

This document contains legal advice from the City Attorney, as well as editorial instructions. The legal advice is **in red**, and the editorial instructions are **in green**.

It is critical that you delete all legal advice before sharing a draft contract with a vendor.

The editorial instructions, in green, must be deleted before you finalize the contract, but they can be in the draft contract you share with the vendor. We recommend, though, that you fill in as many of the blanks, and delete as many of the green instructions as possible, before you send the draft to the vendor.

If you use Track Changes as you draft the document, be sure you Accept All Changes as you finalize the document and perhaps earlier. To do that:

- hit Control-a
- put the mouse on the Accept Change icon on the Reviewing toolbar (it has a check mark on it)
- click the down arrow to see the dropdown menu
- highlight Accept All Changes in Document, and click the mouse.

If the Reviewing toolbar is not visible, go to Tools, Customize check Reviewing, and click Close.

If you use Track Changes as you delete text, the next reader can view what you've deleted if you don't Accept All Changes before you save the file.

Formatting: When you're finished filling in all the blanks, remember to change the color to automatic, and don't bold the font unless it's necessary. Remember to modify the footers as well as the body of the document. Making changes via Ctl-A in the main body doesn't change the footers.

The pagination in the footer is "# of 14," and when you get to the signature page, you'll see "16 of 14." Be not chagrined. When you delete the legal advice, editorial advice and the optional language, the final contract will probably be 14 pages long. Tweak the page numbering as necessary when the contract is close to its final length.

**City and County of San Francisco
Office of Contract Administration
Purchasing Division
City Hall, Room 430
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4685**

**Software Maintenance Attachment
for Agreements between the City and County of San Francisco and**

[insert name of contractor]

This Software Maintenance Attachment (“Attachment”) is appended to the [insert name of Software License or Maintenance Agreement] between the City and County of San Francisco (“City”) and [insert name of contractor] (“Contractor”), dated _____ . The terms and conditions of this Attachment are referenced in and incorporated into the [insert name of Software License or Maintenance Agreement] between City and Contractor. City and Contractor agree that the terms and conditions of this Attachment cover support and maintenance services to be provided by Contractor to City, for the computer programs and user manuals listed in Exhibit A to this Agreement.

1. Definitions. Where any word or phrase defined below, or a pronoun used in place thereof, is used in any part of this Attachment, it shall have the meaning herein set forth.

Effective Date	Date upon which the Controller has certified to the availability of funds and the Contractor has been notified in writing or the Software is received and installed at the customer site, whichever is later.
Errors, Defects and Malfunctions	Either a deviation between the function of the Software and the documentation furnished by Contractor for the Software, or a failure of the Software which degrades the use of the Software.
Fix	Repair or replacement of source, object or executable code in the Software to remedy an Error, Defect or Malfunction.
Maintenance Agreement	this Software Maintenance Attachment and [list any other exhibits] which together specify the terms and conditions for the correction of software Errors, Defects and Malfunctions in the Software, for the provision of Upgrades to the Software, and for the provision of Support Services to end users of the Software.
Patch	Temporary repair or replacement of code in the Software to remedy an Error, Defect or Malfunction. Patches may be made permanent and released in Subsequent Releases of the Software.
Priority Category	A priority assigned to an Error, Defect or Malfunction, designating the urgency of correcting an Error, Defect or Malfunction. Assignment of a Priority Category to an Error, Defect or Malfunction is based on City's determination of the severity of the Error, Defect or Malfunction and Contractor's reasonable analysis of the priority of the Error, Defect or Malfunction.
Priority Protocol	Based on the Priority Category, rules specifying the turnaround time for correcting Errors, Malfunctions and Defects; escalation procedures, and personnel assignment.

Software	Licensed programs and associated documentation licensed to City by [insert name of Licensor] , as listed in Exhibit A [insert the following if upgrades will be required] and any modification or Upgrades or modifications to the program(s) provided under this Maintenance Agreement.
Subsequent Release	A release of the Software for use in a particular operating environment which supersedes the Software. A Subsequent Release is offered and expressly designated by Contractor as a replacement to a specified Software product. A Subsequent Release will be supported by Contractor in accordance with the terms of this Software Maintenance Attachment. Multiple Subsequent Releases may be supported by Contractor at any given time.
Support Services	The Software support service required under this Maintenance Agreement. Support Services include correcting an Error, Defect or Malfunction; providing telephone and/or online support concerning the installation and use of the Software; training in the installation and use of the Software; on-site consulting and application development services; detection, warning and correction of viruses; and disabled/disabling code.
Upgrade	Either an enhancement to the Software code to add new features or functions to the system or software programming revisions containing corrections to Errors, Defects and Malfunctions that have been reported by users or discovered by the Contractor.
Warranty Period	A period commencing with the installation of the Software product during which reported Errors, Defects and Malfunctions for Software products are corrected without charge in accordance with the provisions below.
Workaround	A change in the procedures followed or end user operation of the software to avoid an Error, Defect or Malfunction without significantly impairing functionality or degrading the use of the Software.

Whenever the words “as directed,” “as required,” “as permitted,” or words of like effect are used, it shall be understood as the direction, requirement, or permission of the **[insert name of the department]**. The words “sufficient,” “necessary,” or “proper,” and the like, mean sufficient, necessary or proper in the judgment of the **[insert name of the department]**, unless otherwise indicated by the context.

