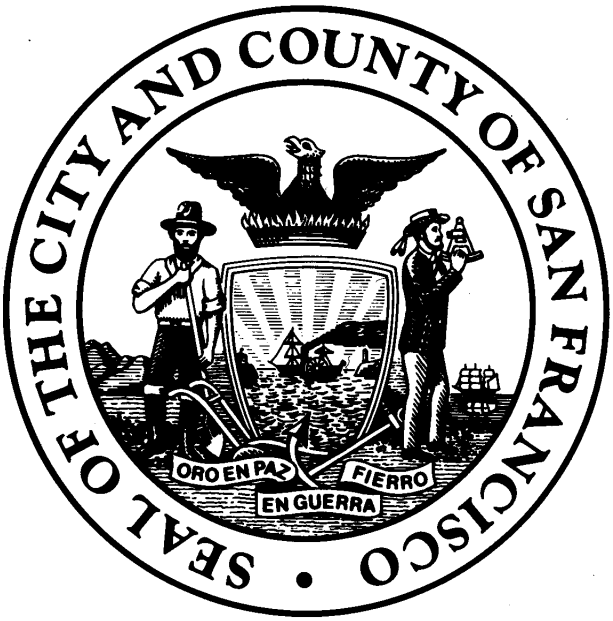
CITY and COUNTY of SAN FRANCISCO
OFFICE of CONTRACT ADMINISTRATION
Judith A. Blackwell, Director



RULES AND REGULATIONS IMPLEMENTING THE SAN FRANCISCO MINIMUM COMPENSATION ORDINANCE (MCO)

April 2002

Office of Contract Administration
Living Wage/Living Health Division
City Hall, Room 430
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4685
(415) 554-6733

Website: http://sfgov.org/lwlh
E-mail: MCO@ci.sf.ca.us

Rules & Regulations Implementing the
San Francisco Minimum Compensation Ordinance (MCO)

	Page
SCOPE OF OCA AUTHORITY	1
DEFINITIONS	1
REGULATION #1: DETERMINING APPLICABILITY OF MCO TO AGREEMENTS	3
REGULATION #2: MCO REQUIREMENTS	5
REGULATION #3: COVERED EMPLOYEES	8
REGULATION #4: EXEMPTIONS	11
REGULATION #5: WAIVERS	15
REGULATION #6: REQUEST FOR PROPOSAL (RFP) PROCESS	17
REGULATION #7: SUBCONTRACTS	18
REGULATION #8: AMENDMENTS	20
REGULATION #9: THE MCO DECLARATION	21
REGULATION #10: RECORDKEEPING AND REPORTS	22
REGULATION #11: MONITORING AND INVESTIGATION	23
REGULATION #12: ENFORCEMENT	25
REGULATION #13: EMPLOYEE COMPLAINT PROCESS	26
APPENDIX A: APPROVED CITY MODEL CONTRACTS AND FORMS	31
APPENDIX B. THE MCO WEBSITE	32

Rules & Regulations Implementing the
San Francisco Minimum Compensation Ordinance (MCO)

The Office of Contract Administration (OCA) promulgates these Rules & Regulations pursuant to Chapter 12P of the San Francisco Administrative Code. Each Contracting Department shall cooperate to the fullest extent with the OCA in the administration of the Minimum Compensation Ordinance (MCO), commonly referred to as the Living Wage Ordinance.

SCOPE OF OCA AUTHORITY

Pursuant to the MCO, the Department of Administrative Services administers, monitors, and enforces the MCO. The Department of Administrative Services has delegated this authority to the OCA. When necessary to carry out its function, the OCA may conduct inquiries and investigations into areas outside of the MCO to determine compliance with the MCO. The OCA may also agree to act as a mediator to resolve compliance problems between employers and employees.

DEFINITIONS

The definitions set forth in §12P.2 of the MCO are incorporated herein by reference. In addition, the following definitions shall apply for purposes of these Rules and Regulations:

"Agreement" includes a contract, subcontract, lease, sublease, or grant, and shall also refer to any solicitation pursuant to which a contract, subcontract, lease, sublease, or grant is executed.

"Complaint" shall mean a report of an alleged breach of contract under the MCO.

"Complainant" shall mean a covered employee who files a Complaint under the MCO.

"Contractor" shall refer to an entity that has an Agreement with the City or with a Lessee at the Airport. "Contractor" shall include "Tenant," except as specifically set forth in these Regulations.

"Employer" shall mean a Contractor who has a City contract or grant subject to the MCO.

"Hearing Officer" shall mean an impartial individual appointed by the OCA to conduct a hearing in accordance with Regulation #13.

"Lease" shall mean an Agreement through which the City and County of San Francisco provides to a tenant exclusive use of property under the jurisdiction of the San Francisco Airport Commission.

"Solicitation" shall include an Invitation for Bids, Request for Proposals, Request for Qualifications, or Request for Information.

"Subcontractor" includes any entity or person who enters into an Agreement with a Contractor to perform services funded through a Contract, or with a Tenant. Except as specifically set forth otherwise, "Subcontractor" shall include "Subtenant."

"Subtenant" includes any entity or person who enters into a sublease with a Tenant.

"Temporary Worker" refers to a worker that has no work schedule, and only works when called. Temporary workers are sometimes referred to as "on-call workers."

"Tenant" shall mean an entity that enters into a Lease with the City and County of San Francisco, for land under the jurisdiction of the San Francisco Airport Commission.

"Wages" means the amount paid to an employee as compensation for labor performed. This term does not include any amount paid to an employee not directly related to the labor performed, such as for parking, uniforms, and contributions to retirement plans.

REGULATION #1: DETERMINING APPLICABILITY OF MCO TO AGREEMENTS

1.1 General Applicability

An Agreement is covered by the MCO if it meets the definition of "Contract" found in §12P.2 of the MCO, or of a "Lease" as set forth in §12P.4 of the MCO. In general, the Agreements that are covered by the MCO include the following:

(A) Service Contracts

The MCO applies to Contracts between the City and County of San Francisco and Contractors that perform services for the City. A construction contract is considered a service contract and thus subject to the MCO.

(B) Grants

The MCO applies to grants of money from the City to grantees, under which the Grantee performs services for the benefit of third parties.

(C) Airport Leases

The MCO applies to Leases of property for a term of 29 consecutive days or more, for real property under the Airport Commission's Jurisdiction.

