

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

SOFTWARE MAINTENANCE AGREEMENT  
FOR AGREEMENTS BETWEEN THE CITY AND COUNTY OF SAN FRANCISCO AND

Tier Technologies, Inc.

This Software Maintenance Agreement ("Agreement") is entered into by and between the City and County of San Francisco ("City") and Tier Technologies, Inc. ("Contractor"), effective as of the Effective Date. City and Contractor agree that the terms and conditions of this Agreement cover support and maintenance services to be provided by Contractor to City, for the computer programs and user manuals listed in Exhibit A to this Agreement.

**1. Definitions**

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

1.1. Effective Date: Date upon which the Controller has certified to the availability of funds and the Contractor has been notified in writing or the Software is received and installed at the customer site, whichever is later.

1.2. Errors, Defects and Malfunctions: Either a deviation between the function of the Software and the documentation furnished to City by Contractor for the Software, including but not limited to other written specifications and procedures regarding the Software as agreed upon between the parties in writing, or a failure of the Software that degrades the use of the Software.

1.3. Fix: Repair or replacement of source, object or executable code in the Software to remedy an Error, Defect or Malfunction.

1.4. Maintenance Agreement: This Agreement and Exhibits A and B thereto which together specify the terms and conditions for the correction of Errors, Defects and Malfunctions in the Software, for the provision of Upgrades to the Software, and for the provision of Support Services to end users of the Software.

1.5. Patch: Temporary repair or replacement of code in the Software to remedy an Error, Defect or Malfunction. Patches may be made permanent and released in Subsequent Releases of the Software.

1.6. Priority Category: A priority assigned to an Error, Defect or Malfunction, designating the urgency of correcting an Error, Defect or Malfunction. Assignment of a Priority Category to an Error, Defect or Malfunction is based on City's determination of the severity of the Error, Defect or Malfunction and Contractor's reasonable analysis of the priority of the Error, Defect or Malfunction.

1.7. Priority Protocol: Based on the Priority Category, rules specifying the turnaround time for correcting Errors, Malfunctions and Defects; escalation procedures, and personnel assignment.

1.8. Software: Licensed programs and associated documentation licensed to City by Tier Technologies, as listed in Exhibit A and any modification or Upgrades or modifications to the program(s) provided under this Maintenance Agreement.

1.9. Subsequent Release: A release of the Software for use in a particular operating environment that supersedes the Software. A Subsequent Release is offered and expressly designated by Contractor as a replacement to a specified Software product. A Subsequent Release will be supported by Contractor in accordance with the terms of this Agreement. Multiple Subsequent Releases may be supported by Contractor at any given time.

1.10. Support Services: The Software support service ordered by City and furnished by Contractor under the terms of this Agreement. Support Services include correcting an Error, Defect or Malfunction; and providing telephone and/or online support concerning the use of the Software, as specified under this Agreement.

1.11. Upgrade: Either an enhancement to the Software code to add new features or functions to the system or software programming revisions containing corrections to Errors, Defects and Malfunctions that have been reported by users or discovered by the Contractor.

1.12. Warranty Period: Left blank by agreement of the parties.

1.13. Workaround: A change in the procedures followed or end user operation of the software to avoid an Error, Defect or Malfunction without significantly impairing functionality or degrading the use of the Software.

1.14. Articles and Services: Any articles or services to be provided by Contractor to City in the performance of this Agreement, including, but not limited to Fixes, Patches, Subsequent Releases, Upgrades, and Workarounds.

1.15. License Agreements: The License Agreement between the City and KPMG Peat Marwick dated June 27, 1994, as amended by the First Amendment dated July 1, 1998, as amended by the Second Amendment dated September 15, 2000, and assigned and assumed by the Assignment and Assumption Agreement dated February 8, 2001 between KPMG LLP and KPMG Consulting, Inc. (now known as BearingPoint, Inc.), (the "1994 License Agreement"); and the Software License and Sublicense Agreement dated July 1, 1998 between KPMG LLP and the City, as assigned and assumed by the Assignment and Assumption Agreement dated February 8, 2001 between KPMG LLP and KPMG Consulting, Inc. (the "1998 License Agreement" and collectively with the 1994 License Agreement, the "License Agreements").

