

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.

The pagination in the footer is "# of 33," and when you get to the signature page, you'll see "34 of 33." Be not chagrined. After you delete the legal advice and editorial advice, the final contract will probably be 33 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 Development Agreement
between the City and County of San Francisco and

[insert name of contractor]

[Delete the recital paragraph if this contract falls under an exception to the RFP rule, such as if this contract is a sole source contract or it is for an amount less than \$29,000.]

WHEREAS, a Request for Proposal ("RFP") was issued on [insert date], and City selected Contractor as the highest qualified scorer pursuant to the RFP;

NOW, THEREFORE, City and Contractor agree as follows:

➔ **If this contract will be paid for with federal, state, or special funds, you may need to modify this form. You must make sure that the terms set forth in this agreement are in full compliance with all applicable terms and requirements of the respective federal, state, or special funds, and that there are no conflicting city requirements with your funding source (such as geographical preferences). You must also make sure that any subsequent agreements, which subrecipients or subgrantees of the federal, state or special funds enter into (with third parties), are also in full compliance with the respective terms and requirements of the federal, state or special fund. Your Department is responsible for making the required changes to this form agreement and reviewing the terms of subrecipient/subgrantee agreements to confirm that the terms of the agreements are in compliance with the relevant fund requirement.**

This agreement (the “Agreement”) is entered into this **[insert day]** day of **[insert month]** , **[insert year]** , in the City and County of San Francisco, State of California, by and between: **[insert name and address of Contractor]** , hereinafter referred to as “Contractor,” and the City and County of San Francisco, a municipal corporation, hereinafter referred to as “City,” acting by and through its Director of the Office of Contract Administration, hereinafter referred to as “Purchasing.”

Recitals

WHEREAS, the **[insert name of department]** wishes Contractor to provide to City the System described in Appendix A; and,

WHEREAS, Contractor represents and warrants that it is qualified to provide the services required to deliver the System to City as set forth under this Agreement; and,

WHEREAS, approval for said Agreement was obtained from Civil Service Commission by Resolution No. **[insert Resolution number]**, dated **[insert date]**;

Now, THEREFORE, the parties agree as follows:

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

ACCEPTANCE TESTS The procedures and performance standards required for Acceptance by City of the Programs and the System as defined herein. These procedures and performance standards are set forth for each phase of System development in Appendix D, the Acceptance Test Plan.

➔ **The Acceptance Test Plan should list all the tests the System will be subjected to, the performance standards it must meet (e.g. response time at peak load and during off hours; transaction rate; and system capacity), and what equipment, material, and assistance Contractor will provide for the tests.**

ACCEPTANCE WINDOW The time period specified in Appendix C following completion of Phase 1 or 2 during which Contractor must secure Acceptance of the completed phase from City.

AGREEMENT This document and all of the accompanying schedules and exhibits, together with any future written and executed amendments.

AUTHORIZATION Either a Term Purchase Agreement, Contract Order, or Purchase Order of the City, properly executed by the [insert name of department] and Purchasing, and certified by the Controller for the specific funding of this Agreement or any modification thereof.

CRITICAL MILESTONES Those milestones specified in the Project Schedule, Appendix C, as Critical Milestones after which liquidated damages apply for failure to complete performance in accordance with this Agreement.

DELIVERABLES Those items described and itemized in Appendix [insert Appendix letter], which items Contractor commits to provide to City on the dates specified in the Implementation Plan.

DESIGN SPECIFICATIONS The written design specifications to be prepared by Contractor to implement the Functional Specifications. The Design Specifications shall include descriptions of each Program to be developed hereunder together with descriptions of the hardware and software environment in which such Programs may be operated and the files or databases, if any, with which such Programs shall function.

➔ **Because coding (which is the last major step in software development) will be based on the Design Specifications, it is advisable for the City to be specific about what it expects the Design Specifications to contain. A major factor in designing the system will be the City's projected growth levels.**

DOCUMENTATION Technical publications relating to use of the System, such as reference, installation, administrative, maintenance, and programmer manuals, provided by Contractor to City, all of which are fully described and itemized in Appendix B.

EQUIPMENT The central processing unit[s] and associated peripheral devices [or, computer hardware] on which the Programs will operate and with which the Programs must be compatible, to be purchased [or, leased] by Contractor for City [or, provided by City].

➔ **The above definition assumes the Contractor is providing a turnkey computer system. If the City is supplying the hardware, you may still wish to define the equipment in order to include a provision in this agreement which requires the software being developed to be compatible with the hardware.**

FUNCTIONAL SPECIFICATIONS The written description of City's requirements, operations, and procedures, which document is to be prepared by Contractor, and upon approval by City shall form the basis for the Design Specifications as defined herein.

➔ **Alternative definition if functional specifications are prepared by City:**

The written description of City's requirements prepared by the City and attached hereto as both the Performance Specifications and the Functional Specifications for this Agreement in Appendix A. Such description shall form the basis for the Design Specifications as defined herein.

➔ **The functions set forth in the functional specifications are the base line from which the Contractor must develop the design specifications and do its programming and also form the basis**

on which the City will determine whether the programs satisfy the Acceptance Tests. In case of a dispute as to whether the Contractor has performed, the Contractor will likely have the burden of proof. See, Carl Beasley Ford, Inc. v. Burroughs Corp., 361 F.Supp. 325, 4 CLSR 523 (E.D. Pa. 1973), aff'd, 493 F.2d 1400 (3d Cir. 1974). It is highly advisable that detailed functional capability be spelled out in this contract.

PERFORMANCE SPECIFICATIONS The description of the minimum System characteristics and performance which must be achieved by the Functional Specifications. Such description is set forth in Appendix A.

PROGRAMS The software developed by Contractor and delivered to City, in the form of machine-executable instructions, to operate on the Equipment for purposes of accomplishing the functional capabilities set forth in Program Specifications, Appendix A.

→ Alternative clause for customization: Programs shall mean the software package described in Appendix A, as customized by Contractor and delivered to City in source and object code form.

PROJECT SCHEDULE The schedule for Contractor's completion of all phases of Work, and the Critical Milestones associated with such completion, as specified in Appendix C.

REVIEW PERIOD The time period specified in Appendix C during which City shall review the completed Work of Phase 1 or 2 and give notice to Contractor of its acceptance or rejection of the completed phase.

SYSTEM The Programs prepared by Contractor for City and the Equipment on which those Programs operate, the combination of which shall satisfy the requirements set forth in the Performance Specifications.

→ This definition assumes the City is purchasing a complete computer system, including both hardware and software. If that is not the case, you still may wish to define the "System" as including both hardware and software for purposes of defining the Vendor's responsibilities to ensure hardware and software compatibility during the acceptance tests. If the vendor is not providing the hardware, then clearly indicate in the agreement's Performance Specifications attachment that the City is procuring or delivering the hardware.

WORK The implementation, assembly, installation, optimization, and integration as required by this Agreement, whether completed or partially completed, including all labor, materials, and services provided, or to be provided, by Contractor to fulfill its obligations hereunder. The Work, therefore, constitutes all of the requirements for providing the System to the City.

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 department]**. The words "sufficient", "necessary", or "proper", and the like, mean sufficient, necessary or proper in the judgment of the **[insert name of department]**, unless otherwise indicated by the context.

2. Certification of Funds; Budget and Fiscal Provisions; Termination in the Event of Non-Appropriation. This 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 Controller, and the amount of City's obligation hereunder shall not at any time exceed the amount certified for the purpose and period

stated in such advance authorization. This Agreement will terminate without penalty, liability or expense of any kind to City at the end of any fiscal year if funds are not appropriated for the next succeeding fiscal year. If funds are appropriated for a portion of the fiscal year, this Agreement will terminate, without penalty, liability or expense of any kind at the end of the term for which funds are appropriated. City has no obligation to make appropriations for this Agreement in lieu of appropriations for new or other agreements. City budget decisions are subject to the discretion of the Mayor and the Board of Supervisors. Contractor's assumption of risk of possible non-appropriation is part of the consideration of this Agreement.

THIS SECTION CONTROLS AGAINST ANY AND ALL OTHER PROVISIONS OF THIS AGREEMENT.

3. Term of the Agreement. The term of this Agreement shall be from **[insert start date]** to **[insert end date]**.

4. Effective Date of the Agreement. This Agreement shall become effective when the Controller has certified to the availability of funds and Contractor has been notified in writing.

5. Software Implementation

a. Program Development. Subject to the terms and conditions of this Agreement, and in consideration for the payments to be made, Contractor agrees to design, develop, and install the Programs in the following discrete and sequential phases. In Phase 1, Contractor will develop Functional Specifications; in Phase 2, Contractor will create the Design Specifications; in Phase 3, Contractor will code the Programs, install the completed System at City's site, and deliver the Documentation for the System. The Work covered under each phase is specified in **[specify the document or Appendix which describes the scope of work]**. Upon completion of Phase 3, the System will be subject to Acceptance Testing to verify conformity with the Design Specifications.

b. Interpretation of the Specifications. The City hereby acknowledges that the Functional Specifications will, upon acceptance by the City, provide the basis for the Design Specifications, and that the Design Specifications will, upon acceptance by the City, provide the basis for the coding and installation of the Programs. In the event of a variance between the written proposal Contractor submitted in response to City's request for the services to be performed under this Agreement (the "Proposal") and the Functional Specifications, the Functional Specifications shall be determinative. In the event of a variance between the Functional Specifications and the Design Specifications, the Design Specifications shall be determinative.

