

File No. 100894

Committee Item No. 2

Board Item No. _____

COMMITTEE/BOARD OF SUPERVISORS

AGENDA PACKET CONTENTS LIST

Committee: Budget and Finance Committee

Date: September 22, 2010

Board of Supervisors Meeting

Date _____

Cmte Board

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| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Resolution |
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| <input type="checkbox"/> | <input type="checkbox"/> | Legislative Digest |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Budget Analyst Report |
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| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Ethics Form 126 |
| <input type="checkbox"/> | <input type="checkbox"/> | Introduction Form (for hearings) |
| <input type="checkbox"/> | <input type="checkbox"/> | Department/Agency Cover Letter and/or Report |
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OTHER

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Completed by: Victor Young

Date: September 17, 2010

Completed by: Victor Young

Date: _____

An asterisked item represents the cover sheet to a document that exceeds 25 pages. The complete document is in the file.

1 [Increasing Contract with Xtech to \$41,000,000]

2 **Resolution authorizing the Office of Contract Administration to enter into the First**
3 **Amendment between the City and Xtech (part of the Technology Store procurement vehicle),**
4 **in which the amendment shall increase the contract amount from \$24 million to \$41 million**
5 **and update certain standard contractual clauses.**
6

7 WHEREAS, the Office of Contract Administration, by competitive bidding, developed the
8 Technology Store procurement method for the purchase of products and services related to
9 Information Technology; and

10 WHEREAS, Xtech is one of the three products vendors who are part of the Technology
11 Store; and,

12 WHEREAS, the original contract with Xtech is dated January 1, 2009; has a term of three
13 years, through December 31, 2011, with possible extensions through December 31, 2013, and has a
14 contract amount of \$24 million; and

15 WHEREAS, the Board of Supervisors approved the original contract on December 9, 2008
16 by Resolution #508-08.

17 WHEREAS, the Office of Contract Administration estimates that the money projected to be
18 spent with Xtech could reach the contract's contract amount in the reasonably near future; and

19 WHEREAS, Charter section 9.118, "Contract and Lease Limitations," subsection (b),
20 requires Board of Supervisors approval of any contract estimated to exceed \$10 million in
21 expenditures or amendments exceeding \$500,000 to such contracts; now, therefore, be it

22 **RESOLVED**, that the Board of Supervisors authorizes the Office of Contract
23 Administration to enter into the First amendment to the contract with Xtech to update the standard
24 contractual clauses; and be it
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1 FURTHER RESOLVED, that said Amendment shall increase the contract amount for the
2 contract with Xtech from \$24 million to \$41 million.

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Item 2
File 10-0894

Department:
Office of Contract Administration (OCA)

EXECUTIVE SUMMARY

Legislative Objective

- Resolution authorizing the Office of Contract Administration (OCA) to execute the First Amendment to an existing agreement between the City and Xtech Joint Venture (Xtech), increasing the not-to-exceed amount by \$17,000,000, from \$24,000,000 to \$41,000,000.

Key Points

- The Office of Contract Administration maintains a number of agreements with various firms for as-needed technology products and related computer services through the City's Technology Store. Subsequent to a competitive bidding process to identify multiple vendors to offer technology products to City Departments through the Technology Store, OCA awarded an agreement to Xtech in a not-to-exceed amount of \$24,000,000, with a term of three years, from January 1, 2009 through December 31, 2011.
- According to OCA, Xtech has been the most utilized vendor by City Departments for products in the City's Technology Store, exceeding OCA's original projections. Over the first 18 months of the agreement with Xtech from January 1, 2009 through June 30, 2010, or 50.0 percent of the term, actual expenditures have totaled \$20,403,941, or 85.0 percent of the current not-to-exceed amount of \$24,000,000.
- Because technology product purchases are funded by monies appropriated in the annual Departmental budgets by the Board of Supervisors, and the proposed increase in the not-to-exceed amount of \$17,000,000, from \$24,000,000 to \$41,000,000, simply provides authorization under in the subject agreement's not-to-exceed amount for City Departments to expend funds previously appropriated by the Board of Supervisors, the Budget and Legislative Analyst recommends approval of the proposed resolution.