Whenever the words "as directed," "as required," "as permitted," or words of like effect are used, it shall be understood as the direction, requirement, or permission of the Controller's Office. The words "sufficient," "necessary," or "proper," and the like, mean sufficient, necessary or proper in the judgment of Mary Fitzpatrick, or of the current Financial Systems and Reporting Manager of the Controller's Office unless otherwise indicated by the context.

## **2. Certification of Funds; Budget and Fiscal Provisions; Termination in the Event of Non-Appropriation**

2.1. This Maintenance 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 City's Controller, and any amount of the City's obligation hereunder shall not at any time exceed the amount certified for the purpose and period stated in such advance authorization.

2.2. This Maintenance Agreement will terminate without penalty, liability or expense of any kind to City at the end of any fiscal year in the event funds are not appropriated for the next succeeding fiscal year. If funds are appropriated for a portion of the fiscal year, this Maintenance Agreement will terminate, without penalty, liability or expense of any kind at the end of the term for which funds are appropriated.

2.3. THIS SECTION SHALL CONTROL AGAINST ANY AND ALL OTHER PROVISIONS OF THIS MAINTENANCE AGREEMENT.

## **3. Term of the Maintenance Agreement**

Subject to Section 2, the term of this Maintenance Agreement shall be from July 1, 2006 to December 31, 2006. The City shall have the option, at its sole discretion, to renew the Agreement for an additional six months at the same price stated in Section 4.

## **4. City's Payment Obligation**

4.1. The City will make a good faith attempt to pay all invoices within 45 days of billing. However, in no event shall City be liable for interest or late charges for any late payments made after such 45-day period. For each piece of Software listed in Exhibit B, City shall pay the price listed in Exhibit B for Support Services for that piece of Software. However, in no event shall the amount of this Agreement exceed Seventy Two Thousand Five Hundred and Two Dollars (\$72,502). This amount is a fixed fee for all Support Services for six months and may be invoiced at any time on or after the Effective Date.

4.2. Contractor and the City understand and intend that the obligations of the City to pay maintenance charges hereunder shall constitute a current expense of the City and shall not in any way be construed to be a debt of the City in contravention of any applicable constitutional or statutory limitations or requirements concerning the creation of indebtedness by the City, nor shall anything contained herein constitute a pledge of the general tax revenues, funds or monies of the City.

4.3. The City shall pay maintenance charges, exclusively from legally available funds, to Contractor or, in the event of an authorized assignment by Contractor to its assignee, according to the terms of this Maintenance Agreement, upon presentation of invoices furnished by Contractor in a form acceptable to the Controller. Payments will be made by warrant drawn on the Treasurer of the City.

## **5. Guaranteed Maximum Costs**

5.1. The City's obligation hereunder shall not at any time exceed the amount certified by the City Controller for the purpose and period stated in such certification.

5.2. Except as may be provided by City ordinances governing emergency conditions, the City and its employees and officers are not authorized to request Contractor to perform services or to provide materials, equipment and supplies that would result in Contractor performing services or providing materials, equipment and supplies that are beyond the scope of the services, materials, equipment and supplies agreed upon in the contract unless the Maintenance Agreement is amended in writing and approved as required by law to authorize the additional services, materials, equipment or supplies. The City is not required to reimburse Contractor for services, materials, equipment or supplies that are provided by Contractor which are beyond the scope of the services, materials, equipment and supplies agreed upon in the contract and which were not approved by a written amendment to the Maintenance Agreement having been lawfully executed by the City.

5.3. The City and its employees and officers are not authorized to offer or promise to Contractor additional funding for the contract which would exceed the maximum amount of funding provided for in the contract for Contractor's performance under the contract. Additional funding for the contract in excess of the maximum provided in the contract shall require lawful approval and certification by the Controller. The City is not required to honor any offered or promised additional funding for a contract which exceeds the maximum provided in the contract which requires lawful approval and certification of the Controller when the lawful approval and certification by the Controller has not been obtained.

5.4. 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.

## **6. Payment; Invoice Format**

6.1. Invoices furnished by Contractor under this Maintenance Agreement must be in a form reasonably acceptable to the City Controller. All amounts paid by City to Contractor shall be subject to audit by City.

6.2. Payment shall be made by City to Contractor at the address specified in the section entitled "Notices to the Parties."

6.3. City may withhold payment to Contractor in any instance in which Contractor has failed or refused to satisfy any material obligation provided under this Maintenance Agreement.

