

Office of Community Investment and Infrastructure
(Successor to the San Francisco Redevelopment Agency)

Nondiscrimination in Contracts Policy

Section 1. Requirements in all Contracts.

(a) Nondiscrimination Provisions. The Office of Community Investment and Infrastructure (successor agency to the San Francisco Redevelopment Agency) ("Agency") shall include in all Contracts and Property Contracts, hereinafter executed or amended, in any manner or as to any portion thereof, provisions obligating the Contractor or other party of said agreement not to discriminate on the basis of the fact or perception of a person's race, color, creed, religion, ancestry, national origin, age, sex, sexual orientation, Gender Identity, Domestic Partner status, marital status, disability or AIDS/HIV status, against any employee of, any Agency employee working with, any member of the public having contact with, or applicant for employment with, such Contractor, and shall require such Contractor to include a similar provision in all Subcontracts executed or amended thereunder. Contractor shall also comply with the Agency's Equal Opportunity Program.

(b) Nondiscrimination in Benefits. The Agency shall not execute or amend any Contracts or Property Contracts on or after the effective date of this Policy with any Contractor that discriminates in the provision of Benefits between employees with Domestic Partners and employees with spouses, and/or between the Domestic Partners and spouses of such employees, where the Domestic Partnership has been registered with a governmental entity pursuant to state or local law authorizing such registration, subject to the following conditions: In the event that the Contractor's actual cost of providing a certain benefit for the Domestic Partner of an employee exceeds that of providing it for the spouse of an employee, or the Contractor's actual cost of providing a certain benefit for the spouse of an employee exceeds that of providing it for the Domestic Partner of an employee, the Contractor shall not be deemed to discriminate in the provision of Benefits if the Contractor conditions providing such benefit upon the employee agreeing to pay the excess costs. In addition, in the event a Contractor is unable to provide a certain benefit, despite taking reasonable measures to do so, the Contractor shall not be deemed to discriminate in the provision of Benefits if the Contractor provides the employee with a Cash Equivalent. In adopting this Section I (b), the intent of the Agency is to equalize to the maximum extent legally permitted the total compensation between similarly situated employees with spouses and employees with domestic partners.

Section 2. Definitions.

As used in this Policy the term:

(a) "Benefits" means any plan, program or Policy provided by an Agency Contractor to its employees as part of the employer's total compensation package. This includes, but is not limited to, the following types of Benefits: retirement plans; medical, dental and vision plans; bereavement, family medical, parental and other leave policies; disability and life insurance plans; employee assistance programs; discounts; access to facilities, services and events; travel and relocation expenses; incentive, stock option, and profit sharing plans and other compensation programs.

(b) "Cash Equivalent" means the amount of money paid to an employee by an Agency Contractor who, despite taking all reasonable measures, is unable to end discrimination in Benefits. The Cash Equivalent shall be the amount of money paid by the Agency Contractor for the benefit given to a similarly situated

employee.¹ To the extent that an Agency Contractor limits the availability of any benefit to the spouses of employees, or vice versa, the availability of a Cash Equivalent may be similarly limited.² The Cash Equivalent payment shall be made either on the same schedule as the Agency Contractor uses for the benefit given to employees with spouses, or, if no such schedule exists, on another schedule so long as such payment is made no less than once per month. No Cash Equivalent payment will be required where making such a payment would violate federal or state law.

(c) "Contract" shall mean an agreement for public works or improvements to be performed, or for goods or services to be purchased or grants to be provided at the expense of the Agency or to be paid out of moneys deposited in the treasury or out of trust moneys under the control or collected by the Agency, and does not include Property Contracts, agreements entered into pursuant to settlement of legal proceedings, contracts for urgent litigation expenses, or contracts for a cumulative amount of \$5,000 or less per vendor in each fiscal year.

(d) "Contractor" means any person or persons, firm, partnership, corporation, or combination thereof, who submits a bid and/or enters into a Contract or Property Contract with the Agency.

