Ordinance amending the Administrative Code to include as a mandatory element in the definition of the term “Responsible” substantiation of a record of safe performance on construction projects by the bidder or proposer on a Public Work or Improvement project, and to expressly require construction contract awards for all specific project-delivery methods be made only to Responsible construction contractors.

NOTE: Unchanged Code text and uncodified text are in plain Arial font. Additions to Codes are in single-underline italics Times New Roman font. Deletions to Codes are in strikethrough italics Times New Roman font. Board amendment additions are in double-underlined Arial font. Board amendment deletions are in strikethrough Arial font. Asterisks (* * * *) indicate the omission of unchanged Code subsections or parts of tables.

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

Section 1. Background and Findings.

(a) Summary of Legislation.

(1) Chapter 6 of the Administrative Code generally requires departments to award contracts for Public Work or Improvement projects to a Responsible Bidder or proposer. The term “Responsible” is defined in Section 6.1 to provide the qualifications and capabilities that a Bidder or Proposer must possess for the City to determine that it is Responsible. The definition does not specifically include substantiation of a record of safe performance on construction projects as a required element. This ordinance amends the definition to include a record of safe performance on construction projects as a required element.

(2) This ordinance also adds the requirement to award construction contracts only to Responsible construction contractors for the following specified types of project-
delivery method procurements that currently do not explicitly require award to a Responsible
construction contractor: Emergency Repairs, Work, and Contracts (Section 6.60); Design-
Build (Section 6.61); Hazardous Materials Abatement Work (Section 6.63); and Contracting
for Elevator, Escalator, Security, Fire Protection or Fire Alarm Systems, Inspection,
Maintenance, and Repair Work (Section 6.65).

(b) Controller’s Audit Recommendations.

The Office of the Controller, City Services Auditor, issued a report dated April 11, 2017,
recommending that the City adopt and institute a proactive approach to construction safety
management and oversight on public works projects to reduce hazardous conditions and
workplace injuries in order to meet the City’s commitment to the safety and well-being of its
residents, visitors, and the City’s and its construction contractors’ employees. In particular, at
Chapter 2, the report recommended “inclus[ion] of safety components in the bidding and
contracting process [as] part of a proactive approach to construction safety,” further stating
that “[t]he City should be proactive to better ensure construction safety by including it as a
criterion for awarding contracts… The definition of responsibility could include qualitative
factors such as safety records… Although the Administrative Code does not specify that
departments must request safety records, doing so may help the City select contractors that
abide by applicable OSHA statutes and regulations… By selecting the lowest bidder and
ignoring safety records, the City is at risk of awarding contracts to contractors that have not
invested in safety and have a history of safety violations.”

(c) Government Audit and Oversight Committee Hearing Concerning a Workplace
Fatality, and Recommendations.

On August 10, 2018, a contractor on a Municipal Transportation Agency (“SFMTA”) Public Work or Improvement construction project experienced a workplace fatality of one of its
construction workers, which resulted in an Occupational Safety and Health Administration
("OSHA") citation against the contractor. In the wake of this fatality, on October 17, 2018, the Board of Supervisors' Government Audit and Oversight Committee ("Committee") held a hearing regarding the City’s vetting process of contractors’ safety records on procurements of construction contractor services on Public Work or Improvement projects. Concurring with the Controller’s Office’s recommendations, the Committee charged the departments empowered by Chapter 6 of the Administrative Code to contract for Public Work or Improvement projects to develop a City-wide approach to construction safety. Committee members expressed concern that the contractor that had experienced the fatality had checked “no” on the SFMTA’s bid form when asked “In the past ten years, has the potential bidder… been cited for any serious or willful violations by OSHA?” Supervisor Yee noted that in 2015 OSHA had upheld a serious and willful citation against the company. Supervisor Yee stated that the hearing was not to focus on a particular company, but rather to inquire as to how City departments asked potential Bidders about their safety records and the basis for potentially finding a contractor non-responsible (unqualified) based on its safety record. Supervisor Yee advocated for improving how the City vets construction contractors on their safety records to ensure the safety of construction workers, City employees, and members of the public at construction sites. Supervisors Yee and Peskin stated that the Chapter 6 departments should have a more robust procedure for vetting the safety records of potential contractors in the procurement process. Supervisor Peskin opined that it is problematic that it can take OSHA years to resolve an appealed citation, and recommended asking about all contractor OSHA citations including those still under investigation or on appeal. Committee members further indicated that all Chapter 6 departments should work together to develop a uniform procedure for vetting contractor safety records. A representative of the SFMTA advised the Supervisors that the Chapter 6 departments were seeking to develop a better way to evaluate open OSHA cases in vetting potential bidders for construction projects. The Supervisors asked the
departments to report back on progress in developing a more robust process for vetting the
safety records of bidders for the City’s construction contracts.