## **7. Submitting False Claims; Monetary Penalties**

If Contractor commits any of the following acts, Contractor shall be liable to the City for three times the amount of damages that the City sustains because of Contractor's acts. If Contractor commits any of the following acts Contractor shall also be liable to the City for the costs, including attorneys' fees, of a civil action brought to recover any of those penalties or damages, and may be liable to the City for a civil penalty of up to \$10,000 for each false claim: (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. (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.

## **8. Taxes**

8.1. Payment of any taxes, including possessory interest taxes and California sales and use taxes, levied upon this Maintenance Agreement, the transaction, or the services delivered pursuant hereto, shall be the obligation of Contractor.

8.2. If this Maintenance Agreement entitles Contractor to the possession, occupancy or use of City real property for private gain, then the following provisions apply:

A. Contractor, on behalf of itself and any permitted successors and assigns, recognizes and understands that this Maintenance Agreement may create a possessory interest subject to property taxation and Contractor, and any permitted successor or assign, may be subject to the payment of such taxes.

B. Contractor, on behalf of itself and any permitted successors and assigns, further recognizes and understands that any assignment permitted hereunder and any exercise of any option to renew or other extension of this Maintenance Agreement may constitute a change in ownership for purposes of property taxation and therefore may result in a revaluation of any possessory interest created hereunder. Contractor shall report any assignment or other transfer of any interest in this Maintenance Agreement or any renewal or extension thereof to the County Assessor within sixty days after such assignment, transfer, renewal or extension.

C. 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 under applicable law with respect to possessory interests.

## **9. Scope of Service Coverage**

9.1. Contractor shall provide Support Services and provide Upgrades during the term of this Maintenance Agreement for the Software. Support Services shall not be provided by Contractor with respect to: (i) use of the Software (a) not in accordance with applicable written specifications and procedures regarding the Software agreed upon between the parties in writing, or (b) inconsistent with the terms of the License Agreements; (ii) Software that has been altered, modified or revised by a party other than Contractor after the Term of this Agreement has commenced; (iii) the malfunction of any third party software or hardware or any part thereof; or (iv) City's failure to provide Contractor access to the Software and related hardware as required herein. Contractor hereby grants the City a license to any Articles and Services provided hereunder, under the license terms and restrictions of the License Agreements effective upon the City paying the amounts due under this Agreement.

9.2. During the term of this Maintenance Agreement, Contractor will furnish Error, Defect or Malfunction correction in accordance with the Priority Categories listed below, based on the City's determination of the severity of the Error, Defect or Malfunction and Contractor's reasonable analysis of the priority of the Error, Defect or Malfunction.

A. High: An Error, Defect or Malfunction, which renders the Software inoperative; or causes the Software to fail catastrophically.

B. Medium: An Error, Defect or Malfunction, which substantially degrades the performance of the Software, but does not prohibit the City's use of the Software.

C. Low: An Error, Defect or Malfunction, which causes only a minor impact on the use of the Software.

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

A. High Protocol: Within two hours during the hours specified in Section 10.2 of this Agreement, Contractor assigns a product technical specialist(s) to diagnose and correct the Error, Defect or Malfunction; thereafter, Contractor shall provide ongoing communication about the status of the correction; Contractor shall immediately provide a Fix, a Patch or a Workaround as soon as reasonably practical. Contractor shall also use commercially reasonable efforts to include a Fix or Patch for the Error, Defect or Malfunction in the next Subsequent Release. Contractor will escalate resolution of the problem to personnel with successively higher levels of technical expertise until the Error, Defect or Malfunction is corrected.

B. Medium Protocol: Within four hours during the hours specified in Section 10.2 of this Agreement, Contractor assigns a product technical specialist(s) to diagnose the Error, Defect or Malfunction and to commence correction of the Error, Defect or Malfunction; to immediately use commercially reasonable efforts to provide a Workaround; to escalate the problem to successively higher levels of technical expertise until the Error, Defect or Malfunction is corrected; and to exercise all commercially reasonable efforts to include a Fix or Patch for the Error, Defect or Malfunction in the next Subsequent Release .

C. Low Protocol: Contractor may include a Fix or Patch in the next Subsequent Release.

## **10. Hotline Support**

10.1. Contractor shall provide remote access hotline support to the City via Contractor's support web site known as Remedy. The website will enable the City to: (i) troubleshoot Priority High and Priority Medium Errors, Defects and Malfunctions, and (ii) download Updates to the Software. The website shall be available 24-hours a day, seven-days a week, except for regularly scheduled maintenance. Contractor shall respond to requests for Support Services made by City through this website based upon the Priority Protocol.

