

**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
Sequoia Voting Systems, Inc.**

This agreement (the "Agreement") is entered into this 11th day of December 2007, in the City and County of San Francisco, State of California, by and between: Sequoia Voting Systems, Inc., 7677 Oakport Street, Ste 800, Oakland, California 94621, 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, hereinafter referred to as "Purchasing."

Recitals

WHEREAS, a Request for Proposal ("RFP") was issued on March 31, 2005, and City selected Contractor as the highest qualified scorer pursuant to the RFP. The RFP is hereby incorporated herein by reference, subject to the terms of this Agreement;

WHEREAS, the Department of Elections (the "Department") wishes Contractor to provide to City the System described in this Agreement; and,

WHEREAS, Contractor represents and warrants that it will provide the services required in accordance with this Agreement; and,

WHEREAS, approval for said Agreement was obtained from Civil Service Commission by Resolution No. 4063-05/06, dated December 19, 2005;

Now, THEREFORE, the parties agree as follows:

1. A. 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.

Acceptance Written notice from the Department to Contractor, stating the System Software, Hardware, and/or System have satisfactorily completed the Acceptance Tests or failure of the City to timely deliver a Defect Notice pursuant to Section 6 of this Agreement.

Acceptance Tests The procedures and performance standards which each unit of Hardware and its associated System Software are required to perform as set forth in Section 6 below and Appendix A (Acceptance Test Plan and Acceptance Criteria) and Appendix B (Implementation Plan).

Agreement	This document and all of the accompanying appendices, schedules and exhibits, together with any future written and executed amendments.
Authorization	Either a Term Purchase Agreement, Contract Order, or Purchase Order of the City, properly executed by the Department and Purchasing, and certified by the Controller for the specific funding of this Agreement or any modification thereof.
Critical Milestone	Those milestones denominated as Critical Milestones in Appendix B-1
Defect Notice	The written notice from City to Contractor notifying Contractor that the Hardware or System Software has not passed the Acceptance Test.
Deliverables	Those items of Hardware and System Software described and itemized in Appendix C (Deliverables) which items Contractor commits to provide to City on the dates specified in Appendix B (Implementation Plan).
Documentation	<p>Those materials to be provided by Contractor under the terms of Appendix G (Support and Maintenance Services), together with the following materials:</p> <p>AVC Edge Pollworker Booklets AVC Edge Maintenance Manual AVC Edge Operations Manual AVC Edge Acceptance Testing Guide AVC Edge Pre-LAT Guide AVC Edge Trainer Guides Note: AVC Edge here includes Voter Verification Printer</p> <p>Optech Insight Pollworker Guide Optech Insight Maintenance Manual Optech Insight Operations Manual Optech Insight Acceptance Testing Guide Optech Insight Pre-LAT Guide Optech Insight Trainer Guides</p> <p>400-C Optical Scan Maintenance Manual 400-C Optical Scan Operations Manual 400-C Optical Scan Acceptance Testing Guide 400-C Optical Scan Pre-LAT Guide 400-C Optical Scan Trainer Guides</p> <p>Card Activator/HAAT Maintenance Manual Card Activator/HAAT Operations Manual</p>
Error, Defect or Malfunction	Failure of the System Software or Hardware to operate in accordance with the Documentation furnished by Contractor for the System Software or Hardware, or a failure of the System Software or Hardware to comply, with respect to the RCV Design Specifications elements of the System, with RCV Design Specifications, excluding in both cases failures to comply which do not materially impair operation of the System.

Hardware	Each and all of the equipment and any other items designated as "Hardware" in Appendix C (Deliverables).
Implementation Plan	The schedule for Contractor's completion of all phases of Work, and the Critical Milestones associated with such completion, as specified in Appendix B (Implementation Plan)
Open Source Code	Software which is provided to the public in both source code and binary (executable) form under a license that permits one or more of the following: viewing, using, modifying, distributing, or displaying the software.
Performance Specifications	The written description of the City's requirements prepared by the City and attached hereto as Appendix D (Performance Specifications). Such description shall form the basis for the RCV Design Specifications as defined herein.
RCV Design Specifications	The written RCV Design Specifications to be prepared by Contractor to implement the Performance Specifications with respect to the Ranked Choice Voting elements of the Hardware and Software System.
Subsequent Release	A new release of the System Software for use in a particular operating environment, which supersedes the existing System Software.
Support and Maintenance Services	The System Software and Hardware support and maintenance services which Contractor is obligated to provide pursuant to this Agreement.
System Software	One or more items of the System Software identified in Appendix C (Deliverables) and any Upgrades to the System Software to the extent installed and used in the System, in object code form, and any related Documentation.
Source Code	The text of the System Software that is written in language that may be read and understood by humans and is compilable by software to be understood and used by a computer.
System	The integrated system consisting of all System Software and Hardware to be provided by Contractor under Appendix C (Deliverables) to this Agreement, the combination of which shall satisfy, with respect to the ranked choice voting elements of the System, the RCV Design Specifications.
Upgrade	A change to the System Software (excluding a Subsequent Release) or Firmware which is (i) for the purpose of enhancing the performance of, or correcting Errors, Defects or Malfunctions in, the System Software or Firmware, or (ii) generally provided by Contractor to Contractor's software maintenance customers.
Work	The providing by Contractor of the System and services required to be provided by Contractor under this Agreement.

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 Department. The word "include" shall be

understood to mean "including, without limitation," or "including, but not limited to," and the like, unless otherwise stated.

B. Appendices

The following Appendices are attached to and made a part of this Agreement:

- Appendix A: Acceptance Test Plan and Acceptance Criteria
- Appendix B: Implementation Plan
- Appendix B-1 Critical Milestones
- Appendix C: Deliverables
- Appendix D: Performance Specifications
- Appendix E: Software License
- Appendix F: Payment Schedule
- Appendix G: Support and Maintenance Services
- Appendix H: Form of Bond

2. 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 of this Agreement.

If at any time in the future City becomes aware that adequate funds have not or will not be appropriated to pay the next payment owing to Contractor under Appendix F (Payment Schedule), City will promptly notify Contractor in writing at least fifteen (15) days before the date on which such payment is due Contractor. In the event of receipt of such notice from the City, Contractor may suspend performance in accordance with Section 8 (H) below.

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

3. Term of the Agreement

The term of this Agreement shall be four (4) years, from December 11, 2007 to December 11, 2011. The City, in its sole discretion, shall have the option to extend the term twice, each time for a period of one (1) year by written notice to Contractor, ninety (90) days prior to the expiration of the current term, of its intention to extend the contract term for the period of one (1) year.

4. Effective Date of the Agreement

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

4-1. Services

Contractor shall deliver and install the System. The System as delivered and installed by Contractor shall perform all functions and services described in Appendix D (Performance Specifications), and Contractor shall perform the services described in Appendix G (Support and Maintenance Services), on the terms and prices stated in Appendix C. The System shall be able to collect, record, count, tabulate and report votes cast in accordance with applicable local, state and federal law, and decisions of a court of competent jurisdiction and official opinions of a governmental body or agency having jurisdiction over election matters interpreting such laws, as in effect on December 1, 2007, including without limitation, ranked-choice voting as required by San Francisco Charter § 13.102, the provision of a computer record indicating the number of ballots cast for each candidate and for and against each ballot measure at each precinct as required by San Francisco Charter § 13.107.5, and all requirements placed on the Contractor as a result of the California Secretary of State's Withdrawal of Approval and Conditional Re-approval of Sequoia Voting Systems, Inc., revised version dated October 25, 2007. Without limitation of the foregoing and in accordance with Section 53, Contractor is not obligated to cause the System, Hardware, Software or any component thereof to comply with any specifications, standards or requirements of the Federal Election Commission, Election Assistance Commission, California Secretary of State or any other governmental, quasi-governmental or regulatory body or agency to the extent such specifications, standards or requirements are not in effect and applicable to City on December 1, 2007 (including, without limitation, National Association of State Election Directors, FEC or EAC 2002 or 2005 standards). The City and the Contractor shall enter into good faith negotiations to amend the Agreement to cover any new hardware, software, firmware or services necessary to meet any new specifications, standards or requirements that come into effect after December 1, 2007 and shall, at that time, negotiate the price of such services.

Contractor shall provide to City all Hardware and System Software required by Appendix C (Deliverables) to this Agreement for the System, and perform all installation, programming, integration, testing, Maintenance Services, Support Services, and delivery of the System during elections, as specified in Appendix D (Performance Specifications), the RCV Design Specifications (as to ranked choice voting elements of the System), and Appendix G (Support and Maintenance Services). Contractor agrees to perform all Work and other obligations of Contractor required by this Agreement, including without limitation, the requirements of Appendices B (Implementation Plan) and D (Performance Specifications), and the RCV Design Specifications (as to ranked choice voting elements of the System).

4-2. Risk of Loss and Title Transfer

Notwithstanding the foregoing or anything to the contrary contained in this Agreement, risk of loss for each component of the System shall pass to City upon delivery to a location designated by the City. Provided, however, that, for Hardware, Contractor shall have liability for loss or damage only during such times Contractor has actual custody and control of the Hardware for purposes of performing Contractor's testing, maintenance, and polling place delivery obligations under this Agreement (including when testing, maintenance, and delivery of equipment is performed or occurs in the City's warehouse under the supervision of the City). Risk of loss shall automatically revert to City upon completion of maintenance and testing and the Hardware's return from polling places to the City's warehouse location.

Notwithstanding the foregoing or anything to the contrary contained in this Agreement, title for each component of the Hardware or System Software shall pass to the City upon the initial delivery to the location designated by the City.

4-3. Security Interest

The City hereby grants Contractor a first and prior purchase money security interest in the Hardware and System Software and in any additions or accessions thereto and in any proceeds (including but not limited to accounts receivables) thereof as security for all of the City's obligations hereunder, which security interest shall commence upon the initial delivery of any item of Hardware or System Software and terminate upon full payment therefore in accordance with this Agreement. Upon request of Contractor, and to the extent the City is permitted to do so under applicable law, the City shall immediately execute any instrument or document reasonably deemed necessary by Contractor to perfect or enforce such security interest.