Fiscal Impact

- The proposed First Amendment would increase the not-to-exceed authorization in the Xtech agreement by \$17,000,000, or 70.8 percent from \$24,000,000 to \$41,000,000. All purchases through the subject Xtech agreement are funded through City Departmental budgeted funds, as previously appropriated by the Board of Supervisors.

Recommendation

- Approve the proposed resolution.

MANDATE STATEMENT & BACKGROUND**Mandate Statement**

In accordance with Charter Section 9.118, any amendment of over \$500,000 to an agreement over \$10,000,000 in anticipated expenditures is subject to Board of Supervisors approval.

Background

The Office of Contract Administration (OCA) maintains a number of agreements with various private firms for as-needed technology products and related services for all City Departments, through the City's Technology Store. Agreements are awarded to such firms for either:

- (a) as-needed technology products, or
- (b) as-needed technology services (such as software programming, software customization, or network security services) and products related to such services.

Departments requiring technology products and technology services are authorized to purchase such items through the City's Technology Store's vendors, who were previously pre-qualified under a competitive Request for Proposals (RFP) process, without undergoing another separate independent competitive process. However, for purchases in excess of \$100,000, Departments are required to obtain bids from no fewer than three pre-qualified vendors from the City's Technology Store, and then purchase technology products from the lowest bidding vendor.

On April 8, 2008, OCA issued a Request for Proposals (RFP) to pre-qualify various vendors for the City's Technology Store. On December 9, 2008, subsequent to this competitive RFP process, the Board of Supervisors approved the award of \$120,000,000¹ for seven agreements, for a term of three years, from January 1, 2009 through December 31, 2011, (File 08-1416) including:

- (a) three agreements totaling \$72,000,000, each in an equal amount of \$24,000,000, for as-needed technology products only (no services are available under such agreements), and
- (b) four agreements totaling \$48,000,000, each in an equal amount of \$12,000,000, for as-needed technology services and products related to such services.

Included among the three \$24,000,000 agreements previously approved by the Board of Supervisors, for City Departments as-needed technology products, is the existing \$24,000,000 agreement between the City and Xtech for the term of three years, from January 1, 2009 through December 31, 2011. The existing agreement with Xtech includes an option to extend the term of the agreement by two additional years, through December 31, 2013.

¹ According to Ms. Jaci Fong, Assistant Director of Purchasing Operations at OCA, the \$120,000,000 in total for the agreements was based on the total technology store purchases over the prior three years including (a) \$72,000,000 in technology products and (b) \$48,000,000 in technology services and related products.

Xtech was also awarded one of the four \$12,000,000 agreements for as-needed technology services and related products, as previously approved by the Board of Supervisors under File 08-1416. However, that \$12,000,000 agreement would not be impacted by the proposed resolution.

DETAILS OF PROPOSED LEGISLATION

The proposed resolution would authorize the Office of Contract Administration (OCA) to execute the First Amendment to an existing agreement between the City and Xtech, increasing the not-to-exceed amount by \$17,000,000, from \$24,000,000 to \$41,000,000. The proposed First Amendment would not impact the existing three year term of the agreement, from January 1, 2009 through December 31, 2011. As previously noted the existing agreement has an option to extend the term by two additional years through December 31, 2013.

FISCAL IMPACT

The proposed resolution would authorize the Office of Contract Administration (OCA) to execute the First Amendment to an existing agreement between the City and Xtech, increasing the not-to-exceed amount by \$17,000,000, or 70.8 percent from \$24,000,000 to \$41,000,000.

According to Ms. Jaci Fong, Assistant Director of Purchasing Operations at OCA, Xtech has been the most utilized vendor of the three Technology Store vendors for City Departments procuring technology products. As shown in Table 1 below, from January 1, 2009 through June 30, 2010, or the first 18 months of these agreements terms, City Departments expended a total of \$43,671,393 out of the total authorized combined not-to-exceed amount of \$72,000,000 (\$24,000,000 per agreement x three agreements) for technology products. As also shown in Table 1 below, 46.7 percent of technology product purchases were made by City Departments under the Xtech agreement, as compared to 19.4 percent of purchases from ComputerLand and 33.9 percent of purchases from Enpointe Technologies, the other two pre-qualified technology product vendors.

