

**AMENDED AND RESTATED SERVICE AGREEMENT AND PROPERTY  
USE LICENSE**

**FOR TOWING, STORAGE AND DISPOSAL  
OF ABANDONED AND ILLEGALLY PARKED VEHICLES**

**by and between the**

**CITY AND COUNTY OF SAN FRANCISCO**

**AND**

**TEGSCO, LLC**

**d.b.a. SAN FRANCISCO AUTORETURN,  
a California Limited Liability Company**

**Dated: July 31, 2010**

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**AMENDED AND RESTATED AGREEMENT AND PROPERTY USE LICENSE  
FOR TOWING, STORAGE, AND DISPOSAL  
OF ABANDONED AND ILLEGALLY PARKED VEHICLES  
BY AND BETWEEN  
THE CITY AND COUNTY OF SAN FRANCISCO AND  
TEGSCO, LLC, D.B.A. SAN FRANCISCO AUTORETURN**

This Amended and Restated Service Agreement And Property Use License for Towing, Storage, and Disposal of Abandoned and Illegally Parked Vehicles ("Amended and Restated Agreement"), dated for convenience as July 31, 2010, is entered into by and between the City and County of San Francisco, a municipal corporation, acting by and through its Municipal Transportation Agency, hereinafter referred to as "City", and TEGSCO, LLC, a California limited liability company doing business as San Francisco AutoReturn, hereinafter referred to as "Contractor", in the City and County of San Francisco, State of California, for the services and under the terms described herein.

**Recitals**

WHEREAS, The City issued a Request for Proposals for Towing, Storage and Disposal of Abandoned and Illegally Parked Vehicles on September 18, 2002 ("RFP"); and

WHEREAS, Contractor submitted a proposal dated March 10, 2003 ("Proposal") which was selected by City as the highest-ranked proposal among the proposals submitted in response to the RFP; and

WHEREAS, In the course of negotiating a Service Amended and Restated Agreement And Property Use License For Towing, Storage and Disposal of Abandoned and Illegally Parked Vehicles the City's existing towing services contractor, The City Tow, informed the City on January 23, 2004 that it would cease to provide towing services as of March 21, 2004; and

WHEREAS, The cessation of towing services under the then-existing contract with The City Tow created emergency circumstances that required the City and Contractor, with the approval of the San Francisco Board of Supervisors, to enter into an Emergency Interim Service Amended and Restated Agreement and Property Use License for Towing, Storage and Disposal of Abandoned and Illegally Parked Vehicles ("Emergency Interim Agreement") pending negotiation of the long-term contract pursuant to the RFP, and Contractor began providing towing services to the City on March 22, 2004; and

WHEREAS, The City and Contractor entered into the Service Agreement and Property Use License for Towing, Storage and Disposal of Abandoned and Illegally Parked Vehicles (the "Original Agreement"), which had a five-year term ending on July 31, 2010 and an option to extend; and

WHEREAS, On June 30, 2007 the City and Contractor entered into an amendment to the Original Agreement (the "First Amendment"), which revised the rate schedule for towing, impounding, lien, and administrative towing fees; and

WHEREAS, the City and Contractor now wish to amend the Original Agreement as amended by the First Amendment to: (1) extend the Original Agreement for five years, until July 31, 2015, (2) revise the rates to be charged for towing and storage of vehicles under the Original Agreement, as amended by the First Amendment, (3) require Contractor to contribute to an audit fund and a fund to be used by City to hire an employee to monitor Contractor's performance, (4) update the insurance and performance guarantees required by the Original Agreement, (5) make changes to the procedures that

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Contractor must follow under the Original Agreement; and 6) amend other provisions of the Original Agreement as amended, by the First Amendment; and

WHEREAS, For simplicity of reference and ease of use by the parties, the parties wish to amend and restate the Original Agreement as amended by the First Amendment by means of this Amended and Restated Service Agreement and Property Use License for Towing, Storage and Disposal of Abandoned and Illegally Parked Vehicles; and

WHEREAS, The parties acknowledge and agree that this Amended and Restated Agreement amends and restates the Original Agreement as amended by the First Amendment, in its entirety, contains the entire understanding of the parties, and thereby supersedes and replaces the Original Agreement as amended by the First Amendment;

NOW, THEREFORE, based on the foregoing, and in consideration of the promises, covenants, and undertakings contained herein, the City and Contractor hereby agree as follows:

### **AMENDED AND RESTATED AGREEMENT**

#### **1. Definitions**

The following words and phrases shall have the meanings set forth below when used in this Amended and Restated Agreement:

**1.1 Abandoned Vehicle:** A vehicle that qualifies to be towed pursuant to San Francisco Traffic Code § 159, or successor section of the San Francisco Municipal Code, because it is parked or left standing on a public street or highway in the City for more than 72 consecutive hours, or is deemed to be abandoned pursuant to Vehicle Code § 22669(a), or is found to be a public nuisance on private property pursuant to Vehicle Code § 22660 and Traffic Code § 234, or successor statutes or local laws..

**1.2 Administrative Hold:** A hold placed on a vehicle impounded by SFMTA or SFPD pursuant to which the vehicle may not be released prior to the passage of a specified period of time, fulfillment of statutory requirements or upon written authorization by the impounding agency. The procedures and requirements for Administrative Holds are further described in Section 4.7 of Appendix A to this Amended and Restated Agreement.

**1.3 Agreement:** This Amended and Restated Agreement, its Appendices, Exhibits and Attachments to Appendices, the Operations Plan as adopted in accordance with Section 14 of Appendix A, the RFP, the Proposal, and other documents attached hereto or specifically incorporated herein by reference.

**1.4 Automated Dispatch System (ADS):** Contractor's automated dispatch management system that is GPS-enabled and provides electronic dispatch communications.

**1.5 Central Dispatch:** Contractor's primary facility for taking Tow Requests and dispatching Tow Cars, as further defined in Section 11.1(d) of Appendix A.

**1.6 Citation:** A ticket for a parking violation processed by SFMTA.

**1.7 City:** The City and County of San Francisco, acting by and through its Municipal Transportation Agency.

**1.8 Claim:** Any claim brought against the City or Contractor or their respective agents, contractors or employees for theft of property or injury to any property or person arising out of Contractor's performance of services under this Agreement. For the purpose of Appendix A, § 5.2, "Claim" shall mean a request for compensation for personal injury, loss from or damage to towed

### **AMENDED AND RESTATED AGREEMENT**



vehicle and/or personal property, costs of recovering a vehicle that was not dropped in violation of Appendix A, Section 4.2, or the value of a vehicle that was lost in violation of Section 4.1 of Appendix A.

**1.9 Complaint:** Any problem with service provided by Contractor within the scope of this Agreement that is communicated to Contractor or City by a Customer and which is not a Claim. This does not include issues reported to the Contractor by Customers that the Contractor is able to resolve to the satisfaction of the Customer through internal issue resolution procedures.

**1.10 Controller:** The Controller of the City and County of San Francisco or any duly authorized agent thereof.

**1.11 Citation Management System (CMS):** SFMTA's Ticket Information Management System (TIMS) or successor system(s) used by SFMTA for tracking Tow Requests and Citations.

**1.12 Customer:** A member of the public who is associated with an impounded vehicle, which may include the registered owner, the driver of the vehicle at the time that it is stopped or towed, a person who appears on behalf of the owner or the driver of the vehicle, or a purchaser of a vehicle at lien sale auction.

**1.13 Customer Service Center:** The location for Customers recovering vehicles in person to pay fees and process required forms for release of a vehicle, as further described in Appendix A Section 11.1(a) and located at 450 7<sup>th</sup> Street, San Francisco.

**1.14 Courtesy Tows:** Tows requested for disabled vehicles owned or used in an official capacity by either SFPD or SFMTA.

**1.15 Days:** Consecutive calendar days, including weekends and holidays, unless otherwise specified.

**1.16 Deficiency Claim:** A claim by Contractor against a registered vehicle owner equal to towing and storage charges, less any amount received from the sale of the vehicle, and which is subject to all rights and limitations set forth in California Civil Code § 3068.2 or any successor statute that creates, defines and limits Contractor's right to such claim.

**1.17 Delinquent Citation:** A Citation that was unpaid past the original due date for payment, upon which penalties for overdue payment have accrued, and which is not scheduled for administrative review or hearing by SFMTA.

**1.18 Designated Facilities:** Real property and any buildings and improvements thereon used by Contractor in the performance of this Agreement, as further described in Appendix A, Section 11.1.

**1.19 Director of Transportation:** The Chief Executive Officer of the Municipal Transportation Agency of the City and County of San Francisco.

**1.20 Dispatch Tows:** Individual Tow Requests that are communicated to Contractor from the Enforcement tow desk or other dispatch center operated by the City.

**1.21 DMV:** California Department of Motor Vehicles.

**1.22 DPH:** Department of Public Health of the City and County of San Francisco.

**1.23 Effective Date:** July 31, 2010, or the date upon which all required approvals are obtained and all signatures of the parties have been affixed hereto, whichever date is later.

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**1.24 Employees:** The persons directed and controlled by Contractor and/or its PEO Contractor who are providing work and services on behalf of Contractor in order to perform the work required under this Agreement, not including entities that are independent subcontractors. The classes and job descriptions of persons who are Employees of Contractor may include, but are not limited to:

- (a) Cashiers, bookkeepers, and accountants.
- (b) Persons who move vehicles at and between Designated Facilities (also known as "Storage Specialists").
- (c) Forklift and heavy equipment operators.
- (d) Clerks, secretaries, telephone operators and administrative and information technology/computer support personnel.
- (e) Tow Car operators directly employed by Contractor and/or its PEO Contractor.
- (f) Guards and security personnel.

**1.25 Expedited Tow:** A tow needed to ensure public or officer safety and/or to eliminate a hazard.

**1.26 Gross Revenues:** Contractor's gross receipts from all fees and proceeds under this Agreement, including all revenues derived from lien sales conducted pursuant to this Agreement. "Gross Revenues" do not include SFMTA or SFPD Traffic Offender Fees or fees payable by vehicle owners or operators collected by Contractor on behalf of the City pursuant to the terms of this Agreement.

**1.27 Headquarters Office:** Contractor's administrative office, currently located at 945 Bryant Street, Suite 350 San Francisco, California.

