of \$10,000,000 are not eligible for the Discount.

(F) **Joint Ventures For Professional Services and Architect/Engineering.** Unless otherwise provided in this Chapter, for Contracts estimated by the Contract Awarding Authority to cost in excess of \$10,000 but less than \$10,000,000, Contract Awarding Authorities shall apply the following Discount to Bids from Joint Ventures with a Small and/or Micro-LBE Joint Venture partner participation on Professional Services and Architect/Engineering prime Contracts:

(1) five percent (5%) to a Joint Venture with Small and/or Micro-LBE Prime Contractor participation that equals or exceeds thirty-five percent (35%) but is under forty percent (40%);

(2) seven and one-half percent (7.5%) to a Joint Venture with Small and/or Micro-LBE Prime Contractor participation that equals or exceeds forty percent (40%);

(3) ten percent (10%) to a Joint Venture exclusively among Small and/or Micro-LBE Prime Contractors.

(4) Contract Awarding Authorities shall apply the Discount to each stage of the selection process, including qualifications, proposals, and interviews.

(5) The Contract Awarding Authority shall apply the Discount described in this subsection (F) only to Bids from Joint Ventures, as defined in this Chapter and its duly promulgated Rules and Regulations, on Professional Services and Architect/Engineering Contracts, and only to those Joint Venture Bids where the Director finds that the Small and/or Micro LBE Joint Venture partner (a) will be responsible for, and has sufficient skill, experience, and financial capacity to perform a clearly defined portion of the work, and (b) shares in the Ownership, Control, management responsibilities, risks, and profits of the Joint Venture at least in proportion to the

value of its assigned Joint Venture work. The Joint Venture's Bid must set forth in detail the Small and/or Micro-LBE Joint Venture partner's portion of the work separately from the work to be performed by the non-LBE Joint Venture partner, and such work must be assigned a commercially reasonable dollar value.

**(G) Affidavit.**

(1) Each Bidder and Contractor shall be required to sign an affidavit declaring under penalty of perjury its intention to comply fully with the provisions of this Chapter and attesting to the truth and accuracy of all information provided regarding such compliance.

(2) Any Bidder that fails to comply with the provisions of Chapter 14B in connection with the submission of a Bid may be subject to appropriate sanctions under Section 14B.17(D) whether or not such Bidder is awarded a Contract.

(3) No person shall knowingly make, file or cause to be filed with the City any materially false or misleading statement or report in connection with this Chapter. If the Director has reason to believe that any person has done so, the Director may conduct an investigation, and after notice and a full and adequate opportunity to be heard, may impose appropriate sanctions under Section 14B.17(D), or the Director may refer the matter to an appropriate governmental law enforcement agency.

**(H) Additional Requirements.**

(1) Each Contract subject to this Chapter 14B shall incorporate by reference, and require the Contractor to comply with the requirements imposed on Contractors therein. In addition, all Contractors shall incorporate by reference in all subcontracts entered into in fulfillment of a Contract's subcontracting participation requirement, and require Subcontractors to comply with, all requirements applicable to Subcontractors under Chapter 14B. Contractor's compliance with Chapter 14B and Contractor's duty to impose specified requirements in specified Subcontracts are material elements of the City's agreement to enter into the Contract and failure to comply shall constitute a material breach of contract.

(2) If the Director finds that any Bidder, Subcontractor or Contractor fails to comply with any of the provisions of this Chapter, rules and regulations implementing the Chapter, or Contract provisions pertaining to any LBE, LBE participation, or outreach, such Bidder, Subcontractor, or Contractor shall be liable for liquidated damages for each Contract in an amount equal to the Bidder's or Contractor's net profit on the Contract, ten percent (10%) of the total amount of the Contract or \$1,000, whichever is greatest, as determined by the Director. The liquidated damages assessed shall be payable to the City upon demand and may be set off against any monies due to the Bidder, Subcontractor, or Contractor from any Contract with the City.

(3) Contractors and Subcontractors shall maintain all records, including but not limited to such information specified by the Director, necessary for monitoring their compliance with the duties imposed on Contractors under this Chapter, for five (5) years following expiration of the Contract, or, as applicable, Subcontract, and shall permit the City to inspect and audit such records.

(4) During the term of the Contract, Prime Contractors shall fulfill the LBE participation commitments stated in their Bids and memorialized in their Contracts. A Contractor's failure to achieve the level of LBE subcontractor participation specified in the Contract shall be deemed a material breach of contract.

(5) Prime Contractors shall include in all Subcontracts with a LBE a provision requiring the Prime Contractor to compensate the LBE Subcontractor for damages for breach of contract or liquidated damages equal to 5% of the Subcontract amount, whichever is greater, if the Prime Contractor fails to use the LBE Subcontractor as specified in the Bid and Contract unless the Director and the Contract Awarding Authority both give advance approval to the Prime Contractor to substitute the LBE Subcontractor or otherwise modify the LBE commitments in the Bid and Contract documents. It shall be a material breach of contract for a Prime Contractor to fail to include such clause in all Subcontracts with LBEs. This provision shall also state that it is enforceable in a court of competent jurisdiction.

(6) Whenever amendments, modifications, supplements, or change orders increase the total dollar value of the Contract, the Prime Contractor must comply with those provisions of this Chapter that applied to the original Contract with respect to the amendment, modification, supplement, or change order.

(7) Contract Awarding Authorities shall submit to the Director for approval all proposed Contract amendments, modifications, supplements, and change orders that cumulatively increase by more than twenty percent (20%) the total dollar value of all Contracts originally valued at \$50,000 or more. The Director shall impose or increase the Subcontracting participation requirement as necessary to reflect additional opportunities for LBE participation from the proposed amendment, modification, supplement, or change order as appropriate.

(8) Prime Contractors and Subcontractors may not engage in any Back Contracting or other work shifting to a lower-tier Subcontract to evade using LBE Subcontractors to perform work or for any other purpose inconsistent with the provisions of this Chapter, or rules and regulations adopted pursuant to this Chapter.

