

**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
Learn iT!**

This Agreement is made this ___ day of _____, 2016, in the City and County of San Francisco, State of California, by and between: **Learn iT!, 33 New Montgomery St., Suite 300, San Francisco, CA 94105**, 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 computer hardware, software, system design, maintenance, training, other consulting services, and other technology products; and,

WHEREAS, approval for this Agreement was obtained when the Civil Service Commission approved Contract Number **PSC 4062-13/14** on **January 6, 2014**; and,

WHEREAS, Request for Proposal (“RFP”) 95270 for Technology Marketplace allows the Office of Contract Administration to conduct additional Request for Proposals, Request for Qualifications, and negotiate agreements or use other procurement processes as needed; and,

WHEREAS, RFP 95270-B was issued on **March 18, 2015** for adding Tier 1-B Specialists within Technology Marketplace, and City selected Contractor as a qualified scorer pursuant to the RFP; and,

WHEREAS, approval for this Agreement was obtained when the Board of Supervisors approved resolution number _____ on _____; and,

WHEREAS, Contractor represents and warrants that it is qualified to perform the services required by City as set forth under this Contract; and,

Now, THEREFORE, the parties agree as follows:

DEFINITIONS:

AUTHORIZATION: Purchase Order or Blanket Purchase Order or Release against a Blanket Order of the City, properly executed by City, and certified by the Controller for the specific funding of an Order or any modification thereof.

CHANGE ORDER: A written instrument authorized in accordance with the requirements established by City that modifies an Order through an adjustment to one or more of the

following: (i) the price, (ii) the product (iii) project schedule, (iv) the project scope of work, or (v) the acceptance criteria.

CITY: The City and County of San Francisco, acting through the Office of Contract Administration with its offices at 1 Dr. Carlton B. Goodlett Place, Room 430, San Francisco, California 94102.

COIT: The Committee on Information Technology of the City and County of San Francisco.

CONSULTING SERVICES: Any Service (excluding Hardware Maintenance and Software Support Services), that involves retaining the professional expertise of a Contractor or Subcontractor to perform tasks that may include but are not limited to: implementation; assembly; installation; optimization; and integration of Hardware or Software; re-engineering business processes; linking business and technology strategies, system design; Software development; enhancing information processing capabilities; managing and/or performing work on a project to provide deliverables; project management; training services; hourly professional services such as assisting on a technical task; or systems integration services, such as acting as a prime contractor to deliver an integrated system that may consist of a combination of Software, Services, and/or Hardware.

CONTROLLER: Controller of the City and County of San Francisco.

DT: The Department of Technology of the City and County of San Francisco.

HARDWARE: Refers to physical devices and components that make up a computing system or any technology based solution such as facility security systems, multimedia video and sound systems, and fleet management systems which may include but is not limited to internal components such as CPUs, power supplies, hard drives, fans, heat sinks and video cards or external components such as webcams, microphones, routers, network switches, data cables, monitors, battery back-ups, printers, speakers and card readers.

HARDWARE MAINTENANCE SERVICE: Refers to maintenance that is either optional or required to ensure that the hardware remains operational and continues to satisfy user requirements. Hardware maintenance may include but is not limited to parts replacement, hardware warranty upgrades, and technical support.

OCA: The Office of Contract Administration of the City and County of San Francisco.

ORDER: An Authorization for the procurement of Products or Services which has been executed and certified in accordance with applicable City requirements, and the negotiated terms and specifications that govern the Products or Services to be delivered pursuant to that Order. All Orders by City Departments are subject to the prior approval of DT and Purchasing.

ORDERING DEPARTMENT: A department of the City and County of San Francisco, or other public agency, which initiates a requisition for the order of products or services pursuant to the authorized procedures set forth in this Agreement.

PRODUCT: Hardware, Software, and/or Supplies, or any combination of them, procured through this Agreement.

PURCHASE ORDER: A City Purchase Order, Blanket Purchase Order, Contract Order, or other document issued by Purchasing for the purpose of authorizing procurement of Products or Services by a City department.

PURCHASING: The Purchasing Division of the Office of Contract Administration of the City and County of San Francisco.

SERVICE: The performance of a task, provision of advice and counsel, assistance or use of a resource that Contractor makes available to City, including but not limited to Software Support Services, Hardware Maintenance Services, Consulting Services, and Training Services.

SOFTWARE: Refers to organized collections of computer data and instructions which may include but is not limited to System software and Application software and programs used for Cloud Computing, Software-as-a-Service (SaaS) solutions, software licenses, and software subscription services.

SOFTWARE MAINTENANCE: Refers to maintenance that is either optional or required to ensure that the software remains operational and continues to satisfy user requirements. Software maintenance may include but is not limited to software updates, patches, upgrades, and technical support.

SPECIFICATIONS: A document that provides information specific to a Product, including the manufacturer's technical literature, which contains information as to the functions of a Product and/or the resources required for its proper operation. The Contractor shall provide specifications for any Products offered upon the request of an Ordering Department.

SUPPLIES: Consumable items to be used with Products, such as printer paper and forms, ink cartridges, and data diskettes.

TECHNOLOGY MARKETPLACE: The multiple award contracts made available to City Ordering Departments and to other governmental agencies and jurisdictions for the efficient and cost-effective procurement of computer hardware, software, and services.

UNAVOIDABLE DELAY: An interruption of the work beyond the control of Contractor and which interruption the Contractor could not have avoided by the exercise of care, prudence, foresight and diligence. Such delays include and are limited to: acts of God; acts of the public enemy; adverse weather conditions; fires; floods; windstorms; tornadoes; wars; riots; insurrections; epidemics; quarantine restrictions; strikes; lockouts; sit-downs; slowdowns; labor shortages; inability of Contractor to procure labor; material shortages; inability of Contractor to procure material; fuel shortages; freight embargoes; accidents; acts of a governmental agency; priorities or privileges established for the manufacture, assembly, or allotment of materials by order, decree or otherwise of the United States or by any department, bureau, commission,

committee, agent or administrator of any legally constituted public authority; changes in the work ordered by the Ordering Department, insofar as they necessarily require additional time in which to complete the entire work; the prevention by the City of a Contractor from commencing or prosecuting the work; the prevention of a Contractor from commencing or prosecuting the work because of the acts of others, excepting the Contractor's subcontractors; the prevention of a Contractor from commencing or prosecuting the work because of the failure of the City to furnish the necessary materials, when required by the terms of an Order and when requested by the Contractor in a manner provided in the Order; and inability to procure or failure of public utility service. The duration of Unavoidable Delays shall be limited to the extent that the commencement, prosecution, and completion of the work are delayed thereby, as determined by the Ordering Department.

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. Charges will accrue only after prior written authorization certified by the Controller, and the amount of City's obligation hereunder shall not at any time exceed the amount certified for the purpose and period stated in such advance authorization. This Agreement will terminate without penalty, liability, or expense of any kind to City at the end of any fiscal year if funds are not appropriated for the next succeeding fiscal year. If funds are appropriated for a portion of the fiscal year, this Agreement will terminate, without penalty, liability, or expense of any kind at the end of the term for which funds are appropriated. City has no obligation to make appropriations for this Agreement in lieu of appropriations for new or other agreements. City budget decisions are subject to the discretion of the Mayor and the Board of Supervisors. Contractor's assumption of risk of possible non-appropriation is part of the consideration 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 _____, 2016 to _____, 2019. The Agreement may be extended with two (2) options to extend the contract for up to one (1) year, each at the sole and absolute discretion of the City.

