

**CITY AND COUNTY OF SAN FRANCISCO
OFFICE OF CONTRACT ADMINISTRATION
PURCHASING DIVISION**

MASTER AGREEMENT

Basic Information

Date	July 1, 2006
Contractor	Xerox Corporation
Contractor's Address	Xerox Corporation 1851 E. First Street, Suite 260 Santa Ana, CA 92075
City's Address	Office of Contract Administration - Purchasing Department City and County of San Francisco City Hall, Room 430 1 Dr. Carlton B. Goodlett Place San Francisco, CA 94102-4685
Estimated Commencement Date	July 1, 2006
Length of Term	The Master Agreement shall be Three (3) Years with three (3) options to extend the term of the master Agreement for periods of one (1) year each.
Individual Equipment Leases Individual Rental Agreements	Individual Equipment Leases shall have a term of three (3), four (4) or five (5) years plus renewals. Individual Rental Agreements shall have a term from one (1) month to no more than twelve (12) months.
Renewal Term	In no case shall the term of the Master Agreement, any Individual Equipment Lease, or any extension or renewal exceed a combined total of 9.9 years. No Individual Rental Agreement may extend more than eleven (11) months beyond the term of the Master Agreement.
Purchase Option	As defined in Article 3, Term, 3.5, <u>Purchase Option</u> of this Master Agreement.



MASTER AGREEMENT

The foregoing Basic Information is incorporated into and made a part of this Agreement (to be defined below). Except where it is specifically stated in the Master Agreement that other terms set forth in the Proposal are more favorable to the City and therefore control, if there is any conflict between provisions, the provisions of the Master Agreement shall govern, followed in order by the provisions of the RFP, the provisions of the Equipment Schedule and finally the provisions of the Proposal.

This Master Agreement (the "Agreement") made as of the date specified in Article 3 in the City and County of San Francisco, State of California, by and between the Person specified in the Basic Information ("Contractor") and the City and County of San Francisco, a municipal corporation ("City"), acting by and through its Director of Purchasing.

WITNESSETH:

WHEREAS, City desires to lease, rent or own certain Equipment (as hereinafter defined) and Contractor desires to lease, rent or sell such Equipment to City.

WHEREAS, City desires to have Contractor service and maintain such equipment.

NOW, WHEREFORE, in consideration of the promises and mutual covenants contained in this Agreement and for the other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties agree as follows:

ARTICLE 1

DEFINITIONS AND OTHER TERMS

1.1 **Specific Terms.** Unless the context otherwise requires, the following capitalized terms (whether singular or plural) shall have the meanings set forth below:

"Appraisal Procedure" shall mean the following procedure for determining the Fair Market Sales Value of any Equipment and the Fair Market Lease or Rental Value of any Equipment; such matter shall be determined on the basis of an appraisal by an independent appraiser mutually agreed upon by Contractor and City. If Contractor and City fail to agree upon a mutually acceptable appraiser within five (5) Business Days after Contractor or City delivers a written request therefore to the other, each shall appoint, within five (5) Business Days thereafter, an independent appraiser, and such appraisers shall jointly determine such matter, or, if such appraisers cannot agree on such matter within thirty (30) days, such matter shall be determined by the two (2) independent appraisers and a third independent appraiser chosen by agreement of such first two appraisers within five (5) Business Days after such thirty (30) day period. If such three (3) appraisers fail to reach an agreement, the estimates of such three (3) appraisers shall be averaged, unless the estimate of one appraisers differs from the median of the three estimates by more than twice the amount that any other estimate differs from the median, in which case the estimate which differs from the median shall be discarded and the two remaining estimates averaged. If such third appraiser is not appointed within such period of five (5)

Business Days or such appraisal is not made within thirty (30) days of such appointment then such appraisal shall be made promptly by an appraiser appointed by the American Arbitration Association. If either party fails to appoint an appraiser within the time required, the determination of the appraiser appointed by the other party shall be final. The expenses of the Appraisal Procedure shall be borne equally between Contractor and City.

“Basic Information” shall mean the Basic Information set forth at the beginning of this Agreement.

“Business Day” means any day other than a City holiday, a Saturday, Sunday or day upon which banks in the State of California are authorized or required to be closed.

“Commencement Date” for any items or item of equipment means the commencement date specified in the applicable supplemental Basic Information.

“Consumable Supplies” Supplies utilized in the normal use of a copier, including toner, developer, fuser agent, sumps, and preventative maintenance kits. Consumable supplies shall not include staples or paper.

“Controller” shall mean the Controller of the City.

“Equipment” shall mean the personal property (including any documentation related thereto), provided by Contractor to City pursuant to this Agreement.

“Equipment Schedule” shall mean the mutually agreed upon ordering request form and encumbrance document which includes, at a minimum, the equipment description and quantity, the lease or rental term and the price of each individual order under the Master Agreement.

“Event of Default” shall mean each of the events set forth in Sections 12.1 and 13.1.

“Fair Market Value” shall mean the fair market lease or rental value that would be obtained in an arm’s-length transaction between an informed and willing buyer and an informed and willing seller, both under no compulsion, respectively, to lease or rent, and neither of which is related to Contractor or City, for the purchase of the Equipment in question.

“Fair Market Sales Value” shall mean the value that would be obtained in an arm’s-length transaction between an informed and willing buyer and willing seller for the purchase of the Equipment in question.

“HRC” shall mean the City’s Human Rights Commission.

“Indemnified Parties” shall mean: (1) City, including all commissions, departments, agencies and other subdivisions of City; (ii) City’s elected officials, directors, officers, employees, agents, successors and assigns; and (iii) all persons or entities acting on behalf of any of the foregoing.

Business Days or such appraisal is not made within thirty (30) days of such appointment then such appraisal shall be made promptly by an appraiser appointed by the American Arbitration Association. If either party fails to appoint an appraiser within the time required, the determination of the appraiser appointed by the other party shall be final. The expenses of the Appraisal Procedure shall be borne equally between Contractor and City.

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"Indemnified Parties" shall mean: (1) City, including all commissions, departments, agencies and other subdivisions of City; (ii) City's elected officials, directors, officers, employees, agents, successors and assigns; and (iii) all persons or entities acting on behalf of any of the foregoing.

“Liens” shall mean all judgments, materialmen’s liens, mechanics’ liens, claims, demands, encumbrances and other liens of whatever nature or character, but excluding any liens or encumbrances created by or through Contractor.

“Losses” shall mean any and all liabilities, obligations, losses, damages, penalties, claims, actions, suits, judgments, fees, expenses and costs of whatever kind and nature (including legal fees and expenses and costs of investigation, of prosecuting or defending any Loss described above) whether or not such Loss be founded or unfounded, of whatever kind and nature.

“Person” means an individual, partnership, corporation, association, trust or any other legal entity.

“Payment” means the payment for any item of Equipment that City is required to make to Contractor under this Agreement as set forth in the applicable Equipment Schedule.

“Payment Date” means the date the Payment for any item of Equipment is due.

“Supplemental Basic Information” shall mean for each item of Equipment, the Supplemental Basic Information contained in the applicable Equipment Schedule.

“Term” shall mean the length of the Master Agreement and any exercised options to renew.

“Lease Term” shall mean the length of time as designated in increments of three (3), four (4) or five (5) years for an equipment order.

“Rental Term” shall mean the length of time, as designated in increments of one (1) month and not exceeding a total of twelve (12) months, for an equipment order.

Additional Terms. The terms “approval”, “acceptable”, “consent” or “satisfactory” or similar terms shall mean approved by, acceptable to, consented to or satisfactory to City, acting through the department or commission recommending this Agreement below. The terms “include”, “included” or “including” and similar terms shall be deemed to be followed by the words “without limitation.” The use of the term “Successor” or “assign” herein refers only to a successor or assign expressly permitted under Article 15.

1.2 **References to this Agreement.** References to this Agreement include: (a) the applicable Equipment Schedule; any and all appendices, exhibits, other schedules attachments hereto; (c) any and all statutes, ordinances, regulations or other documents expressly incorporated by reference herein; and (d) any and all amendments, modifications, or supplements hereto made in accordance with Section 18.14. References to articles, sections, subsections or exhibits refer to articles, sections or subsections of or exhibits to this Agreement, unless otherwise expressly stated. Terms such as “hereunder”, “herein” or “hereto” refer to this Agreement as a whole, including the applicable Equipment Schedule and all other items described in the first sentence of this Section 1.3.