(d) Robust Safety Prequalification Procedures Adopted by the SFPUC.

San Francisco Public Utilities Commission (“SFPUC”) staff, in collaboration with
representatives of other Chapter 6 departments, the Office of Risk Management, industry
experts, and associations representing construction companies, developed a more robust
safety prequalification procedure consistent with goals expressed by the Controller’s Office
and the members of the Committee. The procedure requires each construction contract
bidder or proposer to submit copies of its reported OSHA injury and illness rate, lost work rate,
and its OSHA violations, including those still being investigated and those that are on appeal.
OSHA requires licensed construction contractors to report that information annually on OSHA
form 300A; the SFPUC procedure requires bidders and proposers to submit copies of the
entity’s form 300A as part of the prequalification process. The SFPUC Commission approved
use of the new safety prequalification procedure by Resolution No. 19-0214, adopted on
November 12, 2019.

Since the SFPUC implemented the new safety prequalification procedure, most bidders
and proposers have qualified by answering questions that objectively measure worksite safety
by the results reported to OSHA on its form 300A concerning injury and illness rates, lost work
rates, and the rate of OSHA violations compared to industry standards for the type of work
and scaled by the size of company. The procedure directs contractors that did not prequalify
solely on answers to questions about injury and illness rates and lost work rates, an
acceptable rate of OSHA violations, and any workplace fatalities with the opportunity to
provide their corporate safety documents and procedures and explanations about their OSHA
violations for review by an independent safety expert retained by the Office of Risk
Management. The expert evaluates and scores the applicants’ safety documents and
explanations about OSHA citations and provides the SFPUC General Manager with scores, recommendations, and rationale. The General Manager is responsible for making a final determination on the bidder’s safety record as part of the agency’s responsibility determination. The SFPUC’s safety prequalification procedures provide any contractor that fails to achieve prequalified to bid status the opportunity to appeal the determination in a hearing before a neutral hearing officer.

(e) Departments’ Support for Construction Contractor Safety Requirements.

The City Administrator has convened meetings with Chapter 6 department heads and assistant department heads. All Chapter 6 departments support adoption of uniform safety prequalification procedures modeled after those adopted by the SFPUC. With enactment of this ordinance, the City Administrator is prepared to issue regulations, modeled on the safety prequalification procedure adopted by the SFPUC, to establish a City-wide approach to construction safety on the City’s Public Work or Improvement projects.

Section 2. Chapter 6 of the Administrative Code is amended by revising Sections 6.1, 6.60, 6.61, 6.63, and 6.65, to read as follows:

SEC. 6.1. DEFINITIONS.

*   *   *   *

Responsible or Responsibility. A Bidder, General Contractor, or Prime Contractor for a Public Work or Improvement that who:

(1a) meets the qualifying criteria required for a particular project, including without limitation the expertise, experience, record of prior timely performance, license, resources, and bonding and insurance capability necessary to perform the work under the Contract; and
(2b) at all times deals in good faith with the City and submits bids, estimates, invoices, claims, requests for equitable adjustments, requests for change orders, requests for Contract modifications, or requests of any kind seeking compensation on a City Contract only upon a good faith honest evaluation of the underlying circumstances and a good faith, honest calculation of the amount sought; and

(c) substantiates its record of safe performance on construction projects, including but not limited to consideration of federal or state Occupational Safety and Health Administration ("OSHA") violations and work place fatalities, including OSHA citations under appeal, in accordance with regulations issued by the City Administrator.

*   *   *   *

SEC. 6.60. EMERGENCY REPAIRS, WORK, AND CONTRACTS.

