



**SAN BERNARDINO COUNTY TRANSPORTATION AUTHORITY
REQUEST FOR QUALIFICATIONS (23-1002870)**
for the Shortlisting of Design-Build Teams for the
TUNNEL TO ONTARIO INTERNATIONAL AIRPORT PROJECT

**FORM OF
PRE-PROPOSAL WORKS AGREEMENT**

between the
San Bernardino County Transportation Authority
and
[*Proposer Counterparty*]
[*Date*], 2023

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This **Pre-Proposal Works Agreement** (this “Agreement”) is made and entered into as of [date], 2023 (the “Effective Date”), by and between:

- a) San Bernardino County Transportation Authority, a public entity of the State of California, (“SBCTA”) and
- b) [Name of Shortlisted Design-Build Team], a [type of company and where formed/organized prior to execution] (the “Proposer Counterparty”, and together with SBCTA, the “Parties” and each a “Party”).

RECITALS

- A. **WHEREAS**, SBCTA intends to construct an approximately 4-mile tunnel and autonomous vehicle transit connection from the Cucamonga Station to Ontario International Airport (“ONT”), with one surface station at Cucamonga Station and two surface stations at ONT (as further described in the Project RFQs and any RFP, the “Project”); and
- B. **WHEREAS**, on November 15, 2022, SBCTA issued a Request for Qualifications for Operating System Providers (as amended, the “OSP RFQ”) in order to prequalify Operating System Providers for the purpose of teaming with Shortlisted Design-Build Teams to complete the Work and Project contemplated by the same; and
- C. **WHEREAS**, on November 21, 2022, SBCTA issued a Request for Qualifications for Design-Build Teams (as amended, the “DB RFQ,” and together with the OSP RFQ, the “Project RFQs”) in order to select Design-Build Teams (each, a “Shortlisted Design-Build Team”) to each enter into this Agreement for the purpose of progressing development of proposals to be subsequently submitted to SBCTA for evaluation under a separately issued Request for Proposals (as and when issued, the “RFP”); and
- D. **WHEREAS**, pursuant to the processes set forth in the respective Project RFQs, SBCTA on [date], 2023 prequalified a list of Operating System Providers and on [date], 2023 SBCTA qualified [number] Shortlisted Design-Build Teams, including the Proposer Counterparty, to proceed in the procurement process for the Project under the terms of this Agreement and the RFP; and
- E. **WHEREAS**, this Agreement sets out certain terms and conditions, supplemental to the DB RFQ and any RFP, pursuant to which the Proposer Counterparty will prepare certain pre-proposal deliverables and other work product during the Pre-Proposal Period and otherwise conduct work to advance preparation of its Proposal for evaluation by SBCTA in response to the RFP; and
- F. **WHEREAS**, on the basis of such Proposals under the terms of the RFP, SBCTA anticipates selecting a Proposer (which may, or may not be, the Proposer Counterparty) to enter into a design-build contract for the Project (such contract in substantially the form initially included in any RFP, the “Design-Build Contract”);

NOW, THEREFORE, BE IT RESOLVED, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties do hereby agree as follows:

1. FOUNDATIONAL MATTERS

1.1. Effectiveness and Term

Subject to Section 20.6, the “Term” of this Agreement will commence on the Effective Date and end on the earliest to occur of the following (such date being the “Expiry Date”):

- a. the date of execution of a Design-Build Contract by SBCTA with the Proposer Counterparty or any other Shortlisted Design-Build Team;
- b. the date on which SBCTA informs the Proposer Counterparty that it is no longer eligible to proceed as a Proposer under the terms of the DB RFQ or, once issued, the RFP;
- c. the date of early termination of this Agreement as a result of a Default as provided for in Section 7.1;
- d. the date on which SBCTA informs the Proposer Counterparty of a cancellation of the procurement of the Project; and
- e. the date of expiration of the validity period for any Proposal submitted by the Proposer Counterparty in response to any RFP.

1.2. Integration with Procurement Process

Proposer Counterparty acknowledges and agrees that:

- a. execution of and compliance with this Agreement is a condition precedent to Proposer Counterparty remaining a Shortlisted Design-Build Team eligible to submit a Proposal in response to any RFP and to subsequently be selected by SBCTA for award of the Design-Build Contract;
- b. this Agreement is non-exclusive and SBCTA has entered or will enter into one or more additional agreements (each an “Additional Pre-Proposal Works Agreement”) in equivalent form with other Shortlisted Design-Build Teams;
- c. this Agreement does not commit SBCTA to any particular outcome with respect to the procurement process initiated under the DB RFQ and continued through any RFP, including any commitment to issue any RFP or subsequently award the Project or enter into a Design-Build Contract with the Proposer Counterparty or any other Shortlisted Design-Build Team; and
- d. notwithstanding execution of this Agreement, in accordance with this Section 1.2, the Project procurement process remains ongoing.

2. SUPPLEMENTAL PROCUREMENT RULES

2.1. Integration with Procurement Documents

The procurement process for the Project remains ongoing under the terms of the DB RFQ and, when issued, any RFP, subject to the express modifications made pursuant to this Section 2.

2.2. Issuance of RFP, Addenda, and Project Information

- a. SCBTA may:
 - i. notwithstanding Section 10 (Addenda) of the DB RFQ and the passage of the SOQ Submission Deadline, prior to issuance of any RFP, issue Addenda to the DB RFQ in accordance with its terms;
 - ii. issue the RFP and, thereafter, addenda thereto, which will be effective and binding if made in writing and posted to the Project Website; and
 - iii. in connection with the RFP, issue the Project Information, the proposed form of Design-Build Contract, and the proposed form of Technical Provisions for Proposer Counterparty's use and reference.
- b. Proposer Counterparty acknowledges and agrees that through issuance of any Addenda, RFP, Project Information, form of Design-Build Contract, or form of Technical Provisions, SBCTA may, in its discretion:
 - i. unilaterally amend, modify, or supplement the following provisions of this Agreement:
 - A. Sections 3.2 and 3.3 regarding the schedule for Pre-Proposal Deliverables and Workshops,
 - B. Section 5.2 regarding stipend payments to the extent that such adjustments will only be to increase the stipend amount; and
 - ii. otherwise provide Proposer Counterparty with assumptions, requirements, or constraints relevant to the Project and the development and progression of any Pre-Proposal Deliverable and the performance of the Pre-Proposal Work, which Proposer Counterparty will take into account when performing the Pre-Proposal Work and preparing any Proposal, provided that such issuance and materials be given equal effect under the terms of any Additional Pre-Proposal Works Agreement.

2.3. Meetings

- a. Notwithstanding Sections 11 (Communications and Contacts) and 13 (Pre-SOQ One-on-One Meetings) of the DB RFQ,
 - i. Proposer Counterparty may participate in the Pre-Proposal Workshops as provided for in Section 3.2; and
 - ii. prior to issuance of the RFP, SBCTA may, in its discretion, invite Proposer Counterparty to participate in additional one-on-one meetings and/or forums open to all Shortlisted Design-Build Teams to attend simultaneously, provided that:
 - A. such invitation is also extended to each other Shortlisted Design-Build Team that is party to an Additional Pre-Proposal Works Agreement and that such meetings shall be held in accordance with rules equivalent to those set out in Section 15.4 of the DB RFQ or such other rules of which SBCTA may notify Proposer Counterparty in advance; and

- B. topics for such meetings may include:
 - I. discussion of specific topics relating to due diligence on the Project and progression of the Pre-Proposal Work;
 - II. discussions with third parties; and/or
 - III. presentation and discussion of any Pre-Proposal Deliverable, including in draft form.
- b. While SBCTA intends that the discussions in any meeting (including, for certainty, any Pre-Proposal Workshop) will be confidential to the meeting participants, subject always to Section 6.2, SBCTA reserves the right:
 - i. in the interests of ensuring a transparent and non-discriminatory procurement process, to disclose to each Shortlisted Design-Build Team any issues raised during any such meeting, including through the issuance of addenda, except to the extent that SBCTA determines, in their sole discretion, that such disclosure would constitute a disclosure of Public Records Exempt Materials and
 - ii. to share information, comments or feedback received during any meeting with any governmental authorities' representative, subject to such Person's prior agreement to appropriate confidentiality and non-disclosure restrictions.
- c. All meetings (including, for certainty, any Pre-Proposal Workshop) shall be subject to the following additional rules:
 - i. Proposer Counterparty shall not be permitted to submit to SBCTA any written work product at such meeting except for exact copies of materials that were previously submitted in accordance with this Agreement;
 - ii. SBCTA may invite third-party governmental authorities, subject to prior agreement to appropriate confidentiality and non-disclosure restrictions, to attend;
 - iii. no binding decisions regarding the procurement process, this Agreement, or the Proposal will be made by SBCTA in any meeting;
 - iv. no oral statement made by or on behalf of SBCTA in any meeting, or included in a written record of such meeting, will constitute:
 - A. an amendment or addendum or other waiver or exercise of any Reserved Right; or
 - B. an indication of preference or acceptance or rejection of anything said, done or presented; and
 - v. for certainty, the review of Pre-Proposal Deliverables will be based on the information provided in such deliverables and not on the conduct of Proposer Counterparty or discussions that occur during any meeting.

3. PRE-PROPOSAL WORK

3.1. Authorization and Scope of Pre-Proposal Work

- a. Subject to the terms and conditions of this Agreement and at all times conditioned on Proposer Counterparty remaining a qualified and responsible Shortlisted Design-Build Team under the terms of the DB RFQ and any RFP:
 - i. SBCTA hereby retains Proposer to actively participate in good faith in the procurement process and to prepare a responsive and compliant Proposal in response to any RFP and, including by undertaking the Pre-Proposal Work in accordance with this Agreement; and
 - ii. Proposer Counterparty accepts all such rights, risks, responsibilities, obligations, and liabilities in connection with delivering the Pre-Proposal Work consistent with this Agreement, the DB RFQ, and any RFP.
- b. Proposer Counterparty will conduct the Pre-Proposal Work:
 - i. in accordance with the Procurement Schedule and any RFP, each as updated from time to time in accordance with Section 2.2; and
 - ii. under the assumption that performance of work under any future Design-Build Contract will require compliance with the proposed form, including the proposed form of Technical Provisions, of Design-Build Contract, included in the RFP.
- c. The "Pre-Proposal Work" is comprised of all of the work, services, and activities to be performed, furnished, or undertaken by Proposer Counterparty under this Agreement, including as set out in this Section 3 and with respect to the preparation, delivery, and completion of all Pre-Proposal Deliverables, including:
 - i. preparing and submitting the Pre-Proposal Deliverables and responding to SBCTA's comments (if any) on the same, in accordance with Section 3.3;
 - ii. participating in any required Pre-Proposal Workshops in accordance with Section 3.2 or any other mandatory meetings in accordance with Section 2.3 and the terms of any RFP;but in all cases excluding:
 - iii. any anticipated work under any Design-Build Contract, including any which is the subject of award of such contract under any RFP;
 - iv. the performance of any other work which would be subject to California Public Contract Code § 7104, provided that such may be separately authorized, at SBCTA's discretion, in connection with Supplemental Due Diligence Activities; and
 - v. the performance of any other work which constitute a "public works project" as defined under California Public Contract Code § 9204, provided that such may be separately authorized, at SBCTA's discretion, in connection with Supplemental Due Diligence Activities.

3.2. Pre-Proposal Workshops

- a. Proposer Counterparty will attend each “Pre-Proposal Workshop” described below, as and when required in the Procurement Schedule, as such may be updated from time to time, together with such additional Pre-Proposal Workshops as SBCTA may require in accordance with Sections 2.2 and 2.3.
- b. The Pre-Proposal Workshop topics will be as described in Exhibit 3.
- c. Subject to more detailed direction from SBCTA regarding the agenda for such presentation to be provided in advance, the purpose of each workshop will be to:
 - i. provide Proposer Counterparty with an opportunity to present on the topics and Pre-Proposal Deliverables identified in Exhibit 3;
 - ii. allow the Proposer Counterparty an opportunity to otherwise present elements of its Proposal in their then-current development stage in order to demonstrate its understanding of, and responsiveness to, the Project criteria set forth in the RFP, in the proposed form of Design-Build Contract, and in the proposed form of Technical Provisions;
 - iii. assist SBCTA in understanding any issues related to the Project and the RFP raised by Proposer Counterparty; and
 - iv. to provide SBCTA with the context of Proposer Counterparty’s initial design, risk assessment, and approach to scheduling when reviewing Proposer Counterparty’s Alternative Technical Concept submissions.
- d. No later than the first of the month that any Pre-Proposal Workshop is scheduled to occur, Proposer Counterparty shall submit an agenda for such meeting to SBCTA; such agenda to include each of the topics to be covered at such meeting and the proposed attendees from the Proposer Counterparty (and their respective organizations) at such meeting.
- e. At (but not prior to) any Pre-Proposal Workshop, Proposers shall present such materials and Pre-Proposal Deliverables in the form of drafts, slide decks, narratives and/or drawings as they consider appropriate or as otherwise required by SBCTA and this Section 3.2. Such materials and Pre-Proposal Deliverables shall not be retained by SBCTA.

3.3. Pre-Proposal Deliverables

- a. The “Pre-Proposal Deliverables” are comprised of the materials described in Exhibit 3.
- b. Whenever this Agreement requires Proposer Counterparty to submit a Pre-Proposal Deliverable to SBCTA, Proposer Counterparty will deliver such Pre-Proposal Deliverable in manner, form, and substance reasonably acceptable to SBCTA. In addition, each Pre-Proposal Deliverable will:
 - i. respond to all prior comments made by SBCTA on any previously submitted draft,
 - ii. include all other preliminary materials or supplementary details that show or describe the character, scope, and intent of the Pre-Proposal Work

being performed, or which are otherwise necessary for SBCTA to review the relevant deliverable, in each case as reasonably requested by SBCTA, and

- iii. where applicable, be developed in accordance with the Technical Provisions.

3.4. subcontracting of Pre-Proposal Work

- a. Nothing contained in the Agreement nor any subcontract will create any contractual relationship between SBCTA and any subcontractor, including any Major Participant, or create any obligation on the part of SBCTA to pay or cause the payment of any sums to any subcontractor or grant any subcontractor any rights as a third-party beneficiary.
- b. Proposer Counterparty will be solely responsible for the performance of all subcontractors (of every tier), including each Major Participant, and all other Persons for whom or for which Proposer Counterparty is directly or indirectly responsible by contract or pursuant to Law, and for the performance, non-performance, acts, defaults, omissions, breaches, and negligence of the same, as fully as if any such performance, non-performance, acts, defaults, omissions, breaches, or negligence were those of Proposer Counterparty.
- c. In accordance with California Public Contract Code Section 6109(a), Proposer Counterparty will not perform Pre-Proposal Work with any subcontractor who is ineligible to perform work on a public works project pursuant to California Labor Code Section 1777.1 or Section 1777.7. In accordance with California Public Contract Code Section 6109(b), any contract on a public works project entered into between Proposer Counterparty and a debarred subcontractor is void as a matter of law.

3.5. Force Majeure Events

- a. If either Party's participation or attendance at any Pre-Proposal Workshop or its compliance with its obligations under Sections 3 of this Agreement is prevented or delayed due to the occurrence of a Force Majeure Event, the affected Party shall notify the other Party of the occurrence of the Force Majeure Event and the affected Party's nonperformance shall be excused during the period of prevention or delay, and in the event that Proposer Counterparty is the affected Party, SBCTA will use reasonable efforts to reschedule the required performance within the Procurement Schedule.
- b. The affected Party shall exercise commercially reasonable efforts to overcome the impediment to performance, which performance will not be excused unless the Party demonstrates that performance remains impossible or to the extent such efforts cannot overcome or mitigate the effects of such impediment.

4. WORK PRODUCT AND INTELLECTUAL PROPERTY

4.1. Pre-Proposal Work as "Work for Hire"

- a. All Pre-Proposal Work Product will be considered “work for hire” in which Proposer Counterparty transfers any ownership rights and claims to SBCTA upon delivery, and all such Pre-Proposal Work will be the property of SBCTA without restriction or limitation on their use; provided that, subject to Section 4.2, Pre-Proposal Work will not include, and SBCTA will not obtain title to, any Proprietary Intellectual Property or Third-Party Intellectual Property or any other aspect of the Pre-Proposal Work that is not Intellectual Property but which was created prior to the Effective Date and held and managed as a trade secret or confidential, proprietary information by any Related Party (other than Proposer Counterparty itself).
- b. On such basis, Proposer Counterparty agrees and does hereby assign, grant, transfer and convey to SBCTA, its successors and assigns, Proposer Counterparty’s entire right, title, interest and ownership in and to such Pre-Proposal Work Product. Notwithstanding passage of ownership and title of Pre-Proposal Work by SBCTA, risk of loss associated with Pre-Proposal Work will remain with Proposer Counterparty until the end of the Term.
- c. The foregoing rights of SBCTA will not apply to work product that is expressly required to be returned to the Proposer Counterparty under the terms of the DB RFQ, any RFP, or this Agreement.
- d. Neither Proposer Counterparty nor any of its team members will copyright any of the Pre-Proposal Work Product. Notwithstanding the foregoing, Proposer Counterparty may use and reproduce any elements of Pre-Proposal Work Product that are standard and not unique to the subject of the submission and the Project.
- e. Proposer Counterparty will furnish and execute such documents, including documents of title, and take such further actions as may be reasonably requested by SBCTA to give effect to this Section 4.1.

4.2. Intellectual Property

- a. Proposer Counterparty hereby grants to (or, with respect to any Third-Party Intellectual Property, will provide to or obtain for) SBCTA a non-exclusive, non-transferable, irrevocable, perpetual, fully paid up and sub-licensable license to use the Proprietary Intellectual Property and any Third-Party Intellectual Property for the following purposes:
 - i. procuring, designing, constructing, funding, financing, completing, operating, maintaining, modifying, expanding, maintaining and/or decommissioning any aspect of the Project, or any other project, including in connection with any subsequent procurement of the Project;
 - ii. integration into the Design-Build Contract or any other contract related to the Project;
 - iii. in respect of the integration with any adjacent project or facility with any element or phase of the Project;
 - iv. complying with any Applicable Law or agreement binding on SBCTA; and

- v. performing SBCTA's obligations or exercising SBCTA's rights under this Agreement, any Design-Build Contract, or any other agreement related to the Project,

provided that Proposer Counterparty may, to the extent it is reasonably unable to comply with the foregoing with respect to any Third-Party Intellectual Property, comply with its obligations through functionally equivalent alternative arrangements subject to the consent of SBCTA (such consent not to be unreasonably withheld).

- b. Proposer Counterparty will deliver to SBCTA copies of all Proprietary Intellectual Property and any Third-Party Intellectual Property used in the Pre-Proposal Work promptly following delivery of written request from SBCTA.

5. STIPEND

5.1. Limitation on Financial Obligations

- a. By entry into this Agreement, SBCTA does not assume any obligations, responsibilities, and liabilities, fiscal or otherwise, to reimburse all or part of the costs incurred or alleged to have been incurred by Proposer Counterparty in connection with the procurement for the Project, including in undertaking any Pre-Proposal Work, except to the extent expressly provided for with respect to payment of the Stipend in this Section 5.1.
- b. Proposer will be considered a vendor for purposes of payment of the Stipend.