(D) Airport Tenant Contracts

The MCO applies to Contracts between a Tenant at the Airport and third parties, to perform services on the property covered by the Lease.

(E) Subcontracts

For contracts subject to the MCO, the MCO generally applies to all tiers of subcontracts. Where the MCO is applicable to a contract or to an Airport lease, the MCO generally applies to all subcontracts and subleases thereto. Where a contract is between a tenant and a service provider at the Airport, the MCO does not apply to their subcontracts. Under no circumstances shall a contractor circumvent the intent of the ordinance.

1.2 Presumption of Coverage

An Agreement is presumed to be covered by the MCO. If a Contracting Department uses one of the Model Contracts listed in Appendix A, then the Contracting Department will keep the MCO provisions in the final document unless the OCA has made a determination that the MCO does not apply, in accordance with the MCO and these Rules and Regulations. If a Contracting Department does not use one of the Model Contracts as its Agreement, then the Contracting Department will include appropriate MCO language in the Agreement unless the OCA has made a determination that the MCO does not apply, in accordance with the MCO and these Rules and Regulations.

1.3 Contracting Department Determination and OCA Oversight

The Contracting Department shall make the initial determination whether an Agreement is subject to the MCO. Except as provided for in these Rules and Regulations, all such determinations shall require written confirmation by the OCA to be effective. The Contracting Department shall follow the procedures set forth in Regulation #4 below to notify the OCA of its determination. The OCA shall review the determination and if the OCA finds such determination correct, will confirm and process the order. In the event of a disagreement between the OCA and the Contracting Department, the OCA's determination shall prevail in all instances.

REGULATION #2: THE MCO REQUIREMENTS

The MCO imposes obligations on a Contractor to provide the statutory elements of minimum compensation to its covered employees. Minimum Compensation refers to the wage, as well as the leave time required to be paid to covered employees. In addition, the MCO also imposes other duties upon Contractors. The requirements of the MCO are set forth below.

2.1 Hourly Wage

The MCO mandates that employers pay their covered employees at least $9.00 for every hour worked on the City contract, subject to the rules set forth in this Regulation.

(A) Adjustments to Hourly Rate

The minimum hourly wage shall rise from $9.00 to $10.00 for for-profit businesses, effective January 1, 2002. Thereafter, the rate shall be adjusted upward by 2.5% per year as follows: to $10.25 on January 1, 2003; $10.51 on January 1, 2004; and $10.77 on January 1, 2005.

The rate for non-profit corporations and government entities shall remain at $9.00, because the Joint Report referred to in the MCO found that, according to the financial analysis specified in the MCO, sufficient funds were not available to raise the wage to $10.00 per hour. Thus, the non-profit waiver from increase found at §12P.8 of the MCO is inapplicable.[1]

(B) Benefits and Commissions

The wage is the employee's gross salary, and does not include benefits or commissions.

2.2 Required Time Off

The MCO requires Contractors to provide their covered employees with time off that is both paid and unpaid. Nothing in these Rules is intended to affect the employer's Policies and Procedures regarding approval or scheduling of such time off. The time-off requirements are set forth below:

(A) Paid Time Off

The MCO requires employers give their covered employees 12 days paid time off, if that employee works full time (40 hours a week) on the City contract for one year. The amount of paid time off shall be reduced in an amount that is proportional to the time spent actually working on the City contract. All paid holidays count toward the 12 days paid time off.

[1] However, as a result of concerns for parity and fairness, the Mayor's Office and the Board of Supervisors were able to allocate funds in the Fiscal Year 01-02 budget to pay non-profit corporations receiving General Fund contracts $10.00 per hour for the MCO's covered employees. Because the $10.00 rate is not mandated by the MCO, the 2.5% per year adjustment described in the MCO is not applicable.

If the total number of paid holidays counted toward the provision of paid days off is less than the 12 paid days off required by the MCO, then an employee shall accrue one paid day off per month of full-time employment, and a proportional amount for part-time employment, beginning the first day of employment until the total number of paid holidays and accrued compensated days off equal at least 12 days per year. Paid time off accrued in these instances must be available to the employee for use as sick leave, vacation or personal necessity at the employee's request.

The paid time off shall start accruing at the end of the first pay period when the employee meets the MCO's definition of "covered employee." When an employee requests paid time off, the employer's approval shall not be unreasonably withheld.

(B) Cash Equivalent in Lieu of Paid Time Off

The MCO allows an employer to pay employees a cash equivalent of paid time off, if that employer in good faith determines that it cannot provide the required paid time off. If an employer determines it cannot provide paid time off and therefore will provide the cash equivalent, the employer must document that determination and submit the documentation to the contracting department or the OCA for approval.

Employers who determine it necessary to pay the cash equivalent may choose to do so by adjusting the employee's hourly rate of pay. Accordingly, the amount of the hourly pay that includes the paid time off equivalent has been calculated for the minimum hourly compensation required of $9 per hour and, for commercial employers, for the required increase on January 1, 2002 to $10 per hour.

If a company offers no paid days off, then it must pay covered employees an extra 41¢ for each hour worked when the MCO wage is $9, and an extra 46¢ for each hour worked when the MCO wage is $10. If an employer offers more than zero paid days off but fewer than 12, then the cash equivalent shall be proportionately less.

(C) Unpaid Time Off

The MCO requires that employers give their covered employees 10 days' unpaid time off, if that employee works full time (40 hours a week) on the City contract for one year. The amount of unpaid time off shall be reduced in an amount that is proportional to the time spent actually working on the City contract. If an employee works half-time on the City contract, the employee shall be entitled only to 5 unpaid days off. The unpaid time off may be used, at the employee's option, for sick leave for the employee, or the employee's spouse, domestic partner, child, parent, sibling, grandparent, or grandchild.

An employer may make this time off paid instead of unpaid, provided that it has been accrued by the employee and is available without advance notice for unanticipated illness and provided that the employer also provides the MCO's twelve days paid time off.

Temporary and on-call workers do not receive unpaid time off benefits.

The unpaid time off shall start accruing at the end of the first pay period when the employee meets the MCO's definition of "covered employee."

