

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

**AGREEMENT  
BETWEEN THE CITY AND COUNTY OF SAN FRANCISCO AND  
WAUSAU FINANCIAL SYSTEMS, INC.**

This agreement (the "Agreement") is made this 27th day of June, 2011, in the City and County of San Francisco, State of California, by and between: **WAUSAU Financial Systems, Inc.**, 875 Indianhead Drive, P.O. Box 37, Mosinee, WI 54455-0037, hereinafter referred to as "Contractor," and the City and County of San Francisco, a municipal corporation, hereinafter referred to as "City," acting by and through its Director of the Office of Contract Administration, hereinafter referred to as "Purchasing."

**Recitals**

WHEREAS, the **Office of the Treasurer-Tax Collector** wishes to license software and purchase equipment from Contractor, obtain software customization/development services and integration of software and equipment (end results to be known as Programs), and obtain other software and equipment support services including the implementation and training services described in Appendices to this Agreement from Contractor, cumulatively known as the Work or Project; and,

WHEREAS, Contractor is granting City a term license to use the Licensed Software, including without limitation, sublicenses to use third party software listed in the Investment Overview (Appendix B-1) (except in cases where such third party software is directly licensed to the City by the developer); and

WHEREAS, a Request for Proposal ("RFP") was issued on **September 18, 2009**, and City selected Contractor as the highest qualified scorer pursuant to the RFP; and

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

WHEREAS, approval for said Agreement was obtained from Civil Service Commission by Resolution No. PSC 4035 dated September 21, 2009;

Now, THEREFORE, the parties agree as follows:

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

ACCEPTANCE	Written notice from the City's Project Manager to Contractor that the Licensed Software, Programs, any special phase of the Project, or any Deliverable meets the requirements of this Agreement in accordance with the Acceptance Criteria section of Appendix A.
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ACCEPTANCE CERTIFICATE	A certificate provided by the City confirming the Acceptance of each phase as defined within the Implementation Plan.
ACCEPTANCE PLAN	That document, delivered as a component of the Implementation Plan document, that defines and describes the Acceptance Test(s) which define Acceptance.
ACCEPTANCE TEST	Means the procedures and performance standards required for Acceptance by City of the Programs as defined herein. These procedures and performance standards are set forth for each phase of Programs development in the Acceptance Test Plan section of Appendix A.
ACCEPTANCE WINDOW	The time period specified in the Acceptance Test Plan section of Appendix A following completion of Phase 1 or 2 during which Contractor must secure Acceptance of the completed phase from City.
AGREEMENT	This document and any attached Appendices and Exhibits, including any City-reviewed and approved specifications, and future written and executed Amendments.
AUTHORIZATION DOCUMENT	This Agreement, a Blanket Purchase Order, Contract Order, or Purchase Order of the City , properly executed by the Controller's Office and Purchasing, and certified by the Controller for the specific funding of this Agreement or any modification thereof.
CHANGE ORDER	A written instrument signed by the City's Project Manager and Contractor that modifies this Agreement through an adjustment to one or more of the following: (i) the Project Price, (ii) the Project Schedule, (iii) the Statement of Work, (iv) the Acceptance Criteria, or (v) other requirements specified in this Agreement.
CITY'S PROJECT MANAGER	The individual specified by the City pursuant to Section 6.b. hereof, as the Project Manager authorized to administer this Agreement on the City's behalf.
COMMERCIAL OFF THE SHELF SOFTWARE (COTS)	Compute software, hardware, technology, or computer products, which are ready-made and available for sale, lease, or license to the general public.
CONTRACTOR'S PROJECT MANAGER	The individual specified by Contractor pursuant to Section 6 hereof, as the Project Manager authorized to administer this Agreement on Contractor's behalf.
CRITICAL MILESTONES	An agreed upon set of deliverables that must be met in order to proceed to next series of tasks. Delay on Critical Milestones may impact the Project Schedule. Critical Milestones are identified in Appendix A.
CUSTOMER REQUIREMENTS DOCUMENT	A document developed by mutual agreement of Contractor and the City detailing the specific Customer requirements for the Project.

DATA CONVERSION PLAN	The formal plan to be prepared by Contractor with City support that identifies the data conversion elements: schedule, information, personnel, and any other items agreed upon as integral to the conversion of existing systems data to the configured databases by the City's Project Manager and the Contractor's Project Manager.
DEFECTIVE WORK	Work that (i) is unsatisfactory, faulty, or deficient, (ii) does not conform to the Statement of Work, (iii) does not meet the requirements of any inspection, test, or approval referred to in the Acceptance Criteria, or (iv) does not meet or exceed the requirements specified in this Agreement.
DELIVERABLES	Those items described and itemized in the Appendices, which items Contractor commits to provide to City on the dates specified in the Project Schedule section of Appendix A.
DESIGN SPECIFICATIONS	The written design specification to be prepared by Contractor to implement the Functional Specifications. The Design Specifications shall include descriptions of each Program to be developed hereunder together with descriptions of the hardware and software environment in which such Programs may be operated and the files or databases, if any, with which such Programs shall function.
DETAILED DESIGN DOCUMENT	The deliverable document, in whole or parts, provided by the Contractor to document the Design Specification. The Detailed Design document shall be reviewed and approved by the <b>Office of the Treasurer-Tax Collector</b> .
DOCUMENTATION	Technical publications relating to use of the Licensed Software or Programs, such as reference, installation, administrative, maintenance, and programmer manuals, provided by Contractor to City, all of which are made available to City by Contractor.
EQUIPMENT	The central processing unit[s] and associated peripheral devices [or, computer hardware] on which the Licensed Software or Programs will operate and with which the Licensed Software or Programs must be compatible, to be provided by Contractor as part of this Agreement if listed in the Investment Overview.
ERRORS, DEFECTS AND MALFUNCTIONS	Either a deviation between the function of the Licensed Software or Programs and the documentation furnished by Contractor for the Licensed Software or Programs, or a failure of the Licensed Software or Programs which degrades the use of the Licensed Software or Programs.
FINAL ACCEPTANCE CERTIFICATE	Means the City's final written acceptance of the Programs and services to be provided under this Agreement.
FINAL ACCEPTANCE DATE	Means the date on which the City delivers to Contractor the Final Acceptance Certificate.
FIX	Repair or replacement of source, object or executable code in the Licensed Software or Programs to remedy an Error, Defect or Malfunction.

FORCE MAJEURE	An event beyond the reasonable control of either party, such as acts of God, acts of civil or military authority, fires, strikes, floods, epidemics, quarantine, war, riot, delays in transportation, care shortages, and inability due to causes beyond Contractor's reasonable control to obtain necessary labor, materials or manufacturing facilities.
FUNCTIONAL SPECIFICATIONS	The written description of City's requirements prepared jointly by the City and Contractor and referred to as the Customer Requirements Document. Such description shall form the basis for the Design Specifications as defined herein.
HARDWARE/EQUIPMENT	The hardware/equipment purchased by the City from Contractor for use in connection with the Software and/or Solution.
IMPLEMENTATION PLAN	That deliverable, provided by Contractor, that includes the specific project/task/work plans required for the implementation of the identified work. The Implementation Plan shall also include the Test Plan and Acceptance Plan for the identified work.
INTERFACE SPECIFICATIONS	Means the document that defines external interfaces between the configured Programs and other existing or planned information or communications systems. Contractor and City shall have responsibility for preparing and controlling all of the Interface Specifications.
LICENSE	Means the document describing the terms and conditions under which the right to use software is conferred by the licensor to City.
LICENSED SOFTWARE; SOFTWARE	The proprietary computer software program(s) identified in the Authorization Document and/or listed in the Investment Overview (Appendix B-1), all related materials, Documentation, all corrections, patches or updates thereto, and other written information received by City from Contractor, whether in machine-readable or printed form. The Authorization Document and Investment Overview may identify more than one software product or more than one copy of any product.
LIVE USE	The Licensed Software and Equipment is processing the City's work in a production environment.
OBJECT CODE	Machine readable compiled form of Licensed Software provided by Contractor.
MAINTENANCE RELEASE	A subsequent version of the Software that includes Error Corrections and/or Updates.
PATCH, ERROR CORRECTION	Either (a) a temporary repair or replacement or other modification or addition that, when made or added to the Software, corrects an Error, Defect, or Malfunction, or (b) a procedure or routine that, when observed in the regular operation of the Software, eliminates the practical adverse effect of an Error on the City. Temporary repair may be made permanent and released in Subsequent Releases of the Software.
PERFORMANCE SPECIFICATIONS	The description of the minimum Programs characteristics and performance which must be achieved by the Functional Specifications. Such description is set forth in Appendix A.