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

4. Services Contractor Agrees to Perform. The Contractor agrees to perform the services provided for in Appendix A, "General Administrative Requirements: Scope of Work," attached hereto and incorporated by reference as though fully set forth herein.

5. Compensation. Compensation shall be made by Ordering Departments in accordance with the terms of each Authorization for an Order. In no event shall the amount of this Agreement exceed **twelve million dollars and no cents (\$12,000,000.00)**. No charges shall be incurred under this Agreement nor shall any payments become due to Contractor until reports, services, or both, required under this Agreement are received from Contractor and approved by the Ordering Department or Purchasing as being in accordance with this Agreement, limited to the total of the Order that gave rise to such event. City may withhold payment to Contractor in any instance in which Contractor has failed or refused to satisfy any material obligation provided

for under this Agreement. In no event shall City be liable for interest or late charges for any late payments.

The Controller is not authorized to pay invoices submitted by Contractor prior to Contractor's submission of 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 an invoice, Contractor has ten days to file an affidavit using CMD Payment Affidavit verifying that all subcontractors have been paid and specifying the amounts.

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. Once Contractor's Invoice is approved by City, payment to Contractor will be made via an Automated Clearing House (ACH) payment. (See www.sfgov.org/ach).

8. Submitting False Claims; Monetary Penalties. Pursuant to San Francisco Administrative Code §21.35, any contractor, subcontractor or consultant who submits a false claim shall be liable to the City for the statutory penalties set forth in that section. The text of Section 21.35, along with the entire San Francisco Administrative Code is available on the web at: [http://www.amlegal.com/nxt/gateway.dll/California/administrative/administrativecode?f=template_s\\$fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco_ca\\$sync=1](http://www.amlegal.com/nxt/gateway.dll/California/administrative/administrativecode?f=template_s$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$sync=1). 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 under the supervision of and in the employment 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 though such equipment be 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, its agents, and employees will not represent or hold themselves out to be employees of the City at any time. 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. Contractor agrees to maintain and make available to City, upon request and during regular business hours, accurate books and accounting records demonstrating Contractor's compliance with this section. Should City determine that Contractor, or any agent or employee of Contractor, is not performing in accordance with the requirements of this Agreement, City shall provide Contractor with written notice of such failure. Within five (5) business days of Contractor's receipt of such notice, and in accordance with Contractor policy and procedure, Contractor shall remedy the deficiency. Notwithstanding, if City believes that an action of Contractor, or any agent or employee of Contractor, warrants immediate remedial action by Contractor, City shall contact Contractor and provide Contractor in writing with the reason for requesting such immediate action.

b. **Payment of Taxes and Other Expenses.** Should City, in its discretion, or a relevant taxing authority such as the Internal Revenue Service or the State Employment Development Division, or both, determine that Contractor is an employee for purposes of collection of any employment taxes, the amounts payable under this Agreement shall be reduced by amounts equal to both the employee and employer portions of the tax due (and offsetting any credits for amounts already paid by Contractor which can be applied against this liability). City shall then forward those amounts to the relevant taxing authority. Should a relevant taxing authority determine a liability for past services performed by Contractor for City, upon notification of such fact by City, Contractor shall promptly remit such amount due or arrange

with City to have the amount due withheld from future payments to Contractor under this Agreement (again, offsetting any amounts already paid by Contractor which can be applied as a credit against such liability). A determination of employment status pursuant to the preceding two paragraphs shall be solely for the purposes of the particular tax in question, and for all other purposes of this Agreement, Contractor shall not be considered an employee of City. Notwithstanding the foregoing, Contractor agrees to indemnify and save harmless City and its officers, agents and employees from, and, if requested, shall defend them against any and all claims, losses, costs, damages, and expenses, including attorney's fees, arising from this section.

15. Insurance

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

1) Workers' Compensation, in statutory amounts, with Employers' Liability Limits not less than \$1,000,000 each accident, injury, or illness; and

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

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

4) Professional liability insurance including Technology Errors and Omissions. Contractor shall obtain and maintain throughout the duration of the Agreement, technology errors and omissions liability coverage with limits of not less than \$1,000,000 per occurrence/loss. The policy shall at a minimum cover professional misconduct or lack of the requisite skill required for the performance of services or failure of any product to perform as defined in this Agreement and shall also provide coverage for the following risks:

i. Liability arising from Contractor's or Subcontractor's theft, dissemination, and/or use of confidential information, including but not limited to, bank and credit card account information or personal information, such as name, address, social security numbers stored or transmitted in electronic form.

ii. Network security liability arising from the Contractor's or Subcontractor's unauthorized access to, use of, or tampering with computers or computer systems, including hacker attacks.

iii. Liability arising from the introduction of computer virus by Contractor or Subcontractor into, or otherwise causing damage to the City or third person's computer system, network, or similar computer related property and the data, software, and programs thereon.

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

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

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

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

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

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

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

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

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

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

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

k. Any of the terms of conditions of this Section 15 may be waived by the City's Risk Manager in writing, and attached to this Agreement as Appendix C. Such waiver is fully incorporated herein. The waiver shall waive only the requirements that are expressly identified and waived, and under such terms and conditions as stated in the waiver.

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 such loss, damage, injury, liability or claim is the result of the active negligence or willful misconduct of City and is not contributed to by any act of, or by any omission to perform some duty imposed by law or agreement on Contractor, its subcontractors or either's agent or employee. The foregoing indemnity shall include, without limitation, reasonable fees of attorneys, consultants and experts and related costs and City's costs of investigating any claims against the City. 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.

17. Incidental and Consequential Damages. Contractor shall be responsible for incidental and consequential damages resulting in whole or in part from Contractor's acts or omissions. Nothing in this Agreement shall constitute a waiver or limitation of any rights that City may have under applicable law.

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 (COMPENSATION) 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. Delays; Unavoidable Delays; Liquidated Damages.

a. Delays

1) Prior to commencing a project end-user departments and Contractor shall develop a project timeline and scope of work designating the Contractor's responsibility for each phase of the project and the City's responsibilities if any. Any delays encountered by Contractor

or City in the performance of this Agreement will be excused if and to the extent such delays are deemed unavoidable as determined by the department head administering the project.

2) Either party's failure to notify the other party on a timely basis of any unavoidable delay will subsequently constitute a waiver of the delayed party's right to claim an unavoidable delay. Contractor and City shall have the right to review and contest the validity of any unavoidable delay claimed by the other party.

3) Other than agreed upon compensation for Products or Services to be delivered under this Agreement and except as otherwise provided by law or the provisions of this Agreement, no monetary damages or compensation of any kind will be paid to Contractor due to unavoidable delays in the performance of this Agreement. To the fullest extent permitted by law, Contractor agrees to waive all claims against the City, its consultants, and their respective directors, officers, agents, employees, and authorized representatives, for any loss or damage sustained by reason of delays in the performance of this Agreement.