(9) For the duration of any Contract subject to LBE participation requirements, the Prime Contractor shall pay its Subcontractors within three working days after receiving payment from the City unless the Prime Contractor notifies the Director in writing within ten (10) working days prior to receiving payment from the City that there is a bona fide dispute between the Prime Contractor and the Subcontractor, in which case the Prime Contractor may withhold the disputed amount but shall pay the undisputed amount. The Director may, upon making a determination that a bona fide dispute exists between the Prime Contractor and Subcontractor, waive this three-day payment requirement. In making the determination as to whether a bona fide dispute exists, the Director shall not consider the merits of the dispute. The Prime Contractor shall submit within 10 working days following receipt of payment from the City, a statement, in a form specified by the Director, attesting that he or she has paid all Subcontractors all undisputed amounts from previous City payments.

(I) Reserved.

(J) **Waivers.** The Director shall waive the Discount provided in Section 14B.7(D), and post all approved waivers online on a CMD website, if:

(1) The Director finds, with the advice of the Contract Awarding Authority and the Office of Contract Administration, that needed goods or services are available from a sole source that is not currently disqualified from doing business with the City; or

(2) For Contracts in excess of \$5,000,000, a Contract Awarding Authority establishes that sufficient qualified LBEs capable of providing the needed goods and services required by the

Contract are not available, or the application of the LBE Discount will result in significant additional costs to the City if the waiver of the Bid Discount is not granted.

**(K) Micro-LBE Set-Aside Program.**

(1) Each fiscal year, each Contract Awarding Authority, in consultation with the Director, shall set aside the following for award to Micro-LBEs:

- (a) Not less than 50% of eligible Public Work/Construction Contracts and
- (b) Not less than 25% of Eligible Services/Commodities Contracts.

(2) Contracts under the Micro-LBE Set-Aside Program shall be competitively awarded in accordance with the Administrative Code, except that if (a) fewer than two qualified Micro-LBEs submit Bids, or (b) the Contract Awarding Authority determines that the Contract would not be awarded at a fair market price, then the Contract Awarding Authority may reject all Bids and rebid the Contract outside the set-aside program.

(3) Each Contract Awarding Authority shall include the following information concerning its compliance with the Micro-LBE Set-Aside Program to the Board of Supervisors as part of its annual report under Section 14B.15(B):

(a) Each Eligible Public Works/Construction Contract and, each Eligible Services/Commodities Contract awarded under the Micro-LBE Set-Aside Program, and its dollar amount; and

(b) Each Eligible Public Works/Construction Contract and each Eligible Services/Commodities Contract not awarded under the Micro-LBE Set-Aside Program, accompanied by an explanation as to why each such Contract either was not set aside, or, if set aside, was not awarded under the Micro-LBE Set-Aside Program.

(4) Contracts that are set-aside for award to Micro-LBEs shall not be subject to the subcontracting participation requirement under Section 14B.8. Micro-LBEs that subcontract any portion of a set-aside Contract should subcontract to businesses certified as Micro-LBEs, to the maximum extent possible. Micro-LBEs that subcontract any portion of a set-aside Contract must serve a Commercially Useful Function based on the Contract's scope of work, and must perform work directly with a value of at least twenty-five percent (25%) of the total Contract amount.

**(L) San Francisco First Program.**

(1) Unless otherwise provided in this Chapter, Contract Awarding Authorities shall use the good faith efforts set forth in Section 14B.7(A) to attempt to obtain at least three Bids from Micro or Small LBEs for all Public Works/Construction Contracts estimated to cost in excess of \$10,000 but less than the Threshold Amount and all Commodities, Architect/Engineering, Professional Services, and General Services Contracts estimated to cost in excess of \$10,000 but less than the Minimum Competitive Amount.

(2) If the Contract Awarding Authority is unable to obtain at least three Bids from Micro or Small LBEs, the Contract Awarding Authority shall prepare a written finding explaining why at least three Bids from LBEs were not obtained.

**(M) Prompt payment.** The City shall pay LBE Prime Contractors within thirty (30) days of the date on which the City receives an invoice for work performed for and accepted by the City.

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## **SEC. 14B.8. SUBCONTRACTING.**

(A) **LBE Subcontracting Participation Requirements.** Prior to soliciting Bids, Contract Awarding Authorities shall provide the Director with a proposed job scope for each (1) Public Works/Construction Contract that equals or exceeds fifty percent (50%) of the Threshold Amount, and (2) each Architect/Engineering, Professional Service, and General Services Contract that equals or exceeds fifty percent (50%) of the Minimum Competitive Amount. The Contract Awarding Authority may ask the Director to waive LBE subcontracting participation requirements where it anticipates that there are no subcontracting opportunities or there are not sufficient LBEs available to perform the subcontracting work available on the Contract.

The Director shall set LBE subcontracting participation requirements for each such Contract, where appropriate, based on the following factors:

- (1) The extent of subcontracting opportunities presented by the scope of the proposed Contract; and
- (2) The availability of LBE Subcontractors certified to provide goods and services required under the scope of the proposed Contract.

Except where the Director determines there are not sufficient Small and Micro-LBEs available to perform the subcontracting opportunities presented by the scope of the proposed Contract, Bidders must list and use only Small and Micro-LBEs to satisfy the LBE subcontracting participation requirement set by the Director. Where the Director determines that there are not sufficient Small and Micro-LBEs available, the Director may authorize Contractors to satisfy the LBE subcontractor participation requirement by using Small, Micro or SBA-LBEs, or may set separate subcontractor participation requirements for Small and Micro-LBEs, and for SBA-LBEs. For each Contract where the Director sets a LBE subcontracting requirement at less than twenty percent, the Director shall prepare a written explanation of the details justifying the LBE subcontracting requirement set. The written explanation shall be posted on line as soon practicable.