2.3 Relationship between the MCO in the Airport's Quality Standard Program ("QSP")

Employers covered by the QSP and the MCO must comply with both. If one benefit package is higher than the other is, then the higher must be provided. The QSP applies only to certain job classifications, generally those related to safety and security. Covered employees in other job classifications would be entitled to the MCO benefits only.

REGULATION #3: COVERED EMPLOYEES

The MCO requires that Contractors pay their covered employees the Minimum Compensation, as well as imposes other obligations on the Contractor with respect to covered employees. This Regulation outlines a Contractor's duties with respect to covered employees.

3.1 Requirements to be a Covered Employee

An employee who works and receives compensation for 4 hours per week during a pay period on work funded in whole or in part by the City within the geographic boundaries of the City shall be a Covered Employee. An employee who works and receives compensation elsewhere in the United States must work 10 hours per week during a pay period on work funded in whole or in part by the City, or on land within the jurisdiction of the Airport Commission, to be a Covered Employee.

3.2 Exemptions

Notwithstanding §3.1 above, the following employees shall not be considered Covered Employees:

(A) After School/Summer Employees

An employee who is under the age of 18, is claimed as a dependent for federal income tax purposes, and is employed as an after-school or summer employee, shall not be a Covered Employee.

(B) Trainees

Employees participating in bona fide training programs consistent with Federal Law, which training program will allow that employee to advance into a permanent position, shall be exempt from the definition of Covered Employee.

The City will apply the exemption to workers who are in training programs at a non-profit if the training is: (i) subsidized by public funds from the federal, state, and/or local level, which funds are designated for training, workforce development, job readiness or similar purposes; and, (ii) limited in duration as appropriate to the occupation for which the individual is being trained, taking into account the content of the training, and the prior work experience of the trainee.

A training program qualifies for this exclusion whether or not the program is training the employee to advance into a permanent position for the non-profit Contractor, or for another employer.

The Exemptions set forth in §§3.2(A) and (B) above shall only apply when the Employer does not replace, displace or lower the wage or benefits of any existing position or Employee.

(C) Disabled workers

If a disabled employee: (A) is covered by a current sub-minimum wage certificate issued to the Contractor by the U.S. Department of Labor; or (B) would be covered by such a certificate but for the fact that the Contractor is paying a wage equal to or higher than the minimum wage, then that employee shall be exempt from the definition of Covered Employee.

(D) Volunteers

Volunteers are not covered employees.

3.3 Temporary and On-Call Employees

Temporary and on-call employees qualify as covered employees if they work on the City contract for the minimum of 4 hours per week during a pay period. Temporary and on-call employees do not qualify for unpaid time off.

3.4 Notifying Covered Employees

Contractors must provide written notice about the MCO to Covered Employees. The notice shall be in the form prescribed by the OCA. The notice must be provided during or immediately after the first pay period in which an employee becomes a covered employee. If the MCO wage rate changes, the employer must give notice to covered employees no later than 30 days after the new wage rate takes effect.

In addition, the City shall require employers to post an MCO notice in locations where other employee notices are normally posted.

The employer must provide the MCO notice in any language spoken by a significant number of its employees.

3.5 Contract with No Covered Employees

A contract subject to the MCO may not involve any covered employees, due to the fact that no employee works the requisite amount of hours on the contract. In that case, the employer need not provide the MCO benefits to any employees; however, the employer must include the MCO provisions in any applicable subcontracts.

3.6 City Contract Represents less than 10% of Contractor's business

A contractor may be unable to identify any employee who works at least four hours per week on the City contract. In such cases, if the City's contract represents less than 10% of the contractor's business at the site where the work is being performed, the City assumes that there are no covered employees working on the contract. If the City's contract represents 10% or more of the contractor's business, the City assumes that all employees working on the contract are covered employees.

In such situations, the City may require a separate notice for employees working on the City contract.

3.7 Contract with an Individual or a Sole Proprietor

If a contract subject to the MCO is with a contractor that is an individual or a sole proprietor, the contractor is not obligated to provide the MCO benefits to him or herself. However, the contractor must include the MCO provisions in applicable subcontracts.

3.8 Personnel Listed in Contract Budget

The contractor shall use the contract budget submitted to the City as an indication of which employees are the covered employees under the contract.

3.9 Prohibition against Splitting Employees' Time

And employer may not divide employee's time between working on the City contract and working on other duties with the intent of reducing the number of covered employees working on the contract and evading the intent of the MCO.

REGULATION #4: EXEMPTIONS

An Agreement determined by the Contracting Department to be exempt from the MCO requires written confirmation by the OCA. However, the exempt status of the following types of agreements requires no confirmation by the OCA, and is determined solely by the Contracting Department: (1) Contracts for the purchase of products/goods, (2) Leases for land not under the jurisdiction of the Airport Commission, and (3) Contracts with public entities whose boundaries are not coterminous with those of the City and County of San Francisco.

4.1 Exemption Procedures

If a Contracting Department determines that an Agreement is exempt from the MCO, it shall submit a request for exemption to the OCA using MCO Exemption and Waiver Request (form P-360) referenced in Appendix A. The Contracting Department shall submit any documentation it has received from Contractor along with the exemption form. If the OCA agrees with the determination of exemption, it shall sign the exemption form and process the order. A ruling by the OCA that an agreement is exempt from the MCO shall apply only to the specific agreement to which the exemption request form is directed, and shall not affect any other agreements.

If the OCA denies a Contracting Department's request for exemption, the OCA shall notify the Contracting Department. Thereafter, the Contracting Department shall process the agreement as an agreement subject to the MCO.

4.2 Requirements for Exemption

The following categories of agreements shall be exempt from the MCO, as stated below:

(A) Public Entities

Agreements with public entities are not subject to the MCO unless the public entity's jurisdictional boundaries are coterminous with the City's boundaries. Public entities whose boundaries are coterminous with the City, thereby making them subject to the MCO, include: Local Agency Formation Commission; San Francisco Community College District; San Francisco Housing Authority; San Francisco Redevelopment Agency; San Francisco Transportation Authority; and San Francisco Unified School District.

(B) Aggregate Monetary Threshold

If an entity has entered into agreements with a Contracting Department, the aggregate amount of which equals $25,000 or less payable from that Contracting Department, these agreements shall be exempt from the MCO. For non-profit corporations, this threshold is $50,000. However, when prospective contracting reaches the appropriate threshold, all future contracts shall be covered by the MCO, and all current contracts exempt from the MCO due to the dollar threshold become subject to the MCO from that point forward.

