



**SAN BERNARDINO COUNTY TRANSPORTATION AUTHORITY
REQUEST FOR PROPOSALS
for the
TUNNEL TO ONTARIO INTERNATIONAL AIRPORT PROJECT**

**Draft RFP Issuance Date: []
Proposal Submission Deadline: [] pm PT, []**

**SBCTA
1170 W. Third St., Second Floor
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FOR REFERENCE ONLY

PART A: PROJECT INFORMATION

1. OVERVIEW

1.1. Status of RFQ

- a. To the extent that this RFP contains information or instructions in addition to, different from, or inconsistent or conflicting with, the equivalent information and instructions set out in the Project RFQs, this RFP shall govern.
- b. Other than to the extent provided in the preceding sentence, rules, information and instructions set out in the Project RFQs that by their terms or by implication survive shall continue to govern.

1.2. Project Overview

San Bernardino County Transportation Authority ("SBCTA"), in partnership and cooperation with the City of Rancho Cucamonga, the City of Ontario, Ontario International Airport Authority ("OIAA"), and Omnitrans, are procuring the design and construction of an approximately 4-mile tunnel and autonomous vehicle transit connection from the Rancho Cucamonga Metrolink Station, also known as Cucamonga Station, to the Ontario International Airport ("ONT"), with one surface station at Cucamonga Station and two surface stations at ONT as further described in this Part A (the "Project").

On November 15, 2022, SBCTA issued a Request for Qualifications for Operating System Providers (as amended, the "OSP RFQ") inviting prospective entities interested in participating in the Project as an Operating System Provider to submit qualifications for evaluation to be pre-qualified to team with Shortlisted Design-Build Teams (upon evaluation and selection, each a "Pre-Qualified Operating System Provider").

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") to procure the Project. SBCTA invited entities or groups of entities (each company, team or joint venture acting together for such purpose, a "Prospective Proposer") interested in competing for the Project, pursuant to the DB RFQ, to submit statements of qualifications (such statements, including any supplemental materials and information submitted or provided by a Prospective Proposer in accordance with the DB RFQ, each a "SOQ" and, collectively, the "SOQs").

Upon evaluation of the SOQs, SBCTA will select two design-build teams (each, a "Proposer") to each enter into an agreement (the "Pre-Proposal Works Agreement") for the purpose of preparing certain Pre-Proposal Deliverables stated therein that will progress development of proposals to be subsequently submitted to SBCTA for evaluation under this Request for Proposals (the "RFP").

Following evaluation of any such proposals under this RFP, it is anticipated that SBCTA will select one Proposer (the "Preferred Proposer") to proceed with the execution of a Design-Build Contract, incorporated into this RFP as Annex B, for final design, construction, testing, and commissioning of the Project under the terms of such Design-Build Contract.

The Project contemplates the handover of operations and maintenance of a completely autonomous, on demand transportation system, to include vehicles, control systems, power distribution and vehicle charging, communications systems, station equipment, and maintenance facility fit out and equipment, along with all related equipment and services (collectively, the “Operating System”) to the Lead Operator for a period of five (5) years under a separate “Operating Contract” that is to be entered into between the Lead Operator and Omnitrans. The form of Operating Contract is incorporated into the RFP as Annex C.

1.3. Project Goals

The purpose of the Project is to provide a fast and low-cost connection to the Southern California regional rail/transit system and future interstate high speed rail service for air passengers and other users of ONT. Specifically, the goals of the Project include the following (which are not listed in order of importance):

- a. providing a reliable trip time and ability to accommodate capacity during peak demand;
- b. minimizing wait times for those using the system to transfer to and from Cucamonga Station Metrolink trains and other transit services feeding Cucamonga Station over the majority of the day;
- c. promoting sustainable travel and livability for the region;
- d. providing a convenient, safe, and reliable method of transportation connecting the ONT passenger terminals to the regional transit network;
- e. minimizing environmental impacts and ROW acquisitions;
- f. using flexible design, construction, and technology;
- g. commencement of service targeted for no later than fall 2027; and
- h. promoting a safe work environment throughout the duration of the Project.

2. STATE AND FEDERAL LAW POSITION

2.1. State Law Provisions

SBCTA is issuing this RFP and carrying out the procurement as described below in accordance with the provisions of California Public Contract Code § 22160 et. seq. (the “DB Law”), and other applicable provisions of Applicable Law, and SBCTA’s Contracting and Procurement Policy. Pursuant to the DB Law, the California Legislature has authorized regional transportation agencies to award design-build contracts for transit capital projects.

2.2. Federal Law Provisions

The RFP is drafted based on the assumption that the Project and the plan of finance for the Project will remain eligible for federal-aid funds. Accordingly, this RFP will conform to the requirements of applicable federal Law, including FTA regulations set out in FTA Circular 4220.1F “Third Party Contracting Guidance.”

3. PROJECT STATUS UPDATES

3.1. PCM Procurement

SBCTA has procured a comprehensive PCM consultant team to assist with the implementation of the Project. The PCM's role will be to jointly work together with the stakeholders, on behalf of SBCTA, to successfully oversee environmental approvals, permitting, ROW acquisition, design, construction, and implementation of the Project.

The PCM will administer the Design-Build Contract on behalf of SBCTA, provide review services on behalf of SBCTA for all design submittals, and provide construction management and verification of the Design-Builder's construction operations and work product on behalf of SBCTA.

3.2. NEPA/CEQA

- a. FTA is the lead agency for NEPA review of the Project.
- b. SBCTA is the lead agency for CEQA review of the Project.
- c. SBCTA is currently undertaking the environmental review for the Project and anticipates receiving both NEPA and CEQA decisions in Winter 2023-2024.
- d. Any determination by SBCTA to proceed with the Project is contingent upon receipt of all required environmental clearances. The execution of a Design-Build Contract at the conclusion of this procurement process will not commit SBCTA to a particular course of action beyond work completed under the Pre-Proposal Works Agreement.

3.3. Funding Availability and Phased Delivery

- a. Authority to proceed with Work after the Pre-Proposal Period will be sequenced through issuance of notices to proceed (each an "NTP"), which correspond to SBCTA's planned funding availability for the Work. The Preferred Proposer will be prohibited from undertaking any Work prior to issuance of the relevant NTP. The currently contemplated NTPs are:
 - i. NTP-1 will authorize final design work.
 - ii. NTP-2 will authorize tunnel boring machine procurement.
 - iii. NTP-3 will authorize certain early works prior to the commencement of construction.
 - iv. NTP-4 will authorize construction work.
 - v. NTP-5 will authorize Vehicle procurement.
 - vi. NTP-6 will authorize testing and commissioning of the Operating System, following completion of the NTP-4 Work ("Substantial Completion")
 - vii. Readiness for Revenue Service will be achieved upon completion of the NTP-6 Work, including all necessary approvals for the commencement of revenue service. Execution of the Operating Contract by the Lead Operator will be a condition to Readiness for Revenue Service of testing and commissioning of the Operating System following NTP-6.

- b. SBCTA currently estimates the cost of construction for the Work that will be required under the Design-Build Contract (including the Operating System) will be approximately four hundred million (\$400,000,000).

PART B: PROCUREMENT PROCESS

4. OVERVIEW

4.1. RFP Documents

The RFP will include the following documents:

- a. the RFP document (including Forms),
- b. the form of Design-Build Contract,
- c. the Technical Provisions,
- d. the form of Operating Contract,
- e. any Reference Documents, and
- f. any Addenda.

4.2. Modification Through Addenda

- a. Without limiting the exercise by SBCTA of any of the Reserved Rights, SBCTA may issue Addenda modifying the RFP at any time before the Proposal Submission Deadline.
- b. Notwithstanding any election by the SBCTA to communicate the publication of any such addenda to the Proposer through other means, the sole official notice of issuance of any such addenda will be by the posting of such addenda on the Project Website. The Proposer is solely responsible for monitoring the Project Website to ensure that they have received any and all such Addenda.
- c. SBCTA will not be bound by any (i) oral communications or (ii) written communications, interpretations or clarifications, which written communications do not otherwise constitute an Addendum.

4.3. Project Information

- a. Proposer acknowledges that SBCTA has and continues to make certain Project Information available to it under the terms of the Pre-Proposal Works Agreement and this RFP.
- b. SBCTA does not make, nor will it be deemed to have made, any representation, warranty, or guarantee as to the accuracy, completeness, utility, or relevance of any Project Information or information on third party websites, whether referred to in this RFP, during the course of any meeting or workshop, or otherwise made available by SBCTA. SBCTA has no obligation to update any Project Information, the contents of which may reflect information available as of the date that it was prepared or as of such other date indicated therein.
- c. As such:

- i. Proposer acknowledges and agrees that, without prejudice to any future Design-Build Contract:
- ii. any Project Information or other information, documents, materials, work product, assistance, or access, to or made available to Proposer under this RFP, during the course of any meeting or workshop, or otherwise made available by SBCTA, is and are provided:
 - A. on an “as is”, “where is”, and “with all faults” basis without any undertaking, guaranty, representation or warranty, express or implied, regarding the accuracy, completeness, relevance, fitness for purpose, or adequacy of condition of the same (or any part thereof); and
 - B. subject to any condition or restriction (including the rights of third parties) that may exist from time to time on the same; and
 - C. Proposer will assume full responsibility for their use of any Project Information or other such information, documents, materials, work product, assistance, or access, including any interpretations of or conclusions drawn, will not be entitled to rely on the same, and will bear all risk, including of delay and/or increased cost, resulting from or arising out of its use of any such Project Information or other information, documents, materials, work product, assistance, or access.
- d. Without limiting SBCTA's right to require Proposer to agree to customary or necessary supplemental provisions regarding the receipt or handling of confidential or sensitive information, Proposer shall keep confidential all Project Information furnished to it by SBCTA or otherwise learned by it in oral or written communication with SBCTA or any stakeholder.
- e. Except as may be required by Applicable Law, Proposer shall not make any announcements or release information (including any member of the public, press, or any official body) that it learns during the procurement process, including any information contained in the Project Information. Upon receipt of any request or order, including a subpoena for any documents received by Proposer in connection with this RFP, the procurement, or the Project, Proposer will immediately advise SBCTA. For requests other than orders or subpoenas from legal or administrative bodies with jurisdiction, SBCTA will advise Proposer what information, if any, to make available and to whom.

4.4. Reference Documents

- a. SBCTA has established the Project Website to assemble documents to supplement the Project Information previously provided under the Project RFQs.
- b. All documents and information made available on the Project Website shall constitute “Reference Documents.”
- c. SBCTA does not make, nor will it be deemed to have made, any representation, warranty, or guarantee as to the accuracy, completeness, utility, or relevance of

any Reference Document. Reference Documents are provided for reference, and not reliance, purposes only and shall not be construed as any kind of representation or warranty on behalf of SBCTA or any stakeholder. Proposer will assume full responsibility for their use of any Reference Document and will not be entitled to rely on any such Reference Document unless otherwise set forth in this RFP or in any future agreement related to the Project.

- d. SBCTA has no obligation to update any Reference Document, the contents of which may reflect information available as of the date that it was prepared or as of such other date indicated therein.
- e. Proposer is responsible for ensuring that it has all of the information necessary to respond to the RFP and for independently informing and satisfying itself with respect to the information contained in this RFP and any materials that may be supplied throughout the procurement process.
- f. Proposer is responsible for obtaining its own architectural, engineering, environmental, other technical, or professional advice with respect to the Project, the RFP, and any Addenda, appendices, data, materials or documents provided, delivered or made available or required by SBCTA.

4.5. Use of Reference Documents

- a. Without limiting SBCTA's right to require a Proposer to agree to customary or necessary supplemental provisions regarding the receipt or handling of confidential or sensitive information, Proposer shall keep confidential all Reference Documents furnished to it by SBCTA or otherwise learned by it in oral or written communication with SBCTA or any stakeholder.
- b. Except as may be required by applicable law, Proposer shall not make any announcements or release information (including, but not limited to, any member of the public, press, or any official body) that it learns during the procurement process, including any information contained in the Reference Documents. Upon receipt of any request or order, including a subpoena for any documents received by a Proposer in connection with the Project, Proposer will immediately advise SBCTA. For requests other than orders or subpoenas from legal or administrative bodies with jurisdiction, SBCTA will advise Proposer what information, if any, to make available and to whom.

5. PROCUREMENT SCHEDULE

SBCTA anticipates completing the procurement process in accordance with the indicative schedule (the "Procurement Schedule") appended hereto as Exhibit 1.

6. RFP COMMENTS

6.1. Timing of RFP Comments

Proposer may submit written comments, questions and/or requests for clarification relating to the RFP (collectively, "RFP Comments"), including any addenda, to SBCTA at any time prior to the RFP Comment Deadline set forth in the Procurement Schedule. Proposer is encouraged to submit RFP Comments with respect to the RFP, or a particular addendum,

as and when they are ready for submission. SBCTA may by advance notice set interim RFP Comment deadlines as it deems necessary and appropriate.

6.2. Form and Submission of RFP Comments

- a. All RFP Comments will be in the form of Form 1, compliant with the instructions provided therein, and written so as not to identify the Proposer in the body of the question or comment.
- b. RFP Comments will be submitted to the SBCTA Procurement Contact by e-mail to tunneltoontario@gosbcta.com, in which case the subject line will be "Tunnel to ONT Procurement: RFP Comment Submission No. [Insert Number]". Proposer is responsible for ensuring the receipt of their RFP Comments by SBCTA through the use of automated receipt and read message confirmations.
- c. Proposer should assume that SBCTA will not consider any RFP Comments that are:
 - i. telephone or oral comments; or
 - ii. submitted (A) by a person with no clear affiliation to Proposer that such person purports to represent or (B) to a person other than the SBCTA Procurement Contact.

6.3. Responses to RFP Comments

- a. SBCTA, may in its discretion, elect to address RFP Comments through the release of relevant Project Information within this RFP, when released, or within an Addendum, that by its terms either reflects, or declines to reflect, a response to the substance of such comments.
- b. SBCTA may also, but is not obligated to, provide written responses to RFP Comments; such responses, subject to the confidentiality requirements of this RFP, will be made available to each Proposer.
- c. SBCTA's written responses to RFP Comments will be digitally released or delivered, in SBCTA's discretion, on the Project Website, by email, or otherwise. In responding to RFP Comments, SBCTA may rephrase them as it deems appropriate. SBCTA may also create and answer questions independent of those submitted by Proposer. SBCTA will endeavor to provide responses within a reasonable period following receipt.

7. MEETINGS

7.1. Organization of One-on-One Meetings

- a. SBCTA will provide Proposer with opportunities to have meetings to discuss the RFP and Proposer's RFP Comments ("One-on-One Meetings").

- b. One-on-One Meetings will be held at the invitation of SBCTA.¹ SBCTA reserves the right to cancel or reschedule any anticipated One-on-One Meetings or to require or invite attendance at additional One-on-One Meetings.

7.2. Agenda for One-on-One Meetings

SBCTA may require Proposers to submit a brief agenda for each One-on-One Meeting in advance and may further require the advance submission of written RFP Comments to inform the One-on-One Meeting agendas and allow SBCTA the opportunity to prepare in advance of such meetings.

7.3. Additional Topic Meetings

- a. SBCTA reserves the right to invite Proposer to attend additional meetings not formally organized as One-on-One Meetings for the purpose of providing Proposer with an opportunity to discuss specific topics relating to their due diligence on the RFP and the Project, including discussions with third parties.
- b. SBCTA invites Proposer to suggest topics for discussion at such meetings through the submission of RFP Comments.

7.4. Confidentiality of One-on-One Meetings

- a. SBCTA intends that the discussions in any meeting will be confidential to the meeting participants, provided that SBCTA reserves the right:
 - i. in the interests of ensuring a transparent and non-discriminatory procurement process, to disclose to each Proposer any issues raised during any such meeting, including through the issuance of addenda, except to the extent that SBCTA determines, in its sole discretion, that such disclosure would constitute a disclosure of Public Records Exempt Materials or contradict the confidentiality provisions that apply to a Proposer's Alternative Technical Concepts in accordance with Section 8.4; and
 - ii. to share information, comments or feedback received during any meeting with any governmental authorities' representative, subject to such Person's prior written agreement to appropriate confidentiality and non-disclosure restrictions.

7.5. Other Rules Governing Meetings

- a. All One-on-One Meetings, and any other meetings held in accordance with this RFP, shall be subject to the following additional rules:
 - i. Proposer 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 RFP;

¹ **Note to Proposers:** Details of the date, place and duration of, and any limitation on the number of attendees at, any such meetings, as well as any other logistical details (which potentially may include amendments to the rules that would otherwise apply to such meetings in accordance with this RFP) will be provided by SBCTA in writing in advance thereof.

- ii. SBCTA may invite third-party governmental authorities, subject to prior written agreement to appropriate confidentiality and non-disclosure restrictions, to attend;
- iii. no binding decisions regarding the procurement process, this RFP, 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:
 - D. an amendment or addendum or other waiver or exercise of any Reserved Right; or
 - E. an indication of preference or acceptance or rejection of anything said, done or presented; and
- b. for certainty, the review of Pre-Proposal Submissions will be based on the information provided in such submissions and not on the conduct of Proposer or discussions that occur during any meeting.

8. ALTERNATIVE TECHNICAL CONCEPTS

8.1. ATC Submission Process

- a. Proposer may identify alternative technical concepts that are not, unless and until approved by SBCTA, otherwise permitted by the terms of this RFP and any form of Design-Build Contract or Technical Provisions ("Alternative Technical Concepts" or "ATCs"), but only to the extent that Proposer reasonably anticipates that the incorporation of such ATC will provide an equal or better technical solution than the one being replaced or modified.
- b. Proposer may request that SBCTA review a particular ATC by submitting an "ATC Submission Form" in the form of Form 3 with respect to such concept (each such submission, an "ATC Submission") at any time prior to the ATC Submission Deadline set forth in the Procurement Schedule.
- c. SBCTA reserves the right to request additional information regarding any ATC.

8.2. ATC Discussions at One-on-One Meetings

- a. In accordance with the instructions provided in the ATC Submission Form, in any ATC Submission, Proposer shall indicate whether it requests that such submission be discussed with SBCTA at a One-on-One Meeting. SBCTA also reserves the right to require Proposer, subject to prior written notice, to be prepared to discuss any ATC Submission at such meeting, which Proposer has not previously requested be the subject of such a meeting.
- b. ATC discussions will be subject to the same rules that apply to One-on-One Meetings in accordance with Section 7.

8.3. Responses to ATC Submissions

- a. SBCTA intends to use reasonable efforts to provide Proposers with written feedback on any Conceptual ATC Submission within ten (10) Business Days

following the date of submission (or, if such Conceptual ATC is to be discussed at a One-on-One Meeting, as soon as possible following such meeting).

- b. SBCTA will use reasonable efforts to provide a Proposer with the following written feedback on a Detailed ATC Submission within fifteen (15) Business Days following the later of (1) the date the relevant Detailed ATC Submission was submitted, (2) the One-on-One Meeting at which such submission was discussed, or (3) the date that the Proposer provided additional information pursuant to (vi) below. Such feedback will be one of the following:
 - i. unconditional approval;
 - ii. conditional approval, subject to modifications and/or conditions;
 - iii. disapproval, with or without guidance that such ATC can be re-submitted under any circumstance;
 - iv. notification that the inclusion of the proposed ATC in the Proposer's Proposal is already permitted under the terms of the RFP, and therefore does not qualify as an ATC;
 - v. notification that an addendum to the RFP is currently under consideration that is the subject matter of the proposed ATC, and consideration of the proposed ATC may be more useful if delayed until that RFP addendum is made (or determined not to be made); or
 - vi. a request for clarification of, or for more information, with respect to the proposed ATC.