PRIORITY CATEGORY	A priority assigned to an Error, Defect or Malfunction, designating the urgency of correcting an Error, Defect or Malfunction. Assignment of a Priority Category to an Error, Defect or Malfunction is based on City's determination of the severity of the Error, Defect or Malfunction and Contractor's reasonable analysis of the priority of the Error, Defect or Malfunction.
PRIORITY PROTOCOL	Based on the Priority Category, rules specifying the turnaround time for correcting Errors, Malfunctions and Defects; escalation procedures, and personnel assignment.
PROGRAMS	The software and equipment described in Appendix A and Appendix B-1, as written by the Contractor and approved Third Party Vendors, integrated by Contractor and delivered to the City, in the form of executable code providing fully compatible communication with the Contractor's licensed software engine, to operate on the Equipment for purposes of accomplishing the functional capabilities as set forth: Contractor's ImageRPS™ system as the base remittance platform along with Contractor's Core Cashiering system. Images and data captured by CORE will feed directly into the ImageRPS™ system for depository and posting purposes. In addition, multiple remote location WebDDL® capture sites will be included in the total solution. The Contractor's Optima® IMS enterprise content management solution will provide immediate storage of all the transactions captured on the system on any given business day. Further detail is in Program Specifications.
PROJECT SCHEDULE	The schedule for Contractor's completion of all phases of Work, and the Critical Milestones associated with such completion, as specified in Appendix A.
REVIEW PERIOD	The time period specified in Appendix A during which City shall review the completed Work of Phase 1, 2 or 3 and give notice to Contractor of its acceptance or rejection of the completed phase.
SOURCE CODE	The human readable compliant form of the Licensed Software to be provided by Contractor.
SPECIFICATIONS	The functional and operational characteristics of the Licensed Software as described in Contractor's current published product descriptions and technical manuals.
STATEMENT OF WORK	The services Contractor is to perform to provide operational Programs and all related Services as more fully described in Appendix A hereto.
SUBSEQUENT RELEASE	A release of the Licensed Software for use in a particular operating environment which supersedes the Licensed Software. A Subsequent Release is offered and expressly designated by Contractor as a replacement to a specified Licensed Software product. A Subsequent Release will be supported by Contractor in accordance with the terms of this Agreement. Multiple Subsequent Releases may be supported by Contractor at any given time.

SUPPORT SERVICES	The Licensed Software support services required under this Agreement. Support Services include correcting an Error, Defect or Malfunction; providing telephone and/or online support concerning the installation and use of the Licensed Software; and training in the installation and use of the Licensed Software.
SYSTEM	The Licensed Software and associated interfaces furnished by Contractor for the City and the Equipment on which such software operates, the combination of which shall satisfy the requirements set forth in the Performance Specifications.
SYSTEM CUTOVER	The point at which the City approves Contractor's initiation of the System, or a phase of the project, to a production status and the City may terminate use of the current software system it uses.
SYSTEM DESIGN REVIEW	The process by which the City reviews and approves the Detailed Design documents covering the configured hardware and software.
TEST PLAN	The formal document that defines the approved requirements to be tested and relegates each approved requirement to the proper testing category.
UPDATE	A revision of the Software released by Contractor to its end user customers receiving maintenance and support services from Contractor. "Update" does not include the release of a new product or added features for which Contractor generally imposes a separate charge.
UPGRADE	Either an enhancement to the Licensed Software code to add new features or functions to the Licensed Software or software programming revisions containing corrections to Errors, Defects and Malfunctions that have been reported by users or discovered by the Contractor.
WARRANTY PERIOD	A period commencing with Acceptance of the Licensed Software and Programs product during which reported Errors, Defects and Malfunctions for Licensed Software or Programs products are corrected without charge in accordance with the provisions below.
WORK; PROJECT	The implementation, assembly, installation, optimization, and integration as required by this Agreement, whether completed or partially completed, including all labor, materials, and services provided, or to be provided by Contractor to fulfill Contractor's obligations hereunder. The Work, therefore, constitutes all of the requirements for providing the Programs and all services under this Agreement to the City.
WORKAROUND	A change in the procedures followed or end user operation of the Licensed Software or Programs to avoid an Error, Defect or Malfunction without significantly impairing functionality or degrading the use of the Licensed Software or Programs.

Whenever the words “as directed,” “as required,” “as permitted,” or words of like effect are used, it shall be understood as the direction, requirement, or permission of the **Office of the Treasurer-Tax Collector**.

The words “sufficient,” “necessary,” or “proper,” and the like, mean sufficient, necessary or proper in the judgment of the **Office of the Treasurer-Tax Collector**, unless otherwise indicated by the context.

**2. Certification of Funds; Budget and Fiscal Provisions; Termination in the Event of Non-Appropriation.** This Agreement is subject to the budget and fiscal provisions of the City’s Charter. Charges will accrue only after prior written authorization certified by the Controller, and the amount of City’s obligation hereunder shall not at any time exceed the amount certified for the purpose and period stated in such advance authorization. This Agreement will terminate without penalty, liability or expense of any kind to City at the end of any fiscal year if funds are not appropriated for the next succeeding fiscal year. If funds are appropriated for a portion of the fiscal year, this Agreement will terminate, without penalty, liability or expense of any kind at the end of the term for which funds are appropriated. City has no obligation to make appropriations for this Agreement in lieu of appropriations for new or other agreements. City budget decisions are subject to the discretion of the Mayor and the Board of Supervisors. Contractor’s assumption of risk of possible non-appropriation is part of the consideration of this Agreement.

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

**3. Term of the Agreement.** The term of this Agreement shall be from June 27, 2011 to June 26, 2017 with the option to renew for up to four years at the sole and absolute discretion of City.

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

**5. Services Contractor Agrees to Perform.** Contractor agrees to perform the services provided for in Appendices A, B, C and D attached hereto and incorporated by reference as though fully set forth herein.

**6. Project Administration**

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

**1) Delays.** To prevent slippage caused by Contractor in the completion of the project, Contractor agrees that if such slippage occurs, it will assign additional qualified personnel to the Project. In the event that Contractor assigns additional personnel to the project due to delays not caused by or under the reasonable control of Contractor, the cost of such additional personnel will be billable to the City upon the execution of a written amendment to this Agreement pursuant to Section 52 "Modification of Agreement".

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

**3) Critical Milestones.** Contractor and the City both acknowledge and understand that the Project Schedule as defined in the Statement of Work, Appendix A, contains certain time-sensitive milestones (Critical Milestones) that must be attained by certain dates, and that both parties have defined responsibilities in order to meet such Critical Milestones; otherwise, the City will suffer financial harm. Milestones that are Critical Milestones are so indicated in the Project Schedule. Notwithstanding the City's ability to assess liquidated damages for Contractor's sole failure to meet any Critical Milestone, the time period for achieving Acceptance shall not exceed the mutually defined and agreed to time period, as included in the project schedule after initiation of System testing. In addition to any other remedy provided under this Agreement, Contractor's inability to achieve Final Acceptance of the System within the mutually defined and agreed to time period, as included in the Project Schedule after the last Critical

Milestone will be cause for termination of this Agreement if Contractor is unable to cure such inability within thirty (30) days following written notice from the City, and the City shall be entitled to a full refund of any amounts paid to Contractor under this Agreement for the portion(s) of the System that are not Accepted.

**b. Project Managers.** Contractor and City shall each designate a Project Manager, who shall be accessible by telephone throughout the duration of the Agreement and shall be available 10 a.m. to 6 p.m. central time Monday through Friday, excluding City-designated holidays. These hours may be adjusted by mutual agreement of City and Contractor.

The City's Project Manager will be authorized to make binding decisions for the City regarding this Agreement and will: (1) review all specifications, technical materials and other documents submitted by Contractor, request necessary corrections, and approve such documents; (2) provide requested City information and data and assume responsibility on the adequacy of the same; (3) advise Contractor of City's requirements; and (4) upon request provide access to City's staff, facility and hardware. City's Project Manager shall have the right to manage and direct any aspect of the Project as may be necessary, in his or her opinion, to safeguard the interest of the City. City's Project Manager shall communicate all of his or her concerns to Contractor's Project Manager. In the event Contractor believes that any direction being given by City's Project Manager shall impair the performance of the Project or any phase thereof, Contractor shall immediately inform the City's Project Manager of its concern. Except as specifically provided under this Agreement, City's Project Manager's management of the Project shall not relieve Contractor of any obligations or liabilities set forth in this Agreement and the Appendices or Exhibits thereto.

Throughout the term of this Agreement, whenever the Contractor's Project Manager is not on site, he or she must be available by phone or e-mail. Whenever the Contractor's Project Manager will be unavoidably absent or otherwise unavailable by phone or e-mail for more than eight hours, then a substitute Project Manager must be designated to respond to telephone calls and pages from the City. Contractor shall use its best efforts to maintain the same Project Manager until Final Acceptance of the Programs. However, if Contractor needs to replace its Project Manager, it shall provide City with written notice thereof at least ten (10) business days prior to the date the Project Manager is to be replaced. Notwithstanding the foregoing, Contractor may appoint temporary Project Managers in connection with short term unavailability, sick leave, or reasonable vacations, provided that Contractor gives City reasonable notification thereof in advance. City may require Contractor to replace its Project Manager, by giving Contractor notification thereof and City's objective reasons therefor.