→ Subsequent phases of Work are based upon earlier City approved phases. If the City wants to change an earlier approved phase, it must request a change order as provided in subparagraph D. This should reduce later disputes concerning Work that has been completed and accepted as satisfactory.

c. Interpretive Differences. In the event City and Contractor differ in their interpretations of the Proposal, Functional Specifications, Design Specifications, or Acceptance Tests, City's interpretation, if reasonable, shall be determinative.

→ This provision puts the burden on the Contractor to prove City's interpretation is unreasonable.

d. Change Order Requests. All change order requests by the City shall be made in writing by the City's project manager. Within **[insert number]** days following its receipt of a change order request,

Contractor will submit to City a written cost estimate, which shall include any adjustments to the project price, the Project Schedule, and the Acceptance criteria. Additional services by Contractor made necessary by the City's change order request shall be billed at Contractor's then current consulting rates. City will notify Contractor in writing if it wishes to proceed with the change order within **[insert number]** days.

6. Acceptance Procedure

a. Acceptance of Phases 1 and 2. Upon completion of Phases 1 and 2 of Program development, City shall, within the Review Period, review and give notice to Contractor of City's acceptance or rejection of the specifications of each completed phase of Work. Should City reject either the Phase 1 or 2 Work, then City is entitled to another Review Period upon receipt from Contractor of the revised Phase 1 or 2 specifications. In the event that Contractor fails to provide Phase 1 or 2 Work which meets the Acceptance Criteria of this Agreement during the Acceptance Window, City may, at its option, assess Liquidated Damages per Section 28 of this Agreement and/or terminate this Agreement under Section 8(C), Termination for Cause.

→ The intent is to set a drop-dead date by which time Contractor must achieve Acceptance of each project phase, and if it cannot, then City can assess liquidated damages and/or terminate the Agreement for cause.

b. Final Acceptance of System. Upon completion of Phase 3, City and Contractor shall conduct Acceptance Testing of the System in accordance with the Acceptance Test Plan. City will not be deemed to have Accepted any Program or the System until Contractor receives written notice of Acceptance from City.

c. Contractor's Assistance in Acceptance Tests. Contractor must furnish all materials, equipment, and technical assistance necessary to conduct the Acceptance Tests. Test Equipment provided by Contractor for performance of the Acceptance Tests shall be currently certified as "calibrated" by the test equipment manufacturer, or its authorized calibration service agent.

d. Failure to Pass Acceptance Tests. In the event that City determines that the System fails to meet the standards set forth in the Acceptance Test Plan, City shall promptly report to Contractor each deficiency, and Contractor will correct the reproducible aspects of the problem or failure within **[insert number]** days from date of Contractor's receipt of notice of the problem or failure. Problems or failures that do not re-occur or cannot be repeated by Contractor, or by the City in Contractor's presence, shall not be considered a failure. In the event that Contractor cannot achieve System Acceptance within **[insert number]** days following the commencement of Acceptance Testing, Contractor shall be in default under this Agreement and, in addition to those remedies set forth in Section 6 entitled "Termination," City is further entitled to a refund of all payments made to Contractor under this Agreement.

→ Contractor should provide an acceptance test plan for City's approval. City should specify its remedy in the event of test failure, including a provision for termination and damages if the Contractor cannot achieve final acceptance of the System within the time frame allowed.

e. Parallel Processing. The parties contemplate that parallel processing will be used until both the Programs **[or, the System]** and its backup have completed the Acceptance Tests.

→ Parallel processing is the customary procedure in most installations. The old system is kept in operation while the bugs are worked out of the new system.

7. Documentation Delivery and Training

a. **Documentation Delivery.** Contractor will deliver [insert number] copies of the completed Documentation for the Programs [or, the System] in accordance with the Documentation description, Appendix B, and the Project Schedule, Appendix C. The City may withhold its issuance of the notice of final Acceptance until City receives the completed Documentation.

➔ Request as many copies as may be required now and in the future if the City does not have the right to make copies of the documentation.

b. **City Training.** Contractor will provide up to [insert number] hours of training to [insert number] City personnel at City's [or, Contractor's] premises at no charge [or, at the rates shown in Appendix A]. Upon request by the City, Contractor will provide additional training at its then prevailing rates.

8. Term and Termination/Termination for Convenience

a. **Project Schedule.** The Project Schedule is set forth in Appendix C and may be amended by mutual agreement between City and Contractor.

➔ The term of the Agreement is usually based on a schedule for Contractor's completion of the work. The critical milestones should include the completion date for each of the three phases and for Program Installation and Documentation Delivery as well as the date for achieving System acceptance.

(1) **Delays.** To prevent slippage in the completion of the project, Contractor agrees that if such slippage occurs, it will assign additional qualified personnel to the project.

(2) **Time of the Essence.** The parties agree that time is of the essence, and that the System will be developed and implemented in accordance with the Project Schedule.

(3) **Critical Milestones.** Contractor acknowledges and understands that the Project Schedule contains certain time-sensitive milestones (Critical Milestones) that must be attained by certain dates; otherwise, the City will suffer financial harm. Milestones that are Critical Milestones are so indicated in the Project Schedule. Notwithstanding City's ability to assess liquidated damages for Contractor's failure to meet any Critical Milestone, the time period for achieving final Acceptance shall not exceed [insert number] calendar days after initiation of System testing. In addition to any other remedy provided under this Agreement, Contractor's inability to achieve final Acceptance of the System within [insert number] calendar days after the last Critical Milestone will be cause for immediate termination of this Agreement, and City shall be entitled to a full refund of any amounts paid to Contractor under this Agreement.

b. **Progress Reports.** Contractor will provide City with monthly [or, weekly] written status reports advising the City of its progress, which reports will be delivered [insert number] days following the month to which it relates.

c. **Termination for Cause.** In the event Contractor fails to perform any of its obligations under this Agreement, this Agreement may be terminated and all of Contractor's rights hereunder ended. Termination will be effective after ten days written notice to Contractor. No new work will be undertaken after the date of receipt of any notice of termination, or five days after the date of the notice, whichever is earlier. In the event of such termination, Contractor will be paid for those services performed under this

Agreement to the satisfaction of the City, up to the date of termination. However, City may offset from any such amounts due Contractor any liquidated damages or other costs City has or will incur due to Contractor's non-performance. Any such offset by City will not constitute a waiver of any other remedies City may have against Contractor for financial injury or otherwise.

d. Termination for Convenience. City may terminate this Agreement for City's convenience and without cause at any time 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 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 a notice of termination. Such non-recoverable costs include, but are not limited to, anticipated profits on this Agreement, post-termination employee salaries, post-termination administrative expenses, or any other cost which is not reasonable or authorized under this section. This section shall not prevent Contractor from recovering costs necessarily incurred in discontinuing further work under the contract after receipt of the termination notice.

e. Obligations upon Termination. Upon termination of this Agreement, Contractor will submit an invoice to City for an amount which represents the value of its work or services actually performed prior to the effective date of termination for which Contractor has not previously been compensated, except that with respect to reimbursement for Contractor's services, in no event will the compensation paid for the month in which termination occurs be greater than the scheduled monthly fee multiplied by a fraction, the numerator of which will be the days in the month elapsed prior to the termination and the denominator of which shall be 31. Upon approval and payment of this invoice by City, City shall be under no further obligation to Contractor monetarily or otherwise.

f. Survival. This section and the following sections of this Agreement shall survive termination or expiration of this Agreement:

- | | | | |
|-----|---|-----|--|
| 10c | Payment Does Not Imply Acceptance of Work | 22. | Confidential Information |
| 10d | Taxes | 23. | Insurance |
| 13. | Property Rights of the Parties | 24. | Indemnification and General Liability |
| 16. | Submitting False Claims; Monetary Penalties | 25. | Incidental and Consequential Damages |
| 17. | Disallowance | 26. | Liability of City |
| 18. | Payment Does Not Imply Acceptance of Work | 31. | Audit and Inspection of Records |
| 19. | Responsibility for Equipment | 47. | Non-Waiver of Rights |
| 20. | Independent Contractor; Payment of Taxes and Other Expenses | 48. | Administrative Remedy for Agreement Interpretation |
| 21. | Warranty | 49. | Agreement Made in California; Venue |
| | | 50. | Construction |
| | | 51. | Entire Agreement |
| | | 54. | Protection of Private Information |

9. Default; Remedies. Each of the following shall constitute an event of default ("Event of Default") under this Agreement:

(1) Contractor fails or refuses to perform or observe any term, covenant or condition contained in any of the following Sections of this Agreement:

- | | | | |
|------|---|-----|------------------------------------|
| 10.d | Taxes | 23. | Insurance 22 |
| 16 | Submitting False Claims; Monetary Penalties | 32. | Subcontracting. |
| 22. | Confidential Information | 53. | Compliance with Laws. |
| | | 54. | Protection of Private Information. |

55. Graffiti Removal.

(2) Contractor fails or refuses to perform or observe any other term, covenant or condition contained in this Agreement, and such default continues for a period of ten days after written notice thereof from City to Contractor.

(3) Contractor (a) is generally not paying its debts as they become due, (b) files, or consents by answer or otherwise to the filing against it of, a petition for relief or reorganization or arrangement or any other petition in bankruptcy or for liquidation or to take advantage of any bankruptcy, insolvency or other debtors' relief law of any jurisdiction, (c) makes an assignment for the benefit of its creditors, (d) consents to the appointment of a custodian, receiver, trustee or other officer with similar powers of Contractor or of any substantial part of Contractor's property or (e) takes action for the purpose of any of the foregoing.

