

**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  
Vigor Fab LLC**

This Agreement is made this [insert day] day of [insert month], 20 [insert year], in the City and County of San Francisco, State of California, by and between: **Vigor Fab LLC, 5555 N. Channel Ave., Portland, OR 97217**, 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 or the Director’s designated agent, hereinafter referred to as “Purchasing.”

**Recitals**

WHEREAS, the Office of Contract Administration (“Department”) wishes to procure a Type II Fire Boat (the “Vessel”) for the San Francisco Fire Department; and,

WHEREAS, a Request for Proposal (“RFP”) was issued on March 6, 2013, and City selected Contractor as the highest qualified scorer pursuant to the RFP; and

WHEREAS, Contractor represents and warrants that it is qualified to construct, sell, and deliver the Vessel required by City as set forth under this Contract; and,

Now, THEREFORE, the parties agree as follows:

1. **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. Payments will be made 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 for this Agreement.

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

2. **Term of the Agreement.** Subject to Section 1, the term of this Agreement shall be from the Effective Date until Acceptance, as defined herein, plus the warranty period as to warranty claims and in no event shall the contract last beyond December 31, 2016.

3. **Effective Date of Agreement and Delivery Date.** This Agreement shall become effective when the Controller has certified to the availability of funds and Contractor has been notified in writing by Notice to Proceed. The Delivery Date for the Vessel is the date falling fifteen (15) months from receipt by Contractor of the Notice to Proceed or June 30, 2015, whichever date is later and subject to adjustment as provided for in this Agreement.

4. **Contractor Agrees to Perform.** The Contractor agrees to construct, sell and deliver to City the Vessel as provided for in Appendix A, "Vessel Construction and Sale," attached hereto and incorporated by reference as though fully set forth herein.

5. **Compensation.** Compensation shall be paid on a progress payment basis on the progress payment schedule stated in Appendix B, "Calculation of Charges, attached hereto and incorporated by reference as though fully set forth herein. In no event shall the amount of this Agreement exceed Eleven Million, Six Hundred Thirty-seven Thousand, Six Hundred Sixty Dollars (\$11,637,660.00), except by change order pursuant to Appendix A. The breakdown of costs associated with this Agreement appears in Appendix B. Payments shall become due to Contractor when progress milestones set forth in Appendix B have been achieved and required reporting and invoice for milestone achievement are received from Contractor. City shall have five (5) following receipt of progress milestone invoice to verify milestone achievement and accept the progress invoice. If City does not object to a milestone invoice within five (5) days of receipt, the invoice is deemed accepted. City shall pay each milestone invoice within fifteen (15) days of acceptance. If City objects to a milestone invoice, the objection must be in writing specifying the reason(s) for objecting. City shall pay that portion of the progress payment that represents value to which objection is not taken and Contractor will promptly take steps to correct the cause of the objection and invoice for the remaining portion of the milestone upon correction. 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, provided written notice was given by City and Contractor has failed to cure. 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 CMD Progress Payment Form. If Progress Payment Form is not submitted with Contractor's invoice, the Controller will notify the department, the Director of CMD and Contractor of the omission. If Contractor's failure to provide CMD 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 CMD Progress Payment Form is provided. Following City's payment of the final progress payment specified in Appendix B, Contractor has ten (10) days to file an affidavit using CMD Payment Affidavit verifying that all subcontractors have been paid and specifying the amount.

6. **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 laws governing emergency procedures, officers and

employees of the City are not authorized to request, and the City is not required to reimburse the Contractor for, Commodities or Services beyond the agreed upon contract scope unless the changed scope is authorized by amendment and approved as required by law. Officers and employees of the City are not authorized to offer or promise, nor is the City required to honor, any offered or promised additional funding in excess of the maximum amount of funding for which the contract is certified without certification of the additional amount by the Controller. 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.

7. **Payment; Invoice Format.** Invoices furnished by Contractor under this Agreement must be in a form acceptable to the Controller, and must include a unique invoice 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.”

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. 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.

9. **Disallowance.** If Contractor claims or receives payment from City for a service, reimbursement for which is later disallowed by the State of California or United States Government, Contractor shall promptly refund the disallowed amount to City upon City’s request. At its option, City may offset the amount disallowed from any payment due or to become due to Contractor under this Agreement or any other Agreement. By executing this Agreement, Contractor certifies that Contractor is not suspended, debarred or otherwise excluded from participation in federal assistance programs. Contractor acknowledges that this certification of eligibility to receive federal funds is a material terms of the Agreement.

10. **Taxes.**

a. 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.

b. 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. (See, e.g., Rev. & Tax. Code section 64, as amended from time to time.) Contractor accordingly agrees on behalf of itself and its permitted successors and assigns to report any change in ownership to the County Assessor, the State Board of Equalization, or other public agency as required by law.

4) Contractor further agrees to provide such other information as may be requested by the City to enable the City to comply with any reporting requirements for possessory interests that are imposed by applicable law.

11. **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.

12. **Qualified Personnel.** Work under this Agreement shall be performed only by competent personnel employed by Contractor (or by permitted subcontractors) under the supervision of Contractor. Contractor will comply with City’s reasonable requests regarding assignment of personnel, but all personnel, including those assigned at City’s request, must be supervised by Contractor. Contractor shall commit adequate resources to complete the project within the project schedule specified in this Agreement.

13. **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 if such equipment is furnished, rented, or loaned to Contractor by City.

14. **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 that 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 that can be applied as a credit against such liability). A determination of employment status pursuant to the preceding two paragraphs shall be solely for the purposes of the particular tax in question, and for all other purposes of this Agreement, Contractor shall not be considered an employee of City. Notwithstanding the foregoing, should any court, arbitrator, or administrative authority determine that Contractor is an employee for any other purpose, then Contractor agrees to a reduction in City's financial liability so that City's total expenses under this Agreement are not greater than they would have been had the court, arbitrator, or administrative authority determined that Contractor was not an employee.

15. **Insurance**

a. Without in any way limiting Contractor's liability pursuant to the "Indemnification" section of this Agreement, Contractor must maintain in force, from the Effective Date until Acceptance of the Vessel, insurance in the following amounts and coverages:

1) Workers' Compensation, as required by the State where work is being performed, and Employer's Liability Insurance with a limit of not less than one million dollars (\$1,000,000) per accident for bodily injury and disease, plus coverage under the U.S. Longshore and Harbor Workers' Act (USL&H) and Jones Act. The policy of insurance required shall be endorsed as follows: A waiver of subrogation stating that the insurer "waives all rights of subrogation against the City, its employees and agents."

2) Commercial General Liability: Commercial General Liability insurance shall be provided on Insurance Services Office (ISO) CGL Form No. CG 00 01 or the equivalent, including provisions for defense of additional insureds and defense costs in addition to limits. Policy limits shall be no less than five million dollars (\$5,000,000) per occurrence for all coverage provided and ten million dollars (\$10,000,000) general annual aggregate. The policy shall not limit coverage for the additional insured to "ongoing operations" or in any way exclude coverage for completed operations. Coverage shall be included on behalf of the insured for claims arising out of the actions of independent contractors. The policy shall contain no provisions or endorsements limiting coverage for contractual liability or third party over action claims, and defense costs must not erode policy limits. If the Contractor is using Subcontractors, the policy must include work performed "by or on behalf" of the Contractor. Coverage shall apply on a primary non-contributing basis in relation to any other insurance or self-insurance, primary or excess, available to City or any employee or agent of City. Coverage shall not be limited to the vicarious liability or supervisory role of any additional insured. Coverage shall not exclude contractual liability, restrict coverage to the sole liability of the Contractor, or contain any other exclusion contrary to the Contract. If this coverage is written on a claims-made basis, the retroactive date shall precede the effective date of the Contract with the City and continuous coverage will be maintained or an extended reporting period will be exercised for a period of at least three (3) years from termination or expiration of this Contract. Coverage shall contain no contractors' limitation or other endorsement limiting the scope of coverage for liability arising from explosion, collapse, or underground property damage.

3) Business Automobile Insurance: Automobile Liability Insurance shall be written on ISO Business Auto Coverage Form CA 00 01 or the equivalent, including symbol (1) (any Auto). Limit shall be no less than one million dollars (\$1,000,000) combined single limit per accident. Coverage shall apply on a primary non-contributing basis in relation to any other insurance or self-insurance, primary or excess, available to City or any employee or agent of City. If Contractor does not own any vehicles, this requirement may be satisfied by a non-owned vehicle endorsement to the general and umbrella liability policies provided that a separate policy limit is provided for this coverage as required by this contract.