8.4. Confidentiality

SBCTA will maintain the confidentiality of each ATC Submission except:

- a. to the extent that disclosure is necessary to maintain compliance with federal or State permitting and/or other legal requirements (including under the Public Records Law) necessary for the delivery of the Project;
- b. to governmental entities, which will be involved in the review of ATC Submissions by SBCTA; or
- c. to certain other Persons in accordance with Section 7.5 in connection with any One-on-One Meetings at which such ATC Submissions are discussed; and
- d. following the award of the Design-Build Contract, SBCTA may, in its discretion, share any ATC that was previously submitted by Proposer (whether or not incorporated by such Proposer in its Proposal under any RFP) with the counterparty to the Design-Build Contract.

8.5. Incorporation of ATCs into Contract

- a. SBCTA's approval (with or without conditions) of an ATC will constitute an agreement to modify the applicable requirements of the Design-Build Contract, subject to agreement of the necessary specific drafting modifications as agreed to by SBCTA, to the extent specified in such approval, provided that any such approval of an ATC (whenever issued by SBCTA) does not constitute an approval

of specific drafting modifications to the Design-Build Contract necessary to incorporate such ATC, which modifications will be agreed by SBCTA and Proposer (each acting reasonably).

- b. In the event that SBCTA's approval of an ATC is subject to any condition and/or implementation of such ATC will require a third party (including governmental) approval, the relevant Proposer will be solely responsible for satisfying such condition(s) and/or obtaining any such approval(s). If any required condition is not met and/or approval is not subsequently granted, the Proposer will comply with the requirements of the Design-Build Contract (unmodified by such ATC) without compensation, time extension, or relief.

PART C: PROCUREMENT RULES

9. PROPOSER DUE DILIGENCE

9.1. Responsibility for Due Diligence and Assumption of Risk

- a. Proposer is responsible for performing all due diligence specified in this RFP and otherwise as necessary with respect to the Project in order to perform and complete the Work and to prepare and submit a Proposal.
- b. Proposer acknowledges and agrees that, except with respect to Project Information, any information that Proposer needs to perform and complete its Work will have to be sourced independently by it.

9.2. Supplemental Due Diligence

- a. Proposer will not access any part of the expected Project site or other areas or facilities related to the Project, for the purpose of carrying out Supplemental Due Diligence Activities unless and until SBCTA has approved such access and investigation in accordance with this Section 9.2. Furthermore, Proposer will not conduct intrusive investigations related to the Project, including borings, water or materials sampling, or other equivalent activities deemed inappropriate by SBCTA in its discretion.
- b. Proposer may submit Supplemental Due Diligence Requests for Restricted Access Inspections and Public Access Inspections at any time prior to the deadline therefore specified in the Procurement Schedule.
- c. All Supplemental Due Diligence Requests must be submitted in the form of Form 2. Proposer should submit a separate Supplemental Due Diligence Request with respect to each requested Supplemental Due Diligence Activity.
- d. SBCTA reserves the right to reject any Supplemental Due Diligence Request, including on the basis that such request is excessive in scope or otherwise unreasonable (taking into account all other Supplemental Due Diligence Requests submitted by the same Proposer), and to otherwise impose conditions on any Supplemental Due Diligence Request approval.
- e. Proposer is responsible for all costs and expenses of, and for securing any required third-party consents or permits necessary for them to conduct any otherwise-approved Supplemental Due Diligence Activities, including all costs of

compliance with any training, safety, protective equipment or other requirements for access imposed by SBCTA as conditions for approval.

- f. SBCTA will use reasonable efforts:
 - i. to provide a Proposer with written feedback on any Supplemental Due Diligence Request promptly following receipt, provided, however, that SBCTA may approve (with or without conditions or modifications) or disapprove any such request in its discretion; and
 - ii. to maintain the confidentiality of any Supplemental Due Diligence Request during the procurement process described in this RFP, provided that SBCTA may respond to Proposer's request for Restricted Access Inspections or Public Access Inspections by providing all Proposers with such access, either collectively or individually at different times.

10. CHANGES IN PROPOSER ORGANIZATION AND KEY PERSONNEL

10.1. General Restrictions on Changes

Proposer will not:

- a. materially alter the responsibilities of, or materially diminish the qualifications of any Key Personnel or other Person;
- b. add, delete or substitute a Major Participant, specifically identified in its SOQ as being part of its team; or
- c. materially alter the relationships or responsibilities among any of the Major Participants, Key Personnel, or other Persons, previously identified in its SOQ as being part of its team at any time prior to the date of the public announcement of the identity of the Preferred Proposer, except as provided for in this RFP.

10.2. Organizational Change to Incorporate Operating System Provider

- a. Proposer will be required to incorporate an Operating System Provider as a Major Participant as a condition precedent to submitting a Proposal. Operating System Providers must be selected from among the list of Prequalified Operating System Providers provided by SBCTA. Operating System Providers will not be permitted to participate as a Major Participant on more than one Shortlisted Design-Build Team.
- b. Proposer shall provide SBCTA a notification of Organizational Change to incorporate an Operating System Provider as a Major Participant no later than the deadline provided therefor in the Procurement Schedule.

10.3. Supplemental Statement of Qualifications to Incorporate Lead Operator

- a. Proposer is required to incorporate a Lead Operator as a Major Participant as a condition precedent to submitting a Proposal; as such, Proposer will submit a supplemental statement of qualifications (the "Supplemental SOQ" or the "Lead Operator SOQ") for review and approval by SBCTA by the deadline set forth in the Procurement Schedule.

- b. The Lead Operator SOQ must comply in form and substance with the requirements set forth in Exhibit 6 appended hereto.

11. PRE-PROPOSAL WORKS AGREEMENT & PRE-PROPOSAL SUBMISSIONS

11.1. General Requirements

Proposer acknowledges and agrees that:

- a. execution of and compliance with the Pre-Proposal Works Agreement is a condition precedent to Proposer remaining eligible to submit a Proposal in response to this RFP and to subsequently be selected by SBCTA for award of the Design-Build Contract;
- b. any submission or other information provided by Proposer to SBCTA prior to the Proposal Submission Deadline including, but not limited to, RFP Comments, Pre-Proposal Work Deliverables, other written communications, Supplemental Due Diligence Requests, and ATC Submissions (each, a "Pre-Proposal Submission" and collectively, "Pre-Proposal Submissions") shall be prepared and delivered in accordance with the requirements of the Pre-Proposal Works Agreement;
- c. the Pre-Proposal Works Agreement and the review of any Pre-Proposal Submissions do not commit SBCTA to any particular outcome with respect to the procurement process initiated under the Project RFQs and continued through this RFP, including any commitment to subsequently award the Project or enter into a Design-Build Contract with the Proposer;
- d. notwithstanding execution of the Pre-Proposal Works Agreement, the Project procurement process remains ongoing.

12. PUBLIC RECORDS LAW REQUIREMENTS

12.1. Compliance with Public Records Law

Proposer acknowledges that the Proposal, any Pre-Proposal Submissions, and other materials (including written correspondence, exhibits, photographs, reports, printed material, tapes, electronic disks, and other graphic and visual aids) delivered by Proposer to SBCTA under this 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").

12.2. Confidential and Proprietary Information

12.2.1. Submission of Confidential and Proprietary Information

In the event Proposer submits any information that Proposer 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.

12.2.2. SBCTA Assessment of Confidential and Proprietary Information

- a. SBCTA will not advise Proposer 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 12.2.2 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 Proposer'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.

12.3. Review by Key Stakeholders

- a. Information submitted by Proposer, 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.

12.4. Disputes and Liability**12.4.1. Disclosure Disputes**

- a. In the event of any proceeding or litigation concerning the disclosure of any material submitted by Proposer, SBCTA will be the custodian retaining the material until otherwise ordered by a court or such other authority having 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 objecting to the disclosure.
- b. Proposer 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 for the disclosure of all or a portion of the Proposal or any Pre-Proposal Submissions.

13. COMMUNICATIONS AND CONTACTS

13.1. Proposer Contacts

Proposer previously identified its Proposer's "Official Representative" in its SOQ. Proposer may, after notice to SBCTA, update its Official Representative.

13.2. Rules for Communications and Contact

13.2.1. Application of the Rules

- a. The rules of contact specified in this Section will apply during the procurement for the Work, having commenced as of the date of issuance of the Project RFQs through the execution of the Design-Build Contract (the "Restricted Contact Period").
- b. These rules are designed to promote a fair, competitive, and unbiased procurement process. Additional rules or modifications to these rules may be issued by SBCTA in connection with this RFP.
- c. Contact includes face-to-face, telephone, facsimile, e-mail, or formal written communication, either directly or indirectly by an agent, representative, promoter or advocate of Proposer.

13.2.2. Rules of Contact

The specific rules of contact during the Restricted Contact Period (unless another period is otherwise noted) are as follows:

- a. After release of the Project RFQs, no Restricted Person will communicate with another Proposer or its team members with regard to the Project RFQs, the RFP, or either team's SOQ; provided, however, that subcontractors that are shared between two or more Design-Build Teams may communicate with their respective team members so long as those Proposers establish reasonable protocols to ensure that the subcontractor will not act as a conduit of information between the teams. In addition, contact among Proposer organizations is allowed during SBCTA-sponsored informational meetings.
- b. SBCTA will be the sole contact for purposes this RFP and the procurement. Proposer will correspond with SBCTA regarding the RFP through SBCTA's designated representative (as updated by SBCTA from time to time, the "SBCTA Procurement Contact"), who initially will be:

Ms. Shaneka Morris, Procurement Manager
Special Projects and Strategic Initiatives
San Bernardino County Transportation Authority
1170 W. 3rd St., Second Floor
San Bernardino, CA 92410
Phone: 909.884.8276 x-167
tunneltoontario@gosbcta.com.

Any official information regarding the Work and the Project will be disseminated from SBCTA either from an official email account or on agency letterhead, in either case from the SBCTA Procurement Contact. SBCTA will not be (and will be

deemed not to be) responsible for, and Proposers may not rely (and will be deemed not to have relied) on, any oral or written communication or contact or any other information or exchange that occurs outside the official process specified in this RFP.

- c. Subject to 13.2.2.b, Proposer may also direct communications regarding this RFP, the Work, the Project, or the procurement that are made outside of a One-on-One Meeting or topic meeting to any of the following specifically identified SBCTA representatives:
 - i. Victor Lopez, SBCTA, Director of Rail and Transit Programs;
 - ii. Ian Choudri, HNTB, SBCTA PCM Team; or
 - iii. Brent Butzin, Kaplan Kirsch & Rockwell, SBCTA External Legal Counsel provided that:
 - iv. all such communications shall be made in writing, which may include e-mail; and
 - v. the SBCTA Procurement Contact shall be copied on all communications.
- d. Commencing with the issuance of this RFP and continuing until the earliest to occur of (i) notification that Proposer was not identified as a Shortlisted Design-Build Team, (ii) rejection of all SOQs by SBCTA, (iii) cancellation of the procurement, or (iv) SBCTA entering into a Design-Build Contract with a Preferred Proposer at the conclusion of the procurement, no Proposer or representative thereof will have any *ex parte* communications regarding this RFP, the Pre-Proposal Works Agreement, the Design-Build Contract, or the procurement with:
 - i. any SBCTA Board member; and/or
 - ii. any SBCTA staff, advisors, contractors or consultants involved with the procurement, except for communications expressly permitted by this RFP or except as approved in writing in advance by the SBCTA Procurement Contact, in his or her sole discretion.

The foregoing restriction will not, however, preclude or restrict communications with regard to matters unrelated to this RFP, the Pre-Proposal Works Agreement, the Design-Build Contract, or the procurement, or limit participation in public meetings or any public or Proposer workshop related to the Work, the Project, or this RFP.

- e. Proposer shall not directly or indirectly contact or communicate with the following identified stakeholders regarding the Work, the Project, or this RFP, including employees, representatives, members, consultants, and advisors of the stakeholders listed below (provided that, with respect to consultants and advisors, such restrictions on contact and communications only apply to the extent any such consultant or advisor provides or has provided services related to the Project or this RFP):
 - i. OIAA,

- ii. City of Rancho Cucamonga,
 - iii. City of Ontario,
 - iv. San Bernardino County,
 - v. FTA, and
 - vi. FAA.
- f. In order to ensure that, among other things, the procurement is implemented in a fair, competitive and transparent manner, SBCTA will provide any necessary intermediary coordination during the procurement process between Proposers, on the one hand, and the stakeholders and related Persons who are the subject of the restrictions in Section 14.3.1(f), on the other hand, provided that Proposers are permitted to submit written requests to SBCTA, via the SBCTA Procurement Contact, for its approval, to be given in its discretion, to:
- i. engage a consultant or advisory firm that also acts for any such stakeholder in connection with the Project, the Project RFQs or this RFP, subject to such firm's implementation of Information Barriers; and
 - ii. engage in SBCTA-monitored contacts or communications with any such stakeholder or related Person.

Any such requests should identify the anticipated benefits to the Project and/or the procurement process that may result from the requested engagement, contact or communication.

13.2.3. Violation of Rules of Contact

Any communications or contacts determined to be prohibited by the rules outlined in this Section 13 or otherwise improper, at the sole discretion of SBCTA, may result in disqualification of one or more Proposers.

14. ORGANIZATIONAL CONFLICTS OF INTEREST

14.1. General Requirements

- a. Proposers are required to comply with certain FTA and SBCTA conflict of interest policy requirements for the Project, as more fully set forth in this Section 14.
- b. SBCTA's goals in adopting these policies and requirements include:
 - i. protecting the integrity, transparency, competitiveness and fairness of the planning, procurement, design, construction, and development of the Project;
 - ii. avoiding circumstances where a Proposer obtains, or appears to obtain, an unfair competitive advantage as a result of work performed by a consultant;
 - iii. providing guidance to Proposers in establishing teams for the procurement of the Project; and
 - iv. ensuring compliance with applicable legal requirements.

14.2. Federal and SBCTA Requirements and Prohibitions

14.2.1. Federal Requirements

Proposers are required to comply with FTA's organizational conflict of interests guidance found in Circular 4220.1F and the Federal Common Grant Rule, 2 C.F.R. 200.11. All Persons participating in the procurement should be familiar with all requirements of applicable federal law and FTA regulations, circulars and guidance, including all applicable FTA-third-party procurement and contracting requirements and FTA Circular 4220.1F terms regarding organizational conflicts of interest. Any failure to comply with the FTA requirements in any respect, including the failure to disclose any actual, perceived or potential conflict of interest, may result in Proposer's disqualification from participating in the solicitation.

14.2.2. SBCTA Requirements

- a. Proposers are required to comply with SBCTA's Conflict of Interest Policy for the Project, which is available at <http://www.gosbcta.com/about-sbcta/do-biz-contracting.html>.
- b. Without an exception granted by SBCTA with respect to SBCTA's Conflict of Interest Policy, it is SBCTA's policy that any Person under contract, or previously under contract with SBCTA to prepare procurement documents, preliminary plans, planning reports or other project development products for the Project will not be allowed to participate in any capacity on a Proposer's team. Exceptions to this policy may be granted by SBCTA, consistent with Applicable Law, upon written request from such Person, if it is determined that the Person's involvement is in the best interest of the public and would not constitute an unfair advantage. Proposers seeking such exception will submit such written request as soon as possible. No extension of the Proposal Submission Deadline will be given, nor will SBCTA be responsible for any inability or failure to respond to any such request prior to the Proposal Submission Deadline.
- c. Proposers are also advised that SBCTA's guidelines relating to organizational conflicts of interest in this RFP are intended to augment applicable federal and state law, including federal organizational conflict of interest laws and rules and the laws and rules relating to NEPA. Such Applicable Law will also apply to Proposers' teams and teaming and may preclude certain firms and their entities from participating on a certain Proposer team.

14.3. Disclosure of Conflicts

- a. Proposer will provide information concerning organizational conflicts of interest and disclose all relevant facts concerning any past, present or currently planned interests which may present an organizational conflict of interest (i) at any time during the Restricted Contact Period, as soon as such conflict is discovered, and (ii) in its SOQ (which requirement may be satisfied by inclusion of a confirmation that no such organizational conflicts of interest exist in relation to such Proposer).
- b. With regard to each disclosure pursuant to Section 14.3, Proposer will state how its interests or those of any of its team members, consultants, contractors or subcontractors, including the interests of any chief executives, directors, or Key

Personnel thereof, may result in, or could be viewed as, an organizational conflict of interest.

- c. By submitting its SOQ, each Proposer agrees that, if an organizational conflict of interest is discovered, Proposer must make an immediate and full written disclosure to SBCTA that includes a description of the action that Proposer has taken or proposes to take to avoid or mitigate such conflicts. If an organizational conflict of interest that Proposer knew, or should have known about, but failed to disclose is determined to exist during the procurement process, SBCTA may disqualify Proposer. If an organizational conflict of interest that Proposer knew, or should have known about, but failed to disclose exists and Proposer has entered into a Pre-Proposal Works Agreement or a Design-Build Contract, SBCTA may terminate the Pre-Proposal Works Agreement or the Design-Build Contract, or disqualify one or more Major Participants from continued participation on a Proposer's team, in its discretion. In either case, SBCTA reserves all legal rights and remedies. Proposers should not view the list in Section 14.4 as an exhaustive list of those firm(s) that have or may have conflicts of interest.

14.4. Persons with Organizational Conflicts of Interest

Proposer is prohibited from teaming with, including on its team (as a Major Participant or other contractor, subcontractor, consultant or subconsultant), receiving any advice from, or discussing any aspect relating to the Work or the Project or the procurement of the Work or the Project with any Person or entity with an organizational conflict of interest, including, but not limited to:

- a. 2kbrt Consulting, LLC;
- b. AECOM;
- c. Epic Land Solutions;
- d. Grimshaw Architects;
- e. HNTB Corporation;
- f. Kaplan Kirsch and Rockwell, LLP;
- g. KavPlan, LLC;
- h. Lea+Elliott;
- i. Leighton Group;
- j. LSA Associates;
- k. Monument ROW Services;
- l. Morgner Construction Management;
- m. RailPros;
- n. Towill; and
- o. any other Person that, to the best of Proposer's knowledge and belief:

- i. was or is engaged by SBCTA or any of the above listed entities in connection with the Project or this RFP; or
- ii. had access to non-public information regarding the same by virtue of an otherwise unrelated engagement; and
- p. Affiliates of the foregoing.

15. LIMITATIONS ON PROPOSER TEAM MEMBERSHIP

15.1. Design-Build Team Members on More Than One Team

- a. To ensure a fair and competitive procurement process, no Major Participant (or partner or Joint Venture member thereof) or Affiliate of the same, nor any Key Personnel, nor any Person related thereto, may be a member in any capacity or otherwise participate in the submission of a SOQ for any other Proposer, Shortlisted Design-Build Team, or Operating System Provider, during the course of the procurement process.
- b. If a Prospective Proposer is not selected as a Shortlisted Design-Build Team, then following public announcement of SBCTA's shortlisting determination, the members of each unsuccessful Design-Build Team will be free to participate on Shortlisted Design-Build Teams, subject to compliance with the applicable requirements of the Pre-Proposal Works Agreement and this RFP.