(B) **Satisfaction of Good Faith Efforts Requirements.** At the time of a Bid, all Bidders must meet the LBE subcontracting participation requirement set by the Director, and also must conduct good faith efforts and file evidence of good faith efforts as required in Sections 14B.8 (D) and (E) respectively, with the following exceptions:

- (1) If LBE subcontracting participation in the submitted Bid exceeds the LBE subcontracting participation requirement set by the Director for the Contract by at least thirty-five percent (35%), the Bidder is excused from conducting or documenting its good faith efforts as otherwise required in Sections 14B.8(D) and (E). LBE subcontracting participation shall be determined in this Section 14B.8(B)(1) only, as the sum of all participation by Small and Micro-LBE Prime Contractors, Small and Micro-LBE Joint Venture partners, and Small and Micro-LBE Subcontractors. Participation by SBA-LBE Subcontractors shall count toward LBE subcontracting participation for purposes of determining whether the Bidder is excused from conducting and documenting good faith efforts only if, under Subsection 14B(8)(A), the Director permitted Bidders to list SBA-LBE firms to satisfy subcontracting participation requirements on the Contract.

(2) Where the Director has set LBE subcontracting participation requirements for Public Works/Construction Contracts in an amount less than the Threshold Amount or on Architect/Engineering, Professional Services, or General Services Contracts in an amount less than the Minimum Competitive Amount, Bidders are not required to conduct good faith efforts or to file evidence of good faith efforts as required in Sections 14B.8(D) and (E).

(C) **Non-responsive Bids.** Bids that do not meet the LBE subcontracting participation requirements set under 14B.8(A) will be rejected as non-responsive unless the Director finds that the Bidder diligently undertook all the good faith efforts required by this Chapter (or that the Bidder is exempt from good faith efforts requirements under Section 14B.8(B)) and that the failure to meet the good faith efforts requirements and/or the subcontracting participation requirements resulted from an excusable error. Bidders must contact a LBE before listing that LBE as a Subcontractor in the Bid. Unless an excusable error is found by the Director, a Bid that fails to document compliance with this requirement will be rejected as non-responsive. In addition only LBEs that have been contacted and agreed to be listed as Subcontractors shall be credited toward meeting the LBE subcontracting participation requirements.

(D) **Good Faith Outreach.** In addition to meeting the LBE subcontracting participation requirements, Bidders on (1) Public Works/Construction Contracts that equal or exceed the Threshold Amount; and (2) Architect/Engineering, Professional Service, or General Services Contracts that equal or exceed the Minimum Competitive Amount shall undertake good faith outreach as set forth in this Section 14B.8(D) and duly promulgated Rules and Regulations to select Subcontractors to meet LBE subcontracting participation requirements. Except where a Contract does not include LBE subcontracting participation requirements or a Bid is exempt from good faith outreach under Section 14B.8(B), Bids from Bidders who fail to conduct and/or to document adequate good faith outreach steps as required by this Chapter and its duly promulgated Rules and Regulations shall be declared non-responsive.

(E) **Documentation of Good Faith Outreach.** Each Bid that equals or exceeds the Threshold Amount or the Minimum Competitive Amount, as applicable, shall document good faith outreach and include the documentation with the Bid. Unless otherwise excused by this Chapter, such documentation shall include: (1) the dollar amount of each subcontract and a statement of the scope of work to be performed under the subcontract; (2) the identification of each subcontract awarded to an LBE and, (3) for each subcontract, copies of the Subcontractor Bids submitted. Such documentation shall contain at least the Bid amount and a description of the scope of work, and separately, for each subcontract, a full and complete statement of the reason(s) for selection of the Subcontractor. If the reason is based on relative qualifications, the statement must address the particular qualifications at issue. If the reason is the Bid's respective dollar amounts, the statement must state the amounts and describe the similarities and/or dissimilarities in the scope of work covered by the Bids. If no written Bids were submitted by some or all of the Subcontractors who bid the job, the Bidder shall submit a written statement containing (1) the amount of each oral Bid; and (2) separately, for each subcontract, a full and complete statement of the reason(s) for selection of the Subcontractor. Successful Bidders shall maintain the documentation described in this paragraph for three (3) years following completion of the Contract.

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## **SEC. 14B.9. ENSURING NON-DISCRIMINATION IN SUBCONTRACTING.**

(A) **Prohibition on Discrimination.** A Bidder may not discriminate in its selection of Subcontractors against any person on the basis of race, gender, or any other basis prohibited by law. The City Administrator shall work the Human Rights Commission to ensure that this provision is effected to the fullest extent allowed by law. Contract Awarding Authorities and the City Administrator shall 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 resolution pursuant to Administrative Code Chapter 12A and Section 14B.9(D).

(B) **Availability Data.** In order to prevent unlawful discrimination in the selection of subcontractors, and to identify and correct unlawful practices, the City will monitor the administration of City Contracts, including the selection of Subcontractors, as provided in this Section 14B.9. For Public Work/Construction, Architect/Engineering, Professional Services, and General Services Contracts which the Contract Awarding Authority reasonably anticipates will include Subcontractor participation, prior to the solicitation of Bids, the Director shall assemble data regarding the availability of MBEs, WBEs, and OBEs to provide work that is likely to be subcontracted. The Director, in the Director's sole discretion, shall determine the appropriate methodology.

(C) **Requirements for Solicitations.** In all solicitations of Public Work/Construction, Architect/Engineering, Professional Services, and General Services Contracts for which the Contract Awarding Authority reasonably anticipates will include Subcontractor participation, the Contract Awarding Authority shall include the availability data described above. Bidders shall undertake all required good faith efforts outreach steps in such a manner as to ensure that neither MBEs nor WBEs nor OBEs are unfairly or arbitrarily excluded from the required outreach.