4) Marine Builder's Risk Insurance: Marine Builder's Risk Insurance shall provide coverage for the Vessel. The coverage shall include Vessel underway activity prior to delivery, and shall be on an "all-risk" basis and shall be for the replacement value thereof for all risks of direct physical loss or damage, with a minimum limit of liability equal to the greater of (a) the contract price divided by the number of Vessels in the Contract, or (b) the probable maximum loss of the Project and the components thereof, plus "soft cost expense cover" (including but not limited to additional construction financing interest, construction load fees, engineering expenses/fees, insurance premiums, accounting fees, project administration expenses, attorneys' fees, and fees and other costs associated with such damage or loss). The



coverage shall be written without risk of liability of the City for payment and without deduction for depreciation. There shall be no coinsurance penalty provision in any such policy. The policy deductible shall not exceed one hundred thousand dollars (\$100,000) per occurrence. In addition to liability for physical loss of, or damage to, or damage caused by the Vessel imposed upon the Contractor by law or contract, as provided herein, the Marine Builder's Risk Insurance Policy shall be written to specifically include all Vessel underway activity as often as necessary for completion and testing of the contract work; a statement that the policy is primary to all other collectible insurance; a waiver of subrogation against the city and all subcontractors at any tier; coverage for hurricanes, ice flows, earthquakes, tornados, and volcanic eruption; coverage for renewal of faulty welds, and coverage for Hull and Machinery, and all other equipment and materials while Vessel is at the shipyard or other premises of the Contractor or any subcontractor.

5) Watercraft Liability: Watercraft Liability or Protection & Indemnity insurance with minimum limits of five million dollars (\$5,000,000) each occurrence, Jones Act for employees performing services under said Act, and Pollution Liability on Contractor's owned or chartered vessels, and on the Vessel during sea trials and any transportation of the Vessel from Contractors facility to City for, and up until completion of, Acceptance (unless P&I equivalent coverage is included in the Builder's Risk Insurance for the Vessel). Pollution Liability shall include coverage for bodily injury (including death and mental anguish), property damage, defense costs and cleanup costs with minimum limits of five million dollars (\$5,000,000) each loss and ten million dollars (\$10,000,000) in the aggregate. Coverage shall apply on a primary non-contributing basis in relation to any other insurance or self-insurance, primary or excess, available to City or any employee or agent of City. If this coverage is written on a claims-made basis, the retroactive date shall precede the effective date of the Agreement with the City and continuous coverage will be maintained or an extended reporting period will be exercised for a period of at least three (3) years from termination or expiration of this Contract.

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 that 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. During the warranty period following Acceptance, Contractor will maintain the Workers' Compensation, Commercial General Liability, Business Automobile, and Watercraft Liability Insurance policies described in the preceding paragraphs but without the endorsements in favor of the City described in the preceding paragraphs.

e. All policies shall provide thirty (30) 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.

f. 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 (3) 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.

g. 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.

h. 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.

i. 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.

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

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

16. **Indemnification.** Contractor shall indemnify and save harmless City and its officers, agents and employees from, and, if requested, shall defend them against any and all loss, cost, damage, injury, liability, and claims thereof for injury to or death of a person, including employees of Contractor or loss of or damage to property, arising directly or indirectly from Contractor's performance of this Agreement, including, but not limited to, Contractor's use of facilities or equipment provided by City or others, regardless of the negligence of, and regardless of whether liability without fault is imposed or sought to be imposed on City, except



to the extent that such indemnity is void or otherwise unenforceable under applicable law in effect on or validly retroactive to the date of this Agreement, and except where and to the extent such loss, damage, injury, liability or claim is the result of the negligence or willful misconduct of City. 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. Contractor shall indemnify and hold City harmless from all loss and liability, including attorneys' fees, court costs and all other litigation expenses for any infringement of the patent rights, copyright, trade secret or any other proprietary right or trademark, and all other intellectual property claims of any person or persons in consequence of the use by City, or any of its officers or agents, of articles or services to be supplied in the performance of this Agreement, but excluding the design of the Vessel provided to Contractor by the City or City's other contractors.

**17. Incidental and Consequential Damages.**

NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, CONTRACTOR SHALL NOT BE RESPONSIBLE FOR INCIDENTAL AND CONSEQUENTIAL DAMAGES RESULTING IN WHOLE OR IN PART FROM CONTRACTOR'S ACTS OR OMISSIONS, , INCLUDING, BUT NOT LIMITED TO, CONSEQUENTIAL DAMAGES RESULTING FROM CONTRACTOR'S BREACH OF WARRANTY, NEGLIGENCE, DELAY IN DELIVERY OF THE WORK OR BREACH OF THIS AGREEMENT OR OTHERWISE. HOWEVER, CONTRACTOR SHALL BE LIABLE FOR INCIDENTAL AND CONSEQUENTIAL DAMAGES RESULTING FROM (1) DAMAGES CAUSED BY CONTRACTOR'S INTENTIONAL OR WILLFUL ACTS OR OMISSIONS, (2) (2) STATUTORY DAMAGES SPECIFIED IN THIS AGREEMENT, (3) CONTRACTOR'S OBLIGATION TO INDEMNIFY AND DEFEND CITY FOR INTELLECTUAL PROPERTY INFRINGEMENT, (4) OR WRONGFUL DEATH CAUSED BY CONTRACTOR.

**18. Liability of City.** CITY'S PAYMENT OBLIGATIONS UNDER THIS AGREEMENT SHALL BE LIMITED TO THE PAYMENT OF THE COMPENSATION PROVIDED FOR IN SECTION 5 OR SECTION 21 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.

**19. Liquidated Damages.** By entering into this Agreement, Contractor agrees that in the event the Delivery of the Vessel is delayed beyond the scheduled Delivery set forth in

Appendix A, as the same may be adjusted for Change Orders as provided in Appendix A, City will suffer actual damages that will be impractical or extremely difficult to determine. Contractor agrees that the sum of five thousand dollars (\$ 5,000) per day for each day of delay beyond Delivery 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. Contractor agrees to pay, as liquidated damages for each calendar day that Delivery is delayed beyond the 10th day following the Delivery Date (as adjusted, if applicable, pursuant to the provisions of this Agreement) the sum of five thousand dollars (\$5,000) per day. In no event shall the liquidated damages payable under this Section exceed the sum of four hundred thousand dollars (\$400,000). City's right to such liquidated damages shall be City's sole and exclusive remedy for damages or loss due to late Delivery of the Vessel and City specifically waives all other rights or remedies in law or equity, for damages or loss due to late Delivery of the Vessel, other than City's right under Section 20. ("Default, Remedies"). City may deduct a sum representing the liquidated damages from any money due to Contractor. Such deductions shall not be considered a penalty, but rather agreed monetary damages sustained by City because of Contractor's failure to deliver to City within the time fixed or such extensions of time permitted in writing by City.

**20. 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:

- |     |   |        |                                   |
|-----|---|--------|-----------------------------------|
| 8.  | Submitting False Claims; Monetary Penalties.    | 42.    | Drug-free workplace policy        |
| 10. | Taxes   | 58.    | Compliance with laws              |
| 15. | Insurance                                       | 55.    | Supervision of minors             |
| 24. | Proprietary or confidential information of City | 62.    | Protection of private information |
| 30. | Assignment                                      | 74/75. | Bonds                             |

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 (10) 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 no obligation) to cure (or cause to be cured) on behalf of Contractor any Event of Default; Contractor shall pay to City on demand all costs and expenses incurred by City in effecting such cure, with interest thereon from the date of incurrence at the maximum rate then permitted by law. City shall have the right to offset from any amounts due to Contractor under this Agreement or any other agreement between City and Contractor all damages, losses, costs, or expenses incurred by City as a result of such Event of Default and any liquidated damages due from Contractor pursuant to the terms of this Agreement or any other agreement.

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.

## 21. **Termination for Convenience.**

a. City shall have the option, in its sole discretion, to terminate this Agreement, at any time during the term hereof, for convenience and without cause. City shall exercise this option by giving Contractor written notice of termination. The notice shall specify the date on which termination shall become effective.

b. Upon receipt of the notice, Contractor shall commence and perform, with diligence, all actions necessary on the part of Contractor to effect the termination of this Agreement on the date specified by City and to minimize the liability of Contractor and City to third parties as a result of termination. All such actions shall be subject to the prior approval of City. Such actions shall include, without limitation:

1) Halting the performance of all services and other work under this Agreement on the date(s) and in the manner specified by City.

2) Not placing any further orders or subcontracts for materials, services, equipment or other items.

3) Terminating all existing orders and subcontracts which may by their terms be terminated.

4) At City's direction, assigning to City any or all of Contractor's right, title, and interest under the orders and subcontracts terminated. Upon such assignment,

City shall have the right, in its sole discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts.

5) Subject to City's approval, settling all outstanding liabilities and all claims arising out of the termination of orders and subcontracts.