5.2. Stipend Payment

- a. In consideration for Proposer Counterparty agreement with respect to Pre-Proposal Work Product and intellectual property under Section 3.5, and subject to the terms of this Section 5.2, SBCTA offers to pay a stipend payment in the amounts specified below (each a "Stipend Payment" and collectively the "Stipend") to Proposer Counterparty for each calendar month that commences during the first 10-months of the Pre-Proposal Period (each a "Payment Month") in the amounts specified below.

Event	Stipend Payment
Stipend Payment 1	\$90,000
Stipend Payment 2	\$90,000
Stipend Payment 3	\$90,000
Stipend Payment 4	\$90,000
Stipend Payment 5	\$90,000
Stipend Payment 6	\$90,000
Stipend Payment 7	\$90,000
Stipend Payment 8	\$90,000

Stipend Payment 9	\$90,000
Stipend Payment 10	\$90,000
TOTAL	\$990,000

- b. Notwithstanding the foregoing, SBCTA shall not be obligated to pay any initial or further Stipend Payment to Proposer Counterparty and shall not be responsible, in whole or in part, for any costs incurred by any Proposer as a result of its participation in the procurement process described herein, if:
- Proposer Counterparty is disqualified from, or otherwise is no longer eligible for, further participation in the procurement process under the terms of this Agreement, the DB RFQ, and any RFP, including as a result of a Default; or
 - SBCTA informs the Proposer Counterparty of a cancellation of the procurement of the Project.

5.3. Requests for Payment

- a. SBCTA will make each Stipend Payment to Proposer Counterparty based upon an approved "Request for Payment Form" in the form of Exhibit 7 and any requested supporting documentation and/or Pre-Proposal Deliverables. Each Request for Payment Form will be sent via email to the following email addresses with the the subject line indicated below:
- To:** AP@gosbcta.com
cc: Victor Lopez, V Lopez@gosbcta.com
Subject: SBCTA Tunnel to ONT Project-RFQ 23-1002870_Stipend Payment No. [X]
- b. By the twenty-fifth (25th) of each Payment Month and projected out through the end of such month, Proposer Counterparty will submit a completed Request for Payment Form submitted in accordance with this Section 5.3.
- c. Within twenty one (21) days after SBCTA's receipt of the Request for Payment Form, SBCTA will either (1) notify Proposer Counterparty of the approval of the Request for Payment Form or (2) notify Proposer Counterparty of the reasons for withholding approval in whole or in part.
- d. Stipend Payment requirements do not start until a properly completed Request for Payment Form is provided to SBCTA. If a Request for Payment Form is not approved, in whole or in part, on the basis of non-compliance with this Agreement, SBCTA will inform Proposer Counterparty of the issue and Proposer Counterparty will not be paid until the issue has been resolved to the satisfaction of SBCTA.

5.4. Set-off

SBCTA will have the right to retain, out of any payment otherwise due Proposer Counterparty under this Agreement, an amount sufficient to satisfy any amount due and owing to SBCTA from Proposer Counterparty under this Agreement, including in connection with indemnification, or any other agreement between Proposer Counterparty and SBCTA. Prior to withholding any amounts in dispute, SBCTA will use reasonable efforts to provide Proposer Counterparty with a notice indicating the specific amounts SBCTA intends to withhold and the reasons and contractual basis for the withholding.

6. PUBLIC RECORDS LAW REQUIREMENTS

6.1. Compliance with Public Records Law

Proposer acknowledges that all Pre-Proposal Deliverables, proposals, and other materials, including written correspondence, exhibits, photographs, reports, printed material, tapes, electronic disks, and other graphic and visual aids, delivered by Proposer Counterparty to SBCTA under this Agreement or any RFP are, upon their receipt by SBCTA, the property of SBCTA and are subject to the California Public Records Act, Chapter 3.5, commencing with Section 6250, of Division 7 of Title I of the Government Code (and pursuant to the CPRA Recodification Act of 2021, effective January 1, 2023, Chapter 1, commencing with Section 7920.000, of Division 10 of Title 1 of the Government Code) (the "Public Records Law").

6.2. Confidential and Proprietary Information

6.2.1. Submission of Confidential and Proprietary Information

In the event Proposer Counterparty submits any information that Proposer Counterparty believes is not subject to disclosure pursuant to the Public Records Law ("Public Records Exempt Materials"), it must conspicuously mark the affected document "CONFIDENTIAL" or "CONFIDENTIAL TRADE SECRETS" in the header or footer of each such page affected.

6.2.2. SBCTA Assessment of Confidential and Proprietary Information

- a. SBCTA will not advise Proposer Counterparty as to the nature or content of documents entitled to protection from disclosure under the Public Records Law or other Applicable Law, as to the interpretation of such laws, or as to the definition of trade secret.
- b. Nothing contained in this Section 6.2.2 will modify or amend requirements and obligations imposed on SBCTA by the Public Records Law or other Applicable Law.
- c. SBCTA reserves the right to disagree with a Proposer Counterparty's assessment regarding confidentiality or proprietary nature of information in the interest of complying with the Public Records Law. The provisions of the Public Records Law or other Applicable Law will control in the event of a conflict between the procedures described above and the Applicable Law.

6.3. Review by Key Stakeholders

- a. Information submitted by Proposer Counterparty, including Public Records Exempt Materials, may be made available to representatives of FTA, Omnitrans,

OIAA, the City of Rancho Cucamonga, and the City of Ontario as necessary to facilitate review and evaluation of such materials and other submissions during the procurement.

- b. To the extent reasonably possible, SBCTA intends to follow procedures that will preserve confidentiality relating to Public Records Exempt Materials during the procurement.

6.4. Disputes and Liability

- a. In the event of any proceeding or litigation concerning the disclosure of any material submitted by Proposer Counterparty, SBCTA will be the custodian retaining the material until otherwise ordered by a court or such other authority with jurisdiction with respect thereto, and the submitting party will be responsible for otherwise prosecuting or defending any action concerning the materials at its sole expense and risk; provided, however, that SBCTA reserves the right, in its respective sole discretion, to intervene or participate in the litigation in such manner as it deems necessary or desirable. All costs and fees (including attorneys' fees and costs) incurred by SBCTA in connection with any litigation, proceeding, or request for disclosure will be reimbursed and paid by Proposer Counterparty objecting to the disclosure.
- b. Proposer Counterparty will be responsible for all of its own costs in connection with any litigation, proceeding, or request for disclosure.
- c. In no event will SBCTA or any of its agents, representatives, consultants, directors, officers, or employees be liable to Proposer Counterparty for the disclosure of all or a portion of any materials submitted under this Agreement or any RFP.

7. DEFAULTS, REMEDIES, AND TERMINATION

7.1. Occurrence of Default

Subject to the Proposer Counterparty's rights under Section 3.5 with respect to any Force Majeure Event, the occurrence of any one of the following events will constitute a "Default":

- a. Proposer Counterparty, through its actions or inactions, is deemed by SBCTA to be disqualified from, or otherwise is no longer eligible for, further participation in the procurement process under the terms of this Agreement, the DB RFQ, and any RFP;
- b. if awarded the Project under the terms of any RFP, Proposer Counterparty:
 - i. refuses or fails to enter into the Design-Build Contract in the form incorporated in any RFP, including a refusal or failure to satisfy any conditions precedent to execution of such agreement;
 - ii. fails to engage in good faith negotiations regarding the Design-Build Contract in accordance with the terms of any RFP; and/or

- iii. withdraws or attempts to withdraw its Proposal, or refuses or fails to meet any commitments made therein that were to be fulfilled, in each case prior to execution of the Design-Build Contract;
- c. Proposer Counterparty fails to attend any mandatory meeting, including any Pre-Proposal Workshop, in accordance with Section 2.3, or otherwise materially fails to perform the Pre-Proposal Work required as part of participation at such meeting;
- d. failure to deliver Pre-Proposal Deliverables;
- e. failure to satisfy any conditions precedent to the submittal of a Proposal, including having received approval of an Operating Systems Provider and Lead Operator as Major Participants to the Shortlisted Design-Build Team;
- f. failure to submit a Proposal in conformance with the administrative requirements of any RFP, including with respect to timeliness; method of submission; Proposal contents, format, and organization;
- g. Proposer Counterparty refuses to comply with or disputes SBCTA's rights to Pre-Proposal Work Product and Intellectual Property under Section 3;
- h. Proposer Counterparty is Insolvent;
- i. Proposer Counterparty, any Financially Responsible Party, or any other Major Participant, or any of their respective partners, members, officers, directors, responsible managing officers, or responsible managing employees, is or has been convicted in a court of competent jurisdiction of any charge of fraud, bribery, collusion, conspiracy, or any other act in violation of any state or federal antitrust law in connection with the bidding upon, award of, or performance of, any public works contract, as defined in California Public Contract Code section 1101, with any public entity, as defined in California Public Contract Code section 1100;
- j. after exhaustion of all rights of appeal, there occurs any disqualification, suspension, or debarment from bidding, proposing, or contracting with any state-level, interstate, or federal Governmental Authority (distinguished from ineligibility due to lack of financial qualifications) of Proposer Counterparty or any other Related Party to the extent such remains a Related Party;
- k. any representation or warranty made by Proposer Counterparty pursuant to Section 10.2.5.d is false, misleading or inaccurate in any material respect when made or omits material information when made; or
- l. any other material breach by Proposer Counterparty of this Agreement.

7.2. SBCTA's Remedies upon Default

- a. If any Default occurs, SBCTA may, in its discretion:
 - i. disqualify Proposer Counterparty from further participation in the procurement process under the terms of this Agreement, the DB RFQ, and any RFP;

- ii. draw on any security furnished by Proposer Counterparty under the terms of the DB RFQ, and any RFP;
 - iii. determine Proposer Counterparty ineligible for any or further Stipend Payments under this Agreement;
 - iv. suspend, in whole or in part, the Pre-Proposal Work by written order to Proposer Counterparty; and/or
 - v. exercise any rights and remedies available to it (under this Agreement, at Law or in equity, or otherwise) for so long as such Default continues uncured.
- b. Subject to Section 7.3.1, the foregoing remedies under the terms of this Agreement are not exclusive of any other remedy. Each and every remedy is cumulative and in addition to any other remedy, existing now or hereafter, at Law, or in equity.

7.3. Termination

7.3.1. Exclusive Rights and Remedies

- a. This Section 7.3.1, together with the other provisions of this Agreement expressly referred to in this Section 7.3.1, contain the rights of SBCTA and Proposer Counterparty regarding termination of this Agreement.
- b. Notwithstanding anything to the contrary, a termination of this Agreement in accordance with this Section 7.3.1 will not waive any right or claim to damages that SBCTA may have and SBCTA may pursue any cause of action that it may have under the Agreement.
- c. If only a portion of the Pre-Proposal Work is terminated, Proposer Counterparty will continue to complete the remaining portions of the Pre-Proposal Work that was not terminated in accordance with the Agreement.

7.3.2. Occurrence of Termination or Expiry Date

- a. If a Default occurs, whether or not such Default is then continuing, SBCTA may, in its discretion, terminate this Agreement as a result in accordance with Section 7.2, then SBCTA will have no obligation to pay Proposer Counterparty any amount (and Proposer Counterparty will not be entitled to any Stipend Payment). Anything contained in this Agreement to the contrary notwithstanding, a termination for Default will not waive any right or claim to damages, with respect to indemnification, or otherwise, that SBCTA may have and SBCTA may pursue any cause of action against Proposer Counterparty that it may have under this Agreement.
- b. If the Expiry Date occurs and no Default has occurred and is then continuing, then SBCTA will within thirty (30) days following the Expiry Date pay to Proposer Counterparty the Stipend Payment for the then-current Payment Month and any outstanding Stipend Payments from prior Payment Months as satisfaction in full of its obligation to pay Proposer Counterparty the Stipend.

- c. Without limiting its other obligations under this Agreement, on the Expiry Date, Proposer Counterparty will, unless SBCTA elects in writing to the contrary, assign and transfer to SBCTA, and/or any Person designated by SBCTA, for no additional payment, all Pre-Proposal Work Product and intellectual property as necessary to complete compliance with Section 4.
- d. Under no circumstances is Proposer Counterparty entitled to anticipatory damages, unearned profits, punitive, exemplary, special, incidental, or consequential damages as a result of the occurrence of the Expiry Date.
- e. Anything contained in this Agreement to the contrary notwithstanding, the occurrence of the Expiry Date will not waive any right or claim to damages, with respect to indemnification, or otherwise, that SBCTA may have and SBCTA may pursue any cause of action that it may have against Proposer Counterparty under this Agreement.

8. FEDERAL AND STATE REQUIREMENTS

8.1. Compliance Matters

- a. Proposer Counterparty will comply with and require its subcontractors (including each Major Participant) to comply with, all State and federal requirements applicable to the Pre-Proposal Work, whether or not specifically listed in this Agreement, pursuant to Law, including all federal, state, and local laws, ordinances, rules, and regulations applicable to the work or payment for work thereof.
- b. Proposer Counterparty will not discriminate on the grounds of race, color, religion, sex, national origin, age, or disability in the performance of work under this Agreement.
- c. Furthermore, Proposer Counterparty will comply with the requirements set out in Exhibit 5.
- d. Proposer agrees to incorporate the provisions of this Section 8 and Exhibit 5 in any subcontract into which it might enter with reference to the work performed pursuant to this Agreement.

8.2. Labor and Wage Provisions

In performing the Pre-Proposal Work, Proposer Counterparty will comply, and require all subcontractors to comply, with all applicable federal and State labor, occupational safety and health laws and orders, including payment of prevailing wages.

8.3. Assignment of Claims and Causes of Action

In accordance with California Public Contract Code Section 7103.5(b) and California Government Code Section 4552, Proposer Counterparty will assign to SBCTA all right, title and interest in and to all claims and causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Sec. 15), or under the Cartwright Act (Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code), arising from purchases of goods, services, equipment, hardware, software or materials in accordance with this Agreement.

9. INDEMNIFICATION

9.1. No Obligation to Indemnify Proposer Counterparty

SBCTA will not indemnify Proposer Counterparty and no such express obligation or liability will be construed to the contrary as an indemnity.

9.2. Proposer Counterparty Indemnity

- a. Except as otherwise set forth in Section 9.2.e below, Proposer Counterparty agrees that it will indemnify, defend, and hold harmless SBCTA and all of SBCTA's board members, officers, agents, representatives, employees, successors and assigns (the "Indemnified Party" or collectively the "Indemnified Parties") from any claim, loss, damage, cost, judgment, fee, penalty, charge, or expenses (including attorneys' fees and costs) asserted, incurred, suffered, or awarded as a result of or that relate to any third party claims, suits, actions, allegations, or proceedings arising out of or caused by any acts, actions, negligence, omissions, fault, willful misconduct, violation of law, or breach of contract by Proposer Counterparty, its Major Participants, other team members or their respective agents, employees, or representatives arising in connection with the Work Product and Intellectual Property delivered to SBCTA hereunder or in connection with or contained in the Proposal, whether direct or indirect, except that Proposer will not be liable under this section for damages arising out of injury or damage to persons or property directly caused or resulting from the sole negligence or willful misconduct of SBCTA or any of its board members, officers, agents, representatives, or employees.
- b. The foregoing indemnity will survive the expiration or termination of this Agreement and will expressly apply to and include all third-party claims, suits, actions or allegations of infringement, confidential information, domestic or foreign patent rights, copyrights, intellectual property rights, moral rights, trade secrets, proprietary rights, licensing rights and unauthorized use. Should the Proposer Counterparty become the Design-Builder under the Design-Build Contract, the indemnity under this Section 9.2 will continue to apply in accordance with its terms and be additive to any indemnifications set forth in the Design-Build Contract.
- c. Proposer Counterparty's obligation to indemnify, defend, and pay for the defense, or at SBCTA's option, to participate and associate with SBCTA in defense of any claim and any related settlement negotiations, will be triggered by SBCTA's notice of claim for indemnification to Proposer. Only a final and unappealable adjudication or judgment specifically finding sole negligence or willful misconduct of SBCTA or any of its board members, officers, agents, representatives or employees will excuse performance of this provision. Proposer Counterparty will pay all costs and fees related to this obligation and its enforcement by SBCTA. SBCTA's failure to notify Proposer Counterparty of a claim will not release Proposer Counterparty of the above duty to defend.
- d. For purposes of this Section 9.2, "third party" means any Person (including Proposer Counterparty's employees or agents) other than an Indemnified Party

and Proposer Counterparty, except that a “third party” includes any Indemnified Party’s employee, agent or contractor who asserts a claim that is (i) against an Indemnified Party, (ii) within the scope of the indemnities, and (iii) not covered by the Indemnified Party’s worker’s compensation program.

- e. The indemnity set forth in Section 9.2.a will be limited to the extent that any loss or claim:
 - i. is with respect to design professional liability, in which case the Proposer Counterparty’s indemnification and defense obligations with respect to design professionals will be limited to such claims and amounts as are permitted under CA Civil Code 2782.8; or
 - ii. relates to defects or damages relating thereto solely and directly caused by SBCTA’s misuse or, only with respect to designs, plans, drawings, or other documents of such nature, use or reuse of Proposer Counterparty’s Intellectual Property.

9.3. Relationship to Insurance

For certainty, the insurance coverage Proposer Counterparty is required to obtain and maintain, or cause to be obtained and maintained, pursuant to Section 10 may support but will not limit Proposer Counterparty’s indemnification and defense obligations pursuant to this Agreement.

9.4. Claims by Employees

The indemnification obligations set forth in Section 9.2 will not be limited or reduced by a limitation on the amount or type of damages, compensation, or benefits payable by or for Proposer Counterparty or subcontractor (or anyone directly or indirectly employed by them or anyone for whose acts they may be liable) under workers’ compensation acts, disability benefits acts, other employee benefit acts, related law, or judicial decision with respect to any such law.

9.5. Proposer Counterparty Defenses

In Proposer Counterparty’s defense of SBCTA under this Section, negotiation, compromise, and settlement of any action, SBCTA will retain discretion in and control of the litigation, negotiation, compromise, settlement, and appeals therefrom.

10. INSURANCE

10.1. General Provisions

- a. Without limiting the indemnification obligations of Proposer Counterparty under this Agreement, Proposer Counterparty will purchase at its expense and continuously maintain in full force and effect at all times from and after the Effective Date through the end of the Term insurances in the types and amounts of specified in Section 10.2.
- b. All policies written by insurance carriers shall be authorized and admitted to do business in the state of California with a current A.M. Best rating of A-VIII or better. Professional Liability policies may be from non-admitted carriers provided

they are authorized and licensed in the state of California and meet the current A.M. Best rating of A: X or better.