ARTICLE 2

EQUIPMENT SCHEDULES

2.1 **Delivery of Equipment.** Contractor shall cause each item of Equipment to be delivered at the delivery address specified in the Supplemental Basic Information within fourteen (14) business days of execution of this Agreement. All transportation costs and other expenses, if any, incurred in connection with the delivery of Equipment shall be the responsibility of the Contractor, except where City and Contractor agree that delivery requires unusual and excessive rigging costs. In that case, additional charges will be negotiated at the time the order is placed. Contractor has affirmatively represented that this agreement does not include software development or require the purchase by City of any software license. If, during the term of the Master Agreement, the City orders any item from Contractor that requires a software license, the parties agree to enter in to a software license agreement in substantially the form of the City's Form P-545 as it may be amended from time to time.

2.2 **Installation.** Any Equipment that requires installation as indicated in the Supplemental Basic Information, shall be installed by Contractor or its authorized representative. Installation shall take place in accordance with plans and specifications approved by City and in accordance with all applicable laws, rules and regulations. Contractor shall obtain any permits or licenses required for the installation for the Equipment, unless City otherwise agrees in writing. It shall be the Contractor's responsibility to examine such delivery site specified in the Supplemental Basic Information and to advise the City of any electrical, safety, space or special requirements that are to be met prior to delivery of Equipment. It shall be the City's responsibility to have the site properly prepared for the delivery of equipment. All costs and expenses incurred in connection with installation of the Equipment shall be the responsibility of Contractor.

Contractor agrees that the City may, upon reasonable notice to Contractor, relocate the equipment or any item or items thereof to any location or locations within the geographical boundaries of the City where the City has offices at the City's sole discretion and at no additional charge to City. Prior to any such relocation, the City agrees to execute and to deliver to Contractor such documents that Contractor reasonably requests to protect Contractor's right, title and interest in the equipment.

2.3 **Training.** Training shall be provided to the personnel of the delivery sites on the same day, or within one day following the delivery of the equipment. Additional training shall be provided as often as required at no additional cost to the City.

2.4 **Maintenance.**

a. **Responsibility.** Price paid under this Agreement shall include the cost for the copier and features, delivery, installation, software if any, training, all maintenance, including drum replacement, and all consumable supplies. Consumable supplies shall include but not be limited to toner, developer, fuser agent, sumps and preventive maintenance kits but shall exclude staples and paper. The Contractor shall provide preventive and remedial maintenance service

from 8:00 a.m. to 5:00 p.m., Monday through Friday, except on City holidays. All preventive maintenance shall be performed in accordance with the manufacturer's specifications. The City shall not be charged for copies made by the Contractor's technicians during maintenance service.

b. **Response Time.** Repeated service calls for the same recurring problems will not be tolerated by the City. If the Contractor's technician fails to repair a serious recurring problem the City may select to have the equipment immediately replaced with another unit that is acceptable to City, at the cost of Contractor. The replacement of a piece of equipment shall not alter the term of the Agreement. The maximum service response time shall be 4 working hours per call; the maximum machine replacement time shall be 24 business hours. If replacement takes longer than 24 hours Contractor shall provide a credit to City equal to 1/30 of the monthly lease or rental fee for that piece of equipment for each 24 business hours that the equipment was not in service. Response time shall not include the period that is not considered the City's normal working hours or the period of time in which the service technician takes to repair the equipment. Each service call shall be documented by the Contractor in the form of a service call report, a copy of which shall be left with the using department. This service call report shall, at a minimum, indicate the date and time of the service and a description of the needed repair. The response times listed in this section are minimum requirements. If the Contractor's Proposal contains response times and/or benefits that exceed these minimum requirements, the Contractor shall be bound by the terms of the Proposal which shall become the minimum required by this Agreement.

c. **Uptime Reports.** On a quarterly basis, Contractor shall provide the City a machine uptime report, which shall indicate the using department, model number, serial number, and description of each machine at that location, the install date of each machine, total number of service calls for each machine, the response time for each machine on a service call, the total downtime and the total percent uptime of each installed machine. Contractor shall keep equipment in working order 98% of the available work time. Failure by Contractor to maintain a 98% uptime standard will be grounds for requiring the Contractor to replace the equipment at Contractor's expense with a like or better unit and provide a credit to City of 1/30 of the monthly lease or rental for that piece of equipment for each 24 business hours that the equipment was not in service. The 98% standard listed in this section is a minimum requirement. If the Contractor's Proposal contains standards and/or benefits that exceed these minimum requirements, the Contractor shall be bound by the terms of the Proposal which shall become the minimum required by this Agreement.

2.5 **No Exclusivity.** Nothing contained in this Agreement shall be deemed to grant Contractor an exclusive right during the term of this Agreement to supply City with any equipment or any minimum volume of equipment. City reserves the right, at its sole discretion, to lease, rent or purchase similar or different equipment from any other supplier or contractor that may be used contemporaneously with any item of Equipment provided hereunder.

ARTICLE 3

TERM

3.1 **Effective Date for Each Equipment Schedule.** This Agreement shall become effective with respect to the Equipment listed on each Equipment Schedule when: (a) each party hereto has executed and delivered to Contractor the Equipment Schedule; and (b) the Controller has certified to the availability of funds for such Equipment Schedule as set forth in Section 4.4.

3.2 **Term for Each Equipment.** The term of this Agreement shall commence with respect to such Equipment on the later of (a) the Commencement Date certified in the applicable Equipment Schedule or (b) the effective date specified in Section 3.1, or (c) the vendor has installed the equipment, the equipment has successfully run all diagnostic routines and production checks, and made the equipment available for use by the City. Such term shall end at 11:59 P.M. San Francisco time on the Expiration Date certified in the applicable Equipment Schedule.

3.3 **Duration of this Agreement.** The Master Agreement shall have a 3-year term with the option to renew, in the sole discretion of the City, for up to 3 additional 1-year terms. Individual Equipment Leases shall have a term of 3, 4 or 5 years plus renewals. Individual Rental Agreements shall have a term of 1 month not to exceed a total of 12 months. In no case shall the term of the Master Agreement, any Individual Equipment Lease, or any Individual Equipment Rental including any authorized extension or renewal exceed a combined total of 9.9 years. This Agreement shall remain in effect until all Equipment Schedules have expired or been terminated. If no Equipment Schedule has been executed and delivered within one (1) year after the date of this Agreement specified in the Basic Information, then this Agreement shall automatically be terminated and neither Contractor nor City shall have any rights or obligations hereunder.

3.4 **Renewal Option.** Unless an Event of Default by City shall have occurred and be continuing at the time of giving notice referred to in this Section 3.4 or an Event of Default by City shall have occurred and be continuing at the end of the initial term hereof or the current renewal term, as the case may be, City may, at least thirty (30) days prior to the end of the initial term or renewal term, as the case may be, give Contractor written irrevocable notice of its election to renew this Agreement. At the conclusion of the lease, the City may renew the in place equipment under one of these two options as mutually agreed to with the Contractor:

1: Payments for the term of any renewal shall not exceed 50 percent of the original lease rate; or

2: Upon expiration, the City has the option to have Contractor provide a quote on a 12 or 24 month lease extension on the in place equipment. The quote shall be based upon a calculation of at most 60% of the Fair Market Value of the in-place unit at the end of the lease multiplied by the prevailing State and Local interest rates for a Fair Market Value

lease, and shall include the same base monthly Full Service maintenance component that was in effect during the original lease.

If City fails to exercise its option to renew as herein provided, Contractor shall, subject to Section 3.5, be free to lease or to sell the Equipment on or after the end of the initial term or current renewal term, as the case may be.