6) Completing performance of any services or work that City designates to be completed prior to the date of termination specified by City.

7) Taking such action as may be necessary, or as the City may direct, for the protection and preservation of any property related to this Agreement which is in the possession of Contractor and in which City has or may acquire an interest.

c. Within 30 days after the specified termination date, Contractor shall submit to City an invoice, which shall set forth each of the following as a separate line item:

1) The reasonable cost to Contractor at the schedule of rates attached to this Agreement as Appendix G for all services and other work City directed Contractor to perform prior to the specified termination date, for which services or work City has not already tendered payment. Contractor may also recover the reasonable cost of preparing the invoice not already tendered payment. Contractor may also recover the reasonable cost of preparing the invoice.

2) The reasonable cost to Contractor of handling material or equipment returned to the vendor, delivered to the City, or otherwise disposed of as directed by the City.

3) A deduction for the cost of materials to be retained by Contractor, amounts realized from the sale of materials and not otherwise recovered by or credited to City, and any other appropriate credits to City against the cost of the services or other work.

d. In no event shall City be liable for costs incurred by Contractor or any of its subcontractors after the termination date specified by City, except for those costs specifically enumerated and described in the immediately preceding subsections (b) and (c). Such non-recoverable costs include, but are not limited to, anticipated profits on this Agreement, post-termination employee salaries, post-termination administrative expenses, post-termination overhead or unabsorbed overhead, attorneys' fees or other costs relating to the prosecution of a claim or lawsuit, prejudgment interest, or any other expense that is not reasonable or authorized under such subsections (b) and (c).

e. In arriving at the amount due to Contractor under this Section, City may deduct: (1) all payments previously made by City for work or other services covered by Contractor's final invoice; (2) any claim that City may have against Contractor in connection with this Agreement; (3) any invoiced costs or expenses excluded pursuant to the immediately preceding subsection (d); and (4) in instances in which, in the opinion of the City, the cost of any service or other work performed under this Agreement is excessively high due to costs incurred to remedy or replace defective or rejected services or other work, the difference between the

invoiced amount and City's estimate of the reasonable cost of performing the invoiced services or other work in compliance with the requirements of this Agreement.

f. City's payment obligation under this Section shall survive termination of this Agreement.

**22. Rights and Duties upon Termination or Expiration.**

This Section and the following Sections of this Agreement shall survive termination or expiration of this Agreement:

- |   |  |
|---|--|
| 8. Submitting false claims;                                     | 24. Proprietary or confidential information of City    |
| 9. Disallowance   | 26. Ownership of results                               |
| 10. Taxes   | 27. Works for hire                                     |
| 11. Payment does not imply acceptance of work                   | 28. Audit and inspection of records                    |
| 13. Responsibility for equipment                                | 53. Modification of Agreement                          |
| 14. Independent contractor; payment of taxes and other expenses | 54. Administrative remedy for Agreement Interpretation |
| 16. Indemnification   | 55. Agreement Made in California; Venue                |
| 17. Incidental and consequential damages                        | 56. Construction                                       |
| 18. Liability of city   | 61. Severability                                       |
| 17. Termination for convenience                                 | 62. Protection of Private Information                  |
|   | 76. Entire Agreement                                   |

Subject to the immediately preceding sentence, upon termination of this Agreement prior to expiration of the term specified in Section 2, this Agreement shall terminate and be of no further force or effect. Contractor shall transfer title to City, and deliver in the manner, at the times, and to the extent, if any, directed by City, any work in progress, completed work, supplies, equipment, and other materials produced as a part of, or acquired in connection with the performance of this Agreement, and any completed or partially completed work that, if this Agreement had been completed, would have been required to be furnished to City. This subsection shall survive termination of this Agreement.

**23. 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 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 that constitute 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.

**24. 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 that 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 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.

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

To City: Nishil Bali  
Reference: Term Contract No. 72000, Type II Fire Boat  
Office of Contract Administration, Purchasing Division  
City Hall, Room 430  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4685  
Email: nishil.bali@sfgov.org

To Contractor: US Fab LLC  
5555 N. Channel Ave.  
Portland, OR 97217  
503-247-1556  
Attn: Greg Lind  
greg.lind@vigorindustrial.com

Any notice of default must be sent by registered mail.

26. **Ownership of Results.** Any interest of Contractor or its subcontractors, in drawings, plans, specifications, blueprints, studies, reports, memoranda, 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.

27. **Works for Hire.** If, in connection with services performed under this Agreement, Contractor or its subcontractors create artwork, copy, posters, billboards, photographs, videotapes, audiotapes, systems designs, software, reports, diagrams, surveys, blueprints, source codes, or any other original works of authorship, such works of authorship shall be works for hire as defined under Title 17 of the United States Code, and all copyrights in such works are the property of the City. If it is ever determined that any works created by Contractor or its subcontractors under this Agreement are not works for hire under U.S. law, Contractor hereby assigns all copyrights to such works to the City, and agrees to provide any material and execute any documents necessary to effectuate such assignment. With the approval of the City, Contractor may retain and use copies of such works for reference and as documentation of its experience and capabilities.



28. **Audit and Inspection of Records.** Contractor agrees to maintain and make available to the City, during regular business hours, accurate books and accounting records relating to its work under this Agreement. Contractor will permit City to audit, examine, and make excerpts and transcripts from such books and records, and to make audits of all invoices, materials, payrolls, records of 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 three (3) 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.

29. **Subcontracting.** Contractor is prohibited from subcontracting this Agreement or any part of it unless such subcontracting is first approved by City in writing, provided that Contractor may subcontract portions of the project to its affiliated (more than 50% common ownership) companies. Neither party shall, on the basis of this Agreement, contract on behalf of or in the name of the other party. An agreement made in violation of this provision shall confer no rights on any party and shall be null and void.

30. **Assignment.** The services to be performed by Contractor are personal in character and neither this Agreement nor any duties or obligations hereunder may be assigned or delegated by the Contractor unless first approved by City by written instrument executed and approved in the same manner as this Agreement.

31. **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.

32. Left blank by agreement of the parties.

33. Left blank per waiver of HRC Chapter 14B.

34. **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. Failure of any subcontractors to comply with such provisions 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 CMD-12B-101) with supporting documentation and secure the approval of the form by the San Francisco Contracts Monitoring Division (formerly “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 fifty dollars (\$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.

40. **MacBride Principles—Northern Ireland.** Pursuant to San Francisco Administrative Code §12F.5, the City and County of San Francisco urge companies doing business in Northern Ireland to move toward resolving employment inequities, and encourage such companies to abide by the MacBride Principles. The City and County of San Francisco urge San Francisco companies to do business with corporations that abide by the MacBride Principles. By signing below, the person executing this agreement on behalf of Contractor acknowledges and agrees that he or she has read and understood this section.

41. **Tropical Hardwood and Virgin Redwood Ban.** Pursuant to §804(b) of the San Francisco Environment Code, the City and County of San Francisco urge 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.

42. **Drug-Free Workplace Policy.** Contractor acknowledges that pursuant to the Federal Drug-Free Workplace Act of 1989, the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited on City premises. Contractor agrees that any violation of this prohibition by Contractor, its employees, agents, or assigns will be deemed a material breach of this Agreement.

43. **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 that are is not materially cured by Contractor within ten (10) days of notice by the City will be deemed a material breach of contract.

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

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

46. **Public Access to Meetings and Records.** If the Contractor receives a cumulative total per year of at least \$250,000 in City funds or City-administered funds and is a non-profit organization as defined in Chapter 12L of the San Francisco Administrative Code, Contractor shall comply with and be bound by all the applicable provisions of that Chapter. By executing this Agreement, the Contractor agrees to open its meetings and records to the public in the manner set forth in §§12L.4 and 12L.5 of the Administrative Code. Contractor further agrees to make good-faith efforts to promote community membership on its Board of Directors in the manner set forth in §12L.6 of the Administrative Code. The Contractor acknowledges that its material failure to comply with any of the provisions of this paragraph shall constitute a material breach of this Agreement. The Contractor further acknowledges that such material breach of the Agreement shall be grounds for the City to terminate and/or not renew the Agreement, partially or in its entirety.

47. **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% 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 farther agrees to provide to City the names of each person, entity, or committee described above.

48. Left blank by agreement of the parties.

49. Left blank by agreement of the parties.

50. Left blank by agreement of the parties.

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. **Preservative-treated Wood Containing Arsenic.** Contractor may not purchase preservative-treated wood products containing arsenic in the performance of this Agreement unless an exemption from the requirements of Chapter 13 of the San Francisco Environment Code is obtained from the Department of the Environment under Section 1304 of the Code. The term “preservative-treated wood containing arsenic” shall mean wood treated with a preservative that contains arsenic, elemental arsenic, or an arsenic copper combination, including, but not

limited to, chromated copper arsenate preservative, ammoniacal copper zinc arsenate preservative, or ammoniacal copper arsenate preservative. Contractor may purchase preservative-treated wood products on the list of environmentally preferable alternatives prepared and adopted by the Department of the Environment. This provision does not preclude Contractor from purchasing preservative-treated wood containing arsenic for saltwater immersion. The term “saltwater immersion” shall mean a pressure-treated wood that is used for construction purposes or facilities that are partially or totally immersed in saltwater.