2. Certification of Funds; Budget and Fiscal Provisions; Termination in the Event of Non-Appropriation. This Maintenance Agreement is subject to the budget and fiscal provisions of the City's Charter. Charges will accrue only after prior written authorization certified by the City's Controller, and any amount of the City's obligation hereunder shall not at any time exceed the amount certified for the purpose and period stated in such advance authorization. This Maintenance Agreement will terminate without penalty, liability or expense of any kind to City at the end of any fiscal year in the event funds are not appropriated for the next succeeding fiscal

year. If funds are appropriated for a portion of the fiscal year, this Maintenance Agreement will terminate, without penalty, liability or expense of any kind at the end of the term for which funds are appropriated.

THIS SECTION SHALL CONTROL AGAINST ANY AND ALL OTHER PROVISIONS OF THIS MAINTENANCE AGREEMENT.

3. Term of the Maintenance Agreement. Subject to Section 2, the term of this Maintenance Agreement shall be from [insert beginning date] to [insert termination date].

4. City's Payment Obligation. The City will make a good faith attempt to pay all invoices within 30 days of billing. However, in no event shall City be liable for interest or late charges for any late payments made after such 30 day period. Contractor and the City understand and intend that the obligations of the City to pay maintenance charges hereunder shall constitute a current expense of the City and shall not in any way be construed to be a debt of the City in contravention of any applicable constitutional or statutory limitations or requirements concerning the creation of indebtedness by the City, nor shall anything contained herein constitute a pledge of the general tax revenues, funds or monies of the City. The City shall pay maintenance charges, exclusively from legally available funds, to Contractor or, in the event of an authorized assignment by Contractor to its assignee, according to the terms of this Maintenance Agreement, upon presentation of invoices furnished by Contractor in a form acceptable to the Controller. Payments will be made by warrant drawn on the Treasurer of the City. In no event shall the amount of this Maintenance Agreement exceed [insert whole dollar amount in numbers and words –no pennies and no “.00”]. The breakdown of costs associated with this Maintenance Agreement appears in the agreement between City and Contractor, dated [insert date], to which this Attachment is attached.

5. Guaranteed Maximum Costs. The City's obligation hereunder shall not at any time exceed the amount certified by the Controller for the purpose and period stated in such certification. Except as may be provided by City ordinances governing emergency conditions, the City and its employees and officers are not authorized to request Contractor to perform services or to provide materials, equipment and supplies that would result in Contractor performing services or providing materials, equipment and supplies that are beyond the scope of the services, materials, equipment and supplies agreed upon in the contract unless the Maintenance Agreement is amended in writing and approved as required by law to authorize the additional services, materials, equipment or supplies. The City is not required to reimburse Contractor for services, materials, equipment or supplies that are provided by Contractor which are beyond the scope of the services, materials, equipment and supplies agreed upon in the contract and which were not approved by a written amendment to the Maintenance Agreement having been lawfully executed by the City. The City and its employees and officers are not authorized to offer or promise to Contractor additional funding for the contract which would exceed the maximum amount of funding provided for in the contract for Contractor's performance under the contract. Additional funding for the contract in excess of the maximum provided in the contract shall require lawful approval and certification by the Controller. The City is not required to honor any offered or promised additional funding for a contract which exceeds the maximum provided in the contract which requires lawful approval and certification of the Controller when the lawful approval and certification by the Controller has not been obtained. The Controller is not authorized to make payments on any contract for which funds have not been certified as available in the budget or by supplemental appropriation.

6. Payment; Invoice Format. Invoices furnished by Contractor under this Maintenance Agreement must be in a form acceptable to the Controller. Each invoice must contain a unique identifying number. All amounts paid by City to Contractor shall be subject to audit by City. Payment shall be made by City to Contractor at the address specified in the section entitled “Notices to the Parties.” City may withhold payment to Contractor in any instance in which Contractor has failed or refused to satisfy any material obligation provided for under this Maintenance Agreement.

7. Submitting False Claims; Monetary Penalties. Pursuant to San Francisco Administrative Code §21.35, any contractor, subcontractor or consultant who submits a false claim shall be liable to the City for the statutory penalties set forth in that section. The text of Section 21.35, along with the entire San Francisco Administrative Code is available on the web at <http://www.municode.com/Library/clientCodePage.aspx?clientID=4201>. A contractor, subcontractor or consultant will be deemed to have submitted a false claim to the City if the contractor, subcontractor or consultant: (a) knowingly presents or causes to be presented to an officer or employee of the City a false claim or request for payment or approval; (b) knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the City; (c) conspires to defraud the City by getting a false claim allowed or paid by the City; (d) knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the City; or (e) is a beneficiary of an inadvertent submission of a false claim to the City, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the City within a reasonable time after discovery of the false claim.

8. Taxes. Payment of any taxes, including possessory interest taxes and California sales and use taxes, levied upon this Maintenance Agreement, the transaction, or the services delivered pursuant hereto, shall be the obligation of Contractor. If this Maintenance Agreement entitles Contractor to the possession, occupancy or use of City real property for private gain, then the following provisions apply:

a. Contractor, on behalf of itself and any permitted successors and assigns, recognizes and understands that this Maintenance Agreement may create a possessory interest subject to property taxation and Contractor, and any permitted successor or assign, may be subject to the payment of such taxes.

b. Contractor, on behalf of itself and any permitted successors and assigns, further recognizes and understands that any assignment permitted hereunder and any exercise of any option to renew or other extension of this Maintenance Agreement may constitute a change in ownership for purposes of property taxation and therefore may result in a revaluation of any possessory interest created hereunder. Contractor shall report any assignment or other transfer of any interest in this Maintenance Agreement or any renewal or extension thereof to the County Assessor within sixty days after such assignment, transfer, renewal or extension.

c. Contractor further agrees to provide such other information as may be requested by the City to enable the City to comply with any reporting requirements under applicable law with respect to possessory interests.

