



OFFICE OF THE CITY ADMINISTRATOR



London N. Breed, Mayor
Naomi M. Kelly, City Administrator

Date: November 27, 2019

To: Department Heads
City Financial Officers
Contracting Officers

From: Naomi M. Kelly, City Administrator *N. Kelly*

CC: Alaric Degrafinried, Purchaser and Director of the Office of Contract Administration
Clair Farley, Executive Director, Office of Transgender Initiatives
Dr. Emily Murase, Director, Department on the Status of Women

Subject: Guidance Memorandum for the Implementation of the Administrative Code Section 12X Ban on City Contracts and Travel Involving States with Anti-LGBT and Restrictive Abortion Laws

The Board of Supervisors passed Ordinance No. 189-16 on October 14, 2016 (enacted February 11, 2017) and Amended Ordinance No. 200-19 (recently enacted September 9, 2019), which place a ban on City-funded travel and City contracts involving states with anti-LGBT laws and/or restrictive abortion laws. See Administrative Code Chapter 12X: Prohibiting City Travel and Contracting in States that Allow Discrimination.

The purpose of this memorandum is to provide guidance regarding the implementation of Administrative Code Sections 12X.4 and 12X.14 (prohibited travel), and Sections 12X.5 and 12X.15 (contracting ban).^{1 2} Please note that this guidance memorandum combines, supplements, and, in some cases, supersedes advice provided in the City Administrator's Memoranda dated February 10, 2017, June 30, 2017, August 31, 2017, June 4, 2018, April 17, 2019, September 18, 2019, and October 16, 2019; as well as the Controller's Memorandum dated February 22, 2017.

I. General Information

Administrative Code Sections 12X.5(a) and 12X.15(a) state that the City shall not enter into any Contract with a Contractor that has its United States headquarters in a state on the Covered State List or where any or all of the work on the contract will be performed in a state on the Covered State List. Sections 12X.4 and 12X.14 state that the City shall not require any employees or officers to travel to the states on the Covered State List or approve a request for City-funded travel to a state on the Covered State List.

¹ All further references are to the San Francisco Administrative Code.

² Sections 12X.4 and 12X.14 are identical to each other, as are Sections 12X.5 and 12X.15, except for as otherwise noted herein.

A Covered State under Section 12X.2 (states with anti-LGBTQ laws) is defined as:

“[A]ny state that after June 26, 2015, has enacted a law that, (a) voids or repeals existing state or local protections against discrimination on the basis of Sexual Orientation, Gender Identity, or Gender Expression[;] or (b) authorizes or requires discrimination against same-sex couples or their families or that authorizes or requires discrimination on the basis of Sexual Orientation, Gender Identity, or Gender Expression, including any law that creates an exemption to antidiscrimination laws in order to permit discrimination against same-sex couples or their families or on the basis of Sexual Orientation, Gender Identity, or Gender Expression.”

The travel and contracting prohibitions applicable to these states under Sections 12X.4 and 12X.5 are currently in effect.

A Covered State under Section 12X.12 (states with restrictive abortion laws) is defined as:

“[A] state that has enacted a law that prohibits abortion prior to the Viability of the fetus, regardless of whether there are exceptions to such prohibition. Examples of such restrictive laws include a law prohibiting abortion after fetal pole cardiac activity can be detected but before viability (so-called “fetal heartbeat” laws), and a law that prohibits abortion a set number of weeks after fertilization but before Viability.”

The travel and contracting prohibitions applicable to these states under 12X.14 and 12X.15 do not become effective until January 1, 2020 (the Operative Date).

The comprehensive Covered State List —updated on October 16, 2019 following the enactment of Amended Ordinance No. 200-19—is posted on the website of the Office of the City Administrator at <https://sfgsa.org/chapter-12x-state-ban-list>. This list is reviewed on at least a semiannual basis; when a state is removed or added, the Office of the City Administrator will make that information public and post the updated list on its website. Please refer to the Office of the City Administrator website for the most current Covered State List.

II. Sections 12X.5 and 12X.15 (Contracting Ban)

The Ordinance applies to all contracts for goods and services paid at the expense of the City under Chapter 21 and Chapter 6. Unless otherwise exempted, the contracting ban applies to all contracts entered into by the City. See Section II.C below regarding exceptions and waivers.

In addition, Section 12X.5 of the Ordinance only applies to contracts that were first advertised, solicited, or initiated on or after February 11, 2017 (the Operative Date for Article I); and therefore does not apply to amendments to pre-existing contracts. Section 12X.15 of the Ordinance only applies to contracts that were first advertised, solicited, or initiated on or after January 1, 2020 (the Operative Date for Article II); and therefore does not apply to amendments to pre-existing contracts entered into before that date.