(D) **Review and Investigation by the Human Rights Commission.** The Director of the Human Rights Commission may review or investigate any Bid, including the selection of the Bidder's Subcontractors, to determine whether discrimination may have occurred. The Director of the Human Rights Commission shall review Bids, during the bid protest period, to determine whether: (1) a potential Subcontractor or other person has filed a complaint of discrimination; (2) there is a significant difference between the percentages of MBEs, WBEs, or OBEs available to provide goods and services as Subcontractors on the Contract and the percentages of the Bidder's Subcontractors who are MBEs, WBEs, or OBEs; or (3) other facts and circumstances suggest that further inquiry is warranted. The Director of the Human Rights Commission, in the Director of the Human Rights Commission's sole discretion, shall determine whether and when to investigate further the conduct of a Bidder or Contractor.

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## **SEC. 14B.10. POWERS AND DUTIES OF THE CITY ADMINISTRATOR AND THE CONTRACT MONITORING DIVISION (CMD).**

(A) **City Administrator.** In addition to the duties and powers given to the City Administrator elsewhere, the City Administrator or designee shall:

(1) When necessary, subpoena persons and records, books and documents for any hearing or investigation by the City Administrator or Director or audit pursuant to Section 14B.10(B)(5) concerning certification under, or compliance with this Chapter.

(2) Adopt rules and regulations establishing standards and procedures for effectively carrying out this Chapter.

(3) Issue forms for the Controller or Contract Awarding Authorities to collect information from Contractors as the City Administrator deems necessary to perform its duties under this Chapter.

(4) Hear appeals challenging certification denial decisions by the Director or the imposition of any sanction specified in Section 14B.17(D) against a Bidder, Contractor, Subcontractor, certified LBE, or applicant for certification.

(5) Direct Contract Awarding Authorities, departments and the Controller to provide to the Director such information as will be necessary to enable the Director to issue reports required by this Chapter to the Mayor and the Board of Supervisors, and otherwise to perform his/her duties imposed hereunder.

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

(1) Levy the same sanctions that a Contract Awarding Authority may levy as specified in Section 14B.17(D).

(2) Ensure that the necessary data concerning LBE, MBE, and OBE availability and participation in City Contracting is collected, analyzed, and included in CMD's annual report required by Section 14B.15(B). The Director shall identify areas of contracting where the City or any of its departments are failing to meet LBE subcontracting requirements or are contracting with MBEs, WBEs, or OBEs at rates less than would be anticipated by the availability data.

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

(4) Grant waivers as set forth in Sections 14B.7(J) and 14B.8(A), and disqualify a Bidder or Contractor as set forth in Section 14B.17.

(5) In cooperation with the Controller, randomly audit at least three prime Contractors each fiscal year in order to insure their compliance with the provisions of this Chapter. The Director, in cooperation with the Controller, shall furthermore randomly audit 10 percent (10%) of the Joint Ventures granted Bid Discounts in each fiscal year.

(6) Take actions to ensure compliance with the provisions of this Chapter, including, without limitation, intervening in the selection process in the event of actual discrimination or harm, or issuing recommendations for selection processes administered directly by Contract Awarding Authorities to ensure that the minimum qualifications, evaluation criteria, or scoring methodologies set forth in the requests for bids, qualifications, or proposals, or the selection panel deliberations do not inadvertently disadvantage qualified Small-LBEs, Micro-LBEs, and MBEs, WBEs and OBEs, in competing for opportunities in City contracting.

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## **SEC. 14B.11. POWERS AND DUTIES OF THE CONTROLLER.**

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

(B) The Controller shall not certify the award of any Contract subject to this Chapter where the Director has notified the Controller that the Contract Awarding Authority has not provided the information the Director advises is necessary under this Chapter.

(C) The Controller shall have the right to audit the books and records of Contractors, Joint Venture participants, and Subcontractors to ensure compliance with the provisions of this Chapter.

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## **SEC. 14B.12. POWERS AND DUTIES OF THE MAYOR.**

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

(A) By July 1st of each fiscal year, set and report to the Board of Supervisors a City-wide LBE Participation Goal on the overall dollar value of all Contracts projected to be awarded in the upcoming fiscal year that will be subject to this Chapter. The City-wide LBE Participation Goal shall be based on prior fiscal year LBE utilization data and current LBE availability, but shall not be less than forty percent (40%). The City-wide LBE Participation Goal shall include a sub-Goal of at least twenty percent (20%) participation by Micro-LBEs. Contract Awarding Authorities shall use, among other methods, the good faith efforts in Section 14B.7(A) to attain the City-wide LBE Participation Goal. The City-wide LBE Participation Goal may be achieved by Small and Micro LBE participation as a prime Contractor, Joint Venture partner, or Subcontractor.

(B) Issue notices to all City departments informing them of their duties under this Chapter. The notice shall contain the following information: (1) the City-wide LBE Participation Goal set in Section 14B.12(A) that all City departments are encouraged to attain during the fiscal year, and that a department's failure to attain the City-wide LBE Participation Goal shall be reported in CMD's annual report; (2) the availability of MBEs, WBEs, and OBEs to perform City contracting and that departments are expected to take all steps necessary to ensure against illegal or arbitrary discrimination or exclusion of any certified business; and (3) the data each department is required to provide the Controller on each contract award.

(C) Coordinate and enforce cooperation and compliance by all City Departments with this Chapter.

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## **SEC. 14B.13. POWERS AND DUTIES OF CONTRACT AWARDING AUTHORITIES.**

(A) In addition to the powers and duties given to Contract Awarding Authorities elsewhere, Contract Awarding Authorities shall:

(1) Adjust bond and insurance requirements in accordance with the requirements set by the Risk Manager, or as allowed by law.

(2) Make information available about the City's Bonding and Financial Assistance Program set forth in Section 14B.16 to assist LBEs bidding on and performing City public works/construction Contracts to meet bonding requirements and/or obtain construction loans.

(3) Advertise all Bid opportunities, requests for Proposals, and solicitations for which published notice or advertising is required, at least 10 calendar days prior to the Bid due date.

(4) Require each request for payment submitted by a Contractor to the Contract Awarding Authority to include Subcontractor participation data in a form approved by the Director, verifying the Contractor's payments to its LBE Subcontractors and the Contractor's progress toward meeting its LBE participation requirements.