4) If a delay would affect a Project Schedule in an Order for Consulting Services, within ten (10) business days of either party encountering a delay, the delayed party must notify the other party in writing of the delay and the nature and estimated length of the delay (which, if issued by Contractor shall constitute Contractor's Delay Claim). Contractor and City will thereafter work cooperatively to develop a revised Project Schedule. City will respond to Contractor's Delay Claim within ten (10) business days after both receipt of the Delay Claim and the completion of the revised Project Schedule. In the event that Contractor and City cannot agree on a revised Project Schedule, then City must respond to Contractor's Delay Claim within ten (10) business days after City notifies Contractor of the inability to agree on a Revised Project Schedule. Until both Contractor and City agree on the revised Project Schedule, the existing Project Schedule shall remain in effect and liquidated damages will not accrue for any period in excess of ten (10) business days during which Contractor is waiting for City's response to its Delay Claim.

b. Liquidated Damages

In developing a Project Schedule specific to an Order for Consulting Services, the parties may agree upon Critical Milestones for a particular project subject to liquidated damages. By entering into this Agreement, Contractor agrees that in the event the performance of Consulting Services are delayed beyond the Critical Milestones set forth in a Project Schedule, City will suffer actual damages that will be impractical or extremely difficult to determine. Any Project Schedule containing Critical Milestones shall also state the amount of liquidated damages for any failure to meet those Critical Milestones, which shall not be a penalty, but shall be a reasonable estimate of the loss that City will incur based on the delay, established in light of the circumstances existing at the time the Project Schedule was agreed upon. 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 in the Project Schedule or such extensions of time permitted in writing by Purchasing.

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. | 37. Drug-free workplace policy |
| 10. Taxes | 53. Compliance with laws |
| 15. Insurance | 55. Supervision of minors |
| 24. Proprietary or confidential information of City | 57. Protection of private information |
| 30. Assignment | |

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

3) Contractor (a) is generally not paying its debts as they become due, (b) files, or consents by answer or otherwise to the filing against it of, a petition for relief or reorganization or arrangement or any other petition in bankruptcy or for liquidation or to take advantage of any bankruptcy, insolvency or other debtors’ relief law of any jurisdiction, (c) makes an assignment for the benefit of its creditors, (d) consents to the appointment of a custodian, receiver, trustee or other officer with similar powers of Contractor or of any substantial part of Contractor’s property or (e) takes action for the purpose of any of the foregoing.

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

b. On and after any Event of Default, City shall have the right to exercise its legal and equitable remedies, including, without limitation, the right to terminate this Agreement or to seek specific performance of all or any part of this Agreement. In addition, City shall have the right (but 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.
- 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, without profit, 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. Reasonable costs may include a reasonable allowance for actual overhead, not to exceed a total of 10% of Contractor's direct costs for services or other work. Any overhead allowance shall be separately itemized. Contractor may also recover the reasonable cost of preparing the invoice.

2) A reasonable allowance for profit on the cost of the services and other work described in the immediately preceding subsection (1), provided that Contractor can establish, to the satisfaction of City, that Contractor would have made a profit had all services and other work under this Agreement been completed, and provided further, that the profit allowed shall in no event exceed 5% of such cost.

3) 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.

4) 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 subsection (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 which is not reasonable or authorized under such subsection (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 which 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 | 48. Modification of Agreement. |
| 14. Independent Contractor; Payment of Taxes and Other Expenses | 49. Administrative Remedy for Agreement Interpretation. |
| 15. Insurance | 50. Agreement Made in California; Venue |
| 16. Indemnification | 51. Construction |
| 17. Incidental and Consequential Damages | 52. Entire Agreement |
| 18. Liability of City | 56. Severability |
| | 57. Protection of private information |

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 which, 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 which constitutes a violation of said provisions and agrees that it will immediately notify the City if it becomes aware of any such fact during the term of this Agreement.

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 which may be owned or controlled by City and that such information may contain proprietary or confidential details, the disclosure of which to third parties may be damaging to City. Contractor agrees that all information disclosed by City to Contractor shall be held in confidence and used only in 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 by fax, and shall be addressed as follows:

To City: Greg Pustelnik
Office of Contract Administration
1 Dr. Carlton B. Goodlett Place
City Hall, Room 430
San Francisco, CA 94102
email: Greg.pustelnik@sfgov.org

To Contractor: Damon Lembi
Learn iT!
33 New Montgomery St., Suite 300
San Francisco, CA 94105
email: damon.lembi@learnit.com

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

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 or personnel and other data related to all other matters covered by this Agreement, whether funded in whole or in part under this Agreement. Contractor shall maintain such data and records in an accessible location and condition for a period of not fewer than five years after final payment under this Agreement or until after final audit has been resolved, whichever is later. The State of California or any federal agency having an interest in the subject matter of this Agreement shall have the same rights conferred upon City by this Section.

29. Subcontracting. Contractor is prohibited from subcontracting this Agreement or any part of it unless such subcontracting is first approved by City in writing. 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. Consideration of criminal history in hiring and employment decisions.

a. Contractor agrees to comply fully with and be bound by all of the provisions of Chapter 12T "City Contractor/Subcontractor Consideration of Criminal History in Hiring and Employment Decisions," of the San Francisco Administrative Code (Chapter 12T), including the remedies provided, and implementing regulations, as may be amended from time to time. The

provisions of Chapter 12T are incorporated by reference and made a part of this Agreement as though fully set forth herein. The text of the Chapter 12T is available on the web at www.sfgov.org/olse/fco. A partial listing of some of Contractor's obligations under Chapter 12T is set forth in this Section. Contractor is required to comply with all of the applicable provisions of 12T, irrespective of the listing of obligations in this Section. Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 12T.

b. The requirements of Chapter 12T shall only apply to a Contractor's or Subcontractor's operations to the extent those operations are in furtherance of the performance of this Agreement, shall apply only to applicants and employees who would be or are performing work in furtherance of this Agreement, shall apply only when the physical location of the employment or prospective employment of an individual is wholly or substantially within the City of San Francisco, and shall not apply when the application in a particular context would conflict with federal or state law or with a requirement of a government agency implementing federal or state law.

c. Contractor shall incorporate by reference in all subcontracts the provisions of Chapter 12T, and shall require all subcontractors to comply with such provisions. Contractor's failure to comply with the obligations in this subsection shall constitute a material breach of this Agreement.

d. Contractor or Subcontractor shall not inquire about, require disclosure of, or if such information is received base an Adverse Action on an applicant's or potential applicant for employment, or employee's: (1) Arrest not leading to a Conviction, unless the Arrest is undergoing an active pending criminal investigation or trial that has not yet been resolved; (2) participation in or completion of a diversion or a deferral of judgment program; (3) a Conviction that has been judicially dismissed, expunged, voided, invalidated, or otherwise rendered inoperative; (4) a Conviction or any other adjudication in the juvenile justice system; (5) a Conviction that is more than seven years old, from the date of sentencing; or (6) information pertaining to an offense other than a felony or misdemeanor, such as an infraction.

e. Contractor or Subcontractor shall not inquire about or require applicants, potential applicants for employment, or employees to disclose on any employment application the facts or details of any conviction history, unresolved arrest, or any matter identified in subsection 32(d), above. Contractor or Subcontractor shall not require such disclosure or make such inquiry until either after the first live interview with the person, or after a conditional offer of employment.

f. Contractor or Subcontractor shall state in all solicitations or advertisements for employees that are reasonably likely to reach persons who are reasonably likely to seek employment to be performed under this Agreement, that the Contractor or Subcontractor will consider for employment qualified applicants with criminal histories in a manner consistent with the requirements of Chapter 12T.

g. Contractor and Subcontractors shall post the notice prepared by the Office of Labor Standards Enforcement (OLSE), available on OLSE's website, in a conspicuous place at every workplace, job site, or other location under the Contractor or Subcontractor's control at which work is being done or will be done in furtherance of the performance of this Agreement. The notice shall be posted in English, Spanish, Chinese, and any language spoken by at least 5% of the employees at the workplace, job site, or other location at which it is posted.

h. Contractor understands and agrees that if it fails to comply with the requirements of Chapter 12T, the City shall have the right to pursue any rights or remedies available under Chapter 12T, including but not limited to, a penalty of \$50 for a second violation and \$100 for a subsequent violation for each employee, applicant or other person as to whom a violation occurred or continued, termination or suspension in whole or in part of this Agreement.