53. **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 by a person authorized by the City to do so, including the Owner’s Representative identified pursuant to Appendix A.

54. **Administrative Remedy for Agreement Interpretation.** Subject to Appendix A, 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.

55. **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.

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

57. Left blank by agreement of the parties.

58. **Compliance with Laws.** Contractor shall keep itself fully informed of the City’s Charter, codes, ordinances, and regulations and of all state and federal laws in place at time of execution of this Agreement 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 in place at time of execution of this Agreement.

59. **Services Provided by Attorneys.** Any services to be provided by a law firm or attorney must be reviewed and approved in writing in advance by the City Attorney. No invoices for services provided by law firms or attorneys, including, without limitation, as subcontractors of Contractor, will be paid unless the provider received advance written approval from the City Attorney.

60. Left blank by agreement of the parties.

61. **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.

62. **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.

63. Left blank by agreement of the parties.

64. **Food Service Waste Reduction Requirements.** Effective June 1, 2007, 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 one hundred dollars (\$100) liquidated damages for the first breach, two hundred dollars (\$200) liquidated damages for the second breach in the same year, and five hundred dollars (\$500) liquidated damages for subsequent breaches in the same year reasonable estimates are 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.

65. Left blank by agreement of the parties.

66. **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.

67. **Appendices and Incorporation by Reference.** All attached appendices are fully incorporated into the contract terms. The Request for Proposals issued by City and County of San Francisco and responsive proposal by US Fab/Vigor are both fully incorporated by reference to the extent that they are not in conflict with the terms of the agreement and appendices.

68. Left blank by agreement of the parties.

69. **Bankruptcy.** In the event that either party shall cease conducting business in the normal course, become insolvent, make a general assignment for the benefit of creditors, suffer or permit the appointment of a receiver for its business or assets, or shall avail itself of, or become subject to, any proceeding under the Federal Bankruptcy Act or any other statute of any



state relating to insolvency or the protection of rights of creditors, then at the option of the other party, this contract shall terminate and be of no further force and effect, and any property or rights of such other party, tangible or intangible, shall forthwith be returned to it.

70. **Reports by Contractor.** Each month, Contractor must furnish a report of the percentage of project completed under this contract based the Master Construction Schedule as stated in Appendix A Scope of Services, Item 5. The report must be in a format acceptable to the City, and sent to:

Mark Corso  
Reference: Contract #72000, Type II Fire  
Boat  
Finance Division  
San Francisco Fire Department  
698 2nd Street  
San Francisco, CA 94107

Nishil Bali  
Reference: Contract #72000, Type II Fire Boat  
Office of Contract Administration  
Purchasing Division  
City Hall, Room 430  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4685

71. Left blank by agreement of the parties

72. **Material Safety Data Sheets.** Where required by law, contractor will include Material Safety Data Sheets (M.S.D.S.) with delivery for applicable items. City may withhold Acceptance and final payment until all required M.S.D.S. are provided.

73. **Force Majeure.** No Party shall be liable for any failure to perform its obligations where such failure is as a result of unforeseen Acts of Nature (including fire, flood, earthquake, storm, hurricane, or other natural disaster), war, invasion, act of foreign enemies, hostilities (whether war is declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation, terrorist activities, nationalization, government sanction, blockage, embargo, labor dispute, strike, lockout, or interruption (where such dispute, strike, lockout or interruption is not the result of any action of a Party) and no other Party will have a right to terminate this Agreement under Section 20 (Default; Remedies) in such circumstances.

Any Party asserting Force Majeure as an excuse shall have the burden of proving that reasonable steps were taken (under the circumstances) to minimize delay or damages, that all non-excused obligations were substantially fulfilled, and that the other Party was timely notified of the likelihood or actual occurrence that would justify such an assertion, so that other prudent precautions could be contemplated. Within ten (10) days of becoming aware of any Force Majeure delay (but within three (3) days if the delay occurs within ten (10) days of a scheduled delivery date), the party becoming aware must advise the other in writing of the same, with full details. The parties will promptly thereafter execute a change order making/confirming any necessary adjustments to the Delivery Date or treat the claimed delay as a disputed item for resolution pursuant to the terms of this Agreement.

74. **Bond Requirements.** The following bonds are required for the performance of this Agreement:

a. A Performance Bond, the form attached as Appendix F in the amount of 100% of the agreement to guarantee the faithful performance of this Agreement.

b. A Payment (Labor and Materials) Bond, the form attached as Appendix F in the amount of 100% of the agreement to guarantee the payment of wages for services engaged and of bills contracted for materials, supplies, and equipment used in the performance of this Agreement.

Each bond must be approved as to form by the City Attorney, and approved as to sufficiency and qualifications of the surety by the Controller. The bonds must be renewed annually.

75. **Bond Obligation—Duration.** The City hereby declares that the term of the Performance Bond and the Labor and Materials Bond of this Agreement shall begin on the date that the contract is awarded and shall extend until Acceptance of the Vessel. If bonds are required by the City after Acceptance, the bond amount may be decreased by Contractor to 10% of the purchase price and will remain in effect for a period not less than one (1) year following the date of Acceptance or the time required to resolve any items of incomplete work under this Agreement and the payment of any disputed amounts under this Agreement (including any disputed warranty claims remaining after one (1) year), whichever time period is longer.

76. **Entire Agreement.** This contract, including all general and special terms and conditions, technical specifications, and all attachments, sets forth the entire Agreement between the parties, and supersedes all other oral or written provisions. Any proposed changes in this contract (including technical specifications) shall be submitted to the Contractor/Purchaser for prior approval. Any changes made without the approval of the Contractor/Purchaser and a formal contract modification will not be considered valid. This contract may be modified only as provided in Section 53, “Modification of Agreement.”

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

**CITY**

**CONTRACTOR**

Recommended by:

Vigor Fab LLC

\_\_\_\_\_  
Chief Joanne Hayes-White  
San Francisco Fire Department

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

Approved as to Form:

Dennis J. Herrera  
City Attorney

I have read and understood paragraph 40, the City's statement urging companies doing business in Northern Ireland to move toward 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

By:\_\_\_\_\_  
Gustin R. Guibert  
Deputy City Attorney

Approved:

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

\_\_\_\_\_  
Greg Lind  
Director of Estimating  
5555 N. Channel Ave.  
Portland, OR 97217  
503-247-1556  
greg.lind@vigorindustrial.com  
City vendor number: 86361

**Appendices**

- A: Vessel Construction and Sale
- B: Calculation of Charges
- C: Technical Specifications
- C-1: Revised Drawing List
- D: Vessel Construction Agreement -Change Order Form
- E: Vessel Construction Agreement - Acceptance Certificate
- F: Vessel Construction Agreement - Payment and Performance Bond form
- G: Contractor's Schedule of Time & Materials Rates
- H: Grant Terms

## **Appendix A Vessel Construction and Sale**

Contractor agrees to construct, sell, and deliver the Vessel, as defined below, to City, as follows:

### **1. Technical Specifications**

a. The Office of Contract Administration (“OCA”) is requested proposals from qualified shipyards for the construction of a new Type II Fire Boat (the “Vessel”) for the San Francisco Fire Department (“SFFD”). The Technical Specifications for this project are attached to this Agreement as Appendix C—Technical Specifications. The Revised Drawings list is attached to this Agreement as Appendix C-1. The parties agree that the Revised Drawings list, Appendix C-1, replaces the Contract Plans list found in the Technical Specifications at Section 007, Page 4.

b. Type II Fire Boat construction must meet or exceed the requirements and standards set forth by the National Fire Protection Association Standard on Marine Fire Fighting Vessels (NFPA 1925) for Type II Fire Boat standards.

c. All items must be bid as specified in Appendix C, Technical Specifications. Bidders may be deemed non-responsive for proposing alternates that are not acceptable to the City. See Section 011, Materials and Workmanship of Appendix C, Technical Specifications for details regarding acceptable alternate items.

d. In the event of conflict between documents, this Agreement shall control, then the Specifications, then design drawings referenced in the Specifications, but only to the extent of such conflict and no further.

### **2. Permits**

a. All necessary permits required to perform work are to be supplied by the Contractor at no additional cost to the City.