- c. All policies, except those for workers' compensation and professional liability insurance, shall be endorsed by ISO Form CG 20 10 and CG 20 37, to name SBCTA and its officers, directors, members, employees, agents and volunteers, as additional insureds (the "Additional Insureds"). With respect to general liability arising out of or connected with work or operations performed by or on behalf of Proposer Counterparty under this Agreement, coverage for such Additional Insureds shall not extend to liability to the extent prohibited by section 11580.04 of the Insurance Code. The additional insured endorsements shall not limit the scope of coverage for SBCTA to vicarious liability but shall allow coverage for SBCTA to the full extent provided by the policy.
- d. Evidence of insurance in a form acceptable to SBCTA, including declarations pages of each policy, certificates of insurance, and the required additional insured endorsements, shall be provided to SBCTA prior to commencing the Pre-Proposal Work. Certificate(s) of insurance, as evidence of the required insurance, shall be executed by a duly authorized representative of each insurer; show compliance with the insurance requirements set forth in this Section 10; set forth deductible amounts applicable to each policy; list all exclusions which are added by endorsement to each policy; and also include the SBCTA contract number on the face of the certificate. If requested in writing by SBCTA, the Proposer Counterparty shall submit complete copies of all required insurance policies within 10 business days of a written request by SBCTA.
- e. Regardless of the allowance of exclusions of deductibles or self-insured retention by SBCTA, the Proposer Counterparty shall be responsible for any deductible or self-insured retention amount and shall warrant that the coverage provided to SBCTA is consistent with the requirements of this Section 10. The Proposer Counterparty will pay, and shall require its subcontractors to pay, all deductibles, co-pay obligations, premiums, and any other sums due under the required insurance. All deductibles or self-insured retention will be in amounts acceptable to SBCTA. The Proposer Counterparty will advise SBCTA in writing as to the amounts of any deductible or self-insured retention, or as to any increase in any insurance deductible or self-insured retention under any insurance required above. At the option of SBCTA, if the deductible or self-insured retention is greater than \$ 10,000 or one percent (1%) of the amount of coverage required under this Agreement, whichever is less, the Proposer Counterparty shall guarantee that either: (1) the insurer shall reduce or eliminate such deductibles or self-insured retentions with respect to SBCTA, its directors, officials, officers, employees, and agents; or, (2) the Proposer Counterparty shall procure a bond guaranteeing the amount of the deductible or self-insured retention. SBCTA will have the right, but not the obligation, to pay any deductible or self-insured retention due under any insurance policy. If SBCTA pays any sums due under any insurance required above, SBCTA may withhold said sums from any amounts due to Proposer Counterparty. The Proposer Counterparty's policies will

neither obligate nor prohibit SBCTA or any other Additional Insured, from paying any portion of any Proposer Counterparty's deductible or self-insured retention.

- f. All policies required to be maintained by the Proposer Counterparty or any subcontractor, with the exception of professional liability and worker's compensation, shall be endorsed, with a form at least as broad as ISO Form CG 20 01 04 13), to be primary coverage, and any coverage carried by any of the Additional Insureds shall be excess and noncontributory. Further, none of Proposer Counterparty's or subcontractor's pollution, automobile, general liability or other liability policies (primary or excess) will contain any cross-liability exclusion barring coverage for claims by an Additional Insured against a named insured.
- g. To the fullest extent permitted by law, Proposer Counterparty hereby waives all rights of recovery under subrogation against the Additional Insureds named herein, and any other consultant, subconsultant or sub-subconsultant performing work or rendering services on behalf of SBCTA. To the fullest extent permitted by law, Proposer Counterparty shall require similar written express waivers and insurance clauses from each of its subcontractors at every tier. Proposer Counterparty shall require all of the policies and coverages required in this Section 10 to waive all rights of subrogation against the Additional Insureds (ISO Form CG 24 04 05 09). Such insurance and coverages provided shall not prohibit Proposer Counterparty from waiving the right of subrogation prior to a loss or claim.
- h. If any insurance company elects to cancel or non-renew coverage for any reason, Proposer Counterparty will provide SBCTA 30 days prior written notice of such cancellation or nonrenewal. If the policy is cancelled for nonpayment of premium, Proposer Counterparty will provide SBCTA 10 days prior written notice. In any event, Proposer Counterparty will provide SBCTA with a copy of any notice of termination or notice of any other change to any insurance coverage required herein which Proposer Counterparty receives within one business day after Proposer Counterparty receives it by submitting it to SBCTA at insurance@gosbcta.com with a copy of the notice as provided for under Section 18.
- i. SBCTA may take any steps as are necessary to assure Proposer Counterparty's compliance with its insurance obligations as identified within this Section 10. Failure to continuously maintain insurance coverage as provided herein shall constitute a material breach of contract. In the event Proposer Counterparty fails to obtain or maintain any insurance coverage required, SBCTA may, but is not required to, maintain this coverage and charge the expense to the Proposer Counterparty, or withhold such expense from amounts owed Proposer Counterparty, or terminate this Agreement.
- j. The insurance required or provided shall in no way limit or relieve Proposer Counterparty of its duties and responsibility under the Agreement, including the obligation to indemnify, defend and hold harmless the Indemnified Parties. Insurance coverage in the minimum amounts set forth herein shall not be

construed to relieve Proposer Counterparty for liability in excess of such coverage, nor shall it preclude SBCTA from taking other actions as available to it under any other provision of the Contract or law. Nothing contained herein shall relieve Proposer Counterparty or any subcontractor of their obligations to exercise due care in the performance of their duties in connection with the Pre-Proposal Work and to complete the Pre-Proposal Work in strict compliance with the Agreement.

- k. Insurance required of Proposer Counterparty shall be also provided by subcontractors or by Proposer Counterparty on behalf of all subcontractors to cover their services performed under this Agreement. Proposer Counterparty may reduce types and the amounts of insurance limits provided by subconsultants to be proportionate to the amount of the subconsultant's contract and the level of liability exposure for the specific type of work performed by such subcontractor. Proposer Counterparty shall be held responsible for all modifications, deviations, or omissions in these insurance requirements as they apply to subcontractors.
- l. If Proposer Counterparty maintains higher limits than the minimums shown above, SBCTA shall be entitled to coverage for the higher limits maintained by Proposer Counterparty. Any available insurance proceeds in excess of the specified minimum limits of insurance and coverage shall be available to SBCTA.
- m. SBCTA reserves the right to modify any or all of the above insurance requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.

10.2. Required Policies

10.2.1. Commercial General Liability

- a. Proposer Counterparty shall maintain commercial general liability (CGL) insurance (Insurance Services Office (ISO) Form CG 00 01), and if necessary excess/umbrella commercial liability insurance, with a combined limit of liability of not less than \$5,000,000 each occurrence.
- b. The policy shall, at a minimum, include coverage for any and all of the following: bodily injury, property damage, personal injury, broad form contractual liability (including coverage to the maximum extent possible for the indemnifications in this Agreement), premises-operations (including explosion, collapse and underground coverage), duty to defend in addition to (without reducing) the limits of the policy(ies), and products and completed operations.
- c. The policy shall include:
 - i. \$5,000,000 per occurrence limit for property damage or bodily injury;
 - ii. \$1,000,000 per occurrence limit for personal injury and advertising injury;
 - iii. \$5,000,000 per occurrence limits for products/completed operations coverage (ISO Form 20 37 10 01);

- d. If a general aggregate applies, it shall apply separately to this project/location. The project name must be indicated under "Description of Operations/Locations" (ISO Form CG 25 03 or CG 2504).
- e. Coverage is to be on an "occurrence" form. "Claims made" and "modified occurrence" forms are not acceptable.
- f. A copy of the declaration page or endorsement page listing all policy endorsements for the CGL policy must be included.
- g. All subcontractors at any tier performing any portion of the Pre-Proposal Work for Proposer Counterparty shall also obtain and maintain the CGL insurance coverage, with deductibles or self-insured retentions acceptable to SBCTA, and with limits not less than:
 - i. \$1,000,000 each occurrence;
 - ii. \$2,000,000 general aggregate;
 - iii. \$1,000,000 personal injury and advertising limit; and
 - iv. \$2,000,000 products-completed operations aggregate limit.

10.2.2. Commercial Automobile Liability

- a. Proposer Counterparty shall maintain a commercial automobile liability policy with a total limit of liability of not less than \$5,000,000 each accident. This total limit of liability may be met by combining the limits of the primary automobile policy with an umbrella or excess policy in accordance with Section 10.2.3.
- b. The commercial automobile policy shall cover liability arising out of any vehicle, including owned, hired, leased, borrowed and non-owned vehicles assigned to or used in performance of the Pre-Proposal Work.
- c. The commercial automobile liability insurance shall be written on the most recent edition of ISO Form CA 00 01 or equivalent acceptable to SBCTA.

10.2.3. Umbrella/Excess CGL

- a. If the Proposer Counterparty elects to include an umbrella or excess policy to cover any of the total limits required beyond the primary commercial general liability policy limits and/or the primary commercial automobile liability policy limits, then the policy shall follow form over the Proposer Counterparty primary general liability coverage and shall provide a separate aggregate limit for products and completed operations coverage.
- b. The umbrella or excess policy shall not contain any restrictions or exclusions beyond what is contained in the primary policy.
- c. The umbrella or excess policy shall contain a clause stating that it takes effect (drops down) in the event the primary limits are impaired or exhausted.
- d. The umbrella or excess policy must also extend coverage over the automobile policy if it is to be used in combination with the primary automobile policy to meet the total insurance requirement limits.

- e. There shall be no statement limiting the coverage provided to the parties listed as Additional Insureds or Indemnified Parties.

10.2.4. Worker's Compensation and Employer's Liability

- a. The Proposer Counterparty shall maintain worker's compensation and employer's liability policies including the following:
 - i. Coverage A. Statutory Benefits;
 - ii. Coverage B. Employer's Liability;
 - iii. Bodily Injury by accident with limits of \$1,000,000 per accident; and
 - iv. Bodily Injury by disease with limits of \$1,000,000 policy limit/\$1,000,000 each employee.
- b. The worker's compensation and employer's liability policies shall contain a waiver of subrogation in favor of the Indemnified Parties. Such insurance shall be in strict accordance with the applicable workers' compensation laws in effect during performance of the Pre-Proposal Work by Proposer Counterparty or any subcontractor at any tier.
- c. All subcontractors at any tier performing any portion of the Pre-proposal Work shall also obtain and maintain the same insurance coverage as specified in this Section 10.2.4, with a waiver of subrogation in favor of Proposer Counterparty and all Indemnified Parties. Where coverage is provided through the California State Compensation Insurance Fund, the requirement for a minimum A.M. Best rating does not apply.

10.2.5. Professional Liability

- a. The Proposer Counterparty shall maintain a professional liability policy including a limit of liability not less than \$2,000,000 per claim and an annual aggregate limit of not less than \$4,000,000.
- b. Coverage shall be appropriate for the Pre-Proposal Work to be performed and shall include coverage for errors and omissions arising out of Proposer Counterparty's professional services, or services of any person employed by Proposer Counterparty, or any person for whose acts, errors, mistakes or omissions Proposer Counterparty may be legally liable.
- c. If Coverage is on a claims made basis, the policy shall contain a retroactive date for coverage of prior acts, which date will be prior to the date Proposer Counterparty begins to perform the Pre-Proposal Work under this Agreement.
- d. Proposer Counterparty shall secure and maintain "tail" coverage for a minimum of three (3) years after Agreement completion.

11. PROPOSER COUNTERPARTY REPRESENTATIONS AND WARRANTIES

Proposer Counterparty hereby represents and warrants to SBCTA that each of the following representations and warranties made by it and set out below are true and correct as of the Effective Date.

11.1. Organization, Power, and Authority

- a. Proposer Counterparty, [name], is a [type of entity], with all requisite power to own its properties and assets and carry on its business as now conducted or proposed to be conducted under this Agreement.
- b. Proposer Counterparty is duly qualified to do business in the State, and is in good standing in the State and, as applicable, its state of formation or incorporation.
- c. As of the Effective Date, Proposer Counterparty has full power, right, and authority to execute and deliver and perform this Agreement, and to perform all of Proposer Counterparty's obligations provided for under this Agreement.

11.2. Authorization and Due Execution

- a. Each Person executing this Agreement on behalf of Proposer Counterparty has been duly authorized to execute and deliver this Agreement on behalf of Proposer Counterparty
- b. The execution, delivery, and performance of this Agreement by Proposer Counterparty has otherwise been duly authorized by all necessary action of Proposer Counterparty.
- c. This Agreement has been (or, at the time of execution and delivery, will have been) duly and validly executed and delivered by Proposer Counterparty.

11.3. No Conflicts

The execution, delivery, and performance by Proposer Counterparty of this Agreement does not and will not contravene, or result in breach or default under, any:

- a. Law applicable to Proposer Counterparty that is in effect on the date of execution and delivery of this Agreement;
- b. organizational, corporate, or other governing documents of Proposer Counterparty; or
- c. agreement, instrument, permit, approval, judgment or decree to which Proposer Counterparty is a party or is bound.

11.4. No Breach; No Litigation

There is no action, suit, proceeding, investigation, or litigation pending and served on Proposer Counterparty that challenges:

- a. Proposer Counterparty's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement; or
- b. Proposer Counterparty's official to execute this Agreement,

and Proposer Counterparty has disclosed to SBCTA any pending and un-served or threatened action, suit, proceeding, investigation, or litigation with respect to such matters that Proposer Counterparty is aware of after reasonable inquiry and investigation.

11.5. Debarment; Anti-Money Laundering

- a. None of Proposer Counterparty, any of its principals (being any officer, director, or other direct or indirect owner, partner, employee (including Key Personnel) or other person with primary management or supervisory responsibilities, or a person who has a critical influence on or substantive control over the operations of Proposer Counterparty) or, to Proposer Counterparty's knowledge after reasonable inquiry, any of its subcontractors engaged as of the Effective Date, are presently disqualified, suspended or debarred from bidding, proposing or contracting with any local, state-level, interstate or federal Governmental Authority.
- b. Furthermore, none of Proposer Counterparty, nor any of its subcontractors engaged as of the Effective Date, are listed on any of the following lists or their successors: the Specially Designated Nationals List; the Denied Persons List; the Unverified List; the Entity List or the Debarred List; the General Service Administration's System for Award Management; or any other list of Persons with which SBCTA may not do business pursuant to Law.
- c. Proposer Counterparty is not in violation of:
 - i. any applicable United States anti-money laundering laws, including those contained in the Bank Secrecy Act and the regulations promulgated thereunder;
 - ii. any applicable economic sanction laws administered by Office of Foreign Assets Control of the United States Department of the Treasury (OFAC) or by the United States Department of State; or
 - iii. any applicable United States anti-drug trafficking, anti-terrorism, or anti-corruption laws, civil or criminal.
- d. Proposer Counterparty is not a Person:
 - i. that is charged with, or has reason to believe that he, she or it is under investigation for, any violation of any such laws;
 - ii. that has been convicted of any violation of, has been subject to civil penalties pursuant to, or had any of its property seized or forfeited under any such laws;
 - iii. that is owned, controlled by, or affiliated with any Person identified in the foregoing clauses; or
 - iv. that is in violation of any obligation to maintain appropriate internal controls as required by the governing laws of the jurisdiction of such Person as are necessary to ensure compliance with the economic sanctions, money laundering and anti-corruption laws of the United States and the jurisdiction where the Person resides, is domiciled or has its principal place of business.

11.6. Additional Legal Assurances

- a. Prior to the Effective Date and in accordance with the DB RFQs, Proposer Counterparty disclosed to SBCTA in writing all organizational conflicts of interest (as described in the Project RFQs) of which it was aware and, since such date, Proposer Counterparty has not obtained knowledge (having made reasonable inquiries to obtain such knowledge) of any additional such organizational conflict of interest, and there have been no organizational changes in Proposer Counterparty or changes in its Major Participants that have not been approved by SBCTA.
- b. In connection with this Agreement, Proposer Counterparty has not committed or caused, and will not commit or cause, a violation of: (A) Government Code Sections 1090 through 1099, 84308, or 87100 through 87105; or (B) California Code of Regulations Sections 18438.1 through 18438.8.
- c. Proposer Counterparty has not employed nor retained any company or person, other than a bona fide employee working solely for Proposer Counterparty, to solicit or secure this Agreement. Further, Proposer Counterparty has not paid nor has it agreed to pay any company or person, other than a bona fide employee working solely for Proposer Counterparty, any fee, commission, percentage, brokerage fee, gift or other consideration contingent upon or resulting from the award or making of this Agreement.
- d. Proposer Counterparty has fully complied with all requirements and restrictions of state and federal law respecting the employment of undocumented aliens, including, but not limited to, the Immigration Reform and Control Act of 1986, as may be amended from time to time, and will require that each of its subcontractors and each of their respective subcontractors will comply with the same.
- e. Proposer Counterparty has not, in the past three (3) years, been convicted of or had a civil judgment rendered against it for:
 - i. commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (e.g., federal, state or local) transaction or public contract;
 - ii. violation of federal or state antitrust statutes; or
 - iii. commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property,
 - iv. and Proposer Counterparty is not presently indicted for or otherwise criminally or civilly charged by a Governmental Entity with commission of any of the foregoing offenses.
- f. Proposer Counterparty has not, in the past three (3) years, had one or more public transactions (federal, state or local) terminated for cause or default.

12. REMEDIES

- a. Proposer Counterparty's sole remedy in relation to matters for which an express right or remedy is stated in this Agreement will be that right or remedy and Proposer Counterparty will have no additional right or remedy, however arising.
- b. Proposer Counterparty will not be entitled to any payment or credit (or any portion of either thereof) which would have been due, or from which it would have otherwise received a benefit, under this Agreement to the extent that it is (or should have been) able to recover the amount or receive the benefit of such payment or credit (or such portion) under any insurance available to Proposer Counterparty.

13. LIABILITY

13.1. Joint and Several Liability

In the event that Proposer Counterparty, or its successors or assigns, if any, is comprised of more than one individual or other legal entity (or a combination thereof), then and in that event, each and every obligation or undertaking herein stated to be fulfilled or performed by Proposer Counterparty will be the joint and several obligation or undertaking of each such individual or other legal entity.

13.2. Waiver of Consequential Damages

- a. Neither Party will be liable to the other for any punitive, indirect, incidental, consequential or special damages of any nature, whether arising out of a breach of this Agreement, tort (including negligence), or other legal theory of liability, including loss of bonding capacity, loss of bidding, loss of business or contracting opportunities, or other impact costs.
- b. The limitation set out in Section 13.2.a will not apply to:
 - i. any amounts expressly payable pursuant to this Agreement;
 - ii. Proposer Counterparty's liability for:
 - A. Claims and/or Loss that are in respect of death or personal injury;
 - B. Claims and/or Loss (including defense costs) to the extent that they are required to have been covered by insurance available to Proposer Counterparty; and
 - C. amounts payable by Proposer Counterparty under an indemnity pursuant to this Agreement (but only to the extent such indemnity relates to a Claim asserted and/or Loss suffered by any third-party, and is not otherwise a type of liability listed under A. or B. above); and
 - iii. any Party's liability for Loss arising out of fraud, willful misconduct, criminal conduct, recklessness, bad faith, or gross negligence on the part of the relevant Party (including, with respect to Proposer Counterparty, that of any other Related Party).

13.3. No Personal Liability

No agent, consultant, officer, or authorized employee of SBCTA will be responsible either personally or as an agent, consultant, officer or employee, or board member, for any liability arising under this Agreement, it being understood that in such matters they act as representatives of SBCTA.

13.4. Governmental Immunity

The Parties acknowledge and agree that SBCTA and its officials, officers and employees are relying on, and do not waive or intend to waive, by any provision of this Agreement, the monetary limitations or any other rights, immunities and protections provided by Law, or otherwise available to SBCTA and its officials, officers and employees.

14. GOVERNING LAW

This Agreement will be governed by and construed in accordance with the laws of the State, and any applicable federal law.