If a request for payment fails to include the required information in the form approved by the Director, the Contract Awarding Authority in consultation with the Director, after notice and an opportunity to be heard, may notify the Controller to withhold twenty percent (20%) of the requested payment until the information is provided. Such notice shall be made within two working days of the request for payment, and must inform the Contractor that the Contract Awarding Authority has tentatively determined that the Contractor has not submitted required information, list what information is missing, and provide that if the failure is substantiated, twenty percent (20%) of the requested payment will be withheld until the information is provided.

(5) Require all Contractors to submit, within 10 days following payment by the City to the Contractor for work completed or services performed on a Contract, in a form approved by the Director, a statement signed under penalty of perjury, attesting that the Contractor has paid all Subcontractors, less any contractually provided retention, for the Subcontractor's portions of the work invoiced and included in the City's payment. Contract Awarding Authorities shall notify the Director of any failure to provide the required information or statement. The Director shall investigate and, as necessary, take appropriate enforcement action against any noncomplying Contractor as authorized under Section 14B.17.

(6) Impose, in consultation with the Director, such sanctions or take such other actions as are designed in Section 14B.17(D) to ensure compliance with the provisions of this Chapter.

(7) Not award any Contract to a Person or business that is disqualified from doing business with the City under the provisions of this Chapter.

(8) Designate a staff person to be responsible for responding to the Director and City Administrator regarding the requirements of this Chapter.

(9) Maintain accurate records as required by this Chapter.

(10) Provide technical assistance to LBEs to increase their ability to compete effectively for City Contracts.

(11) Notify the Director in writing within 10 days whenever the cumulative value of amendments, modifications, supplements, and change orders to a Contract subject to this Chapter increase or decrease the Contract's dollar amount by more than ten percent (10%).

(12) Whenever amendments, modifications, supplements, or change orders to a Contract subject to this Chapter increase the total dollar value of a Contract, the Contract Awarding Authority shall require compliance with those provisions of this Chapter that applied to the original Contract.

(13) Obtain prior approval of the Director for all Contract amendments, modifications, supplements, or change orders to a Contract originally valued at or above fifty percent (50%) of the Minimum Competitive Amount, that cumulatively increase the contract's total value by more than twenty percent (20%) of its original or last CMD approved value. The Director shall ensure that the proposed amendment, modification, supplement, or change order does not adversely impact contracting opportunities that would have been present for LBEs had the Contract been initially awarded at the proposed increased value.

(B) Contract Awarding Authorities or departments may issue Bids for Professional Services or Architect/Engineering Services that invite, encourage, or request businesses to form Joint Ventures to promote LBE participation.

(C) For the purpose of determining LBE participation, contracts awarded to joint ventures in which one or more LBEs are combined with one or more business that are not LBEs shall be deemed by the Contract Awarding Authority to be awarded to LBEs only to the extent of the LBE participation in the joint venture.

(D) Subject to the budgetary and fiscal provisions of the San Francisco Charter and to any limitations or requirements associated with the issuance of municipal financings, including but not limited to the use of tax-exempt financing and other long-term obligations, Contract Awarding Authorities shall set aside the following percentage of the value of each Contract, to be used solely to fund CMD's actual costs of administering and enforcing this Chapter. This Section 14B.13(D) shall not apply to Contracts funded by bonds that were authorized prior to June 10, 2006.

(1) For Contracts having an estimated value under \$1 million, the Contract Awarding Authority shall set aside two percent (2%) of the value of the Contract for the purpose described in this Section.

(2) For Contracts having an estimated value of at least \$1 million but less than \$10 million, the Contract Awarding Authority shall set aside one percent (1%) of the value of the Contract for the purpose described in this Section.

(3) For Contracts having an estimated value of at least \$10 million but less than \$50 million, the Contract Awarding Authority shall set aside one half of one percent (0.5%) of the value of the Contract for the purpose described in this Section.

(4) For Contracts having an estimated value of \$50 million or more, the Director, in consultation with the Contract Awarding Authority, shall determine the level of funding necessary to administer and enforce this Chapter with respect to the subject Contract, provided that the funding shall not exceed one half of one percent (0.5%) of the value of the Contract. The

Contract Awarding Authority shall set aside the designated funds to be used solely for the purpose described in this Section.

(5) Notwithstanding Sections 14B.13(D)(1), (2), (3) and (4), with respect to each Contract to be issued by the Port of San Francisco, the San Francisco Public Utilities Commission, the San Francisco Department of Public Works, and the San Francisco International Airport, each such Contract Awarding Authority shall confer with the Director and jointly shall estimate the costs of administering and enforcing this Chapter with respect to each Contract. The Contract Awarding Authority shall set aside the agreed-upon funds to be used solely for the purpose described in this Section.

If, after exchanging information regarding the nature of the Contract and the administrative activities required, the Contract Awarding Authority and the Director do not agree on the cost of administering and enforcing this Chapter, the Mayor or the Mayor's designee shall determine the appropriate amount to be set aside for the purpose described in this Section.

The Director shall report on compliance by Contract Awarding Authorities with set-asides determined under this Section 14B.13(D)(5) and on the agreed upon funds for Contract Awarding Authorities under 14B.13(D)(5) in the CMD's annual report under Section 14B.15(A).

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

In addition to the duties given the Office of Contract Administration elsewhere, the Office of Contract Administration shall:

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

(B) Maintain a central website where the following information for all formal bids, requests for proposals and solicitations for Commodities and Services will be posted and kept current: the title and number; the name of the Contract Awarding Authority; and the name and telephone number of the person to be contacted for further information. Such information shall be posted with sufficient lead time to provide adequate notice and opportunity to potential City contractors and vendors to participate in the bid opportunity, request for proposals or solicitation, but in no event less than 10 calendar days prior to the due date for such bid opportunity, request for proposals, or solicitation.