In determining whether an agreement exceeds the $25,000/$50,000 threshold, the Contracting Department shall calculate the total amount of the agreement by adding

together the amount provided for in the original agreement and all amendments, modifications, renewals, or extensions. An agreement previously exempt because it did not meet the monetary threshold of the MCO may become subject because an amendment, modification, renewal, or extension increases the total amount of the agreement. In that case, the contracting department shall incorporate the standard MCO contract language in the Model Contract Amendment (form P-550), referenced in Appendix A.

If an agreement specifies a maximum amount to be expended, then the Contracting Department shall use the maximum amount stated in the agreement to determine whether the agreement meets the MCO monetary threshold.

(C) Number of employees

If a Contractor has 20 or fewer employees, then the contract is exempt from the MCO. The number of employees includes:

- the contractor's employees as of the date the contract is signed;
- the employees the contractor reasonably believes it will hire during the course of the contract, whether those employees will work on the City contract or not;
- the employees of the contractor's parent and subsidiary entities, if any;
- the employees of any subcontractors the contractor proposes to use to perform all or a portion of the service covered by the contract.

The contractor must provide written documentation of the number of employees for this exemption. A letter on the contractor's letterhead, and signed by an officer who is authorized to legally bind the entity, shall be sufficient.

The number of employees shall be reviewed on a year-by-year basis. This means that if an employer has more than 20 employees at the beginning of the contract and the contract is covered by the MCO; or that the employer has 20 or fewer employees at the beginning of the contract and the contract is exempt from the MCO; then the employer in advance of the contract's anniversary date must recalculate the number of employees. If the number has risen to 21 or more, then the previously exempt contract becomes covered by the MCO for the next year. Conversely, if the number has fallen to 20 or fewer, then the previously covered contract becomes eligible for exemption from the MCO for the next year.

(D) Purchase of Goods

The MCO does not apply to the purchase of goods, or for guarantees, warranties, shipping, delivery, or initial installation of such goods. If a contract is for the purchase of both goods and services, then the contracting department shall make a determination whether the contract is primarily a goods contract or a service contract. The Contracting Department's determination is subject to review by the OCA. If the former, the MCO does not apply; if the latter, the MCO does apply.

In determining what a contract is primarily for, the Contracting Department shall consider the general nature of the contract, as well as how much of its cost is for goods, and how

much for services. If the services account for more than 50% of the total cost, that is an indication that the contract is primarily for services.

If a contract's service and product components are clearly differentiated in the budget for a contract that includes both goods and services, then the MCO applies to the service component only if the service component meets the MCO's $25,000 or $50,000 threshold.

(E) Legal Proceedings

Contracts for the settlement of legal proceedings are exempt from the MCO, and those for urgent or specialized litigation advice may be exempt from the MCO if it is in the best interests of the City to do so. The OCA shall determine whether a contract is for the settlement of legal proceedings, and thus exempt. The City Attorney shall determine whether a contract is for urgent or specialized litigation advice, and whether it would be in the best interests of the City not to include the MCO. The City Attorney shall submit these findings to the OCA in writing.

(F) Grant or Special Fund Expenditures

Agreements involving the expenditure of grant or special funds by the City shall be exempt if the application of the MCO would violate the terms of the grant or any rule of the grantor agency that require compensation lower than the Minimum Compensation; and/or, if the City would be required to use general fund monies to supplement the grant or special funds in order to maintain the current level of services, such agreement shall also be exempt, subject to review by OCA.

The OCA will consider blanket exemptions for non-profit contracts that are receiving grant or special funds for services. These funds shall not flow from the City's General Funds.

(G) Prevailing Rate of Wage

Section A7.204 of the San Francisco Charter and Chapter 6 of the San Francisco Administrative Code set forth agreements to which the prevailing rate of wage law applies. Such agreements shall be exempt from the MCO only if each covered employee receives the prevailing rate, and if the prevailing rate is higher than the wage required by the MCO.

(H) Trust Assets

Any agreement for the investment, management, or other use of trust assets shall be exempt if the application of the MCO would violate the fiduciary duties of the trustee.

(I) City Employee Benefits

Agreements to provide benefits to City employees shall be exempt from the MCO where the Director of Human Resources makes a determination that no entity is willing to comply with the MCO and is capable of providing the required benefits. The Director shall make such determination in writing and submit it to the OCA.

(J) City acting as Creditor or Grantor

If the City is providing funds in the form of loans or grants to entities for the purpose of: (1) acquiring an interest in real property on which residential improvements for low or moderate income households will be constructed, (2) constructing improvements on real property owned by grantee or debtor, if residents of the improvements qualify as low or moderate income households, or (3) rehabilitating improvements owned or leased by a grantee or debtor, then any agreement to provide such funds is exempt from the MCO.

(K) Non-Airport Leases

An agreement for the exclusive use of property owned by, or under the exclusive control of the City, and not under the jurisdiction of the Airport Commission, shall be exempt from the MCO.

(L) Investments that Violate Fiduciary Duties

Agreements for the investment of City monies where the Treasurer finds that requiring compliance with the MCO will violate Treasurer's fiduciary duties and for the investment of retirement, health or other funds held in trust pursuant to Charter, statute, ordinance or MOU where the official or officials responsible for investing or managing such funds finds that requiring compliance with the MCO will violate their fiduciary duties, shall be exempt from the MCO. To effect this exemption, the fiduciary must make its finding in writing and submit it to the OCA.

(M) Agreements Prior to Effective Date

Agreements entered into prior to October 8, 2000, or pursuant to and in accordance with solicitations advertised prior to October 8, 2000 and not amended thereafter, are exempt from the MCO.

4.3 Contractor May Suggest Exemption

The prospective contractor may suggest to the Contracting Department that an exemption may be appropriate for the contract under consideration.

REGULATION #5: WAIVERS

An agreement may fall within the MCO's definition of Contract, but nevertheless have the MCO's application to such agreement waived, pursuant to §§12P.7, 12P.9 and 12P.10 of the MCO. The OCA shall grant or deny waivers in accordance with the MCO and with these Rules.