9. Scope of Service Coverage

> The severity of the problem (for example, impact on the City's business or operations) should drive the type of support the vendor provides for new product releases. If there are severe problems remaining in an older product release, a software vendor will be reluctant to fix them, and instead will require users to upgrade to a new version of the software where the problem likely has been fixed.

The City can define the support requirement by first defining the severity of the problem in terms of whether the software (a) cannot be used; (b) is operational but not performing properly; or (c) is operational but has a minor malfunction. Then, based on the severity of the problem, the City can determine a reasonable timeframe in which the problem must be fixed. The following clause illustrates this:

This section may need to be tailored to conform to the Contractor's business terms for Software support.

a. Contractor shall provide Support Services **[and provide Upgrades]** during the term of this Maintenance Agreement for the Software.

b. During the term of this Maintenance Agreement, Contractor will furnish Error, Defect or Malfunction correction in accordance with the Priority Categories listed below, based on the City's determination of the severity of the Error, Defect or Malfunction and Contractor's reasonable analysis of the priority of the Error, Defect or Malfunction.

1) Priority 1: An Error, Defect or Malfunction which renders the Software inoperative; or causes the Software to fail catastrophically.

2) Priority 2: An Error, Defect or Malfunction which substantially degrades the performance of the Software, but does not prohibit the City's use of the Software.

3) Priority 3: An Error, Defect or Malfunction which causes only a minor impact on the use of the Software.

c. Contractor will furnish Error, Defect or Malfunction correction in accordance with the following protocols:

1) Priority 1 Protocol: Within two hours, Contractor assigns a product technical specialist(s) to diagnose and correct the Error, Defect or Malfunction; thereafter, Contractor shall provide ongoing communication about the status of the correction; shall proceed to immediately provide a Fix, a Patch or a Workaround; and exercise all commercially reasonable efforts to include a Fix or Patch for the Error, Defect or Malfunction in the next Subsequent Release. Contractor will escalate resolution of the problem to personnel with successively higher levels of technical expertise until the Error, Defect or Malfunction is corrected.

2) Priority 2 Protocol: Within four hours, Contractor assigns a product technical specialist(s) to diagnose the Error, Defect or Malfunction and to commence correction of the Error, Defect or Malfunction; to immediately provide a Workaround; to provide escalation procedures as reasonably determined by Contractor's staff; and to exercise all commercially reasonable efforts to include a Fix or Patch for the Error, Defect or Malfunction in the next Software maintenance release.

3) Priority 3 Protocol: Contractor may include a Fix or Patch in the next Software major release.

10. Hotline Support. Contractor shall provide remote access hotline support to City to help City answer routine questions with respect to the use of the Software. Contractor also shall provide remote access hotline support to City to initiate resolution of Priority 1 and Priority 2 Errors, Defects and Malfunctions. Hotline support shall be made available by phone between the hours of 8 a.m. and 6 p.m. Pacific time Monday through Friday, except legal holidays. Hotline support shall be available by electronic bulletin board, electronic mail or other service 24-hours a day, seven-days a week. Responses to questions posted by electronic means will be made within the time frame established under Priority Protocols for an Error, Defect or Malfunction in a Software Product.

> If the City uses the above classifications of Errors, Defects or Malfunctions based on severity, then hotline support could also be provided based on the same classifications.

Alternatively, hotline support can be used only to answer minor or routine questions posed by end users. In this case, clause 10.2 should be deleted, and in its place the text “This section left blank by agreement between the parties” should be substituted.

The software maintenance provider may have established hotline support hours for all end users. Some vendors provide free service for all users; however, there may be a long wait for a telephone support technician. Many vendors provide, upon the software user’s payment of an additional fee, access to a special phone number that gives faster access to support technicians.

11. City Responsibilities Related to Support. City shall use reasonable efforts to make available to Contractor reasonable access to the equipment on which City experienced the Error, Defect or Malfunction, the Software Product and all relevant documentation and records. City shall also provide reasonable assistance to Contractor, including sample output and diagnostic information, in order to assist Contractor in providing Support Services. City shall be responsible for the interface between the Software and other software products installed on City equipment. Unless otherwise agreed in writing between City and Contractor, City is responsible for installing, managing and operating any Software delivered under this Maintenance Agreement.

12. Payment Does Not Imply Acceptance of Work. The granting of any payment by City, or the receipt thereof by Contractor, shall in no way lessen the liability of the Contractor to replace unsatisfactory work, equipment, or materials although the unsatisfactory character of such work, equipment or materials may not have been apparent or detected at the time such payment was made. Materials, equipment, components, or workmanship that did not conform to the requirements of this Maintenance Agreement may be rejected by City and in such case must be replaced by Contractor without delay.

13. Qualified Personnel. Work under this Maintenance Agreement shall be performed only by competent personnel under the supervision of and in the employment of Contractor. Contractor will comply with City’s reasonable requests regarding assignment of personnel, but all personnel, including those assigned at City’s request, must be supervised by Contractor. Contractor shall assign adequate personnel resources to provide the level of service within the response times specified in this Maintenance Agreement.