Table 1: Comparison of Expenditures Over the First 18 Months of the Three Technology Product Agreements Having a Term of Three Years, or 36 Months

Vendor	Expenditures from January 1, 2009 through June 30, 2010	Percent of Total Product Expenditures
Xtech	\$20,403,941	46.7%
ComputerLand	8,457,726	19.4%
Enpointe Technologies	14,809,726	33.9%
Total	\$43,671,393	100.0%

As shown in Table 2 below, at the current average Xtech expenditure rate of \$1,133,522 per month, total Xtech expenditures will reach \$40,807,882 by the Xtech agreement's termination date of December 31, 2011. Ms. Fong stated that the total estimated expenditures of \$40,807,882 was rounded to \$41,000,000 for contracting purposes.

Table 2: Total Estimated Xtech Expenditures

Expenditures from January 1, 2009 through June 30, 2010	\$20,403,941
Amount of Agreement Term Elapsed	+18 months
Average Monthly Expenditures	\$1,133,552
Total Term from January 1, 2009 through December 31, 2011	x 36 months
Estimated Total Expenditures	\$40,807,882
Requested Amended Not-To-Exceed Amount (rounded up to \$41,000,000)	\$41,000,000

POLICY CONSIDERATION

85.0 percent of the subject agreement’s not-to-exceed amount has been utilized over 50.0 percent of the term.

As shown in Table 3 below, over the 18 month period from January 1, 2009 through June 30, 2010, or 50.0 percent of the total three-year (36 month) term of each agreement, (a) actual City expenditures under the Xtech agreement total \$20,403,941, or 85.0 percent of the current not-to-exceed Xtech authorized amount of \$24,000,000, (b) actual City expenditures under the other two agreements with ComputerLand and Enpointe Technologies are approximately 35.2 and 61.7 percent respectively, and (c) actual City expenditures under all three agreements combined total \$43,671,393 or 60.7 percent of the combined current not-to-exceed amount of \$72,000,000.

Table 3: Rates of Expenditure

Vendor	Expenditures from January 1, 2009 through June 30, 2010	Not-To-Exceed Amount	Percent of Not-To-Exceed Amount Expended
Xtech	\$20,403,941	\$24,000,000	85.0%
ComputerLand	8,457,726	24,000,000	35.2%
Enpointe Technologies	14,809,726	24,000,000	61.7%
Total	\$43,671,393	\$72,000,000	60.7%

If the \$43,671,393 technology procurement expenditures during the first 18 months of these agreements continues at the same pace for the last 18 months of these agreements, the Budget and Legislative Analyst projects that the City would expend approximately \$87,342,786 (\$43,671,393 x 2) over the course of the three year terms of the technology product agreements, which is (a) \$15,342,786 or 21.3 percent more than the original \$72,000,000 not-to-exceed total under the three agreements, and (b) \$1,657,214 less than the proposed combined \$89,000,000 not-to-exceed amount (\$72,000,000 plus the subject requested additional \$17,000,000).

According to Ms. Fong, and as discussed in Footnote 1 above, the current combined not-to-exceed amount of \$72,000,000 for all three technology procurement vendor agreements, for the three year term from January 1, 2009 through December 31, 2011, was based on City-wide Departmental expenditures from the prior three years, and was not based on forecasts for technology products provided by the individual City Departments. Therefore, due to actual Departmental expenditures which exceeded the rate of the previous three years, OCA is requesting the proposed \$17,000,000 increase in the existing not-to-exceed limit of \$24,000,000 with Xtech to provide sufficient authorization for future Departmental technology product purchases to be made under the Xtech agreement.

Because technology product purchases are funded by monies previously appropriated by the Board of Supervisors, and the proposed increase in the not-to-exceed amount of \$17,000,000, from \$24,000,000 to \$41,000,000, simply provides authorization in the subject agreement's not-to-exceed amount for City Departments to expend funds previously appropriated by the Board of Supervisors, the Budget and Legislative Analyst recommends approval of the proposed resolution.

RECOMMENDATION

Approve the proposed resolution.