10.2. Contractor shall also provide Support Services via telephone, fax and electronic mail. Such support shall be available from 10:30 a.m. through 8:30 p.m. (EST) Monday through Friday, except legal holidays. Contractor shall respond to requests for Support Services made by City by telephone, fax or electronic mail based on the Priority Protocol.

## **11. City Responsibilities Related to Support**

11.1. City shall use reasonable efforts to make available to Contractor reasonable access to the equipment on which City experienced the Error, Defect or Malfunction, the Software, Articles and Services, and all relevant documentation and records. City shall also provide reasonable assistance to Contractor, including sample output and diagnostic information, in order to assist Contractor in providing Support Services.

11.2. City shall be responsible for the interface between the Software and other software products installed on City equipment.

11.3. Unless otherwise agreed in writing between City and Contractor, City is responsible for installing, managing and operating any Software and Articles and Services delivered under this Maintenance Agreement.

11.4. Unless Tier is otherwise notified in writing of the names of specific alternate individuals by City, the City shall designate the following staff as contacts for the Software listed in Exhibit A to this Agreement to coordinate the City's requests for Support Services: Mary Fitzpatrick, Alan Pavkovic, Jeff Pera, Eric Carter, and Annette Reardon

11.5. Upon Contractor's request, the City will make available to the Contractor a copy of the current source code of the Software listed in Exhibit A on computer readable media and in a format supported by the Contractor, provided that such Software is licensed to City by Contractor.

## **12. 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 the 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 did not conform to the requirements of this Maintenance Agreement may be rejected by City and in such case must be replaced by Contractor without delay.

## **13. Qualified Personnel**

Work under this Maintenance 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 assign adequate personnel resources to provide the level of service within the response times specified in this Maintenance Agreement.

## **14. 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.

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

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

Any terms in this Agreement referring to direction from City shall be construed as providing for direction as to policy and the result of Contractor's work only, and not as to the means by which such a result is obtained. City does not retain the right to control the means or the method by which Contractor performs work under this Agreement.

15.2. Should City, in its discretion, or a relevant taxing authority such as the Internal Revenue Service or the State Employment Development Division, or both, determine that Contractor is an employee for purposes of collection of any employment taxes, the amounts payable under this Agreement shall be reduced by amounts equal to both the employee and employer portions of the tax due (and offsetting any credits for amounts already paid by Contractor which can be applied against this liability). City shall then forward those amounts to the relevant taxing authority.

Should a relevant taxing authority determine a liability for past services performed by Contractor for City, upon notification of such fact by City, Contractor shall promptly remit such amount due or arrange with City to have the amount due withheld from future payments to Contractor under this Agreement (again, offsetting any amounts already paid by Contractor which can be applied as a credit against such liability).

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

## **16. Insurance**

16.1. Without in any way limiting Contractor's liability pursuant to the "Indemnification" section (Section 17) of this Maintenance Agreement, Contractor must maintain in force, during the full term of the Maintenance Agreement, insurance in the following amounts and coverages:

A. Workers' Compensation, in statutory amounts, with Employers' Liability Limits not less than \$1,000,000 each accident; and

B. 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

C. 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.

16.2. Commercial General Liability and Business Automobile Liability Insurance policies must provide the following:

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



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

16.3. All policies shall provide thirty days' advance written notice to City of cancellation mailed to the following address:

Esther Reyes  
Controller's Office  
1 Dr. Carlton B. Goodlett Place  
City Hall, Rm. 395  
San Francisco, CA 94102

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

16.5. 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.

16.6. Should any required insurance lapse during the term of this Maintenance 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 Maintenance Agreement, effective as of the lapse date. If insurance is not reinstated, the City may, at its sole option, terminate this Maintenance Agreement effective on the date of such lapse of insurance.

16.7. Before commencing any operations under this Maintenance Agreement, Contractor shall do the following: (a) furnish to City certificates of insurance and additional insured policy endorsements with insurers with ratings comparable to A-, VII 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, and (b) furnish complete copies of policies promptly upon City request.

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

## 17. **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, resulting 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.