Contractor's Project Manager:	John Stahlecker Wausau Financial Systems, Inc. 875 Indianhead Drive Mosinee, WI 54455-0037 jstahlicker@wausaufs.com (715) 359-0427
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City's Project Manager:	Tajel Shah Office of the Treasurer & Tax Collector 1 Dr. Carlton B. Goodlett Place San Francisco, CA 94102 tajel.shah@sfgov.org / (415) 554-4506
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**c. Changing Project Managers.** The City and Contractor shall use their best efforts to maintain the same Project Manager until Final Acceptance of the System. However, if a party needs to replace its Project Manager, the party shall provide the other party written notice thereof at least ten (10) business days prior to the date the Project Manager shall be replaced. Such notice shall provide all the required information above. Notwithstanding the foregoing, the parties have the right to appoint



temporary Project Managers in connection with short term unavailability, sick leave or vacations. Parties shall notify each other of any such temporary appointments.

**d. Qualified Personnel.** Work under this Agreement shall be performed only by competent personnel appropriately trained in technical skills to perform their duties under the supervision of, and in the employment of, Contractor. The City's personnel will also be adequately trained to perform the City's obligations under this Agreement. Contractor will comply with City's reasonable requests regarding assignment of personnel, but all Contractor personnel, including those assigned at City's request, must be supervised by Contractor. The personnel of each party, when on the premises of the other, shall comply with the security and other personnel regulations of the party on whose premises such individual is located.

**e. Meetings.** From the commencement date of the Project until the Final Acceptance of the Programs, the Project Managers shall communicate at times and locations mutually agreed to by the parties to discuss the progress of the Project. Until the Final Acceptance of the Project, the Project Managers shall communicate, as required by the City, to discuss any operational problems or defects that City has encountered. Contractor and City's Project team must be available to meet as often as is reasonably necessary to facilitate timely completion of the Project.

**f. Reports.** Contractor's Project Manager shall provide progress reports, as requested by the City, to the City's Project Manager which summarizes overall project status, lists meetings that are planned, problems encountered and issues to be resolved.

**g. Inspection.** Upon City's prior twenty-four (24) hour notice to Contractor, City's Project Manager shall have the right to conduct on-site inspections at City's facility and/or test, all Work, Deliverables and materials to be provided for the Project, and the manufacture, assembly and installation of such Deliverables and materials. City's Project Manager's inspection shall be based on compliance with the Agreement. City's Project Manager's right to inspect all aspects of the Project shall not relieve Contractor of its obligation to furnish material and workmanship in accordance with this Agreement, however, any time spent by Contractor on inspections may impact the timing of the Project. City's Project Manager may reject any portion of the Project which fails to meet any applicable specifications, as defined in Appendix A.

**1. Defects Post-Inspection.** Notwithstanding any previous inspection, acceptance, or payment by the City for any Work, or Deliverables found to be in non-compliance with the Agreement, or found to be Defective Work before Final Acceptance of the Project, such Work or Deliverables shall be repaired or replaced within a reasonable period of time by Contractor at its own cost and expense.

**2. Special Testing Tools.** Contractor shall furnish all tools, labor and material which Contractor deems necessary to inspect any Deliverables, Work or material. Unless purchased by the City as part of the Project, Contractor shall provide all test equipment needed to verify and Deliverables or Work at its sole cost and expense. The equipment provided by Contractor for performance test shall be currently certified as "calibrated" by the test equipment manufacturer, or its authorized calibration service agent. Unless purchased by the City, all test equipment shall remain the property of Contractor.

**h. Right to Stop Work.** City's Project Manager shall have the right to stop any work on the Project if: (i) City notifies Contractor of a defect in the Work or Equipment and after such notice, Contractor fails to promptly commence correction of any identified defects in the Work or Equipment, or (ii) Contractor fails to carry out any portion of the Project in accordance with this Agreement. All stop work orders from the City shall be in writing and signed by City's Project Manager. City shall specifically state the cause for the order to stop work. Upon receiving a stop work order, Contractor shall immediately cease working on that portion of the Work specified in the order, until the cause for such order has been eliminated. City's right to stop any work on the Project shall not give rise to a duty on the

part of the City to exercise this right for the benefit of Contractor or any other person or entity. In the event City's Project Manager orders work to be stopped without proper justification, City shall reimburse Contractor for the actual and direct costs incurred by Contractor due to the delay. Furthermore, Contractor will be entitled to a time extension equal to the number of days delay City has caused due to the unjustified work stoppage. In no event will a stop work order extend beyond 30 days.

**i. Change Orders.** The City may at any time, by written order, and without notice to Contractor's sureties, submit a Change Order to Contractor. Within ten (10) working days (or such time period as mutually agreed to by the parties) of receiving a proposed Change Order, Contractor shall submit to City a written cost estimate, which shall include any adjustments to the Project price, the Project Schedule, the Statement of Work, the Acceptance Criteria or any other obligations of Contractor, as applicable. Contractor may also propose a Change Order involving either additions, deletions, or revisions to the Work, or any obligations imposed upon the Parties under this Agreement. Contractor's proposed Change Order shall be in the form of a Request for Change (RFC) which shall explain, in writing, Contractor's basis for requesting the Change Order and the impact of the proposed Change Order on the Project Schedule, the cost of Work, the contract documents and Deliverables, and any other interdependent Work, including but not limited to, the Acceptance Criteria, training, documentation, performance, resources, data conversion, users, re-engineering tasks, and all other aspects of the Project, as provided in this Agreement.

All Change Orders must be pre-approved, in writing, by City's Project Manager. Contractor shall not proceed with any work contemplated in any Change Order until it receives written notification to commence such work from City's Project Manager. Contractor shall commence the work contemplated by the Change Order upon receiving written notice from City's Project Manager. If Contractor and City disagree on the effect that a Change Order will have on the Project price, the Project Schedule or the Acceptance Criteria, then Contractor will not proceed with the work contemplated by the Change Order until the parties agree, in writing, to do so.

The City shall have authority to order minor changes in the Work not involving either an adjustment in the total contract sum or an extension of the time for completion of the Work, provided that the parties mutually agree that the change is minor. The City's Project Manager may waive a variation in the Work if, in his or her opinion, such variation does not materially change the Work or the Program's performance. Such changes shall be effected by written order and shall be binding on the City and Contractor. Contractor shall carry out such written orders promptly. Such written orders may be in the form of a response to a request for information (RFI), a no cost change order, or in any other written form determined by the City.

**j. City Facilities.** City will provide facilities or equipment for Contractor's use during the term of the Agreement and the conditions upon which access will be granted.

## **7. Licensed Software**

**a. Grant of License.** Subject to the terms and conditions of this Agreement, Contractor grants City a non-exclusive and non-transferable license to use the Licensed Software and Programs. City acknowledges and agrees that the Licensed Software is the proprietary information of Contractor and that this Agreement grants City no title or right of ownership in the Licensed Software.

**b. Restrictions on Use.** City is authorized to use the Licensed Software only for City's internal purposes and only on the equipment and/or sites identified and agreed upon by the parties. City agrees that it will, through its best efforts, not use or permit the Licensed Software to be used in any manner, whether directly or indirectly, that would enable any other person or entity to use the Licensed Software on other than as agreed. City agrees not to reverse engineer, reverse compile or disassemble the

object codes, source codes or algorithms of the Licensed Software, or encumber the Licensed Software or transfer the Licensed Software, or any of City's rights therein, to any other party.

**c. System Back-up.** The City may enable for use, at no additional cost, a copy of all products to support operations, testing, and configuration of a back-up system/site for the City, provided that the City provides Contractor with written notice of such activity and that the City refrains from using the Licensed Software simultaneously on both Production and back-up systems, except in support of test activities.

For the purpose of any bona fide City disaster recovery plan or with respect to the use of computer software in its municipal operations, City may make one copy of the Licensed Software for archival purposes and use such archival copy at a site owned or controlled by City. The use of such archival copy shall be limited to (1) the purpose of conducting limited testing of the disaster recovery plan's procedures and effectiveness and (2) during any period subsequent to the occurrence of an actual disaster. City agrees to furnish evidence of its disaster recovery plan and procedures upon Contractor's request.

**d. Transfer of Products.** The City may move the Licensed Software and associated Hardware and supporting materials to another of the City's sites, which physically replaces the original installation site upon written notice to Contractor. In the event that the City moves the Licensed Software and associated Hardware to a location where Contractor is unable to provide support, then Contractor will have no obligation to continue providing support under this Agreement until such VPN access to products is given to Contractor by City.

**e. Documentation.** Contractor shall provide City with Documentation specified in the Authorization Document. Contractor grants to City permission to duplicate all printed Documentation for City's internal use.

**f. Proprietary Markings.** City agrees not to remove or destroy any proprietary markings or proprietary legends placed upon or contained within the Licensed Software or any related materials or Documentation.