33. Local Business Enterprise Utilization; Liquidated Damages

a. **The LBE Ordinance.** Contractor, shall comply with all the requirements of the Local Business Enterprise and Non-Discrimination in Contracting Ordinance set forth in Chapter 14B of the San Francisco Administrative Code as it now exists or as it may be amended in the future (collectively the “LBE Ordinance”), provided such amendments do not materially increase Contractor’s obligations or liabilities, or materially diminish Contractor’s rights, under this Agreement. Such provisions of the LBE Ordinance are incorporated by reference and made a part of this Agreement as though fully set forth in this section. Contractor’s willful failure to comply with any applicable provisions of the LBE Ordinance is a material breach of Contractor’s obligations under this Agreement and shall entitle City, subject to any applicable notice and cure provisions set forth in this Agreement, to exercise any of the remedies provided for under this Agreement, under the LBE Ordinance or otherwise available at law or in equity, which remedies shall be cumulative unless this Agreement expressly provides that any remedy is exclusive. In addition, Contractor shall comply fully with all other applicable local, state and federal laws prohibiting discrimination and requiring equal opportunity in contracting, including subcontracting.

b. Compliance and Enforcement

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

2) **Subcontracting Goals.** The LBE subcontracting participation goal for this contract is **15% of the total value of services procured under this Agreement.** Contractor shall fulfill the subcontracting commitment made in its bid or proposal. Each invoice submitted to City for payment shall include the information required in the CMD Progress Payment Form

and the CMD Payment Affidavit. Failure to provide the CMD Progress Payment Form and the CMD Payment Affidavit with each invoice submitted by Contractor shall entitle City to withhold 20% of the amount of that invoice until the CMD Payment Form and the CMD Subcontractor Payment Affidavit are provided by Contractor. Contractor shall not participate in any back contracting to the Contractor or lower-tier subcontractors, as defined in the LBE Ordinance, for any purpose inconsistent with the provisions of the LBE Ordinance, its implementing rules and regulations, or this Section.

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

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

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. Contractor's failure to comply with the obligations in this subsection shall constitute a material breach of this Agreement.

c. **Nondiscrimination in Benefits.** Contractor does not as of the date of this Agreement and will not during the term of this Agreement, in any of its operations in San Francisco, on real property owned by San Francisco, or where work is being performed for the City elsewhere in the United States, discriminate in the provision of bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits, as well as any benefits other than the benefits specified above, between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees, where the domestic partnership has been registered with a governmental entity pursuant to state or local law authorizing such registration, subject to the conditions set forth in §12B.2(b) of the San Francisco Administrative Code.

d. **Condition to Contract.** As a condition to this Agreement, Contractor shall execute the "Chapter 12B Declaration: Nondiscrimination in Contracts and Benefits" form (Form 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 \$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.

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

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

37. 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.

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

39. 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.

40. 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 or organization’s net worth or other proprietary financial data submitted for qualification for a contract or other benefit until and unless that person or organization is awarded the contract or benefit. Information provided which is covered by this paragraph will be made available to the public upon request.

41. 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.

42. Limitations on Contributions. Through execution of this Agreement, Contractor acknowledges that it is familiar with section 1.126 of the City’s Campaign and Governmental Conduct Code, which prohibits any person who contracts with the City for the rendition of personal services, for the furnishing of any material, supplies or equipment, for the sale or lease of any land or building, or for a grant, loan or loan guarantee, from making any campaign contribution to (1) an individual holding a City elective office if the contract must be approved by the individual, a board on which that individual serves, or the board of a state agency on which an appointee of that individual serves, (2) a candidate for the office held by such individual, or (3) a committee controlled by such individual, at any time from the commencement of negotiations for the contract until the later of either the termination of

negotiations for such contract or six months after the date the contract is approved. Contractor acknowledges that the foregoing restriction applies only if the contract or a combination or series of contracts approved by the same individual or board in a fiscal year have a total anticipated or actual value of \$50,000 or more. Contractor further acknowledges that the prohibition on contributions applies to each prospective party to the contract; each member of Contractor's board of directors; Contractor's chairperson, chief executive officer, chief financial officer and chief operating officer; any person with an ownership interest of more than 20 percent in Contractor; any subcontractor listed in the bid or contract; and any committee that is sponsored or controlled by Contractor. Additionally, Contractor acknowledges that Contractor must inform each of the persons described in the preceding sentence of the prohibitions contained in Section 1.126. Contractor further agrees to provide to City the names of each person, entity or committee described above.

43. Requiring Minimum Compensation for Covered Employees

a. Contractor agrees to comply fully with and be bound by all of the provisions of the Minimum Compensation Ordinance (MCO), as set forth in San Francisco Administrative Code Chapter 12P (Chapter 12P), including the remedies provided, and implementing guidelines and rules. The provisions of Sections 12P.5 and 12P.5.1 of Chapter 12P are incorporated herein by reference and made a part of this Agreement as though fully set forth. The text of the MCO is available on the web at www.sfgov.org/olse/mco. A partial listing of some of Contractor's obligations under the MCO is set forth in this Section. Contractor is required to comply with all the provisions of the MCO, irrespective of the listing of obligations in this Section.

b. The MCO requires Contractor to pay Contractor's employees a minimum hourly gross compensation wage rate and to provide minimum compensated and uncompensated time off. The minimum wage rate may change from year to year and Contractor is obligated to keep informed of the then-current requirements. Any subcontract entered into by Contractor shall require the subcontractor to comply with the requirements of the MCO and shall contain contractual obligations substantially the same as those set forth in this Section. It is Contractor's obligation to ensure that any subcontractors of any tier under this Agreement comply with the requirements of the MCO. If any subcontractor under this Agreement fails to comply, City may pursue any of the remedies set forth in this Section against Contractor.

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

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

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

f. Contractor's commitment to provide the Minimum Compensation is a material element of the City's consideration for this Agreement. The City in its sole discretion shall determine whether such a breach has occurred. The City and the public will suffer actual damage that will be impractical or extremely difficult to determine if the Contractor fails to

comply with these requirements. Contractor agrees that the sums set forth in Section 12P.6.1 of the MCO as liquidated damages are not a penalty, but are reasonable estimates of the loss that the City and the public will incur for Contractor's noncompliance. The procedures governing the assessment of liquidated damages shall be those set forth in Section 12P.6.2 of Chapter 12P.

g. Contractor understands and agrees that if it fails to comply with the requirements of the MCO, the City shall have the right to pursue any rights or remedies available under Chapter 12P (including liquidated damages), under the terms of the contract, and under applicable law. If, within 30 days after receiving written notice of a breach of this Agreement for violating the MCO, Contractor fails to cure such breach or, if such breach cannot reasonably be cured within such period of 30 days, Contractor fails to commence efforts to cure within such period, or thereafter fails diligently to pursue such cure to completion, the City shall have the right to pursue any rights or remedies available under applicable law, including those set forth in Section 12P.6(c) of Chapter 12P. Each of these remedies shall be exercisable individually or in combination with any other rights or remedies available to the City.