5. System Software and Hardware; License and Warranty

A. System Software

(1) Software License. Subject to the terms and conditions of this Agreement, and in consideration for full payment of the software license fee set forth in Appendix C-2, Contractor hereby grants to City upon the express license terms set forth in Appendix E, a nonexclusive and nontransferable limited license to use the System Software only in connection with use of the Hardware for preparing for, conducting, and voting in elections in the jurisdiction of the City pursuant to this Agreement. Contractor hereby represents and warrants that it has title to and/or the authority to grant the License for System Software to City. Contractor shall install the System Software in accordance with the Documentation, Appendix D (Performance Specifications), the RCV Design Specifications (as to ranked-choice voting elements of the System), and Appendix A (Acceptance Test Plan and Acceptance Criteria). The foregoing software license for the System Software is sometimes collectively referred to as the "License" hereinafter.

Contractor agrees that in the event it completely and generally ceases to provide maintenance and support for the System Software, and there is no successor in interest by merger, operation of law, assignment, purchase, or otherwise, it will provide City, without charge, one (1) copy of the then-current Source Code for all of the System Software (including Upgrades) and all supporting Documentation for the System Software then operating and installed. Pursuant to this section, City shall have a personal, nonexclusive, and nontransferable limited license to use the Source Code solely and exclusively for performing Contractor's maintenance obligations under this Agreement, for complying with the Open Code Review pursuant to Section 5(A)(9), and for no other purpose whatsoever.

In furtherance of its obligations as stated above, Contractor has placed a copy of the Source Code for the System Software which corresponds to the most current version of the System Software (including Upgrades) in escrow with an independent escrow agent for the benefit of the California Secretary of State pursuant to a separate escrow agreement. Contractor shall on or before full execution of this Agreement name the City as a beneficiary of such escrow agreement. Contractor will maintain and pay fees associated with the escrow agreement (or a substantially similar substitute agreement of which City is a beneficiary) in place for the entire term of this Agreement. Contractor agrees to update materials on deposit with the escrow agent promptly upon its release of any Upgrade such that the Source Code is maintained as corresponding to the version of the System Software (including Upgrades) in use by the City. Contractor shall provide City with an acknowledgment that City

has been named as a beneficiary of such escrow agreement which will include the name of the escrow agent and will have such acknowledgment renewed each year this Agreement is in effect.

(2) Interpretation of the Specifications. The City hereby acknowledges that the Performance Specifications will provide the basis for the RCV Design Specifications, and that the RCV Design Specifications will, upon acceptance by the City, supersede the Performance Specifications as to the ranked choice voting elements of the System and provide the basis for the programming, installation, integration and testing of the ranked choice voting elements of the System. The Performance Specifications shall continue to be applicable to the extent of elements of the System other than the ranked choice voting elements of the System.

(3) Interpretive Differences. In the event City and Contractor differ in their interpretations of the Performance Specifications, RCV Design Specifications, or Acceptance Tests, the City's reasonable interpretation (provided the same is consistent with this Agreement) shall prevail provided, however, that the City's determination shall not be binding upon or establish a presumption before, any court or governmental body adjudicating any dispute between the City and Contractor, and provided further that the Contractor's remedies shall not in any way be impaired by the City's determination. In the event of any conflict between any provisions of the Documentation and the RCV Design Specifications or Acceptance Criteria, the provisions of the RCV Design Specifications or Acceptance Criteria shall prevail.

(4) Software and Firmware Warranty. From January 1, 2008 through December 31, 2008, and for all subsequent years covered under this Agreement in which the City pays, in full each year from January 1, 2009, the applicable Software Maintenance Fee specified in Appendix C (Deliverables), Contractor warrants that the System Software will, for the term of this Agreement (the "Warranty Period"), perform in accordance with the then-current operating Documentation for the System Software and Firmware and Appendix A (Acceptance Test Plan and Acceptance Criteria) and (as to ranked choice voting elements of the System) the RCV Design Specifications during the term of the Warranty Period, provided that: (a) the City does not, and does not permit any party other than Contractor to, modify, change or alter any of the System Software, Firmware (as defined herein below), or Upgrades except as authorized by Contractor; (b) the City does not, and does not permit any party other than Contractor to modify, change or alter the Hardware on which the System Software, Firmware or Software Upgrades are installed, except as authorized in writing by Contractor in each instance; or (c) the error or defect is not caused by City, its agents, servants, employees or contractors.

(5) Software Upgrades. Upgrades shall be governed by the license terms set forth on Appendix E, whether or not installed by City. Upgrades will be provided to City at no additional cost provided City has paid Contractor in full each year during the term of this Agreement the Software Maintenance Fee stated in Appendix C.

(6) Firmware License. The Hardware incorporates software and logic which constitutes intellectual property rights owned by Contractor ("Firmware"). Contractor hereby grants to the City a non-exclusive and non-transferable limited license to use the Firmware, related Documentation, and any Firmware upgrade solely with and exclusively for the operation of the Hardware for the express purpose of allowing the citizens of San Francisco to vote as contemplated by this Agreement and by the license terms set forth on Appendix E. The City shall not, and shall not permit any third party to, reverse engineer, disassemble, decompile, decipher or analyze the Firmware in whole and/or in part, except as expressly, and only to the extent, authorized by this Agreement. Unless expressly required to do so by a written amendment to this Agreement signed by Contractor, Contractor has no obligation (express or implied) to modify or update the Firmware to meet any future requirements, legal or otherwise. From time to time, Contractor in its sole discretion, may release improvements to the Firmware which add,

change or enhance the functionality of the Firmware, or contain programs not included at the time of the execution of this Agreement, which Contractor makes generally available to its customers (“Firmware Upgrades”). Firmware Upgrades shall be governed by this Agreement and the license terms set forth on Appendix E whether or not installed by the City. Firmware Upgrades will be provided to City at no additional cost provided City has paid Contractor, in full each year during the term of this Agreement, the Maintenance Fee as stated in Appendix C attached hereto.

(7) Additional Software Services. In the event the City requests, during the term of this Agreement, software development services which Contractor is not obligated to provide under the terms of this Agreement, but which were requested by the City in the RFP pursuant to which this Agreement is entered into, Contractor will provide those services at Contractor’s accounting cost plus a profit of fifteen percent (15%) of Contractor’s accounting costs. Contractor and City shall enter into an amendment to this Agreement in accordance with Section 52 stating the services to be provided by, the compensation payable to Contractor and that such compensation is conditioned upon meeting the acceptance testing and/or performance criteria provided in the amendment. In no event shall Contractor be obligated to undertake or perform any services which Contractor determines, in Contractor’s sole discretion, not to be commercially or technically feasible. All property developed during performance of such services shall constitute a Development Intellectual Property Right (as defined in Section 57) owned solely by Contractor and licensed to the City under the terms of this Agreement. If during the term of this Agreement (including the options to extend), Contractor enters into an agreement with another entity for sale or licensing without substantial modification of the product developed in performing such services for the City, and Contractor receives payment under that agreement, Contractor shall pay to the City a one-time payment equal to forty percent (40%) of the amounts charged to the City for such services.

(8) Open Source Code. Notwithstanding Sections 4-1 and 53 of this Agreement:

(a) In the event that disclosed or open source code becomes a requirement of California law or the California Secretary of State promulgates a rule or regulation requiring voting system vendors in the state of California to provide disclosure of their source code or to provide open source code, Contractor will comply with the law or any rule or regulation promulgated by the California Secretary of State.

(b) In the event that the California Secretary of State certifies any voting system for use in California that is licensed under a disclosed or open source code license, Contractor shall disclose its source code or submit an application for federal certification of a disclosed or open source code voting system within one (1) year.

(9) Open Code Review.

(a) At a mutually agreed time in the future, Contractor shall provide the Source Code to a third party expert retained by the City who has experience in voting system technology (the “Expert”) to conduct a review of the Source Code at the City’s expense. Prior to conducting any such review, the City shall require the Expert to execute a confidentiality and non-disclosure agreement reasonably acceptable to Contractor and the City. The Source Code shall at all times be held in a secure location exclusively within the control of the City. Access to the Source Code will be limited to the Expert and to employees of the City having a need to know who are bound by the confidentiality provisions in Section 22 of this Agreement. Access to the Source Code shall be restricted, with a detailed record by person, time and date kept documenting all access to the Source Code. All viewing, testing and analysis of the Source Code shall take place in a room free of any electronic recording device, camera, cell phone, PDA or similar recording instrument. The only persons in the room at the time of Source Code review shall be the Expert, representatives designated by Contractor, and employees of the City having a need to know. The

review of the Source Code shall be for the sole limited purpose of assessing whether the Source Code contains material security deficiencies or malicious code designed to interfere with the operation of the Software. For purpose of this Section 5A(9), a security deficiency shall be deemed to be “material” where such deficiency creates a significant and realistic threat of election tampering, unauthorized access to the System, or the inability of the System to fully tabulate all votes cast, in the context of an actual election.

(b) Upon completion of any such review, the City shall require the Expert to provide a report summarizing the Expert’s conclusions as to the existence of any material security deficiencies in the Source Code or the existence of any malicious code which would interfere with the operation of the Software (the “Report”). Prior to completing the final Report, the City shall require the Expert to provide a draft of the Report to Contractor and the City. Contractor shall, within ten (10) days of receipt of the draft report, advise the Expert in writing of any errors, inconsistencies, or misunderstandings in the Report and provide a copy of this written response to the City. The City shall require the Expert to consider all comments of Contractor in good faith and correct any errors, inconsistencies or misunderstandings described by Contractor. Thereafter, the City shall require the Expert to release the final Report to the City. The City shall make the final Report public. If the final Report discloses any material security deficiencies in the Source Code, or any malicious code which would affect the operation of the Software, Contractor shall take corrective action and shall bear all costs associated with correcting the material security deficiencies. The parties acknowledge that any changes to the Source Code will need to be submitted to federal and state authorities for certification, and that Contractor has no control over the certification process or the length of time required for certification. Contractor shall use reasonable efforts to make such corrections and submit the same for certification as soon as possible. In the event that such certification is not obtained in time for the next election, Contractor shall follow the contingency plan set forth in Section XIII of Appendix G (Support Maintenance Services), including paying all costs associated with a manual count if such a count is necessary.