### **3. Warranty**

a. As a condition of the acceptance of the Vessel, the Contractor shall furnish the following warranties:

1) The Contractor hereby warrants the Vessel for a period of one (1) year from Acceptance. Contractor will, at Contractor’s own expense, and without any cost to the City, replace all parts failures and make all repairs, including labor and transportation costs, that may be required or are made necessary by reason of defective material or workmanship. Any defects found during warranty period, in workmanship or material, shall be corrected without regard to warranty period. Exceptions: City-furnished equipment is not included in Contractor’s warranty but installation work by Contractor for installation of City-furnished equipment is included in Contractor’s warranty. Design is not included in the Contractor’s warranty.

Performance characteristics of the Vessel included in the Technical Specifications are not included in the Contractor's warranty.

2) A one (1) year warranty against latent defects shall be provided. The Contractor shall warrant all workmanship and Contractor-provided materials for twelve (12) months after delivery of Vessel.

b. Nothing contained herein will obligate Contractor at any time to repair or replace any component of the Vessel to the extent such repair and/or replacement is proximately caused by the negligent operation or maintenance of the Vessel or its equipment after Acceptance, or by normal wear and tear in the absence of defective material or workmanship.

c. Contractor shall be notified promptly, and no later than thirty (30) days following discovery by City, of any warranty claim, and Contractor shall be allowed, at its expense, to inspect the Vessel prior to any repair or destruction of relevant parts, though Contractor must conduct such inspection within seven (7) days of City's notice, unless emergency circumstances require that such inspection occur sooner.

d. The responsibility of Contractor shall be limited to correction of any defects and/or breach of warranty claims that appear during the warranty period, including all costs of repair or replacement. Any work required to be performed under the provisions of this warranty shall be carried out at a location selected by Contractor reasonably convenient to the operating location of the Vessel. In all cases, costs and responsibility of returning the Vessel or any parts to Contractor or other place of repair shall be for City's account. City and Contractor will cooperate in determining the time and place of repairs to reasonably minimize the costs to be borne by Contractor and City's loss of use of the Vessel. For warranty repairs performed by others, Contractor shall be liable for the lesser of (i) one hundred percent (100%) of the amount that such repairs and replacements, including the cost of dry-docking, would have cost if they had been carried out by Contractor, or (ii) the reasonable costs actually expended by City in remedying such defects. Reasonable costs consider what it would actually cost if Contractor performed the work in its own or an affiliate's yard and average rates in the market where the Vessel is located during the warranty repairs. Any disputes over whether a condition constitutes defective or warranty work are subject to Technical Mediation.

e. No Other Warranties. The foregoing warranties are City's exclusive warranties, and are in lieu of all other warranties, expressed or implied, including, but not limited to, any express or implied warranty of fitness or merchantability (and including, but not limited to, any warranties that might otherwise exist in the specifications), and which warranties of fitness, merchantability, any other warranties, expressed or implied, whether arising by law or otherwise, including, without limitation, under the Uniform Commercial Code, are hereby expressly disclaimed.

#### 4. **Insurance Requirements**

Refer to Agreement Section 15 for detailed Insurance requirements.

## **5. Master Construction Schedule**

Prior to the beginning of Phase I (Appendix C, Section 003), Contractor will supply the City with a Master Construction Schedule in the form of a Critical Path Method Schedule (Appendix C, Section 813) within fourteen (14) days following execution of contract. Within five (5) days following successful delivery of this item, the City will issue the Contractor a Notice to Proceed via written communication. Until receipt of this Notice, the vendor shall not incur any detailed engineering or construction costs under this contract.

## **6. Shipyard Visits and Pre-Construction Meetings**

a. Where applicable, the shipyard must accommodate authorized representatives of the City to make inspections at the shipyard. As part of the proposal price, the proposer shall include the cost of City visits to the shipyard as detailed in Appendix C, “Technical Specifications, using per diem rates for meals and lodging as specified by the U.S. General Services Agency located at the following website: <http://www.gsa.gov/portal/category/21287>. Each visit must be approved, in writing, by the SFFD Fire Chief or Head Fiscal Officer prior to booking of travel arrangements.

b. Upon completion of the Pre-Production Engineering and Detail Design phase (Appendix C, Section 003), the selected vendor and the SFFD shall have Pre-Construction meeting. The meeting shall be scheduled after the Working Plans (Appendix C, Section 007) and the Contractor’s Weight Estimate (Appendix C, Section 833) have been developed and approved, and the manufacturer’s certifications have been received. Upon successful delivery of items requested at the Pre-Construction meeting, the City will issue the selected vendor a Notice to Proceed to Phase II via written communication. Until receipt of this Notice, the vendor shall not incur any construction cost under this contract.

## **7. Substantial Completion, Dock and Sea Trials**

a. Contractor to give City at least fourteen (14) days’ notice of anticipated date for substantial completion and commencement of Dock and Sea Trials as per the Specifications. The details of these trials are outlined in Section 982 of Appendix C, “Technical Specifications.” These trials shall be conducted by the Contractor and may be witnessed by City. City shall also conduct a substantial completion inspection. If there are any apparent defects in the materials or equipment at the time of substantial completion or trials, the City will promptly notify the Contractor in writing, specifying defects to be corrected. City will conduct re-inspection of any corrections made by Contractor following trials. If no notice of defects is provided to Contractor within 5 days of completing Dock and Sea Trials, the Vessel will be deemed to conform to the Specifications, subject to Delivery and Acceptance in San Francisco, and subject to warranty rights under this Agreement.

b. If there are any apparent defects in the materials or equipment at the time of substantial completion, the City will promptly notify the Contractor thereof. Without limiting any other rights, the City, at its option, may require the Contractor to:

1) Repair or replace, at Contractor’s expense, any or all of the damaged materials, assemblies, or equipment; or



- 2) Refund the price of any or all of the damaged materials, assemblies or equipment; or
- 3) Accept the return of any or all of the damaged materials, assemblies, or equipment.

## 8. Delivery and Acceptance Inspection

a. Following Dock and Sea Trails, the Vessel will be delivered by Contractor to San Francisco and available for acceptance inspection. This delivery available for inspection is considered “Delivery” under this Agreement and satisfies any requirements tied to a Delivery Date unless material damage or defects preventing immediate use of the Vessel by City are found in the acceptance inspections. Within five (5) days of arrival in San Francisco, City will conduct an acceptance inspection and any additional acceptance trials called for in the Specifications. Contractor will also arrange and pay for a diver inspection of the Vessel’s bottom per the terms of Section 983 of Appendix C, “Technical Specifications” (modified by agreement to permit diver inspection rather than drydocking unless bottom damage requiring drydocking repair is found). Upon completion of the five (5) day inspection period, Contractor may tender the Vessel for Acceptance.

b. If there are material defects in the materials or equipment at the time of Delivery or noted in such trials or inspections that prevent the immediate use of the Vessel by City, within five (5) days of arrival in San Francisco, three (3) days of City receiving the diver’s underwater inspection report, whichever is later, City will notify the Contractor in writing, specifying defects to be corrected. If there are no material defects preventing immediate use of the Vessel by City or if City gives no notice of material defects preventing immediate use, then (i) accrual of liquidated damages under Agreement Section 19 will cease to accrue; and (ii) the parties will conduct Acceptance.

## 9. Acceptance

a. Within five (5) days of completion of the Delivery and acceptance inspections described above, Contractor shall tender the Vessel to the City for final acceptance (“Acceptance”). The Acceptance tender must be made during normal work hours, 8:00 a.m.-4:00 p.m., Monday through Friday, at the San Francisco Fire Department pier at Fire Station #35, Pier 22 1/2, The Embarcadero, San Francisco, CA 94105. At the time of such tender for delivery, the Vessel being delivered will have a Builder’s Certificate issued by Contractor, and such certifications as are required by the Specifications. If the Vessel is found by City to conform to the Specifications and this Agreement, City shall provide Contractor with an executed Acceptance Delivery Certificate on the form attached as Appendix E, and the Vessel shall be accepted by City. Any punch list items or defects (that do not prevent immediate use of the Vessel as reasonably determined by the City) shall be identified by City on the Delivery Certificate with particularity. The parties will treat such non-conformities as warranty items or the parties will agree on a dollar value and/or time period for correction of each such item or part. The Vessel will be accepted by City subject to correction of the defects noted and subject to all warranty rights under this Agreement. Contractor shall promptly thereafter either commence work to correct each such item or part or shall accept the assigned dollar value for the

same, as a result of the latter of which the Purchase Price shall be automatically reduced by the agreed dollar value. Upon Acceptance of the Vessel by City, as above, Contractor shall provide City with the following:

- Contractor's Certificate and transfer of title, which transfer of title may be on the Contractors Certificate or a separate USCG Bill of Sale;
- clearly presented diagrams and instructions for all safety equipment, piping, wiring, and other systems;
- deadweight measurement and inclining test data; and
- all other documentation and certifications required by the Specifications for the immediate use of the Vessel by City.