Subject to the limitations below, if notified promptly in writing of any judicial action brought against City based on an allegation that City's use of any Articles and Services infringes a patent or copyright, or any rights of a third party, or constitutes misuse or misappropriation of a trade secret or any other right in intellectual property, such allegation hereinafter referred to as "Infringement," Contractor will hold City harmless and defend such action at its expense. Contractor will pay the costs and damages awarded in any such action or the cost of settling such action, provided that Contractor shall have sole control of the defense of any such action and all negotiations or its settlement or compromise. If notified promptly in writing of any informal claim (other than a judicial action) brought against City based on an allegation that City's use of the Articles and Services constitutes Infringement, Contractor will pay the costs associated with resolving such claim and will pay the settlement amount (if any), provided that Contractor shall have sole control of the resolution of any such claim and all negotiations for its settlement.

Contractor will have no liability for, and no obligation to defend the City against, any claim of Infringement to the extent such claim is based on (a) use of any Articles and Services outside the scope of the applicable License Agreement or other written terms and conditions agreed upon between the parties; (b) use of a superseded or altered release of any Articles and Services if the Infringement would have been avoided by the use of a current unaltered release of such Articles and Services, unless such superseded or altered release is provided or recommended by Contractor after a current unaltered release of such Articles and Services is made available to the Controller's Office by Contractor; (c) the combination, operation, or use of the Articles and Services with other software, hardware or other materials if such Infringement would have been avoided by the use of the Articles and Services without such software, hardware or other materials unless Contractor has recommended such combination, operation or use; (d) any modification of the Articles and Services not made by Contractor; or (e) the City's use of the Articles and Services after Contractor provides written notice to City that City shall cease use of the Articles and Services due to such claim.

In the event that a final injunction shall be obtained against City's use of the Articles and Services by reason of Infringement, or in Contractor's opinion City's use of the Articles and Services is likely to become the subject of Infringement, or Contractor provides written notice to the City as specified in clause (e) of the preceding paragraph, Contractor may at its option and expense (a) procure for City the right to continue to use the Articles and Services as contemplated hereunder, (b) replace the Articles and Services with non-infringing, functionally equivalent substitute Articles and Services, or (c) suitably modify the Articles and Services to make their use hereunder non-infringing while retaining functional equivalency to the unmodified version of the Articles and Services.

TO THE FULL EXTENT PERMITTED BY LAW, THE FOREGOING AND SECTION 41 HEREOF STATES THE ENTIRE LIABILITY OF CONTRACTOR TO THE CITY CONCERNING INFRINGEMENT.

Each party hereby warrants to the other that it is authorized to enter into this Agreement and its performance thereof will not conflict with any other agreement.

#### **18. Liability of City**

CITY'S PAYMENT OBLIGATIONS UNDER THIS MAINTENANCE AGREEMENT SHALL BE LIMITED TO THE PAYMENT OF THE COMPENSATION PROVIDED FOR IN THIS MAINTENANCE AGREEMENT. NOTWITHSTANDING ANY OTHER PROVISION OF THIS MAINTENANCE 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 MAINTENANCE AGREEMENT OR THE SERVICES PERFORMED IN CONNECTION WITH THIS MAINTENANCE AGREEMENT.

#### **19. Default**

Failure or refusal of Contractor to perform or do any act herein required shall constitute a default, provided such failure or refusal continues for a period of forty-five (45) days after written notice thereof from City to Contractor. In the event of any default, in addition to any other remedy available to the City, this Maintenance Agreement may be terminated by the City upon written notice. Such termination does not waive any other legal remedies available to the City. In the event of such termination, Contractor shall refund the difference between the fixed fee for Support Services paid by City and such fee prorated through date of termination on the basis of a twelve (12) month year and a thirty (30) day month. In no event will City be liable for costs incurred by Contractor after receipt of notice of termination. Such non-recoverable costs include, but are not limited to, anticipated profits on this Maintenance Agreement, post-termination employee salaries, post-termination administrative expenses, or any other cost which is not authorized or reasonable under this Section. City's acceptance of such refund shall not constitute a waiver of any other remedies City may have against Contractor for financial injury or otherwise.