(c) Each time Contractor makes material changes to its software, the City reserves the right to require an additional review of Contractor's Source Code under the terms required under Section 5.A.9.(a) and (b).

(d) Contractor will provide all non-proprietary relevant system specifications and product information for display on the Department’s website.

B. Hardware

(1) Hardware Title/Authority. Contractor represents and warrants that it has title to and/or the authority to convey to City good and marketable title to the Hardware. Subject to the terms and conditions of this Agreement, and in consideration for the payments to be made, Contractor shall convey to City good and marketable title to the Hardware, free and clear of all liens, claims and encumbrances other than as stated in this Agreement. Contractor shall provide to City an electronic copy of operating instructions, user manuals and training materials for the Hardware at the time stated in Appendix B (Implementation Plan), which City may reproduce, all of which constitute confidential “Information” pursuant to Section 22 hereof.

(2) Hardware Warranty

(a). Subject to the limitations listed in Section 5B.(2)(b) herein, and upon full payment each year of the term of this Agreement of the Maintenance Fee (as described in Appendix C), Contractor shall repair and provide maintenance services for the Hardware during the term of this Agreement, as described in Appendix G, so that the Hardware is

maintained in good order so as to perform in accordance with the specifications set forth in the Documentation for the Hardware and Appendix A (Acceptance Test Plan and Acceptance Criteria) , free of any Error, Defect or Malfunction.

(b) Limitations

1. Notwithstanding any other terms or provisions of this Agreement, Contractor is not obligated to repair or replace, and Contractor's warranty obligations under this Section 5B(2) shall not be applicable to, any of the following:

a. paper, security seals, batteries (other than internal batteries on DRE voting units), or other consumable parts or supplies,

b. products which have been repaired or altered by persons other than Contractor and other than those expressly approved in writing by Contractor,

c. products from which the serial numbers have been removed, defaced or changed by City or persons under the City's control,

d. products damaged while in use by or in the control of the City as a result of accident, disaster, theft, vandalism, neglect, abuse, use of any product for a purpose other than the purpose for which it is designed or use not in accordance with Documentation furnished by Contractor,

e. products which have been subjected to physical, mechanical or electrical stress or alteration or any conversion by persons other than those expressly approved in writing by Contractor,

f. products used by any person other than City's employees or persons under City's direct supervision including without limitation the voting public.

(3) City's Remedy. Provided Contractor timely performs Contractor's warranty obligations under this Agreement, City's exclusive remedy and Contractor's entire liability for breach of the limited warranty of Section 5B(2), will be replacement of defective components during the term of this Agreement in accordance with this Section 5B(2). This subsection 5B(2) is not intended to impair or limit Contractor's indemnification obligation under Sections 21 or 24 of this Agreement.

(4) Warranty Disclaimer

Contractor disclaims all other warranties, either express or implied, not expressly and specifically set forth herein including, without limitation, the implied warranties of fitness for a particular purpose and merchantability.

(5) Availability of Replacement Parts

Contractor shall maintain spare parts for each item of Hardware throughout the term of this Agreement pursuant to the terms of Appendix G (Support Maintenance Services) attached hereto.

(6) System Warranty

Contractor warrants that, during the term of this Agreement the System will meet or exceed the functional requirements set forth in Appendix A (Acceptance Test Plan and Acceptance Criteria) and Appendix D (Performance Specifications), the RCV Design Specifications, and the Documentation.

C. System Certification

(1) The City acknowledges and agrees that (i) for the Hardware and System Software to be used in an election, components of the Hardware and System Software will require certification by the Secretary of State of California; (ii) that certification by the Election Assistance Commission and National Association of State Election Directors, as well as possibly other governmental and quasi-governmental agencies, may be required to achieve certification by the California Secretary of State; and (iii) the time required by any certifying agency to process the application for certification is not within the control of Contractor. The City agrees that Contractor shall not be in default of this Agreement, and shall have no liability under this Agreement, for any failure of Contractor to achieve any required certification within any date or time period set forth in this Agreement (including, without limitation, Appendix B) or for any delay in any subsequent deadline resulting from the certification delay where such delay is not due to the failure of Contractor to pursue a timely application for certification with reasonable care and diligence. Where the required certification is delayed for reasons other than Contractor's failure to timely pursue such application for certification with reasonable care and diligence, the dates set forth in this Agreement (including, without limitation, the dates and Critical Milestones set forth in Appendix B) shall be extended by the same period of time as is attributable to the delay in achieving certification. Without limitation of the foregoing, failure to timely achieve certification where Contractor has pursued the application for certification with reasonable care and diligence shall not constitute an Event of Default under Section 9A of this Agreement, nor shall Contractor be subject to the Liquidated Damage provisions of Section 29 of the Agreement by reason of such delay in achieving certification.

(2) Contractor attests that it submitted a complete application for Federal certification, including use of the System for RCV elections, to a certified Independent Testing Authority (ITA) on August 22, 2007. Contractor shall provide City with a copy of this application by December 1, 2007.

(3) If Contractor fails to obtain all necessary Federal and State certifications and approvals of the system for use in RCV elections in time for the November 2008 election, Contractor shall follow the contingency plan it develops as required by Section XIII of Appendix G and pay for all costs associated with this contingency plan as required by the same section.

6. Acceptance Procedure

A. RCV Design Specifications

Contractor shall deliver the RCV Design Specifications to City in accordance with Appendix B (Implementation Plan). If the City believes that the RCV Design Specifications do not fulfill the Performance Specifications, the City shall provide Contractor with a detailed and specific written summary clearly stating each failure of the RCV Design Specifications to capture the Performance Specifications. Except to the extent the City clearly and specifically objects to each failure of the RCV Design Specifications to comply with the Performance Specifications in writing within fourteen (14) calendar days of the date of its receipt of the Design Specification from Contractor, the City will be deemed to have accepted the same. After receipt from the City of a timely written notice specifically stating each failure of the Design Specification to comply with the Performance Specifications, Contractor shall within twenty (20) business days from receipt of written notice from the City correct the

failures stated by the City and submit revised RCV Design Specifications to the City. If the Contractor does not correct the failures(s) stated in the City's timely written notice of the failure of the RCV Design Specifications to comply with the Performance Specifications, within such twenty (20) business day period, such failure shall constitute an Event of Default.

B. Hardware Acceptance.

Hardware shall achieve acceptance by the City in accordance with the following:

Within ten (10) days of Contractor's written notice to City that it has performed acceptance testing of the Hardware and that the Hardware satisfies the Acceptance Tests, City shall either (i) notify Contractor in writing of its Acceptance of the Hardware or (ii) notify Contractor in writing by delivery of a Defect Notice of its rejection of the Hardware stating with specificity the failure of the Hardware in question to comply with the Acceptance Tests. If City fails to deliver to Contractor a Defect Notice within such ten (10) day period, the Hardware shall be deemed accepted by the City.

C. Software Acceptance.

The System Software shall achieve acceptance by the City in accordance with the following before delivery to the City:

Within ten (10) days of Contractor's written notice to City that it has performed acceptance testing of System Software and that the System Software satisfies the Acceptance Tests, City shall either (i) notify Contractor of its Acceptance of the System Software or (ii) notify Contractor in writing by delivery of a Defect Notice of its rejection of the System Software stating with specificity the failure of the System Software in question to comply with the Acceptance Tests. If City fails to deliver to Contractor a Defect Notice within such ten (10) day period, the System Software shall be deemed accepted by the City.

D. Final Acceptance of System. Upon (a) System passing the Acceptance Tests, (b) Contractor's delivery of the Documentation for the System to City as provided in Section 7 below, and (c) upon certification by the Department to the San Francisco Board of Supervisors that the official statement of votes cast in the June, 2008 elections are complete and accurate, City shall, within three (3) days thereafter, notify Contractor of its Acceptance of the System or the System's failure to achieve Acceptance. If City fails to notify Contractor in writing clearly and specifically stating the failure of the System to achieve Final Acceptance within three (3) days after the last to occur of such events, Final Acceptance will be deemed to have occurred. If following Final Acceptance (i) a legal action is instituted challenging the results of the June 3, 2008 election, and (ii) such action results in a final judgment of a court of competent jurisdiction holding that the System did not properly record and tabulate votes in such election, Contractor shall (a) be liable for Liquidated Damages in accordance with Section 29(C)(3) of this Agreement, and (b) refund to City promptly upon demand amounts paid by City to Contractor upon Final Acceptance for the Hardware and System Software (the "Final Acceptance Payment"). In such event, Contractor shall be afforded a period of thirty (30) days after notice pursuant to Section 9(A)(ii) to remedy the failure of the System to properly record and tabulate votes. Upon Contractor remedying failure of the System to properly tabulate votes within such thirty (30) day period or later provided the Agreement is not sooner terminated by the City, City shall return the Final Acceptance Payment to Contractor.

7. Documentation Delivery

Contractor shall deliver one (1) electronic copy (capable of hard copy reproduction by City) of the completed Documentation for the System, including for all System Software and Hardware, in accordance with the Appendices B (Implementation Plan) and G (Support and Maintenance Services). The City may withhold its issuance of the notice of Final Acceptance under Section 6(D) until City receives the completed Documentation. The City may make such number of copies of the Document as is required for City to conduct an election. The City shall furnish Documentation only to authorized persons acting under the direction of the City in the conduct of an election.

8. Term and Termination/Termination for Convenience

A. Implementation Plan. The Implementation Plan is set forth in Appendix B (Implementation Plan).

i. Delays. To prevent slippage in the completion of the project, Contractor agrees that if such slippage occurs due to the fault of Contractor and not due to an Excusable Delay (as defined herein Section 56), it will assign additional qualified personnel to the project.

ii. Time of the Essence. The parties agree that time is of the essence, and that the System will be developed and implemented in accordance with the Implementation Plan. Notwithstanding the foregoing, Contractor shall not be responsible for delays not caused by Contractor or due to any Excusable Delay.

iii. Critical Milestones. Contractor acknowledges and understands that the Implementation Plan contains Critical Milestones which must be attained by the dates listed in Appendix B-1 (Critical Milestones) in order to make the System available for use in the election of February 2008 and subsequent elections covered under this Agreement. In the event Contractor fails to achieve a Critical Milestone by the date set forth on Appendix B-1, and does not cure such failure within the cure period stated in Section 9(A)(ii), the City may impose Liquidated Damages in accordance with Section 29 of this Agreement.