(e) "Domestic Partner" shall mean any person who has a currently registered Domestic Partnership with a governmental body pursuant to state or local law authorizing such registration. An Agency Contractor may also institute an internal Domestic Partnership registry to allow for the provision of equal Benefits to employees with Domestic Partnerships who do not register their partnerships pursuant to a governmental body authorizing such registration, or who are located in a jurisdiction where no such governmental Domestic Partnership registry exists.³

(f) "Gender Identity" shall mean a person's various individual attributes as they are understood to be masculine and/or feminine.

(g) "Nondiscrimination in Benefits" means the equality of Benefits between employees with spouses and employees with Domestic Partners, between spouses of employees and Domestic Partners of employees, and between dependents and family members of spouses and dependents and family members of Domestic Partners.

(h) "Policy" shall mean this Nondiscrimination in Contracts Policy.

(i) "Property Contract" shall mean a written agreement for the exclusive use or occupancy of real property for a term exceeding 29 days in any calendar year, whether by singular or cumulative instrument, (i) for the operation or use by others of real property owned or controlled by the Agency for the operation of a

¹ The following scenario is provided as an example of similarly situated employees: An Agency Contractor with locations in Dallas, TX and Bridgeport, CT, offers spousal health insurance to its employees. After taking all reasonable measures, the Agency Contractor is still unable to provide health insurance for the Domestic Partners of its employees. The Cash Equivalent it would pay to its Bridgeport employees would be the amount of money paid by the Agency Contractor for Benefits given to employees with spouses in Bridgeport; the Cash Equivalent the Agency Contractor would pay to its Dallas employees would be the amount of money paid by the Agency Contractor or Benefits given to employees with spouses in Dallas.

² The following scenario is provided as an example of limiting the availability of a Cash Equivalent: An Agency Contractor limits the availability of spousal health insurance coverage to only those spouses who are not already covered by their own employer's health insurance plan. This Agency Contractor is unable to provide health insurance to the Domestic Partners of its employees and instead offers a Cash Equivalent. The Agency Contractor may limit the availability of a Cash Equivalent payment to only those employees whose Domestic Partners are not already covered by their own employer's health insurance plan.

³ Sample language for an internal Domestic Partnership registry is available through the Agency.

business, social, or other establishment or organization, including leases, concessions, franchises and easements, or (ii) for the Agency's use or occupancy of real property owned by others, including leases, concessions, franchises and easements. For the purposes of this Policy, "exclusive use" means the right to use or occupy real property to the exclusion of others, other than the rights reserved by the fee owner. "Property Contract" shall not include a revocable at will use or encroachment permit for the use of or encroachment on Agency property regardless of the ultimate duration of such permit, except that "Property Contract" shall include such permits granted to a private entity for the use of Agency property for the purpose of a for-profit activity. "Property Contract" shall also not include contracts for the purchase or sale of land, Disposition and Development Agreements, Owner Participation Agreements, street excavation, street construction or street use permits, agreements for the use of Agency right of way where a contracting utility has the power of eminent domain, or agreements governing the use of Agency property which constitutes a public forum for activities that are primarily for the purpose of espousing or advocating causes or ideas and that are generally recognized as protected by the First Amendment to the U.S. Constitution, or which are primarily recreational in nature.

(j) "Sexual Orientation" shall mean the status of being lesbian, gay, bisexual or heterosexual.

(k) "Subcontract" shall mean an agreement to (i) provide goods and/or services, including construction labor, materials or equipment, to a Contractor, if such goods or services are procured or used in the fulfillment of the Contractor's obligations arising from a contract or agreement with the Agency, or (ii) to transfer the right to occupy or use all or a portion of a real property interest subject to a Property Contract to a Subcontractor and pursuant to which the Contractor remains obligated under the Property Contract.

(l) "Subcontractor" means any person or persons, firm, partnership, corporation or any combination thereof, who enters into a contract or agreement with a Contractor to perform 10 percent or more of the Contract or Property Contract.

Section 3. Procedures for Implementation.