15. PROTESTS & DISPUTES

15.1. Consent to Jurisdiction

- a. The venue for any litigation arising from a dispute shall be the local State courts and the United States District Court for the Central District of California. Any controversies or legal problems arising out of this Agreement, and any action involving the enforcement or interpretation of any rights hereunder, shall be adjudicated exclusively by such courts.
- b. The Parties acknowledge that the Pre-Proposal Work does not include any element which would be considered a “public works project” for purposes of Public Contract Code § 9204, with any such Pre-Proposal Work being reserved for incorporation in a future Design-Build Contract.

15.2. Protest Procedures

- a. This Section 15.2 sets forth the sole and exclusive protest remedies available with respect to this Agreement.
- b. Only Proposer Counterparty (and not individual Major Participants) is permitted to file protests regarding this Agreement.
- c. Any protests regarding this Agreement shall be delivered to SBCTA by e-mail to tunneltoontario@gosbcta.com. Any Proposer Counterparty submitting such a protest is responsible for obtaining proof of delivery through the use of automated receipt and read message confirmations.
- d. Any protest must include the following in order to be considered complete and delivered as specified in Section 15.2.c:
 - i. the name of the Proposer Counterparty that is making the protest;
 - ii. a succinct statement of the grounds, legal authority and factual basis for such protest; and
 - iii. all documentation required to establish the merits of the protest.

- e. Unless SBCTA decides otherwise in its discretion, no hearing will be held on the protest and SBCTA shall decide it on the basis of the written submissions received from the protesting Proposer Counterparty. SBCTA (and/or its designees) may, in its discretion, discuss the protest with the protesting Proposer Counterparty, SBCTA's advisors and other governmental entities or their representatives.
- f. Any additional information regarding the protest requested from the protesting Proposer Counterparty by SBCTA or its designees shall be submitted within the time period requested in order to expedite resolution of the protest. If any party fails to expeditiously comply with any request for information, the protest may be resolved without such information.

15.3. Dispute Resolution

- a. This Section 15.3 sets forth the dispute resolution procedures under this Agreement.
- b. A Party shall use reasonable efforts to deliver notice of any dispute to the other Party within thirty (30) days of the event or condition giving rise to the dispute. The description of the dispute shall be in sufficient detail to allow the other Party to evaluate the merits of the complaining Party's position, as well as any additional information relating to the dispute as may reasonably requested to evaluate the dispute. The receiving Party shall provide a written response of its position within ten (10) Business Days of receipt of the dispute.
- c. SBCTA will consider both Parties' positions and will render its decision with respect to the dispute within thirty (30) days of receipt of the receiving Party's response.
- d. If Proposer Counterparty wishes to dispute SBCTA's decision, the Parties shall use their best efforts to resolve such dispute at the lowest possible administrative level. If a dispute cannot be resolved, then the Parties shall present the dispute to the Executive Director of SBCTA, or his or her duly authorized representative, and to an equivalent executive officer of Proposer Counterparty for resolution.
- e. If the dispute cannot be resolved at the executive level, the Parties may determine by mutual agreement to proceed with non-binding mediation. The Parties shall, within ten (10) Business Days after submission of the dispute to mediation, select a mediator acceptable to both Parties. If the Parties fail to reach agreement regarding a mediator within ten (10) Business Days, each Party shall submit the names of three (3) mediators to the [relevant mediation agency], and the Parties shall proceed with the mediator selected by the [relevant mediation agency]. Each Mediation must be:
 - i. administered in accordance with the American Arbitration Association ("AAA") Commercial Industry Mediation Rules and Procedures then in effect;
 - ii. held in San Bernardino County, California; and

- iii. concluded within 30 days of the date of selection of the mediator, or within such other time period as may be agreed by the Parties.
- f. No mediator will be empowered to render a binding decision as to any dispute or to make any findings or reduce his or her recommendations or decisions to writing. The mediation shall be considered to be a settlement negotiation as contemplated by the California Evidence Code. In the event that the matter is not resolved in mediation, any offer of settlement shall be inadmissible pursuant to the provisions of California Evidence Code section 1152. The provisions of California Evidence Code sections 703.5 and 1115 through 1128, shall apply to the mediation. The Parties agree that evidence admissible or subject to discovery or disclosure shall not be inadmissible or protected from disclosure solely by reason of its introduction or use in the mediation. Furthermore, disclosure of information which is otherwise privileged shall not alter its privileged character.
- g. If the dispute cannot be resolved through mediation, each Party may pursue any rights and remedies available under Law or under the Agreement.

16. RESERVATION OF RIGHTS

In connection with the procurement process described in this Agreement, SBCTA reserves to itself, any and all of the rights set out in Section 34 of the DB RFQ and any equivalent provisions of any RFP, each of which is incorporated herein by reference.

17. CONSENT TO SERVICE OF PROCESS

Proposer Counterparty irrevocably consents to service of process by notice as provided for in Section 18.

18. NOTICE

- a. Unless the context otherwise requires, any reference to a "notice" in this Agreement means a notice, request, demand, instruction, Pre-Proposal Deliverable, or other communication, and any such notice must be made in writing.
- b. All notices and any other information required to be provided to a Party under this Agreement shall be made in writing, and shall be delivered either personally, by overnight delivery service, by U.S. certified or registered mail, postage prepaid, or by email addressed to the Parties at their respective addresses indicated below or, at SBCTA's election, using the Project Website or as provided by SBCTA:
 - with respect to Proposer Counterparty:
[]
 - with respect to SBCTA:
[]
- c. Notices sent by overnight delivery service shall be deemed received on the Business Day (defined as any day other than a Saturday, Sunday or legal holiday in the State) following the date of deposit with the delivery service. Mailed notices

shall be deemed received upon the earlier of the date shown on the return receipt, or the second Business Day after the date of mailing. Any notice sent by email or through the Project Website shall be deemed received when confirmed by written or electronic confirmation of receipt by the addressee of the email or equivalent digital documentation.

- d. Notwithstanding the foregoing, any service of process must at all times be physically delivered.

19. PARTIES TO CONTRACT

19.1. Binding Effect; Successors and Assigns

- a. This Agreement will be binding upon and inure to the benefit of SBCTA and Proposer Counterparty and each of their respective permitted successors and assigns.
- b. Proposer Counterparty will not assign, transfer, pledge, sell, or otherwise convey this Agreement without SBCTA's prior written consent, in its sole discretion; provided that, this Agreement may be assigned to the special purpose vehicle formed by the Proposer Counterparty for purposes of the Project without the prior written consent of the SBCTA, but upon written notice to SBCTA. Any assignment of this Pre-Proposal Works Agreement without the required consent of SBCTA will be null and void and may, in SBCTA's sole discretion, disqualify Proposer Counterparty from further consideration in the procurement process and for the Project.
- c. SBCTA may assign, transfer, pledge, sell, or otherwise convey this Pre-Proposal Works Agreement without Proposer Counterparty's consent, to any other Person that succeeds to the governmental powers and authority of SBCTA in respect of the Project.

19.2. Limitation on Third-Party Beneficiaries

- a. The Parties agree that this Agreement is solely for the benefit of the Parties and nothing herein is intended to create any third-party beneficiary rights for third parties.
- b. Notwithstanding the foregoing, the duties, obligations, and responsibilities of the Parties with respect to third parties will remain as imposed by Law.

19.3. Independent Proposer Counterparty

- a. Proposer Counterparty must perform the Pre-Proposal Work under this Agreement as a non-exclusive independent contractor, and nothing herein is intended or will be construed to create any partnership, agency, or joint venture relationship between SBCTA and Proposer Counterparty.
- b. Neither Proposer Counterparty nor its subcontractors, nor the employees of any of them, will be deemed for any purpose to be employees or agents of SBCTA. Proposer Counterparty is not authorized to act as SBCTA's agent and will have no authority, expressed or implied, to act for or bind SBCTA unless otherwise expressly set forth for a particular purpose in a separate writing by SBCTA.

20. CONSTRUCTION OF CONTRACT

20.1. Counterparts

This Agreement may be executed in two or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument. Transmission by electronic mail of an executed counterpart of this Agreement will be deemed to constitute due and sufficient delivery of such counterpart, to be followed thereafter by an original of such counterpart. The Parties, in the manner specified by SBCTA, may sign this Agreement digitally.

20.2. Entire and Integrated Agreement

- a. This Agreement, including the Project RFQs, any RFP, and each Exhibit, constitutes the entire agreement between Proposer Counterparty and SBCTA with regard to its subject matter, and no other oral or written understandings, representations, inducements, consideration, promises, or interpretations are part of this Agreement.
- b. Subject to Section 20.5, this Agreement, which includes its Exhibits each as fully incorporated elements, constitutes a single, non-severable, integrated agreement whose terms are interdependent and non-divisible.
- c. Subject to any non-disclosure and confidentiality agreement executed by SBCTA and the Proposer Counterparty pursuant to the Project prior to the Effective Date, this Agreement supersedes all prior negotiations, representations, or agreements, whether written or oral.

20.3. Integration of Provisions Required by Law

The Parties agree that any additional provisions not set forth in this Agreement required by any existing or future Law to be inserted in this Agreement are and will be deemed to be incorporated in this Agreement as and when required by or for compliance with such Law with effect from the date of their incorporation (unless Law expressly provides for retroactive effectiveness).

20.4. Subordination to United States Government

- a. The Parties agree that this Agreement will be subject and subordinate to the provisions of any existing or future agreement between SBCTA and the United States of America, the execution of which has been or may be required as a condition precedent to the transfer of federal rights or property to SBCTA or expenditure or reimbursement of Federal or State funds (including federal grants-in-aid) for the development of the Project, including but not limited to any security requirements of state or federal government, including temporary security procedures or instructions.
- b. In the event that this Agreement, either on its own terms or by any other reason, conflicts with or violates such agreement referred to in the prior paragraph, SBCTA will promptly notify Proposer Counterparty of such conflict or violation, and work with Proposer Counterparty to amend, alter or otherwise modify the

terms of this Agreement in order to resolve such conflict or violation in a manner reasonably acceptable to both Parties.

20.5. Severability

If any provision of this Agreement is held or deemed inoperative or unenforceable because it conflicts with any other provision or provisions hereof, or any constitution, statute, ordinance, rule of Law, public policy, or any other reason, the circumstances will not render the provision in question inoperative or unenforceable in any other case or circumstances, or render any other provision herein contained invalid, inoperative, or unenforceable to any extent. The invalidity of any one or more phrases, sentences, clauses, or Sections contained in this Agreement will not affect the remaining portions of this Agreement or any part thereof.

20.6. Survival

The following provisions of this Agreement will survive the expiration or earlier termination of this Agreement and/or completion of the Pre-Proposal Work:

- a. Section 4 regarding Work Product and Intellectual Property;
- b. Section 9 regarding indemnification;
- c. Section 10.2.5.d regarding representations and warranties,
- d. Sections 12 and 13 regarding remedies and limitations on liability,
- e. Sections 14 and 15 regarding governing law, protests, and disputes,
- f. Exhibit 1: Rules of Interpretation and Exhibit 2: Definitions, and
- g. any Proposer Counterparty liability or obligations to SBCTA arising from a Default occurring prior to the date of such termination.

21. MISCELLANEOUS

21.1. Taxes

- a. SBCTA takes no position, and bears no responsibility or liability, for Proposer Counterparty's elected tax treatment of any interest in the Pre-Proposal Work.
- b. Proposer Counterparty is solely responsible for the withholding or payment of all applicable Federal, State, and local personal income taxes, social security taxes, unemployment and sickness disability insurance, and other payroll taxes with respect to Proposer Counterparty's employees. Neither Proposer Counterparty nor its subcontractors, nor the employees of any of them, will be eligible for any retirement, pension, or other employment benefits available to employees of SBCTA.
- c. As such, Proposer Counterparty will pay or cause to be paid, prior to delinquency, all Taxes in each case in respect of Proposer Counterparty's performance of the Pre-Proposal Work under this Agreement, and any other Related Party interest in any of the foregoing. SBCTA will not in any case be responsible for any Taxes levied on Proposer Counterparty or on any other Proposer Counterparty-Related Parties. Proposer Counterparty accepts sole

responsibility for, and agrees that it will have no right to claim, a Force Majeure Event or to any other claim for relief due to, its misinterpretation of Laws in relation to Taxes or incorrect assumptions regarding applicability of Taxes.

21.2. Costs

- a. Each Party is responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation, execution, and delivery of this Agreement.
- b. Except as otherwise expressly provided in this Agreement, each Party will perform its obligations in accordance with this Agreement at its own cost and risk.

21.3. No Personal Liability of Government Officials

- a. SBCTA's representatives are acting solely as agents and representatives of SBCTA, when carrying out the provisions of or exercising any right under this Agreement. They will not be liable either personally or as employees of SBCTA for actions in their ordinary course of employment.
- b. No agent, consultant, officer, or authorized employee of SBCTA nor any member of SBCTA's board, will be responsible either personally or as an agent, consultant, officer or employee, or board member, for any liability arising under this Agreement, it being understood that in such matters they act as representatives of SBCTA.

21.4. Signature Warranty

Each signatory to this Agreement warrants that the signatory has necessary authority to execute this Agreement on behalf of the entity represented.

EXHIBITS

EXHIBIT 1: RULES OF INTERPRETATION AND CONSTRUCTION

EXHIBIT 2: DEFINITIONS AND ABBREVIATIONS

EXHIBIT 3: PRE-PROPOSAL DELIVERABLES

EXHIBIT 4: REQUEST FOR PAYMENT FORM

EXHIBIT 5: FEDERAL REQUIREMENTS

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EXHIBIT 1 – RULES OF INTERPRETATION AND CONSTRUCTION

Except as otherwise specified, the provisions set forth in this Exhibit 1 apply to this Agreement including its Exhibits:

1. RULES OF INTERPRETATION**1.1. General Rules**

- a. Headings are inserted for convenience only and will not affect interpretation of this Agreement.
- b. Except as otherwise expressly provided or as the context may otherwise provide:
 - i. a reference to any section within this Agreement (including in the Exhibits) is a reference to such Section of this Agreement (excluding the Exhibits); and
 - ii. a reference to an agreement or other document, or to any Law or Permit, will be construed to be a reference to such agreement, document, Law or Permit as it may be amended, modified, replaced, or supplemented from time to time.
- c. The singular includes the plural and vice versa.
- d. Except as otherwise expressly provided in this Agreement, a reference to a person includes such person's permitted successors, assigns and transferees, and any and all gender specific references, classifications and/or language will be interpreted to be gender neutral.
- e. Words preceding "include", "includes", "including" and "included" will be construed without limitation by the words that follow.
- f. Except as otherwise expressly provided in this Agreement or as the context may otherwise provide, words and phrases not otherwise defined herein:
 - i. that have well-known insurance, engineering, construction, or specialized technical industry meanings will be construed pursuant to such recognized meanings where such meaning would be contextually appropriate; and
 - ii. of an accounting or financial nature will be construed pursuant to the Generally Accepted Accounting Principles (GAAP), in each case taking into account the context in which such words and phrases are used.

1.2. Deadlines

Whenever this Agreement requires either Party to make any payment, or provide or deliver any approval, consent, or like assent, notice, Pre-Proposal Work Product, comment or any information or material, or otherwise complete any action or performance, in each case on or no later than a date that is not a Business Day, then such deadline will automatically be extended to the next Business Day to occur after such date.

2. CONSENTS AND RELIANCE

2.1. Exercise of Discretion and Default Standards for Consents and Approvals

Except as otherwise expressly provided in this Agreement, where this Agreement provides SBCTA with any right to consent, approval or like assent, such consent, approval or like assent is to be made or given in the sole discretion of SBCTA.

2.2. Limited Potential Proposer Counterparty Reliance

- a. Proposer Counterparty may rely on approvals, any other consent, approval, or like assent, and any notice, from SBCTA only for the limited purpose of establishing that the approval, or any other consent, approval or like assent, occurred, or any notice was given. Any such approvals, any other consent, approval, or like assent, and any notice, by SBCTA, is otherwise for the sole benefit of SBCTA.
- b. Except as otherwise expressly provided in this Agreement, no:
 - A. approval, other consent, approval or like assent, or notice;
 - B. comment, responses, review, oversight, check, test, inspection, certification, concurrence, verification, or oversight;
 - C. agreement to resolution of a Force Majeure Event claim; or
 - D. payment,
 - E. or the absence of any of the foregoing, will in any case:
 - i. be deemed or construed as:
 - A. any kind of representation or warranty, express or implied, by SBCTA, or be relied upon by Proposer Counterparty in determining whether Proposer Counterparty has satisfied the requirements of this Agreement;
 - B. acceptance of services, materials or Pre-Proposal Work as satisfying the requirements of this Agreement or a professional approval by SBCTA; and
 - C. a detailed review or checking of design, details, or accuracy of Proposer Counterparty's Pre-Proposal Work;
 - ii. relieve Proposer Counterparty from, or diminish Proposer Counterparty's liability for, the performance of its obligations under this Agreement;
 - iii. estop or prevent SBCTA from subsequently exercising its rights under this Agreement without being bound by the manner in which they previously exercised (or refrained from exercising) such rights;
 - iv. prejudice SBCTA's rights against Proposer Counterparty, whether under this Agreement, including any cause of action it may have arising out of this Agreement, or Law;
 - v. constitute a waiver of any rights under this Agreement of any legal or equitable right of SBCTA or of any other Person; and

- vi. be asserted by Proposer Counterparty against SBCTA as a legal or equitable defense to, or as a waiver of or relief from, Proposer Counterparty's obligation to fulfill the requirements of the Agreement.
- b. To the maximum extent permitted by Law, Proposer Counterparty hereby releases, acquits, and discharges SBCTA from any and all duty and obligation to cause the Pre-Proposal Work to satisfy the standards and requirements of this Agreement.

3. RESOLUTION OF CONFLICTS

3.1. Standards for Resolving Conflicts and Inconsistencies

- a. If there is any conflict, ambiguity, or inconsistency between or among any provision(s) of the Agreement that cannot be reconciled by reading all relevant provisions of the Agreement as mutually explanatory of one another, then the order of precedence will be as follows:
 - i. a written amendment to this Agreement signed by both Parties, but only with respect to such portion of the Agreement that it expressly modifies;
 - ii. this Agreement (including, for such purposes, Exhibits 1 and 2, but not other Exhibits);
 - iii. all other Exhibits;
 - iv. the DB RFQ, provided that in the event of any conflict, ambiguity or inconsistency between or among the provisions of this Agreement (including any referenced Project Information) with an equal order of precedence which cannot otherwise be resolved, the most stringent requirement will take precedence;
 - v. except as otherwise expressly provided in this Agreement, where this Agreement cites any external document to define requirements of this Agreement, the cited portion of the applicable external document will:
 - A. be deemed incorporated into this Agreement to the extent it is so cited; and
 - B. have the same order of priority as the part of this Agreement where the citation is made;
 - vi. on plans, working drawings and standard plans, written or calculated dimensions take precedence over scaled dimensions;
 - vii. notwithstanding anything to the contrary contained in this Agreement, in the event of any conflict, ambiguity or inconsistency between or among any applicable requirement under Law and any other requirement of this Agreement, the applicable requirement under Law will take precedence;
 - viii. additional or supplemental requirements that Proposer Counterparty is required to comply with pursuant to this Agreement (including such requirements pursuant to any of the Project Information) with a lower order of precedence relative to other parts of this Agreement as

determined pursuant to this Section 3 of Exhibit 1 will be given effect except to the extent such requirements conflict or are inconsistent with, or otherwise create an ambiguity in relation to, the provisions contained in a part of this Agreement with a higher order of precedence; and

- ix. in the event of any conflict, ambiguity, or inconsistency between Proposer Counterparty's scope of work under this Agreement and any excluded Pre-Proposal Work pursuant to Section 3.1.c of this Agreement (including as to SBCTA's obligations with respect to the Environmental Process), SBCTA's determination, acting reasonably, as to the allocation of responsibility for the relevant scope of work will govern subject to Proposer Counterparty's rights under Section 15 of this Agreement.
- b. Subject only to Proposer Counterparty's express rights under this Agreement, omissions of details of Pre-Proposal Work in this Agreement which details are otherwise necessary to carry out the intent of the Agreement, or that are customarily performed by a Proposer Counterparty in accordance with the Standard of Care, will not themselves relieve Proposer Counterparty from the obligation to perform such omitted Pre-Proposal Work or otherwise entitle Proposer Counterparty to additional time for performance or any compensation.