*   *   *   *

(e) Exemptions. Contracts awarded in accordance with this Section 6.60 under emergency circumstances as described and defined above are exempt from the requirements of this Chapter 6 and Chapters 12A, 12B, 12C, and Chapter 14B of the Administrative Code. It is, however, the policy of the Board of Supervisors for contracting departments to make every effort to comply with the provisions of Administrative Code Chapters 12A, 12B, 12C, and 14B. In order to effectuate this policy, the Department Heads and their staff members shall collaborate with CMD periodically to create a list of Responsible Contractors qualified to perform various types of emergency work, making every effort to include qualified, responsible, and certified LBE contractors on that list. CMD shall be responsible for outreach efforts to make sure that certified LBE Contractors are aware of the opportunity to be considered for the list. For all emergency construction contracts, the Contract Awarding departments or commissions shall be responsible for evaluating and determining whether
Contractors are responsible and qualified to perform the various scopes of work. The Department Heads shall report quarterly to the Board of Supervisors regarding LBE inclusion on the list of Responsible and qualified Contractors for emergency Contracts, a description of each emergency Contract awarded, the reason why the work was performed under these emergency procedures, and whether the emergency Contract was awarded to an LBE Contractor. Such reports shall be referred to a Board committee for public hearing.

*    *    *    *

SEC. 6.61. DESIGN-BUILD.

*    *    *    *

(b) Competitive Bid or Fixed Budget Limit Procurement.

(1) Pre-Qualification. When selecting a Design-Builder based on competitive bid or proposals for a fixed budget limit project, the Department Head shall pre-qualify Design-Builders, or a combination of the Design-Builders and one or more of their subcontractors prior to issuing an invitation to submit bids or proposal. The procedure for pre-qualification is as follows:

(A) The Department Head shall issue a request for qualifications inviting interested parties to submit their qualifications to perform the project. The request for qualifications shall include criteria by which the prospective Design-Builders will be evaluated during the qualification process. The evaluation criteria shall be based on qualifications and experience relevant to the services needed for the project. The list of criteria may include, but is not limited to the following: (i) qualifications to design-build the proposed project; (ii) evidence of financial capacity; (iii) experience on similar projects; (iv) ability to collaboratively and cooperatively deliver projects on time and on budget; (v) history of liquidated damages for delay and other damages paid on prior projects, and prior litigation; (vi) reputation with owners
of prior projects; (vii) claims history with insurance carriers and sureties; and (viii) substantiated record of safe performance on construction projects in accordance with the definition of Responsible in Section 6.1; and (ix) other criteria that the Department Head may deem appropriate. The Department Head shall set objective scoring criteria and incorporate the criteria into any scoring procedure.

* * * *

(4) Procurement of Trade Subcontractors. The Department Head may require that all subcontractors be listed at the time of bid or proposal or may identify specific trades for which the Design-Build must list subcontractors. Following award of the Contract, the Design-Build shall add or substitute trade subcontracts with a value exceeding 0.5% of the Contract amount applicable to the construction work as follows:

(A) Unless otherwise authorized by the Design-Build, each trade subcontract opportunity shall be advertised as provided in subsection 6.21(a)(1);

(B) The Design-Build shall establish reasonable qualification criteria and standards;

(C) The Design-Build may then award the subcontract to a Responsible subcontractor either on a best value basis or to the Responsible Bidder with the lowest Responsive bid;

(D) All subcontractors, whether listed at the time of bid or proposal or added or substituted under this subsection 6.61(b)(4), shall be afforded all of the protections of the California Subletting and Subcontracting Fair Practices Act at California Public Contract Code Section 4100 et seq., as amended from time to time.

(c) Best Value Procurement. If the project seeks private financing proposals and/or the Department Head determines that it is in the public's best interest to consider qualifications and/or other subjective criteria (e.g., quality of design proposal) as part of the
final selection process, the Department Head shall require that prospective proposers be pre-
qualified pursuant to the process in Section 6.61(a)(1) or shall issue a combined request for
qualifications and proposals inviting Design-Builders, or a combination of Design-Builders and
their Core Trade Subcontractors meeting specified minimum qualification criteria, to submit
design-build proposals, which will be evaluated based upon Responsibility and qualifications,
stated subjective criteria, and project and/or financing costs. The license and business tax
requirements of subsections 6.21(a)(6) and (8) shall apply to requests for proposals under this
subsection 6.61(c).