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

i. If Contractor is exempt from the MCO when this Agreement is executed because the cumulative amount of agreements with this department for the fiscal year is less than \$25,000, but Contractor later enters into an agreement or agreements that cause contractor to exceed that amount in a fiscal year, Contractor shall thereafter be required to comply with the MCO under this Agreement. This obligation arises on the effective date of the agreement that causes the cumulative amount of agreements between the Contractor and this department to exceed \$25,000 in the fiscal year.

44. Requiring Health Benefits for Covered Employees

Contractor agrees to comply fully with and be bound by all of the provisions of the Health Care Accountability Ordinance (HCAO), as set forth in San Francisco Administrative Code Chapter 12Q, including the remedies provided, and implementing regulations, as the same may be amended from time to time. The provisions of section 12Q.5.1 of Chapter 12Q are incorporated by reference and made a part of this Agreement as though fully set forth herein. The text of the HCAO is available on the web at www.sfgov.org/olse. Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 12Q.

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

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

c. Contractor's failure to comply with the HCAO shall constitute a material breach of this agreement. City shall notify Contractor if such a breach has occurred. If, within 30 days after receiving City's written notice of a breach of this Agreement for violating the HCAO, Contractor fails to cure such breach or, if such breach cannot reasonably be cured within such period of 30 days, Contractor fails to commence efforts to cure within such period, or thereafter

fails diligently to pursue such cure to completion, City shall have the right to pursue the remedies set forth in 12Q.5.1 and 12Q.5(f)(1-6). Each of these remedies shall be exercisable individually or in combination with any other rights or remedies available to City.

d. Any Subcontract entered into by Contractor shall require the Subcontractor to comply with the requirements of the HCAO and shall contain contractual obligations substantially the same as those set forth in this Section. Contractor shall notify City's Office of Contract Administration when it enters into such a Subcontract and shall certify to the Office of Contract Administration that it has notified the Subcontractor of the obligations under the HCAO and has imposed the requirements of the HCAO on Subcontractor through the Subcontract. Each Contractor shall be responsible for its Subcontractors' compliance with this Chapter. If a Subcontractor fails to comply, the City may pursue the remedies set forth in this Section against Contractor based on the Subcontractor's failure to comply, provided that City has first provided Contractor with notice and an opportunity to obtain a cure of the violation.

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

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

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

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

i. Contractor shall provide reports to the City in accordance with any reporting standards promulgated by the City under the HCAO, including reports on Subcontractors and Subtenants, as applicable.

j. Contractor shall provide City with access to records pertaining to compliance with HCAO after receiving a written request from City to do so and being provided at least ten business days to respond.

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

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

m. If Contractor is exempt from the HCAO when this Agreement is executed because its amount is less than \$25,000 (\$50,000 for nonprofits), but Contractor later enters into an agreement or agreements that cause Contractor's aggregate amount of all agreements with City to reach \$75,000, all the agreements shall be thereafter subject to the HCAO. This obligation arises on the effective date of the agreement that causes the cumulative amount of agreements between Contractor and the City to be equal to or greater than \$75,000 in the fiscal year.

45. First Source Hiring Program

a. Incorporation of Administrative Code Provisions by Reference.

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

b. First Source Hiring Agreement.

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

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

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

3) Set appropriate requirements for providing notification of available entry level positions to the San Francisco Workforce Development System so that the System may train and refer an adequate pool of qualified economically disadvantaged individuals to participating employers. Notification should include such information as employment needs by occupational title, skills, and/or experience required, the hours required, wage scale and duration of employment, identification of entry level and training positions, identification of English language proficiency requirements, or absence thereof, and the projected schedule and

procedures for hiring for each occupation. Employers should provide both long-term job need projections and notice before initiating the interviewing and hiring process. These notification requirements will take into consideration any need to protect the employer's proprietary information.

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

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

6) Set the term of the requirements.

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

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

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

c. **Hiring Decisions**

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

d. **Exceptions**

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

e. **Liquidated Damages.**

Contractor agrees:

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

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

3) That the contractor's commitment to comply with this Chapter is a material element of the City's consideration for this contract; that the failure of the contractor to

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

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

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

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

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

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

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

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

f. **Subcontracts.**

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

46. 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.

47. 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.

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

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

50. 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.

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

52. Entire Agreement. This contract sets forth the entire Agreement between the parties, and supersedes all other oral or written provisions. This contract may be modified only as provided in Section 48, "Modification of Agreement."

53. Compliance with Laws. Contractor shall keep itself fully informed of the City's Charter, codes, ordinances and regulations of the City and of all state, and federal laws in any manner affecting the performance of this Agreement, and must at all times comply with such local codes, ordinances, and regulations and all applicable laws as they may be amended from time to time.

54. 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.

55. Reserved. (Supervision of Minors).

56. 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.

57. 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.

58. Sugar-Sweetened Beverage Prohibition. Contractor agrees that it will not sell, provide, or otherwise distribute Sugar-Sweetened Beverages, as defined by San Francisco Administrative Code Chapter 101, as part of its performance of this Agreement.

59. Food Service Waste Reduction Requirements. Contractor agrees to comply fully with and be bound by all of the provisions of the Food Service Waste Reduction Ordinance, as set forth in San Francisco Environment Code Chapter 16, including the remedies provided, and implementing guidelines and rules. The provisions of Chapter 16 are incorporated herein by reference and made a part of this Agreement as though fully set forth. This provision is a material term of this Agreement. By entering into this Agreement, Contractor agrees that if it breaches this provision, City will suffer actual damages that will be impractical or extremely difficult to determine; further, Contractor agrees that the sum of one hundred dollars (\$100) liquidated damages for the first breach, two hundred dollars (\$200) liquidated damages for the second breach in the same year, and five hundred dollars (\$500) liquidated damages for subsequent breaches in the same year is reasonable estimate of the damage that City will incur

based on the violation, established in light of the circumstances existing at the time this Agreement was made. Such amount shall not be considered a penalty, but rather agreed monetary damages sustained by City because of Contractor's failure to comply with this provision.

60. Reserved (Slavery Era Disclosure).

61. Cooperative Drafting. This Agreement has been drafted through a cooperative effort of both parties, and both parties have had an opportunity to have the Agreement reviewed and revised by legal counsel. No party shall be considered the drafter of this Agreement, and no presumption or rule that an ambiguity shall be construed against the party drafting the clause shall apply to the interpretation or enforcement of this Agreement.