**1.28 Investigative Police Hold:** A Police Hold imposed on an evidentiary vehicle for the purpose of criminal investigation, as further described in Appendix A, Section 4.6.

**1.29 Letter of Credit:** The letter of credit which Contractor is required to maintain to guarantee the performance of Contractor's obligations under this Agreement, as further described in Section 12.1 and 12.2 and in Appendix C, Section 6 of this Agreement. The Letter of Credit and all replacement Letters of Credit provided by Contractor during the Term of this Agreement shall be attached hereto as Appendix E and is incorporated by reference as though fully set forth herein.

**1.30 Lien 1 Vehicle:** A low-value vehicle, including a vehicle valued at five hundred dollars (\$500) or less, in accordance with Vehicle Code § 22670 (requiring valuation of any vehicle towed by a public agency) and § 22851.2 (regarding vehicles valued at an amount not exceeding five hundred dollars (\$500) and not towed for being abandoned) or a vehicle valued at five hundred dollars (\$500) or less pursuant to § 22851.3 (regarding vehicles towed for being abandoned) and §§ 22851.6 - 22851.10 (regarding disposal procedures for low-value vehicles). If the Vehicle Code is amended subsequent to the Effective Date to change the dollar amounts that trigger requirements for low-value vehicles, this Agreement shall incorporate such amendments by reference as though fully set forth herein for the purpose of defining dollar-value thresholds and legally required procedures for handling and disposal of low-value vehicles.

**1.31 Lien 2 Vehicle:** A medium-value vehicle valued at more than five hundred dollars (\$500) and up to and including four thousand dollars (\$4,000) in accordance with Vehicle Code § 22670 (requiring valuation of any vehicle towed by a public agency), or over five hundred dollars (\$500) and up to and including four thousand dollars (\$4,000) for the purpose of Vehicle Code

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§ 22851.3 (regarding vehicles towed for being abandoned), and California Civil Code §§ 3067-3075 (setting forth legally required procedures for lien sales of towed vehicles). If the Vehicle Code or the California Civil Code are amended subsequent to the Effective Date to change the dollar amounts which trigger requirements for medium-value vehicles, this Agreement shall incorporate such amendments by reference as though fully set forth herein for the purpose of defining dollar-value thresholds and legally required procedures for handling and disposal of medium-value vehicles.

**1.32 Lien 3 Vehicle:** A high-value vehicle valued at more than four thousand dollars (\$4,000), in accordance with Vehicle Code § 22670, requiring valuation of any vehicle towed by a public agency, and California Civil Code Sections 3067-3075, setting forth required procedures for lien sales of vehicles. If the Vehicle Code or the California Civil Code are amended subsequent to the Effective Date to change the dollar amounts which trigger requirements for high-value vehicles, this Agreement shall incorporate such amendments by reference as though fully set forth herein for the purpose of defining dollar-value thresholds and legally required procedures for handling and disposal of high-value vehicles.

**1.33 Lien Category:** The classification of a vehicle as a Lien 1, Lien 2 or Lien 3 vehicle in accordance with its appraised value.

**1.34 Mandatory Fee:** All fees that must be paid by Customer before Contractor may release any vehicle to the owner or purchaser of a vehicle. Mandatory Fees include: boot fees, SFMTA Administrative Fee, SFPD Traffic Offender Fee, towing, storage, transfer and lien fees, returned check charges and Delinquent Citation fees, as applicable.

**1.35 Monthly Finance Report:** Monthly report that summarizes administrative and referral fees paid by the Contractor to the City and waiver activity.

**1.36 Occurrence:** Any accident or incident occurring in a single place at a single time from a single event that results in one or more claims for injury to persons or property. An accident or incident that results in multiple claims shall be considered a single Occurrence for purposes of applying any deductible provisions of Contractor's insurance coverages.

**1.37 Operations Plan:** The collected written procedures manuals, lists and schedules required to be submitted by Contractor and approved by City as set forth in Appendix A, Section 14, and which are listed in Appendix B to this Agreement. When approved by City, the Operations Plan shall define the service standards for the work to be performed under this Agreement, and is hereby incorporated into this Agreement as though fully set forth herein.

**1.38 Peak Service Hours:** Monday through Friday, 7:00 a.m. to 8:00 p.m., excluding City holidays.

**1.39 Peak Towing Hours:** Monday through Friday, 7:00 a.m. to 9:00 a.m. and 3:00 p.m. to 7:00 p.m., excluding City holidays.

**1.40 PEO Contract:** Any agreement with any professional employment organization (PEO) which provides payroll, workers' compensation, work place safety, staffing and other human resources services, for the purpose of performing the services required by this Agreement. "PEO Contract" does not include contracts with subcontractors for the provision of Tow Cars, Tow Equipment and related towing services.

**1.41 PEO Contractor:** An entity with whom Contractor has entered into a PEO Contract.

**1.42 Performance Bond:** The Performance Bond which Contractor is required to maintain to guarantee the performance of Contractor's obligations under this Agreement, as further

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described in Section 12.1 and 12.2 and in Appendix C, Section 6 of this Agreement. The Performance Bond and all replacement Performance Bonds provided by Contractor during the Term of this Agreement shall be attached hereto as Appendix F and incorporated by reference as though fully set forth herein.

**1.43 Police Hold:** A hold placed on a vehicle by the SFPD in writing which requires a vehicle to be processed in accordance with the Police Hold procedures specified in this Agreement, or a vehicle with no visible VIN which is held for inspection by the SFPD.

**1.44 Port:** The San Francisco Port Commission, an agency of the City and County of San Francisco.

**1.45 Port MOU:** That certain Memorandum of Understanding by and between SFMTA and the Port, a copy of which is attached hereto as Appendix C and incorporated by reference as though fully set forth herein.

**1.46 Primary Storage Facility:** The facilities primarily used for short term storage of impounded vehicles currently located at 450 7<sup>th</sup> Street, San Francisco, California, as further described in Section 11.1(b) of Appendix A.

**1.47 Project 20:** The SFMTA program which allows vehicle owners and operators to perform community service in lieu of paying Citation fees, in accordance with Vehicle Code § 40215(c)(7).

**1.48 Property, Properties:** Real property owned by the City and licensed to Contractor for the purpose of this Agreement, Pier 70 as of the Effective Date of this Agreement, and any other properties that may be licensed to Contractor by City for the purpose of this Agreement during its Term.

**1.49 Proposal:** The proposal submitted by Contractor in response to the RFP, dated March 10, 2003, incorporated by reference into this Agreement as though fully set forth herein.

**1.50 Records:** The documents Contractor is required to create and maintain under this Agreement, including but not limited to: (1) complete and accurate books, accounts and documentation of financial transactions relating to all items of income received and expenses incurred in the performance of this Agreement; (2) documentation of all vehicles towed; (3) documentation of all vehicles stored; (4) documentation of all Claims; (5) all Monthly Management Reports and other reports Contractor is required to submit to City; (6) charts and diagrams of any property licensed to Contractor by City to fulfill the obligations of this Agreement; (7) other documents or reports as City may require Contractor to produce in the course of performing work under the Agreement; and (8) the Records described in Section 13 of Appendix A to this Agreement.

**1.51 Referral Fee:** The fee established in Section 12.1(a) of Appendix A to this Agreement.

**1.52 RFP:** The City and County of San Francisco's Request for Proposals for Towing, Storage and Disposal of Abandoned and Illegally Parked Vehicles, dated September 18, 2002, and all addenda thereto, incorporated by reference into this Agreement as though fully set forth herein.

**1.53 Regional Sweeps:** Pre-arranged parking or traffic enforcement operations in designated areas. These tow requests are generally communicated directly by SFPD officers or SFMTA Parking Enforcement Officers to Tow Car operators who are deployed in the field and assigned to specific officer(s).

**1.54 Routine Tows:** Scheduled Tows and Dispatch Tows.

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**1.55 Scheduled Tows:** Pre-arranged tow events at times and in places designated by City, including but not limited to scheduled commuting hour ("towaway") tows, Zone Tows, Special Events Tows and Abandoned Vehicle tows. These tow requests are generally communicated directly by SFPD officers or SFMTA Parking Enforcement Officers to Tow Car operators who are deployed in the field and assigned to specific officer(s).

**1.56 Scofflaw Vehicle:** A vehicle towed for multiple Delinquent Citations pursuant to subsection (i) of Vehicle Code § 22651.

**1.57 Secondary Storage Facility:** The facility primarily used for long term storage of impounded vehicles, located at Pier 70, San Francisco, California as of the Effective Date of this Agreement, as further described in Appendix A, Section 11.1(c).

**1.58 SFMTA:** The San Francisco Municipal Transportation Agency an agency of the City and County of San Francisco

**1.59 SFPD:** The Police Department of the City and County of San Francisco or any duly authorized officer or member thereof.

**1.60 SFPD Traffic Offender Fee:** The fee described in Section 12.1(d) of Appendix A to this Agreement, as authorized by Traffic Code §§ 170.2-A and 170.2-B and Vehicle Code § 22850.5, or successor statutes or ordinances.

**1.61 Special Events Tows:** Tows of vehicles parked in violation of temporary parking restrictions, as authorized by Traffic Code §§ 33(c) and 130 or successor ordinances.

**1.62 Term:** The duration of this Agreement as established in Section 2 herein, and any additional period during which Contractor completes repair, remediation or other work required for the termination of the License agreement for Pier 70, as set forth in Appendices C and D of this Agreement, and the tasks listed in Section 54 of this Agreement for transition to a successor contractor or successor agreement.

**1.63 Tow Car:** A motor vehicle which has been altered or designed and equipped for and exclusively used in the business of towing vehicles by means of a crane, hoist, tow bar, tow line, or dolly or is otherwise exclusively used to render assistance to other vehicles, and as defined in Vehicle Code § 615.

**1.64 Tow Equipment:** Tow Cars and all appurtenant computer systems, communications devices, hand tools, electric tools and towing hardware, whether or not expressly listed in this Agreement, which are necessary to perform towing services to the standards of the towing industry and as set forth in this Agreement.

**1.65 Tow Request:** A request directed to Contractor from SFMTA, DPH or SFPD for service by a Tow Car or Tow Equipment for the removal or relocation of a vehicle.