(4) A court or government authority enters an order (a) appointing a custodian, receiver, trustee or other officer with similar powers with respect to Contractor or with respect to any substantial part of Contractor's property, (b) constituting an order for relief or approving a petition for relief or reorganization or arrangement or any other petition in bankruptcy or for liquidation or to take advantage of any bankruptcy, insolvency or other debtors' relief law of any jurisdiction or (c) ordering the dissolution, winding-up or liquidation of Contractor. On and after any Event of Default, City shall have the right to exercise its legal and equitable remedies, including, without limitation, the right to terminate this Agreement or to seek specific performance of all or any part of this Agreement. In addition, City shall have the right (but no obligation) to cure (or cause to be cured) on behalf of Contractor any Event of Default; Contractor shall pay to City on demand all costs and expenses incurred by City in effecting such cure, with interest thereon from the date of incurrence at the maximum rate then permitted by law. City shall have the right to offset from any amounts due to Contractor under this Agreement or any other agreement between City and Contractor all damages, losses, costs or expenses incurred by City as a result of such Event of Default and any liquidated damages due from Contractor pursuant to the terms of this Agreement or any other agreement. All remedies provided for in this Agreement may be exercised individually or in combination with any other remedy available hereunder or under applicable laws, rules and regulations. The exercise of any remedy shall not preclude or in any way be deemed to waive any other remedy.

10. Payments

a. Fixed Price. In consideration for the services rendered under this Agreement and for the rights in the Programs granted hereunder, the City shall pay to Contractor the amount of **[insert dollar amount in numbers and words – no pennies]** in accordance with the attached progress payment schedule. Compensation shall be due and payable within thirty days of the date of invoice. In no event shall the amount of this Agreement exceed **[insert dollar amount in number and words – no pennies]** dollars.

➔ Vendors prefer that City pay Contractor a fee based on time and materials. However, it is often difficult to control the City's costs if the Contractor takes longer than expected to complete the work. Frequently used compromises are a time and materials basis with a cap, or fixed price with provisions compensating the vendor for changed circumstances and/or delays.

No charges shall be incurred under this Agreement nor shall any payments become due to Contractor until reports, services, and products, required under this Agreement are received from Contractor and approved by **[insert name of department]** as being in accordance with this Agreement.

In no event shall City be liable for interest or late charges for any late payments.

b. Retention. The final payment of **[insert percent in words]** percent (**[insert percent in numbers]** %) of the software development and license costs shall be paid **[insert days in words and (numbers)]** days after City issues its notice of Acceptance of the System.

→Commonly negotiated items are the amount of payment to be made at contract execution and the amount of the holdback. The most frequent up front payment is 10% and a good rule of thumb for retention is the developer’s profit margin, if that can be estimated.

c. 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 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 do not conform to the requirements of this Agreement may be rejected by City and in such case must be replaced by Contractor without delay.

d. Taxes

Payment of any taxes, including possessory interest taxes and California sales and use taxes, levied upon or as a result of this Agreement, or the services delivered pursuant hereto, shall be the obligation of Contractor. Contractor recognizes and understands that this Agreement may create a “possessory interest” for property tax purposes. Generally, such a possessory interest is not created unless the Agreement entitles the Contractor to possession, occupancy, or use of City property for private gain. If such a possessory interest is created, then the following shall apply:

(1) Contractor, on behalf of itself and any permitted successors and assigns, recognizes and understands that Contractor, and any permitted successors and assigns, may be subject to real property tax assessments on the possessory interest;

(2) Contractor, on behalf of itself and any permitted successors and assigns, recognizes and understands that the creation, extension, renewal, or assignment of this Agreement may result in a “change in ownership” for purposes of real property taxes, and therefore may result in a revaluation of any possessory interest created by this Agreement. Contractor accordingly agrees on behalf of itself and its permitted successors and assigns to report on behalf of the City to the County Assessor the information required by Revenue and Taxation Code section 480.5, as amended from time to time, and any successor provision.

(3) Contractor, on behalf of itself and any permitted successors and assigns, recognizes and understands that that other events also may cause a change of ownership of the possessory interest and result in the revaluation of the possessory interest. (see, e.g., Rev. & Tax. Code section 64, as amended from time to time) Contractor accordingly agrees on behalf of itself and its permitted successors and assigns to report any change in ownership to the County Assessor, the State Board of Equalization or other public agency as required by law.

(4) 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 for possessory interests that are imposed by applicable law.

11. City Responsibilities

a. City Representative. City will make available to Contractor a qualified project manager who will be authorized to make binding decisions for the City regarding this Agreement and will

promptly: (1) review all specifications, technical materials and other documents submitted by Contractor, request necessary corrections, and approve such documents; (2) provide requested City information and data and assume responsibility on the adequacy of the same; (3) advise Contractor of City's requirements; and (4) upon request provide access to City's staff, facility and hardware.

➔ **If the agreement contains the name of the person who will be the City's representative, allow for substitutions in case of vacations and/or illnesses.**

b. City Facilities. [Specify whether the City will be providing facilities or equipment for Contractor's use during the term of the agreement and the conditions upon which access will be granted. For example, security clearances, only pre-approved Contractor personnel, hours of the day, etc.]

c. Data Conversion. [insert City or Contractor] shall be responsible for the timely and accurate conversion of City's data to the format required by the Programs [or, System], and for providing the test data specified in the Acceptance Test Plan [or, Design Specifications].

➔ **This provision makes it clear who has responsibility to convert legacy data to the new System data. City has the option to hire a third party to convert (which could be useful if Contractor is falling behind) or Contractor can do the work.**

12. Contractor Staffing and Support Services

a. Project Manager. Contractor shall designate a Project Manager, who shall be accessible by telephone or by electronic pager throughout the duration of the Agreement and shall be available [insert times of days, days of week, and exceptions (e.g., from 9 a.m. to 5 p.m. Monday through Friday, excluding weekends and holidays)]. These hours may be adjusted by mutual agreement of City and Contractor. Throughout the term of this Agreement, whenever the Project Manager is not on site, he or she must be available by electronic pager. Whenever the Project Manager will be unavoidably absent or otherwise unavailable by telephone or electronic pager for more than two hours, then a substitute Project Manager must be designated to respond to telephone calls and pages from the City. Contractor shall use its best efforts to maintain the same Project Manager until final Acceptance of the System. However, if Contractor needs to replace its Project Manager, it shall provide City with written notice thereof at least 45 days prior to the date the Project Manager is to be replaced. Notwithstanding the foregoing, Contractor may appoint temporary Project Managers in connection with short term unavailability, sick leave, or reasonable vacations, provided that Contractor gives City reasonable notification thereof in advance. City may require Contractor to replace its Project Manager, by giving Contractor notification thereof and City's objective reasons therefor.

b. Staffing. Work under this Agreement shall be performed only by competent personnel appropriately trained in technical skills to perform their duties 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. The personnel of each party, when on the premises of the other, shall comply with the security and other personnel regulations of the party on whose premises such individual is located.

➔ **Vendors are often reluctant to allow City to have sole discretion in determining if Vendor's staff member is unsatisfactory. Vendor may insist on a higher standard such as poor work performance or not complying with City's regulations. However, you will want to have the flexibility to order the Contractor to replace problem staff even if their conduct does not necessarily warrant**

Contractor's discipline. With the use of networks, there is less need for vendor's staff to be on City's premises.

c. Maintenance Services. Contractor will provide maintenance services for the Programs in accordance with the terms and conditions of its standard maintenance agreement, a copy of which is attached hereto as Appendix B. Such services shall commence upon Acceptance of the Programs by City **[or, upon expiration of the performance warranty provided herein].**

→ City should negotiate a commitment up front from the vendor to maintain the System for "X" number of years.

d. Consulting Services. Upon request by City, Contractor will provide programming, project management, consulting and other related services. The scope and charges for such services shall be the then prevailing best government rate **[or, are specified in Appendix ___]**.

→ You may want to include the above text to permit the Contractor to perform related services that were not specifically included in the scope of work when it was first drafted.

13. Property Rights of the Parties

→ Choose "a" or "b"

→ Select the appropriate paragraphs according to whether the software is being licensed or purchased:

a. License of the Programs. Upon receipt of final payment for all services rendered by Contractor under this Agreement, Contractor hereby grants to City, in perpetuity, an irrevocable, nonexclusive, right and license to use for internal purposes only a machine readable copy of the Programs and Documentation in connection with the City's business.

→ Because most software development is performed by vendors as individualized modifications and enhancements to the vendor's standard software package, vendors generally license the Program in order to avoid encumbering its title to the software package. However, if the program is being developed from scratch at the City's expense, then it is reasonable for the City to expect to retain ownership.

Consider whether City will need a copy of the source code and address that issue in this section as well.

→ Select either "a" above or both "a" and "b" below. If you select only "a", delete subparagraph "b" in its entirety and redesignate the other subparagraphs.

b. Sale of the Programs. Upon receipt of final payment for the Programs **[or, System]**, Contractor will convey to City good and marketable title to the Programs **[or, the System]** free and clear of all liens, claims and encumbrances.

→ Many government and large private projects stipulate that the software must be sold to the agency. If the customized software has market potential, the vendor will want an exclusive source code license to further develop and market the software, or will want to retain title to the underlying modules, while conveying title to the code (source and/or object) and the documentation.

c. **Ownership of Underlying Modules.** The foregoing conveyance of title is subject to Contractor's retention of ownership of all modules developed by Contractor as a utility routine or generalized interface and not specifically for City.

d. **City's Data.** Any data or other materials furnished by the City for use by Contractor under this Agreement shall remain the sole property of the City and will be held in confidence in accordance with Section 21 of this Agreement. Such materials shall be returned to City upon Acceptance of the Programs.