B. Progress Reports. Contractor shall provide City weekly written status reports advising the City of its progress, which reports will be delivered not later than three (3) days following the week to which it relates. For purposes of this paragraph, a week shall mean Sunday through Saturday.

C. Termination for Cause. In the event Contractor commits an Event of Default (as defined in Section 9(A)), this Agreement may be terminated. Termination will be effective after ten (10) days written notice to Contractor. No new work will be undertaken after the date of receipt of any notice of termination. In the event of such termination, Contractor shall be paid amounts required to be paid under this Agreement up to the date of termination. However, City may offset against such amounts due to Contractor any Liquidated Damages and other direct damages which City will incur by reason of Contractor's default and which City is permitted to recover under this Agreement. Except as otherwise stated in Section 29 of this Agreement, such offset will not constitute a waiver of any other remedies available to City under this Agreement.

D. Termination for Convenience. City may terminate this Agreement for City's convenience and without cause at any time by giving Contractor thirty (30) days prior written notice of such termination. In the event of such termination, City shall pay Contractor (i) those amounts owed to Contractor under this Agreement up to the date of termination, and (ii) those expenses reasonably

incurred by Contractor after receipt of notice of termination. Contractor shall cease Work on receipt of notice of termination. Post-termination employee salaries, post-termination administrative expenses, or any other cost not reasonably incurred after notice of termination will not be paid by the City. This section shall not prevent Contractor from recovering costs necessarily incurred in discontinuing further work under the contract after receipt of the termination notice.

E. Obligations upon Termination. Upon termination of this Agreement, Contractor shall submit an invoice to City for amounts payable by the City under Section 8D, for which Contractor has not previously been compensated. Upon approval and payment of this invoice by City, City shall have no further payment obligations to Contractor provided, however, that any cause of action Contractor may have against City under this Agreement (for breach of contract or otherwise) shall not be impaired by such invoice or payment.

F. Survival. This section and the following sections of this Agreement shall survive termination or expiration of this Agreement: 4-3, 10.D, 13, 16, 17, 19 through 22, 24, 25, 26, 47 through 51, 54, 56, 57, 58 and 59.

G. Default by City. Contractor may terminate this Agreement by written notice to the City if:

- i.** City fails to pay any sum owing to Contractor within thirty (30) days of the date when due.
- ii.** City fails to comply with any term or provision of this Agreement (other than failure to make payment), and does not cure such failure within thirty (30) days of written notice from Contractor or such longer time as agreed upon by City and Contractor as needed by City to cure provided City begins such cure within the initial thirty (30) day period.

H. Contractor's Remedies. Contractor's termination rights under this Agreement (including, without limitation, Contractor's termination rights under this Section 8) are in addition to and not in lieu of all other remedies available to Contractor under this Agreement, at law, equity or otherwise, all of which remedies are reserved and each of which may be exercised simultaneously or in the alternative. Without limitation to the foregoing, Contractor may elect in lieu of terminating this Agreement in accordance with this Section 8, to suspend Contractor's performance under this Agreement (without waiver of Contractor's termination right) upon a breach of this Agreement by City, in which case such suspension may remain in effect until the first to occur of (i) cure by the City of such breach or (ii) termination of this Agreement by Contractor after expiration of the cure period (if any) afforded City under this Agreement. In the event of a suspension by Contractor, all scheduled dates and milestones of this Agreement shall be extended by a period of time equal to the duration of the suspension.

9. Default; Remedies.

A. Each of the following shall constitute an event of default ("Event of Default") under this Agreement:

- i.** Contractor is in breach of any of the following Sections of this Agreement: 16 (False Claims), 22 (Confidential Information), 23 (Insurance), 24-1 (Performance Bonds), 33 (Assignment), 53 (Compliance with Laws), 53-1 (California Secretary of State Compliance), or 54 (Private Information), and Contractor fails to (a) commence to diligently attempt to cure breach upon Contractor receiving notice of such breach, and (b) cure such breach within ten (10) days of Contractor receiving notice of such breach or such longer time as agreed upon by City and Contractor as needed by Contractor to cure provided Contractor begins such cure within the initial ten (10) day period.

ii. Contractor fails or refuses to perform or observe any term, covenant or condition contained in this Agreement (other than as set forth in Section 9(A)(i) above), and such default continues for a period of thirty (30) days after receipt of written notice thereof from City to Contractor or such longer time as agreed upon by City and Contractor as needed by Contractor to cure provided Contractor begins such cure within the initial ten (10) day period.

iii. Contractor does not correct the failures of the RCV Design Specifications to comply with the Performance Specifications within twenty (20) business days of receipt of written notice from the City as required under Section 6.A or such longer time as agreed upon by City and Contractor as needed by Contractor to cure provided Contractor begins such cure within the initial twenty (20) day period.

iv. Contractor does not correct the material security or malicious code problems identified by the third party reviewer and does not comply with the contingency plan as required under Section 5.A.9.

v. 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.

vi. 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.

vii. Contractor fails to meet any Critical Milestone stated on Appendix B-1; provided however, in the case of Critical Milestones #3 and #4 only, if Contractor does not cure such failure within thirty (30) days of Contractor receiving written notice from the City or such longer time as agreed upon by City and Contractor as needed by Contractor to cure provided Contractor begins such cure within the initial thirty (30) day period.

B. On and after any Event of Default, which is not cured within the time periods stated in Section 9(A) above, 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 reasonably and necessarily 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.

10. Payments

A. Fixed Price. In consideration for the services rendered under this Agreement and for the rights in the Hardware and System Software granted hereunder, the City shall pay to Contractor the amount set forth in Appendix C (Deliverables) in accordance with the Payment Schedule attached hereto and fully incorporated herein as Appendix F (Payment Schedule). In no event shall the amount of this Agreement exceed Twelve Million Six Hundred and Fifty Thousand Two Hundred and Thirty Three and 25/100 Dollars (\$12,650,233.25). Compensation shall be due and payable within thirty days of the date of Contractor’s invoice. All payments from City to Contractor shall be made via wire transfer in accordance with written wire instructions provided by the Contractor.

B. 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 responsibility of Contractor to conform to the requirements of this Agreement.

C. System Trade-In

(1) On a five (5) year straight-line depreciation schedule, from the date of the Effective Date, Contractor will allow City the option of trading in components of the System , in exchange for the latest version of certified Hardware and Software, developed or released by Contractor, at the current market price. The City may, at its sole discretion, exercise this option prior to the expiration of the five (5) year period.

Year	Depreciated %	Credit %
2009	20%	80%
2010	40%	60%
2011	60%	40%
2012	80%	20%
2013	100%	0%

(2) Effective on the date that the City notifies Contractor that it will exercise this option, Contractor shall provide City with priority of delivery over all other sales made by the Contractor after the City provides such notice.

D. Taxes. 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 goods or services delivered pursuant hereto, shall be the obligation of Contractor.

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. City Responsibilities

A. City Representative. City will make available to Contractor a qualified project manager who will be authorized to make binding decisions for the City regarding this Agreement and will promptly:

(i) review all specifications, technical materials and other documents submitted by Contractor, request necessary corrections, and approve such documents;

(ii) provide requested City information and data and assume responsibility on the adequacy of the same;

(iii) advise Contractor of City's requirements; and

(iv) upon request provide access to City's staff, facility and hardware.

12. Contractor Staffing and Support Services

A. Project Manager. Contractor shall designate a Project Manager in accordance with the requirements of Appendix G (Support and Maintenance Services).

Contractor shall use its reasonable efforts to maintain the same Project Manager until Acceptance of the System. However, if Contractor needs to replace its Project Manager, it shall endeavor to provide City with written notice thereof at least 45 days prior to the date the Project Manager is to be replaced. Notwithstanding the foregoing, Contractor may appoint temporary Project Managers in connection with short term unavailability, sick leave, or reasonable vacations, provided that Contractor gives City reasonable notification thereof in advance.

City may require Contractor to replace its Project Manager, by giving Contractor notification thereof and City's objective reasons therefore. Upon receipt of such notice, Contractor shall make reasonable efforts to replace the Project Manager as soon as reasonably possible, provided that Contractor shall not be required to remove personnel from other ongoing projects. Contractor shall not be obligated to remove any Project Manager if such removal would in the reasonable opinion of Contractor violate applicable law or subject Contractor to liability.

B. Staffing. Work under this Agreement shall be performed only by competent personnel appropriately trained in technical skills to perform their duties under the supervision of, and (subject to subcontracting by Contractor pursuant to Section 32) in the employment of, Contractor. Contractor shall 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. The personnel of each party, when on the premises of the other, shall comply with the security and other personnel regulations of the party on whose premises such individual is located.

C. System Maintenance. Contractor shall maintain the System in accordance with Appendix G (Support and Maintenance Services). On an election day through the term of the contract, Contractor shall provide thirty-three (33) field technicians to provide support. During each Election Period (defined as the period commencing on the date logic and accuracy testing begins and ending upon certification of the election results by the Department of Elections to the San Francisco Board of Supervisors that the official statement of votes cast is complete and accurate (the "Election Period")), through the term of the contract, Contractor shall during Contractor's normal business hours (excluding weekends and holidays) respond to telephone requests for assistance within four (4) business hours and use best efforts to remedy any Error, Defect or Malfunction within twenty-four (24) business hours. On an election day through the term of the contract, Contractor shall use best efforts to respond to a request for assistance by the City and use best efforts to remedy any Error, Defect or Malfunction within one (1) hour after the request for assistance.

13. City's Data.

Any data or other materials furnished by the City for use by Contractor under this Agreement shall remain the sole property of the City and will be held in confidence in accordance with Section 22 of this Agreement. Such materials shall be returned to City upon Acceptance of the Programs.

14. Guaranteed Maximum Costs

A. 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. In the event that the Controller fails to certify sufficient funds to meet the City's obligation to make the next payment owed to Contractor under Appendix F (Payment Schedule) on or before a date which is fifteen (15) days before such payment is due, Contractor may suspend Contractor's performance under this Agreement pursuant to Section 8(H).

B. 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 this Agreement unless the agreement is amended in writing and approved as required by law to authorize 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 this contract and which were not approved by a written amendment to the agreement having been lawfully executed by the City.