3.5 Purchase Option. Unless an Event of Default by City shall have occurred and be continuing at the end of the initial term or the current renewal term, as the case may be, City shall have the option to purchase all or any portion of the Equipment on the last day of the initial term or current renewal term, as the case may be, for a purchase price equal to the Fair Market Sales Value thereof as of the date of purchase. Such option shall be exercised by written notice to Contractor at least thirty (30) days prior to the last day of the initial term or current renewal term, as the case may be, Fair Market Sales Value of the Equipment in question shall be determined by mutual agreement of Contractor and City within ten (10) days after receipt by Contractor of the notice from City, or, if they shall fail to agree within such ten (10) day period, by the Appraisal Procedure. City shall be obligated to pay for such Equipment on the last day of the initial term or the current renewal term, as the case may be. Upon the purchase of any item of Equipment pursuant to this Section 3.5, all of Contractor's right, title and interest in and to such Equipment, and any improvements or additions to such Equipment, shall be automatically transferred directly to City, free and clear of all liens or other encumbrances created by or through Contractor and all interests of Contractor. Contractor shall execute and deliver, upon the request of City, such bills of sale and any other documents, certificates or statements reasonably necessary in connection with such transfer. If City fails to exercise its option under this Section 3.5, the Contractor shall, subject to Section 3.4, be free to sell or lease the Equipment on or after the end of the initial term or the current renewal term, as the case may be.

3.6 Termination for Convenience.

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

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

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

(2) Not placing any further orders or subcontracts for materials, services, equipment or other items. Not delivering any Individual Equipment Leases or Rental Agreements which have not been delivered as of the date of termination.

(3) Terminating all subcontracts except those required for the continued performance of continuing Orders pursuant to section b above.

(4) At City's direction, assigning to City any or all of Contractor's right, title, and interest under the orders and subcontracts terminated. Upon such assignment, City shall have the right, in its sole discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts.

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

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

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

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

(1) The reasonable cost to Contractor, without profit, for all services and other work City directed Contractor to perform prior to the specified termination date, for which services or work City has not already tendered payment. Reasonable costs may include a reasonable allowance for actual overhead, not to exceed a total of 10% of Contractor's direct costs for services or other work. Any overhead allowance shall be separately itemized. Contractor may also recover the reasonable cost of preparing the invoice.

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

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

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

d. In no event shall City be liable for costs incurred by Contractor or any of its subcontractors after the termination date specified by City, except for those costs specifically enumerated and described in the immediately preceding subsection (c). Such non-recoverable costs include, but are not limited to, anticipated profits on this Agreement, post-termination

employee salaries, post-termination administrative expenses, post-termination overhead or unabsorbed overhead, attorneys' fees or other costs relating to the prosecution of a claim or lawsuit, prejudgment interest, or any other expense which is not reasonable or authorized under such subsection (c).

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

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

3.7. Termination for Convenience – Individual Equipment Leases or Rental Agreements. In the event the City decides to terminate all or part of any Individual Equipment Lease or Rental Agreement the following payment formula shall apply: City shall pay the remaining balance due on the Lease or Rental less any unearned charges, including but not limited to interest, and/or maintenance. Within 10 days after City makes this payment Contractor shall remove the terminated equipment.

ARTICLE 4

PAYMENTS

4.1 **Amount.** City shall pay to Contractor the Equipment Payments in the amount set forth in the Supplemental Basic Information. All pricing shall be firm for the term of each original Equipment Lease or Rental. Leases and Rentals shall be fixed at a monthly amount and a cost per copy charge for the term of the lease or rental, plus any equipment options or upgrades. The lease or rental price shall include, but not be limited to, preorder assistance with a needs assessment and analysis for departments, recommendations, equipment, maintenance, service, supplies (paper and staples excluded), on-going analysis of office equipment environments, reports, and the implementation of fleet management. Any renewals or extensions shall be charged as set forth in Section 3.4. Each Payment shall be paid on the Payment Date specified in the Supplemental Basic Information. Payments shall include the cost per month of the copier and features, delivery, installation, training, all maintenance, including drum replacement, and all consumable supplies. All Payments shall be made in lawful money of the United States of America, by warrant drawn on the Treasury of City. Unless otherwise specified by Contractor in writing, each Payment shall be sent to Contractor at the address for notices specified in Article 16. If this Agreement should expire or terminate before the end of any period covered by the applicable Payment, such Payment shall be prorated on a per diem basis based on the actual number of calendar days falling within such period.

4.2 **Payment Dates; Statements.** At least fifteen (15) days prior to the Payment date for each item of Equipment hereunder, Contractor shall provide to City departments listed in the Supplemental Basic Information a statement setting forth the total amount due and payable on such Payment Date including any applicable discounts. Should Contractor fail to receive any Payment when due and payable, Contractor shall within five (5) days of the Payment Date send written notice thereof to City. Notwithstanding the foregoing requirement, City's receipt of the foregoing billing statement and notices from Contractor is not a condition precedent to City's obligation to make the required Payments when due and payable. Additionally, the City may request and the Contractor shall provide for monthly, quarterly or combined billing for City departments with Equipment from Contractor.

4.3 **Risk of Non-Appropriation for Funds.** This Agreement is subject to the budget and fiscal provisions of the City's Charter. City shall have no obligation to make appropriations for this Agreement in lieu of appropriations for new or other agreements. Contractor acknowledges that City budget decisions are subject to the discretion of its Mayor and Board of Supervisors. Contractor assumes all risk of possible non-appropriation or non-certification of funds, and such assumption is part of the consideration for this Agreement. If for any budgetary period of City, City fails to appropriate sufficient funds for the payment of all Payments during that budgetary period, then this Agreement shall terminate at the end of the last fiscal period of City for which funds have been appropriated for the Payments. City will use good faith efforts to notify Contractor promptly of non-appropriation. Upon the termination of this Agreement hereunder, City shall immediately surrender possession of all the Equipment obtained under this Agreement and not purchased by City to Contractor. The termination for this Agreement for non-appropriation shall not constitute an Event of Default by City under this Agreement. In the event of termination of this Agreement for non-appropriation, Contractor shall have the right to repossess all the Equipment which has not been previously purchased by City without being subject to an action for trespass, conversion or the recovery by City of any sums previously received under this Agreement. The proceeds of any sale or leasing of any Equipment repossessed pursuant to this Section 4.3 will be applied to the payment of unpaid balance of City's obligations under this Agreement. Should the amount received by Contractor from such sale be less than the unpaid balance under the Agreement, Contractor shall not have the right to proceed against City for the remaining balance.

4.4 **Certification of Controller.** No City funds shall be available under this Agreement until prior written authorization certified by Controller. In addition, as set forth in San Francisco Administrative Code Section 21.19:

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.

b. Except as may be provided by City ordinances governing emergency procedures, officers and employees of the City are not required to request, and City is not required to reimburse the Contractor for, commodities or services (as these terms are defined in San Francisco Administrative Code Section) beyond the agreed upon contract scope unless the changed scope is authorized by amendment and approved as required by law.

c. Officers and employees of the City are not authorized to offer or promise, nor is the City required to honor, any offered or promised additional funding in excess of the maximum amount of funding for which the contract is certified without certification of the additional amount by the Controller.

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.

4.5 Supercedure of Conflicting Provisions. IN THE EVENT OF ANY CONFLICT BETWEEN SECTION 4.3 OR 4.4. AND ANY OTHER PROVISION OF THIS AGREEMENT, ANY EQUIPMENT SCHEDULE OR ANY OTHER DOCUMENT OR COMMUNICATION RELATING TO THIS AGREEMENT, THE TERMS OF SECTIONS 4.3 AND 4.4 SHALL GOVERN.

4.6 Payments Not a Debt. City shall pay the Payments required under this Agreement exclusively from legally available funds. City intends, and Contractor understands, that the obligations of City to make any and all Payments and other additional payments shall constitute a current expense of City and shall not in any way be construed to be a debt of City in contravention of any applicable constitutional or statutory limitations or requirements concerning the creation of indebtedness by City, nor shall any terms or conditions contained herein constitute a pledge of the general tax revenues, funds or monies of City.

4.7 Maximum Compensation. In no event shall the amount of this Agreement exceed \$6,000,000.00 (Six million dollars and zero cents.)

4.8 Pricing. Pricing under this Agreement is that set forth in the Equipment and Pricing Schedule in Contractor's Response to Proposal 96101 and that Equipment and Pricing Schedule in hereby incorporated into this Agreement. Contractor agrees that this pricing is its most favored customer pricing and that it meets or is more advantageous than Contractor offers its other customers for similar products, quantities, services and terms and conditions.