5.1 Waiver Procedures

If a Contracting Department determines that an agreement qualifies for a waiver from the MCO, it shall submit a request for a waiver to the OCA using the MCO Exemption and Waiver Request (form P-360) referenced in Appendix A, and shall certify in writing that the agreement meets the requirement for the particular waiver. The Contracting Department shall submit any documentation it has received from Contractor along with the exemption/waiver form. If the OCA agrees with the determination of waiver, it shall sign the form and process the order. A ruling by the OCA that the application of the MCO is waived, shall apply only to the specific agreement to which the exemption/waiver request form is directed, and shall not affect any other agreements.

If the OCA denies a Contracting Department's request for waiver, the OCA shall notify the Contracting Department. Thereafter, the Contracting Department shall process the agreement as an agreement subject to the MCO.

All waiver decisions shall be made by the OCA, except as provided in §5.2(E) herein.

5.2 Requirements for Waiver

The MCO sets forth instances in which an agreement may qualify for a waiver from the application of the MCO's provisions. These are:

(A) Single Contractor or Sole Source Waiver

If there is only one prospective contractor that is willing to comply with all City requirements, or if the service needed by the City is available only from a sole source, and the prospective contractor is not disqualified from doing business with the City or other government agency, then the OCA shall waive the requirements of the MCO. Contracting Departments shall perform all investigation necessary to establish these facts, and shall submit its findings in writing to the OCA. (See §12P.7 of the MCO.)

(B) Emergency Waiver

San Francisco Administrative Code Chapters 6 and 21 set forth procedures and rules for the execution of agreements during an emergency. If an agreement meets the requirements for emergency under either of those chapters, the OCA shall waive the requirements of the MCO if and only if there is no contractor willing to comply with the MCO who is capable of responding to the emergency. (See §12P.7 of the MCO.)

(C) Essential Service Waiver

If a service is “essential” to the City, as determined by the OCA in its discretion, and there are no contractors willing to comply with the MCO, the OCA shall waive the requirements of the MCO. (See §12P.7 of the MCO.)

(D) Bulk Purchasing Waiver

If the services to be purchased under a contract are part of a bulk purchasing arrangement with another governmental entity, the arrangement will substantially reduce the cost to the City, and such arrangement is in the best interests of the City or the public, then the OCA shall waive the requirements of the MCO. (See §12P.7 of the MCO.)

(E) PUC Waiver

The General Manager of the San Francisco Public Utilities Commission may waive the MCO where a contractor is providing services to or on behalf of the Public Utilities Commission, and such services are for the provision, conveyance, or transmission of bulk or wholesale water, electricity, or natural gas. In addition, PUC may also waive the MCO for agreements that provide services ancillary to those set forth above. However, the PUC may only waive the MCO in the event that the purchase of such services may not practically be accomplished through the City's standard competitive bidding procedures, and the Contractor is not providing direct, retail services to end users within the geographic boundaries of the City. (See §12P.9 of the MCO.)

(F) Collective Bargaining Waiver

A bona fide collective bargaining agreement may waive the application of the MCO to such agreement, as long as such waiver is explicitly stated in the collective bargaining agreement. (See §12P.10 of the MCO.)

5.3 Contractor May Suggest Waiver

The contractor may suggest to the Contracting Department that a waiver could be appropriate for the contract under consideration.

REGULATION #6: REQUEST FOR PROPOSAL (RFP) PROCESS

6.1 Presumption of Coverage and Incorporation of Standard MCO Contract Language

A Request-for-Proposal ("RFP") is presumed to be covered by the MCO and must incorporate the standard MCO language contained in the Model RFP (form P-590) unless the OCA has confirmed in writing that the RFP is exempt from the MCO or the MCO has been waived.

6.2 Contracting Department's Initial Determination of the MCO's Applicability to RFPs

The Contracting Department reviews the RFP and considers whether an MCO exemption or waiver might be appropriate. If an exemption or waiver could be appropriate, the contracting department is encouraged to consult with the OCA, or submit to the OCA a MCO Exemption and Waiver Request, as soon as possible. This is preferable to submitting the MCO exemption and waiver request after the contractor has been selected and the contract is ready to be executed.

The contracting department shall determine if the RFP is subject to the MCO using the guidelines discussed in Regulation #1.

6.3 Exception or Waiver Categories

It is important for s to consider which exemption or waiver categories might be applicable to an RFP and which might be applicable only to the eventual contract. For example, the exemption category for Grant or Special Fund Expenditures (§4.2(F)) could be appropriate for an RFP if the granting agency has given or could give the direction required by the MCO. In such a situation, it could be advisable to omit the MCO language from the RFP. It is unlikely that any waiver category would apply to an RFP situation.

6.4 Procedure for the RFP

The Contracting Department submits the MCO Exemption and Waiver Request form to the OCA, but the purpose is to request the OCA's approval for the Contracting Department to omit the MCO language from the RFP. If the OCA approves the request, then the Contracting Department omits the MCO language from the RFP. If the OCA denies a request, then the MCO language remains in the RFP.

6.5 Procedure for the Contract

The Contracting Department will submit the MCO Exemption and Waiver Request form to the OCA if the selected vendor does not meet the MCO criteria. If the OCA approves a request, then the contract is processed normally. If the OCA denies the request, then the Contracting Department must seek another contractor.

REGULATION #7: SUBCONTRACTS

The requirements of the MCO apply to subcontracts executed by Contractors, generally subject to the same waivers and exceptions applicable to prime contracts. The MCO refers to these subcontracts as "included subcontracts." Contractors are required to pass on the MCO's obligations to all included subcontracts.

7.1 Included Subcontracts

An agreement between a contractor and another entity, not employed by contractor, through which the subcontractor agrees to assist a contractor in performing under the contract, may be an included subcontract. For the subcontract to be included, the subcontractor must perform all or a portion of the services covered by the contract.

7.2 Excluded and Exempt Subcontracts

If a subcontract is for the purchase of goods, or for the exclusive use of real property outside the control of the airport commission, it is an excluded subcontract. Furthermore, if the subcontract is for services that are not directly related to those covered by the contract, the subcontract is excluded. In addition, the exemptions set forth in §§4.2(A), (E), (F), (G), (H), (I), and (J) herein for contracts also apply to subcontracts. Service subcontractors cannot claim any exemption for the monetary limits set out in §4.2(B) or the employee limits set out in §4.2(C) herein, and thus there is no monetary threshold or employee threshold for a subcontract to be covered under the MCO.