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

this Agreement which requires lawful approval and certification of the Controller when the lawful approval and certification by the Controller has not been obtained.

D. 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.

15. Invoice Format

Invoices furnished by Contractor under this Agreement must be in a form acceptable to the Controller, and must include the Contract Progress Payment Authorization number. All amounts paid by City to Contractor shall be subject to audit by City.

Payment shall be made by City to Contractor at the address specified upon each invoice.

16. Submitting False Claims; Monetary Penalties

Pursuant to San Francisco Administrative Code section 21.35, any contractor, subcontractor or consultant who submits a false claim shall be liable to the City for three times the amount of damages which the City sustains because of the false claim. A contractor, subcontractor or consultant who submits a false claim shall also be liable to the City for the costs, including attorney's 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 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; (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.

17. Disallowance

In the event Contractor claims or receives payment from City for a service not required by this Agreement, reimbursement for which is later disallowed by City or 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.

18. INTENTIONALLY OMITTED

19. Responsibility for Furnished 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. The acceptance or use of such equipment by Contractor or any of its employees means that Contractor accepts full responsibility for and agrees to exonerate, indemnify, defend and save harmless City from and against any and all claims for any damage or injury of any type arising from the use, misuse or failure of such equipment, whether such damage be

to Contractor, its employees, City employees or third parties, or to property belonging to any of the above.

20. Independent Contractor; Payment of Taxes and Other Expenses

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

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

B. Payment of Taxes and Other Expenses. Should City, in its discretion, or a relevant taxing authority such as the Internal Revenue Service or the State Employment Development Division, or both, determine that an employee of Contractor is an employee of the City 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.

21. Patent Infringement; Warranty and Indemnity; Warranty of Authority; No Conflict

A. Indemnification.

If notified promptly in writing of any judicial action brought against City based on an allegation that City's use of the System Software or Hardware infringes a patent, copyright, or intellectual

property right of a third party or constitutes misuse or misappropriation of a trade secret (“Infringement”), Contractor shall hold City harmless and defend such action at its expense. Contractor shall 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 System Software and Hardware constitutes Infringement, Contractor shall pay the reasonable costs incurred by City in 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.

In the event that a final injunction shall be obtained against City’s use of the System Software or Hardware by reason of Infringement, or in Contractor’s opinion City’s use of the System Software and Hardware is likely to become the subject of Infringement, Contractor may at its option and expense (a) procure for City the right to continue to use the System Software or Hardware as contemplated hereunder, (b) replace the System Software or Hardware with non-infringing, functionally equivalent substitute System Software or Hardware, or (c) suitably modify the System Software or Hardware to make its use hereunder non-infringing while retaining functional equivalency to the unmodified version of the System Software or Hardware. If none of these options is reasonably available to Contractor, then this Agreement may be terminated by Contractor and Contractor shall (i) if termination occurs during the first three (3) years from the date of this Agreement, refund to City all amounts paid under this Agreement, and (ii) if termination occurs thereafter, refund to City amounts paid under this Agreement depreciated on a straight line basis over a ten (10) year period from the date of this Agreement.

B. Conditions

Contractor shall have no liability or obligation for any Infringement or claim of Infringement unless City: (i) notifies Contractor in writing of any Infringement Claim or alleged Infringement of which City becomes aware within a reasonable time thereafter (not to exceed thirty (30) days after City first had knowledge of same or such shorter period as may be required in order to avoid prejudice to Contractor); (ii) does not prevent or impede Contractor from the conduct of the defense of such claim, including negotiations for settlement or compromise; (iii) provides Contractor with non-privileged information and records of the City and makes a good faith effort to provide access to relevant City personnel; (iv) permits Contractor to alter the Hardware or System Software, at its own expense, to render it non-infringing; (v) authorizes Contractor to procure for City the authority to continue the use and possession of the System Software or Hardware at no additional cost or additional expense to City beyond sums owing under this Agreement.

C. Exclusions

Contractor shall have no liability for an Infringement or alleged Infringement caused by: (i) use of a superseded or modified release of the System Software or portion thereof, if such infringement would have been avoided by the use of a current unmodified release of the System Software; (ii) use of the System in a manner not authorized by Contractor or for a purpose other than City’s use in accordance with this Agreement; (iii) use of System Software or Hardware which has been altered by City or any person other than Contractor; (iv) the combination, operation, or use of the Hardware or System Software with other equipment or software not furnished by Contractor, if such infringement would have been avoided by use of the Hardware or System Software alone.

D. Warranty of Authority; No Conflict.

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

22. Confidential Information

A. Standard of Care. 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 the 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.

B. Contractor Information. Contractor represents that information concerning Contractor's Firmware, Software (including, without limitation, System Software), pricing, products, finances, and business constitute trade secrets within the meaning of Section 1060 of the California Evidence Code (trade secrets privilege) and Section 3426 et seq. of the California Civil Code (Uniform Trade Secrets Act) which are by their nature competitively sensitive and proprietary (collectively "Trade Secrets"). Contractor shall identify Trade Secrets as such at the time of their submission to the City. City therefore agrees to use its best efforts not to disclose all or any part of the information, materials or property constituting the Trade Secrets provided that Contractor indemnifies and holds harmless City from any liability, costs and expenses actually incurred by City as a result of opposing disclosure of the Trade Secrets. In the event City receives a request for Trade Secrets under the City's Sunshine Ordinance, the Public Record Act, or other applicable public disclosure law, City shall inform Contractor of such request within ten (10) days of City's knowledge or such shorter period as necessary under the applicable statute to avoid prejudice to Contractor's ability to oppose disclosure. In the event City is nonetheless required by law to disclose any of the Trade Secrets, City shall give written notice five business days prior to disclosure and the Contractor hereby releases the City from any and all claims or liability, including any and all claims now known or unknown, arising out of the City's legally-required disclosure of any of the Trade Secrets to third parties or arising out of third party use of such Trade Secrets. In no event shall this Section be interpreted as applying to the contents of this Agreement.

C. Survival. These obligations of confidentiality shall survive the termination of the Agreement.

23. Insurance

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

i. Workers' Compensation, in statutory amounts, with Employers' Liability limits not less than \$1,000,000 each accident.

ii. Comprehensive or 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.

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

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

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

ii. 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. All policies shall provide thirty days' advance written notice to City of cancellation, non-renewal or reduction in coverage, mailed to the following address:

Director
Department of Elections
1 Dr. Carlton B. Goodlett Place, Room 48
San Francisco, California 94102

D. 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.

E. 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.

F. 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.

G. 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.

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

24. Indemnification and General Liability

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 from Contractor's performance of this Agreement, 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 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 Section 24 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.

24-1. Surety Bonds

(a) Contractor shall provide a performance bond by January 1 2008 (the "Performance Bond") in the amounts set forth below to guarantee the faithful performance of the obligations of Contractor under this Agreement. The Performance Bond shall be substantially in the form of the performance bond attached hereto as Appendix H (Bond).

The amount of the Performance Bond shall be as follows:

(i) During the period of January 1, 2008 to January 1, 2009, the sum of Three Million Dollars and 00/100 (\$3,000,000.00). This Bond shall be surrendered to Contractor by City upon delivery to City of the Bond as set forth in the following Section (24-1) (ii);

(ii) During the period of January 1, 2009 to January 1, 2010, the sum of One Million and 00/100 (\$1,000,000.00) Dollars, which Bond shall be surrendered to Contractor by City upon delivery to City of the Bond as set forth in the following Section (24-1) (iii);

(iii) During the period of January 1, 2010 to January 1, 2011, the sum of Five Hundred Thousand and 00/100 (\$500,000.00) Dollars, which Bond shall be surrendered to Contractor by City upon the expiration date of January 1, 2011;

(iv) In the event the City, in its sole discretion, extends the contract for two (2) separate one (1) year periods beyond January 1, 2011, during each one (1) year extension, Contractor shall provide a Bond in the sum of Five Hundred Thousand and 00/100 (\$500,000.00) Dollars, which Bond shall be surrendered to Contractor by City upon the expiration date of the first additional one (1) year extension at January 1, 2012 and, should City extend the contract for the final extension year, Contractor shall provide a final Bond in the sum of Five Hundred Thousand and 00/100 (\$500,000.00) Dollars, which Bond shall be surrendered to Contractor at January 1, 2013.

(b) The corporate surety (ies) issuing the Performance Bond shall be legally authorized to engage in the business of furnishing surety bonds in California. Each surety shall have a current A.M. Best rating of not less than A-VIII. The corporate surety(ies) issuing such bonds shall have no liability

under any bond following the expiration date of such bond except for any claims submitted to the surety prior to the expiration of such bond. The corporate surety (ies) shall have no liability and no recourse shall arise whatsoever against the corporate surety (ies) should it or they elect not to renew a Performance Bond upon its expiration date.

(c) In the event that a performance bond or other financial assurance is required by City and is provided by Contractor in connection with this Agreement or Contractor's performance hereunder, City shall not demand payment with respect to such financial assurance by reason of an alleged default by Contractor under this Agreement until City shall have provided Contractor with written notice and any applicable cure period shall have expired without such default having been cured by Contractor.