15.2. Licensing Requirements

- a. SBCTA will not require Prospective Proposer to be licensed as a condition of submitting an SOQ. However, each of the Proposer, Lead Contractor, Lead Designer, and Lead Tunneling Contractor will be required to be licensed and authorized to conduct business in the State as a condition to a Shortlisted Design-Build Team entering into the Pre-Proposal Works Agreement. Before the execution of the Design-Build Contract or any early works agreement, each entity shall provide evidence that it has all licenses, registrations, and credentials required to design and construct the Project, including date(s) obtained or anticipated to be obtained, type, number, classification, issuing agency, and expiration date.
- b. In addition, members of Shortlisted Design-Build Team and individuals (including professional engineers) that will be undertaking work that requires a California license must be prequalified and licensed prior to performing the applicable work assigned to such member.
- c. Proposer's attention is directed to California Public Contract Code Section 20103.5, which provides:
"The first payment for work or material under any contract will not be made unless and until the Registrar of Contractors verifies to the agency that the records of the Contractors' State License Board indicate that the contractor was properly licensed at the time the contract was awarded. Any bidder or contractor not so licensed will be subject to all legal penalties imposed by Applicable Law, including, but not limited to, any appropriate disciplinary action by the Contractors' State License Board."

- d. Additional licensing requirements with respect to the submission of Proposals will be included in subsequent Addenda to this RFP.

15.3. Other Limitations on Design-Build Team Membership

- a. To ensure a fair and competitive procurement process:
 - i. Lead Contractors, Lead Designers, Lead Tunneling Contractors, Financially Responsible Parties, and legal advisors of Design-Build Teams are forbidden from participating, in any capacity, as a team member of another Shortlisted Design-Build Team during the course of the procurement.
 - ii. Individuals serving Key Personnel roles on one Shortlisted Design-Build Team may not serve any role on another Shortlisted Design-Build Team.
 - iii. Entities that are under direct or indirect common ownership or have the same upstream parent may not be on separate Shortlisted Design-Build Teams or act as Lead Contractors, Lead Designers, Lead Tunneling Contractors, or Financially Responsible Parties on separate Shortlisted Design-Build Teams.

16. DISQUALIFICATION FOR NON-COMPLIANCE

Any violation by any Proposer or other Person (including any Major Participant or Key Personnel) of, or failure to comply with, Sections 13 or 14 may, in SBCTA's discretion, result in the relevant (a) Proposer, (b) Person and/or (c) Proposer with which such Person is affiliated, being disqualified from further participation in the procurement process described in this RFP or the Project.

17. WAGE RATES FOR FEDERAL-AID PROJECTS

- a. The U.S. Department of Labor (USDOL) Wage Rates applicable to the Design-Build Contract are listed in Wage Rate Decision Number CA20210026 as modified through ten (10) days prior to the Proposal Submission Deadline. When multiple wage tables are assigned to a contract, general guidance of their use and examples of construction applicability is available on the Department's website. Contact the Department's Wage Rate Coordinator before responding if there are still questions concerning the applicability of multiple wage tables.
- b. The URL for the Department of Labor is: <http://www.dol.gov/compliance/laws/comp-dbra.htm>
- c. Contact the Department's Wage Rate Coordinator at (850) 414-4492 if the Department's website cannot be accessed or there are questions.
- d. The Proposer shall comply with the Davis-Bacon and Copeland Anti-Kickback Acts and Contract Work Hours and Safety Standards Act as further detailed in Exhibit 5 to this RFP.
- e. The wage rate tables applicable to the Design-Build Contract are set forth in Exhibit 5 to this RFP.

PART D: RFP SUBMISSIONS**18. RFP SUBMISSION REQUIREMENTS****18.1. Proposal Submission Requirements**

Proposer will prepare and submit the Proposal in accordance with the requirements set forth in Exhibit 2 appended hereto.

18.2. Proposal Validity Period²

Each Proposal will remain valid for acceptance by SBCTA for the duration of the Proposal Validity Period, provided that any Proposer may elect, in its sole discretion, to extend the validity of its Proposal beyond the date on which the Proposal Validity Period with respect to such Proposal would otherwise expire in accordance with the definition of Proposal Validity Period.

18.3. Proposal Letter

Proposer will prepare and submit a letter signed by an authorized representative of the Proposer in the form of Form 1 appended hereto (the "Proposal Letter").

18.4. Performance and Proposal Security**18.4.1. Form of Security**

- a. Concurrent with execution of the Pre-Proposal Works Agreement, Proposer shall submit security in the form of:
 - i. a cash deposit in the form of a certified cashier's check payable to SBCTA (or other cash equivalent) to be held in escrow by SBCTA or
 - ii. one or more bonds, each from an Eligible Surety, in the form of Form 4 appended hereto;as applicable, (the "Performance Security"), to secure its obligations under the Pre-Proposal Works Agreement (including to participate in certain workshops and meetings and to prepare and submit certain deliverables thereunder).
- b. The Performance Security shall be in the amount of [one million dollars (\$1,000,000)] and shall remain valid until the Proposal Submission Deadline.
- c. If the Performance Security is furnished in the form of a bond, then it shall be from an Eligible Surety. If such issuer is "Insolvent" or its right to do business is terminated or suspended in any state or it ceases to meet the requirements of an Eligible Surety, or any such bond is otherwise void or defective for any reason, the Proposer will within ten (10) Business Days thereafter substitute the applicable bonds from a different Eligible Surety, pursuant to this RFP.
- d. Following the Proposal Submission Deadline, the Performance Security shall be retained by SBCTA as a proposal security (the "Proposal Security") and held through the Proposal Validity Period, as extended, until execution of the Design-

² **Note to Proposers:** SBCTA anticipates a Proposal Validity Period of 120 days.

Build Contract. The Proposal Security is intended to secure the obligations of Proposer under this RFP with respect to the Proposal and Proposer's obligation to enter into the Design-Build Contract at the conclusion of the procurement if selected as the Preferred Proposer.

- e. Notwithstanding any other provision of this RFP, performance by an Eligible Surety or any guarantor of any of the obligations of the Proposer will not relieve the Proposer of any of its obligations under this RFP.

18.4.2. Forfeiture of Performance and Proposal Security

- a. Proposer understands and agrees that SBCTA will be entitled to draw on such Proposer's Performance Security in its entirety if, and only if, an event of Default occurs pursuant to the Pre-Proposal Works Agreement.
- b. In submitting a Proposal, Proposer understands and agrees that SBCTA will be entitled to draw on such Proposer's Proposal Security in its entirety if, and only if, the Proposer does any one or more of the following:
 - i. breaches or otherwise fails to fully satisfy its obligations under the Pre-Proposal Works Agreement;
 - ii. withdraws, or attempts to withdraw, any part or all of its Proposal Security during the Proposal Validity Period without the prior written consent of SBCTA;
 - iii. prior to execution of the Design-Build Contract, withdraws or attempts to withdraw its Proposal, or refuses or fails to meet any commitments made therein that were to be fulfilled prior to execution of the Design-Build Contract;
 - iv. refuses or fails to enter into the Design-Build Contract in the form incorporated in the RFP, including a refusal or failure to satisfy any conditions precedent to execution of such agreement;
 - v. fails to engage in good faith negotiations regarding the Design-Build Contract in accordance with the terms of this RFP; and/or
 - vi. is disqualified pursuant to Section 16.
- c. Forfeiture of Proposal Security in accordance with the terms of the Proposal Letter will constitute liquidated damages. By submitting its Proposal, Proposer agrees and acknowledges that such liquidated damages are reasonable in order to compensate SBCTA for damages it will incur as a result of Proposer's failure to satisfy the obligations under this RFP to which Proposer agreed when submitting its Proposal.
- d. Such damages include potential harm to the credibility and reputation of the Project and of SBCTA with policy makers and with the general public, delays to the Project, and additional costs of administering this or a new procurement (including engineering, legal, accounting, overhead and other administrative costs).
- e. By submitting its Proposal, Proposer further acknowledges that these damages would be difficult and impracticable to measure and prove, are incapable of

accurate measurement because of, among other things, the unique nature of the Project and the efforts required to receive and evaluate proposals for it, and the unavailability of a substitute for those efforts.

- f. The amounts of liquidated damages stated in this RFP represent good faith estimates and evaluations as to the actual potential damages that SBCTA would incur as a result of Proposer's failure to satisfy the obligations under the RFP to which Proposer agreed when submitting its Proposal, and do not constitute a penalty. By submitting its Proposal, Proposer agrees to such liquidated damages in order to fix and limit Proposer's costs and to avoid later disputes over what amounts of damages are properly chargeable to Proposer.
- g. Without limiting the Reserved Rights, following a draw on the Preferred Proposer's Proposal Security, SBCTA may identify the next highest-ranked Proposer, select it as the Preferred Proposer and proceed to execute a Design-Build Contract with that Proposer.

18.4.3. Return of Performance and Proposal Security

- a. SBCTA will retain the Proposal Security submitted by each Proposer (other than the Preferred Proposer) until the end of such Proposer's Proposal Validity Period. Thereafter, SBCTA will return the Proposal Security to the relevant Proposer promptly, excluding any Proposal Security previously drawn upon in full by SBCTA.
- b. SBCTA will return the Proposal Security to the Preferred Proposer at such time as:
 - i. the Proposal Validity Period, as extended, has expired and a Design-Build Contract has not been executed,
 - ii. SBCTA cancels the procurement, or
 - iii. the Preferred Proposer has fully complied with its obligation under this RFP.

18.5. Proposal Forms

- a. Proposer should complete the following affidavits and certifications:

Proposal Forms:

- i. Form 5: Proposal Letter
- ii. Form 6: Buy America Certification
- iii. Form 7: Non-Collusion Affidavit
- iv. Form 8-A: DBE Commitment Form
- v. Form 8-B: Bidders List
- vi. Form 9: DBE Certification Form
- vii. Form 10: Equal Employment Opportunity Certification
- viii. Form 11: Use of Contract Funds for Lobbying Certification
- ix. Form 12: Debarment and Suspension Certification

- x. Form 13: Iran Contracting Certification
- xi. Form 14: Disclosure of Contributions Form
- xii. Form 15: Form of Legal Opinion

PART E: EVALUATION & SELECTION

19. EVALUATION PROCESS

19.1. Evaluation Criteria

SBCTA anticipates conducting the evaluation of Proposer's Proposal as set forth in Exhibit 3 appended hereto.

20. SELECTION AND POST-SELECTION PROCESS

20.1. Selection and Announcement of Preferred Proposer

- a. Subject to the Reserved Rights, SBCTA intends to, but is not required to, identify a Preferred Proposer following the conclusion of the evaluation process described in Exhibit 3 to this RFP.
- b. SBCTA will (in one or more notices) notify Proposer and the public of the results of the evaluations, (the notice officially naming Proposer as *the* Preferred Proposer, the "Notice of Intent to Award").

20.2. Finalization of the Design-Build Contract for Execution

- a. Under the terms of the Proposal Letter, Proposer will commit to enter into the Design-Build Contract in the form provided in the RFP, without any revisions except:
 - i. minor modifications necessary to create a complete and legally binding contract, including modifications to address drafting issues, clarifications or any conflicts between or within documents, or the equivalent of one of these;
 - ii. modifications to those Design-Build Contract provisions that, as indicated in the form of Design-Build Contract included in the RFP, require information that can only be provided after the Preferred Proposer has been approved, provided that such modifications are consistent with the terms of the RFP in SBCTA's reasonable discretion; and
 - iii. modifications necessary to incorporate terms or concepts provided in the Proposal, including ATCs, which have been approved or required by SBCTA for inclusion in the Design-Build Contract in accordance with this RFP.
- b. SBCTA may, in its discretion, initiate or agree to engage in negotiations with Proposer to modify terms of the Design-Build Contract.
- c. Negotiations (if any) will be limited to those issues or provisions that SBCTA identifies to Proposer as permissible issues or provisions for negotiation. SBCTA may, in its discretion, terminate such negotiations at any time and require Proposer

- to enter into the Design-Build Contract in its form as of the Proposal Submission Deadline in accordance with Section 20.2.a.
- d. In the event SBCTA elects to commence negotiations with a Proposer, then such Proposer will be deemed to have failed to engage in good faith negotiations with SBCTA and will forfeit its Proposal Security as set forth in Section 18.3 if Proposer:
 - i. fails to attend or actively participate in reasonably scheduled negotiation meetings with SBCTA;
 - ii. fails to timely submit deliverables as required by the RFP or SBCTA in the course of negotiations; or
 - iii. insists upon terms or conditions for any documents to be negotiated or provided by Proposer hereunder that are inconsistent with the Design-Build Contract as issued in the RFP (including inclusion of assumptions, qualifications, conditions, pricing basis or exceptions in the Design-Build Contract beyond those that expressly exist in the RFP as of the last addenda to the RFP).
 - e. For purposes of Section 20.2.d, Proposer will be deemed not to have negotiated in good faith if it fails to attend and actively participate in reasonably scheduled negotiation meetings or teleconference calls with SBCTA or insists upon terms or conditions that are materially inconsistent with Proposer's Proposal, which shall include insisting upon terms or conditions that are materially inconsistent with the terms and conditions set forth in the last version of the Design-Build Contract provided by SBCTA to Proposer prior to the Proposal Submission Deadline, which shall be deemed incorporated as a part of Proposer's Proposal.

20.3. Execution of the Design-Build Contract

- a. Within fifteen (15) Business Days after release of the Notice of Intent to Award (or such longer period as SBCTA may determine, in their discretion), the Preferred Proposer is required to submit to SBCTA:
 - i. evidence of all necessary company or partnership action by Proposer to authorize the execution, delivery and performance of the Design-Build Contract;
 - ii. evidence as to the authority, power, and capacity of the individuals executing the Design-Build Contract on behalf of Proposer;
 - iii. subject to SBCTA having previously provided to Preferred Proposer execution copies of the same, or otherwise arranged with the Preferred Proposer's production of the same, the Design-Build Contract, duly executed by Proposer;
 - iv. notice of the name and address of Proposer's agent for service of legal process, if any, and Proposer's Federal Internal Revenue Service employer identification number;
 - v. a written opinion from counsel for the Proposer in the form of Form 12 (with such changes as agreed to by SBCTA in its sole discretion), which counsel

shall be approved by SBCTA (which may be in-house or outside counsel, provided that the organization/authorization/execution opinion shall be provided by an attorney licensed in the state of the formation/organization of the entity for which the opinion is rendered (i.e., Lead Contractor, joint venture member, etc.) and the qualification to do business in California, and the delivery and enforceability opinion shall be provided by an attorney licensed in the State of California); and

- vi. all documents required to be delivered by Design-Build Contract concurrently with or prior to execution of the Design-Build Contract in accordance with its terms,

in each case in compliance with, and not inconsistent with, the requirements and terms of the RFP.

- b. If, prior to SBCTA's counter-execution of the Design-Build Contract, a Proposer Material Adverse Change occurs or exists, the Preferred Proposer will notify SBCTA of such occurrence or existence. If Proposer provides such a notification to SBCTA or they otherwise become aware of the occurrence or existence of any Proposer Material Adverse Change, SBCTA will consider whether such Proposer Material Adverse Change would have resulted in Proposer receiving a "fail" for the Pass/Fail Evaluation. If SBCTA determines that Proposer would have received a "fail", they will notify Proposer of such determination. Following any discussions with Proposer that SBCTA determines are appropriate in such circumstances, SBCTA will (acting reasonably) notify Proposer of the additional security it is required to submit and/or the other measures or actions it is required to take, in each case as deemed necessary (but not more than necessary) by SBCTA (acting reasonably) to address the occurrence of Proposer Material Adverse Change so as to maintain Proposer's "pass" rating, provided that any such required additional security, measures or actions will be consistent with the types of security and assurances reflected in Proposer's Proposal and/or as are otherwise customary and reasonable in equivalent circumstances. Should Proposer fail to comply with any requirement to submit such additional security and/or take any other such measures or actions within ten (10) calendar days of delivery of notice from SBCTA identifying such requirement (or such longer time as may be allowed by SBCTA in its sole discretion), SBCTA may exercise its rights under Section 20.2.b.

20.4. DBE Requirements

Proposer will comply with the SBCTA's goals with respect to the participation of Disadvantaged Business Enterprises (DBE) as set forth in Exhibit 4. Proposer's attention is called to Title 49, Code of Federal Regulations (CFR), Part 26, entitled "Participation by Disadvantaged Business Enterprises (DBE) in Department of Transportation Financial Assistance Programs" ("DBE Regulations"). The DBE Regulations in their entirety are incorporated herein by this reference.

PART F: PROTESTS AND RESERVED RIGHTS**21. PROTESTS****21.1. Applicability and Process**

- a. This Section 21 sets forth the sole and exclusive protest remedies available with respect to this RFP.
- b. Only Proposer who submits a Proposal in response to this RFP are permitted to file protests regarding the RFQ process in accordance with this Section 21.
- c. Any protests regarding the RFP process will be addressed to SBCTA and delivered to the SBCTA Procurement Contact no later than fourteen (14) calendar days after the public announcement by SBCTA of the identity of the Preferred Proposer. Any Proposer submitting such a protest is responsible for obtaining proof of delivery.

21.2. Required Early Communication for Certain Protests

Protests may be filed only after the potential protesting party has informally discussed the nature and basis of the protest with SBCTA, following the procedures prescribed in this Section 21. Informal discussions will be initiated by a written request for a one-on-one meeting delivered to the SBCTA Procurement Contact. The written request will include an agenda for the proposed one-on-one meeting. SBCTA will meet with the potential protesting party as soon as practicable to discuss the nature of the allegations.

21.3. Content of Protest

Any protest must include the following in order to be considered complete and delivered by the deadline:

- a. the full legal name and address of Proposer that is/are making the protest;
- b. a succinct statement of the grounds, legal authority and factual basis for such protest; and
- c. all documentation required to establish the merits of the protest.

21.4. Burden of Proof

The protestor has the burden of proving its protest by clear and convincing evidence. SBCTA may discuss the protest with the protestor and other Proposers. No hearing will be held on the protest. The protest will be decided on the basis of written submissions.

21.5. Decision on the Protest

- a. SBCTA's Procurement Manager or designee will issue a written decision regarding the protest within thirty (30) calendar days after the filing of the detailed statement of protest.
- b. The written decision of SBCTA's Procurement Manager will be final and non-appealable.

21.6. Protestor's Payment of Costs

If a protest is denied, the party filing the protest will be liable for SBCTA's costs reasonably incurred to defend against or resolve the protest, including legal and consultant fees and

costs, and any unavoidable damages sustained by SBCTA as a consequence of the protest.