**g. Authorized Modification.** City shall also be permitted to develop, use and modify Application Program Interfaces (APIs), macros and user interfaces. For purposes of this Agreement, such development shall be deemed an authorized modification. Any such APIs, macros or other interfaces developed by the City shall become the property of the City, and Contractor will have no warranty or support obligations with respect to such APIs.

**h. Delivery.** Contractor shall deliver the Licensed Software products in accordance with Appendix A.

**i. Risk of Loss.** If any of the Licensed Software products are lost or damaged during download or before download is completed, Contractor shall promptly make available the ability to download the software to City, at no additional charge. If any of the Licensed Software products are lost or damaged while in the possession of the City, Contractor will promptly make available the ability to download the software products to City.

**8. Hardware/Equipment.** Contractor shall provide City the Equipment listed in Appendix B-1 at the cost set forth in Appendix B, in accordance with the following terms:

**a. Delivery.** The Equipment shall be delivered to City and installed at the location set forth in Appendix A.

**b. Contractor Installation Responsibilities.** Contractor shall use its best efforts to deliver and install the Equipment on or before the agreed upon date. Contractor will arrange for the installation of the Equipment by qualified representative of Contractor or other approved third parties.

**c. City's Installation Responsibilities.** City will notify its employees and others affected by the installation of the intended date for installation of the Equipment, and will provide sufficient staff to assist Contractor in the installation of the Equipment. City will provide sufficient space and clearance to move the Equipment into the designated operating area. City shall provide the necessary and proper environment for the installation of the Equipment in the designated operating area, including, without limitation, sufficient electrical power to properly operate Equipment during installation, free, clear and unobstructed access to the area where the Equipment is to be installed and adequate working space for Contractor personnel within reasonable distance of the area where the Equipment is to be installed.

**d. F.O.B. Point.** F.O.B. destination in San Francisco, freight prepaid and allowed.

**e. Title and Risk of Loss.** After the Equipment ordered by City under this Agreement has been installed and accepted and final payment has been made, title to such Equipment will pass to City, free and clear of all liens, levies and encumbrances. Risk of loss shall pass to City upon delivery of Equipment to City's site location.

## **9. Programs**

**a. Program Development.** Subject to the terms and conditions of this Agreement, and in consideration for the payments to be made, Contractor agrees to follow the structured project process outlined in Appendix A.

**b. Data Conversion.** Contractor shall be responsible for the timely and accurate conversion of City's data as provided in Appendix A.

**c. Interpretation of the Specifications.** The Functional Specifications will provide the basis for the Design Specifications, and that the Design Specifications will, upon acceptance by the City, provide the basis for the coding and installation of the Programs. The Customers Requirements Document will provide the basis for Design Specification.

**d. Interpretive Differences.** In the event City and Contractor differ in their interpretations of the Functional Specifications, Design Specifications, or Acceptance Tests, such difference will be settled in accordance with the dispute resolution process set forth in Section 32, Dispute Resolution.

**e. Parallel Processing.** The parties contemplate that parallel processing will be used until both the program and its backup have completed the Acceptance Tests.

## **10. Documentation Delivery and Training**

**a. Documentation Delivery.** Contractor will deliver completed Documentation in electronic format for the Licensed Software and Programs in accordance with the Documentation section of Appendix A, and the Project Schedule section of Appendix A and the Authorization Document. The City may withhold its issuance of the notice of final Acceptance until City receives the completed Documentation.

**b. City Training.** Contractor will provide training to City personnel via Contractor's online training portal at the rates shown in Appendix B.

## 11. Warranties

**a. Third Party Products.** The warranties for all Equipment and Software manufactured or developed by entities other than Contractor ("Third Party Products") shall be as stated by the applicable manufacturer or developer. Contractor makes no, and hereby expressly disclaims, any and all warranties with respect to all Third Party Products.

**b. Equipment Warranty.** The Equipment warranty will be the warranty provided by the manufacturer of the Equipment and will be subject to all of the restrictions and limitations of the applicable manufacturer's warranty. Contractor hereby assigns to City all assignable warranties, representations and indemnities granted to Contractor by all Equipment manufacturers, and all remedies for breach of such warranties, representations and indemnities. To the extent that Contractor is not permitted to assign any of such warranties and indemnities to City, Contractor shall use commercially reasonable efforts to enforce such warranties and indemnities on behalf, and at the expense, of City to the extent Contractor is permitted to do so under the terms of any applicable third party agreements. The warranty period for any applicable warranty shall begin on the date specified in the manufacturer's warranty. Contractor will provide the City with true and correct copies of all applicable third party manufacturers' and owners' warranties at the time of Equipment installation.

**c. Software Warranty.** Contractor warrants that when the Licensed Software and all updates and improvements to the Licensed Software are delivered to City under the Software Support Agreement, they will be free from defects as to design, material, and workmanship and will perform on the Designated CPU in accordance with the Contractor's published specifications for the Licensed Software for a period of 365 days from City's Acceptance of such Licensed Software. Furthermore, except as provided in Section 11(a), Contractor warrants the Software to materially conform to the description of its function and performance, as set forth in the (SOW) Statement of Work (Appendix A) technical or other approved written documentation distributed by Contractor, for as long as there is a Software Support Agreement in effect between the parties and City is current in its payment obligations. Contractor agrees to repair or fix any non-conformity free of charge for the time period set forth in subsection h below. Warranty support is limited in all cases to errors and omissions in the Software. Warranty support does not cover errors caused by: Equipment malfunction; use of Equipment and/or networks not pre-approved by Contractor; City's negligence or abuse; fire or water damage; or acts of God or other types of catastrophic damages. Warranty support does not include Updates or Upgrades to the Software. Any warranty will become void if City (or a third party under City's control) makes unauthorized changes or modifications to the Software, or if City declines to implement software changes, fixes or repairs recommended by Contractor.

**d. Virus Warranty.** Except as provided in Section 11(a) above, Contractor warrants to City that the Software will be free of all viruses at time of delivery to City's site. Upon installation of the System at City's site, City assumes all responsibility for virus protection. Contractor will use commercially reasonable efforts to assist City, as City's request and on a time and materials basis, in the event that a virus is detected on City's System. However, Contractor assumes no responsibility for any damage, including but not limited to damage to the System or data loss, caused by any such virus.

**e. Warranty Disclaimer.** Except for the express warranties set forth in or referenced in this Agreement, Contractor (and its licensors and manufacturers, if applicable) disclaim all warranties, express or implied, including warranties of merchantability, fitness for a particular purpose, and those arising from a course of performance, a course of dealing or trade usage. Contractor does not warrant that the operation of the Software and Equipment will be uninterrupted or error free, or that all the deficiencies or errors will be corrected.

**f. Other Representations and Warranties.** Contractor hereby represents, warrants and covenants as to the following:

(1) Contractor has special professional skills, knowledge and expertise in the field of design, implementation and maintenance of the System, and acknowledges City's reliance on same.

(2) The System changes and enhancements, and all components developed by Contractor shall be free of material defects in workmanship and design.

(3) All Contractor's services shall be performed in a skillful and workmanlike manner.

(4) Any Software Upgrade provided by Contractor, once installed and accepted by City, will also be warranted to function correctly, as part of the System Software, and will be covered under Contractor's Warranty and Maintenance Support.

(5) Contractor hereby warrants that the System, as delivered by Contractor, is capable of operating in conformance with the System's current published specifications and capability representations.

**g. Warranties: Right to Grant License.** Contractor hereby warrants that it has title to and/or the authority to grant a license of the Licensed Software to the City.

**h. Warranty of Title.** Contractor warrants that the Licensed Software furnished and further configured and developed pursuant to this Agreement will, prior to its transfer to City, be the sole and exclusive property of Contractor, or Contractor is properly licensed to issue sublicenses for third-party software.

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

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

## **12. Maintenance and Support for Licensed Software**

**a. Maintenance and Support Services for Licensed Software.** Contractor shall provide Support Services and provide Upgrades during the term of this Agreement for Software Support Services, as set forth in Section 3 and Appendix C.

**b. Maintenance and Support Services.** After Acceptance of the Licensed Software, and subject to the terms, conditions, and charges set forth in this Section, Contractor shall provide Support Services Upgrades as follows: (i) Contractor will provide such assistance as necessary to cause the Licensed Software to perform in accordance with the Specifications as set forth in the Authorization Document; (ii) Contractor will provide, for City's use, whatever improvements, enhancements, extensions and other changes to Programs Contractor may develop, and (iii) Contractor will update the Licensed Software, as required, to cause it to operate under new versions or releases of the Licensed Software so long as such updates are made generally available to Contractor's other Licensees.

**c. Error, Defect or Malfunction Correction.** During the term of this Agreement, Contractor shall furnish Error, Defect or Malfunction correction in accordance with the Priority Categories listed below, based on mutual agreement of the parties regarding the determination of the severity of the Error, Defect or Malfunction and Contractor's reasonable analysis of the priority of the Error, Defect or Malfunction.

