

**City and County of San Francisco
Airport Commission
P.O. Box 8097
San Francisco, California 94128**

**THIRD AMENDMENT
TO CONTRACT NO. 9186
THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A.**

THIS THIRD AMENDMENT (this "Amendment") is made as of April 1, 2012, in San Francisco, California, to Contract No. 9186 (the "Agreement") by and between The Bank of New York Mellon Trust Company, N.A. (the "Trustee"), and the City and County of San Francisco, a municipal corporation (the "City"), acting by and through its Airport Commission or the Commission's designated agent, hereinafter referred to as the "Commission."

WHEREAS, the Commission approved Resolution 91-0197 on November 4, 1991 awarding the Agreement to First Interstate Bank, Ltd. (now known as The Bank of New York Mellon Trust Company, N.A.) to provide bond trustee services in the amount of \$260,000; and

WHEREAS, bond trustee services are required pursuant to Resolution No. 91-0210, adopted by the Commission on December 3, 1991 (as subsequently amended and supplemented, the "1991 Master Bond Resolution"); and

WHEREAS, the 1991 Master Bond Resolution requires the services of a bond trustee so long as any of the Commission's bonds are outstanding; and

WHEREAS, in accordance with the provisions of the 1991 Master Bond Resolution, the Trustee may serve as bond trustee until a replacement bond trustee is appointed by the Commission; and

WHEREAS, on December 4, 2001, the Commission adopted Resolution No. 01-0360 approving Modification No. 1 to the Agreement to increase the authorized not-to-exceed compensation amount by \$600,000, for a total contract authorization of \$860,000 to provide ongoing trustee services; and

WHEREAS, on February 6, 2007, the Commission adopted Resolution No. 07-0035 approving Modification No. 2 to the Agreement to increase the authorized not-to-exceed compensation amount by \$900,000, for a total contract authorization of \$1,760,000 to provide ongoing trustee services; and

WHEREAS, on November 15, 2011, the Commission Resolution No. 11-0251 approving this Amendment No. 3 to the Agreement with the Trustee to increase the authorized not-to-exceed compensation amount from \$1,760,000 to \$2,560,000, to approve an additional \$800,000 for the next five years of service, effective April 1, 2012 through March 31, 2017; and

WHEREAS, approval for Amendment No. 3 was obtained when the Civil Service Commission approved Contract number PSC 4023-98/99 on March 19, 2012; and

WHEREAS, the Commission and Trustee desire to modify the Agreement on the terms and conditions set forth herein;

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

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

a. **Agreement.** The term “Agreement” shall mean Contract No. 9186 dated November 4, 1991, between Trustee and City, as amended by:

Modification No. 1, dated December 4, 2001, and
Modification No. 2, dated February 6, 2006.

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

2. Subsection (a) of **Section 4. Compensation** of the Agreement is hereby amended in its entirety to read as follows:

(a) For the complete and satisfactory performance of the services detailed in Appendix A attached to the Agreement, the City will pay the Trustee for all expenses as detailed in Appendix B attached to the Agreement. For purposes of certification by the Controller, the total compensation will be the original contract amount of \$260,000, plus the approved increment of \$600,000 pursuant to Resolution No. 01-0360, plus the approved increment of \$900,000 pursuant to Resolution No. 07-0035, plus the approved increment of \$800,000 pursuant to Resolution No. 11-0251, for a total of \$2,560,000.

3. **Section 6. Conflict of Interest** is hereby replaced in its entirety with the following:

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

4. **Section 10. MacBride Principles—Northern Ireland** is hereby replaced in its entirety with the following:

10. **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 that abide by the MacBride Principles. By signing below, the person executing this agreement on behalf of Trustee acknowledges and agrees that he or she has read and understood this section.

5. **Section 11. Tropical Hardwoods** is hereby replaced in its entirety with the following:

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

6. The Agreement, which was previously amended by Section 2 of Modification No. 2, is further amended by replacing such section with a new **Section 18. Nondiscrimination; Penalties**, as follows:

Section 18. Nondiscrimination; Penalties

a. **Trustee Shall Not Discriminate.** In the performance of this Agreement, Trustee agrees not to discriminate against any employee, City 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.** Trustee 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. Trustee's failure to comply with the obligations in this subsection shall constitute a material breach of this Agreement.

c. **Nondiscrimination in Benefits.** Trustee 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, Trustee 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. Trustee 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, Trustee 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 Trustee and/or deducted from any payments due Trustee.

7. The Agreement, which was previously amended by Section 3 of Modification No. 2, is further amended by replacing such section with a new **Section 19. Limitations on Contributions**, as follows:

Section 19. Limitations on Contributions. Through execution of this Agreement, Trustee 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. Trustee 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. Trustee further acknowledges that the prohibition on contributions applies to each prospective party to the contract; each member of Trustee's board of directors; Trustee's chairperson, chief executive officer, chief financial officer and chief operating officer; any person with an ownership interest of more than 20 percent in Trustee; any subcontractor listed in the bid or contract; and any committee that is sponsored or controlled by Trustee. Additionally, Trustee acknowledges that Trustee must inform each of the persons described in the preceding sentence of the prohibitions contained in Section 1.126. Trustee further agrees to provide to City the names of each person, entity or committee described above.