22. SBCTA'S RIGHTS

22.1. SBCTA's Reserved Rights

In connection with the procurement process described in this RFP, SBCTA reserves to itself any and all of the rights set out in this Section 22 and any other rights available to it under Applicable Law (any of which rights will be exercisable by SBCTA in its sole discretion, with or without cause and with or without notice). The rights referred to in the preceding sentence (together, the "Reserved Rights") include the right to:

- a. modify the procurement process described in this RFP or any dates set or projected in this RFP (including, if applicable, as previously modified in accordance with this Section 22) to address:
 - i. Applicable Law;
 - ii. the best interests of SBCTA;
 - iii. changes to the preferred alternative that arise from the NEPA and CEQA processes; and/or
 - iv. any concerns, conditions or requirements of the SBCTA, FTA or any other State or Federal department or agency;
- b. in reviewing and/or evaluating Proposals:
 - i. appoint evaluation committees, which may include members of other public agencies, to review Proposals and seek the assistance of outside technical, financial, legal and other experts and consultants;
 - ii. terminate evaluation of Proposals received at any time;
 - iii. waive deficiencies, nonconformities, irregularities, and apparent clerical mistakes in a Proposal, accept and review a Proposal that it could otherwise have determined to have failed the Pass/Fail Evaluation or permit clarifications or additional information to be submitted with respect to a Proposal;
 - iv. make independent calculations with respect to numbers and calculations submitted in a Proposal for purposes of its evaluation;
 - v. require confirmation of information submitted by the relevant Proposer, require additional information from such Proposer concerning its Proposal, or require additional evidence of qualifications to perform the work described in this RFP;
 - vi. contact the firm and personnel references supplied by Proposer as well as other potential references not listed, including internal personnel of SBCTA; and/or
 - vii. seek or obtain data from any source that has the potential to improve SBCTA's understanding and evaluation of a Proposal;

- c. in otherwise conducting the procurement process described in this RFP:
- i. modify any and all dates set in this RFP;
 - ii. add or delete Proposer responsibilities from the information contained in the RFP;
 - iii. reject any and all submissions, responses, and Proposals received at any time;
 - iv. not select any Proposer to become the Preferred Proposer in SBCTA's discretion;
 - v. add as the Preferred Proposer any prospective Proposer that submitted a Proposal in order to replace a previously selected Proposer that withdraws or is disqualified from participation in the procurement process described in this RFP;
 - vi. engage in negotiations with Preferred Proposer;
 - vii. suspend and terminate Design-Build Contract negotiations;
 - viii. negotiate with Preferred Proposer without being bound by any provision in the RFP or its Proposal;
 - ix. disqualify any Proposer from the procurement process for violating any rules or requirements of the procurement process specified in (A) this RFP, (B) any other communication from SBCTA or (C) Applicable Law;
 - x. disqualify any Key Personnel from the procurement process at the sole discretion of the SBCTA or for violating any rules or requirements of the procurement process specified in (A) this RFP, (B) any other communication from SBCTA or (C) Applicable Law; and/or
 - xi. accept, reject or seek additional information regarding a Proposer's request to make any Organizational Change;
- d. procure and develop the Project, including any portion thereof, in any manner that it deems necessary, including the right to:
- i. modify the scope, structure, schedule and/or specific terms of, or cancel, the procurement process described in this RFP in whole or in part at any time prior to the execution by SBCTA of a Design-Build Contract, without incurring any cost obligations or liabilities;
 - ii. modify the scope of the Project or the Work during the procurement process;
 - iii. issue addenda, supplements and modifications;
 - iv. issue a new request for qualifications, instructions to proposers, or request for proposals after cancellation of the procurement process described in this RFP;

- v. elect not to commence or continue Design-Build Contract negotiations with Preferred Proposer, and/or suspend or terminate Design-Build Contract negotiations at any time;
- vi. conduct One-on-One Meetings and other meetings at such times, according to such rules of conduct, and with such attendees, as SBCTA may determine are appropriate in its discretion; and/or
- vii. develop some or all of the Project itself or through another State or local governmental entity;
- e. if SBCTA is unable to negotiate a Design-Build Contract to its satisfaction with Proposer, to:
 - i. cancel the procurement process described in this RFP;
 - ii. pursue the development of the Project through a procurement or contracting approach not expressly anticipated by the RFP; and/or
 - iii. exercise such other rights under the DB Law and other provisions of California law as it deems appropriate;
- f. exercise any other right reserved or afforded to SBCTA under this RFP or Applicable Law and regulations; and/or
- g. exercise its discretion in relation to the matters that are the subject of this RFP as it considers necessary or expedient in the light of all circumstances prevailing at the time which SBCTA considers to be relevant.

22.2. No Commitment or Liability

- a. This RFP does not commit or bind SBCTA to enter into a Design-Build Contract or proceed with the procurement process described in this RFP. SBCTA does not assume any obligations, responsibilities or liabilities, fiscal or otherwise, to reimburse all or part of the costs incurred or alleged to have been incurred by parties considering a response to and/or responding to the RFP and all such costs will be borne solely by each Proposer.
- b. In no event will SBCTA be bound by, or liable for, any obligations with respect to the Project or any portion thereof, until such time (if at all) as a Design-Build Contract (in form and substance satisfactory to SBCTA) has been executed and authorized by SBCTA and then, only to the extent set out in the Design-Build Contract.

PART G: DEFINITIONS AND RULES OF INTERPRETATION

23. DEFINITIONS

Except as otherwise specified herein or as the context may otherwise require, the following terms have the respective meanings set out in Annex A to this RFP.

24. RULES OF INTERPRETATION

24.1. References to SBCTA

Any reference in this RFP to SBCTA refers to the Board of Directors of SBCTA, acting by and through SBCTA's directors, officers, employees, and other authorized agents or representatives of each.

24.2. SBCTA Discretion

Any reference in this RFP to SBCTA having the right to exercise its "discretion" means SBCTA having the right to exercise its sole and absolute discretion in regard to a particular decision or action, including the ability to refrain from taking any action and the ability (where appropriate) to impose any conditions in the exercise of such discretion.

24.3. Interpretation of Certain References, Terms, Phrases and Types of Language

24.3.1. Headings and Other Internal References

- a. Headings are inserted for convenience only and will not affect interpretation of this RFP.
- b. Except as otherwise expressly provided in this RFP, a reference to any Section, Part, Form, Annex or Exhibit within this RFP is a reference to such Section or Part of, or Form or Annex set out in, or Exhibit to, this RFP.

24.3.2. Common Terms

- a. When there are references to general words followed by a list, or a reference to a list, to make it clear that those general words "include" the matters set out in that list, then the contents of the list will not, and will not be deemed to, limit the generality of those general words.
- b. The singular includes the plural and vice versa.
- c. The word "promptly" means as soon as reasonably practicable in light of then-prevailing circumstances.

24.3.3. Professional Language and Terms of Art

Except as otherwise expressly provided in this RFP:

- a. words and phrases not otherwise defined herein:
 - i. that have well-known technical or construction industry meanings will be construed pursuant to such recognized meanings; and
 - ii. of an accounting or financial nature will be construed pursuant to Generally Accepted Accounting Principles in the United States as in effect from time to time,in each case taking into account the context in which such words and phrases are used; and
- b. all statements of or references to dollar amounts or money in this RFP, including references to "\$" and "dollars", are to the lawful currency of the United States of America.

24.3.4. References to Agreements, Documents and Laws

Except as otherwise expressly provided in this RFP, any reference:

- i. to an agreement or other document will be construed to be a reference to such agreement or other document (including any schedules, annexes or exhibits thereto) as it may be amended, modified or supplemented from time to time in accordance with its terms; and
- a. to any law will be construed as a reference to such law, enactment, order, regulation or instrument as amended, replaced, consolidated or re-enacted from time to time.

PART H: EXHIBITS & FORMS

Exhibits:

- Exhibit 1: Procurement Schedule
- Exhibit 2: RFP Submission Requirements
- Exhibit 3: Evaluation Process and Criteria
- Exhibit 4: DBE Requirements
- Exhibit 5: Federal & State Requirements
- Exhibit 6: Lead Operator SOQ Submission Process

Pre-Proposal Forms:

- Form 1: RFP Comment Submission Form
- Form 2: Supplemental Due Diligence Request Form
- Form 3: ATC Submission Form
- Form 4: Form of Proposal Security

Proposal Forms:

- Form 5: Proposal Letter
- Form 6: Buy America Certification
- Form 7: Non-Collusion Affidavit
- Form 8-A: DBE Commitment Form
- Form 8-B: Bidders List
- Form 9: DBE Certification Form
- Form 10: Equal Employment Opportunity Certification
- Form 11: Use of Contract Funds for Lobbying Certification
- Form 12: Debarment and Suspension Certification
- Form 13: Iran Contracting Certification
- Form 14: Disclosure of Contributions Form
- Form 15: Form of Legal Opinion



Release of March 5, 2023

EXHIBIT 1: PROCUREMENT SCHEDULE

[Procurement Schedule for the Pre-Proposal Phase to be released following the announcement of Shortlisted Design-Build Teams and the execution of the Pre-Proposal Works Agreement.]

FOR REFERENCE ONLY



Release of March 5, 2023

EXHIBIT 2: RFP SUBMISSION REQUIREMENTS

[To be released following the announcement of Shortlisted Design-Build Teams and the execution of the Pre-Proposal Works Agreement.]

FOR REFERENCE ONLY

EXHIBIT 3: EVALUATION PROCESS AND CRITERIA

[To be released following the announcement of Shortlisted Design-Build Teams and the execution of the Pre-Proposal Works Agreement.]

FOR REFERENCE ONLY



Release of March 5, 2023

EXHIBIT 4: DBE REQUIREMENTS

[To be released following the announcement of Shortlisted Design-Build Teams and the execution of the Pre-Proposal Works Agreement.]

FOR REFERENCE ONLY

EXHIBIT 5: FEDERAL & STATE REQUIREMENTS

[To be released following the announcement of Shortlisted Design-Build Teams and the execution of the Pre-Proposal Works Agreement. SBCTA contemplates including all provisions that are required for an FTA administered Federal-aid project.]

FOR REFERENCE ONLY



Release of March 5, 2023

EXHIBIT 6: LEAD OPERATOR SOQ SUBMISSION REQUIREMENTS

[To be released following the announcement of Shortlisted Design-Build Teams and the execution of the Pre-Proposal Works Agreement.]

FOR REFERENCE ONLY



FORM 1: RFP COMMENT SUBMISSION FORM

Instructions:

Please generally see Section 6 of this RFP. In addition:

- (1) Proposers shall submit RFP Comments in English and in Microsoft® Word format.
- (2) Proposers should use the checkboxes at the top of the Form to indicate the identity and (by filling out the date where indicated) issuance date of all RFP documents to which the RFP Comments relate.
- (3) Proposers should divide their comments into three Parts – Part 1 (comments on the RFP); Part 2 (comments on the Design-Build Contract; Part 3 (comments on the Technical Provisions); and Part 4 (comments on the Operating Contract) – as indicated in the Form. Proposers may exercise their judgment as to the Part in which they include a comment that does not clearly fit within only one part, always taking into account, in particular, SBCTA's preference for technical comments to be included in Parts 3 or 4, and other comments to be included in Parts 1 and 2.
- (4) Proposers shall use the numbering system set out in the Form.
- (5) Under the "Reference" heading, Proposers should:
 - (a) if applicable, first, list the "Part", "Form", "Annex", "Schedule" (or equivalent) of or to the RFP/RFP or the Design-Build Contract (or other document, if applicable), and then reference the relevant Section (including any subsection); or
 - (b) if not applicable, indicate "N/A".
- (6) RFP Comments should be divided into the following categories in accordance with the Category headings in each Part of the Form:
 - (a) "Category A" – an issue that, if not resolved in an acceptable fashion, would likely preclude the Proposer from submitting a Proposal;
 - (b) "Category B" – an issue that, if not resolved in an acceptable fashion, will significantly affect value for money or, taken together with other issues (which should be identified to the extent related or possible), would likely preclude the Proposer from submitting a Proposal;
 - (c) "Category C" – a substantive issue that does not qualify as a Category A, B or D issue; or
 - (d) "Category D" – a drafting issue, a clarification or a comment concerning conflicts between or within documents, or the equivalent of one of these, in each case which a reasonable Proposer would not interpret as intentional (and therefore should be a Category A, B or C comment).
- (7) Within each Category within each of Parts 1, 2, 3, and 4 of the Form, RFP Comments should be ordered sequentially by reference to the order in which they appear in the RFP or the Design-Build Contract (or other document, if applicable).
- (8) Proposers should consider relevance, brevity and clarity when submitting RFP Comments. As such:
 - (a) each comment should address a single issue and therefore comments on multiple parts of a defined term or a provision in the document should be divided into separate comments and (unless substantively related) not aggregated into a single comment;
 - (b) any single comment that complies with instruction (8)(a) may include list numbering to facilitate review and response, provided that list bullets should not be used;
 - (c) each comment should indicate why it has been made;
 - (d) with respect to comments that have previously been submitted (in whole or part), Proposers shall (i) include as the first line of such comment "**The following comment was previously submitted as RFP Comment No. [X] in the submission made on [date]. We are resubmitting it [provide brief explanation].**"
- (9) Proposers should refer to Section 12 before submitting RFP Comments that contain confidential or proprietary information.
- (10) Proposers should delete this instructions box and additional instruction notes prior to submitting any RFP Comments using this Form.



Proposer Name: [Proposer to provide]
Date: [Proposer to provide]

Tunnel to ONT Project: RFP Comment Submission No. []³

- Comments on: ☐ RFP ([date])
☐ Design-Build Contract ([date])
☐ Technical Provisions ([date])
☐ Operating Contract ([date])

Part 1: RFP/RFP Comments

<u>No.</u>	<u>Reference</u>	<u>RFP Comment</u>	<u>For SBCTA Use Only</u>
<u>Category A Comments</u>			

<u>No.</u>	<u>Reference</u>	<u>RFP Comment</u>	<u>For SBCTA Use Only</u>
<u>Category B Comments</u>			

<u>No.</u>	<u>Reference</u>	<u>RFP Comment</u>	<u>For SBCTA Use Only</u>
<u>Category C Comments</u>			

<u>No.</u>	<u>Reference</u>	<u>RFP Comment</u>	<u>For SBCTA Use Only</u>
<u>Category D Comments</u>			

³ **Note to Proposers:** Proposers to sequentially number each set of Pre-Proposal Period Comments submitted.



Part 2: Design-Build Contract Comments

<u>No.</u>	<u>Reference</u>	<u>RFP Comment</u>	<u>For SBCTA Use Only</u>
<u>Category A Comments</u>			

<u>No.</u>	<u>Reference</u>	<u>RFP Comment</u>	<u>For SBCTA Use Only</u>
<u>Category B Comments</u>			

<u>No.</u>	<u>Reference</u>	<u>RFP Comment</u>	<u>For SBCTA Use Only</u>
<u>Category C Comments</u>			

<u>No.</u>	<u>Reference</u>	<u>RFP Comment</u>	<u>For SBCTA Use Only</u>
<u>Category D Comments</u>			



Part 3: Technical Provisions Comments

<u>No.</u>	<u>Reference</u>	<u>RFP Comment</u>	<u>For SBCTA Use Only</u>
<u>Category A Comments</u>			

<u>No.</u>	<u>Reference</u>	<u>RFP Comment</u>	<u>For SBCTA Use Only</u>
<u>Category B Comments</u>			

<u>No.</u>	<u>Reference</u>	<u>RFP Comment</u>	<u>For SBCTA Use Only</u>
<u>Category C Comments</u>			

<u>No.</u>	<u>Reference</u>	<u>RFP Comment</u>	<u>For SBCTA Use Only</u>
<u>Category D Comments</u>			



Part 4: Operating Contract Comments

<u>No.</u>	<u>Reference</u>	<u>RFP Comment</u>	<u>For SBCTA Use Only</u>
<u>Category A Comments</u>			

<u>No.</u>	<u>Reference</u>	<u>RFP Comment</u>	<u>For SBCTA Use Only</u>
<u>Category B Comments</u>			

<u>No.</u>	<u>Reference</u>	<u>RFP Comment</u>	<u>For SBCTA Use Only</u>
<u>Category C Comments</u>			

<u>No.</u>	<u>Reference</u>	<u>RFP Comment</u>	<u>For SBCTA Use Only</u>
<u>Category D Comments</u>			



FORM 2: SUPPLEMENTAL DUE DILIGENCE REQUEST FORM

Instructions: Please generally see Section 9. In addition:

- (1) Proposers should submit a separate Supplemental Due Diligence Request with respect to each requested Supplemental Due Diligence Activity.
- (2) Proposers should delete this instructions box and additional instruction notes prior to submitting this Form.

Proposer Name: [Proposer to provide]

Date: [Proposer to provide]

Tunnel to ONT Project: Supplemental Due Diligence Request No. []⁴

Type of Request

☐

Restricted Access Inspection

☐

Public Access Inspection

Overview

[Provide description.]

Method(s) of Inspection/Investigation

[Provide description.]

Location(s) and Approximate Duration of Activity

[Provide description.]

Identity and Qualifications of Participants (if applicable/known)

[Provide description.]

Permit(s)/Approval(s) Required

[Provide description.]

Potential Benefits to the Procurement

[Provide description.]

⁴ **Note to Proposers:** Proposer Counterparty to sequentially number all Supplemental Due Diligence Requests.

FORM 3: ALTERNATIVE TECHNICAL CONCEPT SUBMISSION FORM

Instructions: Please generally see Section 8. In addition:

- (1) Proposers should submit a separate ATC Submission Form for each ATC.
- (2) ATC Submissions should be numbered in the format of "X.Y" to indicate iterative versions of the same ATC, where:
 - (a) "X" shall be the sequential number of each ATC that is submitted; and
 - (b) "Y" shall be the sequential number of the version of such ATC, where the initial submission shall be version "0" and each subsequent resubmission (including resubmission of a Conceptual ATC as a Detailed ATC) shall be, in sequence, "1", "2", "3" etc.By way of illustration, ATC Submission "7.2" would be the second resubmission (and therefore the third version) of the seventh unique ATC.
- (3) Proposers should complete Parts A and B of the Form set out in this Form for both Conceptual ATCs and Detailed ATCs and Part C of such Form for Detailed ATCs only.
- (4) In completing Part B of an ATC Submission Form for a Detailed ATC (unless no Conceptual ATC was submitted in respect of such ATC), Proposers should include the following express statement (with the inapplicable square bracketed language deleted) under each heading:
"This information [has been] [has not been] amended since the submission of the previous version of this ATC."
- (5) Conceptual ATC submissions shall not exceed three Standard Pages, plus up to two additional Oversized Pages or two pages of Oversized Materials. There is no page limit for Detailed ATC Submissions.
- (6) Any attachments should clearly indicate which headings within the ATC Submission Form the materials relate to.
- (7) Proposers should delete this instructions box and additional instruction notes, and may delete italicized text in Part B and Part C prior to making an ATC Submission using this Form.

Proposer Name: [Proposer to provide]

Date: [Proposer to provide]

Tunnel to ONT Project: ATC Submission No. [] []⁵

A. Background Information

1. Type of Submission

- ☐ Conceptual ATC
- ☐ Detailed ATC

2. Prior Submission(s)

- ☐ None (initial submission of ATC)
- ☐ Previously Submitted as Conceptual ATC

⁵ **Note to Proposers:** Proposer to complete in accordance with instruction (2) to this Form.

- ☐ Previously Submitted as Detailed ATC

3. Explanation of Reason for Resubmission

[Proposer to provide]

4. Request for Discussion at One-on-One Meeting

- ☐ Meeting Requested
- ☐ Meeting Not Requested⁶

⁶ **Note to Proposers:** SBCTA may nevertheless require Proposers to present an ATC Submission at a One-on-One meeting.

B. General ATC Submission Requirements**5. Overview Description**

Narrative overview description of the proposed ATC.

[Proposer to provide]

6. Relevant RFP Requirements

List all material RFP requirements that are inconsistent with, and would require amendment to accommodate, the proposed ATC⁷.

[Proposer to provide]

7. Rationale

Explanation of how, where, and why the ATC would be used on the Project, including how it aligns with the Project Goals.