→ [If City is only getting a licensed software, then subsection e applies.]

e. **Ownership of Modifications and Enhancement.** Contractor hereby grants to City an exclusive perpetual license to use for internal purposes only the Programs contained in the modifications and enhancements to the software package licensed hereunder to City.

→ **Generally once the enhancement is developed, it becomes part of the standard product offered to seller. The City may insist that it be made a standard feature of the product to ensure that the seller will continue its support and development.**

f. **Competition.** Nothing in this Agreement shall be construed so as to preclude Contractor from developing, using, or marketing software that is competitive with that prepared for City hereunder, irrespective of whether such software is similar in functionality or design or is otherwise related to the Programs developed by Contractor for City pursuant to this Agreement.

→ **This is generally important to software developers. Software developers license software products in targeted business areas and want the right to market the underlying software developed for the City to other potential customers and public entities.**

g. **Royalty Payments.** Contractor shall pay to City a royalty of [insert number in words] percent ([insert number] %) of all fees received by Contractor for the licensing [or sale] of the Programs, or portions thereof until the total amount of payments received by City total [insert amount in words] dollars (\$ [insert amount as number]) at which time such royalty payments shall cease.

→ **Because City is paying for the software development and owns the program, if Contractor sells the product to others, then City can negotiate a royalty payment which will reimburse the City for the payments made to the Contractor and perhaps other City costs incurred.**

If City owns the Program and intends to exploit the software commercially, this should be stated in the Agreement.

14. 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 agreement is amended in writing and approved as required by law to authorize 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 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 of the City and County of San Francisco. 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.

15. Invoice Format. Invoices furnished by Contractor under this 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."

16. Submitting False Claims; Monetary Penalties. Pursuant to San Francisco Administrative Code section 21.35, any contractor, subcontractor or consultant who submits a false claim shall be liable to the City for three times the amount of damages which the City sustains because of the false claim. A contractor, subcontractor or consultant who submits a false claim shall also be liable to the City for the costs, including attorney's fees, of a civil action brought to recover any of those penalties or damages, and may be liable to the City for a civil penalty of up to \$10,000 for each false claim. 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; (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.

17. Disallowance. In the event Contractor claims or receives payment from City for a service, reimbursement for which is later disallowed by City or State of California or United States Government, Contractor shall promptly refund the disallowed amount to City upon City's request. At its option, City may offset the amount disallowed from any payment due or to become due to Contractor under this Agreement or any other Agreement.

18. 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 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 do not conform to the requirements of this Agreement may be rejected by City and in such case must be replaced by Contractor without delay.

→ This text applies to paragraph 19. Please be aware that new statutory amendments have made the City 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.

19. 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 acceptance or use of such equipment by Contractor or any of its employees means that Contractor accepts full responsibility for and agrees to exonerate, indemnify, defend and save harmless City from and against any and all claims for any damage or injury of any type arising from the use, misuse or failure of such equipment, whether such damage be to Contractor, its employees, City employees or third parties, or to property belonging to any of the above.

20. 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 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 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 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 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 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 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 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 Agreement are not greater than they would have been had the court, arbitrator, or administrative authority determined that Contractor was not an employee.

21. Warranty

a. Warranty of Title and Indemnification. Contractor warrants that the Programs developed pursuant to this Agreement will, prior to its transfer to City, be the sole and exclusive property of Contractor. If notified promptly in writing of any judicial action brought against City based on an

allegation that City's use of the Programs infringes a patent or copyright, or any rights of a third party, or constitutes misuse or misappropriation of a trade secret or any other right in intellectual property (infringement), Contractor will hold City harmless and defend such action at its expense. Contractor will pay the costs and damages awarded in any such action or the cost of settling such action, provided that Contractor shall have sole control of the defense of any such action and all negotiations or its settlement or compromise. If notified promptly in writing of any informal claim (other than a judicial action) brought against City based on an allegation that City's use of the Programs constitutes Infringement, Contractor will pay the costs associated with resolving such claim and will pay the settlement amount (if any), provided that Contractor shall have sole control of the resolution of any such claim and all negotiations for its settlement. In the event that a final injunction shall be obtained against City's use of the Programs by reason of Infringement, or in Contractor's opinion City's use of the Programs is likely to become the subject of Infringement, Contractor may at its option and expense (a) procure for City the right to continue to use the Programs as contemplated hereunder, (b) replace the Programs with non-infringing, functionally equivalent substitute Programs, or (c) suitably modify the Programs to make its use hereunder non-infringing while retaining functional equivalency to the unmodified version of the Programs. If none of these options is reasonably available to Contractor, then this Agreement may be terminated at the option of either party hereto and Contractor shall refund to City all amounts paid under this Agreement for the development and license of the infringing Programs.

b. Warranty of Authority; No Conflict. Each party hereby warrants to the other that it is authorized to enter into this Agreement and that its performance thereof will not conflict with any other agreement.

c. Warranty of Performance. Contractor hereby warrants that when fully implemented, the Programs to be developed and provided under this Agreement shall perform in accordance with the Design Specifications applicable thereto on the System Acceptance date.

→ **This clause does not commit Contractor to warrant continued performance of the System. This protection is under the holdback clause.**

22. Confidential Information

a. Standard of Care. Contractor understands and agrees that, in the performance of the work or services under this 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 the performance of the Agreement. Contractor shall exercise the same standard of care to protect such information as a reasonably prudent Contractor would use to protect its own proprietary data.

b. Survival. These obligations of confidentiality shall survive the termination of the Agreement.

23. 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.

➔ **Contractors that must be State-licensed as professionals to perform services, i.e., architects, engineers, certified public accountants, etc., shall provide professional liability insurance, also known as errors-and-omissions coverage. If the contractor is such a professional, then include (4). If the contractor is not such a professional, then omit (4).**

(4) Professional liability insurance, applicable to Contractor’s profession, with limits not less than \$1,000,000 each claim with respect to negligent acts, errors or omissions in connection with professional services to be provided under this Agreement.

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 thirty 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.

→ **The following subparagraph k. is optional. For example, if the Contractor is going to use a subcontractor to perform the job under the Agreement, then include subparagraph i. in the Agreement.**

j. If a subcontractor will be used to complete any portion of this agreement, the Contractor shall ensure that the subcontractor shall provide all necessary insurance and shall name the City and County of San Francisco, its officers, agents and employees and the Contractor listed as additional insureds.

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

k. Any of the terms of conditions of this Section 23 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.

24. Indemnification and General Liability. 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 Agreement, 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 Agreement, and except where such loss, damage, injury, liability or claim is the result of 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 subcontractors 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.

25. Incidental and Consequential Damages. Contractor shall be responsible for incidental and consequential damages resulting in whole or in part from Contractor's acts or omissions. Nothing in this Agreement shall constitute a waiver of limitation of any rights that City may have under applicable law.

→ Vendors typically object to liability for incidental and consequential damages. Departments have the discretion to delete this provision (with the City Attorney's approval) if it is not commercially reasonable to require it. See Administrative. Code sec. 21.54.

26. Liability of City. CITY'S OBLIGATIONS UNDER THIS AGREEMENT SHALL BE LIMITED TO THE PAYMENT OF THE COMPENSATION PROVIDED FOR IN SECTION 9 OF THIS AGREEMENT. NOTWITHSTANDING ANY OTHER PROVISION OF THIS 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 AGREEMENT OR THE SERVICES PERFORMED IN CONNECTION WITH THIS AGREEMENT.

27. Conflict of Interest. Through its execution of this 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 Agreement.

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

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

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

Any notice of default must be sent by registered mail. Either party may change the address to which notice is to be sent by giving written notice thereof to the other party.

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

29. Liquidated Damages. By entering into this Agreement, Contractor agrees that in the event the Services, as provided under Section 5 herein, are delayed beyond the Critical Milestones as provided in the Project Schedule, Appendix C, City will suffer actual damages that will be impractical or extremely difficult to determine; further, Contractor agrees that the sum of **[\$[insert amount in numbers; no pennies and no ".00"]** per day for each day of delay beyond the Critical Milestones is not a penalty, but

is a reasonable estimate of the loss that City will incur based on the delay, established in light of the circumstances existing at the time this contract was awarded. City may deduct a sum representing the liquidated damages from any money due to Contractor. Such deductions shall not be considered a penalty, but rather agreed monetary damages sustained by City because of Contractor's failure to deliver to City within the time fixed or such extensions of time permitted in writing by Purchasing.

→ **Liquidated damages are not required but they provide the City with leverage to compel timely completion of work and will offset City costs resulting from delayed completion. This is subject to negotiation but should not be waived lightly.**

30. Bankruptcy. In the event that either party shall cease conducting business in the normal course, become insolvent, make a general assignment for the benefit of creditors, suffer or permit the appointment of a receiver for its business or assets or shall avail itself of, or become subject to, any proceeding under the Federal Bankruptcy Act or any other statute of any state relating to insolvency or the protection of rights of creditors, then at the option of the other party this Agreement shall terminate and be of no further force and effect.

31. 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 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 Agreement, whether funded in whole or in part under this 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 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 Agreement shall have the same rights conferred upon City by this Section.

32. Subcontracting. Contractor is prohibited from subcontracting this Agreement or any part of it unless such subcontracting is first approved by City in a written instrument executed and approved in the same manner as this Agreement. Neither party shall, on the basis of this 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.

33. Assignment. The services to be performed by Contractor are personal in character and neither this 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 Agreement.