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

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

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

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

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

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

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

**d. [Reserved]**

**e. Hotline Support.** Contractor shall provide remote access hotline support to City to help City answer routine questions with respect to the use of the Licensed Software. Contractor also shall provide remote access hotline support to City to initiate resolution of Priority 1 and Priority 2 Errors, Defects and Malfunctions. Hotline support shall be available by phone, electronic bulletin board, electronic mail or other service 24-hours a day, seven-days a week. Responses to questions posted by electronic means will be made within the time frame established under Priority Protocols for an Error, Defect or Malfunction.

**f. City Responsibilities Related to Support.** City shall use reasonable efforts to make available to Contractor reasonable access to the equipment on which City experienced the Error, Defect or Malfunction, the Licensed Software Product, and all relevant documentation and records. In the event that the City does not provide Contractor access to the Licensed Software and associated Hardware and as a result Contractor is unable to provide support, then Contractor will have no obligation to continue providing support under this Agreement until City provides such reasonable access. City shall also provide reasonable assistance to Contractor, including sample output and diagnostic information, in order to assist Contractor in providing Support Services. City shall be responsible for the interface between the Licensed Software and other software products not provided under this Agreement and installed on City equipment subsequent to the Licensed Software acceptance.

### 13. Hardware/Equipment Maintenance.

**Fault Reporting.** During the term for Equipment maintenance services set forth in Section 3, on the terms and conditions of this Agreement and Appendix D, Contractor shall repair or replace without charge to the City if covered by the manufacturer's warranty or standard Equipment maintenance any part of the Hardware found to be faulty by reason of defective material, design, or workmanship. Hardware problems will be reported by the City's through the City's Technical Contact to Contractor at the specified support number. Each such report will be accompanied or followed by sufficient information to enable Contractor to determine the cause of the Hardware problem. Contractor will acknowledge each such report via telephone, facsimile transmission, or electronic mail to the Technical Contact and will use commercially reasonable efforts consistent with the severity of the problem to repair or replace the Hardware.

### 14. Existing Systems

**a. Due Care.** Contractor shall take all advisable precautions to protect all existing equipment, facilities and structures in any area in which Contractor is assembling or installing any portion of the Project. Contractor shall take particular care to configure and install mounting hardware so as not to cause damage to existing structures. Contractor shall be responsible for correcting any damage they may cause to any equipment, facility and structure to the condition prior to the time of damage.

**b. Interruption of Service.** Contractor shall ensure that no unscheduled interruption of service of the existing external systems due to any cause within Contractor's control will occur during the course of installation, testing, maintenance or servicing of the Project. If service or any part of service must be interrupted to install any part of the Project, Contractor shall schedule with the City's Project Manager times when service may be interrupted. City's and Contractor's Project Managers must supervise all service interruptions. With any interruption of service, Contractor and appropriate City staff will work together to fully restore the system and ensure that the system is not degraded by the interruption.

### 15. System Acceptance

**a. System Acceptance Test Plan.** The System Acceptance Test Plan is detailed in Appendix A.

**b. Delivery Acceptance Certificate.** At the completion of the engagement or a phase of the engagement, Contractor will prepare a Delivery Acceptance Certificate for the associated activities and present it to the City for approval/acceptance. The City will have ten (10) business days from date of receipt of the Delivery Acceptance Certificate to approve the engagement or phase. In the event that the City has taken no action within the ten (10) business days, City is deemed to have accepted the engagement or phase activities as satisfactorily completed.

In the event that an engagement or phase is disapproved, the City will submit a detailed written description of why the engagement or phase was rejected and attach to the Delivery Acceptance Certificate. Contractor senior management will review the City's document with the Contractor project manager to determine if corrective action is required and respond to the City engagement sponsor for resolution. Contractor will consider and correct only those items that are identified in writing as being disapproved and that are in direct conflict with the Customer Requirements Document, SOW or Investment Overview.

The final Delivery Acceptance Certificate will be used to signify that all activities or deliverables have been submitted and approved and the engagement is complete.



**c. Failure to Pass Acceptance Testing.** In the event that City determines that the System fails to conform to the Documentation (including the specific Statement of Work deliverables in Appendix A set forth in the Acceptance Test Plan), in some material respect during the Acceptance Period, City shall promptly report to Contractor each deficiency, and Contractor will correct the reproducible aspects of the problem or failure within ten (10) business days ("Cure Period") from date of Contractor's receipt of notice of the problem or failure. Problems or failures that do not re-occur or cannot be repeated by Contractor, or by the City in Contractor's presence, shall not be considered a failure. At the end of such ten (10) business days, City will determine whether the System materially conforms to the Documentation. In the event that there is a material deficiency, Contractor will have an additional ten (10) business days to correct such material deficiency. In the event that Contractor cannot achieve System Acceptance within three (3) Cure Periods following the commencement of Acceptance Testing, Contractor shall be in default under this Agreement and, in addition to those remedies set forth in Section 18 entitled "Term and Termination," City is further entitled to a refund of all payments made to Contractor under this Agreement.

## **16. Payment**

**a. Compensation.** The breakdown of costs associated with this Agreement appears in Appendix B, "Calculation of Charges," attached hereto and incorporated by reference as though fully set forth herein. Compensation for professional services performed by Contractor shall be made within thirty (30) days after an invoice has been submitted to City and the Treasurer concludes the services have been performed, in his or her reasonable discretion, in accordance with Appendix A. Payments for maintenance of the System shall commence upon Live Use of the System, as defined in Section 16.b. below. In no event shall the amount of this Agreement exceed one million eight hundred thousand dollars and no cents (\$1,800,000.00). No charges shall be incurred under this Agreement nor shall any payments become due to Contractor until reports, services, or both, required under this Agreement are received from Contractor and approved by the Treasurer as being in accordance with this Agreement. City may withhold payment to Contractor in any instance in which Contractor has failed or refused to satisfy any material obligation provided for under this Agreement. In no event shall City be liable for interest or late charges for any late payments.

The Controller is not authorized to pay invoices submitted by Contractor prior to Contractor's submission of HRC Progress Payment Form. If Progress Payment Form is not submitted with Contractor's invoice, the Controller will notify the department, the Director of HRC and Contractor of the omission. If Contractor's failure to provide HRC Progress Payment Form is not explained to the Controller's satisfaction, the Controller will withhold 20% of the payment due pursuant to that invoice until HRC Progress Payment Form is provided. Following City's payment of an invoice, Contractor has ten days to file an affidavit using HRC Payment Affidavit verifying that all subcontractors have been paid and specifying the amount.

**b. Maintenance for Support Charges.** Maintenance charges will be invoiced beginning on the date the Licensed Software and Equipment, begin Live Use, and are set forth in Appendix B, "Calculation of Charges". All Licensed Software and Equipment will be considered to be in production upon the earlier of: (a) the date that it begins live use at the City's site ("Live use" shall mean that the Licensed Software and Equipment is processing the City's work in a production environment); or (b) the date that it is tested, configured and ready to be used in production at the City's site, as set forth in the Customer Requirements Document. For each year after the period for which periodic payments are payable, or each year after the first year of the lump sum payment license, as the case may be, Contractor will continue to provide City with the maintenance and support services for the Licensed Software and equipment as described in section 12 above, provided City issues a purchase order or modification to this Agreement and

pays Contractor in advance the annual maintenance and support charges then in effect. If there is an increase in annual maintenance and support charges, Contractor shall give City written notice of such increase at least thirty (30) days prior to the expiration of the applicable maintenance period. Annual maintenance and support charges shall not increase more 3 % of the rate of the year immediately prior to such increase. Contractor will make maintenance and support services available to City for a minimum of 9 years, provided that City remains on a current version of the Licensed Software (defined as the most recent version of the software or one of the two prior versions).

**c. Invoice Format.** Invoices furnished by Contractor under this Agreement must be in a form acceptable to the Controller, and must include a unique identifying number. All amounts paid by City to Contractor shall be subject to audit by City. Payment shall be made by City to Contractor at the address specified in the section entitled “Notices to the Parties.”

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

**e. Taxes**

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

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

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

(3) Contractor, on behalf of itself and any permitted successors and assigns, recognizes and understands that other events also may cause a change of ownership of the possessory interest and result in the revaluation of the possessory interest. (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.

## 17. Property Rights of the Parties

**a. Ownership of Underlying Modules.** Contractor shall retain ownership of all interfaces previously developed for itself or other customers and not included in the SOW.

**b. City's Data.** Any data or other materials furnished by the City for use by Contractor under this Agreement shall remain the sole property of the City and will be held in confidence in accordance with Section 33 of this Agreement (Proprietary or Confidential Information of City). Such materials shall be returned to City upon Acceptance of the Programs.