**1.66 Towed Vehicle Management System (TVMS):** The electronic database system to be used by Contractor to meet record keeping, reporting and vehicle handling requirements of this Agreement, as further described in Section 10 of Appendix A.

**1.67 Traffic Code:** The Traffic Code of the City and County of San Francisco.

**1.68 Treasurer:** The Treasurer of the City and County of San Francisco.

**1.69 Unavoidable Delays:** With respect to a delay in performance, "Unavoidable Delay" shall mean any delay that is attributable to any: (a) strike, lockout or other labor or industrial disturbance (whether or not on the part of the employees of either party hereto or their contractors),

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civil disturbance, future order claiming jurisdiction, act of the public enemy, war, riot, sabotage, blockage, embargo, inability to secure customary materials, supplies or labor through ordinary sources by reason of regulation or order of any government or regulatory body; (b) changes in any applicable laws or the interpretation thereof; or (c) lightning, earthquake, fire, storm, hurricane, tornado, flood, washout, explosion; or (d) a governmental taking by eminent domain of all or a substantial portion of a Designated Facility; or (e) any interference with Contractor's right to access a substantial portion of a Designated Facility owned or provided for Contractor's use by City, or any other cause beyond the reasonable control of the party from whom performance is required, or any of its contractors or other representatives.

**1.70 Vehicle Code:** The Vehicle Code of the State of California.

**1.71 VIN:** The distinguishing number or other mark used for the purpose of uniquely identifying a vehicle or vehicle part, as further defined in Vehicle Code § 671.

**1.72 WAN:** Wide Area Network.

**1.73 Zone Tows:** Tows of vehicles parked in zones listed in Traffic Code § 71b, or successor ordinance.

## **GENERAL PROVISIONS**

### **2. Term of the Agreement**

The Term of this Agreement shall be five years, from the July 31, 2010 through July 31, 2015. The City agrees to submit a request for an increase in rates to the SFMTA Board to reflect any increased cost to Contractor for increased rental payments for the property at Pier 70 from August 1, 2010 through July 31, 2015 that is in excess of CPI adjustments to be applied during the terms of Appendices C and D.

### **3. Effective Date of Amended and Restated Agreement**

This Amended and Restated Agreement shall commence upon the Effective Date.

### **4. Services Contractor Agrees to Perform**

The Contractor shall tow and store any vehicles that SFMTA, DPH or the SFPD orders removed from any public street or highway or from private property within the City, in accordance with the requirements of the San Francisco Transportation Code and the Vehicle Code, and shall perform such other related services as are described in this Agreement, in accordance with Appendix A, "Scope of Work," and Appendix B "Operations Plan". Appendix A, Appendix B, and the Operations Plan to be adopted and amended as provided in Section 14 of Appendix A are all attached hereto and incorporated by reference as though fully set forth herein. Rates and charges to the public for services under this Agreement shall be as set forth in Appendix F, attached hereto and incorporated by reference as though fully set forth herein.

All vehicle handling and storage required by this Agreement shall be conducted at one of the Designated Facilities. As of the Effective Date of this Agreement, City hereby licenses to Contractor the use of one of the real properties on which the Designated Facilities are currently located -- Pier 70, San Francisco. The license agreement for this property is attached hereto as Appendix D and is incorporated by reference as though fully set forth herein. The parties acknowledge that Contractor's Customer Service Center and Primary Storage Facility operations are conducted at a property owned

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by Caltrans and leased by Contractor -- 450 7<sup>th</sup> Street. Should City cease to use Contractor for towing services, the terms for the City's continued use of the 450 7<sup>th</sup> Street property are attached hereto as Appendix G and are incorporated by reference as though fully set forth herein.

City hereby consents to Contractor's towing and storage of vehicles that are not towed or stored pursuant to a Tow Request with the prior written approval of City and subject to any conditions imposed in such written approval; provided however, that (i) Contractor shall at all times conduct itself in accordance with the Customer service standards of this Agreement so as not create any negative effect on Contractor's public image and reputation as the City's towing contractor, and (ii) Contractor's operations with respect to such vehicles shall not create any adverse impact on its performance of all requirements of this Agreement. City may revoke its consent at any time without cause by written notice to Contractor. The following sections of this Agreement shall apply to any towing or storage of vehicles by Contractor within the City and County of San Francisco that are not towed or stored pursuant to a Tow Request: Service Agreement Sections 8, 9, 11, 12, 13, 14, 15, 16, 17, 20, 22, 26, 27, 28, 29, 31, 32, 35, 37, 38, 40, 41, 42, 50; Appendix A Sections 1, 3, 4, 5, 6, 7, 9, 11, 12.1(b), 12.3, 12.5, 12.6, 13, 14; Appendix B, Appendices C and D during their respective terms, and Appendices E and F.

#### **5. Submitting False Claims; Monetary Penalties**

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

#### **6. Taxes**

Payment of any taxes, including possessory interest taxes and California sales and use taxes, levied upon or as a result of this Amended and Restated 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 Amended and Restated 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.

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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 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.

## **7. Payment Does Not Imply Acceptance of Work**

The acceptance of any payment by City and/or Contractor's deduction or offset of funds (that would otherwise be paid by City to Contractor as payment for services) from revenues generated under the Agreement 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 received. Work that does not conform to the requirements of this Agreement may be rejected by City and in such case Contractor must take immediate corrective action.

## **8. Qualified Personnel**

Work under this Agreement shall be performed only by competent personnel under the supervision of and in the employment of Contractor, or through subcontracts entered into pursuant to Section 27. Contractor will comply with City's reasonable requests regarding assignment of personnel, including the removal of specified personnel upon request of City, but all personnel, including those assigned at City's request, must be supervised by Contractor. Contractor shall commit adequate resources to meet its obligations under this Amended and Restated Agreement.

### **8.1 Contractor Is the Employer of the Employees**

Notwithstanding any language in any PEO Contract, and notwithstanding the intent of Contractor and/or any contractor for PEO Contract services in entering into a PEO Contract or as memorialized within a PEO Contract or as a PEO Contract may be construed by any person, Contractor affirms, agrees and warrants that for all purposes under the Agreement and under relevant law applicable to the Agreement, Contractor is the employer of the Employees. Contractor affirms, agrees and warrants that for all purposes of the Agreement, specifically including but not limited to Contractor's duties under Sections 4, 5, 8, 9, 10, 14, 15, 16, 18, 21, 22, 26, 30, 32, 35, 37, 40, 41, 42, 43, 49, 50 of this Agreement, and Section 8 of Appendix A to this Agreement, Contractor is the employer of the Employees.

### **8.2 PEO Contract Shall Not Control or Modify the Agreement**

Notwithstanding any language in any PEO Contract, and notwithstanding the intent of Contractor and/or a PEO Contractor in entering into a PEO Contract or as memorialized within a PEO Contract or as a PEO Contract may be construed by any person, Contractor affirms, agrees and warrants that all provisions of this Agreement are in full force and effect, and that a PEO Contract does not modify Contractor's obligations and duties under this Agreement. Contractor further agrees, affirms and

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warrants that a PEO Contract shall have no effect upon the City's rights under this Agreement and a PEO Contract does not alter the City's right to enforce all provisions of this Agreement against Contractor directly.

### **8.3 PEO Contract is a Subcontract to the Agreement**

Notwithstanding any language in any PEO Contract, and notwithstanding the intent of Contractor and/or a PEO Contractor in entering into a PEO Contract or as memorialized within a PEO Contract or as a PEO Contract may be construed by any person, Contractor affirms, agrees and warrants that for all purposes under this Agreement and under relevant law applicable to this Agreement, any PEO Contract is a subcontract for the purpose of providing payroll, workers' compensation, work place safety and other human resources services to Contractor.

### **8.4 Contractor is Liable for All Actions of PEO Contractor**

Notwithstanding any language in any PEO Contract, and notwithstanding the intent of Contractor and/or a PEO Contractor in entering into a PEO Contract or as memorialized within a PEO Contract, or as any PEO Contract may be construed by any person, Contractor affirms, agrees and warrants that, Contractor shall be liable for all actions of its PEO Contractor insofar as said actions affect the City or Contractor's performance of its duties under the Agreement. For purposes of the Agreement, Contractor shall not assign and has not assigned any of its duties under the Agreement to its PEO Contractor.

### **8.5 City is not a General or Special Employer to the Employees**

The parties agree no employment relationship exists between the City and the Employees. As to the Employees, the City is not a "General Employer" or "Special Employer", as those terms are defined under California law, for any purpose, including but not limited to application of California Labor Code §§ 6300 *et seq.* and California Insurance Code § 11663, or any other applicable statute. Should a court or administrative agency having jurisdiction over the issue determine that the City is a "General Employer" or "Special Employer" of the Employees, Contractor shall fully indemnify the City for all costs and liabilities arising from that finding, including but not limited to consequential and incidental damages, temporary disability indemnity, permanent disability indemnity, medical costs, penalties and fines, vocational rehabilitation costs, and attorneys fees. Contractor's duties and obligations under this section of the Agreement are material obligations guaranteed by the performance guarantee described in Section 12.

### **8.6 Prevailing Wages**

Contractor hereby acknowledges that it has read completely and fully understands San Francisco Administrative Code Section 21.25-2 and agrees that this Agreement shall be subject to, and Contractor shall comply with, all applicable obligations and requirements imposed by that Section.

## **9. 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.

## **10. Independent Contractor; Payment of Taxes and Other Expenses**

**10.1 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

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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.

**10.2 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 or any of its agents or Employees is an employee of the City for purposes of collection of any employment taxes, any amounts offset from revenues paid by Contractor to the City 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 to the City (again, offsetting any amounts already paid by Contractor that 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.

**10.3 Contractor's Employees.** Contractor shall be solely responsible for all matters relating to payment of Contractor's Employees, including compliance with Social Security, withholding and payment of any and all federal, state and local personal income taxes, disability insurance, unemployment, and any other taxes for such persons, including any related assessments or contribution required by law and all other regulations governing City Health Service System, vacation, holiday, retirement or other programs, nor, in the event that City terminates this Agreement shall Contractor have recourse of rights of appeal under City's rules and regulations which are applicable to employees.