34. Local Business Enterprise Utilization; Liquidated Damages

a. The LBE Ordinance. Contractor, shall comply with all the requirements of the Local Business Enterprise and Non-Discrimination in Contracting Ordinance set forth in Chapter 14B of the San Francisco Administrative Code as it now exists or as it may be amended in the future (collectively the "LBE Ordinance"), provided such amendments do not materially increase Contractor's obligations or liabilities, or materially diminish Contractor's rights, under this Agreement. Such provisions of the LBE Ordinance are incorporated by reference and made a part of this Agreement as though fully set forth in this section. Contractor's willful failure to comply with any applicable provisions of the LBE Ordinance is a material breach of Contractor's obligations under this Agreement and shall entitle City, subject to any applicable notice and cure provisions set forth in this Agreement, to exercise any of the remedies provided for under this Agreement, under the LBE Ordinance or otherwise available at law or in equity, which remedies shall be cumulative unless this Agreement expressly provides that any remedy is

exclusive. In addition, Contractor shall comply fully with all other applicable local, state and federal laws prohibiting discrimination and requiring equal opportunity in contracting, including subcontracting.

b. Compliance and Enforcement

(1) Enforcement. If Contractor willfully fails to comply with any of the provisions of the LBE Ordinance, the rules and regulations implementing the LBE Ordinance, or the provisions of this Agreement pertaining to LBE participation, Contractor shall be liable for liquidated damages in an amount equal to Contractor's net profit on this Agreement, or 10% of the total amount of this Agreement, or \$1,000, whichever is greatest. The Director of the City's Human Rights Commission or any other public official authorized to enforce the LBE Ordinance (separately and collectively, the "Director of HRC") may also impose other sanctions against Contractor authorized in the LBE Ordinance, including declaring the Contractor to be irresponsible and ineligible to contract with the City for a period of up to five years or revocation of the Contractor's LBE certification. The Director of HRC will determine the sanctions to be imposed, including the amount of liquidated damages, after investigation pursuant to Administrative Code §14B.17. By entering into this Agreement, Contractor acknowledges and agrees that any liquidated damages assessed by the Director of the HRC shall be payable to City upon demand. Contractor further acknowledges and agrees that any liquidated damages assessed may be withheld from any monies due to Contractor on any contract with City. Contractor agrees to maintain records necessary for monitoring its compliance with the LBE Ordinance for a period of three years following termination or expiration of this Agreement, and shall make such records available for audit and inspection by the Director of HRC or the Controller upon request.

➔ **If the contract will involve the use of subcontracts, include subparagraphs (2), (3) and (4). If the contract will not involve subcontracts, omit (2), (3), and (4) and delete the subsection title above, "(1) Enforcement," but keep the text of the subparagraph.**

(2) Subcontracting Goals. The LBE subcontracting participation goal for this contract is **[insert number]** %. Contractor shall fulfill the subcontracting commitment made in its bid or proposal. Each invoice submitted to City for payment shall include the information required in the HRC Progress Payment Form and the HRC Payment Affidavit. Failure to provide the HRC Progress Payment Form and the HRC Payment Affidavit with each invoice submitted by Contractor shall entitle City to withhold 20% of the amount of that invoice until the HRC Payment Form and the HRC Subcontractor Payment Affidavit are provided by Contractor. Contractor shall not participate in any back contracting to the Contractor or lower-tier subcontractors, as defined in the LBE Ordinance, for any purpose inconsistent with the provisions of the LBE Ordinance, its implementing rules and regulations, or this Section.

(3) Subcontract Language Requirements. Contractor shall incorporate the LBE Ordinance into each subcontract made in the fulfillment of Contractor's obligations under this Agreement and require each subcontractor to agree and comply with provisions of the ordinance applicable to subcontractors. Contractor shall include in all subcontracts with LBEs made in fulfillment of Contractor's obligations under this Agreement, a provision requiring Contractor to compensate any LBE subcontractor for damages for breach of contract or liquidated damages equal to 5% of the subcontract amount, whichever is greater, if Contractor does not fulfill its commitment to use the LBE subcontractor as specified in the bid or proposal, unless Contractor received advance approval from the Director of HRC and contract awarding authority to substitute subcontractors or to otherwise modify the commitments in the bid or proposal. Such provisions shall also state that it is enforceable in a court of competent jurisdiction. Subcontracts shall require the subcontractor to maintain records necessary for monitoring its compliance with the LBE Ordinance for a period of three years following termination of this contract and to make such records available for audit and inspection by the Director of HRC or the Controller upon request.

(4) Payment of Subcontractors. Contractor shall pay its subcontractors within three working days after receiving payment from the City unless Contractor notifies the Director of HRC in writing within ten working days prior to receiving payment from the City that there is a bona fide dispute between Contractor and its subcontractor and the Director waives the three-day payment requirement, in which case Contractor may withhold the disputed amount but shall pay the undisputed amount. Contractor further agrees, within ten working days following receipt of payment from the City, to file the HRC Payment Affidavit with the Controller, under penalty of perjury, that the Contractor has paid all subcontractors. The affidavit shall provide the names and addresses of all subcontractors and the amount paid to each. Failure to provide such affidavit may subject Contractor to enforcement procedure under Administrative Code §14B.17.

35. Nondiscrimination; Penalties

a. Contractor Shall Not Discriminate. In the performance of this Agreement, Contractor agrees not to discriminate against any employee, City and County employee working with such contractor or subcontractor, applicant for employment with such contractor or subcontractor, or against any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations, on the basis of the fact or perception of a person's race, color, creed, religion, national origin, ancestry, age, height, weight, sex, sexual orientation, gender identity, domestic partner status, marital status, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status), or association with members of such protected classes, or in retaliation for opposition to discrimination against such classes.

b. Subcontracts. Contractor shall incorporate by reference in all subcontracts the provisions of Sections 12B.2(a), 12B.2(c)-(k), and 12C.3 of the San Francisco Administrative Code (copies of which are available from Purchasing) and shall require all subcontractors to comply with such provisions. Contractor's failure to comply with the obligations in this subsection shall constitute a material breach of this Agreement.

c. Non-Discrimination in Benefits. Contractor does not as of the date of this Agreement and will not during the term of this Agreement, in any of its operations in San Francisco or where the work is being performed for the City or elsewhere within the United States, discriminate in the provision of bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits, as well as any benefits other than the benefits specified above, between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees, where the domestic partnership has been registered with a governmental entity pursuant to state or local law authorizing such registration, subject to the conditions set forth in Section 12B.2(b) of the San Francisco Administrative Code.

d. Condition to Contract. As a condition to this Agreement, Contractor shall execute the "Chapter 12B Declaration: Nondiscrimination in Contracts and Benefits" form (Form HRC-12B-101) with supporting documentation and secure the approval of the form by the San Francisco Human Rights Commission.

e. Incorporation of Administrative Code Provisions by Reference. The provisions of Chapters 12B and 12C of the San Francisco Administrative Code are incorporated in this Section by reference and made a part of this Agreement as though fully set forth herein. Contractor shall comply fully with and be bound by all of the provisions that apply to this Agreement under such Chapters of the Administrative Code, including but not limited to the remedies provided in such Chapters. Without limiting the foregoing, Contractor understands that pursuant to §§12B.2(h) and 12C.3(g) of the San

San Francisco Administrative Code, a penalty of \$50 for each person for each calendar day during which such person was discriminated against in violation of the provisions of this Agreement may be assessed against Contractor and/or deducted from any payments due Contractor.

36. Earned Income Credit (EIC) Forms. Administrative Code section 12O requires that employers provide their employees with IRS Form W-5 (The Earned Income Credit Advance Payment Certificate) and the IRS EIC Schedule, as set forth below. Employers can locate these forms at the IRS Office, on the Internet, or anywhere Federal Tax Forms can be found. Contractor shall provide EIC Forms to each Eligible Employee at each of the following times: (i) within thirty days following the date on which this Agreement becomes effective (unless Contractor has already provided such EIC Forms at least once during the calendar year in which such effective date falls); (ii) promptly after any Eligible Employee is hired by Contractor; and (iii) annually between January 1 and January 31 of each calendar year during the term of this Agreement. Failure to comply with any requirement contained in subparagraph (a) of this Section shall constitute a material breach by Contractor of the terms of this Agreement. If, within 30 days after Contractor receives written notice of such a breach, Contractor fails to cure such breach or, if such breach cannot reasonably be cured within such period of 30 days, Contractor fails to commence efforts to cure within such period or thereafter fails to diligently pursue such cure to completion, the City may pursue any rights or remedies available under this Agreement or under applicable law. Any Subcontract entered into by Contractor shall require the subcontractor to comply, as to the subcontractor's Eligible Employees, with each of the terms of this section. Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Section 12O of the San Francisco Administrative Code.

37. MacBride Principles--Northern Ireland. Pursuant to San Francisco Administrative Code Section 12F.5, the City and County of San Francisco urges companies doing business in Northern Ireland to move towards resolving employment inequities, and encourages such companies to abide by the MacBride Principles. The City and County of San Francisco urges San Francisco companies to do business with corporations that abide by the MacBride Principles.

38. Tropical Hardwood and Virgin Redwood Ban. Pursuant to Section 804 (b) of the San Francisco Environment Code, the City and County of San Francisco urges contractors not to import, purchase, obtain, or use for any purpose, any tropical hardwood, tropical hardwood wood product, virgin redwood or virgin redwood wood product.

39. Drug-Free Workplace Policy. 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 Contractor, its employees, agents or assigns will be deemed a material breach of this Agreement.

40. 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 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 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 Agreement.

41. Sunshine Ordinance. In accordance with San Francisco Administrative Code §67.24(e), contracts, contractors' bids, responses to requests for proposals 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.