## 18. Term and Termination/Termination for Convenience

**a. Termination for Cause.** In the event that either party fails to perform any of its material obligations under this Agreement, this Agreement may be terminated thirty (30) days following written notice to the other party of the occurrence of such failure, unless such failure has been cured within such thirty (30) day period. No new work will be undertaken after the date of receipt of any notice of termination, or five days after the date of the notice, whichever is earlier. In the event of such termination, Contractor will be paid for those services performed under this Agreement to the satisfaction of the City, up to the date of termination. However, City may offset from any such amounts due Contractor any liquidated damages or other costs City has or will incur due to Contractor's non-performance. Any such offset by City will not constitute a waiver of any other remedies City may have against Contractor for financial injury or otherwise.

**b. Termination for Convenience.** City may terminate this Agreement for City's convenience and without cause at any time by giving Contractor thirty days written notice of such termination. In the event of such termination, Contractor will be paid for those services performed, pursuant to this Agreement, to the satisfaction of the City up to the date of termination. In no event will City be liable for costs incurred by Contractor after receipt of a notice of termination. Such non-recoverable costs include, but are not limited to, anticipated profits on this Agreement, post-termination employee salaries, post-termination administrative expenses, or any other cost which is not reasonable or authorized under this section. This section shall not prevent Contractor from recovering costs necessarily incurred in discontinuing further work under the contract after receipt of the termination notice.

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

**d. Disposition of Licensed Software on Termination.** Upon the expiration or termination of this Agreement or an applicable Authorization Document for any reason, City shall immediately: (i) return the Licensed Software to Contractor together with all Documentation; (ii) purge all copies of the Licensed Software or any portion thereof from all CPU's and from any computer storage medium or device on which City has placed or permitted others to place the Licensed Software; and (iii) give Contractor written certification that through its best efforts and to the best of its knowledge, City has complied with all of its obligations under this Section 18(d).

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

8.	Hardware/Equipment		infringement that occurred prior to the date of termination or expiration of this Agreement
11.	Warranties		
16.d	Payment Does Not Imply Acceptance of Work	30.	Liability of City
16.e	Taxes	33.	Nondisclosure
17.	Property Rights of the Parties	34.	Proprietary or Confidential Information of City
21.	Audit and Inspection of Records	35.	Protection of Private Information
22.	Submitting False Claims; Monetary Penalties	36.	Ownership of Results
25.	Responsibility for Equipment	44.	Non-Waiver of Rights
26.	Independent Contractor; Payment of Taxes and Other Expenses	52.	Modification of Agreement
27.	Insurance	53.	Administrative Remedy for Agreement Interpretation
28.	Indemnification and General Liability, but only with respect to incidents that occurred prior to the date of termination or expiration of this Agreement	54.	Agreement Made in California; Venue
		55.	Construction
		56.	Entire Agreement
29.	Infringement Indemnification, but only with respect to claims arising out of	63.	Severability

**19. [Reserved]**

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

**21. Audit and Inspection of Records.** Contractor agrees to maintain and make available to the City, upon at least twenty (20) business days prior written notice, no more than once each calendar year during regular business hours, accurate books and accounting records relating to its work under this Agreement. Contractor will permit City to audit, examine and make excerpts and transcripts from such books and records, and to make audits of all invoices, materials, payrolls, records or personnel and other data related to all other matters covered by this Agreement, whether funded in whole or in part under this Agreement. Contractor shall maintain such data and records in an accessible location and condition for a period of not less than five years after final payment under this Agreement or until after final audit has been resolved,

whichever is later. The State of California or any federal agency having an interest in the subject matter of this Agreement shall have the same rights conferred upon City by this Section.

**22. 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.

**23. Liquidated Damages.**

By entering into this Agreement, Contractor agrees that in the event the Services, as provided under Section 5 herein, are delayed beyond the Critical Milestones established in Appendix A, City will suffer actual damages that will be impractical or extremely difficult to determine; further, Contractor agrees to pay the City the sum fifty dollars (\$50.00) per day for each day of delay beyond the Critical Milestones, up to a maximum cap of \$2,000, for any delay that is attributable to the fault of Contractor. Contractor shall not be responsible for delays due to causes beyond its reasonable control. The daily sum is not a penalty, but is a reasonable estimate of the loss that City will incur based on the delay, established in light of the circumstances existing at the time this contract was awarded. City may deduct a sum representing the liquidated damages from any money due to Contractor. Such deductions shall not be considered a penalty, but rather agreed monetary damages sustained by City because of Contractor's sole failure to deliver to City within the time fixed or such extensions of time permitted in writing by Purchasing.

**24. Default; Remedies.**

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

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

- |      |   |     |                            |
|------|---|-----|----------------------------|
| 16.e | Taxes                                       | 38. | Subcontracting             |
| 22.  | Submitting False Claims; Monetary Penalties | 39. | Assignment                 |
| 27.  | Insurance                                   | 58. | Compliance with Laws       |
| 34.  | Proprietary or Confidential Information     | 61. | Drug-Free Workplace Policy |
| 35.  | Protection of Private Information           | 65. | Graffiti Removal           |

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

3) Contractor (a) is generally not paying its debts as they become due, (b) files, or consents by answer or otherwise to the filing against it of a petition for relief or reorganization or arrangement or any other petition in bankruptcy or for liquidation or to take advantage of any bankruptcy,

insolvency or other debtors' relief law of any jurisdiction, (c) makes an assignment for the benefit of its creditors, (d) consents to the appointment of a custodian, receiver, trustee or other officer with similar powers of Contractor or of any substantial part of Contractor's property or (e) takes action for the purpose of any of the foregoing.

4) A court or government authority enters an order (a) appointing a custodian, receiver, trustee or other officer with similar powers with respect to Contractor or with respect to any substantial part of Contractor's property, (b) constituting an order for relief or approving a petition for relief or reorganization or arrangement or any other petition in bankruptcy or for liquidation or to take advantage of any bankruptcy, insolvency or other debtors' relief law of any jurisdiction or (c) ordering the dissolution, winding-up or liquidation of Contractor.

b. On and after any Event of Default, City shall have the right to exercise its legal and equitable remedies, including, without limitation, the right to terminate this Agreement or to seek specific performance of all or any part of this Agreement. In addition, City shall have the right (but not 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.

c. 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.

**25. Responsibility for Equipment.** City shall not be responsible for any damage to persons or property as a result of the use, misuse or failure of any equipment used by Contractor, or by any of its employees, even though such equipment be furnished, rented or loaned to Contractor by City. The acceptance or use of such equipment by Contractor or any of its employees means that Contractor accepts full responsibility for and agrees to exonerate, indemnify, defend and save harmless City from and against any and all claims for any damage or injury of any type arising from the use, misuse or failure of such equipment, whether such damage be to Contractor, its employees, City employees or third parties, or to property belonging to any of the above.

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

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

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

## **27. Insurance**

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

- 1) Workers' Compensation, in statutory amounts, with Employers' Liability Limits not less than \$500,000 each accident, injury, or illness; and
- 2) Commercial General Liability Insurance with limits not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Contractual Liability, Personal Injury, Products and Completed Operations; and
- 3) Commercial Automobile Liability Insurance with limits not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Owned, Non-Owned and Hired auto coverage, as applicable.

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

- 1) Name as Additional Insured the City and County of San Francisco, its Officers, Agents, and Employees.
- 2) That such policies are primary insurance to any other insurance available to the Additional Insureds, with respect to any claims arising out of this Agreement, and that insurance applies separately to each insured against whom claim is made or suit is brought.

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

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

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

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

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

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

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

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

**28. Indemnification and General Liability.** Contractor shall indemnify and save harmless City and its officers, agents and employees from, and, if requested, shall defend them against any and all loss, cost, damage, injury, liability, and claims thereof for injury to or death of a person, including employees of Contractor or loss of or damage to property, arising directly or indirectly from Contractor's performance of this Agreement, except to the extent that such indemnity is void or otherwise unenforceable under applicable law in effect on or validly retroactive to the date of this Agreement and except where such loss, damage, injury, liability or claim is the result of the negligence or willful misconduct of City and is not contributed to by any act of, or by any omission to perform some duty imposed by law or agreement on Contractor, its subcontractors or either's agent or employee. The foregoing indemnity shall include, without limitation, reasonable fees of attorneys, consultants and experts and related costs and City's costs of investigating any claims against the City. In addition to Contractor's obligation to indemnify City, Contractor specifically acknowledges and agrees that it has an immediate and independent obligation to defend City from any claim which actually or potentially falls within this indemnification provision, even if the allegations are or may be groundless, false or fraudulent, which obligation arises at the time such claim is tendered to Contractor by City and continues at all times thereafter.

**29. Infringement Indemnification.** If notified promptly in writing of any judicial action brought against City based on an allegation that City's use of the Licensed Software infringes a patent, copyright, or any right of a third party or constitutes misuse or misappropriation of a trade secret or any other right in



intellectual property (Infringement), Contractor will hold City harmless and defend such action at its own expense. Contractor will pay the costs and damages awarded in any such action or the cost of settling such action, provided that Contractor shall have sole control of the defense of any such action and all negotiations or its settlement or compromise. If notified promptly in writing of any informal claim (other than a judicial action) brought against City based on an allegation that City's use of the Licensed Software constitutes Infringement, Contractor will pay the costs associated with resolving such claim and will pay the settlement amount (if any), provided that Contractor shall have sole control of the resolution of any such claim and all negotiations for its settlement.