62. PCI Requirements. Contractors providing services and products that collect, transmit or store cardholder data, are subject to the following requirements:

a. Applications shall be compliant with the Payment Application Data Security Standard (PA-DSS) and validated by a Payment Application Qualified Security Assessor (PA-QSA). A Contractor whose application has achieved PA-DSS certification must then be listed on the PCI Council's list of PA-DSS approved and validated payment applications.

b. Gateway providers shall have appropriate Payment Card Industry Data Security Standards (PCI DSS) certification as service providers (<https://www.pcisecuritystandards.org/index.shtml>). Compliance with the PCI DSS shall be achieved through a third party audit process. The Contractor shall comply with Visa Cardholder Information Security Program (CISP) and MasterCard Site Data Protection (SDP) programs.

c. For any Contractor that processes PIN Debit Cards, payment card devices supplied by Contractor shall be validated against the PCI Council PIN Transaction Security (PTS) program.

d. For items 63(a) to 63(c) above, Contractor shall provide a letter from its qualified security assessor (QSA) affirming its compliance and current PCI or PTS compliance certificate.

e. Contractor shall be responsible for furnishing City with an updated PCI compliance certificate 30 days prior to its expiration.

f. Bank Accounts. Collections that represent funds belonging to the City and County of San Francisco shall be deposited, without detour to a third party's bank account, into a City and County of San Francisco bank account designated by the Office of the Treasurer and Tax Collector.

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

- 1) This Agreement
- 2) Appendix A [General Administrative Requirements: Scope of Work (SOW)]
- 3) Contractor's Proposal
- 4) Request for Proposal (RFP) 95270.

64. Appendices. The following appendices are hereby attached and incorporated into this Agreement as though fully set forth herein and together form the complete Agreement between the parties. Contractor acknowledges and agrees that the terms and conditions of Appendix D shall control over the applicable City purchases. Contractor shall incorporate by reference in all subcontracts the provisions of this Agreement.

- A: General Administrative Requirements: Scope of Work
- B. The RFP, all Addenda, and Contractor's response to the RFP, are attached and incorporated herein by reference as though fully set forth herein.
- C. Insurance Waiver
- D. Sample Agreements to be executed as applicable on a per project basis, substantially in the form attached:
 - i. P-545 Software License Agreement
 - ii. P-540 Software Maintenance Agreement
 - iii. P-542 Software Development Agreement
 - iv. P-500 Professional Services Agreement
 - v. P-530 Equipment Maintenance Agreement
 - vi. Software as a Service Agreement
 - vii. Financing Agreement

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

CITY

CONTRACTOR

Recommended by:

Learn iT!

Greg Pustelnik
Supervising Purchaser
Office of Contract Administration

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

By: _____
Rosa M. Sánchez
Deputy City Attorney

Approved:

Damon Lembi
CEO
Learn iT!
33 New Montgomery Street, Suite 300
San Francisco, CA 94105

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

City Vendor Number: C00756

Appendix A

General Administrative Requirements: Scope of Work

This Scope of Work is used as a general guide for procedures for ordering products and services under the current Technology Marketplace. Although they should be similar, procedures are subject to change and this Scope of Work is not intended to be a complete list of all work necessary under the Agreement.

A. Summary of the quotation and ordering process

This section describes generally how the day-to-day operations of the Technology Marketplace work. These procedures are subject to change. Below is a summary of the current quotation and ordering process:

1. A City Department emails a Technology Marketplace vendor and requests a written quotation for products or services.
 - a. For high-dollar orders: Purchasing requires Ordering Departments to seek competitive quotes from all suppliers in the appropriate Tier, and requires at least three quotations. Under the current Technology Marketplace, \$100,000 is the threshold defining high-dollar orders. This threshold could change during the life of the new contract. For orders exceeding \$100,000 subcontracting information is also required by CMD.
 - b. For orders over \$10,000: Purchasing requires Departments to provide a budgetary quote from a Technology Marketplace contractor when submitting a requisition to Purchasing.
 - c. For orders \$10,000 and below: Departments should first look to a Micro LBE if possible. Purchasing does not require Departments to seek more than one quotation, but encourages it.
2. The Contractor completes the quotation and e-mails it to the Department.
3. The Department submits the Technology Marketplace quotation forms to the Department of Technology (“DT”) for review. If the quotation contains any services, the quotation is sent to Union Local 21 for review and comment.
4. Once approved, Purchasing creates the Purchase Order and transmits it to the Contractor.

B. Ordering, delivery, invoicing and related procedures

1. Preparing the quotation

Contractors must provide written responses to requests for quotes within 48 hours (excluding weekends) and within 7 days (excluding weekends) for products and services, with one of the following: a quote, request for an extension of time (which may or may not be granted), or “no bid”.

2. Ordering

Products and services shall be ordered by the City by means of a Purchase Order or Blanket Purchase Order and approved by Purchasing. All orders must be signed, approved and issued by Purchasing in writing.

Contractors may not accept verbal orders from Departments, or any order that is not on a Purchase Order or Blanket Purchase Order approved by Purchasing. Contractors shall accept orders by fax or e-mail.

Within three working days after receipt of an order, the Contractor must verify the accuracy of the order and provide written or electronic notification of Contractor's acceptance or rejection of the order and delivery dates.

Contractor shall not accept orders from any Department that has had its ordering privileges suspended. A list of Departments receiving such suspensions will be furnished to the Contractor by Purchasing.

If an item is discontinued, the Contractor must notify Purchasing and the end user Department within three working days of receipt of an order or upon notification by the manufacturer or distributor (whichever comes first) that the order cannot be filled. The Contractor must not fill the order with a substitute item without the prior written approval of Purchasing. Items that are substituted without approval may be returned at no cost to the City and the order cancelled.

3. Delivery

Contractor shall deliver products to Technology Marketplace customers within ten City business days after receipt of the order, unless the product is not available from the manufacturer. Contractor must notify any Department placing an order within 72 hours if delivery of that order will be delayed beyond ten (10) business days. Contractor must keep Technology Marketplace customers apprised of changes in the delivery status of their delayed orders.

Contractor must deliver, free of charge, all products sold through the Technology Marketplace. All shipments shall be made “FOB Destination” to all City delivery locations identified on the Purchase Order. Some delivery locations may be outside of San Francisco City limits.

Orders must be delivered in total, unless a prior written authorization for partial shipment has been received from the Technology Marketplace customer placing the order.

All products shall be delivered inside the building.

If the Contractor fails to deliver an article or service of the quality, in the manner or within the time called for by the Technology Marketplace Agreement or an individual order, then City may cancel the order at no cost to the City and acquire such article or service from any source. If City pays a greater price than that named in the Agreement or order for such article or service, the excess price may be charged to and collected from Contractor and/or from the financial guarantee provided by Contractor; or, the City may treat the failure as a default subject to all applicable rights and remedies under the Agreement; or, the City may return deliveries already made and receive a refund from Contractor.

4. Invoicing

For products or services invoices may be submitted only after delivery is complete. Invoices must clearly state the terms of any “prompt pay” discount. A packing slip must be included with each shipment of products to Technology Marketplace customers and must show the Purchase Order number, a complete list of items delivered, and the Department name and contact person. The Purchase Order number must also appear on the outside of the package.

5. Return rights

Contractors shall accept all Standard Products, if they have not been opened, for return within thirty days of delivery, and credit the customer in full. The City shall not pay any restocking fees. Standard Products are those products listed in the 6 major manufacturers on Table 1 of RFP 95270-B, on page 11. For all other products, Contractors may only pass through actual restocking fees incurred from a third party. Administrative costs and handling fees are not allowed.

6. Cancellation

Contractor must allow any order, other than orders of non-Standard Products, to be cancelled by the Ordering Department seven (7) days prior to its scheduled delivery.