42. Requiring Minimum Compensation for Employees. Contractor agrees to comply fully with and be bound by all of the provisions of the Minimum Compensation Ordinance (MCO), as set forth in San Francisco Administrative Code Chapter 12P (Chapter 12P), including the remedies provided, and implementing guidelines and rules. The provisions of Chapter 12P are incorporated herein by reference and made a part of this Agreement as though fully set forth. The text of the MCO is available on the web at www.sfgov.org/olse. Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 12P. Consistent with the requirements of the MCO, Contractor agrees to all of the following:

a. For each hour worked by a Covered Employee during a Pay Period on work funded under the City contract during the term of this Agreement, Contractor shall provide to the Covered Employee no less than the Minimum Compensation, which includes a minimum hourly wage and compensated and uncompensated time off consistent with the requirements of the MCO. For the hourly gross compensation portion of the MCO, Contractor shall pay a minimum of \$10.77 an hour for the term of this Agreement; provided, however, that Contractors that are Nonprofit Corporations or public entities shall pay a minimum of \$9 an hour for the term of this Agreement.

If a Covered Employee of a Nonprofit Corporation works in San Francisco, then that employee is covered by San Francisco's Minimum Wage Ordinance, which is Chapter 12R of the Administrative Code. As of January 1, 2007, Chapter 12R's minimum wage is \$9.14 per hour.

b. Contractor shall not discharge, reduce in compensation, or otherwise discriminate against any employee for complaining to the City with regard to Contractor's compliance or anticipated compliance with the requirements of the MCO, for opposing any practice proscribed by the MCO, for participating in proceedings related to the MCO, or for seeking to assert or enforce any rights under the MCO by any lawful means.

c. Contractor understands and agrees that the failure to comply with the requirements of the MCO shall constitute a material breach by Contractor of the terms of this Agreement. The City, acting through the Contracting Department, shall determine whether such a breach has occurred.

d. If, within 30 days after receiving written notice of a breach of this Agreement for violating the MCO, Contractor fails to cure such breach or, if such breach cannot reasonably be cured within such period of 30 days, Contractor fails to commence efforts to cure within such period, or thereafter fails diligently to pursue such cure to completion, the City, acting through the Contracting Department, shall have the right to pursue the following rights or remedies and any rights or remedies available under applicable law:

(1) The right to charge Contractor an amount equal to the difference between the Minimum Compensation and any compensation actually provided to a Covered Employee, together with interest on such amount from the date payment was due at the maximum rate then permitted by law;

(2) The right to set off all or any portion of the amount described in Subsection (d)(1) of this Section against amounts due to Contractor under this Agreement;

(3) The right to terminate this Agreement in whole or in part;

(4) In the event of a breach by Contractor of the covenant referred to in Subsection (b) of this Section, the right to seek reinstatement of the employee or to obtain other appropriate equitable relief; and

(5) The right to bar Contractor from entering into future contracts with the City for three years.

Each of the rights provided in this Subsection (d) shall be exercisable individually or in combination with any other rights or remedies available to the City. Any amounts realized by the City pursuant to this subsection shall be paid to the Covered Employee who failed to receive the required Minimum Compensation.

e. Contractor represents and warrants that it is not an entity that was set up, or is being used, for the purpose of evading the intent of the MCO.

f. Contractor shall keep itself informed of the current requirements of the MCO, including increases to the hourly gross compensation due Covered Employees under the MCO, and shall provide prompt written notice to all Covered Employees of any increases in compensation, as well as any written communications received by the Contractor from the City, which communications are marked to indicate that they are to be distributed to Covered Employees.

g. Contractor shall provide reports to the City in accordance with any reporting standards promulgated by the City under the MCO, including reports on subcontractors.

h. The Contractor shall provide the City with access to pertinent records after receiving a written request from the City to do so and being provided at least five (5) business days to respond.

i. The City may conduct random audits of Contractor. Random audits shall be (i) noticed in advance in writing; (ii) limited to ascertaining whether Covered Employees are paid at least the minimum compensation required by the MCO; (iii) accomplished through an examination of pertinent records at a mutually agreed upon time and location within ten days of the written notice; and (iv) limited to one audit of Contractor every two years for the duration of this Agreement. Nothing in this Agreement is intended to preclude the City from investigating any report of an alleged violation of the MCO.

j. Any subcontract entered into by Contractor shall require the subcontractor to comply with the requirements of the MCO and shall contain contractual obligations substantially the same as those set forth in this Section. A subcontract means an agreement between the Contractor and a third party which requires the third party to perform all or a portion of the services covered by this Agreement. Contractor shall notify the Department of Administrative Services when it enters into such a subcontract and shall certify to the Department of Administrative Services that it has notified the subcontractor of the obligations under the MCO and has imposed the requirements of the MCO on the subcontractor through the provisions of the subcontract. It is Contractor's obligation to ensure that any subcontractors of any tier under this Agreement comply with the requirements of the MCO. If any subcontractor under this Agreement fails to comply, City may pursue any of the remedies set forth in this Section against Contractor.

k. Each Covered Employee is a third-party beneficiary with respect to the requirements of subsections (a) and (b) of this Section, and may pursue the following remedies in the event of a breach by Contractor of subsections (a) and (b), but only after the Covered Employee has provided the notice,

participated in the administrative review hearing, and waited the 21-day period required by the MCO. Contractor understands and agrees that if the Covered Employee prevails in such action, the Covered Employee may be awarded: (1) an amount equal to the difference between the Minimum Compensation and any compensation actually provided to the Covered Employee, together with interest on such amount from the date payment was due at the maximum rate then permitted by law; (2) in the event of a breach by Contractor of subsections (a) or (b), the right to seek reinstatement or to obtain other appropriate equitable relief; and (3) in the event that the Covered Employee is the prevailing party in any legal action or proceeding against Contractor arising from this Agreement, the right to obtain all costs and expenses, including reasonable attorney's fees and disbursements, incurred by the Covered Employee. Contractor also understands that the MCO provides that if Contractor prevails in any such action, Contractor may be awarded costs and expenses, including reasonable attorney's fees and disbursements, from the Covered Employee if the court determines that the Covered Employee's action was frivolous, vexatious or otherwise an act of bad faith.

1. If Contractor is exempt from the MCO when this Agreement is executed because the cumulative amount of agreements with this department for the fiscal year is less than \$25,000 (\$50,000 for nonprofits), but Contractor later enters into an agreement or agreements that cause contractor to exceed that amount in a fiscal year, Contractor shall thereafter be required to comply with the MCO under this Agreement. This obligation arises on the effective date of the agreement that causes the cumulative amount of agreements between the Contractor and this department to exceed \$25,000 (\$50,000 for nonprofits) in the fiscal year.

43. Requiring Health Benefits for Covered Employees. Unless exempt, Contractor agrees to comply fully with and be bound by all of the provisions of the Health Care Accountability Ordinance (HCAO), as set forth in San Francisco Administrative Code Chapter 12Q, including the remedies provided, and implementing regulations, as the same may be amended from time to time. The provisions of Chapter 12Q are incorporated by reference and made a part of this Agreement as though fully set forth herein. The text of the HCAO is available on the web at <http://www.sfgov.org/oca/lwlh.htm>. Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 12Q.

a. For each Covered Employee, Contractor shall provide the appropriate health benefit set forth in Section 12Q.3 of the HCAO. If Contractor chooses to offer the health plan option, such health plan shall meet the minimum standards set forth by the San Francisco Health Commission.

b. Notwithstanding the above, if the Contractor is a small business as defined in Section 12Q.3(d) of the HCAO, it shall have no obligation to comply with part (a) above.

c. Contractor's failure to comply with the HCAO shall constitute a material breach of this agreement. City shall notify Contractor if such a breach has occurred. If, within 30 days after receiving City's written notice of a breach of this Agreement for violating the HCAO, Contractor fails to cure such breach or, if such breach cannot reasonably be cured within such period of 30 days, Contractor fails to commence efforts to cure within such period, or thereafter fails diligently to pursue such cure to completion, City shall have the right to pursue the remedies set forth in 12Q.5(f)(1-5). Each of these remedies shall be exercisable individually or in combination with any other rights or remedies available to City.

d. Any Subcontract entered into by Contractor shall require the Subcontractor to comply with the requirements of the HCAO and shall contain contractual obligations substantially the same as those set forth in this Section. Contractor shall notify City's Purchasing Division when it enters into such a Subcontract and shall certify to the Purchasing Division that it has notified the Subcontractor of the

obligations under the HCAO and has imposed the requirements of the HCAO on Subcontractor through the Subcontract. Each Contractor shall be responsible for its Subcontractors' compliance with this Chapter. If a Subcontractor fails to comply, the City may pursue the remedies set forth in this Section against Contractor based on the Subcontractor's failure to comply, provided that City has first provided Contractor with notice and an opportunity to obtain a cure of the violation.

e. Contractor shall not discharge, reduce in compensation, or otherwise discriminate against any employee for notifying City with regard to Contractor's noncompliance or anticipated noncompliance with the requirements of the HCAO, for opposing any practice proscribed by the HCAO, for participating in proceedings related to the HCAO, or for seeking to assert or enforce any rights under the HCAO by any lawful means.

f. Contractor represents and warrants that it is not an entity that was set up, or is being used, for the purpose of evading the intent of the HCAO.

g. Contractor shall keep itself informed of the current requirements of the HCAO.

h. Contractor shall provide reports to the City in accordance with any reporting standards promulgated by the City under the HCAO, including reports on Subcontractors and Subtenants, as applicable.

i. Contractor shall provide City with access to records pertaining to compliance with HCAO after receiving a written request from City to do so and being provided at least five business days to respond.

j. City may conduct random audits of Contractor to ascertain its compliance with HCAO. Contractor agrees to cooperate with City when it conducts such audits.

k. If Contractor is exempt from the HCAO when this Agreement is executed because its amount is less than \$25,000 (\$50,000 for nonprofits), but Contractor later enters into an agreement or agreements that cause Contractor's aggregate amount of all agreements with City to reach \$75,000, all the agreements shall be thereafter subject to the HCAO. This obligation arises on the effective date of the agreement that causes the cumulative amount of agreements between Contractor and the City to be equal to or greater than \$75,000 in the fiscal year.