In the event a final injunction is obtained against City's use of the Licensed Software by reason of Infringement, or in Contractor's opinion City's use of the Licensed Software is likely to become the subject of Infringement, Contractor may at its option and expense: (a) procure for City the right to continue to use the Licensed Software as contemplated hereunder, (b) replace the Licensed Software with a non-infringing, functionally equivalent substitute Licensed Software, or (c) suitably modify the Licensed Software to make its use hereunder non-infringing while retaining functional equivalency to the unmodified version of the Licensed Software. If none of these options is reasonably available to Contractor, then the applicable Authorization Document or relevant part of such Authorization Document may be terminated at the option of either party hereto and Contractor shall refund to City all amounts paid under this Agreement for the license of such infringing Licensed Software less a reasonable amount for City's use of the Licensed Software up to the time of return based on a ten (10) year amortization. Any unauthorized modification or attempted modification or misuse of the Licensed Software by City or any failure by City to implement any improvements or updates to the Licensed Software, as supplied by Contractor, or any use of the Licensed Software in combination with other software or products without the prior written consent of Contractor shall void this indemnity unless City has obtained prior written authorization from Contractor permitting such modification, attempted modification or failure to implement. Contractor shall have no liability for any claim of Infringement based on City's use or combination of the Licensed Software with products or data of the type for which the Licensed Software was neither designed nor intended to be used.

**30. Liability of City.** CITY'S PAYMENT OBLIGATIONS UNDER THIS AGREEMENT SHALL BE LIMITED TO THE PAYMENT OF THE COMPENSATION PROVIDED FOR IN SECTION 16 OF THIS AGREEMENT. NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, IN NO EVENT SHALL CITY BE LIABLE, REGARDLESS OF WHETHER ANY CLAIM IS BASED ON CONTRACT OR TORT, FOR ANY SPECIAL, CONSEQUENTIAL, INDIRECT OR INCIDENTAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOST PROFITS, ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR THE SERVICES PERFORMED IN CONNECTION WITH THIS AGREEMENT.

**31. Contractor's Limitation of Liability.**

**a. No Liability for Consequential and Other Damages.** IN NO EVENT SHALL CONTRACTOR BE LIABLE FOR ANY INDIRECT, INCIDENTAL, PUNITIVE, CONSEQUENTIAL, SPECIAL OR EXEMPLARY DAMAGES OF ANY KIND OR NATURE WHATSOEVER, INCLUDING WITHOUT LIMITATION, LOST PROFITS, LOSS OF BUSINESS, LOSS OF REVENUES, LOSS OF DATA OR INTERRUPTION OR CORRUPTION OF DATA, EVEN IF CONTRACTOR WAS ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

**b. Maximum Liability.** IN NO EVENT SHALL CONTRACTOR'S MAXIMUM AGGREGATE LIABILITY RELATED TO OR IN CONNECTION WITH THIS AGREEMENT EXCEED THE TOTAL AMOUNT OF TWO MILLION DOLLARS. CONTRACTOR'S LIABILITY LIMIT SET FORTH HEREIN SHALL NOT APPLY TO (1) DAMAGES CAUSED BY CONTRACTOR'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT, (2) CONTRACTOR'S OBLIGATIONS TO INDEMNIFY AND DEFEND CITY PURSUANT TO THE INFRINGEMENT AND GENERAL INDEMNIFICATION OBLIGATIONS EXPRESSED IN THE AGREEMENT, (3)

STATUTORY DAMAGES SPECIFIED IN THIS AGREEMENT, AND (4) WRONGFUL DEATH CAUSED BY CONTRACTOR.

**c. Waiver of Claims.** Each party hereby waives its rights to bring any claim against the other party arising in any way from or relating in any way to this Agreement more than two (2) years after such claim arises.

**d. Applicability.** EXCEPT AS PROVIDED IN SUBSECTIONS 31(a) AND 31(b), THE LIMITATIONS SET FORTH IN THIS SECTION 31 WILL APPLY TO ANY AND ALL CLAIMS AND CAUSES OF ACTION WHATSOEVER, REGARDLESS OF WHETHER IN CONTRACT, TORT, STRICT LIABILITY OR OTHER THEORY.

**e. Basis of the Bargain; Failure of Essential Purpose.** Customer acknowledges that WAUSAU has set its prices and entered into this Agreement in reliance upon the limitations of liability and the disclaimers of warranties and damages set forth herein, and that the same form an essential basis of the bargain between the parties. The parties agree that the limitations and exclusions of liability and disclaimers of warranties and damages specified in this Agreement will survive and apply even if found to have failed of their essential purpose.

**32. Dispute Resolution.** City and Contractor agree to exercise their best efforts, and to negotiate in good faith, to amicably resolve any dispute that may arise concerning the performance by either party of their obligations under this Agreement. If City's and Contractor's Project Managers cannot resolve disputes through such negotiations, then the Parties will escalate the dispute to their respective executives who shall have authority to settle the controversy and who are at a higher level of management than the Project Managers. Either City or Contractor may give the other party written notice of any dispute not resolved by good faith negotiations between the Parties' respective Project Managers.

Within 15 days after delivery of the notice, the receiving party shall submit to the other a written response. The notice and response shall include (a) a statement of that party's position and a summary of arguments supporting that position, and (b) the name and title of the executive who will represent that party and of any other person who will accompany the executive. Within 15 days the initiating party shall provide the same information to the responding party. Within 30 days after delivery of the initial notice, the executives of both parties shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute. All reasonable requests for information made by one party to the other will be honored. All negotiations pursuant to this clause are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence.

If the executives cannot resolve the dispute to the satisfaction of both Parties, then City and Contractor may attempt to mutually agree on the conditions under which such unresolved disputes can be referred to mediation or non-binding arbitration. If the parties do not mutually agree to mediation or non-binding arbitration, or mutually select a mediator or arbitrator for the dispute, or such efforts do not resolve the dispute, then either party may pursue any remedy available under California law.

**33. Nondisclosure.** City agrees that it shall treat the Licensed Software and its related Documentation with the same degree of care as it treats like information of its own, which it does not wish to disclose to the public. The obligations of the City set forth above, however, shall not apply to the Licensed Software or Documentation, or any portion thereof, which:

- a. is now or hereafter becomes publicly known through no fault of the City;
- b. is disclosed to the City by a third party which the City has no reason to believe is not legally entitled to disclose such information;

- c. is known to the City prior to its receipt of the Licensed Software;
- d. is subsequently developed by the City independently of any disclosures made hereunder by Contractor;
- e. is disclosed with Contractor's prior written consent.
- f. is disclosed by Contractor to a third party without similar restrictions.

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

**34. Proprietary or Confidential Information of City.** Contractor understands and agrees that, in the performance of the work or services under this Agreement or in contemplation thereof, Contractor may have access to private or confidential information which may be owned or controlled by City and that such information may contain proprietary or confidential details, the disclosure of which to third parties may be damaging to City. Contractor agrees that all information disclosed by City to Contractor shall be held in confidence and used only in the performance of the Agreement. Contractor shall exercise the same standard of care to protect such information as a reasonably prudent Contractor would use to protect its own proprietary data. The obligations of the Contractor set forth above, however, shall not apply to information, or any portion thereof, which is disclosed with City's prior written consent.

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

**35. 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.

**36. Ownership of Results.** Any interest of Contractor or its Subcontractors, in drawings, plans, specifications, blueprints, studies, reports, memoranda, surveys, recommendations, computation sheets, computer files and media or other documents 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.

**37. Notice to the Parties.** Unless otherwise indicated elsewhere in this Agreement, all written communications sent by the parties may be by U.S. mail, and e-mail, and shall be addressed as follows:

To City: Pauline Marx  
Chief Assistant Treasurer  
City Hall Room 140  
1 Dr. Carlton B. Goodlett Pl  
San Francisco, CA 94102

To Contractor: Kelly Nanasy  
Chief Financial Officer  
Wausau Financial Systems, Inc.  
875 Indianhead Drive  
Mosinee, WI 54455-0037

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

**38. Subcontracting.** The City acknowledges that Contractor may retain the services of one or more third party suppliers (“Subcontractors”) to perform some of the services under this Agreement. Contractor agrees that it is responsible to the City for any breach of this Agreement by a Subcontractor to the same extent that Contractor would be responsible to the City for Contractor’s own breach of the Agreement. Contractor will provide City with a list of its subcontractors at the time of execution of this Agreement, or at the time Contractor enters into agreements with such subcontractors to perform work on this Agreement.