* * * *

(5) Procurement of Trade Subcontractors. With the approval of the
Department Head, the selected Design-Builder may procure trade work in conformance with
the following procedures:

* * * *

(B) Core Trade Subcontractors. Upon approval of the Department
Head, the Design-Builder may procure design, preconstruction, or design-assist services from
Responsible Core Trade Subcontractors based on qualifications only. As soon as practical, or
as otherwise approved by the department, each Core Trade Subcontractor shall provide a
written cost proposal for construction of the related trade package. Before authorizing the
Design-Builder to subcontract with a Core Trade Subcontractor for the trade package, the
department must validate the cost proposal by an independent cost estimate. The Department
Head, in his or her the Department Head’s sole discretion, may require the Design-Builder to
competitively procure the trade package by competitive bid in conformance with subsection
6.61(b)(5)(A).

* * * *
SEC. 6.63. HAZARDOUS MATERIALS ABATEMENT WORK.

Department Heads are authorized to execute Contracts for hazardous materials abatement work ("Abatement Work") in accordance with the following procedures:

(a) The department shall advertise for and receive proposals from hazardous materials abatement Contractors, which proposals shall address the qualifications of the Contractors to perform the testing, design, and advice portions of Abatement Work and Responsibility to perform construction-related Abatement Work. The proposals shall be evaluated according to the requirements of this Chapter 6 and Chapters 12B, 12C, and 14B of the Administrative Code, relevant to professional services and Public Work or Improvement Contracts.

* * * *

SEC. 6.65. CONTRACTING FOR ELEVATOR, ESCALATOR, SECURITY, FIRE PROTECTION OR FIRE ALARM SYSTEMS, INSPECTION, MAINTENANCE, AND REPAIR WORK.

* * * *

(a) The department may award master agreement Contracts, on an "if-and-as-needed" basis to Responsible special service providers who can establish experience, expertise, and quality of work. A potential special service provider may apply for a master agreement under this Section 6.65 by providing the department with a statement of its experience and qualifications and other information as requested by the department. Within 60 days of receiving such information, the department shall advise the applicant of its eligibility for an award of a master agreement. Master agreements for special services under this Section 6.65 shall conform to the insurance, indemnification, and Prevailing Wage requirements of Section
6.22. Master agreements shall provide for an expiration term of not more than five years from the date the Contract is certified by the Controller, including all modifications.

* * * *

Section 3. Undertaking for the General Welfare. In enacting and implementing this ordinance, 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.

Section 4. Scope of Ordinance. In enacting this ordinance, the Board of Supervisors intends to amend only those words, phrases, paragraphs, subsections, sections, articles, numbers, punctuation marks, charts, diagrams, or any other constituent parts of the Municipal Code that are explicitly shown in this ordinance as additions, deletions, Board amendment additions, and Board amendment deletions in accordance with the “Note” that appears under the official title of the ordinance.

Section 5. Effective Date. This ordinance shall become effective 30 days after enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board of Supervisors overrides the Mayor’s veto of the ordinance.

APPROVED AS TO FORM:
DENNIS J. HERRERA, City Attorney

By: /s/ RANDY PARENT
Deputy City Attorney

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File Number: 200443          Date Passed: July 07, 2020

Ordinance amending the Administrative Code to include as a mandatory element in the definition of the term "Responsible" substantiation of a record of safe performance on construction projects by the bidder or proposer on a Public Works or Improvement project, and to expressly require construction contract awards for all specific project-delivery methods be made only to Responsible construction contractors.

June 22, 2020 Rules Committee - RECOMMENDED

June 30, 2020 Board of Supervisors - PASSED ON FIRST READING
   Ayes: 11 - Fewer, Haney, Mandelman, Mar, Peskin, Preston, Ronen, Safai, Stefani, Walton and Yee

July 07, 2020 Board of Supervisors - FINALLY PASSED
   Ayes: 11 - Fewer, Haney, Mandelman, Mar, Peskin, Preston, Ronen, Safai, Stefani, Walton and Yee

File No. 200443

I hereby certify that the foregoing Ordinance was FINALLY PASSED on 7/7/2020 by the Board of Supervisors of the City and County of San Francisco.

Angela Calvillo
Clerk of the Board

London N. Breed
Mayor

7.17.20
Date Approved