ARTICLE 5

EQUIPMENT

5.1 Title. Subject to Section 3.5, title to the Equipment shall at all times be retained by Contractor. City shall not have any right, title or interest in the Equipment as expressly set forth herein. If requested by Contractor, City shall affix and maintain, at Contractor's expense, in a prominent position on each unit of Equipment, plates, tags or identifying labels indicating Contractor's ownership of the Equipment. If, however, the City exercises its option to purchase any of the Equipment as specified in Section 3.5, title to such equipment shall transfer to the City.

5.2 Liens. City shall keep the Equipment and all parts thereof free from any and all Liens. Should a Lien attach to any Equipment, Contractor shall have the right to take any

necessary steps to defend against any and all actions or proceedings questioning or threatening the validity of Contractor's interest in the Equipment by providing the City thirty (30) days written notice to comply therewith; provided, however, that, in defending against any such actions or proceedings, Contractor shall not be deemed to have waived or released City from liability of or on account of any of its covenants contained herein, or from its liability hereunder to defend the validity hereof and to perform such covenants.

5.3 **Personal Property.** During the term of this Agreement, the Equipment shall remain personal property and shall not be deemed to be affixed to or a part of real property on which the Equipment may be situated, notwithstanding that the Equipment or any part thereof may be or hereafter becomes in any manner physically affixed or attached to real property or any building thereon.

5.4 **Relocation.** City may upon reasonable notice to Contractor, relocate all or any portion of the Equipment to any location within the geographic boundaries of City, at City's sole discretion and cost. Prior to any such relocation the City agrees to execute or obtain and to deliver to Contractor such documents as Contractor may reasonably request to protect Contractor's right, title and interest in the Equipment. City shall be responsible for any loss or damage to equipment caused by relocation, unless the relocation services are provided by the Contractor.

5.5 **Presentation and Demonstration of Equipment.**

a. Vendor shall provide the City a complete catalog of products and services offered in a format that, at a minimum, displays model and brief description of the model, optional accessories for that model, average monthly volume, cost per copy, and if applicable, excess per copy charge and option to purchase price. This catalog may be updated quarterly upon approval by the City, which shall not be unreasonably withheld.

b. The City may request at any time, a demonstration of any copiers prior to the ordering of the equipment. Demonstration units requested shall be at no cost to the City and must be offered for a maximum of 30 calendar days. In addition, there shall be no delivery and removal cost to the City. The City shall sign the Contractor's form relieving the City from any liabilities for this period of time.

5.6 **Alterations, Additions and Attachments.**

a. Contractor, at its own expense, shall make such alterations, additions or attachments to the Equipment as may be required from time to time to comply with the requirements of the law as soon as practicable after any such requirements. Unless City purchases the Equipment pursuant to Section 3.5, Contractor shall retain title to all parts incorporated into the Equipment pursuant to this Section 5.5 (a) except as set forth below.

b. With Contractor's prior written consent, which shall not be unreasonably withheld, City may, at its own expense, from time to time, make such alterations, additions or

attachments to the Equipment as City deems desirable in the proper conduct of its business, including, without limitation removal of parts which City deems obsolete or no longer suitable or appropriate for use on the Equipment; provided, however, that no such alteration, addition or attachment shall change the nature or use of the Equipment from that for which it was originally designed, impair the operation of the Equipment or decrease the then-current value, estimated residual value, remaining useful life or utility of the Equipment as determined immediately prior to the alteration, addition or attachment. Any parts to be incorporated in the Equipment as a result of any such alterations, additions or attachment by City must be in addition to, and not in replacement of or substitution for, any parts originally included in the Equipment or required to be incorporated in the Equipment pursuant to the terms of Section 5.6 (a) or Section 6. City shall retain title to all such parts and shall remove such parts at the end of the term of the applicable Equipment Schedule pursuant to section 5.6.

5.7 **Efficiency and Conservation**

a. Energy Star.

Any equipment provided under this Agreement shall meet the standards and guidelines as set forth in the Memorandum of Understanding between the United States Environmental Protection Agency and manufacturers and suppliers of copiers, inclusive of revisions and amendments, in effect at the time the equipment is installed. This MOU may be found at:

http://www.energystar.gov/ia/partners/product_specs/program_reqs/copier.mou.v2.0.pdf

Providing equipment which does not meet these standards shall be cause for cancellation of an Agreement for equipment, and will be grounds for the elimination of a vendor from the Agreement.

b. Paper Content

Notwithstanding the above section, the City intends to use whenever possible paper consisting of a minimum of 30% (or the current U.S. Government standard) post-consumer content. Any machine provided under this Agreement must be reliable as defined in this Agreement to use recycled as well as virgin paper at the time of installation. Providing equipment that is unable to function reliably as defined in this Agreement using both 30% post-consumer recycled and virgin paper shall be cause for cancellation of a commitment made for equipment and will be grounds for the elimination of a vendor from the Agreement.

5.8 **Return of Equipment.** Upon expiration or termination of the Agreement, City shall return possession of the Equipment (except Equipment that has been purchased by City) to Contractor in the condition in which the Equipment is required to be maintained according to this Agreement, normal wear and tear excepted. City shall remove all parts attached to the Equipment, pursuant to Section 5.5. (b) (unless Contractor otherwise agrees in writing) and shall repair any damage to the Equipment caused by such removal. At Contractor's sole expense, Contractor shall cause the Equipment to be removed and transported from the applicable City location. If Contractor fails to accept and remove the Equipment within fifteen (15) days after such termination or expiration, City shall have the right (but no obligation) to remove the Equipment and place it in any storage facility within the geographical boundaries of the City, at

Contractor's sole expense. Contractor shall hold City free and harmless from any expense or damage of any kind associated or occasioned thereby or arising therefrom.

5.9 **Upgrades**

a. **Upgrades of 12 Month Rental Plans.** City may, after an initial six months of any commitment for any machine, choose to upgrade or downgrade equipment. In the event of an upgrade, the department will pay whatever contract rate exists for the replacement machine for the remaining term of the original agreement. In the event of a downgrade, the department shall pay the contract rate applicable to the replacement equipment for the remaining term of the original agreement.

b. **Upgrades to In-Place Individual Leases (applicable to 36, 48, and 60 month FMV lease plans).** City may choose to upgrade leased equipment. If the upgrade of the equipment is the addition of new features and / or accessories and does not require the replacement of the existing equipment, the end-user may finance the new or added accessories to the existing equipment and lease them over the remaining term of that individual lease agreement. The calculation for the added features and/or accessories would be determined by calculating a payment that is coterminous with the remaining months on the existing lease. The resultant lease payment would be based on the same price level of the accessory established at the commencement of the contract and would be based on the prevailing State and Local interest rate for a Fair Market Value lease. The lease payment for the new accessory would be calculated over the remaining number of months on the in-place unit for which the accessory was being added.

5.10 **High Speed Equipment.** It is the City's intention to limit the number of high-speed copiers installed throughout its operations. For the purposes of this section, high speed shall mean copiers capable of producing copies at a rate greater than seventy-five (75) copies per minute. These machines may be installed only upon express consent of the City. Any equipment found installed without such consent shall be returned to Contractor at no cost to City.

5.11 **Quiet Enjoyment.** Provided the City is not in default of this Agreement, Contractor shall guarantee and shall not disturb the City's quiet use and enjoyment of the Equipment during the term of this Agreement.

5.12 **Inspection by Contractor.** With at least five (5) business days prior notice, Contractor shall have the right, during normal business hours (9:00 AM to 5:00 PM PST), subject to applicable law, to enter upon the premises where the Equipment is located to inspect or to observe use of the Equipment.

ARTICLE 6

**AUDITS; NOTICE OF CHANGES
PENALTIES FOR FALSE CLAIMS**

6.1 **Inspection and Audit.** Contractor shall make available to City, its employees and authorized representatives, during regular business hours, all files, records, books, invoices, documents and other data relating to this Agreement or the Equipment. Contractor shall permit City, its employees and authorized representatives to inspect, audit, examine and make excerpts and transcripts from any of the foregoing. To the extent any of the foregoing are not located within ten (10) miles of the geographic boundaries of City, Contractor shall make them available, within forty-eight (48) hours after any request by City within such physical boundaries or within ten (10) miles thereof.

6.2 **Notification of Changes in Circumstances.** Contractor shall notify City immediately of any change of circumstances that would cause any of the representations and warranties contained in Article 8 to be false or misleading at any time during the term of this Agreement.