In addition, if the contract with the City is covered by an exemption, or if the requirements of the ordinance have been waived for that contract, no subcontract for the performance of services covered by that contract is subject to the ordinance.

7.3 Multiple Tiers of Subcontracts

MCO applies to subcontracts (first tier) and sub-subcontracts (second tier and below). As a subcontractor contemplates a sub-subcontract, the subcontractor considers whether any exemption or waiver applicable to a prime contract could be applicable to the sub-subcontract.

7.4 Request for Exemption or Waiver for Subcontracts

If a prime contractor believes a waiver or exemption from MCO could apply to a subcontract, the prime contractor submits the MCO Exemption and Waiver Request (form P-360) to OCA for review and disposition. This procedure also applies to a subcontractor contemplating a sub-subcontract.

7.5 Requirements of Contractors with Included Subcontracts

(A) Include the MCO in Subcontracts and Monitor Compliance

If a subcontract is an included subcontract, contractor shall include the MCO contractual provisions in the subcontract. The MCO provision makes a Contractor liable for the Subcontractor's violations of the MCO. Therefore, Contractors should monitor Subcontractors' compliance with the MCO.

(B) Notice to City

The contractor must notify the OCA of a subcontract subject to the MCO within 30 days of entering into the subcontract. The OCA may prescribe the contents of such notice, and may revise such prescription from time to time, without amending these Rules. If the subcontractor is an individual who performs services directly and does not hire any employees, it has no obligations under the MCO and the subcontract is not subject to the MCO. However, the individual is still counted when determining whether the prime contractor, etc., has 21 or more employees. (See § 4.2(C).)

REGULATION #8: AMENDMENTS

8.1 General

In some cases, an agreement that is not subject to the MCO may become subject to the ordinance when that agreement is amended. If an amendment to a previously exempt contract nullifies the basis for that contract's exemption, then the amendment must contain the MCO provisions. Note, however, that this applies only to amendments that: (i) extend the term of the contract; (ii) modify the total amount of payments due from the City under a Contract; (iii) modify the scope of services to be performed by a Contractor; or (iv) expand or relocate the premises covered under an Airport property contract.

Contracting Departments shall review amendments in the same manner set forth above for reviewing all other agreements. The OCA shall determine the applicability of the MCO to amendments in the same manner set forth above for all other agreements.

8.2 Agreements that Give the City a Unilateral Option to Renew

If an agreement is not yet subject to the provisions of the MCO but the services are performed by workers who earn less than the MCO wage rate, then the contracting department should not exercise any unilateral option to renew the agreement unless the contractor agrees to comply with the provisions of the MCO by incorporating the standard MCO contract language into the renewed agreement or through a supplemental agreement. If the contractor does not agree to comply with the MCO, then the contracting department could seek an exemption or waiver from the OCA, or could seek a contractor that will comply with the MCO.

REGULATION #9: THE MCO DECLARATION

9.1 The Form

The OCA has developed the "Minimum Compensation Ordinance (MCO) Declaration" (form P-50), referenced in Appendix A. By signing the form, the contractor states that it will comply with the MCO until further notice.

9.2. Declaration is optional because of the MCO contract language

City contracts contain a provision requiring the contractor to comply with the MCO and providing an assurance that the contractor is in compliance with the MCO. By signing the contract, the contractor satisfies the MCO's §12P.6(g) requirement for a procedure for obtaining the contractor's assurance to comply with the MCO.

The City has developed the MCO declaration as an administrative convenience. A contractor is not required to sign the declaration to receive a City contract. If a contractor has signed the Declaration, then a department can assume that the contractor is familiar with the MCO and is aware of its obligations under the MCO.

9.3. Promulgation and revisions

The OCA is responsible for drafting and promulgating the MCO Compliance Declaration. The OCA, at its option, may revise the Declaration and may solicit public comment when it considers such revisions.

REGULATION #10: RECORDKEEPING AND REPORTS

Administration, monitoring, and enforcement of the MCO require that Contractors, Subcontractors, and the City maintain records. This regulation ensures that employers retain records sufficient to document that the employers have provided the MCO benefits to covered employees. Employers must make these records available for inspection to the City upon request. Employers must make an employee's record available for inspection to that employee upon request.

10.1 Contractors' Records

Contractors shall maintain, and shall require subcontractors on subcontracts covered by the MCO to maintain, payroll records containing the following information, at a minimum, on covered employees:

- Name
- Address
- Date of hire
- Job classification
- Rate of pay
- Paid and unpaid time off (accrued and taken)
- Hours worked on an the MCO contract, for each pay period in which an employee qualified as a "covered employee."

Contractors and subcontractors must maintain the records referred to in this Regulation for three years after the City's final payment on the contract.

10.2 Reports from Contractors

The OCA may require contractors to submit periodic reports documenting their compliance with the MCO. The OCA shall prescribe the content of the reports.

10.3 Department Records

Departments shall maintain the following records for at least three years after the close of a contract subject to the MCO:

- Contractor's documentation of number of employees (original).
- Waiver, approved or disapproved by the OCA (original).
- Exemption request (original).

REGULATION #11: MONITORING AND INVESTIGATION

The provisions of these Rules and Regulations will augment the contracting department's normal and customary procedure for administering its contracts. The OCA shall administer, monitor, and enforce the requirements of the MCO as follows:

11.1 General approach

It is the policy of the OCA that issues and complaints be resolved at the lowest possible level; however, the OCA shall be notified of all complaints and any proposed resolution of said complaints.

OCA may investigate complaints whether on referral or on its own volition.

11.2 Review of Agreements

The OCA will be available to review all agreements in cooperation with the contracting department to ensure that relevant language and documents are included. The contracting department shall incorporate the standard MCO contract language referred to in Appendix A into subject agreements. If a contracting department fails to include the required MCO language in an agreement, the OCA will meet with the department head and require the department's compliance.

11.3 Employer Monitoring

The OCA will monitor the operations of employers to ensure compliance by conducting site visits and payroll audits. The OCA may review the provision of wages and benefits by an employer as part of the site visits. An employer shall cooperate with the OCA when a meeting, a site visit, or documentation is requested by the OCA as part of its review. Cooperation includes providing the OCA with: (1) full access to the work site for employer and employee interviews; (2) full access to certified payrolls, timesheets, benefit statements, employee policy manuals, and any other document that would assist the OCA in determining if an employer is providing or has provided the wages and benefits required by the MCO. Requests by the OCA for meetings, site visits, employee interviews, and documents shall be made with reasonable notice. The OCA shall notify the contracting department of each site visit.