14. Responsibility for Equipment. City shall not be responsible for any damage to persons or property as a result of the use, misuse or failure of any equipment used by Contractor, or by any of its employees, even though such equipment be furnished, rented or loaned to Contractor by City.

□ The City may be liable for monetary penalties under the Occupational Safety and Health Act (OSHA). Under certain circumstances, the City may be cited for injuries to Contractor's employees working for City. The Department should check with the City Attorney's office to help delineate the responsibility for safety of the workplace according to the particulars of this contract.

15. Independent Contractor; Payment of Taxes and Other Expenses

a. **Independent Contractor.** Contractor or any agent or employee of Contractor shall be deemed at all times to be an independent contractor and is wholly responsible for the manner in which it performs the services and work requested by City under this Maintenance Agreement. Contractor or any agent or employee of Contractor shall not have employee status with City, nor be entitled to participate in any plans, arrangements, or distributions by City pertaining to or in connection with any retirement, health or other benefits that City may offer its employees. Contractor or any agent or employee of Contractor is liable for the acts and omissions of itself, its employees and its agents. Contractor shall be responsible for all obligations and payments, whether imposed by federal, state or local law, including, but not limited to, FICA, income tax withholdings, unemployment compensation, insurance, and other similar responsibilities related to Contractor's performing services and work, or any agent or employee of Contractor providing same. Nothing in this Maintenance Agreement shall be construed as creating an employment or agency relationship between City and Contractor or any agent or employee of Contractor. Any terms in this Maintenance Agreement referring to direction from City shall be construed as providing for direction as to policy and the result of Contractor's work only, and not as to the means by which such a result is obtained. City does not retain the right to control the means or the method by which Contractor performs work under this Maintenance Agreement.

b. **Payment of Taxes and Other Expenses.** Should City, in its discretion, or a relevant taxing authority such as the Internal Revenue Service or the State Employment Development Division, or both, determine that Contractor is an employee for purposes of collection of any employment taxes, the amounts payable under this Maintenance Agreement shall be reduced by amounts equal to both the employee and employer portions of the tax due (and offsetting any credits for amounts already paid by Contractor which can be applied against this liability). City shall then forward those amounts to the relevant taxing authority. Should a relevant taxing authority determine a liability for past services performed by Contractor for City, upon notification of such fact by City, Contractor shall promptly remit such amount due or arrange with City to have the amount due withheld from future payments to Contractor under this Maintenance Agreement (again, offsetting any amounts already paid by Contractor which can be applied as a credit against such liability). A determination of employment status pursuant to the preceding two paragraphs shall be solely for the purposes of the particular tax in question, and for all other purposes of this Maintenance Agreement, Contractor shall not be considered an employee of City. Notwithstanding the foregoing, should any court, arbitrator, or administrative

authority determine that Contractor is an employee for any other purpose, then Contractor agrees to a reduction in City's financial liability so that City's total expenses under this Maintenance Agreement are not greater than they would have been had the court, arbitrator, or administrative authority determined that Contractor was not an employee.

16. Insurance

a. Without in any way limiting Contractor's liability pursuant to the "Indemnification" section of this Agreement, Contractor must maintain in force, during the full term of the Agreement, insurance in the following amounts and coverages:

> The following types and amounts of insurance are those most commonly required in City contracts, but departments should tailor the types and amounts of insurance to the particular risks of each contractor's services. For example, if the contractor would deliver fuel, transport hazardous waste, or operate aircraft, higher policy limits would be necessary. Please contact the City's Risk Manager with specific questions, and do this early in the contracting process, such as before a bid or RFP is made public.

Any reductions below these coverages require the approval of the City's Risk Manager.

It is important to avoid unnecessarily high insurance requirements, which could be a barrier to small businesses and LBEs doing business with the City.

1) Workers' Compensation, in statutory amounts, with Employers' Liability Limits not less than \$1,000,000 each accident, injury, or illness; and

2) Commercial General Liability Insurance with limits not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Contractual Liability, Personal Injury, Products and Completed Operations; and

3) Commercial Automobile Liability Insurance with limits not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Owned, Non-Owned and Hired auto coverage, as applicable.

b. Commercial General Liability and Commercial Automobile Liability Insurance policies must be endorsed to provide:

1) Name as Additional Insured the City and County of San Francisco, its Officers, Agents, and Employees.

2) That such policies are primary insurance to any other insurance available to the Additional Insureds, with respect to any claims arising out of this Agreement, and that insurance applies separately to each insured against whom claim is made or suit is brought.

c. Regarding Workers' Compensation, Contractor hereby agrees to waive subrogation which any insurer of Contractor may acquire from Contractor by virtue of the payment of any loss. Contractor agrees to obtain any endorsement that may be necessary to effect this waiver of subrogation. The Workers' Compensation policy shall be endorsed with a waiver of subrogation in favor of the City for all work performed by the Contractor, its employees, agents and subcontractors.

d. All policies shall provide ten days' advance written notice to the City of reduction or nonrenewal of coverages or cancellation of coverages for any reason. Notices shall be sent to the City address in the "Notices to the Parties" section.