(a) Evidence of Compliance. Prior to executing a Contract or Property Contract, Contractors shall demonstrate that they are in compliance with the Nondiscrimination in Benefits requirements and, to the extent they are not in compliance with them, that the Contractor complies with one or more of the provisions in Sections 3 (b) through (d) below, by providing either:

- i. evidence that the Contractor has been certified by the Human Rights Commission of the City as being in compliance with Section 12 B 1 (b) of the San Francisco Administrative Code, or
- ii. such forms and documentary evidence as may be requested by the Agency.

(b) Phase-In Periods. An Agency Contractor will not be deemed to be discriminating in the provision of Benefits where the implementation of policies ending discrimination in Benefits is delayed following the first award of an Agency contract to an Agency Contractor after _____, 1997 if:

- i. until the first effective date after the first open enrollment process following the date the contract with the Agency begins, provided that the Agency Contractor submits to the Agency evidence that reasonable efforts are being undertaken to end discrimination in Benefits. This delay may not

exceed two years from the date the contract with the Agency is entered into, and only applies to Benefits for which an open enrollment process is applicable;⁴ or

- ii. until administrative steps can be taken to incorporate Nondiscrimination in Benefits into the Agency Contractor's benefits package. The time allotted for these administrative steps shall apply only to those Benefits for which administrative steps are necessary and may not exceed three (3) months after the Contract award. An extension of this time may be granted at the discretion of the Executive Director of the Agency upon the written request of the Agency Contractor; or
- iii. until the expiration of an Agency Contractor's current collective bargaining agreement(s) where all of the following conditions have been met:
 - I. the provision of Benefits is governed by one or more collective bargaining agreement(s);
 - II. the Agency Contractor has taken all reasonable measures to end discrimination in Benefits by either requesting that the Union(s) involved agree to reopen the agreement(s) in order for the Agency Contractor to take whatever steps necessary to end discrimination in Benefits or by ending discrimination in Benefits without reopening the collective bargaining agreement(s);
 - III. the Agency Contractor cannot end discrimination in Benefits despite taking all reasonable measures to do so; and
 - IV. the Agency Contractor provides a Cash Equivalent to eligible employees for whom Benefits are not available.

(c) Reasonable Measures. An Agency Contractor will not be deemed to be discriminating in the provision of Benefits where, after taking all reasonable measures, the Agency Contractor is unable to end discrimination in Benefits and instead provides the closest approximation of equal Benefits available. If the cost of providing the closest approximation of equal Benefits is at least 33 percent less expensive than the cost of providing equal Benefits, the Agency Contractor must also make a Cash Equivalent payment.⁵ The Agency will determine whether an Agency Contractor has taken all reasonable measures upon the review of information and attached compelling documentation provided by the Agency Contractor that demonstrates that it is not possible for the Agency Contractor to end discrimination in Benefits. A determination that it is not possible for the Agency Contractor to end discrimination in Benefits shall be based upon a consideration of such factors as:

⁴ For purposes of this provision, the term "effective date" refers to the date upon which the next Benefits plan year begins; the term "open enrollment period" refers to the time when employees are eligible to enroll themselves or others in the Agency Contractor's Benefits plan; the term "open enrollment process" begins when the Agency Contractor starts planning for, and negotiating with its insurance provider(s) regarding, the Benefits to be offered during the next Benefits plan year, and ends at the next effective date.

⁵ The following scenario is provided as an example of this provision: An Agency Contractor provides health insurance coverage for the spouses of its employees under Plan A. Plan A is unwilling to cover the Domestic Partners of employees. Plan B will provide coverage to Domestic Partners of employees, but is not as good as Plan A because there is a higher deductible and no prescription coverage. The Agency Contractor pays \$100 toward the premium for spousal coverage under Plan A. Because Plan B is less expensive, the Agency Contractor pays \$67 toward the premium for Domestic Partner coverage under Plan B, which is 33% less than the amount paid under Plan A. In order to not discriminate in the provision of Benefits, the Agency Contractor must provide a Cash Equivalent of \$33 to those employees who elect coverage for their Domestic Partners under Plan B.