Upon delivery to and acceptance of the Vessel by City, as above, or as soon as practicable after such delivery or within thirty (30) days, Contractor shall provide City with the following

- all manufacturer's brochures, installation descriptions, manuals, maintenance and repair instructions for all mechanical and electrical systems as well as all gear, equipment and outfitting manufactured by others;
- specifications and schedules of paintings and coatings;
- all specifications, plans, and drawings, including "as built" drawings; and a list of all inventories and consumables.

b. Any disputes over condition at substantial completion, Delivery or Acceptance are subject to Technical Mediation under Appendix A, Section 18 below but shall not delay delivery, and all undisputed values and amounts shall be paid with the final progress payment upon Acceptance. Notwithstanding anything to the contrary, it is mutually agreed that time is of the essence with respect to delivery of the Vessel; City shall not delay its execution of an Acceptance Certificate and Contractor shall not delay delivery or its transfer of title to City as set forth above..

#### 10. **Working Plans**

a. Contractor acknowledges that, at the date of this Contract, it is in receipt of the Revised Drawings List, Appendix C-1.

b. The Contractor, as part of the scope of work covered by the Contract Price, will do the following:

- 1) Prepare the shop drawings and detail drawings listed as the "Working Plans" at Appendix C, Technical Specifications, Section 007, Page 4 based on the Revised Drawings list, Appendix C-1. The Working Plans must be promptly submitted to the City on an as completed or revised basis.

2) Construct the Vessel based on the Working Plans so as to conform to the Revised Drawings and the construction details set forth in the Technical Specifications, Appendix C.

3) If Contractor discovers ambiguities or conflicting requirements between the Revised Drawings or the Technical Specifications and the actual construction or work that is to be performed in executing the Working Plans, Contractor will promptly notify the City of same. Contractor will work with the City and the City's designer to resolve the ambiguity or conflict. If the ambiguity or conflict requires a change in construction methodology, time, or price, Contractor will promptly notify the City and follow the Change order procedures set forth in Section 13 below.

c. The Contractor's warranty under Appendix A, Section 3 above includes:

1) Contractor's preparation of and execution of the Working Plans. Contractor is responsible for correcting Contractor's errors or deficiencies in Working Plans at no increase in the Contract Price, provided such errors or deficiencies were not caused by errors in: (a) Owner Furnished Equipment; (b) vendor information furnished by the City or City's designer; or (c) any other designs, information, or processes furnished by the City or the City's designer.

2) Any design work undertaken by Contractor in connection with a Vessel Change Order.

d. The design of the Vessel and all plans and drawings relating to the Vessel provided by the City or its designer, and all intellectual property rights in the same (such design, plans and drawings and all intellectual property rights in the same being herein called the "City I.P.R.") shall at all times be and remain the sole and exclusive property of the City, which reserves all proprietary rights in and to the same. The Contractor will not obtain any rights of ownership or other proprietary rights in connection therewith or any part thereof and will not act in any way indicate any third party that Contractor has any ownership or other proprietary rights in the City I.P.R.

The Contractor shall only be entitled to use the City I.P.R. for the sole purpose of (and for no other purpose than) performing this Agreement and constructing the Vessel, including any warranty work.

e. The Working Plans, and working drawings, bills of materials, and production and lofting schedules produced by Contractor in performance of this Agreement (all collectively included within the meaning of "Working Plans" for purposes of this paragraph) shall remain the property of Contractor; provided, that the City shall have access to such Working Plans during construction of the Vessel, and provided further that the City is granted a world-wide, royalty-free license to use or refer to such Working Plans in connection with repair or maintenance of the Vessel. Such license is non-transferrable and non-sublicensable except that the City is entitled to permit use by the City's architects, engineers, contractors and subcontractors for the purposes set forth in the preceding sentence.

## 11. Reports

Contractor shall submit written reports as requested by the San Francisco Fire Department. Format for the content of such reports shall be determined by the San Francisco Fire Department. The timely submission of all reports is a necessary and material term and condition of this Agreement. The reports, including any copies, shall be submitted electronically, or on recycled paper and printed on double-sided pages to the maximum extent possible.

## 12. Department Liaison

a. **City's Representative.** In performing the services provided for in this Agreement, Contractor's liaison with the San Francisco Fire Department will be Mark Corso ("Owner's Representative") or an agent so authorized by Mark Corso. Owner's Representative shall have reasonable access during regular business hours to the Vessels and to all machinery, equipment, and outfit intended for the Vessels, provided that Owner's Representative shall not unreasonably interfere with Contractor's performance under this Agreement or with Contractor's normal business activities. Owner's Representative shall have the authority to authorize modifications, to reject work that is not in conformity with this Agreement, and to make all other decisions with respect to Contractor's performance under this Agreement. Owner's Representative shall be given reasonable advance notice of tests on Vessel so that he may be present for the tests if he so desires. Any tests requested by Owner's Representative that exceed those required by the Specifications will be for City's account and will be performed by Contractor provided they do not unreasonably interfere with or delay Contractor's work, and all fees and expenses associated with any such test will be the sole responsibility of City. Any inspection by the City of the Vessel, materials, and equipment is for the sole purpose of identification and information. Such inspections shall not be construed as final acceptance or as acceptance of the materials or equipment if materials or equipment do not conform to contractual requirements. Contractor shall make available to Owner's Representative an office at Contractor's plant, furnished with desk, chair, and locking filing cabinet. Owner's Representative, and any and all other employees, agents, and representatives of City who enter upon the business premises of Contractor, shall be subject to all reasonable policies, procedures, and regulations of Contractor pertaining to health, safety, security, and administration.

b. **Rejection of Work.** In the event Owner's Representative wishes to reject any of Contractor's work during the course of construction that Owner's Representative believes is not in conformance with this Agreement, such rejection shall be made in writing and shall be delivered to Contractor. If Contractor disputes the rejection, Contractor shall promptly give written notice of such dispute to City. If City supports Owner's Representative and so advises Contractor, Contractor (without waiver of any rights) shall perform the work necessitated by the rejection as requested, but responsibility for the costs of such work may be decided by Technical Mediation.

## 13. Changes or Extras

a. **Change Orders.** The Specifications, Purchase Price, and/or Delivery Date shall not be altered or amended in any manner whatsoever except through a written change

order executed by both parties as set forth in this section. All change orders shall be upon the Contractor's standard change order form, attached as Appendix D. For any changes in or additions to the work requested or agreed to by City, including any change to the Specifications, Purchase Price, or Delivery Date, City and Contractor shall mutually agree in writing to the adjustment in contract price caused thereby, or a method of computing said adjustment, and to the modified Delivery Date. Changes or extra work shall require in advance a written agreement signed by the authorized representative of each party. It is understood that Contractor's charges in calculating change orders will be at the schedule of rates attached to this Agreement as Appendix G. Any agreed change order must be fully funded by the City by certification of the additional amount by the Controller under Agreement Section 5. In the absence of such agreement and certification as to price adjustment and modified Delivery Date, Contractor shall not be required to accept or perform such changes.

b. **Regulatory Changes.** City and Contractor shall cooperate in securing design approvals from the U.S. Coast Guard and other regulatory agencies, as required. If any changes are required by any of these agencies to grant design approval that necessitates alterations or additions to the Vessel resulting in an adjustment to the cost of the Vessel and/or an adjustment to the time required for completion of the Vessel, then Contractor shall be entitled to make such changes, and Contractor and City shall execute a change order, including adjustment to the Purchase Price and/or adjustment to the Delivery Date as may be required to meet the changes necessary to obtain design or construction approval. Any such change order must be fully funded by the City by certification of the additional amount by the Controller under Contract Section 5. In the absence of such agreement and certification as to price adjustment and adjusted Delivery Date, Contractor shall not be required to accept or perform such changes.

#### 14. **Title**

a. Title to the Vessels (including all materials, parts, components, etc. of or to be incorporated into the Vessels other than City's supply) will remain in Contractor during construction. Title to and ownership of the vessel and risk of loss will only transfer to and vest in City upon Acceptance by City as set forth herein.

#### 15. **Security Interest**

a. Contractor grants to City a first priority purchase money security interest in all of Contractor's right, title and interest in and to the following, whether now owned or hereafter acquired:

1) The Vessel construction project being undertaken pursuant to this Agreement, as amended from time to time, the Vessel, and all equipment, outfit, and appurtenances, including all accessions and additions thereto, and all parts, equipment, and materials specifically identified for permanent installation on the Vessel wherever located, whether on board the Vessel or not, all of which the parties acknowledge constitute "purchase-money collateral" as such term is defined in Section 9-103(a)(1) of the Uniform Commercial Code;

- 2) this Agreement, as amended from time to time; and
- 3) all proceeds of the foregoing, including insurance proceeds.