For clarification, a contract arising out of an RFQ pool that was created prior to the Operative Date and let under Administrative Code 21.4(c) is generally not subject to 12X, however an

extension of such a pool to four years as authorized by 21(c)(2) would be subject to 12X if the required reissuance occurs after the Operative Date.

A. Definitions:

The following offers further guidance on the definition of certain terms in the Ordinance.

Joint Ventures: Sections 12X.2 and 12X.12 define “Contractor” as including joint ventures. When a prime contractor is a joint venture, each joint venture partner must comply with Chapter 12X, meaning that none of the joint venture partners can be headquartered in a Covered State or perform work on the contract in a Covered State.

United States Headquarters: For purposes of subsections 12X.5(a) and 12X.15(a), “United States headquarters” is the corporation’s principal place of business in the United States, which is the location where the corporation’s officers direct, control, and coordinate the corporation’s activities in the United States. This is commonly referred to as the “nerve center” of a corporation. For corporations in a parent-subsidary relationship, the “nerve center” inquiry focuses on the business activities of the contractor so long as the parent corporation and subsidiary corporation maintain separate corporate structures and identities.

Enter Into: For purposes of subsections 12X.5(a) and 12X.15(a), “enter into” means the following depending on the type of contract.

For Chapter 6 contracts in excess of the Threshold Amount (currently \$600,000), and consistent with Section 6.1, a contract is “entered into” by the City when the following events have occurred:

- (1) For departments under the Mayor, (a) the Mayor or the Mayor’s designee has approved the contract for award and (b) the Department Head has then issued an order of award; or,
- (2) For departments with boards or commissions, (a) the Department Head has recommended to the board or commission concerned a contract for award and (b) such board or commission has then adopted a resolution awarding the contract.

For Chapter 6 contracts less than or equal to the Threshold Amount, a contract is awarded when the Department Head either signs the contract or issues an order of award, whichever occurs first.

For Chapter 21 Contracts, “enter into” means the time when the contract is fully executed. All contracts are subject to Charter Section 3.105 and are thus subject to certification by the Controller as to the availability of funds.

Subcontractors, Suppliers and Vendors: For purposes of subsections 12X.5(a) and 12X.15(a), “perform any or all of the work” does not include: (1) work performed on a contract by a subcontractor, subconsultant or supplier; or (2) the supply of off-the-shelf equipment,

products or supplies, which are available immediately and do not need to be specially designed or custom-made for the City.

B. Ensuring Compliance with Sections 12X.5(a) and 12X.15(a):

Departments are responsible for complying with the subsections 12X.5(a) and 12X.15(a), and must establish procedures to review and ensure compliance with the contracting ban for all purchases and contracts. This includes contracts and/or purchases pursuant to authority under Chapter 6 and Chapter 21, as well as contracts that do not require approval of the Office of Contract Administration (“OCA”) (such as direct or delegated/Prop Q purchases).

Departments are also expected to notify vendors of the Chapter 12X ban in Bids, Request for Proposals, Request for Qualifications, informal solicitations or other related bid documents.

The following language should be used to meet this requirement (this language supersedes similar language provided in the City Administrator’s prior memoranda):

Subject to certain exceptions, Proposers are hereby advised that this Contract is subject to the requirements of Administrative Code Chapter 12X, which prohibits the City from entering into a contract with a contractor that has its headquarters in a state that has enacted a law or laws that perpetuate discrimination against LGBT people and/or has enacted a law that prohibits abortion prior to the viability of the fetus, or a contractor that will perform any or all of the work on the contract in such a state. Chapter 12X requires the City Administrator to maintain a list of such states, defined as “Covered States” under Administrative Code Sections 12X.2 and 12X.12. The list of Covered States is available on the website of the City Administrator. Proposers will be required to certify compliance with Chapter 12X as part of its proposal, unless the City determines that a statutory exception applies.

The RFP template will be updated to reflect the revised language and include a sample certification that proposers must submit with their proposal or bid to certify compliance with Chapter 12X.

By entering into contracts, departments are confirming that the contract is in compliance with Chapter 12X. See section below regarding Non-Applicability, Exceptions and Waivers in the event a department wishes to enter into a contract otherwise prohibited by Chapter 12X.