**10.4 Payroll and Taxation.** Contractor shall make or cause to be made all necessary payroll deductions for disability and unemployment insurance, social security, withholding taxes and other applicable taxes, and prepare, maintain and file or cause to be filed all necessary reports with respect to such taxes or deductions, and all other necessary statements and reports pertaining to labor employed in the performance of this Agreement.

## **11. Required Insurance**

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Subject to approval by the City's Risk Manager of the insurers and policy forms, Contractor shall place and maintain throughout the Term of this Agreement, and pay the cost thereof, the following insurance policies:

**11.1** Comprehensive general liability insurance with limits not less than \$1,000,000 (such limit may be provided through a primary and excess policy) each Occurrence, combined single limit for bodily injury and property damage, or in such greater amount and limits as SFMTA may reasonably require from time to time, including coverage for contractual liability, personal injury, broadform property damage, products and completed operations, independent contractors (excluding towing and dismantling subcontractors), and mobile equipment.

**11.2** Sudden and accidental pollution insurance with limits not less than \$1,000,000 for each occurrence.

**11.3** Comprehensive business/commercial automobile liability insurance with limits not less than \$1,000,000 for each Occurrence combined single limit for bodily injury and property damage, including coverage for owned, non-owned and hired automobiles. If Contractor does not own or lease company vehicles that are subject to motor vehicle registration, then only non-owned and hired coverage is required.

**11.4** Garage-keeper's legal liability insurance with limits not less than \$5,000,000 (such limit may be provided through a primary and excess policy) for each Occurrence combined single limit for loss and damage to vehicles in Contractor's care, custody or control caused by fire, explosion, theft, riot, civil commotion, malicious mischief, vandalism or collision, with any deductible not to exceed \$25,000 for each Occurrence. Contractor may insure or self-insure loss of non-automobile property in the care, custody, or control of the garage keeper with a limit of \$5000.

**11.5** Workers' Compensation Insurance, including Employers' Liability, with limits not less than \$1,000,000 for each accident, covering all Employees employed by Contractor in the performance of this Agreement to provide statutory benefits as required by the laws of the State of California. Said policy shall be endorsed to provide that the insurer waives all rights of subrogation against the City.

**11.6** Environmental impairment liability insurance with limits not less than \$1,000,000 each occurrence, covering the sudden and accidental release of hazardous materials and the resulting costs of clean up.

Except as set forth above, any deductibles in the policies listed above shall not exceed \$25,000 each occurrence. The insurance policies shall be endorsed to name as an additional insured the City and County of San Francisco and its respective departments, commissioners, officers, agents and employees.

The agreements between the Contractor and its towing and dismantling subcontractors (as applicable) shall require that reasonable insurance is maintained and that the City will be named as an additional insured on the general liability policy.

**11.7** Commercial General Liability and Commercial Automobile Liability Insurance policies must be endorsed to provide:

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

(b) 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

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applies separately to each insured against whom claim is made or suit is brought, but the inclusion of more than one insured shall not operate to increase the insurer's limits of liability.

(c) 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.

**11.8** 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.

**11.9** 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.

**11.10** Subject to the provisions of Section 18.1, 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.

**11.11** 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, including additional insured endorsements and the policy declaration page for any umbrella policies, set forth above. Failure to maintain insurance shall constitute a material breach of this Agreement.

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

## **12. Financial Assurances**

### **12.1 Requirement to Provide Financial Guarantees**

Upon the Effective Date of this Agreement, Contractor shall provide, and shall maintain for the time periods specified herein, financial instruments and funds described in this Section 12 as security to ensure Contractor's performance of all terms and conditions of this Agreement and to compensate for any damage to City property and/or other actual costs to City or for reimbursement to Customers for Contractor's violation of the terms of this Agreement, as further described below.

### **12.2 Letter of Credit and Performance Bond**

**12.2.1 Performance Guarantee.** Upon the Effective Date of this Agreement, Contractor shall provide to the City, and shall maintain throughout the Term of this Agreement and for a period of at least ninety (90) days after expiration or termination of this Agreement, or until all of Contractor's obligations have been performed under this Agreement (including but not limited to investigation and remediation obligations under Appendices C and D), whichever date is later, a performance guarantee of two million dollars (\$2,000,000), which shall consist of a confirmed, irrevocable Letter of Credit in an amount between one million dollars (\$1,000,000) and two million

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dollars (\$2,000,000) and, if Contractor chooses to satisfy the performance guarantee, in part, with a Performance Surety Bond, a Performance Surety Bond of up to one million dollars (\$1,000,000) in favor of the City and County of San Francisco, a municipal corporation, acting by and through its Municipal Transportation Agency (and during the Term of Appendix D, the Port of San Francisco), guarantying the faithful performance by Contractor of this Agreement and of the covenants, terms and conditions of this Agreement, including all monetary obligations set forth herein, and including liquidated damages and any dishonesty on the part of Contractor.

The City may draw upon such Performance Surety Bond and/or Letter of Credit in circumstances which include, but are not limited to:

(a) To ensure regulatory compliance in the event that Contractor receives a notice of violation or other regulatory order from a governmental or regulatory agency with jurisdiction over Contractor's operations or the Properties used by Contractor for the performance of this Agreement and Contractor does not achieve compliance with the notice of violation or order to the satisfaction of the issuing agency within the time specified by the agency or by the City if the agency does not specify a timeframe.

(b) To reimburse the City for any fine or other charge assessed against the City related to any notice of violation or other regulatory order issued to Contractor.

(c) To reimburse the City for costs associated with City's environmental assessments or corrective action related to Contractor's violation of any of the requirements of Appendix D, which may be performed at the City's sole discretion.

(d) To satisfy rental payment obligations for City-owned property licensed to Contractor in Appendix D .

(e) To satisfy fines assessed by City against Contractor pursuant to Appendix D of the Agreement.

(f) To compensate City for losses or damage to property caused by Contractor.

**12.2.2 Performance Surety Bond/Letter of Credit Requirements.** The Performance Surety Bond and/or Letter of Credit required by this Section 12 shall be issued on a form and issued by a financial institution acceptable to the City in its sole discretion, which financial institution shall (a) be a bank, insurance or trust company doing business and having an office in the State of California, (b) have a combined capital and surplus of at least \$25,000,000, and (c) be subject to supervision or examination by federal or state authority. If Contractor defaults with respect to any provision of this Agreement, City may, but shall not be required to, make its demand under said Performance Surety Bond or Letter of Credit for all or any portion thereof, to compensate City for any loss or damage which City may have incurred by reason of Contractor's default or dishonesty, including (but not limited to) any claim for fines or liquidated damages; provided, however, that City shall present its written demand to said bank, insurance or trust company for payment under said Performance Surety Bond or Letter of Credit only after City first shall have made its demand for payment directly to Contractor, and five (5) full days have elapsed without Contractor having made payment to City.

### **12.2.3 Expiration or Termination of Letter of Credit.**

In the event the City receives notice from the issuer of the Letter of Credit that the Letter of Credit will be terminated, not renewed or will otherwise be allowed to expire for any reason during the period from the commencement of the Term of this Agreement to ninety (90) days after the expiration or termination of this Agreement or the conclusion of all of Contractor's obligations under

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the Agreement, whichever occurs last, and Contractor fails to provide the City with a replacement Letter of Credit (in a form and issued by a financial institution acceptable to the City) within ten (10) days following the City's receipt of such notice, such occurrence shall be an Event of Default as defined in Section 18 of this Agreement, and, in addition to any other remedies the City may have due to the default, including the right to terminate this Agreement, the City shall be entitled to draw down the entire amount of the Letter of Credit (or any portion thereof) and hold such funds in an account with the Treasurer in the form of cash guarantying Contractor's obligations under this Agreement under the terms of this Section 12. In such event, the cash shall accrue interest to the Contractor at a rate equal to the average yield of Treasury Notes with one-year maturity, as determined by the Treasurer. In the event the Letter of Credit is converted into cash pursuant to this paragraph, upon termination of this Agreement Contractor shall be entitled to a full refund of the cash (less any demands made thereon by the City pursuant to Section 12.2.4.) within ninety (90) days of the termination date, including interest accrued through the termination date.

**12.2.4 Expiration or Termination of Performance Surety Bond.** The term of the Performance Surety Bond shall apply for individual one-year periods, and may be extended by the insurance, bank or trust company by Continuation Certificate. The insurance, bank or trust company herein may, if it so elects, terminate its obligation under this bond by serving at least forty five (45) days written notice of its intention to do so upon the SFMTA. In the event the City receives notice from the issuer of the Performance Surety Bond that the Performance Surety Bond will be terminated, not renewed or will otherwise be allowed to expire for any reason during the period from the commencement of the Term of this Agreement to ninety (90) days after the expiration or termination of this Agreement or the conclusion of all of Contractor's obligations under the Agreement, whichever occurs last, and Contractor fails to provide the City with a replacement Performance Surety Bond (in a form and issued by a financial institution acceptable to the City) within ten (10) days following the City's receipt of such notice, such occurrence shall be an Event of Default as defined in Section 18 of this Agreement. However, neither nonrenewal by the insurance, bank or trust company, nor the failure or inability of the Contractor to file a replacement bond in the event of nonrenewal, shall itself constitute a loss to the City recoverable under the Performance Surety Bond or any renewal or continuation thereof. Insurance, bank or trust company's liability under the Performance Surety Bond and all continuation certificates issued in connection therewith shall not be cumulative and shall in no event exceed the amount as set forth in the Performance Surety Bond or in any additions, riders, or endorsements properly issued by the insurance, bank or trust company as supplements thereto.