The foregoing security interest secures the performance of all obligations of Contractor outstanding from time to time under this Agreement and all other agreements, instruments, and documents relating thereto, now or hereafter in effect as amended from time to time (collectively, the "Obligations"). The parties acknowledge that the Obligations constitute a "purchase money obligation" as such term is defined in Section 9-103(a)(2) of the Uniform Commercial Code. Contractor expressly authorizes City to file such U.C.C-1 financing statements as City may deem necessary to perfect and continue City's security interest in the aforementioned collateral. From time to time at City's request, Contractor shall execute and deliver all further instruments and documents and take all further action as may be reasonably necessary to perfect and provide first priority for any security interest granted or purported to be granted in this Agreement or to enable City to exercise and enforce its rights and remedies with respect to the aforementioned collateral. Contractor shall not register the Vessel under the vessel registration or titling laws of the United States or any state, or document the Vessel with the USCG, except as may be required during the construction or the delivery of the Vessel, provided that such documents do not adversely affect the security interest of City. The security interest granted to City hereunder is inferior only to Contractor's lien rights in the Vessel in the event of default by City, which lien rights are acknowledged by City.

#### 16. **Loss of Vessel**

a. **City's Option.** In the event of an actual or constructive total loss of the Vessel prior to Acceptance, or of substantially all of the materials, propulsion systems, or equipment at Contractor's plant intended for the Vessel, construction of the Vessel shall proceed/recommence, unless City elects within thirty (30) days of such loss to cancel the construction. If an election is made to cancel the construction or to proceed with/recommence construction, City shall give written notice to that effect to Contractor within thirty (30) days of the loss.

b. **Delivery Date Adjustment Subsequent to Total Loss.** If City does not elect to cancel construction subsequent to an actual or constructive total loss, the Delivery Date shall be extended by mutual negotiation and execution of a change order for such time as is necessary for Contractor to clear all damage to the Vessel and to Contractor's plant, facilities and equipment, to reinstate the Vessel and Contractor's plant and production schedule, to complete work on other vessels or projects in Contractor's production line if necessary in order to reinstate the Vessel, and to purchase and obtain delivery of materials, engines or equipment in substitution for those damaged. City shall have no claim against Contractor for any loss or damage incurred by City as a result of such delay.

c. **Insurance Payment.** In the event that there is an actual or constructive total loss of the Vessel prior to Acceptance and if no election is made to cancel the construction, then the monies received from the Contractor's Risk Insurance with respect to the Vessel shall be applied to the construction of a replacement Vessel. All proceeds of the Contractor's Risk Insurance for damage or loss of City-furnished equipment shall be paid to City and/or City's



lender as their interests may appear. If the election is made to cancel construction, all proceeds of the Contractor's Risk Insurance shall be paid to Contractor and City as their interests may appear, and to the extent proceeds of the Contractor's Risk Insurance cover the value of Contractor's work on the Vessel between the time of the last Deposit or Progress Payment under Appendix B and the total loss, Contractor will be entitled to receive that portion of the insurance proceeds.

d. **Partial Loss.** If any of the materials or equipment in Contractor's plant intended for the Vessel are partially but not completely damaged or lost prior to delivery, any monies received in respect of the insurance shall be applied in repairing such damage or loss in a reasonable and workmanlike manner and, if necessary and agreed, the date for completion shall be extended by mutual negotiation and execution of a change order.

e. **Permissible Delays.** The Delivery Date shall be extended without incurring a delivery delay charge to take account of the following events causing delay ("Permissible Delay"):

- 1) Any governmental control, intervention, or newly imposed requirements;
- 2) Circumstances arising out of war, riot, civil commotion, terrorism, or malicious damage;
- 3) Labor stoppage or slowdowns, including any actions brought about by collective bargaining, strikes, or lockouts of any of Contractor's workmen or any of the workmen employed by subcontractors or the makers of any of the machinery, equipment, or material necessary for the construction of the Vessel or of its machinery or equipment;
- 4) Any delay or default by City in the payment of the Purchase Price;
- 5) Any nonconformity, defect, or delay in delivery of machinery, equipment or materials necessary for the construction of the Vessel where such machinery, equipment or materials are:
  - i. City Supply; or
  - ii. limited in the Specifications to a particular supplier or manufacturer, provided Contractor has exercised proper purchasing practices; or
  - iii. limited in the Specifications to a particular design or material not readily available from suppliers, provided Contractor has exercised proper purchasing practices;
- 6) Substantial damage or destruction caused by fire, explosion, windstorm, flood or other loss to Contractor's plant, equipment or materials;
- 7) Inclement weather that causes the closure of the public schools in the municipality where the Vessel is being constructed;



8) High winds preventing the safe use of cranes at the facility where the Vessel is being constructed for more than four (4) consecutive hours during a workday and all other crane related construction in shipyard is also prevented, such delaying event will be documented to City within three (3) days;

9) Delays in the delivery voyage to San Francisco due to weather or sea condition limitations imposed by insurers of the Vessel or their surveyors;

10) Delays authorized pursuant to Appendix A, Section 16 “Loss of Vessel.”

#### 17. **Notice of Delay**

a. Within ten (10) days of becoming aware of any Permissible Delay (but within three (3) days if the delay occurs within ten (10) days of a scheduled delivery date), the party becoming aware shall advise the other in writing of the same, with full details, and the parties shall promptly thereafter execute a change order making/confirming any necessary adjustments to the Delivery Date.

#### 18. **Technical Mediation**

a. The parties agree to use a process of Technical Mediation to help resolve disputes during construction or over warranty claims that are of a technical nature. Such technical disputes are:

- 1) disputes as to quality of work, materials, parts, equipment, or fabrication;
- 2) disputes as to conformity of work with the Plans and Specifications;
- 3) disputes as to deficiencies noted on delivery certificates;
- 4) disputed change orders having a value under \$75,000;
- 5) disputed warranty claims having a value under \$75,000; and
- 6) any other dispute of a similar technical nature that the parties agree to submit to Technical Mediation.

b. The Technical Mediation shall be conducted in the shipyard facility where the Vessel is being constructed if before delivery, and in San Francisco if after delivery. If the parties are unable to agree on an individual to serve as technical mediator, the manager of the American Bureau of Shipping Technical Services office in San Francisco (or its successor entity) shall appoint one. The technical mediator shall be a commercial executive, naval architect, marine surveyor, ship builder, or ship repairer only, and in any event knowledgeable with regard to marine construction. The technical mediator shall promptly hear and consider all information presented by the parties about the dispute, shall assist the parties in resolving the dispute, and if

requested by either party, make recommendations as to how the mediator would rule on the dispute as a fact finder. Any expenses of the technical mediator in connection with resolution of technical disputes shall be shared equally by the parties. Any other costs and expenses incurred by a party relating to Technical Mediation, including attorneys' fees, shall be borne by that party only. Any decision or recommendation of the technical mediator is non-binding on the parties unless the parties mutually agree in writing in advance of the decision or recommendation that the mediator's decision or recommendation is to be final and binding as if made in a binding arbitration. Any non-binding matter submitted to Technical Mediation may subsequently be resolved through litigation.

c. The parties agree that the powers of the technical mediator in any agreed binding decision are limited as follows:

The technical mediator:

- 1) shall deal only with the dispute that was referred for him to investigate and submit his findings and recommendations
- 2) shall have no power to decide any matter that is not directly related to the dispute submitted to him
- 3) shall have no power to modify the Specifications or Drawings
- 4) shall be bound by the provisions of this Agreement and shall have no power to add to, subtract from, or modify any of the terms of this Agreement, including, but not limited to, the limitations on consequential damages and warranty claims, and shall have no power to award any such consequential damages or punitive damages.

## **Appendix B Calculation of Charges**

### **1. Pricing**

(a) All pricing in the bid proposal and contract shall be in US dollars.

(b) Pricing shall be firm throughout the term of the contract.