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## **SEC. 14B.15. REPORTING AND REVIEW.**

(A) **Quarterly Reports by CMD.** By July 1, October 1, January 1, and April 1 of each fiscal year, CMD shall issue quarterly written reports for the prior fiscal quarter to the Mayor and the Board of Supervisors. The report shall document:

(1) Each Contract Awarding Authority's progress toward achieving the goals of this Chapter, including, among other things, each Contract Awarding Authority's progress in meeting the City-wide LBE Participation Goal, individual Contract LBE participation requirements, and ensuring non-discrimination against MBEs, WBEs, and OBEs. The report shall also document the level of participation of all categories of LBEs, and whether or not each Contracting Awarding Authority has fully reported all data required by this Chapter or requested by CMD, the City Administrator, or the Controller.

(a) Whenever CMD's report concludes that a Contract Awarding Authority has intentionally disregarded or negligently performed any obligation imposed by this Chapter, finds consistent non-compliance with this Chapter by a Contract Awarding Authority's Prime Contractors, or concludes that a Contract Awarding Authority failed to provide any data required by this Chapter or requested by CMD, the City Administrator, or the Controller, a member of the Board may schedule before the appropriate Committee of the Board a hearing on that report. At the hearing, the Department heads must be prepared to respond to the Director's finding of intentional disregard and/or negligent performance and to explain what steps they intend to take to forestall repetition of the problems identified in CMD's report.

(2) All waivers of LBE Bid Discounts granted by the Director under Section 14B.7(J) and all waivers of LBE Subcontracting Participation requirements granted by the Director under 14B.8(A).

**(B) Annual Report by City Departments.** As part of their annual report to the Board of Supervisors, City departments shall report:

(1) On their progress toward achievement of the City-wide LBE Participation Goal and Contract-specific LBE subcontracting participating requirements and steps to ensure non-discrimination against MBEs, WBEs, and OBEs in the preceding year; and

(2) On their compliance with the Micro-LBE Set Aside Program in accordance with Section 14B.7(K)(3).

**(C) Annual Report by the City Administrator.** By July 1st of each fiscal year, the City Administrator shall submit an annual report to the Mayor and Board of Supervisors on the progress of the City toward achieving the goals of this Chapter, together with an identification of problems and specific recommendations for improving participation by all categories of LBEs in City contracting. The report shall include an analysis of the availability of MBEs, WBEs, and OBEs and the bidding environment in the various industries that participate in City contracts.

**(D) Board of Supervisors Public Hearing.** Each year, after receiving CMD's quarterly reports and the annual reports of CMD and City departments, the Board may hold a hearing to review the City's performance under this Chapter, the administration of this Chapter by CMD, and the progress of City departments towards achieving the purposes of this Chapter, and other subjects pertaining to the Chapter.

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## **SEC. 14B.16. SAN FRANCISCO BONDING AND OTHER ASSISTANCE.**

**(A) San Francisco Bonding and Financial Assistance Program.**

(1) **Program Description.** The City and County of San Francisco, acting through the City Administrator, or, in his or her discretion, as delegated to the Risk Manager, intends to provide guarantees to private bonding companies and financial institutions in order to induce those entities to provide required bonding and financing to eligible Contractors and Subcontractors bidding on and performing City Public Works/Construction Contracts. This bonding and financial assistance program is subject to the provisions of this Section 14B.16(A).

(2) **Eligible Contracts.** The assistance described in this Section 14B.16(A) shall be available for any City Public Works/Construction Contract to which this Chapter applies.

(3) **Eligible Businesses.** Businesses must meet the following criteria to qualify for assistance under this Section 14B.16(A).

(a) The business may be either a prime Contractor or Subcontractor; and

(b) The business must be certified by the CMD as an LBE according to the requirements of Section 14B.3, 14B.5, or 14B.6;

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

(i) Bond application assistance,

(ii) Assistance in developing financial statements,

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

(iv) Identification of internal financial control systems, and

(v) Development of accurate financial reporting tools.

(4) **Agreements Executed by the Risk Manager.** The Risk Manager is hereby authorized to enter into the following agreements in order to implement the bonding and financial assistance program described in this Section 14B.16(A):

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

(b) With respect to a construction loan to be made to a Contractor or Subcontractor, an agreement to guaranty up to fifty percent (50%) of the original principal amount of the construction loan or fifty percent (50%) of the actual loss suffered by the financial institution as a result of a loan default, whichever is less; provided that in any event the City's obligations with respect to a guaranty shall not exceed \$1,000,000;

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

(5) **Monitoring and Enforcement.** The Risk Manager shall maintain records on the use and effectiveness of this program, including but not limited to (1) the identities of the businesses and bonding companies participating in this program, (2) the types and dollar amounts of public work Contracts for which the program is utilized, and (3) the types and dollar amounts of losses which the City is required to fund under this program. The Risk Manager shall submit written reports to the Board of Supervisors every six months beginning January 1, 2015, advising the

Board of the status of this program and its funding capacity, and an analysis of whether this program is proving to be useful and needed.

(6) **Contributions to the San Francisco Self-Insurance Surety Bond Fund.** Subject to the budgetary and fiscal provisions of the San Francisco Charter, each department that conducts public works or improvements under Chapter 6 of the Administrative Code shall contribute annually to the San Francisco Self-Insurance Surety Bond Fund ("the Fund") an amount that is set by multiplying the annual contribution rate set pursuant to Administrative Code Section 10.100-317(c) times its total appropriations for capital construction and improvement.

(7) **Annual Certification of Funds.** The Risk Manager shall seek annual certification of funds from the Self Insurance Bond Fund and approval as to form of such certification from the Controller and City Attorney. Such certification shall be monitored by the Risk Manager to ensure the program operates within the transactional bounds of the Self Insurance Bond Fund and the appropriated budget for its administration. The Risk Manager will review the amount certified each fiscal year with the Controller and City Attorney, should there be a call on any bond funded through the program.

(8) **Line of Credit; Credit Enhancement Program.** The Risk Manager is hereby authorized to negotiate a line(s) of credit or any credit enhancement program(s) or financial product(s) with a financial institution(s) to provide funding; the program's guaranty pool may serve as collateral for any such line of credit.