44. 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 a board 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.

➔ **The requirements of Chapter 83 apply to: (a) entry level positions for work performed by a contractor in the City; (b) entry level positions for work performed on the contract in Alameda, San Francisco or San Mateo counties; (c) entry level positions for work performed on the contract on property owned by the City; and (d) entry level positions for work done under a permit authorization on a development project in the City. If the contract amount is more than \$50,000, then you must call the First Source Hiring Administrator (401-4960) to review whether Chapter 83 will apply to the contract. If it does, then insert §45. If the First Source Hiring Administrator grants a waiver, then §45 should read “Left blank by agreement of the parties. (first source hiring program)”**

45. First Source Hiring Program

a. Incorporation of Administrative Code Provisions by Reference. The provisions of Chapter 83 of the San Francisco Administrative Code are incorporated in this Section by reference and made a part of this Agreement as though fully set forth herein. Contractor shall comply fully with, and be bound by, all of the provisions that apply to this Agreement under such Chapter, including but not limited to the remedies provided therein. Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 83.

b. First Source Hiring Agreement. As an essential term of, and consideration for, any contract or property contract with the City, not exempted by the FSHA, the Contractor shall enter into a first source hiring agreement ("agreement") with the City, on or before the effective date of the contract or property contract. Contractors shall also enter into an agreement with the City for any other work that it performs in the City. Such agreement shall:

(1) Set appropriate hiring and retention goals for entry level positions. The employer shall agree to achieve these hiring and retention goals, or, if unable to achieve these goals, to establish good faith efforts as to its attempts to do so, as set forth in the agreement. The agreement shall take into consideration the employer's participation in existing job training, referral and/or brokerage programs. Within the discretion of the FSHA, subject to appropriate modifications, participation in such programs maybe certified as meeting the requirements of this Chapter. Failure either to achieve the specified goal, or to establish good faith efforts will constitute noncompliance and will subject the employer to the provisions of Section 83.10 of this Chapter.

(2) Set first source interviewing, recruitment and hiring requirements, which will provide the San Francisco Workforce Development System with the first opportunity to provide qualified economically disadvantaged individuals for consideration for employment for entry level positions. Employers shall consider all applications of qualified economically disadvantaged individuals referred by the System for employment; provided however, if the employer utilizes nondiscriminatory screening criteria, the employer shall have the sole discretion to interview and/or hire individuals referred or certified by the San Francisco Workforce Development System as being qualified economically disadvantaged individuals. The duration of the first source interviewing requirement shall be determined by the FSHA and shall be set forth in each agreement, but shall not exceed 10 days. During that period, the employer may publicize the entry level positions in accordance with the agreement. A need for urgent or temporary hires must be evaluated, and appropriate provisions for such a situation must be made in the agreement.

(3) Set appropriate requirements for providing notification of available entry level positions to the San Francisco Workforce Development System so that the System may train and refer an adequate pool of qualified economically disadvantaged individuals to participating employers. Notification should include such information as employment needs by occupational title, skills, and/or experience required, the hours required, wage scale and duration of employment, identification of entry level and training positions, identification of English language proficiency requirements, or absence thereof, and the projected schedule and procedures for hiring for each occupation. Employers should provide both long-term job need projections and notice before initiating the interviewing and hiring process. These notification requirements will take into consideration any need to protect the employer's proprietary information.

(4) Set appropriate record keeping and monitoring requirements. The First Source Hiring Administration shall develop easy-to-use forms and record keeping requirements for documenting compliance with the agreement. To the greatest extent possible, these requirements shall utilize the employer's existing record keeping systems, be nonduplicative, and facilitate a coordinated flow of information and referrals.

(5) Establish guidelines for employer good faith efforts to comply with the first source hiring requirements of this Chapter. The FSHA will work with City departments to develop employer good faith effort requirements appropriate to the types of contracts and property contracts handled by each department. Employers shall appoint a liaison for dealing with the development and implementation of the employer's agreement. In the event that the FSHA finds that the employer under a City contract or property contract has taken actions primarily for the purpose of circumventing the requirements of this Chapter, that employer shall be subject to the sanctions set forth in Section 83.10 of this Chapter.

(6) Set the term of the requirements.

(7) Set appropriate enforcement and sanctioning standards consistent with this Chapter.

(8) Set forth the City's obligations to develop training programs, job applicant referrals, technical assistance, and information systems that assist the employer in complying with this Chapter.

(9) Require the developer to include notice of the requirements of this Chapter in leases, subleases, and other occupancy contracts.

c. Hiring Decisions. Contractor shall make the final determination of whether an Economically Disadvantaged Individual referred by the System is "qualified" for the position.

d. Exceptions. Upon application by Employer, the First Source Hiring Administration may grant an exception to any or all of the requirements of Chapter 83 in any situation where it concludes that compliance with this Chapter would cause economic hardship.

e. Liquidated Damages. Contractor agrees:

(1) To be liable to the City for liquidated damages as provided in this section;

(2) To be subject to the procedures governing enforcement of breaches of contracts based on violations of contract provisions required by this Chapter as set forth in this section;

(3) That the contractor's commitment to comply with this Chapter is a material element of the City's consideration for this contract; that the failure of the contractor to comply with the contract

provisions required by this Chapter will cause harm to the City and the public which is significant and substantial but extremely difficult to quantify; that the harm to the City includes not only the financial cost of funding public assistance programs but also the insidious but impossible to quantify harm that this community and its families suffer as a result of unemployment; and that the assessment of liquidated damages of up to \$5,000 for every notice of a new hire for an entry level position improperly withheld by the contractor from the first source hiring process, as determined by the FSHA during its first investigation of a contractor, does not exceed a fair estimate of the financial and other damages that the City suffers as a result of the contractor's failure to comply with its first source referral contractual obligations.

(4) That the continued failure by a contractor to comply with its first source referral contractual obligations will cause further significant and substantial harm to the City and the public, and that a second assessment of liquidated damages of up to \$10,000 for each entry level position improperly withheld from the FSHA, from the time of the conclusion of the first investigation forward, does not exceed the financial and other damages that the City suffers as a result of the contractor's continued failure to comply with its first source referral contractual obligations;

(5) That in addition to the cost of investigating alleged violations under this Section, the computation of liquidated damages for purposes of this section is based on the following data:

A. The average length of stay on public assistance in San Francisco's County Adult Assistance Program is approximately 41 months at an average monthly grant of \$348 per month, totaling approximately \$14,379; and

B. In 2004, the retention rate of adults placed in employment programs funded under the Workforce Investment Act for at least the first six months of employment was 84.4%. Since qualified individuals under the First Source program face far fewer barriers to employment than their counterparts in programs funded by the Workforce Investment Act, it is reasonable to conclude that the average length of employment for an individual whom the First Source Program refers to an employer and who is hired in an entry level position is at least one year;

therefore, liquidated damages that total \$5,000 for first violations and \$10,000 for subsequent violations as determined by FSHA constitute a fair, reasonable, and conservative attempt to quantify the harm caused to the City by the failure of a contractor to comply with its first source referral contractual obligations.

(6) That the failure of contractors to comply with this Chapter, except property contractors, may be subject to the debarment and monetary penalties set forth in Sections 6.80 et seq. of the San Francisco Administrative Code, as well as any other remedies available under the contract or at law; and

Violation of the requirements of Chapter 83 is subject to an assessment of liquidated damages in the amount of \$5,000 for every new hire for an Entry Level Position improperly withheld from the first source hiring process. The assessment of liquidated damages and the evaluation of any defenses or mitigating factors shall be made by the FSHA.

f. Subcontracts. Any subcontract entered into by Contractor shall require the subcontractor to comply with the requirements of Chapter 83 and shall contain contractual obligations substantially the same as those set forth in this Section.

46. 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 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 Agreement, and (ii) prohibit Contractor from bidding on or receiving any new City contract for a period of two (2) years. The Controller will not consider Contractor’s use of profit as a violation of this section.

47. Non-Waiver of Rights. The omission by either party at any time to enforce any default or right reserved to it, or to require performance of any of the terms, covenants, or provisions hereof by the other party at the time designated, shall not be a waiver of any such default or right to which the party is entitled, nor shall it in any way affect the right of the party to enforce such provisions thereafter.

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

49. Agreement Made in California; Venue. The formation, interpretation and performance of this 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 Agreement shall be in San Francisco.

50. Construction. All paragraph captions are for reference only and shall not be considered in construing this Agreement.

51. Entire Agreement. This contract sets forth the entire Agreement between the parties, and supersedes all other oral or written provisions. If any provision of this Agreement is held to be unenforceable, this Agreement shall be construed without such provision.