3.2. Special Provisions with Respect to Pre-Proposal Work and Design

- a. Incorporation into this Agreement of any part of the Pre-Proposal Work will not:
 - i. limit, modify, or alter SBCTA's rights to review and approve any Work Product;
 - ii. be deemed as acceptance or approval of any part of the same by SBCTA as conforming with the requirements of this Agreement or Law; and
 - iii. waive application of Section 3.1 of this Exhibit 1.
- b. If any part of the Pre-Proposal Work and/or any approved design package and/or any approved Work Product includes statements, terms, concepts or designs that can reasonably be interpreted as commitments or offers acceptable on award of this Agreement or approval of the design package or Work Product:
 - i. to provide higher quality items, materials, designs, or products than otherwise required by this Agreement;
 - ii. to adhere to more stringent requirements than otherwise required by this Agreement; and
 - iii. to perform services or meet standards in addition to or better than those otherwise required under this Agreement, then Proposer Counterparty's obligations hereunder will include compliance and performance in accordance with such statements, terms, concepts, and designs.
- c. Proposer Counterparty is responsible for any omissions from any approved design package or Work Product and for any misdescription by it of details of Pre-Proposal Work that are necessary to carry out the intent of this Agreement.

EXHIBIT 2 – DEFINITIONS AND ABBREVIATIONS

Except as otherwise specified herein, or as the context may otherwise require, the capitalized terms and acronyms used in this Agreement have the respective meanings set out in the DB RFQ or, once issued, the RFP, and otherwise in this Exhibit 2:

“Additional Insured”	has the meaning given to it in Section 10.1.e.
“Additional Pre-Proposal Works Agreement”	has the meaning given to it in Section 1.2.
“Agreement”	has the meaning given to it in the Preamble.
“Authority Having Jurisdiction”	means, together and separately, utility owners, government authorities, regulatory authorities, and/or any other entity having jurisdiction pursuant to Applicable Law over any part of the Pre-Proposal Work or the Project.
“DB RFQ”	has the meaning given to it in the Recitals.
“Default”	has the meaning given to it in Section 7.1.
“Effective Date”	has the meaning given to it in the Preamble.
“Expiry Date”	has the meaning given to it in Section 1.1.
“Fault Event”	means an event that arises directly or indirectly as a result of any: <ul style="list-style-type: none">a. breach by Proposer Counterparty of this Agreement;b. act or omission, fraud, willful misconduct, criminal conduct, recklessness, bad faith, or negligence by or of Proposer Counterparty or any other Related Party;c. Default; andd. other breach of Law, Permit, or this Agreement, by any Related Party.
“FLSA”	means Federal Fair Labor Standards Act.
“Force Majeure Event”	means any event or circumstance beyond the reasonable control of either Party, to the extent such could not have been avoided or mitigated by the exercise of due diligence, and which could not have been expected or taken into account as of the Effective Date, including, but not limited to, pandemics and epidemics (including COVID-19, but excluding those impacts of COVID-19 that are in effect as of the Effective Date), lockouts, failures of power, acts of God, tornados, hurricanes, earthquakes, acts of public enemies, terrorism, riots, insurrections, civil commotion, inability to obtain labor or materials or reasonable substitutes for either, fire, or similar

cause, in each case with respect to any potential claim under Section 3.5 by the Proposer Counterparty as the affected Party, excluding any event or circumstance arising from any Fault Event.

“Governmental Authority” means any:

- a. United States Federal, State or local government, and any political subdivision of any of them; and
- b. any interstate, governmental, quasi-governmental, judicial, public, regulatory or statutory instrumentality, administrative agency, authority, body or entity of, or formed by, any such government or subdivision thereof,

in each case other than SBCTA.

“Indemnified Party” has the meaning given to it in Section 9.2.

“Insolvency Event” means a Person in respect of which any of the following have occurred and are continuing:

- (a) any of:
 - (i) the commencement of a voluntary case under Federal bankruptcy law;
 - (ii) the filing of a petition seeking to take advantage of any other law, domestic or foreign, relating to bankruptcy, insolvency, reorganization, winding up or composition for adjustment of debts;
 - (iii) the application for or the consent to the appointment of, or the taking of possession by, a receiver, custodian, trustee, or liquidator of itself or of a substantial part of its property, domestic or foreign;
 - (iv) the admission in writing of its inability to pay its debts as they become due;
 - (v) the making of a general assignment for the benefit of creditors; or
 - (vi) the taking of any corporate (or equivalent) action for the purpose of authorizing any of the foregoing; or
- (b) the commencement of a case or other proceeding against such Person in any court of competent jurisdiction seeking:
 - (i) relief under Federal bankruptcy law or under any other law, domestic or foreign, relating to bankruptcy, insolvency, reorganization, winding up or adjustment of

debts; or

(ii) the appointment of a trustee, receiver, custodian, liquidator or the like for such Person or for all or any substantial part of their respective assets, domestic or foreign,

and with respect to i. or ii.:

(i) the petition that commenced such case or proceeding is not contested by such Person within the amount of time provided under Law; or

(ii) either: (I) such case or proceeding continues without dismissal or stay for a period of 60 Calendar Days; or (II) an order granting the relief requested in such case or proceeding (including, an order for relief under such federal bankruptcy law) is entered and not appealed to the extent that the order for relief is stayed.

“Insolvent” means the condition of a Person in respect of whom an Insolvency Event has occurred.

“Intellectual Property” means all current and future legal and/or equitable rights and interests in or to know-how, patents (including applications), copyrights (including moral rights), trademarks (registered and unregistered), service marks, trade secrets, designs (registered and unregistered), utility models, circuit layouts, business and internet domain names, inventions, solutions embodied in technology, databases and data sets, and other intellectual activity and applications of or for any of the foregoing subsisting in or relating to the Pre-Proposal Work Product and the Pre-Proposal Work, the Project design and other data including algorithms, software, source code, and source code documentation used in connection with the Project, the Pre-Proposal Work Product and the Pre-Proposal Work, and, for certainty, includes all Third-Party Intellectual Property.

“Law” means any federal, State, or local:

- a. constitutional provision;
- b. statute, law (including common law), code, regulation, ordinance, or rule;
- c. binding judgment, judicial or administrative order, or decree;
- d. written directive, regulations, or other governmental restriction or requirement (including those resulting from an initiative or referendum process, but

excluding those by SBCTA within the scope of its administration of this Agreement); and

- e. similar form of decision of or determination by, or any written interpretation or administration of any of the foregoing by, any Governmental Authority,

in each case that is applicable to or has an impact on the Pre-Proposal Work or the Project (where such applicability or impact will be determined by reference to the context in which the term Law is used), whether taking effect before or after the Effective Date, but excluding Permits.

“OSP RFQ”	has the meaning given to it in the Recitals.
“Party”	means either SBCTA or Proposer Counterparty and “Parties” means collectively, SBCTA and Proposer Counterparty.
“Payment Month”	has the meaning given to it in Section 5.2.
“Permit”	means any consent, agreement, permit, clearance, authorization, approval, certification, notification, ruling, exemptions, variance, registration, filing, decision, order, license, right-of-way agreement, concession, grant, registration, franchise or qualification required or advisable under the applicable circumstances to be issued by, granted by, or made with any Authority Having Jurisdiction in connection with the Pre-Proposal Work or the performance of any of Proposer Counterparty’s obligations under this Agreement.
“Pre-Proposal Deliverables”	has the meaning given to it in Section 3.3.
“Pre-Proposal Period”	means that part of the Term from the Effective Date through the submission deadline for the Proposal under the RFP.
“Pre-Proposal Period Comments”	has the meaning given to it in Section 2.3.
“Pre-Proposal Work”	has the meaning given to it in Section 3.1.
“Pre-Proposal Workshop”	has the meaning given to it in Section 3.2.
“Pre-Proposal Work Product”	means the SOQ, any Proposal, and all Pre-Proposal Deliverables, Supplemental Due Diligence Requests, agendas, comments, correspondence, and other materials submitted by Proposer Counterparty to SBCTA under the terms of the DB RFQ, any RFP,

and this Agreement.

“Project RFQs” has the meaning given to it in the Recitals.

“Proposer Counterparty” has the meaning given to it in the Preamble.

“Proprietary Intellectual Property” means Intellectual Property, excluding Work Product, that is patented or copyrighted by any Related Party prior to the [publication of the DB RFQ], or, if not patented or copyrighted, was created prior to the [publication of the DB RFQ] and held and managed as a trade secret or confidential, proprietary information by the relevant Related Party.

“Public Access Inspections” means inspections of areas that are physically and legally accessible to members of the general public, to the extent such inspections would be functionally distinguishable from the lawful activities of most other users of such areas; and/or would require the use of non-intrusive equipment.

“Related Party” means:

- a. Proposer Counterparty,
- b. each other Major Participant,
- c. each subcontractor (of any tier),
- d. any other Persons (except SBCTA) performing any of the Pre-Proposal Work for or on behalf of Proposer Counterparty,
- e. any other Persons (except SBCTA, and any members of the general public) for whom Proposer Counterparty may be legally or contractually responsible, and
- f. the employees, agents, officers, directors, representatives and consultants of any of the foregoing.

“Restricted Access Inspections” means inspections of such areas are not physically and/or legally accessible to members of the general public.

“SBCTA” means the San Bernardino County Transportation Authority.

“Stipend” has the meaning given to it in Section 5.2.

“Stipend Payment” has the meaning given to it in Section 5.2.



"Supplemental Due Diligence Activities"	means Restricted Access Inspections and/or Public Access Inspections.
"Supplemental Due Diligence Request"	means a request to conduct Supplemental Due Diligence Activities submitted in accordance with the terms of this Agreement.
"Term"	has the meaning given to it in Section 1.1.
"Third-Party Intellectual Property"	means any Intellectual Property used or applied by Proposer Counterparty or any Related Party in connection with the Pre-Proposal Work which is owned by any Person other than SBCTA or a Related Party.
"Work Product"	means all Pre-Proposal Deliverables, correspondence, drawings, specifications, plans, engineering models, reports, documents, data compilations, applications, research, manuals, CAD materials, job books, designs, software, reports, analysis, studies and other information or material of any kind, in any medium, acquired, collected, created or prepared by on behalf of Proposer Counterparty in the performance of the Pre-Proposal Work, including any draft, and any and all Intellectual Property, acquired, collected, developed or prepared in whole or in part during performance of and arising out of the Pre-Proposal Work, including improvements and modifications, whether or not copyrightable, patentable, and/or trademarkable, and any applications for letters patent issuing thereon.

EXHIBIT 3 – PRE-PROPOSAL DELIVERABLES

Workshop No.	Date	Workshop Theme	Major Topics	Deliverables
0	June 2023	Kick-Off	<ul style="list-style-type: none"> Review comments on SBCTA-provided Technical Provisions and Reference Information Documents Review comments on SBCTA-provided Draft Geotechnical Data and Baseline Reports Discuss opportunities for innovation and value creation 	<ul style="list-style-type: none"> Comments on SBCTA-provided Technical Provisions and Reference Information Documents Comments on SBCTA-provided Draft Geotechnical Data and Baseline Reports, including requests for supplemental geotechnical data
1	August 2023	Work Plan	<ul style="list-style-type: none"> Review of action items and follow-up questions from previous workshop Review Draft Pre-Construction Phase (Phase 1) Work Plan Review Draft Risk Register 	<ul style="list-style-type: none"> Status of action items and follow-up questions from previous workshop Draft Phase 1 Work Plan, including at a minimum: <ul style="list-style-type: none"> Project understanding and scope Phase 1 work major elements and milestones Management approach, team responsibilities and communication matrices Key issues, input needed, and decisions required Interfaces with other projects and stakeholders Draft Risk Register identifying key risks, approaches to manage/mitigate, and contingency

Workshop No.	Date	Workshop Theme	Major Topics	Deliverables
2	September 2023	Alignment, Stations, Operations Control Center and Maintenance Facility	<ul style="list-style-type: none"> Review of action items and follow-up questions from previous workshop(s) Review alignment plan/profile and typical sections Review functional layout for the following: <ul style="list-style-type: none"> Cucamonga Station Ontario T2 and T4 Stations Operations Control Center Maintenance Facility Confirmation of SBCTA-provided right-of-way plans Confirmation of SBCTA-provided utility relocation plans Review updates to Draft Risk Register 	<p>plans</p> <ul style="list-style-type: none"> Status of action items and follow-up questions from previous workshop(s) Draft Alignment Drawings, including at a minimum: <ul style="list-style-type: none"> Horizontal alignment showing key existing features Vertical alignment showing key existing features Typical cross sections Project structures and facilities Limits of at-grade, portals, cut-and-cover transitions, and tunnel structures Right-of-way limits, including temporary and permanent easements Roadways, utilities, and other critical infrastructure in proximity to the alignment Draft Station Drawings, including at a minimum: <ul style="list-style-type: none"> Functional layout and space allocation Passenger facilities (ticketing, waiting areas, etc.), circulation, and intermodal connections Vehicular circulation including roadway access for pick up and drop off Utility services Draft Operations Control Center and Maintenance Facility Drawings, including at a minimum: <ul style="list-style-type: none"> Functional layout and space allocation Equipment needs

Workshop No.	Date	Workshop Theme	Major Topics	Deliverables
				<ul style="list-style-type: none"> ○ Employee considerations (work areas, restrooms, locker rooms, etc.) ○ Utility services
3	October 2023	Tunnel and Geotechnical	<ul style="list-style-type: none"> ● Review of action items and follow-up questions from previous workshop(s) ● Review typical sections for bored tunnel, portals, and transition structures (e.g., at-grade to u-section, u-section to cut-and-cover section, cut-and-cover section to bored tunnel) ● Review ventilation approach, including space allocation and layout of equipment rooms, utility service connections, and site access needs ● Review tunnel fire and life safety and emergency operations approach, including emergency walkways, exit stair facilities, fire protection systems 	<ul style="list-style-type: none"> ● Status of action items and follow-up questions from previous workshop(s) ● Draft Tunnel Basis of Design ● Draft Tunnel Drawings, including at a minimum: <ul style="list-style-type: none"> ○ Tunnel, portal and transition structure cross-sections, including consideration for fire and life safety and other required equipment ○ Mitigation and design requirements for geotechnical and seismic conditions ○ Tunnel lining requirements ○ Ventilation structure locations, sizing, and configuration ○ Access for operations, emergency and maintenance; locations and right-of-way ○ Protection of MWD, Caltrans and UPRR structures

Workshop No.	Date	Workshop Theme	Major Topics	Deliverables
			<p>preliminary analysis for standpipe, sprinklers, and other systems</p> <ul style="list-style-type: none"> • Review approach for tunneling under MWD, Caltrans and UPRR structures and protection of these structures • Review construction approach including construction methods and sequence, temporary construction easements, muck disposal, hauling routes, etc. • Discuss site access needs, timing and duration • Discuss temporary power needs • Discuss any major geotechnical risks, mitigation approaches and contingency plans • Review updates to Draft Risk Register 	

Workshop No.	Date	Workshop Theme	Major Topics	Deliverables
4	November 2023	Project Schedule	<ul style="list-style-type: none"> Review of action items and follow-up questions from previous workshop(s) Review Draft Project Schedule Review updates to Draft Risk Register 	<ul style="list-style-type: none"> Status of action items and follow-up questions from previous workshop(s) Draft Basis of Schedule Report, including but not limited to: <ul style="list-style-type: none"> Execution approach, identifying all key or driving resources Calendars used for each work segment, indicating the workdays per week, hours per week, and public holidays Shift patterns (no. of shifts) and shift times for each work segment and any other special calendars that only allow work to take place during a pre-defined window of time Production rate assumptions used within the schedule development, including but not limited to tunnel boring, tunnel lining fabrication, tunnel lining installation, and tunnel muck excavation Interfaces milestones and / or activities with other entities Assumptions used for review times with agencies or others requiring review of information. List any contingencies built into the schedule, for weather or other disruptions. Note the total day allocated for such events. List of long lead procurement items and other activities with long duration periods

Workshop No.	Date	Workshop Theme	Major Topics	Deliverables
				<ul style="list-style-type: none"> ○ List schedule risks ○ Document top 3 critical paths ● Draft Level 3 (AACEI definition) detailed Project schedule in sufficient detail to demonstrate at minimum: key sequences of activities for the work, float paths to revenue operations, and key schedule risks. ● Document major activities and milestones including but not limited to: final design, right-of-way, permits and approvals, third party agreements, public and private utility relocations, major construction work activities, long lead items, system integration, start-up testing & commissioning.
5	December 2023	Pricing Basis and Methodology	<ul style="list-style-type: none"> ● Review of action items and follow-up questions from previous workshop(s) ● Review Pricing Development Methodology and Project Cost Model ● Review updates to Draft Risk Register 	<ul style="list-style-type: none"> ● Status of action items and follow-up questions from previous workshop(s) ● Proposal Pricing Development Methodology that describes the cost estimating approach that will be used, including but not limited to: <ul style="list-style-type: none"> ○ Pricing methodology describing the general approach to defining and quantifying the GMP pricing ○ Anticipated basis ○ Framework for the organization and management of cost data ○ Estimating standards ○ Estimate limitations / exclusions ● Draft Basis of Guaranteed Maximum Price (GMP) proposal table of contents with narrative of what each section will contain; including but not limited to:

Workshop No.	Date	Workshop Theme	Major Topics	Deliverables
				<ul style="list-style-type: none"> ○ Phasing / timelines used in preparation of the estimate ○ Project Scope / Scope of Services related to the Proposal ○ Estimate Methodology ○ Estimate Classification ○ Design, Planning and Pricing Basis ○ Allowances ○ Assumptions ○ Exclusions ○ Contingencies ○ Escalation ○ Overhead & Profit ○ Risks and Opportunities ○ Estimating Team – Preparers and Contributors ● Draft Project Cost Model for each element of the Project following FTA's SCC format.
6	January 2024	Vehicles and Systems	<ul style="list-style-type: none"> ● Review of action items and follow-up questions from previous workshop(s) ● Review requirements for lighting, electrical equipment, network equipment, and communication systems ● Review vehicle functional requirements 	<ul style="list-style-type: none"> ● Status of action items and follow-up questions from previous workshop(s) ● Draft Systems Drawings, including at a minimum: <ul style="list-style-type: none"> ○ Configuration for lighting and electrical equipment, security, access control, SCADA, PA, messaging, network and communications, and fare collection, including: <ul style="list-style-type: none"> ▪ Proposed Equipment list ▪ Single Lines and block diagrams ▪ Space and room allocations ▪ Conduit and Cable

Workshop No.	Date	Workshop Theme	Major Topics	Deliverables
			<ul style="list-style-type: none"> Review system interfaces. Review vehicle operational model Review updates to Draft Risk Register 	<ul style="list-style-type: none"> Construction Design Drawings RF Coverage Analysis Draft Concept of Operations (covering all systems and subsystems) Draft Vehicle and System Interface Functional Requirements Report, including but not limited to: <ul style="list-style-type: none"> Definition and description of vehicle subsystems Graphic depiction of each interface between on-board vehicle subsystems and wayside systems Communications architecture for the entire vehicle interface communication system Draft Vehicle Operations Model and Report, including but not limited to: <ul style="list-style-type: none"> Passenger loading and unloading Vehicle travel through the entire tunnel
7	February 2024	Safety Certification and O&M	<ul style="list-style-type: none"> Review of action items and follow-up questions from previous workshop(s) Review requirements and approach for safety certification Review requirements and approach for operations & 	<ul style="list-style-type: none"> Status of action items and follow-up questions from previous workshop(s) Draft Safety Certification Plan



Release of March 5, 2023

Workshop No.	Date	Workshop Theme	Major Topics	Deliverables
			<ul style="list-style-type: none">• maintenance (O&M) Review updates to Draft Risk Register	

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EXHIBIT 4 – REQUEST FOR PAYMENT FORM**Instructions**

- (1) Proposer Counterparty shall submit this form in English and in Microsoft® Word format. All references to currency shall use U.S. dollars.
- (2) Proposer Counterparty should use the checkboxes at the top of the Form to indicate the Stipend Payment to which the Request for Payment Form relates.
- (3) Proposer Counterparty shall use the numbering system set out in the Form.
- (4) Proposer Counterparty shall provide a narrative description of Pre-Proposal Work completed to date with a list of Pre-Proposal Deliverables that have been submitted to SBCTA and a list of Pre-Proposal Workshops that have been attended.
- (5) Proposer Counterparty shall confirm all required and requested attachments are appended to the Form by using the checkboxes for Confirmation of Attachments.
- (6) Proposer Counterparty shall indicate the Stipend Payment amount released in the previous Payment Month and the Stipend Payment being requested for the current Payment Month.
- (7) Proposer Counterparty should delete this instructions box and additional instruction notes prior to submitting this Form.

