

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 or any Individual Equipment Lease or Rental.

ARTICLE 10

INSURANCE

10.1 **Insurance.** Without in any way limiting Contractor's liability pursuant to the "Indemnification" section of this Agreement, Contractor must maintain in force, during the full term of the Agreement and until the expiration of the last expiring Individual Equipment Lease or Rental, insurance in the following amounts and coverages:

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

b. Commercial General Liability Insurance with limits not less than \$1,000,000 each occurrence and \$2,000,000 general aggregate for Bodily Injury and Property Damage, including Contractual Liability, Personal Injury, Products and Completed Operations; and

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

d. Professional liability insurance, applicable to Contractor's profession, with limits not less than \$1,000,000 each claim with respect to negligent acts, errors or omissions in connection with the Services.

e. 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. Contractor shall be solely responsible for any deductibles under its insurance policy(s).

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

a. Include as Additional Insured the City and County of San Francisco, its Officers, Agents, and Employees only for claims arising out of the willful or negligent acts or omissions of KMBS in the performance of the services under the contract.

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

10.3 All policies shall be endorsed to provide thirty (30) days' advance written notice to the City of cancellation for any reason, intended non-renewal, or reduction in coverages. Notices shall be sent to the City address set forth in Article 16, entitled "Notices and Other Communications."

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

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

10.6 Before commencing any Services, Contractor shall furnish to City certificates of insurance and additional insured policy endorsements with insurers with ratings comparable to A-, VIII or higher, that are authorized to do business in the State of California, and that are satisfactory to City, in form evidencing all coverages set forth above. Approval of the insurance by City shall not relieve or decrease Contractor's liability hereunder.

10.7 The Workers' Compensation policy(ies) shall be endorsed with a waiver of subrogation in favor of the City for all work performed by the Contractor, its employees, agents and subcontractors.

10.8 If Contractor will use any subcontractor(s) to provide Services, Contractor shall require the subcontractor(s) to provide all necessary insurance and to name the City and County of San Francisco, its officers, agents and employees and the Contractor as additional insureds.

10.9 Deleted by agreement of the parties.

ARTICLE 11

DAMAGE, DESTRUCTION AND CONDEMNATION

11.1 **Equipment Title.** The City shall have no right, title, or interest in Leased or Rental Equipment except the use and maintenance rights as provided herein or to any additions, repairs, replacements or modifications thereto. Title to the Equipment shall remain with Contractor. City agrees to keep the Equipment free and clear of all liens and claims.

11.2 **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.

11.3 **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 thirty (30) days from date of written notice to the Contractor.

City would not pay lease payments after a KMBS default on an Individual Equipment Lease under any circumstances.

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. For purposes of clarification, no termination fee shall apply to termination upon event of Contractor Default by City under this Section 13.2.

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

c. **Right to Cure.** In the event of default by the Contractor, the City shall provide written notice to the Contractor and 30 days opportunity to cure default. The City shall have the right to seek any remedy available at law or in equity.

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 business person 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 or 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 **Local Business Enterprise Utilization; Liquidated Damages.** (Please note that the Contract Monitoring Division of the Office of the City Administrator has assumed responsibilities under law previously held by the Human Rights Commission for implementing

the LBE Ordinance. All references in this Agreement to the Human Rights Commission shall be understood to refer to the City Administrator and the Contract Monitoring Division, as applicable.)

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

b. Compliance and Enforcement

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

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, on real property owned by San Francisco, or where work is being performed for the City elsewhere within the United States, discriminate in the provision of employee benefits between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees, 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 **Alcohol and Drug-Free Workplace.** City reserves the right to deny access to, or require Contractor to remove from, City facilities personnel of any Contractor or subcontractor who City has reasonable grounds to believe has engaged in alcohol abuse or illegal drug activity which in any way impairs City's ability to maintain safe work facilities or to protect the health and well-being of City employees and the general public. City shall have the right of final approval for the entry or re-entry of any such person previously denied access to, or removed from, City facilities. Illegal drug activity means possessing, furnishing, selling, offering, purchasing, using or being under the influence of illegal drugs or other controlled substances for which the individual lacks a valid prescription. Alcohol abuse means possessing, furnishing, selling, offering, or using alcoholic beverages, or being under the influence of alcohol.

17.6 Omitted by agreement of parties. (**Resource Conservation**).

17.7. **First Source Hiring Program**

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

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

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

(2) Set first source interviewing, recruitment and hiring requirements, which will provide the San Francisco Workforce Development System with the first opportunity to provide qualified economically disadvantaged individuals for consideration for employment for entry level positions. Employers shall consider all applications of qualified economically disadvantaged individuals referred by the System for employment; provided however, if the employer utilizes nondiscriminatory screening criteria, the employer shall have the sole discretion to interview and/or hire individuals referred or certified by the San Francisco Workforce Development System as being qualified economically disadvantaged individuals. The duration of the first source interviewing requirement shall be determined by the FSHA and