[Proposer to provide]

8. Impacts

A preliminary analysis of potential environmental, social, economic, community, traffic, safety, operations and maintenance or third-party impacts (positive and negative), including specific separate identification and analysis of any such impacts that are not reflected in the final EIS.

[Proposer to provide]

9. Cost and Benefit Analysis

An estimate (which in the case of a Conceptual ATC can be limited to an order of magnitude) of likely costs, and savings, that are likely to result from implementation of such ATC, including reference to assumptions on which such estimate is based.

[Proposer to provide]

10. Schedule Analysis

An estimate (which in the case of a Conceptual ATC can be limited to an order of magnitude) of likely design and construction time-period impacts (positive and negative) of such ATC, including reference to assumptions on which such estimate is based.

[Proposer to provide]

11. Conceptual Drawings

At Proposer's discretion, unless otherwise requested by the Procuring Authorities, conceptual drawings.

[Proposer to attach]

12. Past Use

Identification of other projects on which the ATC (or a substantially similar approach) has been implemented, regardless of the results, and the relevance of such experience.

[Proposer to provide]

13. Additional Information

With respect to previously submitted ATC Submissions only, additional information as requested by SBCTA following review of such prior submissions.

[Proposer to provide]

FOR REFERENCE ONLY

⁷ **Note to Proposers:** Proposers are not required to propose RFP drafting amendments when completing Part B, but are required to do so when completing Section 5 of Part C.

C. Detailed ATC Requirements**1. Risks**

To the extent not otherwise addressed by the responses to Part B above, an analysis of any additional risks to SBCTA or third parties associated with implementation of the ATC, including discussion of how such risks are, or are proposed to be, allocated under the terms of the Design-Build Contract.

[Proposer to provide]

2. Handback – Impact on O&M

Description of any proposed changes in handback procedures and/or the handback requirements associated with the ATC, if any are expected.

[Proposer to provide]

3. Right-of-Way

A description, the estimated cost, and the proposed procurement schedule of any additional right-of-way expected to be required to implement the ATC, if any.

[Proposer to provide]

4. List of Required Approvals

A list of required, or likely to be required, third party and governmental approvals.

[Proposer to provide/attach]

5. Proposed Drafting Revisions

(a) List all RFP requirements that are inconsistent with the proposed ATC and (b) attach in the form of a mark-up (for amendments to existing drafting) and/or a rider (with respect to newly proposed drafting) proposed revisions to address those inconsistencies.

[Proposer to provide/attach]



Release of March 5, 2023

FOR REFERENCE ONLY



FORM 4: FORM OF PERFORMANCE AND PROPOSAL SECURITY

KNOW ALL PERSONS BY THESE PRESENTS:

WHEREAS, the San Bernardino County Transportation Authority, a public entity of the State of California ("SBCTA") (referred to herein as "Obligee"), has selected _____, a _____ duly authorized to do business in the State of California and having its principal place of business at _____ (referred to herein as "Principal"), to enter into a Pre-Proposal Works Agreement as a Shortlisted Design-Build Team for the Tunnel to Ontario International Airport Project (the "Project") in response to SBCTA's Request for Qualifications (as amended, the "RFQ") issued on November 21, 2022, on the terms and conditions set forth therein; and

WHEREAS, Principal is required to furnish a bond guaranteeing (i) the faithful performance of its obligations under the Pre-Proposal Works Agreement and its participation in the procurement described in the concurrently issued Request for Proposals ("RFP"), and (ii) Principal will execute the Design-Build Contract by the applicable deadline if it is identified as the apparent highest ranked proposer or awarded a contract based on its Proposal delivered pursuant to the RFP.

NOW, THEREFORE, Principal and _____, a _____, an admitted surety insurer in the State of California having its principal place of business at _____ ("Surety"), are held and firmly bound unto Obligee in the amount of _____ DOLLARS lawful money of the United States of America (\$____,____.____) (the "Penal Sum"), for payment of which sum Principal and Surety jointly and severally firmly bind themselves and their heirs, executors, administrators, successors and assigns.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT, if Principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements under the Pre-Proposal Works Agreement and the RFP, including any and all amendments and supplements thereto that may be executed with or without notice to the Surety, on Principal's part to be kept and performed at the time and in the manner therein specified, and in all respects according to their true intent and meaning, and shall indemnify, defend, protect, and hold harmless the Obligee as stipulated in the Pre-Proposal Works Agreement and the RFP, then this obligation shall become and be null and void; otherwise it shall be and remain in full force and effect.

The following terms and conditions shall apply with respect to this bond:

1. The Pre-Proposal Works Agreement and the RFP for the Project are incorporated by reference herein.
2. Upon occurrence of any of the following events, then this obligation shall be null and void; otherwise, it shall remain in full force and effect:
 - (a) Except as expressly provided otherwise in the Pre-Proposal Works Agreement, the RFP, or agreed to by SBCTA in writing:

- (i) Principal's performance of all of its obligations under the executed Pre-Proposal Works Agreement and the RFP, including submission of a responsive Proposal in response to the RFP at the conclusion of the Pre-Proposal Period;
 - (ii) Principal's receipt of written notice from SBCTA that either (i) no Design-Build Contract for the Project will be awarded by SBCTA pursuant to the RFP, or (ii) SBCTA has awarded the Design-Build Contract for the Project, has received the executed Contract, and other required documents, and does not intend to award the Contract to Principal; and
 - (iii) Except if (ii) above applies, as expressly provided otherwise in the RFP or agreed to by SBCTA in writing, Principal's performance of all of its obligations to achieve award and execution of the Design-Build Contract by the applicable deadline, as such deadline may be extended in accordance with the RFP; or
- (b) If SBCTA has not previously delivered notice of forfeiture as provided for under the terms of this bond, either:
- (i) the early termination by SBCTA of the Pre-Proposal Works Agreement;
 - (ii) a public announcement by SBCTA of the cancellation of the procurement process for the Project prior to executing a Design-Build Contract with the Principal; or
 - (iii) failure of SBCTA to conditionally award the Design-Build Contract to Principal within the Proposal Validity Period.
3. This bond specifically guarantees the performance of each and every obligation of Principal under the Pre-Proposal Works Agreement, including, but not limited to, the obligation to submit a responsive Proposal in response to the RFP at the conclusion of the Pre-Proposal Period (as defined in the Pre-Proposal Works Agreement), as each such document may be amended and supplemented, but not to exceed the Penal Sum.
4. This bond further guarantees that the Principal will satisfy its obligations to achieve award and execute of the Design-Build Contract by the applicable deadline if it is identified as the apparent highest ranked proposer or awarded a contract based on its Proposal delivered pursuant to the RFP, but not to exceed the Penal Sum. The obligation of the Principal to enter into the Design-Build Contract shall be contingent upon the final form of contract containing terms materially consistent with those terms set forth in the Design-Build Term Sheet upon the initial issuance of the RFP.
5. Whenever Principal shall be, and is declared by Obligee to be, in default of Principal's obligations under either Section 3 or Section 4 above, provided that Obligee is not then in material default thereunder, Surety shall promptly pay to SBCTA the full Penal Sum as liquidated damages and not as a penalty, within ten days after occurrence of such declaration. Principal agrees and acknowledges that such liquidated damages are reasonable in order to compensate SBCTA for damages it will incur as a result of Principal's failure to satisfy the obligations under the Pre-Proposal Works Agreement to which Principal agreed when submitting its Proposal. Such damages include potential

harm to the credibility and reputation of the Project and of SBCTA with policy makers and with the general public, delays to the Project and additional costs of administering this or a new procurement (including engineering, legal, accounting, overhead and other administrative costs), or increased costs to enter into a Design-Build Agreement with an alternative Proposer. Principal further acknowledges that these damages would be difficult and impracticable to measure and prove, are incapable of accurate measurement because of, among other things, the unique nature of the Project and the efforts required to receive and evaluate proposals for it, and the unavailability of a substitute for those efforts. The amounts of the Penal Sum represents liquidated damages and good faith estimates and evaluations as to the actual potential damages that SBCTA would incur as a result of Principal's failure to satisfy the obligations under the Pre-Proposal Works Agreement, or failure of the Principal to enter into the Design-Build Contract to which Principal agreed when submitting its Proposal, and do not constitute a penalty. Principal agrees to such liquidated damages in order to fix and limit Principal's costs and to avoid later disputes over what amounts of damages are properly chargeable to Principal.

6. No change, alteration, modification, or supplement to the Pre-Proposal Works Agreement or the RFP, or the nature of the work to be performed thereunder, including without limitation any extension of time for performance, or any change or modification of any terms of payment or extension of time for any payment pertaining to or relating to the Pre-Proposal Works Agreement, or any rescission or attempted rescission of the Pre-Proposal Works Agreement or this bond, or any conditions precedent or subsequent in this bond attempting to limit the right of recovery of Obligee seeking to recover from this bond, or any fraud practiced by any other person other than Obligee seeking to recover from this bond, shall in any way affect the obligations of Surety under this bond. Surety waives notice of any such change, alteration, modification, supplement, or extension of time.
7. **[Use in case of multiple or co-sureties:** The Co-Sureties agree to empower a single representative with authority to act on behalf of all the Co-Sureties with respect to this bond, so that Obligee will have no obligation to deal with multiple sureties under this bond. All correspondence from Obligee to the Co-Sureties and all claims relating to this bond shall be sent to such designated representative. The designated representative may be changed only by delivery of written notice (by personal delivery or by certified mail, return receipt requested) to Obligee designating a single new representative, signed by all of the Co-Sureties. The initial representative shall be _____, and shall be contacted at the following address:

_____]

[Use in case of a single surety: Correspondence or claims relating to this bond should be sent to Surety at the following address:



_____]

8. No right of action shall accrue on this bond to or for the use of any entity other than Obligee or its successors and assigns.

IN WITNESS WHEREOF, Principal and Surety have caused this bond to be executed and delivered as of _____, 20__.

Principal:

By: _____

Its: _____

(Seal)

Surety:

By: _____

Its: _____

(Seal)

[ADD APPROPRIATE SURETY ACKNOWLEDGMENTS]



Release of March 5, 2023

FORM 5: PROPOSAL LETTER

[To be released following the announcement of Shortlisted Design-Build Teams and the execution of the Pre-Proposal Works Agreement.]

FOR REFERENCE ONLY



Release of March 5, 2023

FORM 6: BUY AMERICA CERTIFICATION

[To be released following the announcement of Shortlisted Design-Build Teams and the execution of the Pre-Proposal Works Agreement.]

FOR REFERENCE ONLY



Release of March 5, 2023

FORM 7: NON-COLLUSION AFFIDAVIT

[To be released following the announcement of Shortlisted Design-Build Teams and the execution of the Pre-Proposal Works Agreement.]

FOR REFERENCE ONLY



Release of March 5, 2023

FORM 8-A: DBE COMMITMENT FORM

[To be released following the announcement of Shortlisted Design-Build Teams and the execution of the Pre-Proposal Works Agreement.]

FOR REFERENCE ONLY



Release of March 5, 2023

FORM 8-B: BIDDERS LIST

[To be released following the announcement of Shortlisted Design-Build Teams and the execution of the Pre-Proposal Works Agreement.]

FOR REFERENCE ONLY



Release of March 5, 2023

FORM 9: DBE CERTIFICATION FORM

[To be released following the announcement of Shortlisted Design-Build Teams and the execution of the Pre-Proposal Works Agreement.]

FOR REFERENCE ONLY



Release of March 5, 2023

FORM 10: EQUAL EMPLOYMENT OPPORTUNITY CERTIFICATION

[To be released following the announcement of Shortlisted Design-Build Teams and the execution of the Pre-Proposal Works Agreement.]

FOR REFERENCE ONLY



Release of March 5, 2023

FORM 11: USE OF CONTRACT FUNDS FOR LOBBYING CERTIFICATION

[To be released following the announcement of Shortlisted Design-Build Teams and the execution of the Pre-Proposal Works Agreement.]

FOR REFERENCE ONLY



Release of March 5, 2023

FORM 12: DEBARMENT AND SUSPENSION CERTIFICATION

[To be released following the announcement of Shortlisted Design-Build Teams and the execution of the Pre-Proposal Works Agreement.]

FOR REFERENCE ONLY



Release of March 5, 2023

FORM 13: IRAN CONTRACTING CERTIFICATION

[To be released following the announcement of Shortlisted Design-Build Teams and the execution of the Pre-Proposal Works Agreement.]

FOR REFERENCE ONLY



Release of March 5, 2023

FORM 14: DISCLOSURE OF CONTRIBUTIONS FORM

[To be released following the announcement of Shortlisted Design-Build Teams and the execution of the Pre-Proposal Works Agreement.]

FOR REFERENCE ONLY



Release of March 5, 2023

FORM 15: FORM OF LEGAL OPINION

[To be released following the announcement of Shortlisted Design-Build Teams and the execution of the Pre-Proposal Works Agreement.]

FOR REFERENCE ONLY

ANNEX A: DEFINITIONS

“Addenda” and “Addendum”	mean any supplemental written additions, deletions, and modifications to the provisions of this RFP as described in Section 4.2.
“Applicable Law”	means any: <ul style="list-style-type: none">(a) statute, law (including common law), code, regulation, ordinance or rule;(b) binding judgment, judicial or administrative order or decree;(c) written directive, guideline, policy requirement, methodology or other governmental restriction or requirement (including those resulting from an initiative or referendum process, but excluding those by SBCTA within the scope of their administration of this Contract); and(d) 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 Project or the Work.
“ATC”	means alternative technical concepts as described in Section 8, which concepts would not (absent SBCTA approval pursuant to Section 8.5) be permitted under the terms of the Contract.
“ATC Submission”	means the submission by a Proposer of an ATC in accordance with Section 8.1.
“ATC Submission Deadline”	means the date set forth in the Procurement Schedule.
“Conceptual ATC Submission”	means an Alternative Technical Concept that, as submitted in the form of an ATC Submission Form, contains all the information required by of that form.
“CEQA”	means the California Environmental Quality Act.
“DB Law”	has the meaning given to it in the Section 2.
“DB RFQ”	has the meaning given to it in the Section 1.2.
“DBE”	means Disadvantaged Business Enterprises.
“DBE Regulations”	has the meaning given to it in Section 20.4.
“Default”	has the meaning given to it in Section 18.4.2.

“Design-Build Contract”	means the contract that is anticipated to be entered into by SBCTA and the Preferred Proposer following the conclusion of the Preconstruction Period in accordance with the terms of the RFP.
“Design-Builder”	means the counterparty to the Design-Build Contract entered into with SBCTA at the conclusion of the procurement in respect of the Project.
“Detailed ATC Submission”	means an Alternative Technical Concept that, as submitted in the form of an ATC Submission Form, contains all the information required by of that form.
“Eligible Surety”	means a bonding surety: <ul style="list-style-type: none">(a) licensed in the State and at all relevant times listed on the U.S. Department of the Treasury’s annual Listing and Approved Sureties (Department Circular 570); and(b) having either:<ul style="list-style-type: none">i. two or more of the following long-term unsecured debt credit ratings: (A) “A” by Standard & Poor’s Rating Services; (B) “A” by Fitch, Inc.; (C) “A2” by Moody’s Investors Service, Inc.; or (D) “A” by DBRS, Inc., in each case with an outlook of “stable” or better, and provided that such rating agency is at all relevant times a nationally recognized statistical rating organization registered with the Securities and Exchange Commission; orii. a rating of at least A and X, respectively, or higher, according to A.M. Best’s Financial Strength and Financial Size Ratings.
“Financially Responsible Party”	means each parent company or other entity (in either case, if any) that provides a letter of support in accordance with the Project RFQs. Each Financially Responsible Party is a Major Participant.
“Form”	means any of the Proposal forms set out in Part H.
“FTA”	means Federal Transit Administration.
“Insolvency Event”	means a Person in respect of which any of the following have occurred and are continuing: <ul style="list-style-type: none">(a) any of:<ul style="list-style-type: none">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.:
- A. the petition that commenced such case or proceeding is not contested by such Person within the amount of time provided under Law; or
 - B. 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.

“Joint Venture”	means a consortium, partnership, joint venture or any other unincorporated grouping acting together for a common purpose and, each individual member or partner of such Joint Venture.
“Key Personnel”	means the individuals identified as such by a Proposer in its SOQ.
“Lead Contractor”	means the single entity or joint venture that will be primarily and directly responsible for construction of the Project. If this role will be performed by a Joint Venture, then all members or partners of that Joint Venture will be considered to be the Lead Contractor.
“Lead Designer”	means the single entity or joint venture that will be primarily and directly responsible for design of the Project. If this role will be performed by a Joint Venture, then all members or partners of that Joint Venture will be considered to be the Lead Designer.
“Lead Operator”	means the entity that is identified as a Major Participant on a Shortlisted Design-Build Team pursuant to the process to be set forth in the RFP that is primarily responsible for operations and maintenance of the Operating System and will enter into the Operating Contract.
“Lead Operator SOQ”	has the meaning given to it in Section 10.3.
“Lead Tunneling Contractor”	means the entity that will be primarily and directly responsible for tunnel construction on the Project.
“Major Participant”	means each of Proposer, Lead Contractor, Lead Designer, Lead Tunneling Contractor, and any financially responsible parties. One entity may fill more than one Major Participant role.
“NEPA”	means the National Environmental Policy Act.
“Notice of Intent to Award”	has the meaning given to it in Section 20.1.
“NTP”	means notice to proceed.
“Official Representative”	means the contact for Proposer with respect to this procurement and the ITP as set out in Section 13.1.
“OIAA”	means Ontario International Airport Authority.

“One-on-One Meeting”	has the meaning given to it in Section 7.
“ONT”	means Ontario International Airport.
“Operating Contract”	has the meaning given to it in Section 1.2.
“Operating System”	means the vehicles, control systems, power distribution and vehicle charging, communications systems, station equipment, and maintenance facility fit out and equipment, along with all related equipment and services as required to provide a complete autonomous, on demand transportation system.
“Operating System Provider”	means the entity that will be responsible, in whole or in part, for the design, fabrication, delivery, installation, testing, integration, commissioning, verification of passenger service readiness, permitting, and safety certification, of the Operating System.
“Organizational Change”	means the addition, deletion, or substitution or a Major Participant or other Persons previously identified in its SOQ as being part of Proposer’s team or other reorganization to Proposer’s team that would render the organizational charts and descriptions provided in its SOQ inaccurate or incomplete.
“OSP RFQ”	has the meaning given to it in Section 1.2.
“Oversized Materials”	means drawings, schematics, organizational charts or schedules.
“Oversized Page”	means a 11” x 17” sized white piece of paper with at least 1” margins, or the digital equivalent, that: <ul style="list-style-type: none">(a) uses fonts that are (i) no smaller than 8-point and (ii) standard-form Arial; and(b) contains only Oversized Materials.
“Pass/Fail Evaluation”	means the evaluation conducted by SBCTA in accordance with the pass/fail criteria set out in the RFP.
“PCM” or “Project and Construction Manager”	means the entity contracted by SBCTA to manage the Project, which includes among other things, administering the Contract, providing design reviews for the Project, and providing construction management and verification of Preferred Proposer’s construction operations and product.