Proposer Counterparty Name: *[Proposer Counterparty to provide]*

Date: *[Proposer Counterparty to provide]*

Tunnel to ONT Project: Request for Payment No. []¹**Narrative Description of Pre-Proposal Work Completed to Date (with List of Pre-Proposal Deliverables Submitted & Pre-Proposal Workshops Attended):**

- *[Proposer Counterparty to provide]*

CONFIRMATION OF ATTACHMENTS: ☐ Documentation Requested by SBCTA (if any)

- *[Proposer Counterparty to provide]*

STIPEND PAYMENT AMOUNT:

Dollar Amount of Stipend Payment: \$ []

- *[Proposer Counterparty to provide]*

¹ Proposer Counterparty shall sequentially number each Request for Payment Form.



Under penalty of perjury, I hereby:

- (a) certify on behalf of Proposer Counterparty that the representations, certifications, statements, disclosures, authorizations and commitments made, and information contained, in this Request for Payment Form in respect of the Proposer Counterparty have been authorized by such entity, and is or are correct, complete and not materially misleading;
- (b) certify no Default event has occurred or continues to occur; and
- (c) swear and affirm that I am authorized to act on behalf of Proposer Counterparty in signing and delivering this Form and acknowledge that SBCTA is relying on my representation to this effect.

Proposer Counterparty: [insert name]

By: _____

Title: [insert title]

Date: [insert date]

NOTICE TO SIGNATORIES

A material false statement, omission or fraudulent inducement made in connection with this letter is sufficient cause for disapproval of the firm's participation in the procurement. In addition, such false submission may subject the person or entity making the false statement to criminal charges. (Title 18 USC 1001, false statements; California Penal Code Section 132, offering altered or antedated or forged documents or records; and Section 134, preparing false documentary evidence).

EXHIBIT 5 – FEDERAL REQUIREMENTS²

The Pre-Proposal Work shall comply with, and the Proposer Counterparty shall perform its obligations and (where relevant) shall require each subcontractor to perform their respective obligations under this Agreement, the other Agreement documents and the subcontracts in accordance with the following requirements.

1. General Requirements

The Proposer Counterparty and its subcontractors shall comply with applicable requirements and provisions, in effect now or as hereafter amended, of (1) 49 U.S.C. chapter 53 and other procurement requirements of Federal laws; (2) 2 C.F.R. pt. 200; (3) all other applicable Federal regulations pertaining to federally-aided contracts; and (4) Federal Transit Administration (“FTA”) Circular 4220.1F, “Third Party Contracting Guidance”, March 18, 2013, and any later revision thereto, except to the extent FTA determines otherwise in writing.

2. Protection of Security Sensitive Information and Critical Infrastructure Information.

The Proposer Counterparty and its subcontractors shall comply with all applicable provisions of 49 C.F.R. Part 1520 and 6 C.F.R. Part 29 and all applicable FTA guidance, including FTA Resource Document for Transit Agencies, “Sensitive Security Information (SSI): Designation, Markings, and Control, Resource Document for Transit Agencies” (March 2009), as may be amended, and all Department of Homeland Security (DHS) directives, including DHS Management Directive System MD Number: 11042.1, “Safeguarding Sensitive but Unclassified (For Official Use Only) Information” (January 6, 2005) as may be amended. The Proposer Counterparty also agrees to include these requirements in each subcontract and to require each subcontractor to include this clause in lower tier subcontracts.

3. Ethics**3.1. Bonus or Commission.**

The Proposer Counterparty affirms that it has not paid, and agrees not to pay, any bonus or commission to obtain this Agreement.

3.2. Lobbying Restrictions.

The Proposer Counterparty agrees that:

- a. In compliance with 31 U.S.C. § 1352(a), it will not use the proceeds of this Agreement to pay the costs of influencing any officer or employee of a Federal agency, Member of Congress, officer or employee of Congress or employee of a member of Congress, in connection with making, extending or modifying the Agreement;

² Federal and state requirements remain under review by SBCTA, including to conform to recent changes in law, and are expected to be updated in the final Addendum.

- b. In addition, the Proposer Counterparty will comply with other applicable Federal laws and regulations prohibiting the use of Federal assistance for activities designed to influence Congress or a State legislature with respect to legislation or appropriations, except through proper, official channels; and
- c. It will comply and will assure the compliance of each subcontractor and other participant at any tier of the Project with USDOT regulations, "New Restrictions on Lobbying", 49 C.F.R. Part 20, to the extent consistent with 31 U.S.C. § 1352.
- d. The Proposer Counterparty will also comply and assure compliance of each subcontractor and other participant at any tier of the Project with 31 U.S.C. § 3801, *et seq.*
- e. Subcontractors who apply or bid for an award of \$100,000 or more shall file the certification required by 49 C.F.R. Part 20, "New Restrictions on Lobbying." Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. § 1352. Each tier shall also disclose the name of any registrant under the Lobbying Disclosure Act of 1995 who has made lobbying contracts on its behalf with non-Federal funds with respect to that Federal contract, grant or award covered by 31 U.S.C. § 1352. Such disclosures are forwarded from tier to tier up to the Authority. See Form 9 entitled "Use of Contract Funds for Lobbying Certification" in Part H of the Instructions to Proposers.

3.3. False or Fraudulent Statements or Claims.

The Proposer Counterparty acknowledges and agrees that:

- a. Civil Fraud. The Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. §§ 3801 *et seq.*, and USDOT regulations, "Program Fraud Civil Remedies", 49 C.F.R. Part 31, apply to the Proposer Counterparty's activities in connection with the Project. By executing the Agreement, the Proposer Counterparty certifies or affirms the truthfulness and accuracy of each statement it has made, it makes, or it may make in connection with the Project. In addition to other penalties that may apply, the Proposer Counterparty also acknowledges that if it makes a false, fictitious, or fraudulent claim, statement, submission, certification, assurance, or representation, directly or indirectly, to the Federal Government, the Federal Government reserves the right to impose on the Proposer Counterparty the penalties of the Program Fraud Civil Remedies Act of 1986, as amended, to the extent the Federal Government deems appropriate.
- b. Criminal Fraud. If the Proposer Counterparty makes a false, fictitious, or fraudulent claim, statement, submission, certification, assurance, or representation directly or indirectly to the Federal Government, the Federal Government reserves the right to impose on the Proposer Counterparty the penalties of 49 U.S.C. § 5323(l)(1), 18 U.S.C.

§ 1001, or other applicable Federal law to the extent the Federal Government deems appropriate.

- c. Inclusion in Lower Tier subcontracts. The Proposer Counterparty agrees to include the clauses at Section PART A: 1.1.1a and PART A: 1.1.1b in each lower tier subcontract financed in whole or in part with federal assistance provided by the FTA. It is further agreed that the clauses shall not be modified, except to identify the lower tier subcontract that will be subject to the provisions.

3.4. Trafficking in Persons.

- a. To the extent applicable, the Proposer Counterparty agrees to comply with, and assures the compliance of each subcontractor with, the requirements of subsection 106(g) of the Trafficking Victims Protection Act of 2000 (TVPA), as amended, 22 U.S.C. § 7104(g), and the provisions of said subsection (g) consistent with U.S. OMB guidance, "Award Term for Trafficking in Persons", 2 C.F.R. Part 175:
- b. Definitions. For purposes of this section, the Proposer Counterparty agrees that:
 - i. Employee means an individual who is employed by the Proposer Counterparty or any subcontractor under this Agreement.
 - ii. Forced labor means labor obtained by any of the following methods: the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.
 - iii. Private entity means any entity other than a State, local government, Indian tribe, or foreign public entity, as those terms are defined in 2 C.F.R. § 175.25 and includes a for-profit organization, and also a nonprofit organization, including any nonprofit institution of higher education, hospital, or tribal organization other than one included in the definition of Indian tribe at 2 C.F.R. § 175.25(b).
 - iv. Severe forms of trafficking in persons has the meaning given at section 103 of the TVPA, as amended, 22 U.S.C. § 7102(9). Commercial sex act has the meaning given at section 103 of the TVPA, as amended, 22 U.S.C. § 7102(4).
 - v. Coercion has the meaning given at section 103 of the TVPA, as amended, 22 U.S.C. § 7102.
- c. The Proposer Counterparty agrees:
 - i. To inform the Authority immediately of any information it receives from any source alleging a violation of a prohibition in 22 U.S.C. § 7104(g).
 - ii. That the Authority may unilaterally terminate this Agreement if the Proposer Counterparty, a subcontractor, or other participant at any tier, or an employee of any of them, violates the provisions of 22 U.S.C. § 7104(g). The Authority's right to terminate implements FTA's right to terminate unilaterally:

- A. Under subsection 106(g) of the Trafficking Victims Protection Act of 2000 (TVPA), as amended, 22 U.S.C. § 7104(g), and
 - B. Is in addition to all other remedies for noncompliance that are available to the Authority under this Agreement and to the Federal Government.
- iii. That:
- A. Neither it, its subcontractors or other participants at any tier, or the employees of any of them, will engage in severe forms of trafficking in persons during the period of time that this Agreement is in effect;
 - B. Neither it, its subcontractors or other participants at any tier, or the employees of any of them, will procure a commercial sex act during the period of time that this Agreement is in effect; or
 - C. Neither it, its subcontractors or other participants at any tier, or the employees of any of them, will use forced labor in the performance of this Agreement or any subcontract;
 - D. The provision of this subsection will be included in all subcontracts and any other arrangement under this Agreement at any tier,

3.5. Members of Congress

No member or delegate to the Congress of the United States shall be admitted to any share or part of this Agreement or to any benefit arising therefrom.

4. Civil Rights

4.1. General

The Proposer Counterparty agrees to comply with all applicable civil rights laws and regulations, in accordance with applicable Federal directives, except to the extent that the Federal Government determines otherwise in writing. The Proposer Counterparty shall include the requirements of this Section 4 in every prime subcontract for performance of Construction Work, and shall require each subcontractor performing Construction Work, at all tiers, to include the requirements of this Section 4 in any lower tier subcontracts. If funding for the O&M Work is obtained from FTA, the Proposer Counterparty shall include the requirements of this Section 4 in every prime subcontract for performance of O&M Work, and shall require each subcontractor performing O&M Work, at all tiers, to include the requirements of this Section 4 in any lower tier subcontracts.

4.2. Nondiscrimination in Federal Public Transportation Programs.

The Proposer Counterparty agrees to comply, and assures the compliance of each subcontractor or other participant at any tier of the Project, with the provisions of 49 U.S.C. § 5332, which prohibit discrimination on the basis of race, color, creed, national origin, sex, disability, or age, and prohibit the exclusion or discrimination in employment or business opportunity and/or denial of program benefits in employment or business opportunities, as identified in 49 U.S.C. § 5332. The Proposer Counterparty shall follow,

and require its subcontractors and other participants at any tier of the Project to follow, the most recent version of the FTA's Circular 4702.1B, "Title VI Requirements and Guidelines for Federal Transit Administration Recipients" (October 2012) to the extent required by the FTA.

4.3. Nondiscrimination — Title VI of the Civil Rights Act.

The Proposer Counterparty agrees to comply, and assures the compliance of each subcontractor or other participant at any tier of the Project, with all provisions prohibiting discrimination on the basis of race, color, or national origin of Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d et seq.; with USDOT regulations, "Nondiscrimination in Federally-Assisted Programs of the Department of Transportation — Effectuation of Title VI of the Civil Rights Act of 1964", 49 C.F.R. Part 21; and with federal transit law, 49 U.S.C. § 5332. Except to the extent FTA determines otherwise in writing, the Proposer Counterparty agrees to follow all applicable provisions of FTA Circular 4702.1B, "Title VI Requirements and Guidelines for Federal Transit Administration Recipients" (October 2012); USDOT "Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964," 28 C.F.R. § 50.3, and any other applicable Federal directives that may be issued.

4.4. Equal Employment Opportunity.

- a. The Proposer Counterparty agrees to and assures that each subcontractor and other participant at any tier of the Project agree to, prohibit discrimination on the basis of race, color, religion, sex, or national origin. The Proposer Counterparty agrees to comply, and assures the compliance of each subcontractor or other participant at any tier of the Project, with all equal employment opportunity (EEO) provisions of 49 U.S.C. § 5332; with Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e; with Executive Order No. 11246, "Equal Employment Opportunity," as amended by Executive Order No. 11375, "Amending Executive Order No. 11246, Relating to Equal Employment Opportunity," 42 U.S.C. § 2000e note; and implementing Federal regulations and any later amendments thereto. Except to the extent FTA determines otherwise in writing, the Proposer Counterparty also agrees to follow all applicable Federal EEO directives that may be issued.
- b. Accordingly:
 - i. General. The Proposer Counterparty agrees that it will not discriminate against any employee or applicant for employment because of race, color, creed, sex, disability, age, or national origin. The Proposer Counterparty agrees to take affirmative action that includes employment, upgrading, demotions or transfers, recruitment or recruitment advertising, layoffs or terminations; rates of pay or other forms of compensation; and selection for training, including apprenticeship.
 - ii. Equal Employment Opportunity Requirements for Construction Activities. For activities determined by the U.S. Department of Labor (U.S. DOL) to qualify as "construction", the Proposer Counterparty agrees to comply and assures the compliance of each subcontractor and other participant at any tier of the Project, with all applicable equal employment opportunity

requirements of U.S. DOL regulations, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor", 41 C.F.R. Parts 60 *et seq.*, which implement Executive Order No. 11246, "Equal Employment Opportunity", as amended by Executive Order No. 11375, "Amending Executive Order No. 11246 Relating to Equal Employment Opportunity", 42 U.S.C. § 2000e note, and also with any Federal laws and regulations in accordance with applicable Federal directives affecting construction undertaken as part of the Project.

- c. Specifically, during the performance of this Agreement, the Proposer Counterparty agrees as follows:
- iii. The Proposer Counterparty will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Proposer Counterparty will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Proposer Counterparty agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.
 - iv. The Proposer Counterparty will, in all solicitations or advertisements for employees placed by or on behalf of the Proposer Counterparty, state that all qualified applicants will receive considerations for employment without regard to race, color, religion, sex, or national origin.
 - v. The Proposer Counterparty will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the Proposer Counterparty's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
 - vi. The Proposer Counterparty will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.
 - vii. The Proposer Counterparty will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

- viii. In the event of the Proposer Counterparty's noncompliance with the nondiscrimination clauses of this Agreement or with any of the said rules, regulations, or orders, this Agreement may be canceled, terminated, or suspended in whole or in part and the Proposer Counterparty may be declared ineligible for further government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.
- ix. The Proposer Counterparty will include the portion of the sentence immediately preceding paragraph (A) and the provisions of paragraphs (A) through (G) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor at all tiers. The Proposer Counterparty will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, that in the event the Proposer Counterparty becomes involved in, or is threatened with, litigation with a subcontractor at any tier as a result of such direction by the administering agency the Proposer Counterparty may request the United States to enter into such litigation to protect the interests of the United States.