8. The Agreement, which was previously amended by Section 4 of Modification No. 2, is further amended by replacing such section with a new **Section 20. Requiring Minimum Compensation for Covered Employees**, as follows:

Section 20. Requiring Minimum Compensation for Covered Employees

a. Trustee 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 Trustee's obligations under the MCO is set forth in this Section. Trustee is required to comply with all the provisions of the MCO, irrespective of the listing of obligations in this Section.

b. The MCO requires Trustee to pay Trustee'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 Trustee is obligated to keep informed of the then-current requirements. Any subcontract entered into by Trustee 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 Trustee'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 Trustee.

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

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

f. Trustee'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 Trustee fails to comply with these requirements. Trustee 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 Trustee's noncompliance. The procedures governing the assessment of liquidated damages shall be those set forth in Section 12P.6.2 of Chapter 12P.

g. Trustee 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, Trustee fails to cure such breach or, if such breach cannot reasonably be cured within such period of 30 days, Trustee 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. Trustee 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 Trustee 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 Trustee later enters into an agreement or agreements that cause contractor to exceed that amount in a fiscal year, Trustee 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 Trustee and this department to exceed \$25,000 in the fiscal year.

9. The Agreement, which was previously amended by Section 5 of Modification No. 2, is further amended by replacing such section with a new **Section 21. Requiring Health Benefits for Covered Employees**, as follows:

Section 21. Requiring Health Benefits for Covered Employees

Trustee 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, Trustee shall provide the appropriate health benefit set forth in Section 12Q.3 of the HCAO. If Trustee 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 Trustee 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. Trustee's failure to comply with the HCAO shall constitute a material breach of this agreement. City shall notify Trustee 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, Trustee fails to cure such breach or, if such breach cannot reasonably be cured within such period of 30 days, Trustee 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 Trustee 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. Trustee 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 Trustee 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 Trustee based on the Subcontractor's failure to comply, provided that City has first provided Trustee with notice and an opportunity to obtain a cure of the violation.

e. Trustee shall not discharge, reduce in compensation, or otherwise discriminate against any employee for notifying City with regard to Trustee'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. Trustee 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. Trustee 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. Trustee shall keep itself informed of the current requirements of the HCAO.

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

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

m. If Trustee is exempt from the HCAO when this Agreement is executed because its amount is less than \$25,000 (\$50,000 for nonprofits), but Trustee later enters into an agreement or agreements that cause Trustee'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 Trustee and the City to be equal to or greater than \$75,000 in the fiscal year.

10. The Agreement, which was previously amended by Section 6 of Modification No. 2, is further amended by replacing such section with a new **Section 22. Prohibition on Political Activity with City Funds**, as follows:

Section 22. Prohibition on Political Activity with City Funds. In accordance with San Francisco Administrative Code Chapter 12.G, Trustee 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. Trustee 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 Trustee 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 Trustee from bidding on or receiving any new City contract for a period of two (2) years. The Controller will not consider Trustee's use of profit as a violation of this section.

11. A new **Section 23. Submitting False Claims; Monetary Penalties** is hereby added to the Agreement, as follows.

23. 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.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:sanfrancisco_ca. 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.

12. Appendix B – Calculation of Charges is replaced in its entirety with the attached Appendix B – Bond Trustee Services – CALCULATION OF CHARGES – THIRD AMENDMENT.

13. Effective Date. Each of the modifications set forth in Section 2 shall be effective on and after April 1, 2012.

14. 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.

**Appendix B – Bond Trustee Services
CALCULATION OF CHARGES – THIRD AMENDMENT**

	<u>Trustee Fees</u>	<u>Estimated Annual Cost</u>
Annual Administration Fee	\$2,000	\$106,000
Investment Charge per Transaction	\$35	\$3,955
Transaction Fee per Wire Transfers	\$25	\$3,300
Transaction Fee per Check	n/a	\$0
Bondholder Services per Issue	\$100	\$5,300
Annual Audit Report per Issue	\$50	\$2,650
Investment Agreement, or Repurchase/Forward Purchase Agreement (if applicable)	\$500	\$2,000
Annual fee of a Repurchase/Forward Purchase Agreement (if applicable)	\$500	\$6,000
Indirect Costs	Not to exceed \$150 per issue	\$7,950
Total Estimated Annual Fees		\$137,155

<u>Transaction Costs per Bond Issue (to be paid from Closing Costs)</u>	<u>Trustee Fees</u>	<u>Estimated Annual Fees</u>
Annual Administration Fee	\$2,300	\$13,800
Acceptance Fee per New Issue	\$250	\$1,500
Annual Escrow Agent (Registrar & Paying) Agent, Acceptance Fee per Escrow	\$500	\$1,500
Redemption Processed per Redemption	\$500	\$3,000
Termination Fee per Issue	\$500	\$3,000
Total Estimated Annual Fees		\$22,800

Total Estimated Annual and Transaction Fees **\$159,955**

Trustee agrees to notify Commission sixty (60) days in advance of any fees or charges not shown in the above schedule; provided, however, that during the continuance of an Event of Default (as defined in the Commission's Resolution No. 91-0290 adopted on December 3, 1991 (the "1991 Resolution"), the provisions of Section 7.04 of the 1991 Resolution shall apply. Such other fees and charges as may arise during the term of this contract shall be payable upon approval by the Commission.