“Performance Security”	has the meaning given to it in Section 18.4.
“Person”	means any of a natural person, a corporation, a limited liability company, a trust, a partnership, a limited liability partnership, a joint stock company, a consortium, a joint venture, an unincorporated association or any other entity recognized as having legal personality under the laws of the State, in each case as the context may require.
“Preferred Proposer”	means the Proposer that is selected by SBCTA to enter into the Design-Build Contract following the evaluation of all Proposals submitted by Proposers in response to the RFP.
“Pre-Proposal Deliverables”	has the meaning given to it in the Section 1.2.
“Pre-Proposal Period”	means that part from effective date of the Pre-Proposal Works Agreement through the Proposal Submission Deadline under the RFP.
“Pre-Proposal Submissions”	has the meaning given to it in Section 11.
“Pre-Proposal Works Agreement”	has the meaning given to it in the Section 1.2.
“Pre-Qualified Operating System Provider”	means the Operating System Providers that are identified by SBCTA at the conclusion of the procurement process contemplated by this RFP as eligible to proceed in the procurement and be selected as a Major Participant on a Shortlisted Design-Build Team.
“Procurement Schedule”	has the meaning given to it in Section 5.
“Project”	has the meaning given to it in the Section 1.2.
“Project Information”	means any information provided to Proposers during the RFQ stage of this procurement.
“Project RFQs”	has the meaning given to it in the Section 1.2.
“Project Website”	means the limited-access website to be separately notified to Proposer for use in connection with the procurement.
“Proposal”	means, collectively, the submission by Proposer to SBCTA in response to the requirements set forth in the RFP.
“Proposal Letter”	means the letter attached to this ITP as Form 2.
“Proposal Security”	has the meaning given to it in Section 18.4.

“Proposal Submission Deadline”	Submission	has the meaning given to it in the Procurement Schedule.
“Proposal Validity Period”		<p>means with respect to the Proposal, the period commencing at the Proposal Submission Deadline and ending on (and including) the earliest to occur of:</p> <ul style="list-style-type: none">(a) the date which is ninety (90) days after the Proposal Submission Deadline or, if after such deadline, the date on which a Proposer submitted its final update to its Proposal (if any) in response to an SBCTA request;(b) the date on which SBCTA publicly announces the cancellation of the procurement process described in this RFP; and(c) the date on which Proposer elects, in its sole discretion, to extend the validity of its Proposal in accordance with Section 18.2.
“Proposer”		has the meaning given to it in the Section 1.2.
“Proposer Material Adverse Change”		<p>means:</p> <ul style="list-style-type: none">(a) a change that has occurred or is anticipated in the business, operations, financial condition, liabilities or capitalization of any Major Participant; or(b) any other condition or circumstance related to any Major Participant, <p>which, in any case, in the SBCTA’s reasonable opinion has or is anticipated to have a material adverse impact on Proposer’s financial and/or technical capacity to design and build the Project as contemplated by the terms of the Contract.</p>
“Prospective Proposer”		has the meaning given to it in the Section 1.2.
“Public Access Inspections”		<p>means inspections of areas that are physically and legally accessible to members of the general public, to the extent such inspections:</p> <ul style="list-style-type: none">(a) would be functionally distinguishable from the lawful activities of most other users of such areas; and/or(b) would require the use of non-intrusive equipment.

“Public Records Exempt Materials”		has the meaning given to it in Section 12.2.
“Public Records Law”		has the meaning given to it in Section 12.1.
“Readiness for Revenue Service”		has the meaning given to it in Section 3.3.
“Reference Document”		means the documents provided to Proposer through the Project Website or otherwise to assist Proposer in their Project due diligence and to supplement the Project Information previously provided under the Project RFQs.
“Reserved Rights”		has the meaning given to it in Section 22.1.
“Restricted Access Inspections”		means inspections of such areas are not physically and/or legally accessible to members of the general public.
“Restricted Contact Period”		has the meaning given to it in Section 13.2.1.
“RFP”		has the meaning given to it in the Section 1.2.
“RFP Comments”		has the meaning given to it in Section 6.1.
“RFP Comment Deadline”		means any initial or final RFP Comment Deadline set out in the Procurement Schedule or any interim deadline for Proposer to comment on the ITP established by SBCTA from time to time.
“SBCTA”		means the San Bernardino County Transportation Authority.
“SBCTA Contact”	Procurement	has the meaning given to it in Section 13.2.2.
“SBCTA Manager”	Procurement	means the SBCTA Procurement Contact.
“Shortlisted Teams”	Design-Build	means those Proposer entities and their Major Participants selected at the conclusion of the Design-Builder RFQ procurement process to respond to the RFP.
“SOQ”		means a statement of qualifications submitted by a Proposer in accordance with the DB RFQ.
“Standard Page”		means a 8-1/2” x 11” sized piece of white paper with at least 1” margins, or the digital equivalent, that, subject to the pre-formatting of any Annex or Form, uses: (a) fonts that are (i) no smaller than 11-point (or 8-point in any table, graphic or chart), (ii) standard-form Arial and (iii)

displayed or printed in black (other than in any heading, table or graphic); and

- (b) “single line” spacing (paragraph formatting) 0 points before each line, 6 points after each line (other than in any table, graphic or chart).

“State”	means the State of California.
“Substantial Completion”	has the meaning given to it in Section 3.3.
“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 RFP.
“Supplemental SOQ”	has the meaning given to it in Section 10.3.
“Technical Provisions”	means the documents included as an annex to this RFP addressing Project administration, design, construction, operations, maintenance, vehicle, and other relevant technical disciplines.
“Vehicle”	means a rubber-tired zero-emission passenger carrying unit capable of autonomous operations as contemplated by the Project RFQs.
“Work”	means the work to be completed by the Design-Builder pursuant to the Design-Build Contract.

ANNEX B: FORM OF DESIGN-BUILD CONTRACT⁸

This document (the “**Term Sheet**”) sets forth the anticipated principal terms and conditions that will be addressed in the Design-Build Contract (the “**Contract**”) and subsequently entered into between SBCTA and the Design-Builder concerning the Project (as defined below).

This Term Sheet is not intended to, and shall not, create any liability or binding obligation of either Proposer or SBCTA.

This Term Sheet does not purport to include all provisions relative to the structure or terms of the proposed transaction or definitive documentation. No binding agreement will exist until all necessary approvals have been obtained, including approval by SBCTA’s board of directors, and the parties have executed and delivered a definitive Contract and any related agreements.

* * *

Please note the following:

- SBCTA intends to prepare the Contract on the basis of this Term Sheet. As necessary, additional and customary provisions, including “boilerplate” and legally required provisions, may be added to the Contract if not included in this Term Sheet.
- To the extent practical, the Contract will be drafted using the principles of brevity and clarity in order to facilitate agreement and later contract compliance and administration.
- Provisions are presented in the approximate order in which they would appear in the Contract.

Ref.	Subject	Terms
Essential Terms		
1.	Parties	The Contract will be entered into between SBCTA and the Design-Builder.
2.	Role of Omnitrans; the Lead Operator and Entering Into the Operations Contract	<p>Prior to execution of the Contract SBCTA will make arrangements with Omnitrans as necessary to give effect to those provisions which concern operational matters that fall within Omnitrans’ and not SBCTA’s jurisdiction.</p> <p>Omnitrans will be a participant alongside SBCTA throughout all stages of the procurement process. Design-Builder will be required to interface with and respond to comments from Omnitrans at all stages through and during implementation.</p> <p>Design-Builder will be required to retain Lead Operator to provide services from construction through testing and commissioning. As a condition to Project completion, the Lead Operator will enter into a separate Operating Contract with Omnitrans. The form of Operating Contract between the Lead Operator and Omnitrans will be provided with the RFP, and which will be subject to comment and suggested modification from the Design-</p>

⁸ **Note to Proposers:** SBCTA anticipates that the initial release of the RFP will include this Design-Build Contract Term Sheet. The full form of Design-Build Contract, which will be materially consistent with this Design-Build Contract Term Sheet, will be released by subsequent Addendum during the Pre-Proposal Period.

Ref.	Subject	Terms
		Build Teams during the Pre-Proposal Period. The Lead Operator will assume operating responsibility for the Operating System for a five (5) year period under the Operating Contract.
3.	Statement of Purpose	<p>To:</p> <ul style="list-style-type: none"> enable the Design-Builder to design, build, test, and commission a tunnel connection from the Rancho Cucamonga Metrolink Station to the Ontario International Airport (“ONT”) (the “Project”); include a Lead Operator that will separately enter into a five (5) year contract with Omnitrans to operate the Project at the conclusion of construction, testing, and commissioning; and provide for protections of the public interest in connection with the Project. <p>The Contract may otherwise forego the inclusion of recitals.</p>
4.	Construction of the Contract	Necessary provisions to confirm Contract’s integrated and binding nature, inclusive of Exhibits and the Technical Provisions (together with the Contract, the “ Contract Documents ”), and the integration of provisions required by law (including FTA provisions and FAA provisions relevant to ONT).
Formation of Contract		
5.	Grant of Rights	<p>SBCTA will grant the Design-Builder the right, and the Design-Builder will accept the obligation, to design, build, operate and maintain the Project. The Design-Builder’s associated rights of access to and use of the site are detailed further below under the heading “Project Site”.</p> <p>SBCTA’s grant of rights may constitute a license, right of entry and use, and/or other arrangement, but it will exclude interests in real property such as ownership or a leasehold. SBCTA or other governmental authorities will hold any real property interests as indicated under the heading “Ownership”.</p>
Assurances and Undertakings		
6.	Reference Materials and Due Diligence	<p>Subject to Supervening Events provisions, Design-Builder:</p> <ul style="list-style-type: none"> will acknowledge all information provided by SBCTA during the Proposal process up to the execution of the Contract will be deemed to be reference material provided for information and not reliance, without representation or warranty and will at all times be responsible for conducting Project due diligence in accordance with the Baseline Standard of Practice.
7.	General Undertakings	<p>The Design-Builder to undertake to perform all Work (including design, construction, operation, and maintenance activities) and to deliver the Project in compliance with:</p> <ul style="list-style-type: none"> the Contract, the Exhibits (listed at the conclusion of this Term Sheet) and various technical provisions addressing Project administration, design, construction, operations, maintenance, vehicle, and other relevant technical disciplines (the “Technical Provisions”); applicable laws;

Ref.	Subject	Terms
		<ul style="list-style-type: none"> permits and approvals, including the NEPA/CEQA environmental approvals once received; agreed technical standards incorporated by reference in such specifications and the Contract ("Project Standards"); and otherwise, the Baseline Standard of Practice. <p>The "Baseline Standard of Practice" will be defined as the degree of skill, care, prudence, foresight, and practice that would reasonably and ordinarily be expected from time to time of a skilled and experienced professional designer, engineer, constructor, manufacturer, installer, maintainer, or operator, as applicable, engaged in the same (or if none, a reasonably equivalent) type of activity or activities in North America as that of the Design-Builder, or any other Person to which such term relates, never being less than the standard applied by the Design-Builder or such Person, or any of its or their Affiliates, under the same or similar circumstances on other projects.</p>
8.	Specific Undertakings	<p>The Contract will include lists of affirmative and negative Design-Builder undertakings.</p> <p>To promote brevity and clarity undertakings referenced elsewhere in this Term Sheet may be consolidated into this list if SBCTA determines that such undertakings do not benefit from being drafted as stand-alone provisions.</p> <p>The Design-Builder's undertakings will include:</p> <ul style="list-style-type: none"> except where expressly provided otherwise in the Contract, acceptance of all risks, responsibilities, obligations, costs and liabilities in connection with delivering the Work, including the absence of any public subsidy (excluding the agreed payment obligations). maintenance of and compliance with licenses, certifications, and accreditations; efforts to execute required certifications and keeping SBCTA informed of any potential or actual debarment; minimizing any material adverse impacts of the Work and repair or pay for the repair of any damage caused by the Work; remedy defects and non-conforming work; cooperation and coordination with SBCTA and other entities with jurisdiction in matters relating to the work, including for the purposes of oversight; performing work taking into account the context of certain adjacent facilities and transportation services, projects, and communities, including responsibility for designing to and integrating with identifiable interfaces, and cooperation and coordination with those responsible for adjacent facilities and projects and adjacent communities (where applicable in accordance with relevant third party agreements or MOUs as provided for in Section 18); and avoiding interrupting or impeding ONT facilities, utilities, or operations, and avoiding any other unnecessary adverse impacts or

Ref.	Subject	Terms
		disruptions to adjacent facilities and transportation services, projects, and communities.
Initiation of Work, Scheduling and Completion		
9.	Sequencing of the Work	<p>The Design-Builder's authority to proceed with the scope of work will be sequenced through issuance of sequential notices to proceed (each an "NTP") and achievement of work elements and other key conditions.</p> <p>The Design-Builder will be prohibited from undertaking any element of the Work prior to it having satisfied the relevant conditions precedent, including as reflected by issuance of an NTP.</p> <p>The NTPs, associated conditions precedent, sequencing and division of the work, and related key events, are set out in Attachment A to this Term Sheet.</p>
10.	Commencement and Completion Mechanics	<p>The Contract will set out procedural mechanics for satisfying conditions precedent to issuance of each NTP or for completion of work, such as substantial completion of the tunnel and systems. These mechanics will, as applicable, reference more detailed requirements listed in the Technical Provision Exhibits, but are generally expected to comprise the following NTPs:</p> <ul style="list-style-type: none"> • "NTP-1" will authorize final design work. • "NTP-2" will authorize tunnel boring machine procurement. • "NTP-3" will authorize certain early works prior to the commencement of construction. • "NTP-4" will authorize construction work. • "NTP-5" will authorize Vehicle procurement. • "NTP-6" will authorize testing and commissioning of the Operating System, following completion of the NTP-4 Work ("Substantial Completion") • "Readiness for Revenue Service" will be achieved upon completion of the NTP-6 Work, including all necessary approvals for the commencement of revenue service. Execution of the Operations Contract by the Lead Operator will be a condition to Readiness for Revenue Service.
11.	Deadlines	<p>The following deadlines will apply to elements of the Work. Each deadline is intended to provide additional time beyond the Design-Builder's scheduled/ anticipated completion dates before such deadline would be missed.</p> <ul style="list-style-type: none"> • NTP-1 Deadline - no later than [April 30, 2024]. • NTP-5 Issuance Deadline (notice received from SBCTA authorizing Design-Builder to proceed with NTP-5 Work) - no later than 180 days after issuance of NTP-1. • NTP-5 Partial Completion Deadline (approved final inspection of Vehicles prior to releasing for shipment) - no later than 30 months after completion of NTP-1 Work. • NTP-5 Completion Deadline (all vehicles delivered to the Project Site and ready for testing) - no later than 24 months after issuance

Ref.	Subject	Terms
		<p>of NTP-4.</p> <ul style="list-style-type: none"> Substantial Completion Deadline (completion of NTP-4 Work) - no later than [November 30, 2027]. Final Completion Deadline (achieve Final Completion) - no later than [March 31, 2028]. Readiness for Revenue Service Deadline - no later than [April 30, 2028]. <p>Deadlines may be extended only through a Change or as the result of a Supervening Event.</p>
12.	Consequences for Missed Deadlines	<p>Failure to achieve any of the following deadlines may result in default and termination.</p> <ul style="list-style-type: none"> NTP-5 Completion Deadline Substantial Completion Deadline Final Completion Deadline Readiness for Revenue Service Deadline <p>Failure to complete the relevant Work by the applicable deadlines set forth in Section 11 will result in performance deductions from payments otherwise due to the Design-Builder.</p>
13.	Vehicle Procurement	<p>The Design-Builder will be responsible for procuring and for maintaining (until handover to the Lead Operator under a separate Operating Contract) a fleet of vehicles capable of meeting or exceeding the Contract performance specifications (including as set out in the Technical Provisions). Ownership and control of the vehicle fleet is addressed below under the "Ownership" heading.</p> <p>Vehicle procurement will be conducted as NTP-5 Work within the timelines established by the relevant deadlines.</p> <p>The minimum vehicle requirements will be as set out in the Technical Provisions. The Design-Builder shall be responsible for acquiring a sufficient number of vehicles to satisfy the requirements of the Technical Provisions.</p> <p>Each vehicle procurement must include an option for the acquisition of additional vehicles with the maximum duration permitted by the FTA / USDOT.</p> <p>In undertaking the NTP-5 Work the Design-Builder will comply with the relevant deadlines referenced in Section 11. Failure to adhere to such deadlines may have the consequences indicated in Section 12.</p>
Compliance with Law, Permits, and Third-Party Agreements		
14.	Compliance with Law	<p>The Design-Builder's obligation to comply with law will include any "Change in Law", meaning the coming into effect of the enactment, promulgation or adoption of any law, a binding change in interpretation of any law, or any modification or repeal of any law that is materially different from or inconsistent with law previously in effect.</p>

Ref.	Subject	Terms
		<p>In limited circumstances, the Design-Builder will be entitled to claim relief and/or time and compensation as a result of a Change in Law that constitutes a Supervening Event. For purposes of the Supervening Event provisions generally, Changes in Law will not include:</p> <ul style="list-style-type: none"> any change in interpretation or application of law existing at the time of execution of the Contract which regulates or governs any aspect of the vehicles the Design-Builder elects to procure, including any autonomous operation of such vehicles; any law with which the Design-Builder is obligated to comply as a result of it being made subject to a regulator for the vehicles due to the Design-Builder's exercise of discretion as to how it performs the work, including an election to use fully-autonomous vehicles; any change which was (in the same or substantially similar form and substance) pending, passed or adopted at the time the Contract was executed; the exercise of discretion and oversight by a governmental authority in any permitting or approval process; any change in Federal, State, or local trade, export, customs or sanctions law, labor, tax, building, construction, or zoning law, which does not also satisfy the requirements to be a Compensable Change in Law below. <p>All other Changes in Law which qualify as Supervening Events will be treated as a Relief Event, and not a Compensable Event, in accordance with Section 42 (each a "Non-Compensable Change in Law"), unless such Change in Law applies only to, or the effects of which principally apply to, the Project and/or to the Design-Builder and the following apply (in which case it will be a "Compensable Change in Law"): </p> <ul style="list-style-type: none"> it is intended to serve a discriminatory purpose, for which purposes generally applicable regulation of similar innovative facilities and services will not be considered discriminatory; and it has an adverse impact on the Design-Builder.
15.	Project Standards	The Design-Builder's obligation to comply with Changes in Law will include compliance with Project Standards where compliance with updates to standards specified in the Contract is necessary to maintain compliance with law.
16.	NEPA/CEQA	<p>The lead agency for NEPA review is FTA. The lead agency for CEQA review is SBCTA.</p> <p>SBCTA anticipates that Section 163 of the FAA Reauthorization of 2018 ("Section 163") may apply to limit FAA approval authority over the proposed Project improvements at ONT.</p>
17.	Permitting	The Design-Builder shall be responsible for securing and complying with all permits (other than NEPA and CEQA) required to undertake the Work. In undertaking applications for permits, the Design-Builder shall involve and keep SBCTA informed.
18.	Third-Party Agreements	SBCTA presently anticipates entering into Third-Party Agreements with the: City of Ontario; City of Rancho Cucamonga (concerning the Project