#### **20. Support Service Term and Termination for Convenience**

**20.1. Commencement.** Support Services for the Software shall begin on July 1, 2006.

**20.2. Termination for Convenience.** City shall have the option, in its sole discretion, to terminate this Maintenance Agreement, at any time during the term thereof, for City's convenience and without cause by giving Contractor ninety (90) days written notice of such termination. In the event of such termination, Contractor shall refund the difference between the fixed fee for Support Services paid by City and such fee prorated through the date of termination on the basis of a twelve (12) month year and a thirty (30) day month. In no event will City be liable for costs incurred by Contractor after receipt of notice of termination. Such non-recoverable costs include, but are not limited to, anticipated profits on this Maintenance Agreement, post-termination employee salaries, post-termination administrative expenses, or any other cost which is not authorized or reasonable under this section. City's acceptance of such refund shall not constitute a waiver of any other remedies City may have against Contractor for financial injury or otherwise.

## **21. Rights and Duties Upon Termination or Expiration**

21.1. This Section and the following Sections of the Maintenance Agreement shall survive termination or expiration of this Maintenance Agreement: 7, 8, 12, 14-18, 23-25, 27, 28, 35, 37, 38, 41 and, 42.

21.2. Subject to the immediately preceding subsection 21.1, upon termination of this Maintenance Agreement prior to expiration of the term specified in Section 3, this Maintenance Agreement shall terminate and be of no further force or effect. Contractor shall transfer a license to City, consistent with the terms of this Agreement and deliver in the manner, at the times, and to the extent, if any, reasonably 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 Maintenance Agreement, and any completed or partially completed work which, if the Maintenance Agreement had been completed, would have been required to be furnished to the City. This subsection shall survive termination of this Maintenance Agreement.

## **22. Conflict of Interest**

Through its execution of this Agreement, Contractor acknowledges that it is familiar with the provision of Section 15.103 of the City's Charter, Article III, Chapter 2 of the City's Campaign and Governmental 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.

## **23. 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 ("Confidential Information") 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 software developer would use to protect its own proprietary data.

Contractor represents to City that the Fixes, Patches, Upgrades, Workarounds, and Subsequent Releases under this Agreement are Confidential Information, the disclosure of which to third parties would be damaging to the Contractor. Subject to Section 31 of this Agreement, Chapter 67 of the San Francisco Administrative Code, and the California Public Records Act (California Government Code §§6250 et seq.), the City agrees to hold the work or services it receives under this Agreement in confidence and to exercise the same standard of care to protect this information as a reasonably prudent municipal corporation.

The term "Confidential Information" shall not include, and the obligations of this Section shall not apply to, any information which: (a) at the time of disclosure to the recipient party, is in the public domain; (b) after disclosure, becomes part of the public domain by publication or otherwise, except by breach of this Agreement or by fault of the recipient party, and then only after such later date; (c) was lawfully in the recipient party's possession (as reflected by its written records) without an obligation of confidence at the time of disclosure by the disclosing party, and which was not acquired, directly or

indirectly, from the disclosing party; (d) the recipient party can demonstrate by written documents resulted from its own research and development, independent and without use of disclosure from the disclosing party; (e) was received by the recipient party from third parties not under an obligation not to disclose such information, or (f) the recipient party discloses pursuant to the final order of a court, administrative agency or governmental body provided the recipient party provides the disclosing party with at least 5 business days written notice of such pending order or the City discloses pursuant to relevant law.

#### **24. Notices to Parties**

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

To City: Mary Fitzpatrick  
Controller's Office  
1 Dr. Carlton B. Goodlett Place  
City Hall, Rm. 482  
San Francisco, CA 94102  
mary.fitzpatrick@sfgov.org

To Contractor: Tier Technologies, Inc.  
Attn: Vice President, Financial Management Systems  
10780 Parkridge Blvd., Suite 400  
Reston, VA 20191  
akeshava@Tier.com

Invoice payments shall be sent to the following address:

Tier Technologies, Inc.  
Dept 238701 - PO Box 67000  
Detroit, MI 48267-2387

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.

#### **25. 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 Maintenance 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 Maintenance Agreement, whether funded in whole or in part under this Maintenance Agreement. Contractor shall maintain such data and records in an accessible location and condition for a period of not less than three years after final payment under this Maintenance 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 of this Maintenance Agreement shall have the same rights conferred upon City by this Section.

## **26. Subcontracting**

Contractor is prohibited from subcontracting this Maintenance Agreement or any part of it unless such subcontracting is first approved by City in writing. Neither party shall, on the basis of this Maintenance 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.

## **27. Assignment**

The services to be performed by Contractor are personal in character and neither this Maintenance 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 Maintenance Agreement.