e. Should any of the required insurance be provided under a claims-made form, Contractor shall maintain such coverage continuously throughout the term of this Agreement and, without lapse, for a period of three years beyond the expiration of this Agreement, to the effect that, should occurrences during the contract term give rise to claims made after expiration of the Agreement, such claims shall be covered by such claims-made policies.

f. Should any of the required insurance be provided under a form of coverage that includes a general annual aggregate limit or provides that claims investigation or legal defense costs be included in such general annual aggregate limit, such general annual aggregate limit shall be double the occurrence or claims limits specified above.

g. Should any required insurance lapse during the term of this Agreement, requests for payments originating after such lapse shall not be processed until the City receives satisfactory evidence of reinstated coverage as required by this Agreement, effective as of the lapse date. If insurance is not reinstated, the City may, at its sole option, terminate this Agreement effective on the date of such lapse of insurance.

h. Before commencing any operations under this Agreement, Contractor shall furnish to City certificates of insurance and additional insured policy endorsements with insurers with ratings comparable to A-, VIII or higher, that are authorized to do business in the State of California, and that are satisfactory to City, in form evidencing all coverages set forth above. Failure to maintain insurance shall constitute a material breach of this Agreement.

i. Approval of the insurance by City shall not relieve or decrease the liability of Contractor hereunder.

j. (Reserved)

> **Do not insert subparagraph k. until after a waiver has been granted by the Risk Manager.**

k. Any of the terms of conditions of this Section 16 may be waived by the City's Risk Manager in writing, and attached to this Agreement as Appendix C. Such waiver is fully incorporated herein. The waiver shall waive only the requirements that are expressly identified and waived, and under such terms and conditions as stated in the waiver.

17. Indemnification. Contractor shall indemnify and save harmless City and its officers, agents and employees from, and, if requested, shall defend them against any and all loss, cost, damage, injury, liability, and claims thereof for injury to or death of a person, including employees of Contractor or loss of or damage to property, arising directly or indirectly from Contractor's performance of this Maintenance Agreement, including, but not limited to, Contractor's use of facilities or equipment provided by City or others, regardless of the negligence of, and regardless of whether liability without fault is imposed or sought to be imposed on City, except to the extent that such indemnity is void or otherwise unenforceable under applicable law in effect on or validly retroactive to the date of this Maintenance Agreement and except where such loss, damage, injury, liability or claim is the result of the

active negligence or willful misconduct of City and is not contributed to by any act of, or by any omission to perform some duty imposed by law or agreement on Contractor, its sublicensees or either's agent or employee. The foregoing indemnity shall include, without limitation, reasonable fees of attorneys, consultants and experts and related costs and City's costs of investigating any claims against the City. In addition to Contractor's obligation to indemnify City, Contractor specifically acknowledges and agrees that it has an immediate and independent obligation to defend City from any claim which actually or potentially falls within this indemnification provision, even if the allegations are or may be groundless, false or fraudulent, which obligation arises at the time such claim is tendered to Contractor by City and continues at all times thereafter. Contractor shall indemnify and hold City harmless from all loss and liability, including attorney's fees, court costs and all other litigation expenses for any infringement of the patent rights, copyright, trade secret or any other proprietary right or trademark and all other intellectual property claims of any person or persons in consequence of the use by City, or any of its officers or agents, of articles or services to be supplied in the performance of this Maintenance Agreement.

18. Liability of City. CITY'S PAYMENT OBLIGATIONS UNDER THIS MAINTENANCE AGREEMENT SHALL BE LIMITED TO THE PAYMENT OBLIGATION PROVIDED FOR IN SECTION 4 OF THIS MAINTENANCE AGREEMENT. NOTWITHSTANDING ANY OTHER PROVISION OF THIS MAINTENANCE AGREEMENT, IN NO EVENT SHALL CITY BE LIABLE, REGARDLESS OF WHETHER ANY CLAIM IS BASED ON CONTRACT OR TORT, FOR ANY SPECIAL, CONSEQUENTIAL, INDIRECT OR INCIDENTAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOST PROFITS, ARISING OUT OF OR IN CONNECTION WITH THIS MAINTENANCE AGREEMENT OR THE SERVICES PERFORMED IN CONNECTION WITH THIS MAINTENANCE AGREEMENT.

19. Default. Failure or refusal of Contractor to perform or do any act herein required shall constitute a default. In the event of any default, in addition to any other remedy available to the City, this Maintenance Agreement may be terminated by the City upon ten days' written notice. Such termination does not waive any other legal remedies available to the City.

20. Support Service Term and Termination for Convenience

a. **Commencement.** Support Services for the Software begin on the Effective Date for the Software.

b. **Termination for Cause.** In the event Contractor fails to perform any of its obligations under this Maintenance Agreement, this Maintenance Agreement may be terminated and all of Contractor's rights hereunder ended. Termination will be effective after ten days written notice to Contractor. In the event of such termination, Contractor will be paid for those services performed under this Maintenance Agreement to the satisfaction of the City, up to the date of termination. However, City may offset from any such amounts due Contractor any costs City has or will incur due to Contractor's non-performance. Any such offset by City will not constitute waiver of any other remedies City may have against Contractor for financial injury or otherwise.

c. **Termination for Convenience.** City shall have the option, in its sole discretion, to terminate this Maintenance Agreement, at any time during the term thereof, for City's convenience and without cause by giving Contractor thirty days written notice of such

termination. In the event of such termination, Contractor will be paid for those services performed, pursuant to this Maintenance Agreement, to the satisfaction of the City up to the date of termination. In no event will City be liable for costs incurred by Contractor after receipt of notice of termination. Such non-recoverable costs include, but are not limited to, anticipated profits on this Maintenance Agreement, post-termination employee salaries, post-termination administrative expenses, or any other cost which is not authorized or reasonable under this section.