- i. Benefits providers identified and contacted, in writing, by the Agency Contractor, and written documentation from these providers that they will not provide equal Benefits;
- ii. the existence of Benefits providers willing to offer equal Benefits to the Agency Contractor; and
- iii. the existence of federal or state laws which preclude the Agency Contractor from ending discrimination in Benefits.

(d) Alternate Methods of Structuring Benefits. So long as an Agency Contractor does not discriminate in the provision of Benefits between employees with spouses and employees with Domestic Partners, an Agency Contractor may elect to provide Benefits:

- i. to individuals in addition to employees' spouses and employees' Domestic Partners;
- ii. on a basis unrelated to both Marital Status and Domestic Partner status; or
- iii. neither to employees' spouses nor to employees' Domestic Partners.

Section 4. Waivers and Exceptions.

(a) Waivers -Executive Director. The Executive Director will waive the requirements of this Policy upon making written findings that the circumstances in (i) or (ii) below exist:

- i. Sole Source Contract occurs when:
 - I. the goods or services to be purchased by the Agency are needed; and
 - II. there is only a sole source available to provide the Agency with the needed goods or services; and
 - III. the prospective Contractor is not currently disqualified from doing business with the Agency, or from doing business with any governmental agency based on any contract compliance requirements; and
 - IV. the contracting department or commission has explained to the prospective Contractor the Nondiscrimination in Benefits requirements of Policy and the prospective Contractor has refused to stop discriminating in the provision of Benefits; and
 - V. the Agency (A) constructs the Contract for the shortest reasonable duration and (B) attempts to award any future Contracts for the needed goods or services to a Contractor that does not discriminate in the provision of Benefits by developing contacts with other providers who do comply with the Nondiscrimination in Benefits requirements of the Policy and/or by assisting the sole source provider with full compliance with the Nondiscrimination in Benefits requirements of the Policy.
- ii. Emergency Contract occurs when: the Contract is necessary to respond to an emergency which endangers the public health or safety and no entity which complies with the requirements of this Policy capable of performing the emergency work is immediately available.

(b) Waivers -Commission. The Agency Commission may waive by resolution any or all of the requirements of this Chapter in any instance in which:

- i. the Executive Director finds that there are no qualified responsive bidders or prospective Contractors who comply with the requirements of this Policy and that the Contract is for an essential Agency service or project; or
- ii. the Executive Director finds that transactions entered into pursuant to bulk purchasing arrangements through federal, state or regional entities which actually reduce the Agency's purchasing costs would be in the best interests of the Agency.

(c) Exceptions -Public Entities as Contractors. This Policy shall not apply where the prospective Contractor is a public entity and the Executive Director finds that goods, services, construction services for a public work or improvement or interest in or right to use real property of comparable quality or accessibility as are available under the proposed Contract or Property Contract are not available from another source, or that the proposed Contract or Property Contract is necessary to serve a substantial public interest.

(d) Exceptions -Grants or Agreements with Public Entities. This Policy shall not apply where the Executive Director finds that its requirements will violate or are inconsistent with the terms or conditions of a grant, subvention or agreement with a public agency or the instructions of an authorized representative of any such agency with respect to any such grant, subvention or .agreement, provided that the Executive Director has made a good faith attempt to change the terms or conditions of any such grant, subvention or agreement to authorize application of this Policy.

(e) Exceptions -Financial or Investment Services and Litigation Expenses. This Policy shall not apply to:

- i. the investment of trust moneys or agreements relating to the management of trust assets; or
- ii. Agency moneys invested in U.S. government securities or under pre-existing investment agreements; or
- iii. the investment of Agency moneys where the Executive Director finds that:
 - I. no person, entity or financial institution doing business in San Francisco which is in compliance with this Policy is capable of performing the desired transaction(s); or
 - II. the Agency will incur a financial loss which in the opinion of the Executive Director would violate the Agency's fiduciary duties. This subparagraph (e) shall be subject to the requirement that Agency moneys shall be withdrawn or divested at the earliest possible maturity date if deposited or invested with a person, entity or financial institution other than the U.S. government which does not comply with this Policy; or
- iv. Contracts for urgent litigation expenses, where the Agency General Counsel certifies in writing to the Executive Director that the Contract involves specialized litigation requirements such that it would be in the best interests of the Agency to waive the requirements of this Policy.