Ref.	Subject	Terms
		<p>generally); City of Rancho Cucamonga (together with Brightline, concerning development at the Rancho Cucamonga Station); and OIAA; with respect to the conduct and coordination of the work.</p> <p>The Design-Builder will comply with the terms of any such third-party agreement, provided that any new or modified third-party agreement added after the effective date by SBCTA will be subject to Design-Builder's prior approval, not to be unreasonably withheld, to the extent (and only to the extent) that such:</p> <ul style="list-style-type: none"> imposes an obligation on the Design-Builder which exceeds its prior obligations under this Contract and such obligation would result in a risk or liability which is not accounted for through the relief and compensation afforded under the Contract.
Project Site		
19.	Early Access	<p>Prior to securing access to and use of any part of the Project Site in accordance with Section 20 and subject to such conditions SBCTA may require (including the Design-Builder having in place all necessary insurance coverage), SBCTA will, at the Design-Builder's written request and to the extent it is able, grant the Design-Builder with early access to and use of parts of the Project Site (to the extent such are within the limits of the potential SBCTA-provided property) for purposes of conducting due diligence and otherwise facilitating, and preparing for, the Design-Builder's performance of the Work.</p>
20.	Project Site, Access and Use	<p>The "Project Site" will be comprised of the outmost limits of the Project necessary for the Work including:</p> <ul style="list-style-type: none"> the area within which the Project will be constructed and conducted as identified in accordance with any environmental decision (the "ROW Limits"); additional ROW acquired pursuant to procedures for the acquisition of property by SBCTA on the Design-Builder's behalf to be set out in an Exhibit to the Contract); other SBCTA-provided property (if any); and the tunnel portal and shaft construction area, road approaches, areas through where ditches and channels are to be executed. <p>SBCTA will make the Project Site available to the Design-Builder pursuant to the grant of rights under Sections 5 and 21.</p> <p>The parties will acknowledge and agree that any depiction or anticipation of the Project Site in the Contract at execution will reflect multiple possible alternatives under consideration as of the execution date pursuant to CEQA/NEPA and not an impermissible agreement with respect to any particular alternative.</p>
21.	Design-Builder Rights to Site	<p>SBCTA's grant rights to the Design-Builder under Section 5 will include a right to access and use, or the equivalent, for the Project Site.</p> <p>The Design-Builder's rights to the Project Site:</p> <ul style="list-style-type: none"> will be subject to any applicable rights of other persons, restrictions,

Ref.	Subject	Terms
		<p>or qualifications, including those set out in the Contract, Law, or disclosed in any reference information;</p> <ul style="list-style-type: none"> • will be non-exclusive outside of the tunnel and limited to conditions set out in each NTP as issued; and • include customary associated obligations (to the extent not otherwise addressed in the Technical Provisions) with respect to matters such as site security, maintenance and repair, and limiting street and lane closures. <p>During the period of the Design-Builder's access to and use of the Project Site, the Design-Builder shall have sole responsibility for risk of damage and loss, subject to the terms of the Contract.</p>
22.	Additional Properties	<p>SBCTA will entertain requests for acquisition of certain other parcels ("Additional Properties") provided Design-Builder provides notice and can demonstrate to SBCTA's reasonable satisfaction, that such Additional Properties are required for permanent improvements for the Project or for temporary construction or conduct of the Work, and that acquisition of Additional Property is otherwise consistent with applicable law and governmental approvals.</p> <p>Design-Builder shall support any requests for acquisition of Additional Properties with such information as may be reasonably required by SBCTA. In all cases, SBCTA's obligation to provide such access is subject to the following conditions:</p> <ul style="list-style-type: none"> • if requested by SBCTA, Design-Builder's providing an analysis regarding alternative courses of action; • SBCTA's agreement that the property acquisition is in the best interest of the Project; and • Design-Builder's providing such evidence as SBCTA may require to enable issuance of a determination of necessity. <p>Except as a consequence of a Supervening Event, the Design-Builder will not be entitled to any increase in the Contract Price or any time extension as a result of any risk, delay, cost, liability or obligation that arises due to the acquisition, or attempted acquisition, of any Additional Properties. Design-Builder shall pay directly all costs in connection with acquiring Additional Properties and additional governmental approvals. Such costs will be determined in accordance with the California Relocation Assistance Law (Cal. Gov. Code Sections 7260 et. seq.), the Uniform Act, the California Eminent Domain Law (Cal. Code of Civ. Proc. Sections 1230.010 et seq.), and SBCTA and FHWA and Caltrans policies for federal-aid projects. If SBCTA incurs any such costs on Design-Builder's behalf, SBCTA may submit invoices for such costs to Design-Builder, in which case Design-Builder shall pay such invoices within ten (10) days of SBCTA's submission to Design-Builder.</p> <p>The process for scheduling provision of site access as described above shall apply to Additional Properties except that (i) SBCTA shall provide Design-Builder with notice of the minimum time necessary for provision of access upon its approval of the acquisition, which shall be no less than</p>

Ref.	Subject	Terms
		fifteen (15) months, and (ii) delay in acquisition is not considered to be caused by SBCTA except to the extent that the delay was directly attributable to negligent actions affirmatively taken by SBCTA.
Design and Construction		
23.	Environmental	<p>The Design-Builder is responsible for compliance with all environmental requirements (being environmental laws and associated government approvals, including pursuant to NEPA/CEQA and any mandated mitigation measures), including as provided in the Technical Provisions.</p> <p>The Design-Builder is responsible for all identification, investigation, removal, treatment, storage, transportation, management, and/or disposal of hazardous materials.</p>
24.	Generator Status	<p>The Design-Builder will not be considered the sole generator and arranger of:</p> <ul style="list-style-type: none"> hazardous materials that existed on the site prior to its occupancy; and any release of hazardous materials by SBCTA or a third party that constitutes a Supervening Event. <p>However, the foregoing does not alter the Design-Builder's obligations to undertake hazardous materials management.</p> <p>The Design-Builder will be considered the generator and assume generator and arranger responsibility any release(s) of hazardous materials by itself or its agents or for any conditions which it is otherwise responsible pursuant to the indemnity.</p>
25.	Utilities	<p>SBCTA anticipates conducting advance relocation of all dry utilities. Specific provisions regarding notice of required relocations will be included in the Contract.</p> <p>The Design-Builder is responsible for all utility work associated with wet utilities that is required to complete the Project, including as provided in the Technical Provisions.</p> <p>As part of its general undertakings, the Design-Builder to undertake that it will not impermissibly interrupt operations, utilities or facilities at ONT or along the right of way.</p>
26.	Site Conditions	<p>Without limiting the Developer's notice obligations with respect to Supervening Event provisions described in Section 42, if the Design-Builder discovers or encounters during the course of the Work any subsurface or physical site conditions or "Differing Site Conditions," which will be comprised of the encountering or discovery of any:</p> <ul style="list-style-type: none"> utility condition not identified through required due diligence under Section 6; and buried obstruction of man-made origin (other than a utility of any kind) that requires specialized or large-scale excavation equipment or blasting for removal, latent naturally occurring geological conditions (excluding

Ref.	Subject	Terms
		<p>groundwater),</p> <ul style="list-style-type: none"> any environmental impairment (as defined) in soil or surface water, or in groundwater to the extent at concentration levels above the applicable value permitted by Law, requiring Design-Builder's management of hazardous materials; <p>to the extent such were not known by the Design-Builder prior to execution of the Contract and could not have reasonably been identified or anticipated.</p> <p>Design-Builder will be required immediately to:</p> <ul style="list-style-type: none"> notify SBCTA, stop Work in and secure the area absent contrary instructions, and provide SBCTA with details regarding the location and nature of the discovery or encounter, the Design-Builder's proposed course of action, and any required notices to any entities that may have jurisdiction. <p>Failure to timely notify SBCTA will bar the Design-Builder from relief. SBCTA will use reasonable efforts to notify the Design-Builder within five (5) days after receiving the Design-Builder's notice as to whether Work should be resumed, whether further investigation is required, and/or whether additional action is required to be undertaken by the Design-Builder. SBCTA may require the Design-Builder to recommence Work in the area at any time, even though an investigation may still be ongoing. The Design-Builder shall promptly recommence Work in the area upon notice from SBCTA to do so.</p>
27.	PCC Section 7104 Compliance	<p>The Contract will incorporate terms and conditions to harmonize the agreed site condition risk allocation with Public Contract Code Section 7104.</p> <p>Such provisions will:</p> <ul style="list-style-type: none"> confirm the parties' agreement that certain defined terms and events, notice provisions, and risk allocation provisions are intended to constitute the relevant "change order" "procedures described in the contract" and therefor constitute the Design-Builder's sole right to claim and receive any extension of time, relief, and/or compensation sure to any condition that is subject to Public Contract Code Section 7104, including 7104(b); and waive the Design-Builder's obligation to suspend work in certain circumstances when site conditions are encountered so as to allow the work to proceed and the Design-Builder to exercise its obligations with respect to responding to such site conditions.
Ownership		
28.	Ownership of Vehicles	<p>With respect to Vehicles, ownership of and title to each Vehicle which has been procured by the Design-Builder shall immediately and automatically vest in the Omnitrans, free of all Encumbrances, upon payment for the same. The terms of purchase shall be set out in the Contract.</p>

Ref.	Subject	Terms
29.	Work Product and Intellectual Property (IP)	<p>All submittals, and other information or material of any kind, in any medium, acquired, collected, created or prepared by on behalf of the Design-Builder in the performance of the Work, including any draft, in each case to the extent acquired, collected, developed or prepared in whole or in part during performance of and arising out of the Work, shall be considered "Work Product", in which the Design-Builder transfers ownership rights and claims to SBCTA upon creation, and all such Work Product shall be the property of SBCTA. Notwithstanding ownership of Work Product by SBCTA, risk of loss associated with Work Product shall remain with the Design-Builder until the end of the Term. The Design-Builder shall execute such documents and take such further actions as may be reasonably requested by SBCTA to give effect to the foregoing.</p> <p>Design-Builder shall grant SBCTA and any successor operator, its and their successors and assigns, a fully paid up, perpetual license to use any Intellectual Property held, used developed, owned, or provided by the Design-Builder (including through third parties) in connection with the Project for the purposes of:</p> <ul style="list-style-type: none"> enabling connectivity between the system and ONT (or any adjacent project, any adjacent facility, or any existing or future public transportation facilities) and/or completing, operating, modifying, expanding, maintaining and/or decommissioning the Project following the early termination date or the end of the Term. <p>With respect to Design-Builder's Intellectual Property comprised of software (other than off the shelf or shrink-wrapped software, for which the Design-Builder shall grant SBCTA the same rights as afforded the Design-Builder under the Design-Builder's license), the foregoing license with respect to software and source code shall be limited to access to the application programming interfaces necessary for the purposes stated above. Design-Builder will not take any action (or refrain from taking any action) with respect to Intellectual Property in a manner that is calculated or intended to directly or indirectly prejudice, frustrate, or interfere with the purposes stated above.</p> <p>SBCTA, in its discretion, may make certain other intellectual property available to the Design-Builder for use on the Project, pursuant to a license, grant, assignment or other arrangement, to be determined by SBCTA, acting reasonably.</p>
Economic Matters		
30.	Payment Provisions	<p>The Contract is a design-build contract with a total lump sum price. Design-Builder will acknowledge that the lump sum amount includes all costs necessary to complete the Work without any right to adjustment, except as specified. Such lump sum price, as it may be adjusted under the Contract, is the total amount payable by SBCTA to the Design-Builder for completion of the Work, the ("Contract Price"). The Contract Price may be adjusted to:</p> <ul style="list-style-type: none"> account for compensation payable with respect to any Change Order, Directive Letter, Supervening Event, or for a sharing of cost

Ref.	Subject	Terms
		<p>savings from a reduction in the Design-Builder's scope of Work.</p> <p>Except as otherwise provided, Design-Builder will not be entitled to Contract Price increases, time extensions, or the right to terminate the Contract for any delay in NTP issuance caused by its own acts or omissions or those of any related entity. Contract Price increases will be proportionally amortized over all the Work and shall be the property of SBCTA.</p> <p>Submission of all documents, information, and materials indicated in the Contract, without false, inaccurate, or materially misleading information or certifications, are conditions precedent to SBCTA's obligation to make the relevant payments. SBCTA may make customary deductions of payment as required by law and as enumerated under the Contract. Failure to deduct such sums from any progress payments will not constitute a waiver of SBCTA's rights to such sums or to any related breach or default. Any amounts that Design-Builder owes to SBCTA under the Contract shall earn interest from the date such amounts are due to SBCTA at the lesser rate of ten percent (10%) per annum, or (ii) the maximum rate allowable under Law.</p> <p>SBCTA will not pay for materials not yet unincorporated in the Work unless such materials are:</p> <ul style="list-style-type: none"> • delivered, promptly stored by Design-Builder in bonded storage at a location approved by SBCTA, and accompanied by certified bill; • meet the requirements of the Contract, become the property of SBCTA, and are delivered with proper bills of sale or other written instruments (in a form acceptable to SBCTA) conveying title to SBCTA free and clear of all liens; • deducted from succeeding invoices if material is subsequently lost, damaged, or unsatisfactory; and • invoiced properly, in that payment to the Design-Builder has not exceed the amount paid by the Design-Builder as evidenced by a bill of sale supported by a paid invoice. <p>Progress payments will be made based on duly certified and approved estimates of the Work performed. SBCTA will retain five percent (5%) of the amount of each such estimate as retainage until the Work is complete and accepted ("Retainage"). SBCTA will make partial payments of Retainage amounts for distinct portions of the Work that have been, in the sole opinion of SBCTA, satisfactorily completed by the Design-Builder. The Design-Builder may request such a partial release of retainage for Work completed by any Subcontractor. The percentage of retainage specified in the Design-Builder's Subcontracts for the Work must not exceed five percent (5%).</p> <p>Except as provided above, no portion of the Retainage will be released until all liquidated damages have been paid to SBCTA, Design-Builder has established to SBCTA's satisfaction that there are no additional, anticipated liquidated damages owed to SBCTA, and no Design-Builder</p>

Ref.	Subject	Terms
		<p>default has occurred or remains uncured. SBCTA will release 50% of the Retainage (less the amount of prior releases) 30 days after Substantial Completion and will release all remaining Retainage (other than amounts eligible to be withheld) on the date that Final Payment is due.</p> <p>Final payment for all Work shall not become due to Design-Builder under the Contract until Design-Builder submits an Application for Final Payment along with all required supporting documentation to SBCTA, showing the proposed total amount due to Design-Builder, including Retainage. If after Final Payment, it is determined through the claims process that either Party is entitled to payment from the other Party, such Party shall pay the amounts determined to be owing to the other Party within ten (10) Business Days after such determination.</p> <p>Design-Builder will promptly pay Subcontractors upon receipt of payment from SBCTA and certify such payment with each invoice submitted per No. 39 below. Any breach of prompt payment requirements will subject Design-Builder to the penalties, sanctions and other remedies under Law.</p> <p>Portions of any payment to Design-Builder that are identified as undisputed by SBCTA will be paid in accordance with Pub. Cont. Code § 9204 as required. Disputed payments will be determined pursuant to an agreed-upon dispute resolution procedure, including informal processes and mediation. Upon resolution of any payment dispute, each Party shall pay any amount owed to the other Party. Design-Builder's obligation to perform the Work in accordance with the Contract is not relieved if SBCTA does pay disputed amounts.</p> <p>SBCTA's release of any payment or Retainage will in no way constitute "acceptance" of the Work or otherwise relieve the Design-Builder of any obligation with respect to such portion of the Work.</p>
31.	Invoicing Mechanism	<p>Design-Builder will submit to SBCTA, on or before the 25th day of each month, a draft invoice and a draft invoice certificate, using forms attached as an Exhibit, that includes the portion of the Work actually completed, documentation establishing the estimated value of the Work completed and showing invoiced materials adhere to established quality standards, amounts paid to Subcontractors along with a Prompt Pay Certification in a form attached as an Exhibit, and any other supporting documentation reasonably requested by SBCTA. Design-Builder will also require a Prompt Pay Certification in a form attached as an Exhibit from Subcontractors.</p> <p>Invoicing documents will be reviewed at periodic meetings held between the Design-Builder and SBCTA ("Progress Meetings") and the draft invoice will be signed by the Parties' representatives indicating the portions which are approved and the proposed total payment amount. Within seven (7) days after the Progress Meeting, Design-Builder will submit an updated form of invoice based on the draft invoice reviewed at the Progress Meeting. Within fifteen (15) days of receipt of such invoice, SBCTA will review it, notify Design-Builder of the approved amount for</p>

Ref.	Subject	Terms
		<p>payment, and specify the reason for any disapproved amounts. Such disapproved amounts may be included in the next month's invoice after any deficiencies are corrected.</p> <p>Within thirty (30) days after SBCTA's receipt of the updated invoice, SBCTA will pay the approved amount less any amounts that SBCTA is entitled to withhold or deduct under the Contract.</p>
32.	Tax	<p>The Design-Builder will pay, prior to delinquency, all taxes levied or imposed on it or otherwise in respect of or arising from the Design-Builder's interests in and rights to all Project and Work Areas, the Project and the Contract.</p> <p>SBCTA will not be responsible for any taxes of the kind referenced above or otherwise levied or imposed on the Design-Builder.</p>
Public Interest Protections		
33.	Bonds and Other Security	<p>Payment and performance bonds in the full amount of the construction contract value will be retained by SBCTA from the commencement of the NTP-1 Work until Readiness for Revenue Service.</p> <p>SBCTA will be entitled to request additional security and/or guarantees in the event that a material adverse credit event affects the Design-Builder.</p>
34.	Remedial Plans	<p>SBCTA reserves the right to request a remedial plan in the event that:</p> <ul style="list-style-type: none"> there are material defects in the Work; or a Design-Builder default or other material fault event has occurred and not been cured. <p>In such event, SBCTA also reserves the right to increase oversight of the project and/or suspend the Work.</p>
35.	Warranties	<p>The Design-Builder shall warranty all elements of the Project (except as otherwise provided below) for a period ending two (2) years after Substantial Completion.</p> <p>The Design-Builder will also be obligated to secure and assign to SBCTA or Omnitrans (as applicable) all warranties from manufacturers.</p> <p>The Design-Builder shall obtain manufacturers extended warranties for all Vehicles for a period ending seven (7) years from the date of delivery.</p>
36.	Inspection, Oversight and Record Keeping	<p>SBCTA and its authorized agents will have an unrestricted right to enter the Project Site for reasonable inspection purposes.</p> <p>The Design-Builder will maintain all project records and make such available for inspection by SBCTA upon reasonable notice from SBCTA.</p>
Subcontracting, Personnel, Labor, and Legal Requirements		
37.	Personnel	<p>Key Personnel identified in the RFQ/RFP shall be seconded to or employed by the Design-Builder at all relevant times, occupying the role and performing the function of their position.</p>