**39. Assignment.** Neither party may assign or otherwise transfer any of its rights, interest or obligations under this Agreement without the prior written consent of the other party, which consent will not be unreasonably withheld. Notwithstanding the foregoing, Contractor may assign this Agreement or its rights, interest or obligations under this Agreement to a successor in interest to Contractor, whether by way of asset sale, merger or other transfer of Contractor or its business, with notice to City, but without City’s consent. Subject to the foregoing, all covenants, representations, warranties and agreements of the parties contained in this Agreement shall be binding on and inure to the benefit of the parties’ respective heirs, executors, administrators, personal representatives, successors and permitted assigns.

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

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

**42. 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.

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

**44. 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.

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

**46. Local Business Enterprise Utilization; Liquidated Damages.**

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

applicable notice and cure provisions set forth in this Agreement, to exercise any of the remedies provided for under this Agreement, under the LBE Ordinance or otherwise available at law or in equity, which remedies shall be cumulative unless this Agreement expressly provides that any remedy is exclusive. In addition, Contractor shall comply fully with all other applicable local, state and federal laws prohibiting discrimination and requiring equal opportunity in contracting, including subcontracting.

**b. Compliance and Enforcement**

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

**2) Subcontracting Goals.** The LBE subcontracting participation goal for this contract is 7%. Contractor shall fulfill the subcontracting commitment made in its bid or proposal. Each invoice submitted to City for payment shall include the information required in the HRC Progress Payment Form and the HRC Payment Affidavit. Failure to provide the HRC Progress Payment Form and the HRC Payment Affidavit with each invoice submitted by Contractor shall entitle City to withhold 20% of the amount of that invoice until the HRC Payment Form and the HRC Subcontractor Payment Affidavit are provided by Contractor. Contractor shall not participate in any back contracting to the Contractor or lower-tier subcontractors, as defined in the LBE Ordinance, for any purpose inconsistent with the provisions of the LBE Ordinance, its implementing rules and regulations, or this Section.

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

**4) Payment of Subcontractors.** Contractor shall pay its subcontractors within three working days after receiving payment from the City unless Contractor notifies the Director of HRC

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

#### **47. Nondiscrimination; Penalties**

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

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

**c. 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.

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

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

#### **48. Requiring Minimum Compensation for Covered Employees**

a. 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 made a part of this Agreement as though fully set forth. The text of the MCO is available on the web at [www.sfgov.org/olse/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.

b. 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 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.

c. 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.

d. 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.

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

f. 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.

g. 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.

h. 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.



i. 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 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.

**49. 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 section 12Q.5.1 of Chapter 12Q are incorporated by reference and made a part of this Agreement as though fully set forth herein. The text of the HCAO is available on the web at [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.

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

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

c. Contractor's failure to comply with the HCAO shall constitute a material breach of this agreement. City shall notify Contractor if such a breach has occurred. If, within 30 days after receiving City's written notice of a breach of this Agreement for violating the HCAO, Contractor fails to cure such breach or, if such breach cannot reasonably be cured within such period of 30 days, Contractor fails to commence efforts to cure within such period, or thereafter fails diligently to pursue such cure to completion, City shall have the right to pursue the remedies set forth in 12Q.5.1 and 12Q.5(f)(1-6). Each of these remedies shall be exercisable individually or in combination with any other rights or remedies available to City.

d. Any Subcontract entered into by Contractor shall require the Subcontractor to comply with the requirements of the HCAO and shall contain contractual obligations substantially the same as those set forth in this Section. Contractor shall notify City's 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.

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

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

g. Contractor shall 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.

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

i. 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.

j. 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.

k. 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.

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

m. 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.

## **50. First Source Hiring Program**

### **a. Incorporation of Administrative Code Provisions by Reference.**

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

### **b. First Source Hiring Agreement.**

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

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

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

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

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

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

6) Set the term of the requirements.

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

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

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

**c. Hiring Decisions**

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

**d. Exceptions**

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

**e. Liquidated Damages.**

Contractor agrees:

- 1) To be liable to the City for liquidated damages as provided in this section;
- 2) To be subject to the procedures governing enforcement of breaches of contracts based on violations of contract provisions required by this Chapter as set forth in this section;
- 3) That the contractor's commitment to comply with this Chapter is a material element of the City's consideration for this contract; that the failure of the contractor to comply with the contract provisions required by this Chapter will cause harm to the City and the public which is significant and substantial but extremely difficult to quantify; that the harm to the City includes not only the financial cost of funding public assistance programs but also the insidious but impossible to quantify harm that this community and its families suffer as a result of unemployment; and that the assessment of liquidated damages of up to \$5,000 for every notice of a new hire for an entry level position improperly withheld by the contractor from the first source hiring process, as determined by the FSHA during its first investigation of a contractor, does not exceed a fair estimate of the financial and other damages that the City suffers as a result of the contractor's failure to comply with its first source referral contractual obligations.
- 4) That the continued failure by a contractor to comply with its first source referral contractual obligations will cause further significant and substantial harm to the City and the public, and that a second assessment of liquidated damages of up to \$10,000 for each entry level position improperly withheld from the FSHA, from the time of the conclusion of the first investigation forward, does not exceed the financial and other damages that the City suffers as a result of the contractor's continued failure to comply with its first source referral contractual obligations;
- 5) That in addition to the cost of investigating alleged violations under this Section, the computation of liquidated damages for purposes of this section is based on the following data:
  - (a) The average length of stay on public assistance in San Francisco's County Adult Assistance Program is approximately 41 months at an average monthly grant of \$348 per month, totaling approximately \$14,379; and
  - (b) In 2004, the retention rate of adults placed in employment programs funded under the Workforce Investment Act for at least the first six months of employment was 84.4%. Since qualified individuals under the First Source program face far fewer barriers to employment than their counterparts in programs funded by the Workforce Investment Act, it is reasonable to conclude that the average length of employment for an individual whom the First Source Program refers to an employer and who is hired in an entry level position is at least one year;Therefore, liquidated damages that total \$5,000 for first violations and \$10,000 for subsequent violations as determined by FSHA constitute a fair, reasonable, and conservative attempt to quantify the harm caused to the City by the failure of a contractor to comply with its first source referral contractual obligations.
- 6) That the failure of contractors to comply with this Chapter, except property contractors, may be subject to the debarment and monetary penalties set forth in Sections 6.80 et seq. of the San Francisco Administrative Code, as well as any other remedies available under the contract or at law.

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.

**51. 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.

**52. Modification of Agreement.** This Agreement may not be modified, nor may compliance with any of its terms be waived, except by written instrument executed and approved in the same manner as this Agreement. Contractor shall cooperate with Department to submit to the Director of HRC any amendment, modification, supplement or change order that would result in a cumulative increase of the original amount of this Agreement by more than 20% (HRC Contract Modification Form).

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

**54. 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.

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

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

**57. Time of the Essence.** Time is of the essence with respect to the performance of each and all of the material obligations, covenants, and conditions and of this Agreement.

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

**59. MacBride Principles – Northern Ireland.** 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 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.

**60. 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 products, virgin redwood or virgin redwood wood products.

**61. 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 the Contractor, its employees, agents or assigns shall be deemed a material breach of contract.

**62. 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.

**63. 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.

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

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

compliance with, the applicable requirements of the San Francisco Public Works Code, the San Francisco Planning Code or the San Francisco Building Code; or (2) any mural or other painting or marking on the property that is protected as a work of fine art under the California Art Preservation Act (California Civil Code Sections 987 et seq.) or as a work of visual art under the Federal Visual Artists Rights Act of 1990 (17 U.S.C. §§ 101 et seq.).

Any failure of Contractor to comply with this section of this Agreement shall constitute a material breach of this Agreement.

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

**67. 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.

**68. Order of Precedence.** In case of discrepancy or ambiguity in the terms or conditions of this Agreement, the following order of precedence shall prevail:

- (1) This Agreement
- (2) The Statement of Work (SOW)
- (3) The Detailed Design Document
- (4) Contractor's Proposal
- (5) The Office of the Treasurer-Tax Collector's Request for Proposal (RFP)

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

**CITY**

**CONTRACTOR**

Recommended by:

**Wausau Financial Systems, Inc.**




Jose Cuinaros  
Treasurer-Tax Collector  
Office of the Treasurer-Tax Collector

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


Approved as to Form:


I have read and understood paragraph 58, the City's statement urging companies doing business in Northern Ireland to move towards resolving employment inequities, encouraging compliance with the MacBride Principles, and urging San Francisco companies to do business with corporations that abide by the MacBride Principles.

Dennis J. Herrera  
City Attorney

By:   
Rosa M. Sanchez by CATHERINE BARNES  
Deputy City Attorney

Approved:

  
Jeff Penn  
Vice President of Contracts  
Wausau Financial Systems, Inc.  
875 Indianhead Drive  
Mosinee, WI 54455-0037

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

City vendor number: 47821

**Appendices**

- A: Statement of Work
- B: Calculation of Charges
- B-1: Investment Overview
- B-2: 5 Year Maintenance Support Summary
- C: WAUSAU Financial Systems, Inc. Software Support Agreement
- D: WAUSAU Financial Systems, Inc. Equipment Maintenance Agreement

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