4.5. Additional Equal Employment Opportunity Construction Contract Specifications (Executive Order 11246).

- a. Disadvantaged Business Enterprise. To the extent authorized by Federal law, the Proposer Counterparty shall facilitate participation by Disadvantaged Business Enterprises (DBEs) in the Project and assures that each subcontractor or other participant at any tier of the Project will facilitate participation by DBEs in the Project to the extent applicable. Therefore:
- b. The Proposer Counterparty agrees and assures that it shall comply with section 1101(b) of MAP-21, 23 U.S.C. § 101 note; USDOT regulations, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs", 49 C.F.R. Part 26; and federal transit law, 49 U.S.C. § 5332.
- c. The Proposer Counterparty agrees and assures that it shall not discriminate on the basis of race, color, sex, or national origin in the performance of this Agreement and the award and performance of any subcontract or other arrangement under this Agreement in the administration of its DBE program and shall comply with the requirements of 49 C.F.R. Part 26. The Proposer Counterparty agrees to take all necessary and reasonable steps as set forth in 49 C.F.R. Part 26 to ensure nondiscrimination in the award and administration of all subcontracts, and other arrangements under this Agreement. As set forth in 49 C.F.R. § 26.13(b), failure by the Proposer Counterparty to carry out these

requirements is a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy as SBCTA deems appropriate, which may include, but is not limited to:

- x. Withholding monthly progress payments;
 - xi. Assessing sanctions;
 - xii. Liquidated damages; and/or
 - xiii. Disqualifying the Proposer Counterparty from future bidding as non-responsible.
- d. Each subcontract the Proposer Counterparty signs with a subcontractor must include the assurance set forth above.
- e. Nondiscrimination on the Basis of Sex. The Proposer Counterparty and subcontractor agree to comply with all applicable requirements of Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. §§ 1681 *et seq.*; with implementing U.S. Department of Transportation regulations at 49 C.F.R. Part 25 that prohibit discrimination on the basis of sex that may be applicable; and federal transit law, 49 U.S.C. § 5332.
- f. Nondiscrimination on the Basis of Age. The Proposer Counterparty and subcontractor agree to comply with all applicable requirements of:
- i. The Age Discrimination Act of 1975, as amended, 42 U.S.C. §§ 6101 *et seq.*, and with implementing U.S. Health and Human Services regulations, "Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance", 45 C.F.R. Part 90, which prohibit discrimination against individuals on the basis of age;
 - ii. The Age Discrimination in Employment Act (ADEA) 29 U.S.C. §§ 621 through 634 and implementing U.S. Equal Employment Opportunity Commission (U.S. EEOC) regulations, "Age Discrimination in Employment Act", 29 C.F.R. Part 1625; and
 - iii. Federal transit law, 49 U.S.C. § 5332.
- g. Access for Individuals with Disabilities. To the extent applicable, the Proposer Counterparty and subcontractor shall comply with 49 U.S.C. § 5301(d), which states the federal policy that elderly individuals and individuals with disabilities have the same right as other individuals to use public transportation services and facilities, and that special efforts shall be made in planning and designing the services and facilities to implement transportation accessibility rights for elderly individuals and individuals with disabilities. The Proposer Counterparty and subcontractor also shall comply with all applicable provisions of section 504 of the Rehabilitation Act of 1973, as amended, with 29 U.S.C. § 794, which prohibits discrimination on the basis of disability; with Titles I, II, and III of the Americans with Disabilities Act of 1990 (ADA), as amended, 42 U.S.C. §§ 12101 *et seq.*, which requires that accessible facilities and services be made available to individuals with disabilities; and with the Architectural Barriers Act of 1968, as amended, 42 U.S.C. §§ 4151 *et seq.*, which requires that buildings and public

accommodations be accessible to individuals with disabilities; with federal transit law, 49 U.S.C. § 5332, which includes disability as a prohibited basis for discrimination; and with other laws and amendments thereto pertaining to access for individuals with disabilities that may be applicable. In addition, the Proposer Counterparty and subcontractor agree to comply with applicable implementing Federal regulations and any later amendments thereto, and agree to follow applicable Federal directives except to the extent FTA approves otherwise in writing. Among those regulations and directives are:

- i. USDOT regulations, "Transportation Services for Individuals with Disabilities (ADA)", 49 C.F.R. Part 37;
 - ii. USDOT regulations, "Nondiscrimination on the Basis of Disability in Programs and Activities Receiving or Benefiting from Federal Financial Assistance", 49 C.F.R. Part 27;
 - iii. Joint U.S. Architectural and Transportation Barriers Compliance Board (U.S. ATBCB)/USDOT regulations, "Americans With Disabilities (ADA) Accessibility Specifications for Transportation Vehicles", 36 C.F.R. Part 1192 and 49 C.F.R. Part 38;
 - iv. U.S. DOJ regulations, "Nondiscrimination on the Basis of Disability in State and Local Government Services", 28 C.F.R. Part 35;
 - v. U.S. DOJ regulations, "Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities", 28 C.F.R. Part 36;
 - vi. U.S. EEOC, "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act", 29 C.F.R. Part 1630;
 - vii. U.S. Federal Communications Commission regulations, "Telecommunications Relay Services and Related Customer Premises Equipment for Persons with Disabilities", 47 C.F.R. Part 64, Subpart F;
 - viii. U.S. ATBCB regulations, "Electronic and information Technology Accessibility Standards", 36 C.F.R. Part 1194;
 - ix. FTA regulations, "Transportation for Elderly and Handicapped Persons", 49 C.F.R. Part 609; and
 - x. Federal civil rights and nondiscrimination directives implementing the foregoing Federal laws and regulations, except to the extent the Federal Government determines otherwise in writing.
- h. Drug and Alcohol Abuse-Confidentiality and Other Civil Rights Protections. To the extent applicable, the Proposer Counterparty and subcontractor agree to comply with the confidentiality and other civil rights protections of the Drug Abuse Office and Treatment Act of 1972, as amended, 21 U.S.C. §§ 1101 *et seq.*, with the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, as amended, 42 U.S.C. §§ 4541 *et seq.*, and with the Public Health Service Act, as amended, 42 U.S.C. §§ 290dd through 290dd-2, and any amendments thereto.

- i. Access to Services for Persons with Limited English Proficiency. The Proposer Counterparty and subcontractor shall facilitate compliance with the policies of Executive Order No. 13166, "Improving Access to Services for Persons with Limited English Proficiency", 42 U.S.C. § 2000d-1 note, and follow applicable provisions of USDOT Notice, "DOT Policy Guidance Concerning Recipients' Responsibilities to Limited English Proficiency (LEP) Persons", 70 Fed. Reg. 74087, December 14, 2005, except to the extent that FTA determines otherwise in writing.
- j. Environmental Justice. The Proposer Counterparty shall facilitate compliance with the policies of Executive Order No. 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations", 42 U.S.C. § 4321 note; USDOT Order 5610.2, "Department of Transportation Actions To Address Environmental Justice in Minority Populations and Low-Income Populations", 62 Fed. Reg. § 18377 *et seq.*, April 15, 1997; and the most recent edition of FTA's Circular 4703.1, "Environmental Justice Policy Guidance for Federal Transit Administration Recipients" (August 2012), except to the extent that the federal government determines otherwise in writing.
- k. Other Nondiscrimination Laws. The Proposer Counterparty agrees to comply with all applicable provisions of other Federal laws and regulations, and follow applicable Federal directives pertaining to and prohibiting discrimination, except to the extent the Federal Government determines otherwise in writing.
- l. Veterans Preference. Contractors working on a capital project funded using FTA assistance shall give a hiring preference, to the extent practicable, to veterans (as defined in 5 U.S.C. § 2108) who have the requisite skills and abilities to perform the construction work required under the contract. This Provision shall not be understood, construed or enforced in any manner that would require an employer to give preference to any veteran over any equally qualified applicant who is a member of any racial or ethnic minority, female, an individual with a disability, or former employee. See 49 U.S.C. § 5325 (k).

5. Prohibited Interest

No member, officer, or employee of the Authority or of any local public body during his tenure and for a period of one (1) year thereafter shall have any interest, direct or indirect, in the Agreement or the proceeds thereof.

6. Termination

If the Federal Government suspends or terminates all or any part of the Federal assistance for this Agreement, the Authority may suspend work under or terminate the Agreement, in whole or in part, under the suspension or termination provision of the Agreement that are applicable in the circumstances.

7. Labor Provisions

7.1. General

- a. To the extent that the Agreement or any subcontract involves construction activities, the Proposer Counterparty shall comply with, and assure the compliance of each subcontractor and other participant at any tier of the Project

with, the following federal laws and regulations providing protections for construction employees:

- i. Davis-Bacon Act, as amended, 40 U.S.C. §§ 3141 *et seq.*, pursuant to FTA enabling legislation requiring compliance with the Davis-Bacon Act at 49 U.S.C. § 5333(a), and implementing U.S. DOL regulations, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act)", 29 C.F.R. Part 5. All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 C.F.R. Parts 1, 3, and 5 are herein incorporated by reference;
 - ii. Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. §§ 3701 *et seq.*, specifically, the wage and hour requirements of section 102 of that Act at 40 U.S.C. § 3702, and implementing U.S. DOL regulations, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act)", 29 C.F.R. Part 5; and the safety requirements of section 107 of that Act at 40 U.S.C. § 3704 and 29 U.S.C. §§ 651 *et seq.*, and implementing U.S. DOL regulations, "Occupational Safety and Health Standards," 29 C.F.R. Part 1910 and "Safety and Health Regulations for Construction", 29 C.F.R. Part 1926; and
 - iii. Copeland "Anti-Kickback" Act, as amended, 18 U.S.C. § 874 and 40 U.S.C. § 3145, and implementing U.S. DOL regulations, "Contractors and subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States", 29 C.F.R. Part 3.
- b. To the extent that the Agreement or any subcontract concerns activities that do not involve construction, the Proposer Counterparty shall comply and assure the compliance of each subcontractor and other participant at any tier of the Project with the employee protection requirements for non-construction employees of the Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. §§ 3701 *et seq.*, in particular with the wage and hour requirements of section 102 of that Act at 40 U.S.C. § 3702, and with implementing U.S. DOL regulations, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act)", 29 C.F.R. Part 5.
- c. Pursuant to 29 CFR § 1926.3, it is a condition of this Agreement that the Secretary of Labor or authorized representative thereof shall have right of entry to any site of contract performance to inspect or investigate the matter of compliance with the construction safety and health standards and to carry out the duties of the Secretary under section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. §§ 3704-3705).

- d. The Proposer Counterparty shall comply with, and assure the compliance of each subcontractor and other participant at any tier of the Project with, the following provisions:

7.2. Minimum Wages

- a. All laborers and mechanics employed or working upon the Site of the Work will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 C.F.R. Part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor included in Part B of this Exhibit 7, regardless of any contractual relationship which may be alleged to exist between the subcontractor(s) and such laborers and mechanics.
- b. Contributions made or costs reasonably anticipated for bona fide fringe benefits under Section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics, are considered wages paid to such laborers or mechanics, subject to the provisions of Section PART A: 1.1.1e; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in Section 7.5. Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: Provided, that the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classification and wage rates conformed under Section PART A: 1.1.1c and the Davis-Bacon poster (WH-1321) shall be posted at all times by the Proposer Counterparty and subcontractors at the Site of the Work in a prominent and accessible place where it can be easily seen by the workers.
- c. Any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the Agreement shall be classified in conformance with the wage determination. The Authority shall approve an additional classification and wage rate and fringe benefits therefor only when the following criteria have been met:
 - i. The work to be performed by the classification requested is not performed by a classification in the wage determination; and
 - ii. The classification is utilized in the area by the construction industry; and
 - iii. The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

- d. If the Proposer Counterparty and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the Authority agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), the Authority will send a report of the action taken to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. Said Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within thirty (30) days of receipt and so advise the Authority or will notify the Authority within the 30-day period that additional time is necessary.
- e. In the event the Proposer Counterparty and laborers or mechanics to be employed in the classification or their representatives, and the Authority do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the Authority shall refer the questions, including the views of all interested parties and the recommendation of the Authority to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within thirty (30) days of receipt and so advise the Authority or will notify the Authority within the 30-day period that additional time is necessary.
- f. The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs PART A: 1.1.1c.i and PART A: 1.1.1c.ii above, shall be paid to all workers performing work in the classification under this Agreement from the first day on which work is performed in the classification.
- g. Whenever the minimum wage rate prescribed in the Agreement for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the Proposer Counterparty or subcontractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.
- h. If the Proposer Counterparty or subcontractor, as appropriate, does not make payments to a trustee or other third person, the Proposer Counterparty may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, provided, that the Secretary of Labor has found, upon the written request of the Proposer Counterparty, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the Proposer Counterparty or any subcontractor to set aside in a separate account asset for the meeting of obligations under the plan or program.

7.3. Withholding

- a. The Authority shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the Proposer Counterparty under this Agreement or any other Federal contract with the same entity, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same entity, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers employed

by the Proposer Counterparty or subcontractors the full amount of wages required by the Agreement. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the Site of the Work, all or part of the wages required by the Agreement, the Authority may, after written notice to the Proposer Counterparty, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

7.4. Payrolls and Basic Records

- a. Payrolls and basic records relating thereto shall be maintained by the Proposer Counterparty and each subcontractor during the course of the Work and preserved for a period of three (3) years thereafter for all laborers and mechanics working at the site of the work. Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in Section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 C.F.R. § 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the Proposer Counterparty shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. The Proposer Counterparty and any subcontractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.
- b. The Proposer Counterparty and each subcontractor shall submit weekly for each week in which any Work is performed under the Agreement two (2) copies of all payrolls to the Authority within seven (7) days after the regular payroll date for transmission to the USDOT. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under Section PART A: 1.1.1a, except that full social security numbers and home addresses shall not be included on weekly transmittals. Instead the payrolls shall only need to include an individually identifying number for each employee (e.g., the last four (4) digits of the employee's social security number). The required weekly payroll information may be submitted in any form desired. Optional Form WH-347 is available for this purpose from the Wage and Hour Division website at <http://www.dol.gov/whd/forms/wh347.pdf> or successor site. The Proposer Counterparty is responsible for the submission of copies of payrolls by all subcontractors. The Proposer Counterparty and subcontractors shall maintain the full social security number and current address of each covered worker, and shall provide them upon request to the Authority, as the case may be, for

transmission to the USDOT, the Proposer Counterparty or the Wage and Hour Division of the Department of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. It is not a violation of this section for the Proposer Counterparty to require a subcontractor, or for a subcontractor to require a lower tier subcontractor, to provide addresses and social security numbers to the Proposer Counterparty or subcontractor for its own records, without weekly submission to the sponsoring government agency (or the applicant, sponsor, or owner).

- c. Each payroll submitted shall be accompanied by a "Statement of Compliance", signed by the Proposer Counterparty, subcontractor or its agent who pays or supervises the payment of the persons employed under the Agreement or subcontract and who shall certify the following:
 - i. That the payroll for the payroll period contains the information required to be provided under Section 5.5 (a)(3)(ii) of Regulations, 29 C.F.R. Part 5, the appropriate information is being maintained under Section 5.5 (a)(3)(i) of Regulations, 29 C.F.R. Part 5, and that such information is correct and complete;
 - ii. That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulation, 29 C.F.R. Part 3;
 - iii. That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.
- d. The weekly submission of a properly executed certification set forth the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by this Section PART A: 1.1.1d.
- e. The falsification of any of the above certifications may subject the Proposer Counterparty or subcontractor to civil or criminal prosecution under Section 1001 of Title 18 and Section 231 of Title 31 of the United States Code.
- f. The Proposer Counterparty or subcontractor shall make the records required under this Section PART A: 1.1.1a available for inspection, copying or transcription by authorized representatives of the USDOT or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the Proposer Counterparty or subcontractor fails to submit the required records or to make them available, the Federal Agency may, after written notice to the Proposer Counterparty, sponsor, applicant, or the Authority, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 C.F.R. § 5.12.

7.5. Apprentices and Trainee

- a. Apprentices. Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer and Labor Services or with a State Apprenticeship Agency recognized by the Office, or if a person is employed in his or her first ninety (90) days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Office of Apprenticeship Training, Employer and Labor Services, or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the subcontractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a subcontractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Office of Apprenticeship Training, Employer and Labor Services, or a State Apprenticeship Agency recognized by the Office, withdraws approval of an apprenticeship program, the subcontractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.
- b. Trainees. Except as proved in 29 C.F.R. § 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's

level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeymen wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the subcontractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

- c. Equal Employment Opportunity. The utilization of apprentices, trainees and journeymen under this Section PART A: 1.1.1d shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 20 C.F.R. Part 30.

8. Compliance with Copeland Act Requirements

The Proposer Counterparty and any subcontractors at any tier shall comply with the requirements of 29 C.F.R. Part 3, which are incorporated by reference in this Agreement.

9. Agreement Termination: Debarment

A breach of this Section PART A: 1.1.1d may be grounds for termination of the Agreement and/or any subcontract under the Agreement, and for debarment of the Proposer Counterparty or any subcontractor at any tier as provided in 29 C.F.R. § 5.12.

10. Compliance with Davis-Bacon and Related Act Requirements

All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 C.F.R. Parts 1, 3, and 5 are herein incorporated by reference in this Agreement.

11. Disputes Concerning Labor Standards

11.1. General

Disputes arising out of the labor standards provisions of this Agreement or any subcontract under the Agreement shall not be subject to the general disputes clause of the Agreement or subcontract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 C.F.R. Parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the Proposer Counterparty



(or subcontractor) and the Authority, the U.S. Department of Labor, or the Proposer Counterparty's/ subcontractor's employees or their representatives.

11.2. Certification of Eligibility

- a. By entering into this Agreement, the Proposer Counterparty certifies that neither it (nor he or she) nor any person or firm who has an interest in the Proposer Counterparty is a person or firm ineligible to be awarded Government contracts by virtue of Section 3(a) of the Davis-Bacon Act or 29 C.F.R. § 5.12(a)(1).
- b. No part of this Agreement shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of Section 3(a) of the Davis-Bacon Act or 29 C.F.R. § 5.12(a)(1).
- c. The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. § 1001.

11.3. Contract Work Hours and Safety Standards Act

The Proposer Counterparty shall comply with, and assure the compliance of each subcontractor and other participant at any tier of the Project with, the following provisions:

11.4. Overtime Requirements

Neither the Proposer Counterparty nor subcontractor contracting for any part of the Work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such Work to work in excess of forty (40) hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half (1 ½) times the basic rate of pay for all hours worked in excess of forty (40) hours in such workweek.

11.5. Violations; Liability for Unpaid Wages; Liquidated Damages

In the event of any violation of the clause set forth in this Section 0, the Proposer Counterparty and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, the Proposer Counterparty or such subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in this Section 0, equal to the liquidated damages established by the Department of Labor pursuant to the Contract Work Hours and Safety Standards Act as of the date of execution of each subcontract involving Construction Work (currently \$10) for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty (40) hours without payment of the overtime wages required by the clause set forth in this Section 0.

11.6. Withholding for Unpaid Wages and Liquidated Damages

The Authority shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of Work performed by the Proposer Counterparty or subcontractor under the Agreement or any subcontract under the Agreement or any other Federal contract with the same entity, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same

entity, such sums as may be determined to be necessary to satisfy any liabilities of such entity for unpaid wages and liquidated damages as provided in the clause set forth above.

12. Subcontracts

The Proposer Counterparty and any subcontractors at any tier shall insert in any subcontracts the clauses contained in 29 CFR 5.5(a)(1) through (10) and such other clauses as the (write in the name of the Federal agency) may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.

13. Delinquent Certified Payrolls

If the Proposer Counterparty is delinquent in submitting its payroll records or those of any subcontractor required under Section 7, processing of invoices may be held in abeyance pending receipt of the payroll records. In addition, if the Proposer Counterparty is delinquent in submitting its payroll records or those of any subcontractor, the Proposer Counterparty shall be liable to the Authority for liquidated damages. The liquidated damages shall constitute the sum of Ten Dollars (\$10) for each day that the payroll records are late.

14. Cargo Preference — Use of United States-Flag Vessels

- a. To the extent applicable, the Proposer Counterparty shall comply with 46 U.S.C. § 55305 and U.S. Maritime Administration regulations, "Cargo Preference-U.S.-Flag Vessels", 46 C.F.R. Part 381.
- b. The Proposer Counterparty agrees to utilize privately owned United States-flag commercial vessels to ship at least fifty percent (50%) of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers) involved, whenever shipping any equipment, material, or commodities pursuant to this Agreement, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessel.
- c. The Proposer Counterparty agrees to furnish within twenty (20) business days following the date of loading for shipments originating within the United States or within thirty (30) business days following the date of loading for shipments originating outside the United States, a legible copy of a rated, "onboard" commercial ocean bill-of-lading in English for each shipment of cargo described in Section PART A: 1.1.1a to the FTA Administrator and the Authority (through the subcontractor(s) in the case of subcontractor(s) bills-of-lading) and to the Office of Cargo Preference and Domestic Trade, Maritime Administration, 1200 New Jersey Avenue, S.E., Washington, D.C. 20590, marked with appropriated identification of the Project.
- d. The Proposer Counterparty agrees to insert the substance of the provisions of this clause in all subcontracts issued pursuant to this Agreement.