Ref.	Subject	Terms
		The Design-Builder shall not remove or replace Key Personnel without SBCTA's prior approval, provided that removal without notification may occur as required by Law or pursuant to good industry practice.
38.	Subcontracting	<p>The Design-Builder will be responsible for the engagement and management of all subcontracts. Subcontracting of the work will not limit the Design-Builder's liability.</p> <p>All subcontracts must include terms required by law or necessary to comply with the Contract.</p> <p>The Design-Builder shall have the right to have work directly or indirectly performed by affiliates only if such affiliate is qualified, experienced and capable in the performance of such part of the work and such affiliate shall execute a subcontract that is in form and substance similar to subcontracts that are being used by the Design-Builder for similar work or services with unaffiliated subcontractors.</p>
39.	Workforce and Labor Requirements	<p>The Design-Builder will provide representations that it will not discriminate on in the selection of subcontractors and the performance of Work and will comply with law with respect to the same, failure of which will be a Design-Builder breach. These provisions shall be included in all subcontracts.</p> <p>The Design-Builder shall comply will all applicable laws relating to EEO and nondiscrimination.</p> <p>The Design-Builder will comply, and cause its subcontractors to comply, with the California Labor Code. Pursuant to the prevailing wage laws, all workers shall be paid at least the minimum hourly wage, as determined by the California Department of Industrial Relations and any superseding federal law or regulation.</p>
40.	DBE Program	As a sub-recipient of Federal Transit Administration (FTA) funds, SBCTA is obligated to comply with the regulations set forth by Omnitrans, the direct recipient of federal funds. As Omnitrans has established a Race-Neutral FTA DBE program, there is no Race Conscious DBE goal on this project; however, the Omnitrans 2.9% Race Neutral Goal is applicable to this Project. As the sub-recipient, SBCTA highly encourages the participation of DBE contractors and the utilization of DBE subcontractors in this Project. Any DBEs on this Project will be used to satisfy Omnitrans' overall agency DBE goal of 2.9%.
Changes and Supervening Events		
41.	Changes	<p>SBCTA may, in its discretion, submit a written request to the Design-Builder to propose a change to the means, methods, or scope of the Work (a "Change") through issuance of a ("Change Proposal") to the Design-Builder.</p> <p>The issuance of a Change Proposal will be subject to the Design-Builder's consent which shall not be unreasonably withheld. If the Parties agree on the terms of such request, they will, in a form prepared by SBCTA, memorialize the agreement in writing.</p>

Ref.	Subject	Terms
		Absent agreement on the terms of a Change Proposal, SBCTA may compel a Change by a directive order through issuance of a "Directive Letter" to the Design-Builder. Such order will constitute a Compensable Event.
42.	Supervening Events	<p>The Contract will define two categories of "Supervening Events", Relief Events and Compensable Events (each as described below) which will entitle the Design-Builder to relief from its obligations and/or schedule relief and compensation. All Supervening Event claims will be subject to timely notice, use of a form of claim attached as an Exhibit, efforts to mitigate, and an absence of Design-Builder fault.</p> <p>"Relief Events" will relieve the Design-Builder of its affected obligations and entitle Design-Builder to deadline schedule relief, but not result in compensation. Relief Events will be limited to:</p> <ul style="list-style-type: none"> • a Non-Compensable Change in Law (as previously defined); • any unusual and unreasonable delay by a Utility or Railroad in performing any work required by it; and • force majeure. <p>"Compensable Events" will relieve the Design-Builder of its affected obligations, and also result in compensation and deadline schedule relief. Compensable Events will be limited to:</p> <ul style="list-style-type: none"> • Differing Site Conditions (as previously defined); • Compensable Change in Law (as previously defined); • material breach of the Contract or law by SBCTA; • failure by SBCTA to provide access to the Project Site as and when it is obligated to do so; • Generator Status Liability (as previously defined); • Species and Remains (as previously defined); • subject to Design-Builder's timely submission of a complete submittal or application meeting all applicable quality requirements, the failure of a Governmental Entity of Authority Having Jurisdiction (other than a Utility or Railroad) to review submittals and/or issue any Permit within the timeframes set forth in the applicable Third Party Agreement; and • imposition of a new or modified Third Party Agreement. <p>Where a Supervening Event affects or will affect the Design-Builder's performance of obligations under the Contract, the Design-Builder will be relieved from the performance of such obligations only to the extent and duration that the Design-Builder's inability to perform such obligations is directly resultant from the Supervening Event.</p> <p>Where a Compensable Event affects or will affect achievement of a deadline, the relevant deadline will be extended on a day for day basis to reflect the period of delay.</p>
Indemnity and Insurance		

Ref.	Subject	Terms
43.	Insurance ⁹	<p>The Contract, by reference to an insurance exhibit, will require the Design-Builder to furnish insurance coverage and limits as follows:</p> <ul style="list-style-type: none"> (i) Builder's Risk (course of construction) policy [covering all real and personal property related to the construction of the Project] in an amount equal to the contract value. (ii) Commercial General Liability policy written on an occurrence form that shall provide coverage at least as broad as the coverage provided by ISO form CG 00 01 with limits of not less than \$2,000,000 per occurrence and 4,000,000 general aggregate. (iii) Commercial Umbrella/Excess Liability policy or policies [covering bodily injury, personal injury, property damage, and advertising injury liability coverage at least as broad as the primary coverages set forth above with limits of not less than \$100,000,000 per occurrence and general aggregate]. (iv) Commercial Automobile Liability policy with limits of liability of not less than \$10,000,000 combined single limit for Design-Builder and Subcontractors. (v) Worker's Compensation and Employer's Liability insurance [for Design-Builder and Subcontractors as required by applicable Law, and employer's liability insurance having coverage limits of \$1,000,000 for each accident, \$1,000,000 for disease (each employee), and \$1,000,000 for disease (policy limit)]. (vi) Professional Liability errors and omissions insurance [in one or more project-specific policies, at Design-Builder's discretion]. Limits shall be no less than \$25,000,000. (vii) Pollution Liability policy with a total limit of liability of no less than \$ 10,000,000 per claim, or per occurrence, and \$ 10,000,000 in the aggregate per policy period. (viii) Railroad Protective Liability coverage as may be required by UPRR pursuant to any Third-Party Agreement or otherwise as a condition of the railroad's consent for entry into railroad facilities or property. (ix) Cyber Liability policy of not less than \$3,000,000. (x) Deductibles or self-insured retention above \$10,000 or one percent (1%) of the contract value, whichever is less, shall be declared to and approved in writing by SBCTA's Risk Manager or are not allowed. (xi) All insurance coverage required to be provided by Design-Builder, with the exception of automobile liability and worker's compensation, shall apply specifically and exclusively for the Project and extend to all aspects of the Work, with coverage limits dedicated solely to the Project. Use of other insurance programs

⁹ **Note to Proposers:** Insurance requirements are tentative, assuming insurances are to be provided by the Design-Builder (in which case a project-specific policy will be permitted, but not required). All Principal Subcontractors will be required to be covered by and/or provide similar coverages as specified for the Design-Builder. Alternatively, SBCTA continues to evaluate whether an Owner-Controlled Insurance Program might be preferable and reserves the rights to modify these insurance requirements to allow for the same.

Ref.	Subject	Terms
		<p>is acceptable, provided that coverage under such programs provides dedicated Project-specific limits and identified premiums and meets all requirements described in contract.</p> <p>(xii) Additional Insured Coverage - All policies, except those for Workers' Compensation and Professional Liability insurance, shall name San Bernardino County Transportation Authority (SBCTA), City of Rancho Cucamonga, Southern California Regional Rail Authority, Ontario International Airport Authority and any other entity required by contract, permit, easement or SBCTA, their respective officers, directors, members, employees, and agents, as additional insureds ("Additional Insureds"). The Indemnified Parties shall be named, by specific endorsement, as additional insureds using ISO form CG 20 10 10 01 and ISO form CG 20 37 10 01, or their respective equivalent forms. With respect to general liability arising out of or connected with work or operations performed by or on behalf of the CONTRACTOR under this Contract, 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 the indemnified parties to vicarious liability, but shall allow coverage for the indemnified parties to the full extent provided by the policy.</p> <p>Without limiting the generality of the foregoing, the Design-Builder will be required to verify that subcontractors engaged or employed to provide work for the Project will carry and maintain similar insurance set forth in the Contract.</p>
44.	Authority Indemnity	SBCTA will not have any obligation to indemnify the Design-Builder.
45.	Design-Builder Indemnity	<p>The Design-Builder shall indemnify Omnitrans, OIAA, the City of Rancho Cucamonga, the City of Ontario, and SBCTA (each an "Indemnified Party" and collectively, "Indemnified Parties") and each of their employees and officers from and against any and all claims and/or losses arising from the Design-Builder's design and construction of the Project, the Design-Builder's breach of the Contract, and Design-Builder's introduction to or management of hazardous materials at the Project Site or any other land required for construction or operation of the Project. Such claims and losses shall include those that are in respect to:</p> <ul style="list-style-type: none"> • death or personal injury • loss or damage to property • disruption to or interruption of performance of public services and activities • third party claims. <p>Any claim or loss that arises from any of the following shall be excluded from the Design-Builder's indemnity:</p> <ul style="list-style-type: none"> • where the loss was already subject to an indemnity claim from another indemnified party; and • directly caused by a Supervening Event, or fault, fraud or

Ref.	Subject	Terms
		<p>negligence of an indemnified party.</p> <p>With respect to design professional liability, where defense and indemnification obligations with respect to design professionals will be limited to those permitted under CA Civil Code 2782.8, the indemnification will be similarly limited.</p>
Default and Termination		
46.	Design-Builder Defaults	<p>The Contract will include usual and customary events of default by the Design-Builder, subject to applicable notice and cure periods to be agreed by the parties, Design-Builder defaults will include, but be not limited to:</p> <ul style="list-style-type: none"> the Design-Builder breaches any material term, covenant or condition of the Contract; abandonment of the Project; the Design-Builder failure to achieve certain deadlines in accordance with No. 12; the Design-Builder liability to SBCTA for deficiencies or damage exceeds a specified threshold; bankruptcy or insolvency; final legal judgements rendered against the Design-Builder for intentional or reckless misconduct, violation of false claims acts, or criminal activity; disqualification, suspension or debarment.
47.	SBCTA Defaults	<p>Subject to applicable notice and cure periods to be agreed by the parties, SBCTA defaults will be limited to a failure by SBCTA to pay any amount due and owing provided that either:</p> <ul style="list-style-type: none"> SBCTA's obligation to make such payment has been confirmed in a binding settlement agreement or by the issuance of a final, non-appealable court order by a court of competent jurisdiction, and SBCTA subsequently failed to pay such confirmed amount within 30 days of the date required in such settlement agreement or by such court order; or such failure continued undisputed for at least 30 days, the Design-Builder notified SBCTA of such failure, and such failure continued without dispute for a further 30 days.
48.	Remedies upon Default	<p>If a counterparty default is not cured within the applicable cure period, if any, the Contract will grant the non-defaulting party usual and customary remedies including but not limited to termination of the Contract and such other remedies as are included in this Term Sheet.</p>
49.	Termination Events	<p>The Contract may be terminated early in the event of the following (subject to notice and, as applicable, rights to cure):</p> <ul style="list-style-type: none"> Termination for Design-Builder failure to achieve certain deadlines in accordance with No. 12 above Termination at SBCTA's option Termination as a result of Design-Builder Default Termination as a result of SBCTA Default Termination as a result of an adverse court ruling

Ref.	Subject	Terms
		For expediency, SBCTA will be permitted to exercise an optional termination right in the event of a dispute regarding a Design-Builder Default. If the dispute is resolved favorably for SBCTA, the termination will be deemed to have been for Design-Builder Default.
50.	Termination Payments	<p>In the event of termination due to Design-Builder default or fault, or any adverse court ruling, SBCTA will only be obligated to pay the Design-Builder for any completed payment milestones with respect to the Construction Period, adjusted to account for defective Work not remedied and for permitted set-off, as reduced by the amount of payments otherwise made and net of any costs and charges incurred by SBCTA, together with the cost of completing the Work under the Contract.</p> <p>In the event of termination due to SBCTA's option or default, SBCTA will only be obligated to pay the Design-Builder for completed work (as above), employee redundancies, and subcontractor breakage costs, adjusted to account for defective Work not remedied and for permitted set-off.</p>
<u>Remedies and Limitations on Liability</u>		
51.	Remedies	The Design-Builder's remedies will be limited to those expressly set out in the Contract.
52.	Liability	<p>Customary waiver of consequential damages.</p> <p>If the Design-Builder, or any successor or assign, is at any time a joint venture, members to be jointly and severally liable</p> <p>No personal liability for personnel, contractors, employees of the parties.</p>
<u>Assignments and Change of Control</u>		
53.	Limitation on Liability	<p>Under the Contract, Design-Builder's total aggregate liability to the SBCTA including for default, breach of contract, negligence, any liquidated damages, pursuant to any indemnity obligations related to claims asserted and/or losses suffered by any indemnified parties, or otherwise in connection with the Project, will not exceed an amount equal to fifty percent (50%) of the contract price.</p> <p>This limitation on liability will not apply:</p> <ul style="list-style-type: none"> To losses to the extent (i) such losses are required to be covered by insurance under the contract, (ii) such losses are covered by proceeds of insurance carried or insuring the Design-Builder under Project- related policies regardless of whether such policies are required under the Contract, or (iii) Design-Builder has self-insured such losses pursuant to the Contract; under any indemnity pursuant to this Contract to the extent such indemnity relates to a claim asserted and/or losses suffered by any third party, or claims arising from death or bodily injury; for loss arising out of fraud, willful misconduct, criminal conduct, recklessness, bad faith or gross negligence (including that of any Design-Builder related entity); or to costs, liabilities or obligations arising from Design-Builder's

Ref.	Subject	Terms
		abandonment of the Project.
54.	Assignments and Change of Control	<p>The Contract will restrict any voluntary or involuntary, direct or indirect sale; transfer; assignment; conveyance; or encumbrance (including through change of control) of Design-Builder's interests in and to:</p> <ul style="list-style-type: none"> the Contract in whole or in part, any Contract funds or claims due, or to become due, under the Contract, or its rights to access and use the SBCTA-Provided Property and Easements, in each case without the Approval of SBCTA. <p>Such sale, transfer, assignment, conveyance, or encumbrance shall be null and void and may, in SBCTA's discretion, constitute a Design-Builder default for breach. Approval of any such sale, transfer, assignment, conveyance, or encumbrance by SBCTA will, in no case, relieve the Design-Builder (or any Guarantor or Surety) from its or their obligations or liabilities under or in relation to the Contract.</p>
Legal Matters		
55.	Design-Builder Representations and Warranties	<p>The Design-Builder representations and warranties as to:</p> <ul style="list-style-type: none"> Organization, power and authority Authorization and due execution No conflicts Consents and approvals Compliance with law; no litigation Debarment; anti-money laundering etc. Additional legal assurances (re: organizational conflicts, violations of California Government Code Sections 1090 through 1099, 84308, or 87100 through 87105 or California Code of Regulations Sections 18438.1 through 18438.8, recent criminal convictions, civil judgments, or terminations for cause)
56.	SBCTA Representations and Warranties	<p>SBCTA representations and warranties as to:</p> <ul style="list-style-type: none"> Power and authority Authorization and due execution
57.	Governing Law	The Contract will be governed in accordance with the laws of California.
58.	Subordination Principle	<p>The Contract will be subordinate to the provisions of any existing or future agreements between OIAA and the US, relative to the operation and maintenance of ONT, the terms and execution of which have been or may be required as a condition precedent to the expenditure or reimbursement to SBCTA, OIAA and/or ONT of federal funds for the development of the airport ("Grant Assurances").</p> <p>In the event that the Contract conflicts with or violates such Grant Assurances, SBCTA will promptly notify the Design-Builder of such conflict or violation, and work with the Design-Builder to amend, alter or otherwise modify the terms of the Contract in order to resolve such conflict or violation in a manner reasonably acceptable to both SBCTA and the Design-Builder.</p>

Ref.	Subject	Terms
59.	Dispute Resolution Procedure	<p>The dispute resolution procedures will comply with Public Contract Code Section 9204 to the extent applicable.</p> <p>An early resolution process shall require the Design-Builder to submit notice of potential claim to SBCTA for response and, if required, conference for resolution.</p> <p>Unresolved claims that become disputes shall be submitted to SBCTA through the dispute resolution process.</p> <p>The dispute resolution process shall require project level negotiation followed by, if required, executive level negotiation. SBCTA will issue a final decision following the project level or executive level negotiation.</p> <p>The Design-Builder shall have the right to submit the SBCTA decision to the disputes review board, which shall have one member selected by each of the parties and a third member selected by the first two members.</p> <p>Disputes exceeding \$375,000 may be submitted to judicial reference following a recommendation by the disputes review board.</p> <p>Disputes involving less than \$375,000 may be submitted by either party to the disputes review board for a binding decision in accordance with the State Arbitration Act.</p> <p>The dispute resolution process shall exclude matters that are excluded from such under the Contract, claims for injunctive relief, matters regarding compliance with law or indemnification, DBE participation, claims against insurance companies and any claim or dispute that does not arise under the Contract.</p> <p>The disputes resolution process will not apply to matters which do not constitute claims under Public Contract Code Section 9204, such as disputes regarding matters which are expressly excluded under the terms of the Contract, compliance with law, rights of termination and indemnification, claims for injunctive relief or insurance claims, surety claims, certain claims involving third parties as necessary parties, issues regarding DBE participation, Cal-OSHA jurisdictional matters, issues related to subcontractor substitutions governed by Public Contract Code Section 4100 et seq.</p>
60.	Consent to Jurisdiction, Joinder, Service of Process	<p>The parties shall consent to the jurisdiction of local State courts and to the Central District of California.</p>
Rules and Definitions		
61.	Rules for Submittals and Approvals	<p>Essential rules to establish baseline submittal review time and standards expectations, and expectations regarding consent procedures and standards.</p>

<u>Ref.</u>	<u>Subject</u>	<u>Terms</u>
62.	Rules of Interpretation	Essential set of rules for contract interpretation and resolution of drafting conflicts, including those that promote brevity overall by reducing repetitive drafting (e.g. “includes” means “not limited to”, references to agreements and laws are “as amended” etc.).
63.	Definitions	List of defined terms.
<u>Miscellaneous</u>		
64.	Various	<p>Necessary “boilerplate” and other miscellaneous provisions, include:</p> <ul style="list-style-type: none"> • Mandatory State and Federal Provisions (to the extent not otherwise addressed, including with respect to labor, subcontracting, and Buy America) • Provisions related to nature of relationship (independence of the Design-Builder, third party beneficiaries) • Provision related to construction of Contract (counterparts, entire agreement, severability, amendments and waivers, and survival clauses) • Notice provision • Setoff

List of Contract Exhibits and Technical Provisions

<u>Exhibits</u>
Exhibit 1: Definitions and Contract Particulars
Exhibit 2: Proposal Schedule
Exhibit 3: Payments
Exhibit 4: Insurance Requirements
Exhibit 5: DBE Performance Plan
Exhibit 6: ATCs
Exhibit 7: Legal Requirements
Exhibit 8: Forms
Exhibit 9: List of Reference Documents
<u>Technical Provisions</u>
1. General
2. Project Management
3. Submittals and Reviews
4. Project Controls
5. Quality Management
6. Environmental Compliance
7. Site Safety and Security
8. Site Clearing and Demolition
9. Earthwork
10. Survey and Mapping
11. Geotechnical
12. Utilities
13. Roadways
14. Stormwater and Drainage
15. Structures
16. Landscaping and Restoration
17. Illumination
18. Staging and Maintenance of Traffic
19. Third Party Coordination
20. Right-of-Way
21. Maintenance During Construction
22. Vibration Monitoring and Control
23. Settlement Monitoring and Mitigation
24. Corrosion
25. U-Sections and Cut-and-Cover Tunnels
26. Bored Tunnels
27. Tunnel Systems
28. Tunnel Power

29. Tunnel Ventilation
30. Tunnel Communication
31. Vehicle Technology and Systems Engineering
32. Testing and Commissioning
33. Ticketing and Fare Collection
34. Storage and Maintenance Facility
35. Stations
36. Safety and Security Certification



ANNEX C: FORM OF OPERATING CONTRACT

[To be released during the Pre-Proposal Period.]

FOR REFERENCE ONLY