6.3 **Submitting False Claims; Monetary Penalties.** Contractor acknowledges and agrees that it is a "contractor" under and is subject to San Francisco Administrative Code Section 21.35(e). Pursuant to San Francisco Administrative Code Section 21.35, the covenant of good faith and fair dealing is contained in every City commodities or services contract (as defined in S.F. Admin. Code §21.01(e)(f)), and contractors and subcontractors shall at all times deal in good faith with the City and shall submit all claims, requests for equitable adjustments, requests for change orders, requests for contract modifications or requests of any kind seeking increased compensation on a City contract only upon a good-faith, honest evaluation of the underlying circumstances and a good-faith, honest calculation of the amount sought. Any contractor, subcontractor or consultant who commits any of the following acts shall be liable to City for three times the amount of damages which City sustains because of the act of the contractor, subcontractor or consultant. A contractor, subcontractor or consultant who commits any of the following acts shall also be liable to 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 City for a civil penalty of up to ten thousand dollars (\$10,000) for each false claim (as defined in S.F. Admin. Code §21.35(f)). A contractor, subcontractor or consultant will be deemed to have submitted a false claim to 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 City; (c) conspires to defraud the City by getting a false claim allowed or paid by the City; (d) knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the City; or (e) is a beneficiary of an inadvertent submission of a false claim to City, subsequently discovers the falsity of the claim, and fails to disclose the false claim to City within a reasonable time after discovery of the false claim.

ARTICLE 7

TAXES

7.1 **Contractor to Pay All Taxes.** Contractor shall pay to the appropriate governmental authority, as and when due, any and all taxes, fees, assessments or other governmental charges, including possessory interest taxes and California sales and use taxes, levied upon or in connection with this Agreement, the Equipment or any of the activities contemplated by this Agreement.

7.2 **Use of City Real Property.** If at any time under this Agreement or the Services Agreement Contractor obtains any right to the possession, occupancy or use of City real property for private gain, the following provisions shall apply:

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

b. Contractor, on behalf of itself and any subcontractors, successors and assigns, further recognizes and understands that any assignment permitted hereunder and any exercise of any option to renew or other extension of this Agreement may constitute a change in ownership for purposes of property taxation and therefore may result in a revaluation of any possessory interest created hereunder. Contractor shall report any assignment or other transfer of any interest in this Agreement or any renewal or extension thereof to the County Assessor within sixty (60) days after such assignment, transfer, renewal or extension.

c. Contractor shall provide such other information as may be requested by City to enable City to comply with any reporting requirements under applicable law with respect to possessory interests.

ARTICLE 8

REPRESENTATIONS AND WARRANTIES

Contractor represents and warrants each of the following as of the date of this Agreement and at all times throughout the term of this Agreement:

8.1 **Valid Existence; Licenses and Permits.** Contractor is a duly formed legal entity, validly existing and in good standing under the laws of the jurisdiction of its formation. Contractor is qualified to do business in the State of California and has obtained all necessary licenses, permits, approvals and authorizations necessary or proper in order to perform Contractor's obligations hereunder.

8.2 **Authorization; Enforceability.** Contractor has duly authorized by all necessary action the execution, delivery and performance of this Agreement. Contractor has duly executed and delivered this Agreement and this Agreement constitutes a legal, valid and binding obligation of Contractor, enforceable against Contractor in accordance with the terms hereof.

8.3 **No Misstatements.** No document furnished or to be furnished by Contractor to City in connection with this Agreement or any other document relating to any of the foregoing, contains or will contain any untrue statement of material fact or omits or will omit a material fact necessary to make the statements contained therein not misleading, under the circumstances under which any such statement shall have been made.

8.4 **No Conflict of Interest.** Contractor is familiar with the provisions of Section 15.103 and Appendix C 8.105 of City's Charter, and Section 87100 *et seq.* of the California Government Code, and knows of no facts which constitute a violation of such provisions.

8.5 **Vendor Warranties.** If Contractor is not a manufacturer, dealer or vendor of the Equipment, then Contractor hereby assigns to City during the term of this Agreement, and irrevocably appoints City its agent and attorney-in-fact during the term of this Agreement to assert from time to time, whatever claims and rights, including warranties of the Equipment, which Contractor may have against the manufacturer, dealer or vendor of the Equipment. .

8.6 **Warranty – Merchantability and Fitness.** Contractor warrants that all equipment furnished to the City under this Agreement are merchantable and fit for the particular purpose for which Contractor knows, or has reason to know City sought to procure them.
Contractor

ARTICLE 9

INDEMNIFICATION AND GENERAL LIABILITY

9.1 **Indemnification.** Contractor shall indemnify, protect, defend and hold harmless each of the Indemnified Parties from and against any and all Losses arising from, in connection

with or caused by: (a) a material breach of this Agreement by Contractor; (b) a material breach of any representation or warranty of Contractor contained in this Agreement; (c) any personal injury caused, directly or indirectly, by any act or omission of Contractor or its employees, subcontractors or agents; (d) any property damage caused, directly or indirectly by any act or omission of Contractor or its employees, subcontractors or agents; (e) the use, misuse or failure of any equipment (other than the Equipment) or facility used by Contractor, or by any of its employees, subcontractors or agents, regardless of whether such equipment or facility is furnished, rented or loaned to Contractor by an Indemnified Party; (f) any tax, fee, assessment or other charge for which Contractor is responsible under Article 7; or (g) any infringement of patent rights, copyright, trade secret or any other proprietary right or trademark of any Person in consequence of the use by any Indemnified Party of any goods or services furnished to such Indemnified Party in connection with this Agreement. Notwithstanding the foregoing, Contractor shall have no obligation under the immediately preceding sentence with respect to any Loss that is caused solely by the active negligence or willful misconduct of the Indemnified Party and is not contributed to by any act or omission (including any failure to perform any duty imposed by law) by Contractor or its employees, subcontractors or agents.

9.2 **Duty to Defend; Notice of Loss.** Contractor acknowledges and agrees that its obligation to defend the Indemnified Parties under Section 9.1: (a) is an immediate obligation, independent of its other obligations hereunder; (b) applies to any Loss which actually or potentially falls within the scope of Section 9.1, regardless of whether the allegations asserted in connection with such Loss are or may be groundless, false or fraudulent; and (c) arises at the time the Loss is tendered to Contractor by the Indemnified Party and continues at all times thereafter. The Indemnified Party shall give Contractor prompt notice of any Loss under Section 9.1 and Contractor shall have the right to defend, settle and compromise any such Loss; provided, however, that the Indemnified Party shall have the right to retain its own counsel at the expense of Contractor if representation of such Indemnified Party by the counsel retained by Contractor would be inappropriate due to conflicts of interest between such Indemnified Party and Contractor. An Indemnified Party's failure to notify Contractor promptly of any Loss shall not relieve Contractor of any liability to such Indemnified Party pursuant to Section 9.1, unless such failure materially impairs Contractor's ability to defend such Loss. Contractor shall seek the Indemnified Party's prior written consent to settle or compromise any Loss if Contractor contends that such Indemnified Party shares in liability with respect thereto.

9.3 **LIMITATION ON LIABILITY OF CITY.** CITY'S OBLIGATIONS UNDER THIS AGREEMENT SHALL BE LIMITED TO THE PAYMENTS REQUIRED UNDER ARTICLE 4. NOTWITHSTANDING ANY OTHER PROVISION CONTAINED IN THIS AGREEMENT OR ANY OTHER DOCUMENT OR COMMUNICATION RELATING TO 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 LOST PROFITS, ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR ANY SERVICES OR GOODS FURNISHED IN CONNECTION WITH THIS AGREEMENT.

9.4 **Incidental and Consequential Damages.** Contractor shall be responsible for incidental and consequential damages resulting in whole or in part from Contractor's acts or

omissions. Nothing in this agreement shall constitute a waiver or limitation of any rights which City may have under applicable law.

9.5 **Indemnification.** Contractor shall indemnify and hold City harmless from all loss and liability, including attorneys' fees, court costs and all other litigation expenses for any infringement of the patent rights, copyright, trade secret or any other proprietary right or trademark, and all other intellectual property claims of any person or persons in consequence of the use by City, or any of its officers or agents, of articles or services to be supplied in the performance of this Agreement.