15. Buy America

- a. The Proposer Counterparty shall comply with 49 U.S.C. § 5323(j) and FTA regulations, "Buy America Requirements", 49 C.F.R. Part 661, and any amendments thereto, which provide that Federal funds may not be obligated unless steel, iron, and manufactured products used in FTA-funded projects are produced in the United States, unless a waiver has been granted by the FTA or the product is subject to a general waiver. General waivers are listed in Appendix A to 49 C.F.R. § 661.7. Separate requirements for rolling stock are set out at 49 U.S.C. § 5323(j)(2)(C) and 49 C.F.R. § 661.11. Rolling stock must be assembled in the United States and have a sixty percent (60%) domestic content. The Proposer Counterparty is responsible for ensuring lower tier subcontractors are in compliance with this Section 15, including submission of appropriate certifications from subcontractors set forth in Part H of the Instructions to Proposers, Form 4.
- b. In addition to the provision of the certifications in the Proposal documents and the certifications under Section PART A: 1.1.1a, the Proposer Counterparty shall submit material source documentation throughout the Term to demonstrate compliance with Buy America, at such times and in such form as is required by the Authority. The material source documentation shall include, at a minimum, the name of the subcontractor supplying the material, location and contact information of manufacturer, project name and number, date and location material shipped, material description, material quantity, and means of identifying the product (such as label marking, product model number or serial number).
- c. The Authority may undertake investigations as it deems appropriate to confirm compliance with this provision by the Proposer Counterparty and subcontractors, including the right to inspect all Work, materials, payrolls, and data; and opportunity to audit all Project-related information in accordance with Section 16.18. The Proposer Counterparty shall cooperate with any such investigation.

16. Compliance with Environmental Standards

16.1. General

The Proposer Counterparty agrees and understands that environmental and resource laws, regulations, and guidance, now in effect or that may become effective in the future, may apply to the Project.

16.2. National Environmental Policy Act

The Proposer Counterparty agrees to comply with, and agrees to assure that its subcontractors at every tier comply with, the following federal laws, regulations, executive orders, and guidance, to the extent applicable:

- a. Federal transit laws, specifically 49 U.S.C. § 5323(c)(2), as amended;
- b. The National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. §§ 4321 through 4335, as limited by 49 U.S.C. § 5159;
- c. U.S. Council on Environmental Quality regulations pertaining to compliance with NEPA, 40 C.F.R. Parts 1500 through 1508;

- d. Joint FHWA and FTA regulations, "Environmental Impact and Related Procedures," 23 C.F.R. Part 771 and 49 C.F.R. Part 622;
- e. Executive Order No. 11514, as amended, "Protection and Enhancement of Environmental Quality," 42 U.S.C. § 4321 note;
- f. Joint FHWA and FTA final guidance, "SAFETEA-LU Environmental Review Process (Pub. L. 109-59)," 71 *Fed. Reg.* 66576, November 15, 2006, especially guidance on implementing 23 U.S.C. § 139 pertaining to environmental procedures and 23 U.S.C. § 326 pertaining to state responsibility for categorical exclusions; and
- g. Other federal environmental protection laws, regulations, executive orders, or guidance applicable to the Project.

16.3. Use of Certain Public Lands

The Proposer Counterparty agrees to comply, and assures that its subcontractors at every tier will comply with the following, to the extent applicable:

- a. U.S. DOT laws, specifically 49 U.S.C. § 303, which requires certain findings be made before an FTA-funded Project may be carried out that involves the use of any publicly owned land that Federal officials authorized under law have determined to be a:
 - i. Park of national, State or local significance,
 - ii. Recreation area of national, State or local significance,
 - iii. Wildlife refuge of national, State or local significance, or
 - iv. Waterfowl refuge of national, State or local significance, and
- b. Joint FHWA and FTA regulations, "Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites," 23 C.F.R. Part 774, and referenced in 49 C.F.R. Part 622.

16.4. Wild and Scenic Rivers

The Proposer Counterparty agrees to comply with, and agrees to assure that its subcontractors at every tier comply with, protections for the national wild and scenic rivers system, including the following, to the extent applicable:

- a. The Wild and Scenic Rivers Act of 1968, as amended, 16 U.S.C. §§ 1271 through 1287;
- b. U.S. Forest Service regulations, "Wild and Scenic Rivers," 36 C.F.R. Part 297; and
- c. U.S. Bureau of Land Management regulations, "Management Areas," 43 C.F.R. Part 8350.

16.5. Wetlands

The Proposer Counterparty agrees to comply with and agrees to assure that its subcontractors at every tier comply with, protections for wetlands provided in Executive

Order No. 11990, as amended, "Protection of Wetlands," 42 U.S.C. § 4321 note, to the extent applicable.

16.6. Floodplains

The Proposer Counterparty agrees to comply with and agrees to assure that its subcontractors at every tier comply with, Executive Order No. 11988, as amended, "Floodplain Management," 42 U.S.C. § 4321 note, facilitating compliance with the flood hazards protections in floodplains, to the extent applicable.

16.7. Endangered Species and Fishery Conservation

The Proposer Counterparty agrees to comply with, and agrees to assure that its subcontractors at every tier comply with, the following protections for endangered species, to the extent applicable:

- a. The Endangered Species Act of 1973, as amended, 16 U.S.C. §§ 1531 through 1544; and
- b. The Magnuson Stevens Fishery Conservation and Management Act, as amended, 16 U.S.C. § 1801 et seq.

16.8. Waste Management

The Proposer Counterparty agrees to comply with and agrees to assure that its subcontractors at every tier comply with, the Resource Conservation and Recovery Act, as amended, 42 U.S.C. §§ 6901 through 6992k, to the extent applicable.

16.9. Hazardous Waste

The Proposer Counterparty agrees to comply with, and agrees to assure that its subcontractor at every tier comply with, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9601 through 9675, establishing requirements for the treatment of areas affected by hazardous waste, to the extent applicable, and all Hazardous Materials Management obligations, specifically including the hazardous waste management responsibilities found at 40 C.F.R. Part 261, and as set forth in Section 10.1 of the Agreement.

16.10. Historic Preservation

The Proposer Counterparty agrees to comply with, and agrees to assure that its subcontractors at every tier comply with, the following, to the extent applicable:

- a. 49 U.S.C. § 303;
- b. § 106 of the National Historic Preservation Act, as amended, 16 U.S.C. § 470f;
- c. Executive Order No. 1593, "Protection and Enhancement of the Cultural Environment," 16 U.S.C. § 470 note;
- d. Archaeological and Historic Preservation Act of 1974, as amended, 16 U.S.C. § 469a through 469c; and
- e. U.S. Advisory Council on Historic Preservation regulations, "Protection of Historic Properties," 36 C.F.R. Part 800, including consultation with the State Historic Preservation Officer concerning investigations to identify properties and

resources included in or eligible for inclusion in the National Register of Historic Places that may be affected by the Project and notification of the FTA of affected properties.

16.11. Indian Sacred Sites

The Proposer Counterparty agrees to comply with, and agrees to assure that its subcontractors at every tier comply with, the following, to the extent applicable:

- a. Federal efforts to promote the preservation of places and objects of religious importance to American Indians, Eskimos, Aleuts, and Native Hawaiians;
- b. The American Indian Religious Freedom Act, 42 U.S.C. § 1996; and
- c. Executive Order No. 13007, "Indian Sacred Sites," 42 U.S.C. § 1996 note.

16.12. Mitigation of Adverse Environmental Effects

If the Project causes or results in any adverse environmental effect, the Proposer Counterparty agrees to, and agrees to assure that its subcontractors:

- a. Comply with all environmental mitigation measures that may be identified as commitments in the environmental documents that apply to the Project, such as environmental assessments, environmental impact statements, memoranda of agreement, documents required under 49 U.S.C. § 303, any other environmental documents, and any conditions the Federal Government imposes in a finding of no significant impact or record of decision; and
- b. Assure that any mitigation measures agreed on are incorporated by reference and made a part of this Agreement, that any deferred mitigation measures will be incorporated by reference and made a part of this Agreement as soon as agreement with the Federal Government is reached, and that any mitigation measures agreed to will not be modified or withdrawn without the written approval of the Federal Government.

16.13. Energy Conservation

The Agreement shall comply with mandatory standards and policies relating to energy efficiency which are contained in the applicable state energy conservation plan issued in compliance with the Energy Policy and Conservation Act, 42 U.S.C. § 6321 *et seq.* To the extent applicable, the Proposer Counterparty agrees to perform an energy assessment for any building constructed, reconstructed, or modified with FTA assistance, as provided in FTA regulations, "Requirements for Energy Assessments", 49 C.F.R. Part 622, Subpart C. The Proposer Counterparty is responsible for ensuring lower tier subcontractors are in compliance with this Section 16.13.

16.14. Certification Regarding Debarment

The Proposer Counterparty agrees that it will comply with the following requirements of 2 C.F.R. Part 180, subpart C, as adopted and supplemented by USDOT regulations at 2 C.F.R. Part 1200:

- a. It will not enter into any arrangement to participate in the development or implementation of the Project with any subcontractor at any tier that is debarred or suspended, except as authorized by:

- i. USDOT regulations, "Nonprocurement Suspension and Debarment," 2 C.F.R. Part 1200;
 - ii. U.S. OMB, "Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)," 2 C.F.R. Part 180, as amended; and
 - iii. Executive Orders Nos. 12549 and 12689, "Debarment and Suspension," 31 U.S.C. § 6101 note.
- b. It will review the U.S. GSA "System for Award Management," <https://www.sam.gov>, or successor site, if required by USDOT regulations, 2 C.F.R. Part 1200.
- c. It will include, and require each of its subcontractors at every tier to include, a similar provision in each lower tier covered transaction, ensuring that each lower tier subcontractor will:
 - i. Comply with Federal debarment and suspension requirements; and
 - ii. Review the "System for Award Management" at <https://www.sam.gov>, or successor site, if necessary to comply with USDOT regulations, 2 C.F.R. Part 1200.

16.15. Fly America Requirements

The Proposer Counterparty shall comply with 49 U.S.C. § 40118 (the "Fly America" Act) in accordance with the General Services Administration's regulations at 41 C.F.R. §§ 301-10.131 through 301-10.143, which provide that the Proposer Counterparty and its subcontractors are required to use U.S. flag air carriers for U.S. Government-financed international air travel and transportation of individuals and their personal effects or property, to the extent such service is available, unless travel by foreign air carrier is a matter of necessity, as defined by the Fly America Act. The Proposer Counterparty shall submit, if a foreign air carrier was used, an appropriate certification or memorandum adequately explaining why service by a U.S. flag air carrier was not available or why it was necessary to use a foreign air carrier and shall, in any event, provide a certificate of compliance with the Fly America requirements. The Proposer Counterparty agrees to include, and to require subcontractors to include, the requirements of this Section 16.15 in all subcontracts that may involve international air transportation.

16.16. Recycled Products/Recovered Materials

The Proposer Counterparty agrees to comply with all the requirements of Section 6002 of the Resource Conservation and Recovery Act (RCRA), as amended (42 U.S.C. § 6962), including the regulatory provisions of 40 C.F.R. Part 247, and Executive Order 12873, as they apply to the procurement of the items designated in Subpart B of 40 C.F.R. Part 247. To the extent applicable, the Proposer Counterparty shall include these requirements in each subcontract and require each subcontractor to include this clause in lower tier subcontracts.

16.17. Seismic Safety Requirements

The Proposer Counterparty shall comply with the Earthquake Hazards Reduction Act of 1977, as amended, 42 U.S.C. §§ 7701 *et seq.*, in accordance with Executive Order No. 12699, "Seismic Safety of Federal and Federally-Assisted or Regulated New Building

Construction", 42 U.S.C. § 7704 note, and comply with USDOT regulations, "Seismic Safety", 49 C.F.R. Part 41 (specifically, 49 C.F.R. § 41.117). The Proposer Counterparty shall include this clause in each subcontract issued under the Agreement for architectural and engineering services and construction related to new buildings or additions to new buildings and shall require each subcontractor to include this clause in similar lower tier subcontracts.

16.18. Access to Records and Reports

- a. The Proposer Counterparty shall retain, and cause subcontractor at any tier to retain, complete and readily accessible records related in whole or in part the Project, including, but not limited to, data, documents, reports, records, statistics, subcontracts and sub-agreements, leases, arrangements, and supporting materials related to those records.
- b. The Proposer Counterparty shall provide, and shall cause subcontractors at any tier to provide, to the U.S. Secretary of Transportation and the Comptroller General of the United States, or their duly authorized representatives, and the Authority access to all third-party contract records as required by 49 U.S.C. § 5325(g) and 2 C.F.R. pt. 200; opportunity to inspect all Work, materials, payrolls, and data; and opportunity to audit all Project-related information.
- c. The Proposer Counterparty shall provide, and shall cause subcontractors at any tier to provide, the Authority and the FTA Administrator or their authorized representatives, including any project management oversight subcontractor, access to the contract records and construction sites.
- d. The Proposer Counterparty shall permit, and cause subcontractors to permit, any of the foregoing parties to reproduce by any means whatsoever or to copy excerpts and transcriptions as reasonably needed.
- e. The Proposer Counterparty shall maintain, and shall require subcontractors to maintain, all books, records, accounts and reports required under this Agreement for a period of not less than three (3) years after the date final payment is made under this Agreement, except in the event of litigation or settlement of claims arising from the performance of this Agreement, in which case the Proposer Counterparty agrees to maintain same until the Authority, the FTA Administrator, the Comptroller General, or any of their duly authorized representatives, have disposed of all such litigation, appeals, claims or exceptions related thereto. Reference 2 C.F.R. pt. 200.
- f. The Proposer Counterparty shall include, and cause its subcontractors at any tier to include, the provisions of this Section 16.18 in each subcontract under this Agreement.

16.19. Clean Water Requirements

The Proposer Counterparty agrees to comply with, and agrees to assure that any subcontracts exceeding \$100,000 at every tier comply with, the Clean Water Act, as amended, 33 U.S.C. §§ 1251 through 1377, and its implementing regulations and guidance, except as the federal government determines otherwise in writing. The

Proposer Counterparty agrees to comply with, and agrees to assure that its subcontractors at every tier comply with, the following:

- a. Protection of underground sources of drinking water in compliance with the Safe Drinking Water Act of 1974, as amended, 42 U.S.C. § 300f through 300j-6;
- b. Notice of violating facility provisions in Section 508 of the Clean Water Act, as amended, 33 U.S.C. § 1368 to the Authority, understanding that the Authority will in turn report each violation as required to FTA and EPA's Regional Office; and
- c. Executive Order No. 11738, "Providing for Administration of the Clean Air Act and the Federal Water Pollution Control Act with Respect to Federal Contracts, Grants, or Loans," 42 U.S.C. § 7606 note.

16.20. Clean Air Requirements

The Proposer Counterparty agrees to comply with, and agrees to assure that any subcontracts exceeding \$100,000 at every tier comply with, the Clean Air Act, as amended, 42 U.S.C. §§ 7401 through 7671q, and its implementing regulations and guidance, except as the federal government determines otherwise in writing. The Proposer Counterparty agrees to comply with, and agrees to assure that its subcontractors at every tier comply with, the following:

- a. U.S. EPA regulations, "Control of Air Pollution from Mobile Sources," 40 C.F.R. Part 85; "Control of Emissions from New and In-Use Highway Vehicles and Engines," 40 C.F.R. Part 86; "Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Laws, 40 C.F.R. § 93, subpart A; and Fuel Economy and Greenhouse Gas Exhaust Emissions of Motor Vehicles," 40 C.F.R. Part 600;
- b. State Implementation Plans (SIP), including implementing each air quality mitigation or control measure incorporated in the documents accompanying the approval of the Project, assuring if the Project is identified as a Transportation Control Measure in the SIP it will be wholly consistent with the design concept and scope described in the SIP, and complying with § 176(c) of the Clean Air Act, 49 U.S.C. § 7506(c) and U.S. EPA regulations, "Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23, U.S.C. or the Federal Transit Laws," 40 C.F.R. Part 93, subpart A; and
- c. Notice of violating facility provisions of Section 306 of the Clean Air Act, as amended, 49 U.S.C. § 7414 and Executive Order No. 11738, "Providing for Administration of the Clean Air Act and the Federal Water Pollution Control Act with Respect to Federal Contracts, Grants, or Loans," 42 U.S.C. § 7606 note.

17. Pre-Award and Post-Delivery Audit Requirements (applicable only to supply of AVs)

- a. The Proposer Counterparty agrees to comply with 49 U.S.C. § 5323(m) and FTA regulations "Pre-Award and Post Delivery Audits of Rolling Stock Purchases" at 49 C.F.R. Part 663 regarding pre-award and post-delivery audits of rolling stock acquisitions.

- b. Specifically, the Proposer Counterparty agrees to comply with 49 U.S.C. § 5323(m) and FTA's implementing regulation at 49 C.F.R. Part 663 and to complete and submit documentation which lists (a) component and subcomponent parts of the rolling stock identified by manufacturer of the parts, their country of origin, and costs; and (b) the actual location of the final assembly point for the rolling stock, including a description of the activities which took place at the final assembly point and the cost of the final assembly.

18. Restrictions on Telecommunications Equipment and Services

This Agreement is subject to 2 C.F.R. 200.216 and Section 889 of Public Law 115-232, the National Defense Authorization Act for Fiscal Year 2019. The Proposer Counterparty shall not provide under this Agreement any equipment or services prohibited by those laws and regulations.

19. No Obligation by the Federal Government

- a. Notwithstanding any concurrence by the Federal Government in or approval of the solicitation or award of the Agreement, subcontract or other arrangement at any tier, absent its express written consent, the Federal Government has no obligations or liabilities to the Proposer Counterparty or any other participant at any tier of the project.
- b. The Proposer Counterparty shall include this clause in each subcontract issued under the Agreement and shall require each subcontractor to include this clause in lower tier subcontracts. It is further agreed that the clause shall not be modified, except to identify the parties who will be subject to its provisions.

20. FTA Terms

The preceding provisions include, in part, certain standard terms and conditions required by the USDOT, whether or not expressly set forth in the preceding provisions. All contractual provisions required by USDOT, as set forth in FTA Circular 4220.1F, as amended and updated, are hereby incorporated by reference. Anything to the contrary herein notwithstanding, all FTA mandated terms in the FTA Best Practices Manual Appendix A-1 shall be deemed to control in the event of a conflict with other provisions contained in this Agreement. The Proposer Counterparty shall not perform any act, fail to perform any act, or refuse to comply with any requests made by the Authority which would cause the Authority to be in violation of the FTA terms and conditions. The Proposer Counterparty agrees to include these requirements in each subcontract and to require each subcontractor to include this clause in lower tier subcontracts.

21. Changes in Requirements

Federal requirements cited above may change and the changed requirements shall be applicable to this Agreement as required. It is understood by the Proposer Counterparty and each subcontractor that all limits or standards set forth above to be observed in the performance of the Agreement services are minimum requirements.