25. Maximum Liability of Contractor

CONTRACTOR'S TOTAL AGGREGATE LIABILITY FOR ANY LOSS, DAMAGE, COSTS OR EXPENSES UNDER OR IN CONNECTION WITH THIS AGREEMENT, HOWSOEVER ARISING, INCLUDING WITHOUT LIMITATION, LOSS, DAMAGE, COSTS OR EXPENSES CAUSED BY BREACH OF CONTRACT, SHALL IN NO CIRCUMSTANCES EXCEED THE AMOUNT OF LIQUIDATED DAMAGES WHICH MAY BE IMPOSED ON CONTRACTOR IN ACCORDANCE WITH THE TERMS OF SECTION 29 OF THIS AGREEMENT FOR THE YEAR IN WHICH THE CLAIM AROSE REDUCED BY THE AMOUNT OF LIQUIDATED DAMAGES ACTUALLY ASSESSED BY CITY UNDER SECTION 29 DURING THAT YEAR. THIS LIMITATION SHALL BE APPLICABLE NOTWITHSTANDING THAT ANY REMEDY AVAILABLE TO CITY MAY FAIL IN ITS ESSENTIAL PURPOSE. CONTRACTOR SHALL NOT BE LIABLE FOR ANY LOSS OF PROFITS, LOSS OF BUSINESS, INCIDENTAL LOSS OF DATA, INCIDENTAL LOSS OF USE OR ANY OTHER INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL LOSS OR DAMAGE WHATSOEVER, HOWSOEVER ARISING, INCURRED BY CITY OR ANY THIRD PARTY, EVEN IF THE PARTIES OR THEIR REPRESENTATIVES HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

NOTWITHSTANDING THE FOREGOING, THIS SECTION 25 IS NOT INTENDED TO LIMIT OR IMPAIR (1) THE INDEMNIFICATION OBLIGATIONS OF CONTRACTOR UNDER SECTION 21, 22(B) OR 24 OF THIS AGREEMENT, (2) CONTRACTOR'S LIABILITY ARISING OUT OF OR IN CONNECTION WITH ANY VIOLATION BY CONTRACTOR OF CITY CHARTER OR ORDINANCE, OR (3) THE LIABILITY OF CONTRACTOR FOR CAUSES OF ACTION ARISING INDEPENDENTLY OF THIS AGREEMENT INCLUDING WITHOUT LIMITATION FRAUD, MISREPRESENTATION OR INTENTIONAL TORTIOUS MISCONDUCT.

26. Liability of City

CITY'S OBLIGATIONS UNDER THIS AGREEMENT SHALL BE LIMITED TO THE PAYMENT OF THE COMPENSATION PROVIDED FOR IN SECTION 10 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.

27. 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.

28. Notices to the Parties

Unless otherwise indicated elsewhere in this Agreement, all written communications sent by the parties may be by U.S. mail, an overnight courier service providing evidence of delivery, or by fax, and shall be addressed as follows:

To City: Director
Department of Elections
1 Carlton B. Goodlett Place, Room 48
San Francisco, California 94102
Fax: (415) 554-7399

To Contractor: Sequoia Voting Systems, Inc.
Peter McManemy, VP/CFO
7677 Oakport Street
Oakland, California 94621
Fax (510) 875-1226

Any notice of default must be sent by registered mail. Notice shall be effective on receipt.

Either party may change the address to which notice is to be sent by giving written notice thereof to the other party.

29. Liquidated Damages

A. By entering into this Agreement, Contractor agrees that if any of the events stated in this Section 29 occur, and are not corrected within the time periods stated or referenced in this Section 29, City will suffer actual damages that will be impractical or extremely difficult to determine; further, Contractor agrees that each sum stated below is not a penalty, but is a reasonable estimate of the loss that City will incur based on the delay, established in light of the circumstances existing at the time this contract was awarded. City may deduct a sum representing the liquidated damages then owing by Contractor from any money due to Contractor. Such deductions shall not be considered a penalty, but rather agreed monetary damages sustained by City because of the events described below. In the event City is awarded Liquidated Damages under this Section, the amounts payable by Contractor under this Section 29 represent the sole and exclusive damage award available to City by reason of any of the events described or referenced in this Section 29, notwithstanding any other term or provision of this Agreement except the indemnification obligations of contractor under Section 21, 22(B), and 24 of this agreement.

In no event and under no circumstances will the total amount of liquidated damages imposed on Contractor pursuant to all subsections of this Section 29 exceed (i) during the first year from January 1, 2008 through December 31, 2008, the sum of Four Million Dollars (\$4,000,000.00), but not exceeding the amount of Three Million and 00/100 Dollars (\$3,000,000.00) in Section 29.C.3. for any single election;

(ii) during the second year from January 1, 2009 through December 31, 2009, the sum of Three Million and 00/100 Dollars (\$3,000,000.00), but not exceeding the amount of Two Million Five Hundred Thousand and 00/100 Dollars (\$2,500,000.00) in Section 29.C.3. for any single election; and (iii) during the balance of the term of this Agreement, the sum of Two Million Dollars and 00/100 (\$2,000,000.00) per election, but not exceeding (a) One Million and 00/100 Dollars (\$1,000,000.00) for any single election that does not involve ranked choice voting or (b) Two Million and 00/100 Dollars (\$2,000,000.00) for any single election that includes ranked choice voting as provided in Section 29.C.3. Except that in no event shall Contractor incur or be liable for payment of liquidated damages where delay results from an Excusable Delay (as defined in Section 56 of this Agreement) or where delay is due to the failure to timely receive certification, but such delay is not a result of the failure of Contractor to pursue an application for certification with reasonable care and diligence (as provided in Section 5 C(1)) by meeting Critical Milestones #1 and #2 . For purposes of calculating the maximum damages per election under this Section 29, Liquidated Damages assessed for a “single election” shall mean all Liquidated Damages assessed under Section 29C and 29E for that election.

The amounts for which Contractor is liable under this Section 29 are referred to as “Liquidated Damages”.

B. Critical Milestones: In the event that Contractor fails to complete any of the Critical Milestones (as listed on Appendix B-1) and does not cure such failure within the cure period applicable to that Critical Milestone as stated in Section 9, Contractor shall be liable for Liquidated Damages in the sum of One Thousand and 00/100 (\$1,000.00) Dollars per day commencing after expiration of the cure period until the Critical Milestone is met up to a maximum amount of One Hundred Thousand and 00/100 (\$100,000.00) Dollars in the aggregate for a single Critical Milestone.

C. On Election Days:

1. If ten percent (10%) or more of the DRE units fail to operate on an election day, Contractor shall be liable for Liquidated Damages in the amount of One Hundred Seventy Five Thousand and 00/100 Dollars (\$175,000.00) provided, however, that DRE units which fail to operate but are successfully repaired, replaced or made operational by Contractor within one (1) hour of receipt of notice from City (provided that additional DRE units/parts purchased by the City are available or if no such units/parts are available that Contractor uses best efforts to obtain such units/parts and make replacements or repairs within a reasonable time) shall not be deemed to have failed to operate. In the event that Contractor is no longer providing storage and warehousing services for the Hardware, the City shall afford Contractor access to the Hardware as and when necessary for Contractor to perform Contractor’s maintenance obligations under this Agreement.

2. If ten percent (10%) or more of the optical scan units fail to operate on an election day, Contractor shall be liable for Liquidated Damages in the amount of One Hundred Seventy Five Thousand and 00/100 Dollars (\$175,000.00) provided, however, that optical scan units which fail to operate but are repaired, replaced or made operational by Contractor within four (4) hours of receipt by Contractor of notice from City (provided that additional optical scan units/parts purchased by the City are available, or if no such units/parts are available that Contractor uses best efforts to obtain such units/parts and make replacements or repairs within a reasonable time) shall not be deemed to have failed to operate. In the event that Contractor is no longer providing storage and warehousing services for the Hardware, the City shall afford Contractor access to the Hardware as and when necessary for Contractor to perform Contractor’s maintenance obligations under this Agreement.

3. For each election in which the City is unable to properly record and tabulate votes because of (i) an Error, Defect or Malfunction in the System, and Contractor fails to provide an alternative tabulation solution which processes a statement of votes in compliance with applicable laws (provided, however, that Contractor's obligation to comply with laws shall be limited as stated in Section 53 of this Agreement), or (ii) failure of Contractor to achieve certification of the System for use in the Election scheduled for June, 2008 and for all elections covered under this Agreement, Contractor shall be liable for Liquidated Damages as follows: for elections occurring in the first (1st) year from January 1, 2008 through December 31, 2008, the sum of Three Million and 00/100 Dollars (\$3,000,000.00) per election; for elections occurring in the second year (2nd) year from January 1, 2009 through December 31, 2009, the sum of Two Million Five Hundred Thousand and 00/100 Dollars (\$2,500,000.00) per election; and for elections during the balance of the term of this Agreement, the sum of (a) One Million and 00/100 Dollars (\$1,000,000.00) per election not invoking ranked choice voting, and (b) Two Million and 00/100 (\$2,000,000.00) Dollars per election involving ranked choice voting. Notwithstanding the foregoing, any election in which fifty percent (50%) or less of the total number of voting units supplied by Contractor are used in such election, Contractor's liability for Liquidated Damages shall be limited to the sum of Five Hundred Thousand (\$500,000.00) Dollars. Except that in no event shall Contractor incur or be liable for payment of liquidated damages where delay is due to the failure to timely receive certification, but such delay is not a result of failure of the Contractor to pursue an application for certification with reasonable care and diligence (as provided in Section 5C (1)) by meeting Critical Milestones #1 and #2 or results from an Excusable Delay (as defined in Section 56 of this Agreement).

4. If due to an Error, Defect or Malfunction in the System, City's tabulation of votes during an election at ten percent (10%) or more of precincts is delayed, Contractor shall be liable for Liquidated Damages as follows: if votes are not tabulated by 11:59 p.m. on that election day, the sum of One Hundred Fifty Thousand and 00/100 Dollars (\$150,000.00); if votes are not tabulated by noon of the day after that election day, the sum of Two Hundred and 00/100 Thousand Dollars (\$200,000.00); if votes are not tabulated by 11:59 p.m. on the second day following that election day, the sum of Four Hundred Thousand and 00/100 Dollars (\$400,000.00).

30. Bankruptcy

In the event that either party shall cease conducting business in the normal course, become insolvent, make a general assignment for the benefit of creditors, suffer or permit the appointment of a receiver for its business or assets or shall avail itself of, or become subject to, any proceeding under the Federal Bankruptcy Act or any other statute of any state relating to insolvency or the protection of rights of creditors, then at the option of the other party this Agreement shall terminate and be of no further force and effect.

31. 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 shall 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 personal and other data related to all other matters covered by this Agreement, whether funded in whole or in part under this Agreement. Contractor shall maintain such data and records in an accessible location and condition for a period of not less than 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 of this Agreement shall have the same rights conferred upon City by this Section.