**12.2.5 Demands Upon Performance Surety Bond or Letter of Credit.** City may use all or any portion of the Performance Surety Bond or Letter of Credit to compensate City for any loss or damage that it may have incurred by reason of Contractor's negligence or breach. Such loss or damage may include without limitation any damage to or restoration of the Properties for which Contractor is responsible, and claims for fines and/or liquidated damages. Should the City terminate this Agreement due to a breach by Contractor, the City shall have the right to draw from the Performance Surety Bond or Letter of Credit those amounts necessary to pay any fees or other financial obligations under the Agreement and perform the towing and storage services described in this Agreement until such time as the City procures another contractor and the agreement between the City and that contractor becomes effective. The Treasurer shall have sole authority and responsibility to make demands upon the Performance Surety Bond or Letter of Credit. The Treasurer shall not allow any demands made to the Performance Surety Bond or Letter of Credit pursuant to claims arising from Section 6(c) of Appendix C to exceed a combined outstanding amount of more than four hundred thousand dollars (\$400,000.00) In addition, the Treasurer shall not allow any demands to be made to the Performance Surety Bond or Letter of Credit pursuant to claims arising from Section 6(b)

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of Appendix C to exceed a combined outstanding amount of more than twice the amount of the current Base Fee established in Appendix D, Section 5, including all periodic CPI adjustments up to the date of the demand on the Performance Surety Bond or Letter of Credit. The Treasurer shall not allow any demands made to the Performance Surety Bond or Letter of Credit pursuant to claims arising from any section of the Agreement, excluding Appendices C and D, to exceed a combined outstanding amount of more than one million three hundred thousand dollars (\$1,300,000.00).

**12.2.6 Depletion of Performance Surety Bond or Letter of Credit.** If any portion of a Letter of Credit or Performance Surety Bond is used by City, Contractor shall provide written proof that the Performance Surety Bond or Letter of Credit has been restored to its initial value, which shall require a replacement Performance Surety Bond or Letter of Credit in the face amount of the required Performance Surety Bond or Letter of Credit. Contractor's failure to do so within the time limits specified in Section 18.1.1(f) shall constitute an Event of Default as defined in Section 18 of this Agreement.

**12.2.7 Dispute Resolution.** In the event that a dispute arises between the City and Contractor concerning this Agreement or the use or maintenance of the Performance Surety Bond or Letter of Credit, Contractor may appeal to the Director of Transportation within fourteen (14) days of demand on the Performance Surety Bond or Letter of Credit with evidence supporting Contractor's claim for relief from the demand on the Performance Surety Bond or Letter of Credit. The Director of Transportation will respond within fourteen (14) days. Any failure of the Director of Transportation to respond within fourteen (14) days shall be deemed a rejection of Contractor's claim for relief from the demand on the Performance Surety Bond or Letter of Credit. Contractor's claim for relief from demands on the Letter of Credit and the Director of Transportation's response to such demand shall constitute the administrative remedy for Agreement interpretation described in Section 46 herein. Each party reserves its remedies in equity and law. No decision by the City concerning the Performance Surety Bond or Letter of Credit shall prevent Contractor from seeking restoration of the funds by appropriate legal action.

**12.3 Maintenance Deposit.** Upon execution of this Agreement, Contractor shall deposit with City the amount of one hundred thousand dollars (\$100,000) as a maintenance deposit. These funds may be used by City when maintenance required by this Agreement is not done in a timely manner or in accordance with the standards of this Agreement. Contractor shall be responsible for replenishing this maintenance deposit fund to maintain a balance of one hundred thousand dollars (\$100,000) within fifteen (15) days of any date that the fund falls below the minimum balance. Failure to replenish the maintenance deposit fund for more than forty-five (45) days shall be an Event of Default under this Agreement. Any interest accrued and earned on the maintenance deposit fund shall be retained by City.

**12.4 Claims Fund.** Contractor shall at all times maintain a Claim Fund for payment of Claims. Contractor shall maintain at least fifty-thousand dollars (\$50,000) in the Claim Fund at all times. Contractor shall be responsible for replenishing this Claims Fund to maintain a balance of fifty thousand dollars (\$50,000) within fifteen (15) days of any date that the fund falls below the minimum balance. Failure to replenish the Claims Fund for more than forty-five (45) days from the date that it falls below the minimum balance shall be an Event of Default under this Agreement.

**12.5 Environmental Oversight Deposit.** Upon the Effective Date of this Agreement, Contractor shall provide to the City, and shall maintain and replenish throughout the term of the property license set forth in Appendix D ("Pier 70 License") and for a period of at least ninety (90) days after termination or expiration of the Pier 70 License, an Environmental Oversight Deposit in the amount of ten thousand dollars (\$10,000), which shall be deposited in an account specified by

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City. If Contractor receives a notice of violation or other regulatory order from a governmental or regulatory agency with jurisdiction over Pier 70 and or its operations (other than from the Port of San Francisco), and such notice is not cured within fourteen (14) days, the City may draw from this deposit to reimburse the City for staff costs incurred by the City while inspecting site conditions and enforcing and administering the Hazardous Materials provisions of the Pier 70 License. If Contractor receives a notice of violation or other regulatory order from a governmental or regulatory agency with jurisdiction over the site and or its operations (other than from the Port of San Francisco), and such notice is cured within fourteen (14) days, the City may draw from this deposit in an amount not to exceed \$500 to reimburse the City for staff costs incurred by the City. The City will submit an invoice to Contractor for any such costs, and Contractor will pay such invoiced amounts within thirty (30) days to replenish the Environmental Oversight Deposit. Contractor's failure to pay such costs within thirty (30) days, or to replenish the Environmental Oversight Deposit if drawn upon, will constitute an Event of Default.

### **13. Insurance and Performance Guarantee Requirements**

All insurance policies, Performance Surety Bonds and Letters of Credit obtained pursuant to this Agreement shall be endorsed to provide that thirty (30) days prior written notice of cancellation, non-renewal or reduction in coverage or limits shall be given to SFMTA in the manner and at the addresses specified below (and during the term of Appendix D, to the Port of San Francisco in the manner and at the address specified in Appendix D).

Two copies of any Performance Surety Bond or Letter of Credit, and two copies of each original policy or policy endorsement of insurance shall be provided to SFMTA (and during the term of Appendix D, to the Port of San Francisco) upon the Effective Date of this Agreement, and complete copies of any insurance policies obtained pursuant to this Agreement shall be provided to SFMTA (and during the term of Appendix D, to the Port of San Francisco) if requested at any time.

**13.1** Upon City's request, Contractor shall provide satisfactory evidence that Contractor has adequately provided for Social Security and Unemployment Compensation benefits for Contractor's Employees.

Contractor shall comply with the provisions of any insurance policy covering Contractor or the City, and with any notices, recommendations or directions issued by any insurer under such insurance policies so as not to adversely affect the insurance coverage.

### **14. Contractor's Representations and Warranties**

Contractor hereby represents and warrants as follows:

**14.1 Experience.** Contractor is experienced in the operation and management of automobile towing and disposal services and hereby agrees to apply its best efforts and most efficient methods in performance of this Agreement.

**14.2 Formation.** Contractor is a duly formed, validly existing and in good standing limited liability company under the laws of the State of California.

**14.3 Authority.** Contractor has full power and authority (corporate or otherwise) to enter into this Agreement and to consummate the transactions contemplated by it. This Agreement has been duly authorized by all necessary action on the part of Contractor, and no other corporate or other action on the part of Contractor is necessary to authorize the execution and delivery of this Agreement.

**14.4 Conflicts and Consents.** The execution and delivery by Contractor of this Agreement and the performance by Contractor of the transactions contemplated by it will not violate

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any federal, state or local law, rule or regulation, or conflict with or result in any breach or violation of, or constitute a default (or an event which with notice or lapse of time or both would become a default) under, or constitute an event or condition that would permit termination or acceleration of the maturity of, the Articles of Incorporation, bylaws or partnership agreement of Contractor (as applicable) or any indenture, mortgage, lease, agreement or other instrument or obligation to which Contractor is a party or by which it may be bound which would materially adversely affect the ability of Contractor to perform its obligations under this Agreement. No approval, authorization, consent or other order or action of, or filing or registration with, any person, entity or governmental authority is required for the execution and delivery by Contractor of this Agreement.

**14.5 Conflict with Orders.** The execution and delivery by Contractor or this Agreement will not conflict with any order, judgment or decree of any court, government, government agency or instrumentality, whether entered pursuant to consent to otherwise, by which Contractor may be bound or affected.

**14.6 Litigation.** There is no litigation, action, arbitration, grievance, administrative proceeding, suit or claim filed and pending, nor is there any investigation by a governmental agency of Contractor or any of its affiliates that, if adversely decided, could have a material adverse impact on Contractor's ability to perform its obligations under this Agreement.

## **15. Indemnification**

Contractor shall indemnify and save harmless City and its officers, agents and employees from, and, if requested, shall defend them against any and all loss, cost, damage, injury, liability, and claims thereof for injury to or death of a person, including Employees of Contractor or loss of or damage to property, resulting directly or indirectly from Contractor's performance of this Agreement, including, but not limited to, the use of Contractor's facilities or equipment provided by City or others, regardless of the negligence of, and regardless of whether liability without fault is imposed or sought to be imposed on City, except to the extent that such indemnity is void or otherwise unenforceable under applicable law in effect on or validly retroactive to the date of this Agreement, and except where such loss, damage, injury, liability or claim is the result of the active negligence or willful misconduct of City and is not contributed to by any act of, or by any omission to perform some duty imposed by law or agreement on Contractor, its 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. The foregoing indemnification does not include the limitations on Contractor's liability described in Appendix D, Sections 24.3 and 24.8.

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.

As to any intellectual property that Contractor provides to the City in the performance of this Agreement, Contractor shall indemnify and hold City harmless from all loss and liability, including attorneys' fees, court costs and all other litigation expenses for any infringement of the patent rights, copyright, trade secret or any other proprietary right or trademark, and all other intellectual property claims of any person or persons, arising as a consequence of the use by City of the intellectual property supplied by the Contractor, or any of its officers or agents.

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## **16. 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 or limitation of any rights that City may have under applicable law.

## **17. Liability of City**

NOTWITHSTANDING ANY OTHER PROVISION OF THIS AMENDED AND RESTATED 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 AMENDED AND RESTATED AGREEMENT OR THE SERVICES PERFORMED IN CONNECTION WITH THIS AMENDED AND RESTATED AGREEMENT.

## **18. Default; Remedies**

**18.1** Each of the following shall constitute an event of default ("Event of Default") under this Amended and Restated Agreement; provided, however, that with the exception of the Events of Default listed in Section 18.1.1 below, Contractor shall have thirty (30) days after the date of written notice of the default sent by City to cure the default before an Event of Default exists:

**18.1.1** The following conduct by Contractor shall constitute an Event of Default at the time it occurs without a right to cure under this Section 18, and shall be grounds for termination pursuant to Section 19:

(a) Contractor fails or refuses to perform or observe any term, covenant or condition contained in any of the following Sections of this Agreement: 5, 6, 11, 12.2.1, 13, 22, 28, 35 and 54.