FORM SFEC-126:
NOTIFICATION OF CONTRACT APPROVAL
(S.F. Campaign and Governmental Conduct Code § 1.126)

City Elective Officer Information <i>(Please print clearly.)</i>	
Name of City elective officer(s):	City elective office(s) held:
Contractor Information <i>(Please print clearly.)</i>	
Name of contractor: Xtech	
<i>Please list the names of (1) members of the contractor's board of directors; (2) the contractor's chief executive officer, chief financial officer and chief operating officer; (3) any person who has an ownership of 20 percent or more in the contractor; (4) any subcontractor listed in the bid or contract; and (5) any political committee sponsored or controlled by the contractor. Use additional pages as necessary.</i>	
(1) Azhar Mahmood, Partner; Patricia Eaton, Partner; Dilraj Kahai, Partner; Azhar Mahmood, Partner (2) Azhar Mahmood, Partner; Patricia Eaton, Partner; Dilraj Kahai, Partner; Azhar Mahmood, Partner (3) Azhar Mahmood, Partner; Patricia Eaton, Partner; Dilraj Kahai, Partner; Azhar Mahmood, Partner (4) AAES; Academy X; Ameritech; Chaves; Mlok Consulting (5) None	
Contractor address: 1275 Fairfax Avenue, 2nd Floor, San Francisco, CA 94124	
Date that contract was approved:	Amount of contract: Increase Contract amount from \$24,000,000 to \$41,000,000
Describe the nature of the contract that was approved: Computer hardware, software and services	
Comments:	

This contract was approved by (check applicable):

the City elective officer(s) identified on this form

a board on which the City elective officer(s) serves _____

Print Name of Board

the board of a state agency (Health Authority, Housing Authority Commission, Industrial Development Authority Board, Parking Authority, Redevelopment Agency Commission, Relocation Appeals Board, Treasure Island Development Authority) on which an appointee of the City elective officer(s) identified on this form sits

Print Name of Board

Filer Information <i>(Please print clearly.)</i>	
Name of filer: Clerk of the San Francisco Board of Supervisors	Contact telephone number: (415) 554-5184
Address: City Hall, Room 244, 1 Dr. Carlton B. Goodlett Pl. San Francisco, CA 94102	E-mail: bos.legislation@sfgov.org

Signature of City Elective Officer (if submitted by City elective officer)

Date Signed

Signature of Board Secretary or Clerk (if submitted by Board Secretary or Clerk)

Date Signed

City and County of San Francisco

Office of Contract Administration



Gavin Newsom
Mayor

Naomi Kelly
Director and Purchaser

Purchasing

August 9, 2010

File 100894

To: Angela Calvillo
Clerk of the Board

From: Naomi Kelly *N. Kelly*
Director and Purchaser

Subject: Resolution approving an increase in dollar amount for contract with Xtech and an update to the City's standard contractual terms

BY _____

2010 AUG -9 PM 4:50

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO

The Office of Contract Administration is submitting the enclosed resolution that would authorize an amendment to the City's contract with Xtech to increase the contract's dollar limit from \$24 million to \$41 million.

Enclosures

11 7 799 - 11

CITY AND COUNTY OF SAN FRANCISCO
OFFICE OF CONTRACT ADMINISTRATION
PURCHASING DIVISION

First Amendment

THIS AMENDMENT (this "Amendment") is made as of September 1, 2010, in San Francisco, California, by and between **Xtech Joint Venture**, ("Contractor"), and the City and County of San Francisco, a municipal corporation ("City"), acting by and through its Director of the Office of Contract Administration.

RECITALS

WHEREAS, City and Contractor have entered into the Agreement (as defined below); and

WHEREAS, City and Contractor desire to modify the Agreement on the terms and conditions set forth herein to increase the contract amount and update standard contractual clauses.

NOW, THEREFORE, Contractor and the City agree as follows:

1. Definitions. The following definitions shall apply to this Amendment:

1a. Agreement. The term "Agreement" shall mean the Agreement, dated January 1, 2009 between Contractor and City.

1b. Other Terms. Terms used and not defined in this Amendment shall have the meanings assigned to such terms in the Agreement.