OCA may require employers to submit periodic reports of covered employees, including their names and job classifications.

11.4 Employer Review in Response to Specific Concerns or Complaints

The OCA will perform an investigation when there is a specific concern or complaint about an employer. If an employee alleges non-compliance with the MCO or retaliation by the contractor as a result of the allegation, the OCA shall initiate the investigation pursuant to Regulation #13.

11.5 Employer's Failure to Reasonably Cooperate

If an employer fails to produce requested documentation, fails to allow access to the work site or the employees for employee interviews, or otherwise unreasonably fails to cooperate with the OCA, then the OCA may consider the contractor to be out of compliance with the MCO. In addition to the remedies provided in the MCO, the OCA may request that the Controller's Office withhold payments to the employer until the employer cooperates.

REGULATION #12: ENFORCEMENT

12.1 Notice to Employer of MCO Violations

If the OCA determines that the employer has violated or is not in compliance with the MCO, then the OCA will notify the employer of the determination and allow the employer 30[1] working days to correct the violation. The OCA may, in its discretion, allow the employer additional time beyond the 30 working days to make the corrections if the employer demonstrates to the OCA that a good faith effort to comply has been made. The OCA shall notify the contracting department of the employer's failure to comply with the MCO and of the deadline by which corrections must be made.

12.2 Failure to Correct or Comply

If the violation or failure to comply continues and no resolution is imminent, then the OCA, in cooperation with the Controller's Office, the City Attorney and the contracting department, may pursue available remedies including the withholding of contract payments; termination of the contract for cause; debarment from future City agreements, leases, licenses for three (3) years; and any other remedy that may be available to the City. (See §12P.6(c) of the MCO.)

12.3 Prime Contractors Responsible for Subcontractors

Prime contractors shall be responsible for ensuring that violations of the MCO by their subcontractors or sublessees are cured within the time stated in the OCA's notice to correct the violation. If the subcontractor or sublessee fails or refuses to comply or to correct the breach, then the OCA may consider the prime contractor to be out of compliance with the MCO.

REGULATION #13: EMPLOYEE COMPLAINT PROCESS

A Covered Employee may report to the OCA in writing any alleged breach by a Contractor of the MCO. All Complaints under the MCO from Covered Employees shall be submitted to the OCA or to the Contracting Department.

13.1 Standards for Complaints

To initiate a formal investigation by the OCA, the Covered Employee must sign and submit a Minimum Compensation Ordinance Complaint form (form P-35), referenced in Appendix A. Complaints made by Contracting Departments, other Contractors, other Covered Employees, or other parties on behalf of a specific Covered Employee may not be investigated as Complaints; provided however, that nothing herein shall preclude the OCA from obtaining any information or taking any action it deems appropriate to ensure compliance under the MCO.

Complaints must be made in writing and may be made in any format, but are preferred on the official MCO complaint form. Specific descriptions of the complaint/breach are preferred in the Employee's own words; however, Employees may receive assistance from their representative or designee, or from the intake staff and/or Investigator in order to describe their complaint more clearly and succinctly. The City will either: (1) print the complaint form in languages spoken by a significant number of covered employees; or (2) make other arrangements for employees who will file their complaint in other languages.

Employees are encouraged to provide documentation or other evidence supporting their claims. Such documentation may include copies of pay stubs or records, requests or approvals for time off, employee handbooks or personnel manuals, statements of witnesses (including other employees or supervisors) or other personnel records or information which support their claims. Employees are encouraged to describe their complaints succinctly, to list their claims chronologically, and to be as specific as possible in detailing exact amounts, dates, or other information relative to their complaint. Complaints should be filed immediately upon the discovery of the breach, and preferably within 30 and no longer than 60 days of discovery of the alleged breach. However, Covered Employees may report breaches at any time after their discovery.

13.2 Investigation of Complaints by the OCA

If a Covered Employee makes a Complaint, the OCA shall investigate it in the following manner:

(A) Initial Review

Initially, the OCA shall determine the following:

1. If the Employee's work is covered by the MCO.

2. If the form of the Complaint is complete, i.e., contains all information necessary to pursue the investigation, such as Employee and Contractor names and addresses, the type of complaint, a description of complaint, and the Employee's signature and date.
3. If immediate findings can be made.
4. If further documentation and/or investigation is needed, and of what type.

(B) Further Investigation

The Investigator shall proceed immediately to conduct any further investigation reasonably warranted to resolve the Complaint, unless the Investigator determines that immediate findings can be made. This investigation shall include requesting information and documentation from the Contracting Department and the Contractor, conducting interviews of relevant parties, and conducting site visits or spot checks to the Contracting Department and/or Contractor. The Investigator shall provide the Contractor an opportunity to respond to the Complaint.

The Investigator shall endeavor to complete the investigation within 30 days of receiving the Complaint.

(C) Confidentiality Requirements

The OCA shall provide written notice to the Covered Employee reporting the breach that the MCO states:

> "To ensure compliance with this Chapter and to enhance the monitoring activities of the OCA, the City desires to encourage reporting by Covered Employees pursuant to this subsection. The OCA shall keep confidential, to the maximum extent permitted by applicable laws, the Covered Employee's name and other identifying information."

The OCA shall make reasonable efforts to maintain the confidentiality of payroll information obtained in the course of handling complaints, and shall disclose information only as necessary for enforcement purposes, or for purposes of complying with Sunshine Act or other applicable public records laws.

The OCA shall maintain records on the number, type, status and resolution of all Complaints and shall make such status reports available to the public by the 15th calendar day of each month for the preceding month. Such reports shall only contain aggregate data and shall not violate the confidentiality of Employees. By August 1 of each year, the OCA shall make available to the public an annual report on complaints, including such analysis and recommendations as it deems necessary to further the intent of the MCO.

13.3 The OCA Determination of Merit

Upon the conclusion of the investigation, the investigator shall report to the OCA the evaluation as to whether a violation of the MCO has occurred. This report shall include appropriate recommendations as to any action that the OCA should take, including what restitution shall be due to the Covered Employee, if any. Such a report also shall include a summary of the evidence presented. The OCA shall then make a determination as to whether a Contractor is in breach of the MCO, and if so, shall determine appropriate remedies.