ARTICLE 10

INSURANCE

10.1 **Types and Amounts of Coverage.** Without limiting Contractor's liability pursuant to Article 9, Contractor shall maintain in force, during the full term of this Agreement, insurance in the following amounts and coverages:

a. Property insurance on an all-risk form (excluding earthquake coverage) in an amount equal to the amount specified in the *Supplemental Basic Information*, which is one hundred percent (100%) of the replacement value of the Equipment. Such amount shall be adjusted annually upon renewal of the policy to ensure consistent full replacement value. Any deductible under such policy shall not exceed five thousand dollars (\$5,000), each loss.

b. Commercial General Liability Insurance with limits not less than the amount of one million dollars (\$1,000,000), each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Contractual Liability, Personal Injury, Products and Completed Operations.

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

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

10.2 **Additional Requirements.** Such policies shall:

a. Name as additional insured City and its officers, agents and employees.

b. Provide 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. Provide at least thirty (30) days' advance written notice to City of cancellation or modification mailed to City's address for notices pursuant to Article 16.

10.3 **Required Post-Expiration Coverage.** Should any of the insurance required hereunder be provided under a claims-made form, Contractor shall maintain such coverage continuously throughout the term of this Agreement and, without lapse, for a period of three (3) years beyond the expiration or termination of this Agreement, to the effect that, should occurrences during the term hereof give rise to claims made after expiration or termination of the Agreement, such claims shall be covered by such claims-made policies.

10.4 **General Annual Aggregate Limit/Inclusion of Legal or Defense Costs.** Should any of the insurance required hereunder 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.

10.5 **Evidence of Insurance.** Before commencing any operations under this Agreement, Contractor shall furnish to City certificates of insurance, in form and with insurers satisfactory to City, evidencing all coverages set forth above, and shall furnish complete copies of policies promptly upon City's request.

10.6 **Effect of Approval.** Approval of any insurance by City shall not relieve or decrease the liability of Contractor hereunder.

10.7 **Waiver of Subrogation.** Notwithstanding anything to the contrary contained herein, Contractor and City each hereby waive any right of recovery against the other party and against any other party maintaining a policy of insurance covering the Equipment, or any portion thereof, for any loss or damage maintained by such other party, whether or not such loss is caused by the fault or negligence of the other party. If any policy of insurance relating to the Equipment does not permit the foregoing waiver or if the coverage under any such policy would be invalidated due to such waiver, Contractor shall obtain, if possible, from the insurer under such policy a waiver of all rights of subrogation the insurer might have against City or any other party maintaining a policy of insurance covering the same loss, in connection with any claim, loss or damage covered by such policy.

ARTICLE 11

DAMAGE, DESTRUCTION AND CONDEMNATION

11.1 **Liability for Damage to Equipment.** It is understood and agreed that the City is responsible for loss of or damage to any Contractor-owned equipment involved, only as caused by the negligent or wrongful actions of City's officers, agents and employees.

11.2 **Condemnation.** If all the Equipment or so much thereof as to render the remainder unusable for the purposes for which it was used or intended to be used by City shall be

taken under the power of eminent domain, this Agreement shall cease as of the day on which possession is taken. City shall take or cause to be taken such action as is reasonably necessary to obtain compensation at least equal to the value of the Equipment or portion thereof taken by eminent domain and all condemnation proceeds shall be transferred by City to Contractor. If less than all the Equipment shall be taken under the power of eminent domain and the remainder is usable for the purposes for which it was used by City at the time of such taking, then this Agreement shall continue in full force and effect as to such remainder, and the parties waive the benefits of any law to the contrary, and in such event there shall be a partial abatement of the Payments due under this Agreement in an amount equal to the proportion which the fair market sales value (as of the applicable Commencement Date) of that portion of the Equipment taken under the power of eminent domain bears to the fair market sales value (as of the applicable Commencement Date) of the Equipment taken.

ARTICLE 12

EVENTS OF DEFAULT BY CITY; REMEDIES

12.1 **Events of Default.** The occurrence of any one or more of the following events shall constitute an "Event of Default" by City under this Agreement:

a. **Failure to Pay.** City fails to make any Payment when due and payable, and such failure continues for more than fifteen (15) Business Days after notice and opportunity to cure thereof from Contractor; provided, however, that no Event of Default shall occur if such failure to pay was due to City's failing to appropriate sufficient funds to make the required Payment.

b. **Failure to Pay Other Charges.** City fails to make any other payment required under this Agreement when due and payable, and such failure continues for more than forty-five (45) days after notice and opportunity to cure thereof from Contractor; provided, however, that no Event of Default shall occur if such failure to pay was due to City failing to appropriate sufficient funds to make the required payment.

c. **Nonmonetary Breach.** City fails to keep, observe or perform any material term, covenant or condition (other than as specifically enumerated in Subsections 12.1(a) and 12.1(b)) contained in this Agreement to be kept or performed by City and such failure shall have continued for more than sixty (60) days after City receives written notice thereof from Contractor.

d. **Voluntary Insolvency.** City (i) is generally not paying its debts as they become due, (ii) 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, (iii) makes an assignment for the benefit of its creditors, (iv) consents to the appointment of a custodian, receiver, trustee or other officer with similar powers of City or of any substantial part of City's property or (v) takes action for the purpose of any of the foregoing.

e. **Involuntary Insolvency.** Without consent by City, a court or government authority enters an order, and such order is not vacated within sixty (60) days, (i) 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, (ii) 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 (iii) ordering the dissolution, winding-up or liquidation of City.

12.2 **Remedies Upon Event of Default.** Upon and during the continuance of an Event of Default by City, Contractor may do any of the following, individually or in combination with any other remedy:

a. Contractor may take whatever action at law or in equity may appear necessary or desirable to collect the payments then due and thereafter to become due, or to enforce performance and observance of any obligation, agreement or covenant of City under this Agreement.

b. Contractor may retake possession of the Equipment with respect to which there is an Event of Default by City, and sell or lease such Equipment, holding City liable for all Payments on such Equipment up to the effective date of repossession.

12.3 **Remedies Nonexclusive.** Each of the remedies provided for in this Article 12 may be exercised individually or in combination with any other remedy available hereunder or under applicable laws, rules and regulations, including the right to bring suit for damages. The remedies contained herein are in addition to all other remedies available to Contractor at law or in equity by statute or otherwise and the exercise of any such remedy shall not preclude or in any way be deemed to waive any other remedy.

ARTICLE 13

EVENTS OF DEFAULT BY CONTRACTOR; REMEDIES

13.1 **Events of Default.** The occurrence of any one or more of the following events shall constitute an "Event of Default" by Contractor under this Agreement:

a. **False Statement.** Any statement, representation or warranty contained in this Agreement or in any other document submitted to City under this Agreement is found by City to be false or misleading.

b. **Failure to Perform Other Covenants; Breach of Warranty.** Contractor fails to perform or breaches any warranty, agreement, provision or covenant of this Agreement to be performed or observed by Contractor as and when performance or observance is due and such

failure or breach continues for a period of fifteen (15) calendar days after the date on which such performance or observance is due.

c. **Voluntary Insolvency.** Contractor (i) is generally not paying its debts as they become due, (ii) 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, (iii) makes an assignment for the benefit of its creditors, (iv) 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 (v) takes action for the purpose of any of the foregoing.

d. **Involuntary Insolvency.** Without consent by Contractor, a court or government authority enters an order, and such order is not vacated within fifteen (15) days, (i) 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, (ii) 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 (iii) ordering the dissolution, winding-up or liquidation of Contractor.

13.2 **Remedies Upon Event of Default.** Upon and during the continuance of an Event of Default by Contractor hereto, the City may do any of the following, individually or in combination with any other remedy:

a. **Termination.** City may terminate this Agreement. Such termination shall not waive any rights or remedies of City hereunder.

b. **Legal Action.** Whatever action at law or in equity may appear necessary or desirable to enforce performance and observance of any obligation, agreement or covenant of City under this Agreement.

c. **Right to Cure.** The City shall have the right (but no obligation) to cure any Event of Default by the Contractor. All amounts expended by the City in effecting such cure shall be deemed Losses hereunder and shall accrue interest from the date of incidence at the maximum rate permitted by law.

13.3 **Remedies Nonexclusive.** Each of the remedies provided for in this Article 13 may be exercised individually or in combination with any other remedy available hereunder or under applicable laws, rules and regulations, including the right to bring suit for damages. The remedies contained herein are in addition to all other remedies available to City at law or in equity by statute or otherwise and the exercise of any such remedy shall not preclude or in any way be deemed to waive any other remedy.