21. Rights and Duties Upon Termination or Expiration. This Section and the following Sections of the Maintenance Agreement shall survive termination or expiration of this Maintenance Agreement:

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| 7. Submitting False Claims; Monetary Penalties | 25. Audit and Inspection of Records. |
| 8. Taxes. | 26. Subcontracting. |
| 12. Payment Does Not Imply Acceptance of Work. | 27. Assignment. |
| 14. Responsibility for Equipment. | 34. Provisions Controlling. |
| 15. Independent Contractor; Payment of Taxes and Other Expenses | 35. Entire Agreement; Modifications |
| 16. Insurance | 37. Non-Waiver of Rights. |
| 17. Indemnification. | 38. Governing Law. |
| | 41. Protection of Private Information. |

Subject to the immediately preceding sentence, upon termination of this Maintenance Agreement prior to expiration of the term specified in Section 3, this Maintenance Agreement shall terminate and be of no further force or effect. Contractor shall transfer title to City, and deliver in the manner, at the times, and to the extent, if any, directed by City, any work in progress, completed work, supplies, equipment, and other materials produced as a part of, or acquired in connection with the performance of this Maintenance Agreement, and any completed or partially completed work which, if the Maintenance Agreement had been completed, would have been required to be furnished to the City. This subsection shall survive termination of this Maintenance Agreement.

22. Conflict of Interest. Through its execution of this Maintenance Agreement, Contractor acknowledges that it is familiar with the provision of Section 15.103 of the City's Charter, Article III, Chapter 2 of the City's Campaign and Governmental Conduct Code, and Section 87100 et seq. and Section 1090 et seq. of the Government Code of the State of California, and certifies that it does not know of any facts which constitutes a violation of said provisions and agrees that it will immediately notify the City if it becomes aware of any such fact during the term of this Maintenance Agreement.

23. Proprietary or Confidential Information of City. Contractor understands and agrees that, in the performance of the work or services under this Maintenance Agreement or in contemplation thereof, Contractor may have access to private or confidential information which may be owned or controlled by City and that such information may contain proprietary or confidential details, the disclosure of which to third parties may be damaging to City. Contractor agrees that all information disclosed by City to Contractor shall be held in confidence and used

only in performance of this Maintenance Agreement. Contractor shall exercise the same standard of care to protect such information as a reasonably prudent software developer would use to protect its own proprietary data.

24. Notices to Parties. Unless otherwise indicated elsewhere in this Maintenance Agreement, all written communications sent by the parties may be by U.S. mail, e-mail or fax, and shall be addressed as follows:

To City: **[name and title of department contact person]**
 [name of department]
 [mailing address]
 [e-mail address; fax number is optional]

To Contractor: **[name of contractor]**
 [mailing address]
 [e-mail address; fax number is optional]

Either party may change the address to which notice is to be sent by giving written notice thereof to the other party. If e-mail notification is used, the sender must specify a Receipt notice. Any notice of default must be sent by registered mail.

> You may want to consider including delivery by an overnight delivery service or courier as adequate notice for any of the above situations.

25. Audit and Inspection of Records. Contractor agrees to maintain and make available to the City, during regular business hours, accurate books and accounting records relating to its work under this Maintenance Agreement. Contractor will permit City to audit, examine and make excerpts and transcripts from such books and records, and to make audits of all invoices, materials, payrolls, records or personnel and other data related to all other matters covered by this Maintenance Agreement, whether funded in whole or in part under this Maintenance Agreement. Contractor shall maintain such data and records in an accessible location and condition for a period of not less than five years after final payment under this Maintenance Agreement or until after final audit has been resolved, whichever is later. The State of California or any federal agency having an interest in the subject of this Maintenance Agreement shall have the same rights conferred upon City by this Section.

26. Subcontracting. Contractor is prohibited from subcontracting this Maintenance Agreement or any part of it unless such subcontracting is first approved by City in writing. Neither party shall, on the basis of this Maintenance Agreement, contract on behalf of or in the name of the other party. An agreement made in violation of this provision shall confer no rights on any party and shall be null and void.

27. Assignment. The services to be performed by Contractor are personal in character and neither this Maintenance Agreement nor any duties or obligations hereunder may be assigned or delegated by the Contractor unless first approved by City by written instrument executed and approved in the same manner as this Maintenance Agreement.

28. Limitations on Contributions. Through execution of this Agreement, Contractor acknowledges that it is familiar with section 1.126 of the City's Campaign and Governmental Conduct Code, which prohibits any person who contracts with the City for the rendition of personal services, for the furnishing of any material, supplies or equipment, for the sale or lease of any land or building, or for a grant, loan or loan guarantee, from making any campaign contribution to (1) an individual holding a City elective office if the contract must be approved by the individual, a board on which that individual serves, or the board of a state agency on which an appointee of that individual serves, (2) a candidate for the office held by such individual, or (3) a committee controlled by such individual, at any time from the commencement of negotiations for the contract until the later of either the termination of negotiations for such contract or six months after the date the contract is approved. Contractor acknowledges that the foregoing restriction applies only if the contract or a combination or series of contracts approved by the same individual or board in a fiscal year have a total anticipated or actual value of \$50,000 or more. Contractor further acknowledges that the prohibition on contributions applies to each prospective party to the contract; each member of Contractor's board of directors; Contractor's chairperson, chief executive officer, chief financial officer and chief operating officer; any person with an ownership interest of more than 20 percent in Contractor; any subcontractor listed in the bid or contract; and any committee that is sponsored or controlled by Contractor. Additionally, Contractor acknowledges that Contractor must inform each of the persons described in the preceding sentence of the prohibitions contained in Section 1.126. . Contractor further agrees to provide to City the names of each person, entity or committee described above.