The agency shall notify the Contracting Department, Contractor, and Complainant, summarizing evidence and specifying remedies required. Such notice shall also advise the Contractor that it has 30 days to cure the breach, or the City will pursue its rights under the contract and applicable law.

13.4 Hearing upon Employee Request

If the OCA determines that no breach has occurred, or if the OCA fails to obtain the cure of a breach by the Contractor within 60 days after receipt of notice by the Covered Employee, the Covered Employee may request an administrative review hearing.

(A) Request; Notice; Attendance

The Covered Employee must request such a hearing within 90 days after giving written notice of the breach. Such a request for a hearing must be made in writing and received by the OCA within the 90 calendar days specified in the MCO. Such a request must contain the name, address, and phone number of the employee and of the Contractor, the date of the initial Complaint of the breach to the OCA and the Contractor, and a brief summary of the type of complaint/breach, the dates during which it occurred, and, if the Employee wishes, a proposed restitution and/or remedy.

The OCA shall make reasonable attempts to schedule the hearing at a time that is convenient to all parties, including scheduling hearings outside of regular business hours. The OCA shall notify Contractor, and Complainant and the Contracting Department of the scheduled hearing. Such notification shall be made in writing within 14 days of the OCA's receipt of the Employee's request for a hearing. At the same time, the OCA shall also notify the Contracting Department in writing of the request for a hearing. The hearing shall be conducted by an impartial individual appointed by the OCA to act as Hearing Officer.

The Complainant may attend the hearing personally, or appoint a designated representative to act on the Complainant's behalf. Such representative may be an attorney, union representative, or any person designated by the Employee. The Employee may at any time terminate his/her representative and select another, or represent himself/herself.

If a Complainant fails to attend a regularly noticed hearing without good cause, the employee shall be deemed by the Hearing Officer to have withdrawn the request for a hearing. If a Contractor fails to attend a noticed hearing without good cause, the hearing shall be held in the Contractor's absence.

(B) Hearing Procedures

Hearings under this Regulation shall be conducted in the following manner:

(1) The Hearing Officer shall open the hearing, stating the date and time, and identifying the participants.

(2) Administrative hearings shall be conducted informally for the purpose of accurately determining the facts of the dispute. Each participant shall have the opportunity to

present documentary and/or testimonial evidence in support of its position, as well as the opportunity to cross-examine witnesses. The burden of proving that a breach has occurred lies with the Complainant. If the OCA determines that a breach has occurred, the burden of proof to show that it has been cured then lies with the Contractor. The Hearing Officer shall set forth the procedure for the presentation of evidence. The Hearing Officer shall receive non-cumulative evidence of the type that responsible persons would customarily rely upon in the conduct of serious business, even though such evidence may not be admissible in court over objection.

(3) The Hearing Officer shall make a determination, and provide notice of such determination to the Employee, Contractor, the OCA, and Contracting Department within seven days following the date that the Hearing Officer finds the hearing closed.

(4) The Hearing officer shall issue a written decision recommending a disposition of the employee's appeal to the OCA. Such decisions shall be served on all parties to the dispute. Each of the parties will have an opportunity to submit written exceptions or objections to the proposed resolution within ten days to the OCA. The OCA may accept, reject in its entirety, or accept with modifications, the recommendation of the hearing officer. The decision of the OCA shall constitute the final step in the appeal procedure.

(5) The decision of the OCA, or of the Hearing Officer if no exceptions are made, shall be final, and not appealable through administrative adjudication. Further actions may only be taken as provided for in the MCO, through the Superior Court of the State of California.

(6) If the OCA, or the Hearing officer if no exceptions are made, finds that there is a breach, and such breach is not cured within 21 days thereafter, then the City shall issue a "Right to Sue Letter" which is a prerequisite to the Employee's filing an action (lawsuit) against the Employer. However, if the City has obtained compliance within the 21-day waiting period and provided notice to the Covered Employee of that action, then the City shall not issue a "Right to Sue" letter.

(7) If the OCA, or the Hearing officer if no exceptions are made, finds that no breach has occurred, the City will not issue a "Right to Sue Letter."

(C) Retaliation

Employers may not retaliate against any employee because the employee makes any inquiry of the employer or the City regarding the MCO, or makes any attempt to assert the employee's rights under the MCO. If an employer takes adverse action against an employee within 60 days of the employee's assertion of MCO rights, a rebuttable presumption shall arise that the action was done in retaliation for the assertion of those rights.

(D) Employer's Inadvertent Violation of the MCO

If the City finds that an employer's violation of the MCO was inadvertent, then the City will not assess civil penalties against the employer.

13.5 Employer's internal complaint resolution procedures

The City encourages an employee to pursue its employer's internal complaint resolution procedures before filing an MCO complaint with the OCA. However, the OCA will investigate MCO complaints even if an employee has not exhausted the employer's internal procedures.

APPENDIX A: APPROVED CITY MODEL CONTRACTS AND FORMS

The following Model Agreements contain the MCO provisions, and have been approved for use by the OCA. Contracting Departments are responsible for ensuring the use of these forms in implementing the MCO.

- P-500: Professional Service Contract
- P-520: Equipment Maintenance Agreement
- P-542: Software Development Agreement
- P-550: Contract Amendment
- P-590: Request for Proposal
- G-100: Grant Agreement
- P-250: Purchase Order

The following forms are related to the MCO:

- P-35: MCO Complaint Form
- P-40: MCO Employee Notice
- P-50: MCO Declaration
- P-360: MCO Exception and Waiver Request

These documents may be amended from time to time by the OCA.

APPENDIX B: THE MCO WEBSITE

The OCA has developed a website related to the MCO. The URL is: "http://sfgov.org/lwlh." The website has the following buttons:

- Information & Help for Workers
- Information & Help for Contractors
- Information & Help for Contractors and SFO
- Frequently Asked Questions, "FAQs"
- Complete Text of Ordinance
- Implementation Rules
- Forms
- Contact Us

[1] Revised April 2002. Page 25, Rules and Regulation #12 Enforcement, Section 12.1, Notice to Employer of MCO Violation , revised to 30 days, previously stated 10 days.