32. Subcontracting

Contractor intends to retain subcontractors to perform certain of Contractor's duties under this Agreement, subject to the consent of the City in accordance with this Section 32. Prior to retaining a subcontractor, Contractor shall notify the City in writing of the identity of the proposed subcontractor. The City shall promptly evaluate such subcontractor, and shall not unreasonably withhold, delay or condition the City's consent to such subcontractor. In the event the City rejects any subcontractor proposed by Contractor, City shall notify Contractor in writing specifically stating the City's reason for rejection of such subcontractor. To the extent that Contractor is delayed in performing Contractor's obligations under this Agreement due to a delay by the City in approving or rejecting a subcontractor, the deadlines under this Agreement shall be extended by the time period attributable to the City's delay. 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.

33. 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, provided that Contractor may subcontract Contractor's obligations hereunder in accordance with Section 32 above. Notwithstanding the foregoing, Contractor may assign this Agreement to any entity owned or controlled by, or under common control with Contractor provided (i) the assignee has executed an assignment and assumption agreement reasonably acceptable to City, and (ii) the assignee has the ability to perform Contractor's obligations under this Agreement.

34. Disadvantaged Business Enterprise Utilization; Liquidated Damages

a. The DBE Ordinance

Contractor, shall comply with all the requirements of the Disadvantaged Business Enterprise Ordinance set forth in Chapter 14A of the San Francisco Administrative Code as it now exists or as it may be amended in the future (collectively the "DBE 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 DBE 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 provision of the DBE 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 DBE 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 DBE Ordinance, the rules and regulations implementing the DBE Ordinance, or the provisions of this Agreement pertaining to DBE 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 Human Rights Commission or any other public official authorized to enforce the DBE Ordinance (separately and collectively, the "Director of HRC") may also impose other sanctions against Contractor authorized in the DBE 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 DBE certification. The Director of HRC will determine the sanctions to be imposed, including the amount of liquidated damages, after investigation pursuant to Administrative Code §14A.13(B).

By entering into this Agreement, Contractor acknowledges and agrees that any liquidated damages assessed by the Director of the HRC 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 DBE 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 HRC or the Controller upon request.

35. Nondiscrimination; Penalties

A. Contractor Shall Not Discriminate. In the performance of this Agreement, Contractor agrees not to discriminate against any employee, City and City employee working with such contractor or subcontractor, applicant for employment with such contractor or subcontractor, or against any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations, on the basis of the fact or perception of a person's race, color, creed, religion, national origin, ancestry, age, height, weight, sex, sexual orientation, gender identity, domestic partner status, marital status, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status), or association with members of such protected classes, or in retaliation for opposition to discrimination against such classes.

B. Subcontracts. Contractor shall incorporate by reference in all subcontracts the provisions of Sections 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. Non-Discrimination 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 or where the work is being performed for the City or elsewhere within 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 Section 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 HRC-12B-101) with supporting documentation and secure the approval of the form by the San Francisco Human Rights Commission.

E. Incorporation of Administrative Code Provisions by Reference. The provisions of Chapters 12B and 12C of the San Francisco Administrative Code are incorporated in this Section by reference and made a part of this Agreement as though fully set forth herein. Contractor shall comply fully with and be bound by all of the provisions that apply to this Agreement under such Chapters of the Administrative Code, including but not limited to the remedies provided in such Chapters. Without limiting the foregoing, Contractor understands that pursuant to Section 12B.2(h) 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.

36. Earned Income Credit (EIC) Forms

Administrative Code section 12O requires that employers provide their employees with IRS Form W-5 (The Earned Income Credit Advance Payment Certificate) and the IRS EIC Schedule, as set forth below. Employers can locate these forms at the IRS Office, on the Internet, or anywhere Federal Tax Forms can be found.

A. Contractor shall provide EIC Forms to each Eligible Employee at each of the following times: (i) within thirty days following the date on which this Agreement becomes effective (unless Contractor has already provided such EIC Forms at least once during the calendar year in which such effective date falls); (ii) promptly after any Eligible Employee is hired by Contractor; and (iii) annually between January 1 and January 31 of each calendar year during the term of this Agreement.

B. Failure to comply with any requirement contained in subparagraph (a) of this Section shall constitute a material breach by Contractor of the terms of this Agreement. If, within 30 days after Contractor receives written notice of such a breach, 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 to diligently pursue such cure to completion, the City may pursue any rights or remedies available under this Agreement or under applicable law.

C. Any Subcontract entered into by Contractor shall require the subcontractor to comply, as to the subcontractor's Eligible Employees, with each of the terms of this section.

D. Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Section 12O of the San Francisco Administrative Code.

37. MacBride Principles--Northern Ireland

Pursuant to San Francisco Administrative Code Section 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.

38. Tropical Hardwood and Virgin Redwood Ban

Pursuant to Section 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.

39. 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.

40. 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 to the extent applicable, materially complies with the ADA and any other applicable federal, state and local disability rights legislation. This Section 40 does not apply to the accessibility of the System to be supplied by Contractor. Contractor agrees not to discriminate against disabled persons in the provision of services, benefits or activities provided under this Agreement and further agree that any violation of this prohibition on the part of Contractor, its employees, agents or assigns will constitute a material breach of this Agreement. Contractor shall provide a System which complies with the accessibility requirements of Section 53-1 and (except with respect to the ranked choice voting elements of the System) Appendix D (Performance Specifications) and (with respect to the ranked choice voting elements of the System) the RCV Design Specifications.

41. Sunshine Ordinance

In accordance with San Francisco Administrative Code §67.24(e), contracts, contractors' bids, responses to requests for proposals 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.

42. Requiring Minimum Compensation for Employees

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 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 <http://www.sfgov.org/oca/lw/lh.htm>. Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 12P. Consistent with the requirements of the MCO, Contractor agrees to all of the following:

A. For each hour worked by a Covered Employee during a Pay Period on work funded under the City contract during the term of this Agreement, Contractor shall provide to the Covered Employee no

less than the Minimum Compensation, which includes a minimum hourly wage and compensated and uncompensated time off consistent with the requirements of the MCO. For the hourly gross compensation portion of the MCO, Contractor shall pay a minimum of \$10.77 an hour beginning January 1, 2005 and for the remainder of the term of this Agreement; provided, however, that Contractors that are Nonprofit Corporations or public entities shall pay a minimum of \$9 an hour for the term of this Agreement.

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

C. Contractor understands and agrees that the failure to comply with the requirements of the MCO shall constitute a material breach by Contractor of the terms of this Agreement. The City, acting through the Contracting Department, shall determine whether such a breach has occurred.

D. 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, acting through the Contracting Department, shall have the right to pursue the following rights or remedies and any rights or remedies available under applicable law:

i. The right to charge Contractor an amount equal to the difference between the Minimum Compensation and any compensation actually provided to a Covered Employee, together with interest on such amount from the date payment was due at the maximum rate then permitted by law;

ii. The right to set off all or any portion of the amount described in Subsection (d)(1) of this Section against amounts due to Contractor under this Agreement;

iii. The right to terminate this Agreement in whole or in part;

iv. In the event of a breach by Contractor of the covenant referred to in Subsection (b) of this Section, the right to seek reinstatement of the employee or to obtain other appropriate equitable relief; and

v. The right to bar Contractor from entering into future contracts with the City for three years.

Each of the rights provided in this Subsection (d) shall be exercisable individually or in combination with any other rights or remedies available to the City. Any amounts realized by the City pursuant to this subsection shall be paid to the Covered Employee who failed to receive the required Minimum Compensation.

E. 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.

F. Contractor shall keep itself informed of the current requirements of the MCO, including increases to the hourly gross compensation due Covered Employees under the MCO, and shall provide prompt written notice to all Covered Employees of any increases in compensation, as well as any written

communications received by the Contractor from the City, which communications are marked to indicate that they are to be distributed to Covered Employees.

G. Contractor shall provide reports to the City in accordance with any reporting standards promulgated by the City under the MCO, including reports on subcontractors.

H. The Contractor shall provide the City with access to pertinent records after receiving a written request from the City to do so and being provided at least five business days to respond.

I. The City may conduct random audits of Contractor. Random audits shall be (i) noticed in advance in writing; (ii) limited to ascertaining whether Covered Employees are paid at least the minimum compensation required by the MCO; (iii) accomplished through an examination of pertinent records at a mutually agreed upon time and location within ten days of the written notice; and (iv) limited to one audit of Contractor every two years for the duration of this Agreement. Nothing in this Agreement is intended to preclude the City from investigating any report of an alleged violation of the MCO.

J. 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. A subcontract means an agreement between the Contractor and a third party that requires the third party to perform all or a portion of the services covered by this Agreement. Contractor shall notify the Department of Administrative Services when it enters into such a subcontract and shall certify to the Department of Administrative Services that it has notified the subcontractor of the obligations under the MCO and has imposed the requirements of the MCO on the subcontractor through the provisions of the subcontract. 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.

K. Each Covered Employee is a third-party beneficiary with respect to the requirements of subsections (a) and (b) of this Section, and may pursue the following remedies in the event of a breach by Contractor of subsections (a) and (b), but only after the Covered Employee has provided the notice, participated in the administrative review hearing, and waited the 21-day period required by the MCO. Contractor understands and agrees that if the Covered Employee prevails in such action, the Covered Employee may be awarded: (1) an amount equal to the difference between the Minimum Compensation and any compensation actually provided to the Covered Employee, together with interest on such amount from the date payment was due at the maximum rate then permitted by law; (2) in the event of a breach by Contractor of subsections (a) or (b), the right to seek reinstatement or to obtain other appropriate equitable relief; and (3) in the event that the Covered Employee is the prevailing party in any legal action or proceeding against Contractor arising from this Agreement, the right to obtain all costs and expenses, including reasonable attorney's fees and disbursements, incurred by the Covered Employee. Contractor also understands that the MCO provides that if Contractor prevails in any such action, Contractor may be awarded costs and expenses, including reasonable attorney's fees and disbursements, from the Covered Employee if the court determines that the Covered Employee's action was frivolous, vexatious or otherwise an act of bad faith.

L. 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 (\$50,000 for nonprofits), 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 (\$50,000 for nonprofits) in the fiscal year.

43. Requiring Health Benefits for Covered Employees

Unless exempt, 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 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 <http://www.sfgov.org/oca/lwlh.htm>. 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 (d) 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(f)(1-5). 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 Purchasing Division when it enters into such a Subcontract and shall certify to the Purchasing Division 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 keep itself informed of the current requirements of the HCAO.