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

(9) **Default on Guarantees.** The Director shall decertify any Contractor that defaults on a loan or bond for which the City has provided a guarantee on the Contractor's behalf. However, the Director may in his or her sole discretion refrain from such decertification upon a finding that the City has contributed to such default.

(B) **Education and Training.** The City Administrator and Director shall continue to develop and strengthen existing education and training programs for LBEs and City Contract awarding personnel.

(C) **Cooperative Agreements.** With the approval of the Board of Supervisors, the City Administrator may enter into cooperative agreements with agencies or entities, public and private, concerned with increasing the use of LBEs in government contracting or in private developments within San Francisco.

(D) **Mentor-Protégé Program.** The Director shall establish a Mentor-Protégé Program (MPP) to foster partnerships between established, successful contractors and LBEs to provide training, networking, and mentoring opportunities with the goal to improve LBE MPP participants' ability to compete effectively for City contracts. As a benefit to participating in the MPP, the Director may pursuant to duly promulgated rules and regulations, exempt mentor Contractors from the good faith outreach requirements in Section 14B.8.

(E) **LBE Contractor Advance Payment Program.** The City Administrator, in consultation with the Controller, shall investigate and develop a LBE advance payment program to fund temporary loans to LBE Subcontractors for approved invoices on City-funded Contracts subject

to the budgetary and fiscal provisions of the Charter. The City Administrator shall prepare an implementation plan, including a feasibility study, and shall submit the implementation plan to the Mayor by June 1, 2015.

(F) **City Lease and Concession Agreements.** The Office of Economic and Workforce Development shall convene a working group with members including but not limited to representatives from the Real Estate Department, Port, Municipal Transportation Agency, Airport, Recreation and Park Department and the LBE community, to investigate a local business enterprise preference program for City leases and concession agreements. The working group shall submit its program recommendations to the Mayor and Board by June 1, 2015.

(G) The City Administrator shall convene a working group to investigate whether there are barriers to participation by LBE firms in specific industries such as architecture. The working group shall report any findings to the Mayor and Board by September 1, 2015.

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## **SEC. 14B.17. ENFORCEMENT.**

(A) The Director shall monitor the City's utilization of Small-MBEs, Micro-LBEs, MBEs, WBEs, and OBEs in City contracting. The Director shall issue Contract exit reports for any Contract with LBE subcontracting participation requirements and/or LBE participation as a Joint Venture partner. The purpose of this exit report is to verify that Contractors satisfied their LBE Subcontractor participation requirements and LBEs Joint Venture partner commitments, if applicable.

(B) **Investigations.** The Director shall, at his or her discretion, investigate instances of potential noncompliance with this Chapter.

Bidders, Contractors, and Subcontractors shall cooperate in all respects with such an investigation. The Director may issue a written request for information to a Bidder, Contractor, or Subcontractor that identifies the records and any other information CMD requires and impose a reasonable deadline for responding. A Bidder, Contractor, or Subcontractor that fails to respond to the Director's request for information, or otherwise fails to cooperate in the investigation, or any such party who the Director determines, after investigation, has not complied with the Chapter, shall be subject, after notice and a full and adequate opportunity to be heard, to appropriate sanctions, including but not limited to the sanctions set forth in Section 14B.17(D).

(C) **Conference and Conciliation.** In the Director's sole discretion, the Director may attempt to resolve noncompliance with this Chapter by any Bidder, Contractor, or Subcontractor through informal processes, including conference and conciliation.

(D) **Sanctions.** The City, including the Director and Contract Awarding Authorities, as appropriate, may after affording notice of the alleged noncompliance and full and adequate due



process, impose any of the following sanctions on a Bidder, Contractor, or Subcontractor who fails to comply with this Chapter:

- (1) Declare a Bid non-responsive;
- (2) Suspend a Contract;
- (3) Withhold Contract payments;
- (4) Assess contractual or statutory penalties;
- (5) Debar a Bidder under Chapter 28;
- (6) Revoke certification.

(E) **Referral to Human Rights Commission.** The City, including the Director and Contract Awarding Authorities, as appropriate, shall refer instances of alleged discrimination in contracting to the Human Rights Commission for investigation as set forth in 14B.9 and, as appropriate, imposition of sanctions under Administrative Code Chapter 12A.

(F) Notwithstanding any other provision of this Chapter, a Bidder, Contractor, or Subcontractor who demonstrates by clear and convincing evidence that such person or entity made reasonable efforts to comply with, and monitor its compliance with, the provisions of this Chapter, that its failure to fully comply occurred in spite of such measures, that such party or entity acted at all times in good faith and without knowledge of its noncompliance, and that it has taken corrective steps to remedy future noncompliance, shall not be subject to Sanctions.

(G) **Procedures for Revocation of Certification and Appeals Thereof.** The procedures for appealing the Director's denial of an application for certification or nonrenewal upon expiration of the Certification term, shall be governed by Section 14B.4(C). The procedures for appealing the revocation or suspension of Certification during the Certification term shall be governed by Section 14B.17(I).

(H) **Procedures for Debarment.** The Director shall have the authority to act as a charging official under San Francisco Administrative Code Chapter 28 to debar a Bidder, Contractor, or certified LBE for violations of this Chapter. The debarment procedures of Chapter 28 shall govern.

(I) **City Administrator to Hear Appeals.** Except as provided in Sections 14B.4(C) and 14B.17(H), the City Administrator or Hearing Officer appointed by the City Administrator shall hear appeals challenging any determination of the Director under this Section 14B.17. The City Administrator or Hearing Officer appointed by the City Administrator may sustain, reverse or modify the Director's findings and sanctions imposed, or take such other action to effectuate the purpose of this Chapter. Unless the City Administrator or Hearing Officer appointed by the City Administrator so orders, an appeal shall not stay the Director's determination and the imposition of sanctions.