52. Modifications and Change Orders. The City may at any time, by written order, submit a Change Order to Contractor. Within ten working days of receiving a proposed Change Order, Contractor shall submit to City a written cost estimate, which shall include any adjustments to the **[list if applicable: Project price, the Project Schedule, the Statement of Work, the Acceptance Criteria]** or any other obligations of Contractor, as applicable. All Change Orders must be pre-approved, in writing, by City’s Project Manager. Contractor shall not proceed with any work contemplated in any Change Order until it receives written notification to commence such work from City’s Project Manager. Contractor shall commence the work contemplated by the Change Order upon receiving written notice from City’s Project Manager. If Contractor and City disagree on the effect that a Change Order will have on the **[list if applicable: Project price, the Project Schedule, the Statement of Work, the Acceptance Criteria]**, then Contractor must nevertheless proceed with the work contemplated by the Change Order once City’s Project Manager and the Purchaser direct Contractor, in writing, to do so. This Agreement may not be modified, nor may compliance with any of its terms be waived, except by written instrument executed and approved in the same manner as this Agreement.

53. Compliance with Laws. Contractor shall keep itself fully informed of the City’s Charter, codes, ordinances and regulations of the City and of all state, and federal laws in any manner affecting the performance of this Agreement, and must at all times comply with such local codes, ordinances, and regulations and all applicable laws.

54. Protection of Private Information. Contractor agrees to comply fully with and be bound by all of

the provisions of Chapter 12M of the San Francisco Administrative Code ("Protection of Private Information"), including the remedies provided. The provisions of Chapter 12M are incorporated herein by reference and made a part of this Agreement as though fully set forth. Capitalized terms used in this section and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 12M. Consistent with the requirements of Chapter 12M, Contractor agrees to all of the following: Neither Contractor nor any of its Subcontractors shall disclose Private Information obtained from the City in the performance of this Agreement to any other Subcontractor, person, or other entity, unless one of the following is true:

- (1) The disclosure is authorized by this Agreement;
- (2) The Contractor received advance written approval from the Contracting Department to disclose the information; or
- (3) The disclosure is expressly required by a judicial order.

Any disclosure or use of Private Information authorized by this Agreement shall be in accordance with any conditions or restrictions stated in this Agreement. Any disclosure or use of Private Information authorized by a Contracting Department shall be in accordance with any conditions or restrictions stated in the approval. Private Information shall mean any information that: (1) could be used to identify an individual, including without limitation, name, address, social security number, medical information, financial information, date and location of birth, and names of relatives; or (2) the law forbids any person from disclosing. Any failure of Contractor to comply with Chapter 12M shall be a material breach of this Agreement. In such an event, in addition to any other remedies available to it under equity or law, the City may terminate this Agreement, debar Contractor, or bring a false claim action against Contractor.

55. 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 Agreement shall constitute an Event of Default of this Agreement.

56. 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 Agreement as though fully set forth. This provision is a material term of this Agreement. By entering into this 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 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.

57. 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:

I have read and understood paragraph 37, 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.

Dennis J. Herrera
City Attorney

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

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

Approved:

City vendor number: **[vendor number]**

Jaci Fong
Director of the Office of Contract Administration,
and Purchaser

[Appendices

[appendix letter and title, if applicable

A: Performance specifications

B: Documentation

C: Project schedule

D: Acceptance test plan

[if you have received a waiver from the Risk Manager:

[E: Insurance Waiver]

➔ **In the footer, the page number should match the “of” number, such as “33 of 33.”**

Appendix A

Performance Specifications

➔ Describe in detail what functions the System is supposed to perform, any limitations on how it performs those functions, and the performance and other requirements the System should meet. The following checklist is designed to assist in defining the specifications. The performance specifications should include:

1. Immediate growth plans and projected future growth that the System capacity should be sufficient to provide for, and the growth level that expansion of the System should be able to cover.
2. System performance requirements, including execution speed and response time at peak volumes of data and transactions and at off-peak hours.
3. System reliability, including downtime and downgraded performance.
4. System accessibility to peripheral units.
5. Programming standards.
6. The various combinations of data that the System will be required to output.
7. The frequency that City will need to recall all or part of its data bank.
8. The length of time the data must be retained by the System, or stated in the converse, the frequency with which data may be purged from the computer system.
9. The flexibility required by City in entering its data.
10. Particular requirements such as the computer operating system or language.
11. The degree of security required by City for the System. (In determining this, the sensitivity of the data stored in the computer system should be balanced against the degree of access which the System is designed to achieve. If the data stored requires a high degree of security, encryption and user code security systems should be considered.)
12. Compatibility of the System with other City systems.
13. Expandability of the System.

Appendix B Documentation

The following is a description of all technical publications relating to use of the System, such as reference, installation, administrative, maintenance, and programmer manuals, and the number of copies of each to be provided by Contractor to City.

➔Itemize and describe in detail all the documentation City wants Contractor to provide with the System. Define the standards, including the nature and extent of coding annotations. For each type of documentation, be sure to indicate how many copies are to be provided. Unless the documentation is listed in this section, Contractor does not have to provide it.

Appendix C Project Schedule

1. Start Date: [insert start date]

The date on which the time for completion of Phase 1 shall begin to accrue.

2. Notice to Proceed: [insert number in words and (numbers)] days

The minimum time period of advance notification that City shall give Contractor to notify Contractor that Authorization has been obtained for this Agreement and that Contractor should be ready to begin Work on the Start Date.

3. Phase 1: Preparation of Functional Specifications

a. Time for completion: [insert number in words and (numbers)] days

The length of time following the Start Date during which Contractor shall complete and deliver to City for City's review the following Work:

b. Functional Specifications of the System

[List any additional things Contractor shall complete during Phase 1 and any Critical Milestones associated with this phase.]

c. Review Period: [insert number in words and (numbers)] days

→ Should be a number several multiples smaller than the number used for the Acceptance Window.

The length of time following delivery to City of the Work specified above, or resubmission of such Work to City following error correction by Contractor, that City shall have to review the completed Work and give notice to Contractor of City's acceptance or rejection of the completed Work.

d. Acceptance Window: [insert number, such as 90 or 120, in words and in (numbers)] days

The time period following completion of Phase 1 during which Contractor must secure Acceptance of that phase from City.

4. Phase 2: Preparation of Design Specifications

a. Time for completion: [insert number in words and (numbers)] days

The length of time following Acceptance by City of the Functional Specifications and other Work produced in Phase 1 during which Contractor shall complete the following Work:

b. Design Specifications of the System

[List any additional things Contractor shall complete during Phase 2 and any Critical Milestones associated with this phase.]

c. **Review Period:** [insert number in words and (numbers)] days

➔ **Should be a number several multiples smaller than the number used for the Acceptance Window.**

The length of time following delivery to City of the Work specified above, or resubmission of such Work to City following error correction by Contractor, that City shall have to review the completed Work and give notice to Contractor of City's acceptance or rejection of the completed Work.

d. **Acceptance Window:** [insert number, such as 90 or 120, in words and in (numbers)] days

The time period of following completion of Phase 2 during which Contractor must secure Acceptance of the completed phase from City.

5. Phase 3: Program Coding, System Installation, and Documentation Delivery

a. **Time for completion:** [insert number in words and (numbers)] days

The length of time following Acceptance by City of the Design Specifications and other Work produced in Phase 2 during which Contractor shall complete the following Work:

Coding of the Programs for the System

Factory, pre-installation testing of the System by Contractor [and City, if so desired]

Installation of the completed System at its final City site

Delivery of Documentation for System

[List any additional things Contractor shall complete during Phase 3 and any Critical Milestones associated with this phase.]

Following completion by Contractor of Phase 3, City and Contractor shall commence performance of the Acceptance Tests.

➔ **The above separation of the project is suggested, although not required. Also, the above Phases can be further subdivided. Where appropriate, be sure to always make a Critical Milestone explicit as such.**

Appendix D Acceptance Test Plan

➔ Acceptance Criteria:

Explicitly define what must be satisfied for there to be acceptance. This section is similar to the Performance Specifications, but unlike the Performance Specifications, which gets superseded by the Functional Specifications and later the Design Specifications, it remains the same over the course of the Agreement and thus provides a standard for evaluating the completed System that can be specified at the outset and remain unaltered. Use the following checklist of important items to consider:

1. Response time of System at peak load and during off hours
2. Transaction rate
3. System capacity
4. System Reliability--Specify the length of time of the reliability test period [i.e. 30 days] and the permissible downtime of the system during that period [i.e. "X"%]. Also specify the required accessibility of the system to peripheral units during that time period [i.e. not more than 10% can be prohibited access simultaneously at any time except during downtime of the System].
5. Test failures--Define what constitutes a test failure. Can categorize failures by severity.
6. Permissible number of failures--Define the number of failures and the severity thereof that are permissible before the System is determined to have failed the test(s).
7. Retesting--Circumstances under which retesting is appropriate.
8. System satisfies all the requirements set forth in the Performance Specifications.

Acceptance Procedure:

Things to consider in drafting this section:

1. Use of the old system and the new System in parallel--Length of time Contractor has to debug the System while at this stage; performance tests City will perform at this point.
2. Certification by Contractor that the System is ready to be used in operation by City.
3. Cutover from old System to new System--Tests that must be passed before this is done; cutover procedure; retention of old system as a backup and the conditions that would cause and the method of reversion to the old system.
4. Time for Contractor to debug the System while in operation(usually a short time, if any).
5. Time frame for Final Acceptance procedures--Testing by City of the System in full operation; total amount of time for the System acceptance tests, and if the System fails to pass during that time, what will happen and the remedies that will be available.
6. Method and timing of issuance of Final Acceptance.
7. Equipment, material, and assistance Contractor is to provide during all stages of the testing.
8. Notice procedures for the City to inform Contractor of failed tests and for Contractor to inform City that errors have been corrected and the System is ready to be retested.
9. Recording procedures for the tests and their results.
10. Times during the acceptance testing period during which the installed System at City's site will be available to Contractor to perform debugging.

**Appendix E
Insurance Waiver**

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