ARTICLE 14

DISCLOSURE OF INFORMATION AND DOCUMENTS

14.1 **Proprietary or Confidential Information of City.** Contractor understands and acknowledges that, in the performance of this Agreement or in contemplation thereof, Contractor may have access to private or confidential information that may be owned or controlled by City and that such information may contain proprietary or confidential information, 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 this 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.

14.2 **Sunshine Ordinance.** Contractor acknowledges and agrees that this Agreement is subject to Section 67.24(e) of the San Francisco Administrative Code, which provides that contracts, including this Agreement, Contractor's bids, responses to Requests for Proposals (RFPs) and all other records of communications between City and persons or entities seeking contracts, shall be open to inspection immediately after a contract has been awarded. Nothing in such Section 67.24(e) (as it exists on the date hereof) 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. All information provided by Contractor which is covered by such Section 67.24(e) (as it may be amended from time to time) will be made available to the public upon request.

ARTICLE 15

ASSIGNMENTS

15.1 **No Assignment.** Neither Contractor nor City shall, either directly or indirectly, assign, transfer, hypothecate, sublet or delegate all nor any portion of this Agreement or any of its rights, duties or obligations hereunder without the prior written consent of the other party, which shall not be unreasonably withheld. This Agreement shall not, nor shall any interest herein, be assignable as to the interest of Contractor involuntarily or by operation of law without the prior written consent of City. A change of ownership or control of Contractor or a sale or transfer of substantially all of the assets of Contractor shall be deemed an assignment for purposes of this Agreement.

15.2 **No Public or Private Offerings.** Without limiting the scope of Section 15.1, Contractor shall not effect a private or public offering of certificates of participation, municipal securities or other debt instruments representing fractionalized interest in this Agreement without first obtaining the written consent of City, as such consent shall be approved as to form by City Attorney. City shall have the right to require Contractor to satisfy any conditions City imposes before it consents to any offering of any such certificates, securities or instruments, including approval by City's Board of Supervisors.

15.3 **Agreement Made in Violation of this Article.** Any agreement made in violation of Section 15.1 or 15.2 shall confer no rights on any Person and shall automatically be null and void.

15.4 **Assignor Retains Responsibility.** No assignment or transfer pursuant to this Article 15 shall relieve the assigning party of liability for the performance by any assignee or transferee of all of the covenants, terms and conditions contained in this Agreement.

ARTICLE 16

NOTICES AND OTHER COMMUNICATIONS

16.1 **Requirements.** Unless otherwise specifically provided herein, all notices, consents, directions, approvals, instructions, requests and other communications which may affect either party's performance hereunder shall be in writing, shall be addressed to the person and address set forth in the ***Basic Information*** and shall be (a) deposited in the U.S. mail, first class, certified with return receipt requested and with appropriate postage, (b) hand delivered or (c) sent via facsimile (if a facsimile number is provided in the ***Basic Information***). Any other non-essential communications may be by telephone or email.

16.2 **Notice to Controller.** Whenever Contractor delivers to City any notice, certificate or other communication relating to an Event of Default by City or an event which (after notice or any grace period) may become an Event of Default, Contractor shall also concurrently provide a copy of such notice to the Office of the Controller at 1 Dr. Carlton B. Goodlett Place Rm. 316, San Francisco, CA 94102 - 4685 by the same means as that used for sending the original notice.

16.3 **Effective Date.** All communications that must be in writing pursuant to Section 16.1 shall become effective on the date of receipt. Such date of receipt shall be determined by: (a) if mailed, the return receipt, completed by the U.S. Postal Service; (b) if sent via hand delivery, a receipt executed by a duly authorized agent of the party to whom the notice was sent; or (c) if sent via facsimile, the date of telephonic confirmation of receipt by a duly authorized agent of the party to whom the notice was sent or, if such confirmation is not reasonably practicable, the date indicated in the facsimile machine transmission report of the party giving such notice.

16.4 **Change of Address.** From time to time any party hereto may designate a new address for purposes of this Article 16 by notice to the other party.

ARTICLE 17

COMPLIANCE

17.1 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.

(2) Subcontracting Goals

The DBE subcontracting participation goal for this contract is 8%. Contractor shall fulfill the subcontracting commitment made in its bid or proposal. Each invoice submitted to City for payment shall include the information required in HRC Form 7 and Form 9. Failure to provide HRC Form 7 and Form 9 with each invoice submitted by Contractor shall entitle City to withhold 20% of the amount of that invoice until HRC Form 7 and Form 9 is provided by Contractor.

Contractor shall not participate in any back contracting to the Contractor or lower-tier subcontractors, as defined in the DBE Ordinance, for any purpose inconsistent with the provisions of the DBE Ordinance, its implementing rules and regulations, or this Section.

(3) Subcontract Language Requirements

Contractor shall incorporate the DBE Ordinance into each subcontract made in the fulfillment of Contractor's obligations under this Agreement and require each subcontractor to agree and comply with provisions of the ordinance applicable to subcontractors.

Contractor shall include in all subcontracts with DBEs made in fulfillment of Contractor's obligations under this Agreement, a provision requiring Contractor to compensate any DBE subcontractor for damages for breach of contract or liquidated damages equal to 5% of the subcontract amount, whichever is greater, if Contractor does not fulfill its commitment to use the DBE subcontractor as specified in the bid or proposal, unless Contractor received advance approval from the Director of HRC and Purchasing to substitute subcontractors or to otherwise modify the commitments in the bid or proposal. Such provisions shall also state that it is enforceable in a court of competent jurisdiction.

Subcontracts shall require the subcontractor to maintain records necessary for monitoring its compliance with the DBE Ordinance for a period of three years following termination of this contract and to make such records available for audit and inspection by the Director of HRC or the Controller upon request.

(4) Payment of Subcontractors

Contractor shall pay its subcontractors within three working days after receiving payment from the City unless Contractor notifies the Director of HRC in writing within ten working days prior to receiving payment from the City that there is a bona fide dispute between Contractor and its subcontractor and the Director waives the three-day payment requirement, in which case Contractor may withhold the disputed amount but shall pay the undisputed amount.

Contractor further agrees, within ten working days following receipt of payment from the City, to file an affidavit (HRC Form 9) with the Controller, under penalty of perjury, that the Contractor has paid all subcontractors. The affidavit shall provide the names and addresses of all subcontractors and the amount paid to each. Failure to provide such affidavit may subject Contractor to enforcement procedure under Administrative Code §14A.13.

17.2 Nondiscrimination; Penalties

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

b. **Subcontracts.** Contractor shall incorporate by reference in all subcontracts the provisions of 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. **Nondiscrimination in Benefits.** Contractor does not as of the date of this Agreement and will not during the term of this Agreement, in any of its operations in San Francisco or where 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.

17.3 **MacBride Principles--Northern Ireland.** Pursuant to San Francisco Administrative Code Section 12.F.5, City urges companies doing business in Northern Ireland to move towards resolving employment inequities, and encourages such companies to abide by the MacBride Principles. City urges San Francisco companies to do business with corporations that abide by the MacBride Principles.

17.4 **Tropical Hardwood and Virgin Redwood Ban.** Pursuant to San Francisco Administrative Code Section 12I.5(b), City urges all 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.

17.5 **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 and its employees, agents or assigns shall comply with all terms and provisions of such Act and the rules and regulations promulgated thereunder.

17.6 **Resource Conservation; Liquidated Damages.** Chapter 21A of the San Francisco Administrative Code (Resource Conservation) is incorporated herein by reference. Failure by Contractor to comply with any of the applicable requirements of Chapter 21A will be deemed a material breach of contract. If Contractor fails to comply in good faith with any of the provisions of Chapter 21A, Contractor shall be liable for liquidated damages in an amount equal to Contractor's net profit under this Agreement, or five percent (5%) of the total contract amount, whichever is greater. Contractor acknowledges and agrees that the liquidated damages assessed shall be payable to City upon demand and may be offset against any monies due to Contractor from any contract with City.