(b) Substantial abandonment or discontinuance by Contractor, without the prior written consent of the City, of any or all of the services and operations required hereunder.

(c) Contractor's representation or warranty made pursuant to this Agreement which Contractor made knowing that it was not true and correct at the time when made.

(d) Failure of Contractor to replenish the maintenance deposit or Claims Fund required by Sections 12.3 and 12.4 and such failure continues for more than forty-five (45) days.

(e) Failure of Contractor to replenish the Environmental Oversight Deposit required by Section 12.5 and such failure continues for more than thirty (30) days.

(f) Failure to replace the Performance Surety Bond or Letter of Credit as required by Sections 12.2.3 and 12.2.5 within twenty (20) days of (i) City's receipt of notice of its termination or expiration, or (ii) use by City of the Performance Surety Bond or Letter of Credit, unless City's use is challenged pursuant to Section 12.2.6, in which event the twenty (20) days shall run from the date of the Director of Transportation's denial of the challenge, or fourteen (14) days from the date of the challenge, whichever is later.

**18.1.2** Contractor fails or refuses to perform or observe any other term, covenant or condition contained in this Agreement.

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**18.1.3** 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.

**18.1.4** 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, or (D) levying of a writ of attachment or execution against any of Contractor's property.

**18.1.5** Failure of Contractor to pay when due any other amount owing from Contractor to the City, including without limitation rents, taxes, fees or other charges, whether or not such amounts are related to this Agreement; provided, however, that if Contractor disputes the amount of any such obligation in good faith and is actively negotiating or litigating such dispute, Contractor's failure to pay such amount shall not constitute a default under this paragraph.

**18.1.6** Failure of Contractor to abide by any of the terms or conditions of the Port MOU, set forth in Appendix C to this Agreement.

**18.2** 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. City's right to termination for an Event of Default shall be subject to Contractor's opportunity to cure such Event of Default pursuant to the terms of Sections 18.1 and 19. 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.

**18.3** 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.

**18.4** 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.

## **19. Termination**

The City shall have the right to terminate this Agreement after written notice to Contractor upon the occurrence of any Event of Default, provided, however, that Contractor shall have a period of ten (10)

## **AMENDED AND RESTATED AGREEMENT**

days from the date of City's notice of intent to terminate to cure such default before City's termination for cause may become effective.

**19.1 Termination Effective Upon Notice.** Termination under this Section shall be effective immediately upon notice being given by SFMTA to Contractor and after the expiration of any applicable cure periods. Upon such termination, all rights, powers, privileges and authority granted to Contractor under this Agreement shall cease, and Contractor shall immediately thereupon vacate the Designated Facilities, except as may be permitted pursuant to Section 54 (Transition Period), below.

**19.2 Termination Not Exclusive Remedy.** The City's right to terminate this Agreement under this Section is not its exclusive remedy but is in addition to all other remedies provided to it by law or the provisions of this Agreement.

**19.3 Duties Upon Termination.** Upon termination of this Agreement, the City and Contractor shall promptly pay to the other, as soon as is determinable after the effective date of termination, all amounts due each other under the terms of this Agreement, and upon such payment neither shall have any further claim or right against the other, except as expressly provided herein. Upon the effective date of termination, Contractor shall deliver to the SFMTA the originals of all books, permits, plans, Records, licenses, contracts and other documents pertaining to Contractor's operation under this Agreement, any insurance policies, bills of sale or other documents evidencing title or rights of the City, and any and all other Records or documents pertaining to Contractor's operation under this Agreement, any insurance policies, bills of sale or other documents evidencing title or rights of the City, and any and all other Records or documents pertaining to the Designated Facilities, whether or not enumerated herein, which are requested by the City or necessary or desirable for the ownership and operation of the Designated Facilities, which are then in possession of Contractor. Contractor further agrees to do all other things reasonably necessary to cause an orderly transition of the management and operation of the services provided by Contractor under this Agreement without detriment to the rights of the City or to the continued operation of such services.

**20. Provisions of Amended and Restated Agreement Surviving Termination or Expiration**

This Section and the following Sections of this Agreement shall survive termination or expiration of this Amended and Restated Agreement: 1, 5, 6, 7, 9, 10, 12 (except for 12.2.5), 14, 15, 16, 17, 18.2, 18.3, 19.3, 20, 22.1, 23, 24, 25, 26, 29, 38, 39, 43, 46, 47, 48, 49, 53, 54, 55, 56 and 57; and Appendix A Sections 1.3(b), 4.1, 5.2, 12, 13.3, 15.1, 15.2, 15.7(1), 15.7(2), 15.10(7) and 15.11.

**21. Conflict of Interest**

Through its execution of this Agreement, Contractor acknowledges that it is familiar with the provisions of §15.103 and Appendix C 8.105 of City's Charter and § 87100 et seq. of the Government Code of the State of California, and certifies that it does not know of any facts which constitute a violation of said provisions.

**22. Proprietary or Confidential Information**

**22.1** 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 to the extent permitted by law, all information disclosed by City to Contractor shall be held in confidence and used only in 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.

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**22.2** Contractor understands and agrees that the City's Sunshine Ordinance (Administrative Code, Chapter 67) and the California Public Records Act (Gov. Code section 6250 *et seq.*), apply to the Agreement and all of its appendices, that these documents are not proprietary or confidential, do not constitute trade secrets, and that the City must disclose these documents to the public, upon request, without redaction, except for employee's personal information. Contractor shall cooperate with City in the compilation, copying and production of records in its custody that are subject to requests for public records. The City is not required to take any action, or to refuse to release information where to do so would violate applicable law. During the Term, the City will endeavor to provide Contractor reasonable notice of any request for public information that seeks disclosure of confidential or proprietary information that Contractor has provided to City under the Agreement and that Contractor has identified as confidential and proprietary, with the exception of this Agreement and its appendices. Contractor may at its option then take whatever legal steps it deems appropriate to protect said information from disclosure to the public, but the City shall have no further obligation to protect said information from disclosure. However, if the Contractor takes legal action to protect said information, and if the City is required to incur legal fees and costs in such legal action, and if the Contractor does not prevail in such legal action, Contractor shall pay all legal fees and costs that the City incurs as a result of such legal action. Contractor shall clearly identify to City all information that Contractor provides to City that it considers to be proprietary, trade secret or is otherwise protected from disclosure under the California Public Records Act, the City's Sunshine Ordinance and other applicable law.

**23. Notices to the Parties**

Any insurance certificates or notices required under Sections 11, 12, 13, 15, 18, 19, 46 or 52 of the Agreement must be sent by first class, certified U.S. mail, postage pre-paid. All other written communications, unless otherwise indicated elsewhere in this Agreement, may be by first class U.S. mail, by email, or by fax, and shall be addressed as follows, or to such other address as designated by the parties in writing:

**To Contractor:**

San Francisco AutoReturn  
Attention: John Wicker, President and CEO  
945 Bryant Street, Suite 350  
San Francisco, CA 94103  
Telephone: 415-575-2355  
Facsimile 415-575-2375  
Email: [jwicker@autoreturn.com](mailto:jwicker@autoreturn.com)

**To City:**

San Francisco Municipal Transportation Agency  
Attention: Lorraine Fuqua  
1 South Van Ness Avenue, 8<sup>th</sup> Floor  
San Francisco, CA 94103  
Telephone: 415-701-4678

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Facsimile: 415-701-4736  
Email: lorraine.fuqua@sfmta.com

## **24. Ownership of Results**

Any interest of Contractor or its Subcontractors, in the Records prepared by Contractor or its subcontractors in connection with services to be performed under this Agreement, shall become the property of and will be transmitted to City. However, Contractor may retain and use copies for reference and as documentation of its experience and capabilities. To the extent that the use of proprietary software or other proprietary information or intellectual property is required to access or utilize the data contained in the Records, or that Contractor holds particular work practices or methods to be proprietary, Contractor hereby grants the City a perpetual, royalty-free, nonexclusive, nontransferable, limited license, to use and reproduce said proprietary information or intellectual property, solely for City's internal purposes related to the towing, storage, and disposal of abandoned and illegally parked vehicles.

## **25. Works for Hire**

Subject to the limited license set out in Section 24 above, any artwork, copy, posters, billboards, photographs, videotapes, audiotapes, systems designs, software, source codes, or any other original works of authorship of Contractor that are not Records, are proprietary to Contractor and shall not be considered works for hire as defined under Title 17 of the United States Code, and all copyrights in such works are the property of Contractor.

## **26. Audit and Inspection of Records**

**26.1 Records.** Contractor shall maintain, in accordance with generally accepted accounting principles and business practices, all books, accounts and Records created in the performance of this Agreement in accordance with the requirements of Appendix A. Such books, accounts and Records shall be maintained throughout the Term of this Agreement at one of the Designated Facilities, or at Contractor's Headquarters Office. Records created or maintained in an electronic format shall be submitted monthly in an electronic format as specified by SFMTA, which may be an electronic database format or a static electronic format, such as PDF or an electronic format that attaches a date or time stamp to each document and record entry that cannot be erased or altered. Contractor shall deliver said copy of the Records with the Monthly Management Report described in Appendix A, Section 13.

Except as otherwise specified herein, Contractor shall maintain Records related to this Agreement in a safe and secure location available for inspection and copying by City for a period of five (5) years following termination of this Amended and Restated Agreement.

**26.2 City's Right to Inspect.** Any duly authorized agent of City shall have the right to examine, at any time during normal business hours, all books, accounts and Records, including computer records, of the type described above.

**26.3 Audit.** Within sixty (60) days of the expiration or termination of the Agreement, an independent auditor approved by the SFMTA shall conduct an audit of those records pertaining to Contractor's performance during the final year of this Agreement, including a summary report of prior annual audits conducted pursuant to Appendix A, Section 12.6. Such audit shall include a review of all records involving the removal, impoundment and disposition of vehicles pursuant to

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this Agreement during the previous and current audit periods. All costs of such audits shall be withdrawn from the Contractor Compliance Audit Fund, as specified in Section 12.6 of Appendix A. A certified copy of each such audit report shall be furnished promptly to SFMTA and the Controller not more than 120 days following the expiration of the Agreement.