29. Drug-Free Workplace. Contractor acknowledges that pursuant to the Federal Drug Free Workplace Act of 1989, the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited on City premises. Contractor agrees that any violation of this prohibition by the Contractor, its employees, agents or assigns shall be deemed a material breach of contract.

30. Compliance with Americans with Disabilities Act. Contractor acknowledges that, pursuant to the Americans with Disabilities Act (ADA), programs, services and other activities provided by a public entity to the public, whether directly or through a contractor, must be accessible to the disabled public. Contractor shall provide the services specified in this Maintenance Agreement in a manner that complies with the ADA and any and all other applicable federal, state and local disability rights legislation. Contractor agrees not to discriminate against disabled persons in the provision of services, benefits or activities provided under this Maintenance Agreement and further agrees that any violation of this prohibition on the part of Contractor, its employees, agents or assigns will constitute a material breach of this Maintenance Agreement.

31. Sunshine Ordinance. In accordance with Section 67.24(e) of the San Francisco Administrative Code, contracts, Contractors' bids, responses to RFPs and all other records of communications between City and persons or firms seeking contracts shall be open to inspection immediately after a contract has been awarded. Nothing in this provision requires the disclosure of a private person's or organization's net worth or other proprietary financial data submitted for qualification for a contract or other benefit until and unless that person or organization is awarded the contract or benefit. Information provided which is covered by this paragraph will be made available to the public upon request.

32. Prohibition on Political Activity with City Funds. In accordance with San Francisco Administrative Code Chapter 12.G, Contractor may not participate in, support, or attempt to influence any political campaign for a candidate or for a ballot measure (collectively, “**Political Activity**”) in the performance of the services provided under this Maintenance Agreement. Contractor agrees to comply with San Francisco Administrative Code Chapter 12.G and any implementing rules and regulations promulgated by the City’s Controller. The terms and provisions of Chapter 12.G are incorporated herein by this reference. In the event Contractor violates the provisions of this section, the City may, in addition to any other rights or remedies available hereunder, (i) terminate this Maintenance Agreement, and (ii) prohibit Contractor from bidding on or receiving any new City contract for a period of two years. The Controller will not consider Contractor’s use of profit as a violation of this section.

33. Compliance with Laws. Contractor shall keep itself fully informed of the City's Charter, codes, ordinances and regulation of the City and of all state, and federal laws in any manner affecting the performance of this Maintenance Agreement, and must at all times comply with such local codes, ordinances, and regulations and all applicable laws as they may be amended from time to time.

34. Provisions Controlling. Contractor agrees that in the event of conflicting language between this “Software Maintenance Attachment” and Contractor's printed form, the provisions of this “Software Maintenance Attachment” shall take precedence.

35. Entire Agreement; Modifications. The Maintenance Agreement, together with the Appendices and/or Exhibits hereto, constitutes the entire Maintenance Agreement between the parties and this Maintenance Agreement may not be modified, nor may any of its terms be waived, except by written instrument executed and approved in the same manner as this Maintenance Attachment. All agreements between the parties are included herein and no promises or statements have been made by either party unless endorsed hereon in writing. No change or waiver of any provisions hereof shall be valid unless made in writing with the consent of both parties and executed in the same manner as this Maintenance Agreement. Should the application of any provision of this Maintenance Agreement to any particular facts or circumstances be found by a court of competent jurisdiction to be invalid or unenforceable, then (a) the validity of other provisions of this Maintenance Agreement shall not be affected or impaired thereby, and (b) such provision shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be reformed without further action by the parties to the extent necessary to make such provision valid and enforceable. Subject to the specific provisions of this Maintenance Agreement, this Maintenance Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and assigns.

36. Force Majeure. Contractor shall not be liable for failure to maintain Software when such failures are due to causes beyond its reasonable control, such as acts of God, acts of civil or military authority, fires, strikes, floods, epidemics, quarantine, war, riot, delays in transportation, care shortages, and inability due to causes beyond its reasonable control to obtain necessary labor, materials or manufacturing facilities, and in such event Contractor shall perform as soon as such cause is removed.

37. Non-Waiver of Rights. The waiver by either party of any breach by either party of any term, covenant or conditions hereof shall not operate as a waiver of any subsequent breach of the same or any other term, covenant or condition hereof.

38. Governing Law. This formation, interpretation and performance of this Maintenance Agreement shall be governed by the laws of the State of California. Venue for all litigation relative to the formation, interpretation and performance of this Maintenance Agreement shall be in San Francisco.

39. Construction. All section headings contained herein are for convenience and reference only and are not intended to define or limit the scope of any provision of this Maintenance Agreement.

40. Administrative Remedy for Agreement Interpretation. Should any question arise as to the meaning and intent of this Maintenance Agreement, the question shall, prior to any other action or resort to any other legal remedy, be referred to Purchasing who shall decide the true meaning and intent of this Maintenance Agreement.