H. 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.

I. 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 five business days to respond.

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

K. 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.

44. Limitations on Contributions

Through execution of this Agreement, Contractor acknowledges that it is familiar with section 1.126 of the City and County'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 a board 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.

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.

i. Contractor shall comply with First Source interviewing, recruitment and hiring requirements, which will provide the San Francisco Workforce Development System with the exclusive opportunity to initially provide Qualified Economically Disadvantaged Individuals for consideration for employment for Entry Level Positions. The duration of the First Source interviewing requirement shall be ten (10) days, unless business necessity requires a shorter period of time.;

ii. Contractor shall comply with requirements for providing timely, appropriate 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;

iii. Contractor agrees to use good faith efforts to comply with the First Source hiring requirements. A Contractor may establish its good faith efforts by filling: 1) its first available Entry Level Position with a job applicant referred through the First Source Program; and, 2) fifty percent (50%) of its subsequent available Entry Level Positions with job applicants referred through the San Francisco Workforce Development System. Failure to meet this target, while not imputing bad faith, may result in a review of the Contractor's employment records.

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

Violation of the requirements of Chapter 83 is subject to an assessment of liquidated damages in the amount of \$2,070 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. 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.

48. 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 the Department of Elections who shall, within ten (10) business days, render a decision on the meaning and intent of this Agreement. Contractor may avail itself of any other legal remedy available to Contractor on or after the earlier of (i) the date a decision is rendered, or (ii) upon expiration of the ten (10) business day decision period regardless of whether a decision has been rendered.

49. Agreement Made in California; Venue

A. The formation, interpretation and performance of this Agreement shall be governed by the laws of the State of California and the parties agree subject to the dispute resolution requirements of this Section 49, venue for all litigation relative to the formation, interpretation and performance of this Agreement shall be in San Francisco.

B. Any dispute between the parties either with respect to the interpretation of any provision of this Agreement or with respect to the performance by either party hereunder shall be resolved as follows: upon the written request of either party, each party or an authorized representative of each party, will meet, in person or by teleconference, for the purpose of endeavoring to resolve such dispute. The representatives of the parties shall discuss the problem and negotiate in good faith in an effort to resolve the dispute without the necessity of any formal proceeding relating thereto. During the course of such negotiation, all reasonable requests made by one party to the other for nonprivileged information reasonably related to this Agreement will be honored in order that each of the parties may be fully advised of the other's position. The specific format for such discussions will be left to the discretion of the representatives of the parties but may include the preparation of agreed-upon statements of fact or written statements of position furnished to the other party. Except where clearly prevented by the area in dispute, both parties agree to continue performing their respective obligations under this Agreement while the dispute is being resolved unless and until such obligations are suspended, terminated or expire in accordance with the provisions hereof.

50. Construction

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

51. Entire Agreement

This contract sets forth the entire Agreement between the parties, and supersedes all other oral or written provisions. If any provision of this Agreement is held to be unenforceable, this Agreement shall be construed without such provision.

52. Modifications and Change Orders

A. 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 the Department to submit to the Director of HRC 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%.

B. If Contractor wishes to suggest changes to the Hardware, System Software or System, it shall submit to City a description of such proposed changes including any effect on the pricing and Implementation Plan. City shall be under no obligation to accept any such proposal, but if it does so the changes shall only take effect after the agreed changes have been described in an amendment to this Agreement signed by both parties.

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 applicable to the performance of this Agreement, and must, to the extent applicable, at all times comply with such local codes, ordinances, and regulations and all applicable laws. In no event shall any term or provision of this Agreement require Contractor to undertake or perform changes to the Hardware, System Software or Firmware due to changes in law, or changes in interpretation of existing law by a court of competent jurisdiction, occurring after the date of this Agreement. Without limitation of the foregoing, Contractor is not obligated to cause the System, Hardware, Software or any component thereof to comply with any specifications, standards or requirements of the National Association for State Election Directors, Federal Election Commission, Election Assistance Commission, California Secretary of State or other governmental, quasi-governmental or regulatory body or agency to the extent such specifications, standards or requirements are not in effect and applicable on the date of this Agreement (including, without limitation, FEC or EAC 2002 or 2005 standards).

53-1 System Compliance with State and Federal Laws

Pursuant to this Agreement and by order of the Secretary of State, voting systems certified for use in California shall comply with all applicable state and federal statutes, regulations, rules and requirements, including, but not limited to, those voting system requirements set forth in the California Elections Code and the Help America Vote Act of 2002, and those requirements incorporated by reference in the Help America Vote Act of 2002, that are in effect as of the date of this Agreement. Further, voting systems shall also comply with all applicable state and federal voting system guidelines, standards, regulations and requirements that derive authority from or are promulgated pursuant to and in furtherance of the California Elections Code or the Help America Vote Act of 2002 or other applicable state or federal law when appropriate, that are in effect as of the date of this Agreement, including but not limited to, the 2002 Voting System Standards/Guidelines, developed by the Federal Election Commission (FEC) and adopted by the Election Assistance Commission (EAC) and EAC Advisory 2005-004, dated July 20, 2005. This does not include future final court interpretations of existing state or federal law not in effect as of the date of this Agreement.

Voting system manufacturers and/or their agents shall assume full responsibility for any representation that a voting system complies with all applicable state and federal requirements as referenced above. In the event such representation is determined to be false or misleading, voting system manufacturers or their agents shall be responsible for the cost of any upgrade, retrofit or replacement, of any voting system or its component parts, found to be necessary for certification or to otherwise bring the system into compliance.

Any voting system purchased with funds allocated by the Secretary of State's Office shall meet all applicable state and federal standards, regulations and requirements, including, but not limited to, those voting system requirements as set forth in the California Elections Code and the Help America Vote Act of 2002, and those requirements incorporated by reference in the Help America Vote Act of 2002 that are in effect as of the date of this (application, agreement, contract, etc.), including, but not limited to, the 2002 Voting System Standards/Guidelines, developed by the Federal Election Commission (FEC) and adopted by the Election Assistance Commission (EAC) and EAC Advisory 2005-004, dated July 20, 2005.

54. Nondisclosure of Private Information

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.

55. INTENTIONALLY OMITTED.

56. Excusable Delays

A. Neither party shall be liable for any failure or delay in the performance of its obligations under this Agreement that is beyond the party's control or could not have been avoided by the party's exercise of reasonable care and diligence including, without limitation, actions by the other party that prevented the party from performing or impaired the party's ability to perform, natural disaster, fire, explosion, earthquake, floods, supply disruptions, unavailability of necessary utilities, strike, war or military actions, terrorism, insurrection, quarantine restrictions, acts of God, government actions or decrees (except for failure of Contractor to comply with requirements for the testing or certification of the System existing on the date of this Agreement and established by the California Secretary of State, other governmental independent testing authorities, or other entities certifying or testing the System or components of the System (except as otherwise stated in this Agreement)) or judgment or decree of a court of competent jurisdiction (not arising out of a breach of this Agreement by the party) (collectively, an "Excusable Delay").

B. In the event of an Excusable Delay, any performance time table or deadlines under this Agreement, as well as any other affected provision of this Agreement, shall be deemed revised to the extent reasonably necessary for Contractor to complete its performance under this Agreement.

57. Intellectual Property Rights

Each party shall retain its rights in any Intellectual Property Rights owned by or licensed to it prior to the Effective Date. All Development Intellectual Property Rights whether or not developed by Contractor will be owned exclusively by Contractor; provided, however that City, provided it has not breached this Agreement, shall have a personal non-exclusive, non-transferable license to the use of such Development Intellectual Property Rights in accordance with this Agreement and Appendix E (License Terms) solely as necessary for City to use the Hardware and System Software in the manner contemplated by this Agreement. For purposes of this Agreement, "Intellectual Property Rights" shall mean rights in inventions, know-how, patents, registered designs, design rights, trade names, trademarks, service marks, trade secrets, copyrights, semiconductor design rights, mask works and topography rights whether or not registered and including any application to register any of the same, and all rights or forms of protection of a similar nature or having equivalent effect which may subsist anywhere in the world. "Development Intellectual Property Rights" shall mean any Intellectual Property Rights created or coming into being as a result of Contractor performance of this Agreement.

58. No Third Party Beneficiaries

Contractor and City agree that this Agreement is for the benefit of the parties hereto (and their permitted assignees) and is not intended to confer any rights or benefits on any third party, and that there are no third party beneficiaries of this Agreement or any part or specific provision of this Agreement, and no third party shall have any right to enforce this Agreement or any provision hereof.

59. No Transfer

City acknowledges and agrees that (i) the Hardware, System Software, Upgrades, Firmware and Documentation consist of, contain and utilize for their operation trade secrets and other proprietary and confidential Intellectual Property Rights which are the sole and exclusive property of Contractor and which Contractor developed through the investment of considerable effort and expense, and (ii) City is prohibited by this Agreement (including, without limitation, Appendix E (License Terms)) from in any

way transferring, assigning, loaning, or otherwise conveying to any third party the System Software, Firmware, Upgrades or Documentation or any license rights granted to City therein, and (iii) transfer of the Hardware or any component thereof to any third party may compromise Contractor's Intellectual Property Rights in such Hardware, through the potential of reverse engineering or otherwise. In light of the foregoing, City agrees that City shall not, without the prior express written consent of Contractor in each instance, transfer or convey, in any manner whatsoever (including, without limitation, by loan, lease or bailment), any of the Hardware or any component thereof to any other person or entity. City acknowledges that Contractor's pricing under this Agreement is based in part upon the agreements of the City in this Section 59.

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

CITY

Recommended by:

John Arntz
Director, Department of Elections

Approved as to Form:
Dennis J. Herrera
City Attorney

By _____
Ann M. O'Leary
Deputy City Attorney
Approved

Naomi Little
Director of Office of Contract Administration/ Purchaser

CONTRACTOR

Sequoia Voting Systems, Inc.
Name

59760
City Vendor Number

7677 Oakport Street, Suite 800
Address

Oakland, CA 94621
City, State, ZIP

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.

I have read and understood Sec. 37, 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.

Sequoia Voting Systems, Inc.

By _____
Signature
Peter McManemy
Name
VP/CFO
Title
510-875-1200
Phone Number
37-1274619
Federal Employer ID Number