## **28. 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 or for the furnishing of any material, supplies or equipment to the City, whenever such transaction would require approval by a City elective officer or the board on which that City elective officer serves, from making any campaign contribution to the officer at any time from the commencement of negotiations of the contract until the later of either (1) the termination of negotiations for such contract or (2) three months after the date the contract is approved by the City elective officer or the board on which that City elective officer serves.

## **29. Drug-Free Workplace**

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

## **30. 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 Maintenance 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 Maintenance 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 Maintenance Agreement.

## **31. Sunshine Ordinance**

In accordance with Section 67.24(e) of the San Francisco Administrative Code, contracts, Contractors' bids, responses to RFPs and all other records of communications between City and persons or firms seeking contracts shall be open to inspection immediately after a contract has been awarded. Nothing in this provision requires the disclosure of a private person's or organization's net worth or other

proprietary financial data submitted for qualification for a contract or other benefit until and unless that person or organization is awarded the contract or benefit. Information provided which is covered by this paragraph will be made available to the public upon request. Contractor represents that the Fixes, Patches, Upgrades, Workarounds, and Subsequent Releases and their associated documentation are deemed to be a "Trade Secret" by Contractor as such term is used in California Government Code Section 6254.7(d). If a request is made to view such Trade Secrets, the City will use commercially reasonable efforts to immediately notify Contractor of such request.

### **32. 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.

### **33. Compliance with Laws**

Contractor shall keep itself fully informed of the City's Charter, codes, ordinances and regulation of the City and of all state, and federal laws in any manner affecting the performance of this Maintenance 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.

### **34. Left Blank by the Agreement of the Parties**

### **35. Entire Agreement; Modifications**

35.1. The Maintenance Agreement, together with the Appendices and/or Exhibits hereto, constitutes the entire Maintenance Agreement between the parties and this Maintenance Agreement may not be modified, nor may any of its terms be waived, except by written instrument executed and approved in the same manner as this Maintenance Agreement.

35.2. All agreements between the parties as to the subject matter hereof are included herein and no promises or statements have been made by either party unless endorsed hereon in writing. No change or waiver of any provisions hereof shall be valid unless made in writing with the consent of both parties and executed in the same manner as this Maintenance Agreement.

35.3. Should the application of any provision of this Maintenance 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 Maintenance 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.

35.4. Subject to the specific provisions of this Maintenance Agreement, this Maintenance Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and assigns.

**36. Force Majeure**

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

**37. Non-Waiver of Rights**

The waiver by either party of any breach by either party of any term, covenant or conditions hereof shall not operate as a waiver of any subsequent breach of the same or any other term, covenant or condition hereof.

**38. Governing Law**

This formation, interpretation and performance of this Maintenance 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 Maintenance Agreement shall be in San Francisco.

**39. Construction**

All section headings contained herein are for convenience and reference only and are not intended to define or limit the scope of any provision of this Maintenance Agreement.

**40. Administrative Remedy for Agreement Interpretation**

Should any question arise as to the meaning and intent of this Maintenance 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 this Maintenance Agreement.

**41. Liability of Contractor**

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

In no event shall the aggregate liability of either party hereto, other than (1) Contractor's obligations under Section 17 hereof, including without limitation liability for death or bodily injury, and (2) Contractor's liability arising out of or in connection with Sections 7 and 32 hereof, exceed \$10 Million.

**42. Nondisclosure of Private Information**

As of March 5, 2005, Contractor agrees to comply fully with and be bound by all of the provisions of Chapter 12M of the San Francisco Administrative Code (the "Nondisclosure of Private Information Ordinance"), including the remedies provided. The provisions of the Nondisclosure of Private



Information Ordinance are incorporated herein by reference and made a part of this Agreement as though fully set forth. Capitalized terms used in this section and not defined in this Agreement shall have the meanings assigned to such terms in the Nondisclosure of Private Information Ordinance. Consistent with the requirements of the Nondisclosure of Private Information Ordinance, Contractor agrees to all of the following:

(a) Neither Contractor nor any of its Subcontractors shall disclose Private Information obtained from the City in the performance of this Agreement to any other Subcontractor, person, or other entity, unless one of the following is true:

(i) The disclosure is authorized by this Agreement;

(ii) The Contractor received advance written approval from the Contracting Department to disclose the information; or

(iii) The disclosure is required by law or judicial order.