41. Protection of Private Information. Contractor has read and agrees to the terms set forth in San Francisco Administrative Code Sections 12M.2, "Nondisclosure of Private Information," and 12M.3, "Enforcement" of Administrative Code Chapter 12M, "Protection of Private Information," which are incorporated herein as if fully set forth. Contractor agrees that any failure of Contractor to comply with the requirements of Section 12M.2 of this Chapter shall be a material breach of the Contract. In such an event, in addition to any other remedies available to it under equity or law, the City may terminate the Contract, bring a false claim action against the Contractor pursuant to Chapter 6 or Chapter 21 of the Administrative Code, or debar the Contractor.

42. Graffiti Removal. Graffiti is detrimental to the health, safety and welfare of the community in that it promotes a perception in the community that the laws protecting public and private property can be disregarded with impunity. This perception fosters a sense of disrespect of the law that results in an increase in crime; degrades the community and leads to urban blight; is detrimental to property values, business opportunities and the enjoyment of life; is inconsistent with the City's property maintenance goals and aesthetic standards; and results in additional graffiti and in other properties becoming the target of graffiti unless it is quickly removed from public and private property. Graffiti results in visual pollution and is a public nuisance. Graffiti must be abated as quickly as possible to avoid detrimental impacts on the City and County and its residents, and to prevent the further spread of graffiti. Contractor shall remove all graffiti from any real property owned or leased by Contractor in the City and County of San Francisco within forty eight (48) hours of the earlier of Contractor's (a) discovery or notification of the graffiti or (b) receipt of notification of the graffiti from the Department of Public Works. This section is not intended to require a Contractor to breach any lease or other agreement that it may have concerning its use of the real property. The term "graffiti" means any inscription, word, figure, marking or design that is affixed, marked, etched, scratched, drawn or painted on any building, structure, fixture or other improvement, whether permanent or temporary, including by way of example only and without limitation, signs, banners, billboards and fencing surrounding construction sites, whether public or private, without the consent of the owner of the property or the owner's authorized agent, and which is visible from the public right-of-way. "Graffiti" shall not include: (1) any sign or banner that is authorized by, and in compliance with, the applicable requirements of the San Francisco Public Works Code, the San Francisco Planning Code or the San Francisco Building Code; or (2) any mural or other painting or marking on the property that is protected as a work of fine art under the California Art Preservation Act (California Civil Code Sections 987 et seq.) or as a work of visual art under the Federal Visual Artists Rights Act of

1990 (17 U.S.C. §§ 101 et seq.). Any failure of Contractor to comply with this section of this Maintenance Agreement shall constitute a material breach of this Maintenance Agreement.

43. Food Service Waste Reduction Requirements. Contractor agrees to comply fully with and be bound by all of the provisions of the Food Service Waste Reduction Ordinance, as set forth in San Francisco Environment Code Chapter 16, including the remedies provided, and implementing guidelines and rules. The provisions of Chapter 16 are incorporated herein by reference and made a part of this Maintenance Agreement as though fully set forth. This provision is a material term of this Maintenance Agreement. By entering into this Maintenance Agreement, Contractor agrees that if it breaches this provision, City will suffer actual damages that will be impractical or extremely difficult to determine; further, Contractor agrees that the sum of \$100 liquidated damages for the first breach, \$200 liquidated damages for the second breach in the same year, and \$500 liquidated damages for subsequent breaches in the same year is reasonable estimate of the damage that City will incur based on the violation, established in light of the circumstances existing at the time this Maintenance Agreement was made. Such amount shall not be considered a penalty, but rather agreed monetary damages sustained by City because of Contractor's failure to comply with this provision.

44. Cooperative Drafting. This Agreement has been drafted through a cooperative effort of both parties, and both parties have had an opportunity to have the Agreement reviewed and revised by legal counsel. No party shall be considered the drafter of this Agreement, and no presumption or rule that an ambiguity shall be construed against the party drafting the clause shall apply to the interpretation or enforcement of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day first mentioned above.

CITY

CONTRACTOR

Recommended by:

[company name]

[name]
[title]
[department]

By signing this Agreement, I certify that I comply with the requirements of the Minimum Compensation Ordinance, which entitle Covered Employees to certain minimum hourly wages and compensated and uncompensated time off.

Approved as to Form:

Dennis J. Herrera
City Attorney

I have read and understood paragraph 35, the City's statement urging companies doing business in Northern Ireland to move towards resolving employment inequities, encouraging compliance with the MacBride Principles, and urging San Francisco companies to do business with corporations that abide by the MacBride Principles.

By: _____
[name of Deputy City Attorney]
Deputy City Attorney

Approved:

Naomi Kelly
Director of the Office of Contract
Administration, and
Purchaser

[name of authorized representative]
[title]
[optional: address]
[optional: city, state, ZIP]

City vendor number: [vendor number]

Appendices

- A: Services to be provided by Contractor
- B: Calculation of Charges

> If you obtained an insurance waiver from the Risk Manager, then list Appendix C here.

C: Insurance Waiver

> In the footer, the page number should match the "of" number, such as "20 of 20."

Appendix A

> List all computer programs and user manuals that will receive support services pursuant to this Maintenance Agreement in this Appendix.

Appendix B
Insurance Waiver

>Use as appropriate and only if an insurance waiver has been signed and granted by the Risk Manager.