(c) The total price, subject to adjustment as only stated in the final contract, is Eleven Million, Six Hundred Thirty-seven Thousand, Six Hundred Sixty Dollars (\$11,637,660.00). This pricing includes the following options:

- Cummins engine package
- Payment and Performance Bond
- Extended warranty on fire pumps – 2 additional years (3 years total)
- Impressed current cathodic protection
- Cathelco anti-fouling system

**2. Payments** Payments to the Contractor shall be made as progressive payments from a Blanket Purchase Order based on a timeline of scheduled deliverables as follows:

Issuance of Notice to Proceed by City:	10%
Execution of the purchase order for the Main Engine/Propulsion Gear/Fire Pump Engine Order:	10%
Execution of the purchase order for the Fire Fighting System Order:	10%
Hull module erection begins:	5%
Receipt of All components of the Main Engine/Propulsion Gear/Fire Pump Engine Order in the yard:	10%
Superstructure erection begins:	5%
Completion of all major Steelwork of the hull (all steel modules landed) including all welding:	10%
Receipt of All components of the Fire Fighting System Order in the yard:	10%
Superstructure complete and landed on hull including all welding:	10%
Launch of the vessel:	10%
Acceptance of Vessel in San Francisco at Fire Station #35 (Pier 22 1/2):	10%

**Appendix C**  
**Technical Specifications**

Separate Attachment

**Appendix C-1**  
**Revised Drawings List**

**VESSEL CONSTRUCTION AGREEMENT**

**Appendix D — Change Order Form**

**Change Order**

**Number \_\_\_\_\_**

<b>OWNER</b>		<b>CONTRACTOR</b>	
Name	:	Name	:
Address	:	Address	:
City, State	:	City, State	:
Contact Name	:	Contact Name	:
Telephone	:	Telephone	:
Facsimile	:	Facsimile	:
<b>VESSEL</b>		<b>CONTRACT</b>	
Name	:	Title	:
Official Number	:	Date	:
Type/Use	:	Reference No.	:

**CHANGE REQUESTED BY:**

**CHANGE IN MATERIALS:**

Original cost of such materials : \_\_\_\_\_

Revised cost of such materials : \_\_\_\_\_

Difference (increase/decrease) : \_\_\_\_\_

CHANGE IN LABOR:

Original cost of such labor : \_\_\_\_\_  
Revised cost of such labor : \_\_\_\_\_  
Difference (increase/decrease): \_\_\_\_\_

CHANGE IN SCHEDULE AND/OR DELIVERY DATE:

Time (delay or advancement): \_\_\_\_\_  
Revised Delivery Date : \_\_\_\_\_

IMPACT ON OTHER WORK :

Original cost of such materials : \_\_\_\_\_  
Revised cost of such materials : \_\_\_\_\_  
Difference (increase/decrease) : \_\_\_\_\_

Original cost of such labor : \_\_\_\_\_  
Revised cost of such labor : \_\_\_\_\_  
Difference (increase/decrease): \_\_\_\_\_

Time (delay or advancement) : \_\_\_\_\_  
Revised Delivery Date : \_\_\_\_\_



Upon execution by both parties, the foregoing Change Order shall be deemed fully incorporated into the Vessel Construction Agreement between City and Contractor identified above. This Change Order may be executed in counterparts and/or by facsimile, with a facsimile copy of a signature considered equivalent to an original signature.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

OWNER:

CONTRACTOR:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
Authorized Signature

\_\_\_\_\_  
Authorized Signature

\_\_\_\_\_  
Printed Name and Title

\_\_\_\_\_  
Printed Name and Title

**VESSEL CONSTRUCTION AGREEMENT**

**Appendix E**

**Acceptance Certificate**

<b>OWNER</b>		<b>CONTRACTOR</b>	
Name	:	Name	:
Address	:	Address	:
City, State	:	City, State	:
Contact Name	:	Contact	:
Telephone	:	Telephone	:
Facsimile	:	Facsimile	:
<b>VESSEL</b>		<b>CONTRACT</b>	
Name	:	Title	:
Official Number	:	Date	:
Type/Use	:	Reference No.	:

The Vessel identified above is tendered for delivery by Contractor to City pursuant to the Vessel Construction Agreement referenced above. Concurrently and in accordance with the terms of said contract, Contractor tenders the following documents and/or other items to City:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_
5. \_\_\_\_\_
6. \_\_\_\_\_

Contractor warrants that all work upon the Vessel has been performed and completed in full compliance with the terms and conditions of said contract, including without limitation the Specifications as identified therein, and that all required tests and trials have been satisfactorily performed, except as follows:

	Item	Work Days	Dollar Value
1.			
2.			
3.			
4.			

City, having completed its inspection of the Vessel, hereby accepts redelivery of the Vessel pursuant to the terms and conditions of said contract except as follows:

	Item	Work Days	Dollar Value
1.			
2.			
3.			
4.			

DATED this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

OWNER:

CONTRACTOR:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
Authorized Signature

\_\_\_\_\_  
Authorized Signature

\_\_\_\_\_  
Printed Name and Title

\_\_\_\_\_  
Printed Name and Title

**VESSEL CONSTRUCTION AGREEMENT**

**Appedix F**

**Payment and Performance Bond form**

**PERFORMANCE BOND AND PAYMENT (LABOR & MATERIALS) BOND**

KNOW ALL MEN BY THESE PRESENTS, that WHEREAS, the San Francisco Fire Department, through the Office of Contract Administration of the City and County of San Francisco, State of California, has awarded to:

---

hereinafter designated as the "Principal", a Contract by BOARD OF SUPERVISORS RESOLUTION NO. \_\_\_\_\_, adopted \_\_\_\_\_, 2014\_\_ for:

*Project Title*  
**Contract No. Contract Number**

WHEREAS, said Principal is required under the terms of said Contract to furnish a Bond for the faithful performance of said Contract; and to furnish a separate Bond for the payment of any materials, provisions, or other supplies, used in, upon, for or about the performance of the Work contracted to be done;

NOW, THEREFORE, we the Principal and

---

as Surety, are firmly bound unto the City and County of San Francisco in the penal sum of

(PERFORMANCE BOND)

(PAYMENT BOND)

and

---

lawful money of the United States for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally firmly by these presents for the penal sum for a performance bond and an equal and separate penal sum for a separate payment bond. The conditions of this obligation is such that if the said principal does well and faithfully performs all the conditions and covenants of said Contract, according to the true intent and meaning thereof, upon its part to be kept and performed, then the above obligation is to be null and void, otherwise to remain in full force and effect.

**(PERFORMANCE BOND)**

THE CONDITION OF THIS OBLIGATION IS SUCH, that if the above bounden Principal, its heirs, executors, administrators, successors or assigns, shall in all things stand to and abide by, and well and truly keep and perform the covenants, conditions and agreements in the said Contract, including the provisions for liquidated damages in the said Contract, any changes, additions or alterations thereof made as therein provided, on its part, to be kept and

performed at the time and in the manner therein specified, and in all respects according to their true intent and meaning, and shall indemnify and save harmless the City and County of San Francisco, its officers and agents, as therein stipulated, then this obligation shall become null and void; otherwise it shall be and remain in full force and effect.

**(PAYMENT BOND)**

THE CONDITION OF THIS OBLIGATION IS SUCH, that if said principal, its heirs, executors, administrators, successors or assigns, of its subcontractor or subcontractors, shall fail to pay for any services, materials, provisions, equipment or other supplies, used in, upon, for or about the performance of the work contracted to be done, or for any work or labor thereon of any kind, or for amounts due the Unemployment Insurance Act with respect to such work or labor, then the surety of this Bond will pay for same, in an amount not exceeding the sum specified in this Bond, and in case suit is brought upon this Bond will also pay a reasonable attorney's fee, to be fixed by the Court. This Bond shall inure to the benefit of all contractors or subcontractors of Principal and any and all persons, companies, corporations, political subdivisions and state agencies, performing labor, furnishing materials or equipment, or performing other services under the Contract.

Surety, for value received, hereby expressly agrees that no change, extension of time, modification, alteration or addition to the undertakings, covenants, terms, conditions and agreements of the Contract, or to the work to be performed thereunder, or to the Specifications accompanying the same, and no inadvertent overpayment of progress payments, shall in any way affect its obligations on these Bonds; and it does hereby waive notice of any such change, extension of time, modification, alteration or addition to the undertakings, covenants, terms, conditions and agreements of the Contract, or to the Work to be performed thereunder, or to the Specifications, or of any inadvertent overpayment of progress payments.

IN WITNESS WHEREOF, the above-bounden parties have executed this instrument under their seal this \_\_\_\_day of \_\_\_\_\_, 2014, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

Approved as to form:  
Dennis J. Herrera  
City Attorney

By: \_\_\_\_\_  
Deputy City Attorney

\_\_\_\_\_  
Principal

By: \_\_\_\_\_

\_\_\_\_\_  
Surety

By: \_\_\_\_\_

END OF DOCUMENT

## Appendix G

### Contractor's Schedule of Time & Materials Rates

Labor (Straight Time): \$78.00 per hour  
Labor (Overtime Premium): \$28.00 per hour  
Materials and Subcontracts: Cost plus 20%

#### General Tariffs

Forklift	\$125.00 per hour plus labor
Crane	\$200.00 per hour plus labor
Berthage	\$2.00 per foot per day
Electrical	\$0.14 per kWh
Laydown Area	\$0.50 per sq. ft./month

\*A list of tariff rates is available on request



Exhibit H  
Grant Terms