(b) Any disclosure or use of Private Information authorized by this Agreement shall be in accordance with any conditions or restrictions stated in this Agreement. Any disclosure or use of Private Information authorized by a Contracting Department shall be in accordance with any conditions or restrictions stated in the approval.

(c) Private Information shall mean any information that: (1) could be used to identify an individual, including without limitation, name, address, social security number, medical information, financial information, date and location of birth, and names of relatives; or (2) the law forbids any person from disclosing.

(d) Any failure of Contractor to comply with the Nondisclosure of Private Information Ordinance shall be a material breach of this Agreement. In such an event, in addition to any other remedies available to it under equity or law, the City may terminate this Agreement, debar Contractor, or bring a false claim action against Contractor.

#### **43. Graffiti Removal**

Graffiti is detrimental to the health, safety and welfare of the community in that it promotes a perception in the community that the laws protecting public and private property can be disregarded with impunity. This perception fosters a sense of disrespect of the law that results in an increase in crime; degrades the community and leads to urban blight; is detrimental to property values, business opportunities and the enjoyment of life; is inconsistent with the City's property maintenance goals and aesthetic standards; and results in additional graffiti and in other properties becoming the target of graffiti unless it is quickly removed from public and private property. Graffiti results in visual pollution and is a public nuisance. Graffiti must be abated as quickly as possible to avoid detrimental impacts on the City and County and its residents, and to prevent the further spread of graffiti.

Contractor shall remove all graffiti from any real property owned or leased by Contractor in the City and County of San Francisco within forty eight (48) hours of the earlier of Contractor's (a) discovery or notification of the graffiti or (b) receipt of notification of the graffiti from the Department of Public Works. This section is not intended to require a Contractor to breach any lease or other agreement that it may have concerning its use of the real property. The term "graffiti" means any inscription, word, figure, marking or design that is affixed, marked, etched, scratched, drawn or painted on any building, structure,

fixture or other improvement, whether permanent or temporary, including by way of example only and without limitation, signs, banners, billboards and fencing surrounding construction sites, whether public or private, without the consent of the owner of the property or the owner's authorized agent, and which is visible from the public right-of-way. "Graffiti" shall not include: (1) any sign or banner that is authorized by, and in compliance with, the applicable requirements of the San Francisco Public Works Code, the San Francisco Planning Code or the San Francisco Building Code; or (2) any mural or other painting or marking on the property that is protected as a work of fine art under the California Art Preservation Act (California Civil Code Sections 987 et seq.) or as a work of visual art under the Federal Visual Artists Rights Act of 1990 (17 U.S.C. §§ 101 et seq.).

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

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

CITY

CONTRACTOR

Recommended by:

  
\_\_\_\_\_  
Signature

Tier Technologies, Inc.  
\_\_\_\_\_  
Company Name

Ed Harrington  
\_\_\_\_\_  
Name

10780 Parkridge Blvd., Suite 400  
\_\_\_\_\_  
Address

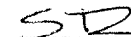
Controller  
\_\_\_\_\_  
Title and Department

Reston, VA 20191  
\_\_\_\_\_  
City, State, ZIP

Approved as to Form:

DENNIS J. HERRERA  
City Attorney


By   
\_\_\_\_\_

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

Todd Vucovich  
\_\_\_\_\_  
Name

Approved:

Senior Vice-President, PSSI  
\_\_\_\_\_  
Title

  
\_\_\_\_\_  
Naomi Kelly, Director of Office of Contract  
Administration/ Purchaser

94-3145844F  
\_\_\_\_\_  
Federal Employer Number

**Exhibit A**

<b>Module</b>	<b>Version</b>
FAMIS	5.x
ADPICS	5.x
BPREP	5.x
RIMS	5.x
FAACS	5.x
Labor Distribution	5.x
SYSTEMWIDE	5.x
Stargaze GUI	5.x
Performance Executive	5.x

And any associated documentation including but not limited to user manuals.

**Exhibit B  
Maintenance Fees**

<b>Module</b>	<b>6-Month Fee</b>
FAMIS (including RIMS)	\$22,973
ADPICS	19,144
FAACS	4,961
Labor Distribution	4,595
SYSTEMWIDE	3,829
Stargaze GUI	4,500
Performance Executive	12,500
<b>Total</b>	<b>\$72,502</b>