17.7 **First Source Hiring** Chapter 83, Sections 83.1 – 83.18 of the San Francisco Municipal Code (Administrative Code) establishes requirements for First Source Hiring that are applicable to this Agreement. Within sixty (60) calendar days from the execution of this Agreement, Contractor shall submit to the City an approved First Source Hiring Agreement (FSHA) which details entry-level job positions, job retention goals, job training, recruitment and referral programs, record keeping and monitoring and good faith efforts requirements in compliance with the City's First Source Hiring Ordinance. Chapter 83 of the City Municipal Code and the City-approved FSHA is hereby incorporated into this Agreement.

17.8 **Compliance with Other Laws.** Without limiting the scope of any of the preceding sections of this Article 17, Contractor shall keep itself fully informed of City's Charter, codes, ordinances and regulations and all state, and federal laws, rules and regulations

affecting the performance of this Agreement and shall at all times comply with such Charter codes, ordinances, and regulations rules and laws.

17.9 EIC Forms

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 thirty 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 thirty 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.

17.10 Limitations on Contributions

Through execution of this Agreement, Contractor acknowledges that it is familiar with section 1.126 of the City's Campaign and Governmental Conduct Code, which prohibits any person who contracts with the City for the rendition of personal services or for the furnishing of any material, supplies or equipment to the City, whenever such transaction would require approval by a City elective officer or the board on which that City elective officer serves, from making any campaign contribution to the officer at any time from the commencement of negotiations of the contract until the later of either (1) the termination of negotiations for such contract or (2) three months after the date the contract is approved by the City elective officer or the board on which that City elective officer serves.

17.11 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 contract. 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 contract, 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.

17.12 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.

17.13 Compliance with Laws

Contractor shall keep itself fully informed of the City's Charter, codes, ordinances and regulations of the City and of all state, and federal laws in any manner affecting the performance of this Agreement, and must at all times comply with such local codes, ordinances, and regulations and all applicable laws.

17.14 Nondisclosure of Private Information

As of March 5, 2005, Contractor agrees to comply fully with and be bound by all of the provisions of Chapter 12M of the San Francisco Administrative Code (the "Nondisclosure of Private Information Ordinance"), including the remedies provided. The provisions of the Nondisclosure of Private Information Ordinance are incorporated herein by reference and made a part of this Agreement as though fully set forth. Capitalized terms used in this section and not defined in this Agreement shall have the meanings assigned to such terms in the Nondisclosure of Private Information Ordinance. Consistent with the requirements of the Nondisclosure of Private Information Ordinance, Contractor agrees to all of the following:

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

- (1) The disclosure is authorized by this Agreement;
- (2) The Contractor received advance written approval from the Contracting Department to disclose the information; or
- (3) 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.

17.15 Graffiti Removal

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

Contractor shall remove all graffiti from any real property owned or leased by Contractor in the City and County of San Francisco within forty eight (48) hours of the earlier of Contractor's (a) discovery or notification of the graffiti or (b) receipt of notification of the graffiti from the Department of Public Works. This section is not intended to require a Contractor to breach any lease or other agreement that it may have concerning its use of the real property. The term "graffiti" means any inscription, word, figure, marking or design that is affixed, marked, etched, scratched, drawn or painted on any building, structure, fixture or other improvement, whether permanent or temporary, including by way of example only and without limitation, signs, banners, billboards and fencing surrounding construction sites, whether public or private, without the consent of the owner of the property or the owner's authorized agent, and which is visible from the public right-of-way. "Graffiti" shall not include: (1) any sign or banner that is authorized by, and in compliance with, the applicable requirements of the San Francisco Public Works Code, the San Francisco Planning Code or the San Francisco Building Code; or (2) any mural or other painting or marking on the property that is protected as a work of fine art under the California Art Preservation Act (California Civil Code Sections 987 et seq.) or as a work of visual art under the Federal Visual Artists Rights Act of 1990 (17 U.S.C. §§ 101 et seq.).

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

ARTICLE 18

MISCELLANEOUS

18.1 **No Waiver.** No waiver by either party of any default or breach of this Agreement by the other party shall be implied from any failure to take action on account of such default if such default persists or is repeated. No express waiver by either party shall affect any default other than the default specified in the waiver and shall be operative only for the time and to the extent therein stated. Waivers of any covenant, term or condition contained herein shall not be construed as a waiver of any subsequent breach of the same covenant, term or condition. The consent or approval of any action requiring further consent or approval shall not be deemed to waive or render unnecessary the consent or approval to or of any subsequent similar act.

18.2 **Administrative Remedy for Agreement Interpretation.** Should any question arise as to the meaning or intent of this Agreement, the question shall, prior to any other action or resort to any other legal remedy, be referred to the City's Director of Purchasing, who shall decide the true meaning and intent of the Agreement. Such decision shall be final and conclusive.

18.3 **Governing Law; Venue.** The formation, interpretation and performance of this Agreement shall be governed by the laws of the State of California, without regard to its conflict of laws principles. Venue for all litigation relative to the formation, interpretation and performance of this Agreement shall be in San Francisco.

18.4 **Headings.** All article and section headings and captions contained in this Agreement are for reference only and shall not be considered in construing this Agreement.

18.5 **Entire Agreement.** This Agreement sets forth the entire Agreement between the parties, and supersedes all other oral or written provisions, other than any express warranty and services and performance measures contained in any written materials (including any bid or proposal documents) delivered to City in connection herewith. Pricing under this Agreement is that set forth in the Equipment and Pricing Schedule in Contractor's Response to Proposal 96101 and that Equipment and Pricing Schedule in hereby incorporated into this Agreement.

18.6 **Certified Resolution re Signatory Authority.** Upon request of City, Contractor shall deliver to City a copy of the corporate resolution(s) authorizing the execution, delivery and performance of this Agreement, certified as true, accurate and complete by the secretary or assistant secretary of Contractor.

18.7 **Time.** Time is of the essence in this Agreement.

18.8 **Further Assurances.** From and after the date of this Agreement, Contractor agrees to do such things, perform such acts, and make, execute, acknowledge and deliver such documents as may be reasonably necessary or proper and usual to complete the transactions

contemplated by this Agreement and to carry out the purpose of this Agreement in accordance with this Agreement.

18.9 **Severability**. Should the application of any provision of this Agreement to any particular facts or circumstances be found by a court of competent jurisdiction to be invalid or unenforceable, then (a) the validity of other provisions of this Agreement shall not be affected or impaired thereby, and (b) such provision shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be reformed without further action by the parties to the extent necessary to make such provision valid and enforceable.

18.10 **Successors; No Third-Party Beneficiaries**. Subject to the terms of Article 15, the terms of this Agreement shall be binding upon, and inure to the benefit of, the parties hereto and their successors and assigns. Nothing in this Agreement, whether express or implied, shall be construed to give any Person (other than the parties hereto and their respective successors and assigns and, in the case of Article 9, the Indemnified Parties) any legal or equitable right, remedy or claim under or in respect of this Agreement or any covenants, conditions or provisions contained herein.

18.11 **Counterparts**. This Agreement may be executed in any number of counterparts, each of which shall for all purposes be deemed to be an original and all of which shall together constitute but one and the same instrument.

18.12 **Waiver of Personal Liability**. No member of City's Board of Supervisors nor any elected official, officer, agent or employee of City shall be individually or personally liable for the Payments or any other payments coming due hereunder or be subject to any personal liability or accountability by reason of this Agreement.

18.13 **Survival of Terms**. The obligations of Contractor and the terms of the following provisions of this Agreement shall survive and continue following expiration or termination of this Agreement: Sections 6.1, 6.3, Article 9, Section 10.3, Article 14, Article 15, Article 16 and this Article 18.

18.14 **Modification**. 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.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date specified in the **Basic Information**.

CITY

CONTRACTOR

Recommended:

Bill Jones

I have read and understood paragraph 17.3, the City's statement urging companies doing business in Northern Ireland to move towards resolving employment inequities, encouraging compliance with the MacBride Principles, and urging San Francisco companies to do business with corporations that abide by the MacBride Principles.

By: Bill Jones

Title Asst Director, Purchasing

Daniel McLean
Authorized Signature

Approved as to Form:

Dennis J. Herrera,
City Attorney

DANIEL J. McLEAN
Printed Name

By: D. Clayton
Deputy City Attorney

WEGO CONTROLLER
Title

Xerox Corporation
Company Name

Approved:

Naomi Kelly
Naomi Kelly
Purchaser and Director, Office of Contract Administration.

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