7. Title and Warranties

a. Warranty Service

Contractors shall pass on all warranties offered by manufacturers to the City on all products within 48 hours (excluding weekends) of delivery to City. The Contractor must also offer any additional warranty services offered by a manufacturer for purchase.

b. Passage of title

Contractors must pass title of product purchased to the City within 48 hours (excluding weekends) of delivery and the City must be eligible for all benefits of ownership including free services provided under manufacturer’s warranties within 48 hours (excluding

weekends) of delivery of product. If after 48 hours the City cannot obtain service under the manufacturer's warranty, because title has not been properly passed to the City by the Contractor or the Contractor has not properly recorded ownership, the City shall immediately notify the Contractor. Contractor will have 24 hours to record title of the product properly, repair the product or replace the non-working product with a comparable working product. Failure to comply with any of the above may result in irreparable harm to the City and a \$100 per day liquidated damage will be assessed from the date that the issue is first reported by the City.

8. Software Licenses

All software licenses procured through the Technology Marketplace shall be passed on to the City within 48 hours (excluding weekends) of delivery and the City must be eligible for all benefits of ownership including free services provided under manufacturer's warranties within 48 hours (excluding weekends) of delivery of software license. Failure to comply with any of the above may result in irreparable harm to the City and a \$100 per day liquidated damage will be assessed from the date that the issue is first reported by the City.

C. Communications with the City

1. General communications with the City

Contractors must make reasonable efforts to respond to inquiries from City Departments within one business day. City inquiries may include requests for consultation, design, pricing, order status, product comparisons, compatibility information and return information.

Contractors must provide a toll-free number to accommodate telephone inquiries staffed by adequate personnel to provide prompt, courteous, and informed answers to customer inquiries within two hours of the customer's initial call. Contractors must offer a "Help Desk" option to Technology Marketplace clients.

2. E-mail

Contractors must provide e-mail communication capacity with the City. Such E-mail communication must be compatible with that used by the City and any public sector entities to which the Technology Marketplace Contract applies.

3. Account Manager

Contractors must provide an Account Manager to function as the single point of contact with the City at the Technology Marketplace. The Account Manager must be dedicated to servicing the City's account exclusively, and cannot be used to service other accounts of the Contractor. This person will be responsible for all aspects of the Contract and its facilitation. The Account Manager must be available to the City by phone, fax and pager. The proposed Account Manager should meet with Purchasing at least once per month, or as the need arises, at no additional cost to the City to ensure that services continually meet the City's needs.

D. General product policies

1. New products

Contractors must sell only new products to the City. Contractors must offer the latest commercially available versions of any and all hardware and software sold to the City. The City will not accept “gray market products.”

If the latest commercially available version is not provided at the time of an order, the version sold must be replaced with the latest version when it becomes available, giving the City full credit for the version that was temporarily supplied.

If a new product is no longer available, then a remanufactured product will only be considered upon prior written notification from Contractor to the City. A remanufactured product will not be shipped to the City unless Purchasing has issued a written letter of acceptance. Remanufactured equipment will only be accepted if it includes the full manufacturer’s warranty, is eligible for inclusion under any applicable maintenance contracts and can be certified (as applicable) for maintenance purposes at no additional cost to the City.

2. Prohibited products and minimum specifications

From time to time, the City reserves the right to prohibit Contractor from selling to the City certain products, and to prohibit user Departments from purchasing the same. The City may also set minimum specifications for performance or energy efficiency that may be updated from time to time. Contractor will be required to provide products that comply with these specifications. A Contractor found to be selling products that do not comply with these specifications may be suspended from selling to the City under this Agreement for a period of up to 3 months.

3. Environmentally preferable product purchasing

The City wishes to ensure that its expenditures of public money are made in a manner consistent with its human health and environmental policies. A primary tool for meeting this goal is the purchase of environmentally preferable products, that is, products for which the environmental impacts have been considered and found to be less damaging to the environment and human health than competing products and services that serve the same purpose. The Precautionary Purchasing Ordinance (San Francisco Environment Code, Chapter 2) establishes the framework for environmentally preferable purchasing efforts in San Francisco.

Computer equipment has been designated as a high priority product category for the City’s environmentally preferable purchasing efforts. It is the intention of the City to contract with computer equipment vendors that are willing and able to work as active partners with City staff in promoting environmentally preferable purchasing. The City also wishes to reward vendors and manufacturers that are leaders in reducing the overall environmental impacts of their operations. Vendors selected to participate in this contract will be expected to maintain complete

and easily accessible environmental information on their product offerings, including—but not limited to—listings of available equipment that meets the federal Electronic Products Environmental Assessment Tool (EPEAT) criteria, Energy Star® certified product offerings, and information necessary for completing the Federal Electronics Challenge Product Information Sheet. Vendors will be required to offer EPEAT silver- and gold-certified computer products as part of this contract. The City also intends to continually upgrade its environmental criteria for computer purchases.

E. Maintenance and Repair

All maintenance and repair work will be performed by qualified and trained personnel. Contractor must offer written quotes for all product repairs including an estimate of the time and cost of repairs.

F. Consulting and Professional services projects

1. General

This category consists of professional services, such as project management, software development, hardware and software installation, system design, training, and other professional services related to the deployment of technology. It excludes sales and normal maintenance of hardware and software.

A Contractor must submit a detailed Scope of Work defining any consulting or professional services project requested by a Department. The Scope of Work may be subject to approval by DT and may be subject to other reviews such as Local 21, before the project will be permitted to proceed. As applicable, the City may request that the project include a transition plan detailing how the project will eventually be transitioned to City personnel, including a designation of City employees and training plans.

Performance Bonds are highly recommended by Purchasing and may be required by Purchasing based on the level of risk associated with the project. The cost of any performance bond will be the responsibility of the Ordering Department.

2. Projects over \$100,000

2.1 The Contractor must submit the following to the requesting Department:

- a. A detailed Scope of Work (“SOW”) defining the project to be delivered to the Department.
- b. The SOW should include a schedule with agreed upon deliverables and milestones.
- c. The SOW should designate any critical milestones that would be subject to liquidated damages for delay, if applicable.
- d. The name of the project management software that will be used (such as MS Project).

- e. Estimate cost of subcontractors and materials.
- f. Training should be specified as a separate line item and deliverable.
Including:
 - i) A detailed description of the training and a list of skills that will be made available through the training to provide for the ongoing maintenance of said project.
 - ii) Estimated timeframe for training.
 - iii) Number of employees to be trained and the number of hours of training to be provided to each employee.
 - iv) The cost associated with training.

2.2 The Contractor must agree to 10% retention by the City on progress payments. The retention will be released for payment to the Contractor when the project is accepted by the Department. Progress payments will be linked to a specific deliverable or the meeting of a specific milestone.

2.3 The Contractor may be required to provide formal status reports during the life of the project. The format of the status report and the frequency of its preparation will be determined during the project approval process and will be dependent upon a number of variables such as:

- a. Estimated cost
- b. Project complexity
- c. Estimated time
- d. Other aspects of the project deemed relevant by the City

2.4 Any consulting or personal services project that exceeds \$100,000 or is expected to require over 90 days to complete may require quarterly meetings that include representation from:

- a. The Ordering Department
- b. COIT and/or DT
- c. Contract Monitoring Division (“CMD”)
- d. The Technology Marketplace Contractor
- e. All project sub-contractors

G. Pricing policies

1. Pricing

All Technology Marketplace Contractors will be required to extend their most favorable pricing for products and services it makes available to major companies or other public entities within the State of California comparable in size and/or requirements to the City during the term of the Agreement. This most favorable pricing must be at least equivalent to the pricing that the Contractor makes available to major companies or other public entities within the state of California comparable in size and/or requirements to the City. The most favored pricing will be

established during the time frame that Contractor is required to provide a written response to the City's request for quote.