(J) **Willful Noncompliance by Contract Awarding Authority.** Whenever the Director determines that a Contract Awarding Authority has willfully failed to comply with its duties under this Chapter, the Director shall attempt to resolve the matter informally with the Contract Awarding Authority. Should such attempt fail to resolve the issue, the Director shall inform the City Administrator of the Director's determination and the impasse in resolving the matter. If the City Administrator confirms the noncompliance and also is unable to resolve the matter

informally, the City Administrator shall issue a written finding of noncompliance specifying the nature of the noncompliance, to the Contract Awarding Authority, the Mayor and the Board of Supervisors.

(K) **Reporting Improper Government Activity; Protection of Whistleblowers.** Complaints that a City officer or employee has engaged in improper government activity, including acts of reprisal, retaliation, threats, coercion, or similar acts, shall be made in accordance with the provisions of Article IV of the Campaign and Governmental Conduct Code.

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## **SEC. 14B.18. APPLICABILITY AND EXCEPTIONS.**

(A) **State or Federal Provisions.** In Contracts which involve the use of any funds furnished, given or loaned by the Government of the United States or the State of California, all laws, rules and regulations of the Government of the United States or the State of California or of any of its departments relative to the performance of such work and the conditions under which the work is to be performed, shall prevail over the requirements of this Chapter when such laws, rules or regulations are in conflict.

(B) **Severability.** The provisions of this Chapter are declared to be separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section, or portion of this Chapter, or the invalidity of the application thereof to any Person or circumstances shall not affect the validity of the remainder of this Chapter, or the validity of its application to other persons or circumstances.

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

(D) **Municipal Transportation Agency.** Consistent with Charter Section 8A.101(d), the Municipal Transportation Agency shall comply with the provisions of this Chapter and shall be solely responsible for its administration and enforcement with respect to matters within the Municipal Transportation Agency's jurisdiction.

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## **SEC. 14B.19. SUBCONTRACTING PARTICIPATION REQUIREMENTS: DESIGN-BUILD AND INTEGRATED PROJECT DELIVERY CONTRACTS.**

LBE Subcontracting participation requirements shall be implemented for Design-Build and Integrated Project Delivery Contracts as follows:

(A) **Design-Build Contracts.**

(1) The Director shall establish separate LBE participation requirements for the design and construction portions of the Design-Build Contract.

(2) Except as provided in Section 14B.19(C), LBE subcontracting participation requirements for Design-Build Contracts shall be governed by Section 14B.8.

**(B) Integrated Project Delivery Contracts.** The Director shall establish a project-wide LBE subcontracting participation requirement.

**(C) LBE Subcontracting Participation Requirements for Trade Subcontractors.** LBE Subcontracting participation requirements for trade package subcontracts awarded under Design-Build Contracts under Administrative Code Section 6.61(L) and Integrated Project Delivery contracts under Administrative Code Section 6.68 shall be as follows:

(1) Prior to the advertisement of any trade packages, the Design-Builder or Construction Manager/General Contractor (Prime Contractor), in consultation with the Director, shall establish a written plan for achieving the LBE subcontracting participation requirement. The plan shall be based on the availability of LBEs who could perform the work or supply materials and equipment for each trade package. In the case of a Design-Build Contract, the professional design services such as architectural or engineering performed by LBE firms will be credited toward the established LBE participation requirement on the design portion of the Contract. In the case of a trade package subcontract where some or all of the work is design-build, the plan should credit professional design services such as architectural or engineering performed by LBE firms toward the established trade package LBE participation requirement.

(2) The Prime Contractor shall set forth the applicable LBE subcontracting participation requirements in the bid specifications for each trade package. The Prime Contractor shall undertake the good faith outreach required in Section 14B.8(D) for each trade package until the cumulative trade package LBE utilization commitments meet the project-wide subcontracting participation requirements.

(3) The Director shall have sole authority for determining whether or not each trade package low bidder has met the applicable LBE subcontracting participation requirement.

(4) In the event a trade package apparent low bid does not meet the LBE subcontracting participation requirement, the Prime Contractor shall allow the bidder up to ten business days after bid opening to amend the bid to make up the shortfall, provided that the amendment conforms with CMD Rules and Regulations and does not violate the California Subletting and Subcontracting Fair Practices Act (Public Contract Code Section 4100 *et seq.*). The Prime Contractor shall deem an apparent low bid that does not make up a shortfall in LBE subcontracting participation requirements within the ten day extension, or such additional time as the Director may, in writing, allow, non-responsive and ineligible for award of the trade package subcontract. In such an instance, the Director and the Prime Contractor shall proceed to evaluate the second low bidder in the same manner, and so on for potential contract award.

(5) The Director shall monitor the Prime Contractor's actual LBE subcontracting participation as the trade package bids are received. In the event the Director determines that LBE subcontracting participation commitments at a particular time in the bidding of trade packages are materially lower than stated in the Prime Contractor's plan prepared under Section (C)(1) above, the Prime Contractor shall make all efforts to take immediate corrective steps, including to negotiate and award trade packages to LBEs using the seven and one half percent (7½%) of total trade package costs available to it for negotiating subcontracts under Administrative Code Sections 6.61(L)(3) or 6.68(H)(3), as applicable. The Prime Contractor shall be solely responsible for complying with the LBE subcontracting participation

requirements and may be subject to sanctions as described herein in Section 14B.17 for failure to do so.

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## **SEC. 14B.20. DEVELOPMENT AGREEMENTS.**

In addition to any requirement in Section 56.7 of the Administrative Code, a development agreement entered into by the City under Chapter 56 of the Administrative Code shall require a detailed LBE utilization plan. The plan shall require compliance with the Good Faith Outreach requirements in Section 14B.8(D), the nondiscrimination provisions in Section 14B.9, and shall include a LBE utilization requirement set by the Director in conformance with the City-wide LBE Participation Goal, a reporting and monitoring program as approved by the Director, and an enforcement plan that allows the Director to assess penalties or other sanctions as provided in Section 14B.17.