C. Non-Applicability, Exceptions and Waivers:

Contracting departments seeking to enter into (as defined above) a contract or make a purchase otherwise prohibited by Chapter 12X must make a determination of non-applicability, exception or waiver as authorized by subsection 12X.5(b). If a department makes such a determination, it must record the determination and the base(s) for inapplicability using Form P-12X.5/12X.15 (available on the OCA website at www.sfgov.org/OCA). Below are the exceptions listed within the Ordinance for which contracting departments may enter into new contracts with businesses otherwise headquartered in Covered States:

- Needed services are available only from one source.

- Contract is necessary to respond to an emergency which endangers public health or safety and no compliant company is immediately able to perform required services.
- There are no compliant/qualified responsive bidders and the contract is for a service, project or property that is essential to the City or public.
- Public interest warrants the granting of a waiver because application would have an adverse impact on services or a substantial adverse financial impact on the City.
- Services to be purchased are available under a bulk purchasing agreement with a federal, state or local government entity or a group purchasing organization, which will substantially reduce the City's cost.
- Violates or inconsistent with the terms or conditions of a grant, subvention, or agreement with a public agency, provided that the contracting officer has made a good faith attempt to change the terms or conditions.

For purchases submitted for review to OCA that require a determination in order to contract with a company banned by Chapter 12X, a copy of the Form P-12X.5/12X.15 must be included in the routing packet. For purchases not reviewed by OCA that require a determination in order to contract with a company banned by Chapter 12X, departments must retain a copy of the Form P-12X.5/12X.15 as part of the contract file.

Additionally, subsections 12X.5(c) and 12X.15(c) require each contracting department to submit a report to the City Administrator on an annual basis (within 30 days of the end of the fiscal year) that summarizes the contract and the basis for inapplicability.

D. City/DHR Tuition Reimbursement Program

Training-related expenses (excluding travel, see section III below) purchased by employees under the City's/Department of Human Resources' ("DHR") Tuition Reimbursement Program, are not considered "contracts" for purposes of subsections 12X.5(a) and 12X.15(a) and therefore are not prohibited under Chapter 12X. This is because they are purchased directly by the employee (not the City) and reimbursed by DHR pursuant to the terms of employee's respective Memorandum of Understanding ("MOU"). Training-related tuition reimbursement expenses include:

- Books
- Conference Registration
- Conference materials

Refer to the Online Tuition Reimbursement Policy on DHR's website at www.sfgov.org/DHR and the employee's respective MOU for further information.

However, note that when a department pays for the expenses listed above for training for an employee or group of employees, the City is entering into a contract and subsections 12X.5(a) 12X.15(a) would therefore apply.

III. Sections 12X.4 and 12X.14 (Travel)

As noted above, subsections 12X.4(a)(2) and 12X.14(a)(2) prohibit the City from approving

“City-funded travel” to a Covered State after the applicable Operative Date (i.e., February 11, 2017 for Section 12X.4(a) and January 1, 2020 for Section 12X.14(a)). “Approval” of such travel occurs when either: (1) an employee purchases travel to a Covered State and seeks reimbursement from the City/department (including travel to attend training and conferences approved under the Tuition Reimbursement Program, see above); or (2) a department directly purchases travel to a Covered State. Generally, “City-funded travel” includes:

- All modes of travel (e.g., airfare, bus, train, car rental, taxi, ride-sharing, including parking and tolls, etc.) (however, subsections 12X.4(c) and 12X.14(c) provide that “travel” does not include landing in a state by plane to make a connecting flight to a destination outside that state; or traversing a state by automobile, train, bus, or otherwise, to reach a destination outside that state)
- Lodging
- Per diem
- Salary (i.e., paid work time; however, employees may use their Paid Time Off accruals (e.g., vacation))

Sections 12X.4(b) and 12X.14(b) provide exceptions for travel that is:

- Necessary for the enforcement of any state or City law;
- Necessary for the defense of any legal claim against the City;
- Required by law;
- Required to meet contractual obligations incurred by the City; or
- Necessary for the protection of public health, welfare or safety.

Additionally, requests for employee travel to a state banned under Section 12X.14(a)(2) after January 1, 2020 that were approved prior to October 16, 2019 (the date the Covered State List was first updated and published following the enactment of the new Administrative Code Section), will be permitted.

Department Heads will consider requests for exemptions on a case-by-case basis. For travel-related questions, please refer to the Controller’s Office Accounting Policies and Procedures for further guidance.

Questions:

Should you have any questions on these policies or the legislation, please do not hesitate to contact my office. Routine requests about contracting should be directed to Alaric Degrafinried, Purchaser/OCA Director, at (415) 554-6714 or Alaric.Degrafinried@sfgov.org. If you have questions or require further clarification on City-funded travel, please contact your Financial Officer or accountant representative.