2. Verification of Contractor's prices

Within 7 days of a request, the Contractor must provide evidence of the manufacturer's list price or the actual cost to the Contractor of products and services or subcontracted services sold through the Technology Marketplace as applicable. "Evidence" may consist of an actual manufacturer's price list, a letter provided on the manufacturer's letterhead containing a contact name, signature and telephone number for the manufacturer's representative or actual invoices from manufacturers or distributors or subcontractors to the Contractor for products and services purchased by the City.

3. Violation of pricing requirements

Contractor will abide by the pricing policy of Section G.1. If Contractor is found to charge prices higher than those agreed upon in this Agreement then Contractor must reimburse the City for the excess charges and Contractor may be prohibited from doing business with the City for a period of up to 3 months. If upon a second inspection, Contractor is found to still be charging the City prices higher than those agreed upon in this Agreement, the City in its sole and absolute discretion may terminate this Agreement.

4. Pricing offered to other customers

Should a Contractor participate in any government, educational, or other special pricing program in the State of California, e.g., CMAS, GSA, Western States Contracting Alliance, etc., the Contractor must make the same pricing available to the City.

5. Mandatory federal and state fees

Contractor shall be responsible for collecting all applicable federal and state mandatory fees with no additional cost mark-up to City, and shall be responsible for remitting the fees to the appropriate agency, including, but not limited to, the California Electronic Waste Recycling Fee: <http://www.boe.ca.gov/sptaxprog/ewaste.htm>.

6. Payment for Travel Expenses and Other Direct Costs (ODC)

The need for travel under this Agreement or ODCs shall be approved in advance of the date of travel in writing by a memo stating the dates of the travel, the purpose, the planned expenses by person, with the City's Project Manager's dated signature indicating approval. Reimbursable expenses shall include actual direct costs (with no markup) of expenses directly incurred by Contractor. Payments will be made by City to Contractor within 30 days after the City has received Contractor's invoice for expenses, submitted in compliance with the United States General Services Administration per diem rates (CONUS) for San Francisco at <http://www.gsa.gov>.

The following items will be eligible for reimbursement as ODCs:

a. Contractor's out-of-town travel ("out-of-town" shall mean outside the nine Bay Area counties: San Francisco, Alameda, Marin, Santa Clara, Sonoma, Contra Costa, Napa, San Mateo, Solano);

b. Contractor's out-of-town meal, travel and lodging expenses for project-related business trips, including, but not limited to:

1) Rental vehicle: Contractor must select the most economical rental agency and type of vehicle available and acquire any commercial rate or government discount available when the vehicle is rented;

2) Personal vehicle use: Contractor will be paid per mile as established by the United State Internal Revenue Service and only for that portion of travel that is outside the nine Bay Area counties. Contractor shall submit to the City an approved mileage log with his/her expense sheet;

3) Contractor meal and lodging expenses shall be reasonable and actual but limited to CONUS per diem rates.

Anything not listed above is not eligible for reimbursement.

H. Cooperative Agreement

The Director of Purchasing may allow other public agencies or non-profit organizations made up of multiple public agencies to utilize this Agreement to obtain some or all of the commodities to be provided by Contractor under the same terms and conditions as the City.

With the exception of City, Contractor shall charge each public agency (the "Ordering Agency") that procures any goods or services under the Technology Marketplace an administrative fee in the amount of 1.9% on each transaction. Contractor shall pay the administrative fee irrespective of whether the Ordering Agency has paid the amount of the fee to Contractor. Contractor shall provide City a monthly report detailing each invoice for goods or services that Contractor submitted to an Ordering Agency. The City may modify the amount of the administrative fee for any fiscal year (July 1 to June 30).

Contractor agrees that this does not create a contractual relationship between City and any Ordering Agency, and that City shall have no liability to Contractor arising out of any agreement between Contractor and any Ordering Agency for goods or services under the Technology Marketplace.

I. Operations, personnel and support

Unless otherwise indicated, Contractors must meet the following requirements at the time the proposal is submitted and for the duration of the Agreement:

1. Offices

Contractors must have a business office within the City and County of San Francisco.

All of the Contractor's offices that are intended to support the requirements of this RFP must be open and its Technology Marketplace personnel must be available during normal working hours Monday through Friday (8 a.m. to 5 p.m.) except for official City holidays.

2. Training and product information

Contractors shall facilitate access to web-based training, product information and technical support offered by manufacturers to Technology Marketplace clients.

J. Leasing and financing

In consultation with the City's Office of Public Finance, the City may elect to pay for Technology Marketplace acquisitions through tax-exempt lease-purchase financing. The City may provide such financing itself or acquire third party financing, under such terms, conditions and interest rates as may be agreed upon between the parties for each financed transaction. Contractors must agree to this type of order and payment method.

Alternatively, the Contractor may also provide financing itself, or acquire other third party financing, under such terms, conditions and interest rates as may be agreed upon between the parties for each financed transaction. Such financing shall be subject to the prior written approval from the Office of Contract Administration.

Contractor shall pass through all warranties for the lease-purchase equipment to the City. The City reserves the right to acquire financing from outside sources. The City's standard Financing Agreement for lease-purchase financing transactions is attached hereto as Appendix D(vii). Provide a detailed description of the program you are offering to the City and a statement indicating your willingness to work with the City's own financing programs.

K. Reports

1. Monthly sales reports

By the tenth day of each month, or the next workday thereafter, Contractors must deliver a report of products and services sold the previous month, including: the type, quantity, manufacturer name, manufacturer's part number and description, price paid per item and name of Department. The City may make changes to the format or specifications for this report. The

Contractor must comply with all such changes. Contractor shall prepare and submit additional reports in accordance with format and content specifications to be provided by Purchasing.

2. LBE report

For contracts containing LBE subcontracting goals, by the tenth day of each month, or the next workday thereafter, Contractors must provide the City with CMD Form 7 demonstrating LBE participation and CMD Form 9 if applicable.

3. Proposed subcontractors report

Prior to commencing work on any project involving the use of subcontractors, Contractors will submit a list of all proposed subcontractors to the Ordering Department before that project can be approved by City. Contractor must submit supplemental subcontractor reports during the course of the project to show any substitution or addition of subcontractors. The substitution and addition will be subject to Department and City's approval. Please provide the following information for each subcontractor: name; address; telephone number; contact name; summary of work to be performed; and mark-up percentage.

Appendix B

The RFP, all Addenda, and Contractor's response to the RFP, are attached and incorporated herein by reference as though fully set forth herein.

Appendix C
Insurance Waiver (if applicable)

Appendix D

Sample Agreements to be executed as applicable on a per project basis, substantially in the form attached:

- i. P-545 Software License Agreement
- ii. P-540 Software Maintenance Agreement
- iii. P-542 Software Development Agreement
- iv. P-500 Professional Services Agreement
- v. P-530 Equipment Maintenance Agreement
- vi. Software as a Service Agreement
- vii. Financing Agreement