Section 5. Jurisdiction.

(a) Subcontractors. The Nondiscrimination provisions in Section 1(a) do apply to Subcontractors. However the nondiscrimination in Benefits requirements in Section 1(b) do not apply to Subcontractors.

(b) Location. The Nondiscrimination in Benefits requirements apply to all locations throughout the United States where a Contractor is doing business.

(c) Covered Entity. The entity which enters into a contract with the Agency is the entity which must comply with the Policy.

(d) Subsidiaries and Joint Ventures. Separate corporate entities, including parents and subsidiaries of the entity which contracts with the Agency, are not required to comply with the ordinance. In the case of a joint venture, all joint venture partners will be required to comply. The Agency will examine the corporate structure of the entity to determine whether it has been created for separate, independent and legitimate business reasons, and not for the purpose of avoiding the ordinance. The factors to be included in this determination shall include:

- i. the legal status of the entity;
- ii. the way in which and location where Benefits are administered;
- iii. the authority of the person signing the contract; and
- iv. any other factors deemed relevant by the Executive Director.

Section 6. Effective Date.

The Nondiscrimination in Benefits provisions shall not apply to any Contracts or Property Contracts executed or amended prior to January 2, 1998, or to bid packages advertised and made available to the public, or any competitive or sealed bids received by the Agency, prior to January 2, 1998.

Section 7. Miscellaneous.

(a) Verification of Domestic Partnership or Marriage. An Agency Contractor may verify the existence of a Domestic Partnership or marriage to the extent such verification is undertaken equally for employees with Domestic Partners and employees with spouses.

(b) Excess Costs. In the event that the actual cost of providing a certain benefit to an employee with a Domestic Partner or an employee's Domestic Partner exceeds that of providing the benefit to an employee with a spouse or to an employee's spouse, or vice versa, the Agency Contractor may condition Nondiscrimination in Benefits upon the employee agreeing to pay the excess costs. The excess costs the Agency Contractor may pass on to the employee may include only the actual costs of the benefit for that employee and may not include implementation or administrative costs, any tax consequence to the employer, or additional costs to other employees.

(c) Taxation. For the purposes of this Policy:

- i. the withholding of income tax from an employee for income associated with the provision of Benefits is permissible to the extent the taxation is required by state or federal law; and
- ii. nothing in these rules is intended to require an Agency Contractor to take any action that would jeopardize the tax-qualified status of a retirement plan.

(d) Notification. Notification by an Agency Contractor to its employees regarding the provision of Benefits to employees with spouses and employees with Domestic Partners must be conducted so that all employees are given equal notice of all available Benefits.

(e) Continuation Coverage. The continuation of Benefits, including health Benefits, should be provided equally to the spouses of employees and the Domestic Partners of employees, except where otherwise prohibited by law.

Section 8. Authority.

The Executive Director, or his or her designee, is hereby granted the power to do all acts and exercise all powers referred to in this Policy, provided however, that all Contracts or Property Contracts for an amount exceeding \$20,000 must be approved by the Agency Commission in accordance with the Agency's Purchasing Policy.

Section 9. Severability.

This Policy shall be construed so as not to conflict with applicable federal or state laws, rules or regulations. Nothing in this Policy shall authorize the Agency to impose any duties or obligations in conflict with limitations on local authority established by federal law at the time such Agency action is taken. In the event that a court or agency of competent jurisdiction holds that state or federal law, rule or regulation invalidates any clause, sentence, paragraph or section of this Chapter or the application thereof to any person or circumstances, it is the intent of the Agency that the court or agency sever such clause, sentence, paragraph or section so that the remainder of this Policy shall remain in effect.