**26.4 Retention of Records.** Contractor shall retain all records of subcontracts, Employee payroll and benefits, tax assessments and payments, and those records and reports described in Sections 10 and 26 of this Agreement for a period of not less than four (4) years from date of termination of this Agreement.

## **27. Subcontracting**

Except as specifically provided in this Agreement, Contractor shall not enter into any subcontract for the performance of all or any part of this Agreement for the acquisition of towing services, security services, vehicle handling or disposal services, auctioneer or appraisal services, Customer relations services or with any PEO Contractor without the prior written consent of the City, which consent shall not be unreasonably withheld. Any attempt to enter into such a subcontract without such consent shall be null and void. Subject to the foregoing, this Agreement shall be binding upon, enforceable by, and shall inure to the benefit of any permitted subcontractor.

## **28. Assignment**

Contractor shall not assign or otherwise transfer this Agreement or any of Contractor's rights, duties or interest under this Agreement without the prior written consent of the City. Any attempted assignment or transfer without such consent shall be null and void. Subject to the foregoing, this Agreement shall be binding upon, enforceable by, and shall inure to the benefit of the successors and permitted assigns of the Contractor.

## **29. 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.

## **30. Earned Income Credit (EIC) Forms**

Administrative Code Chapter 120 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 that Federal Tax Forms can be found.

**30.1** Contractor shall provide EIC Forms to each Eligible Employee at each of the following times: (i) within thirty (30) days following the date on which this Amended and Restated 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.

**30.2** Failure to comply with any requirement contained in Section 30.1 of this Agreement shall constitute a material breach by Contractor of the terms of this Agreement. If, within thirty (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 thirty (30) days, Contractor fails to commence efforts to cure within such period or thereafter fails to diligently pursue such cure to

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completion, the City may pursue any rights or remedies available under this Agreement or under applicable law.

**30.3** 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.

**30.4** Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 12O of the San Francisco Administrative Code.

### **31. Minority/Women/Local Business Utilization; Liquidated Damages**

**31.1 Compliance.** Contractor understands and agrees to comply fully with all applicable provisions of Chapter 12D.A ("Minority/Women/ Local Business Utilization Ordinance--IV") of the San Francisco Administrative Code set forth in the RFP, Contractor's Proposal and this Agreement, and agrees to include such provisions in all subcontracts (as defined in Section 27) made in fulfillment of the Contractor's obligations under this Agreement. Said provisions are incorporated by reference and made a part of this Agreement as though fully set forth herein. Contractor's willful failure to comply with Chapter 12D.A is a material breach of contract.

**31.2 Enforcement.** If Contractor willfully fails to comply with any of the provisions of Chapter 12D.A set forth in this Agreement pertaining to MBE or WBE 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. City may also impose other sanctions against Contractor authorized in Chapter 12D.A, 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 MBE or WBE certification. City will determine the sanctions to be imposed, including the amount of liquidated damages, after investigation pursuant to §12D.A.16(B). By entering into this Agreement, Contractor acknowledges and agrees that any liquidated damages assessed by City 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 this Section 31 for a period of three (3) years following termination of this contract, and shall make such records available for audit and inspection by HRC or the Controller upon request.

**31.3 Subcontracting Goals.** The MBE/WBE subcontracting participation goal for this contract is 12% of Gross Revenues. Contractor shall fulfill this goal throughout the duration of this Agreement. Contractor shall not participate in any back contracting to the Contractor or lower-tier subcontractors, as defined in Chapter 12D.A, for any purpose inconsistent with the provisions of Chapter 12D.A, its implementing rules and regulations, or this Section.

**31.4 Subcontract Language Requirements.** Contractor shall include in all subcontracts with MBEs or WBEs made in fulfillment of Contractor's obligations under this Agreement, a provision requiring Contractor to compensate any MBE or WBE subcontractor for damages for breach of contract or liquidated damages equal to 5% of the subcontract amount, whichever is greater, if Contractor fails to comply with the requirements of this Section, unless Contractor received approval from City 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 this Section 31 for a period of three (3) years following termination of this contract and to make such records available for audit and inspection by City upon request.

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**31.5 Payment of Subcontractors.** Contractor shall pay its subcontractors within thirty (30) days after receiving an invoice or request for payment from a subcontractor, unless Contractor notifies City in writing within ten (10) working days prior to receiving payment from the City that there is a bona fide dispute between Contractor and its subcontractor, in which case Contractor may withhold the disputed amount but shall pay the undisputed amount.

**32. Nondiscrimination; Penalties**

**32.1 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.

**32.2 Nondiscrimination 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, on real property owned by San Francisco, or where work is being performed for the City elsewhere in 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 §12B.2(b) of the San Francisco Administrative Code.

**32.3 Subcontracts.** Contractor shall incorporate by reference in all subcontracts the provisions of §§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.

**32.4 Condition to Contract.** As a condition to this Amended and Restated 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.

**32.5 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, including but not limited to the remedies provided in such Chapters. Without limiting the foregoing, Contractor understands that pursuant to §12B.2(h) of the 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.

**33. MacBride Principles—Northern Ireland**

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Pursuant to San Francisco Administrative Code §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. By signing below, the person executing this Agreement on behalf of Contractor acknowledges and agrees that he or she has read and understood this section.

**34. Tropical Hardwood and Virgin Redwood Ban**

Pursuant to § 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.

**35. 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.

**36. Resource Conservation**

Chapter 5 of the San Francisco Environment Code ("Resource Conservation") is incorporated herein by reference. Failure by Contractor to comply with any of the applicable requirements of Chapter 5 will be deemed a material breach of contract.

**37. 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.

**38. Sunshine Ordinance**

**38.1 Documents Subject to Disclosure by the City.** In accordance with San Francisco Administrative Code §67.24(e), contracts, contractors' bids, responses to solicitations 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 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 by the City upon request. Contractor acknowledges that this Agreement and all of its appendices are covered by this paragraph and are subject to disclosure without redaction, except for employee's personal information.

**38.2 Documents Subject to Disclosure by Contractor.** Contractor agrees that it shall comply with San Francisco Administrative Code § 67.29-7(c), the provisions of which are set out in full below:

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In any contract, agreement or permit between the City and any outside entity that authorizes that entity to demand any funds or fees from citizens, the City shall ensure that accurate records of each transaction are maintained in a professional and businesslike manner and are available to the public as public records under the provisions of this ordinance. Failure of an entity to comply with these provisions shall be grounds for terminating the contract or for imposing a financial penalty equal to one-half of the fees derived under the agreement or permit during the period of time when the failure was in effect. Failure of any Department Head under this provision shall be a violation of this ordinance. This paragraph shall apply to any Agreement allowing an entity to tow or impound vehicles in the City and shall apply to any Agreement allowing an entity to collect any fee from any persons in any pretrial diversion program.

Contractor's compliance with Section 67.29-7(c) is a material term of the Agreement.

**38.3 Public Records Requests from Public.** If any member of the public communicates a public records request directly to Contractor, Contractor shall refer the requestor to SFMTA. In no event shall Contractor respond directly to a public records request or attempt to communicate a public records request to SFMTA on behalf of the requestor. SFMTA will work with Contractor, and Contractor shall cooperate with SFMTA to identify responsive records in Contractor's possession. If production of requested records involves significant staff time of Contractor, City in its sole discretion may elect to collect legally authorized fees from the requestor and credit some or all of the fees to Contractor.

#### **39. Notification of Limitations on Contributions**

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

#### **40. Requiring Minimum Compensation for Covered 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 Sections 12P.5 and 12P.5.1 of Chapter 12P are incorporated herein by reference and

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made a part of this Amended and Restated Agreement as though fully set forth. The text of the MCO is available on the web at [www.sfgov.org/olse/mco](http://www.sfgov.org/olse/mco). A partial listing of some of Contractor's obligations under the MCO is set forth in this Section. Contractor is required to comply with all the provisions of the MCO, irrespective of the listing of obligations in this Section.

The MCO requires Contractor to pay Contractor's employees a minimum hourly gross compensation wage rate and to provide minimum compensated and uncompensated time off. The minimum wage rate may change from year to year and Contractor is obligated to keep informed of the then-current requirements. 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. It is Contractor's obligation to ensure that any subcontractors of any tier under this Amended and Restated 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.

**40.1** Contractor shall not take adverse action or otherwise discriminate against an employee or other person for the exercise or attempted exercise of rights under the MCO. Such actions, if taken within 90 days of the exercise or attempted exercise of such rights, will be rebuttably presumed to be retaliation prohibited by the MCO.

**40.2** Contractor shall maintain employee and payroll records as required by the MCO. If Contractor fails to do so, it shall be presumed that the Contractor paid no more than the minimum wage required under State law.

**40.3** The City is authorized to inspect Contractor's job sites and conduct interviews with employees and conduct audits of Contractor.

**40.4** Contractor's commitment to provide the Minimum Compensation is a material element of the City's consideration for this Agreement. The City in its sole discretion shall determine whether such a breach has occurred. The City and the public will suffer actual damage that will be impractical or extremely difficult to determine if the Contractor fails to comply with these requirements. Contractor agrees that the sums set forth in Section 12P.6.1 of the MCO as liquidated damages are not a penalty, but are reasonable estimates of the loss that the City and the public will incur for Contractor's noncompliance. The procedures governing the assessment of liquidated damages shall be those set forth in Section 12P.6.2 of Chapter 12P.

**40.5** Contractor understands and agrees that if it fails to comply with the requirements of the MCO, the City shall have the right to pursue any rights or remedies available under Chapter 12P (including liquidated damages), under the terms of the contract, and under applicable law. 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 shall have the right to pursue any rights or remedies available under applicable law, including those set forth in Section 12P.6(c) of Chapter 12P. Each of these remedies shall be exercisable individually or in combination with any other rights or remedies available to the City.

**40.6** 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.

**40.7** 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, but Contractor later enters into an agreement or agreements that cause contractor to exceed that amount

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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 in the fiscal year.

#### **41. Requiring Health Benefits for Covered Employees**

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.5.1 of Chapter 12Q are incorporated herein by reference and made a part of this Agreement as though fully set forth. The text of the HCAO is available on the web at [www.sfgov.org/olse](http://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 12Q.