2. Modifications to the Agreement. The Agreement is hereby modified as follows:

2a. Compensation. Section 5 of the Agreement, "**Compensation**", currently reads as follows:

5. Compensation

Compensation shall be made by Ordering Departments in accordance with the terms of each Authorization for an Order. In no event shall the amount of this Agreement exceed \$24,000,000 (twenty four million dollars).

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 Ordering Department or Purchasing 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.

Such Section is amended in its entirety to read as follows:

5. Compensation

Compensation shall be made by Ordering Departments in accordance with the terms of each Authorization for an Order. In no event shall the amount of this Agreement exceed \$41,000,000 (forty one million dollars).

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 Ordering Department or Purchasing 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.

2b. Submitting False Claims Monetary Penalties. Section 8 of the Agreement, "**Submitting False Claims Monetary Penalties,**" is hereby replaced in its entirety by Section 8 **Submitting False Claims Monetary Penalties,**" to read as follows:

8. 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.

2c. **Insurance.** Section 15 of the Agreement, "**Insurance**," is hereby replaced in its entirety by Section 15 "**Insurance**," to read as follows:

15. 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 \$1,000,000 each accident, injury, or illness; and

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

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

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

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

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

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

d. All policies shall provide 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.

2d. Limitations on Contributions. Section 42 of the Agreement, "Limitations on Contributions," is hereby replaced in its entirety to read as follows:

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.

2e. Requiring Minimum Compensation for Covered Employees. Section 43 of the Agreement, "Requiring Minimum Compensation for Covered Employees," is hereby replaced in its

entirety by Section 43 "Requiring Minimum Compensation for Covered Employees," to read as follows:

43. 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. 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.

2f. Requiring Health Benefits for Covered Employees. Section 44 of the Agreement, **“Requiring Health Benefits for Covered Employees,”** is hereby replaced in its entirety by Section 44 **“Requiring Health Benefits for Covered Employees.”**to read as follows:

44. 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. 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.

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

l. 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.

2g. **First Source Hiring.** Section 45 of the Agreement, "**First Source Hiring,**" is hereby replaced in its entirety by Section 45, "**First Source Hiring Program,**" to read as follows:

45. First Source Hiring Program

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

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

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

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

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

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

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

6) Set the term of the requirements.

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

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

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

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

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

e. Liquidated Damages. Contractor agrees:

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

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

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

City suffers as a result of the contractor's failure to comply with its first source referral contractual obligations.

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

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

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

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

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

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

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

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

2h. Cooperative Drafting. Section 61 is hereby added to the Agreement as follows:

61. 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.

3. Effective Date. Each of the modifications set forth in Section 2 shall be effective on and after the date of this Amendment.

4. Legal Effect. Except as expressly modified by this Amendment, all of the terms and conditions of the Agreement shall remain unchanged and in full force and effect.

IN WITNESS WHEREOF, Contractor and City have executed this Amendment as of the date first referenced above.

CITY

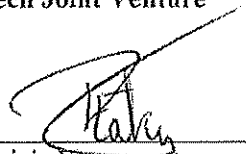
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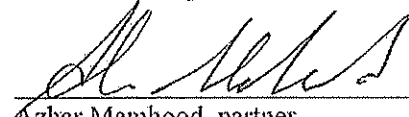
Recommended by:

Xtech Joint Venture



Jaci Fong
Manager IT Purchasing
Office of Contract Administration



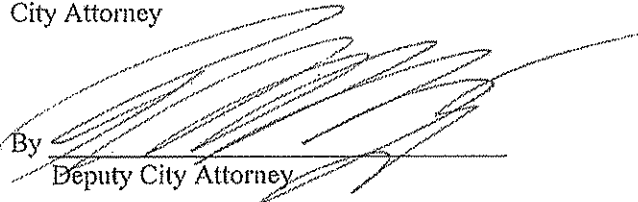
Patricia Eaton, partner


Azhar Mamhood, partner

Approved as to Form:

Xtech Joint Venture
1275 Fairfax Avenue, Suite 201
San Francisco, CA. 94124
Vendor # 64607

Dennis J. Herrera
City Attorney

By 

Deputy City Attorney

Approved:

Naomi Kelly
Director of Office of Contract Administration/
Purchaser