**41.1** 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.

**41.2** 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 this Section 41.1 above.

**41.3** 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 thirty (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 thirty (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.

**41.4** Any Subcontract entered into by Contractor shall require the Subcontractor (unless that Subcontractor is exempt pursuant to Section 12Q.3) 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 Office of Contract Administration when it enters into such a Subcontract and shall certify to the Office of Contract Administration 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.

**41.5** 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.

**41.6** 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.

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41.7 Contractor shall maintain employee and payroll records in compliance with the California Labor Code and Industrial Welfare Commission orders, including the number of hours each employee has worked on the City Contract.

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

41.9 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.

41.10 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 ten business days to respond.

41.11 Contractor shall allow City to inspect Contractor's job sites and have access to Contractor's employees in order to monitor and determine compliance with HCAO.

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

41.13 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.

## **42. 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 Amended and Restated 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 a ("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

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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.

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- (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

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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

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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.

**43. 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.

**44. Preservative-treated Wood Containing Arsenic**

Contractor may not purchase preservative-treated wood products containing arsenic in the performance of this Amended and Restated Agreement unless an exemption from the requirements of Chapter 13 of the San Francisco Environment Code is obtained from the Department of the Environment under Section 1304 of the Code. The Term "preservative-treated wood containing arsenic" shall mean wood treated with a preservative that contains arsenic, elemental arsenic, or an arsenic copper combination, including, but not limited to, chromated copper arsenate preservative, ammoniacal copper zinc arsenate preservative, or ammoniacal copper arsenate preservative. Contractor may purchase preservative-treated wood products on the list of environmentally preferable alternatives prepared and adopted by the Department of the Environment. This provision does not preclude Contractor from purchasing preservative-treated wood containing arsenic for saltwater immersion. The Term "saltwater immersion" shall mean a pressure-treated wood that is used for construction purposes or facilities that are partially or totally immersed in saltwater.

**45. Modification of Amended and Restated Agreement**

This Agreement may not be modified, nor may compliance with any of its terms be waived, except by written instrument executed and approved by Contractor and by the Director of Transportation, except where the approval of the Municipal Transportation Agency Board or the San Francisco Board of Supervisors is required by applicable law, in which case, the approval of those agencies shall also be required.

**46. Administrative Remedy for Agreement Interpretation**

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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 Director of Transportation, who shall decide the true meaning and intent of the Agreement.

**47. 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.

**48. Construction**

All paragraph, article, and section captions and headings contained in this Agreement are for reference and convenience only and shall not be considered in construing the scope or meaning of this Agreement. Unless this Agreement specifically provides otherwise, it is to be construed in the following manner.

**48.1 Syntax.** Whenever the context of this Agreement requires, the singular shall include the plural, the plural shall include the singular, the masculine shall include the feminine and the feminine shall include the masculine.

**48.2 References.** Unless otherwise indicated, references to Articles, Sections and subsections are to Articles, Sections and subsections in this Agreement.

**49. Entire Amended and Restated Agreement**

This contract sets forth the entire Agreement between the parties, and supersedes all other oral or written provisions. This contract may be modified only as provided in Section 45.

This Agreement contains the entire Agreement between the parties with respect to the subject matter of this Agreement and any prior Agreements, discussions or understandings, written or oral, are superseded by this Agreement and shall be of no force or effect. No addition or modification of any term or provision of this Agreement shall be effective unless set forth in writing and signed by the parties to this Agreement.

**50. Compliance with Laws**

Contractor shall keep itself fully informed of the City's Charter, codes, ordinances and regulations 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 as they may be amended from time to time. Contractor shall comply and conform with all laws and all governmental regulations, rules and orders that may from time to time be put into effect relating to, controlling or limiting Contractor's performance under this Agreement or enjoyment of any rights or privileges granted hereby. Contractor shall secure all permits and licenses specifically required for Contractor's performance under this Agreement (copies of which shall be promptly provided to City), and shall comply with all applicable laws and regulations relating to labor employed in and relating to Contractor's performance under this Agreement. Contractor shall not use or occupy the Designated Facilities in an unlawful, noisy, improper or offensive manner and shall use its best efforts to prevent any occupancy of the Designated Facilities or use made thereof which is unlawful, noisy, improper or offensive or contrary to any law or ordinance applicable to them. Contractor shall not cause or maintain any nuisance in or about the Designated Facilities, and shall use its best efforts to prevent any person from doing so. Nor shall Contractor cause any rubbish, dirt or refuse to be placed in the streets, sidewalks or alleys adjoining the Designated Facilities or to accumulate in the Designated Facilities.

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**51. Services Provided by Attorneys**

Any services required under this Agreement that are to be provided by a law firm or attorney must be reviewed and approved in writing in advance by the City Attorney. No invoices for services provided by law firms or attorneys, including, without limitation, as subcontractors of Contractor, will be paid unless the provider received advance written approval from the City Attorney.

**52. Unavoidable Delays**

Any prevention, delay or stoppage in a party's performance of any part of this Agreement due to an Unavoidable Delay shall excuse the performance of the party affected for a period of time or otherwise in a manner that bears a causal relationship and is in proportion to any such prevention, delay or stoppage.

**53. Severability**

Should the application of any provision of this Agreement to any particular facts or circumstances be found by a court of competent jurisdiction to be invalid or unenforceable, then (a) the validity of other provisions of this Agreement shall not be affected or impaired thereby, and (b) such provision shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be reformed without further action by the parties to the extent necessary to make such provision valid and enforceable.

**54. Transition Period**

**54.1** Notwithstanding any other provision of this Agreement to the contrary, Contractor hereby agrees that it shall cooperate in good faith with City and with any contractor chosen by City pursuant to a competitive selection process to take over Contractor's obligations after the expiration of this Agreement, or any contractor designated by City to provide towing services following termination of this Agreement pursuant to §19 herein, for the smooth and efficient transfer of those functions.

**54.2** Contractor agrees to take all actions as may be necessary or as the City may direct for the protection and preservation of any property related to this Agreement that is in the possession of Contractor and in which City has or may acquire an interest, including any environmental remediation required under Appendices C and D. Contractor acknowledges that City has a vested interest for payment of fees for vehicles that Contractor has towed and/or is storing, and Contractor shall not impair said interest and shall take all actions reasonably necessary to safeguard City's interest in said towed and stored vehicles.

**54.3** Contractor shall remove any towed and/or stored vehicles from City property by the termination date and shall relocate said vehicles to a location approved by the City or (subject to City approval) authorize a successor contractor to serve as an agent of Contractor for purposes of conducting any lien sale auctions that may be required for disposal of such vehicles.

**54.4** Contractor shall provide City or any successor contractor with all information necessary, in a form approved by the City, to facilitate retrieval by the registered owner of any vehicle upon which Contractor holds a lien.

**54.5** Contractor agrees to assign all right, title and interest of Contractor in the 450 7<sup>th</sup> Street property to the City, subject to the payment terms specified in Appendix G, as part of the transition of towing operations to a successor towing services contractor.

**55. Administration of Contract**

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This Agreement shall be administered by and for the City by SFMTA. The Executive Director/CEO of SFMTA shall, unless otherwise stated herein, have the authority to act for or on behalf of the City in the administration of this Agreement.

**56. Required Actions**

Contractor agrees to execute all instruments and documents and to take all actions as may be required or necessary in order to carry out the purposes and terms of this Agreement.

**57. Non-impairment of City-Owned Towing Equipment and Facilities**

Nothing contained in this Agreement shall be deemed to prohibit, limit or otherwise restrict the use and operation by City of City-owned towing equipment or storage facilities, or the procurement by City of towing services for City-owned vehicles.

**58. Deleted by agreement of the parties.**

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

**60. 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 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 one hundred dollars (\$100) liquidated damages for the first breach, two hundred dollars (\$200) liquidated damages for the second breach in the same year, and five hundred dollars (\$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.

**61. 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

AMENDED AND RESTATED AGREEMENT

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.).

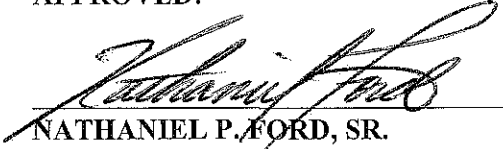
Any failure of Contractor to comply with this section of this Agreement shall constitute an Event of Default of this Agreement.

**62. 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.

AMENDED AND RESTATED AGREEMENT

IN WITNESS WHEREOF, THE PARTIES HERETO HAVE EXECUTED THIS  
AMENDED AND RESTATED AGREEMENT ON THE DAY FIRST MENTIONED ABOVE.  
CITY CONTRACTOR

APPROVED:

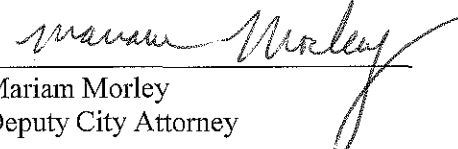


**NATHANIEL P. FORD, SR.**  
Executive Director/CEO  
San Francisco Municipal Transportation Agency

Approved as to Form:

**DENNIS J. HERRERA**  
City Attorney

By:



Mariam Morley  
Deputy City Attorney

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

I have read and understood paragraph 33, 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.



**JOHN WICKER**  
President and CEO  
TEGSCO, LLC,  
d.b.a. San Francisco AutoReturn  
945 Bryant Street, Suite 350  
San Francisco, CA 94103  
Phone No.: 415-575-2355  
Employer ID No.: 01-0688299

SFMTAB Resolution Number: 10-080

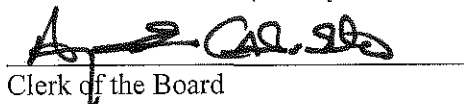
Date: 6/1/10

Attest: R. Boomer

Roberta Boomer, Secretary,  
S. F. Municipal Transportation Agency Board

Board of Supervisors

Resolution No. 323-10  
Dated: 7/29/10



Clerk of the Board

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## **LIST OF APPENDICES**

- A. Scope of Work**
- B. Operations Plan**
- C. SFMTA-Port MOU**
- D. Pier 70 Property License**
- E. Letter of Credit & Performance Surety Bond**
- F. Rate Schedule**
- G. Consolidated Facility Payment Schedule**

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