

**AMENDMENT NO. 29  
TO  
AGREEMENT FOR ENGINEERING SERVICES  
CITY OF BILLINGS AVIATION AND TRANSIT DEPARTMENT**

**DATED April 10, 2017**

This AMENDMENT, made and entered into on \_\_\_\_\_ by and between the following:

City of Billings, Montana, a Municipal Corporation, PO Box 1178  
Billings, Montana 59103, hereinafter designated the OWNER

and

Morrison-Maierle, Inc., 315 N. 25<sup>th</sup> Street, Suite 102, Billings, Montana 59101,  
a private Montana Corporation, hereinafter designated as the ENGINEER

**WITNESSETH:**

WHEREAS, the OWNER and the ENGINEER have entered into an Agreement for Professional Aviation and Transit Engineering service contract dated April 10, 2017, and;

WHEREAS, the OWNER has a need for additional engineering services, and;

WHEREAS, the ENGINEER represents that he/she is qualified to perform such services, is in compliance with the Montana Statutes relating to the registration of professional engineers and is willing to furnish such services to the OWNER;

NOW, THEREFORE, in consideration of the terms, conditions, covenants and performance contained herein, or attached and incorporated herein, the parties hereto agree to amend the April 10, 2017 Agreement, corresponding amendments to this Agreement, and all related exhibits as follows:

**ARTICLE I – SCOPE OF SERVICES**

The following items of work listed below are added and amended by Amendment 29 for MET Training Lot Rehabilitation.

This Amendment 29 also includes addition of required FTA clauses, as attached in Exhibit A. These clauses apply to this Amendment only and do not modify any previous agreements.

The general scope of work is to provide design engineering, plans and specifications, and contract management for the proposed project. This contract will also include the bidding and construction observation.

**Phase I –Design, Plans and Specifications**

Phase I work items include:

- Prepare the scope of work for design and construction administration, including coordination with Sponsor.
  - The anticipated start date for work is design fall 2021, bid opening February 2022 and construction summer of 2022.
- Prepare fee proposal. This will include preparing the initial fee proposal as well as negotiations with the Sponsor.

- Prepare Sponsor-Consultant project specific agreement. This includes preparation, negotiation, and distribution.
- Design for Training Lot approximately 60,000 square feet. The lot is located west of City of Billings MET office on Monad.
  - Design pavement grades within the fence area and tie into existing building and east side parking lot.
  - Storm water location, possible pipes, drainage pond.
  - CATEX.
  - Details – fence, pavement section, pond, pavement markings.
  - Storm drainage design report, submit to the City for approval.
- Prepare final Plans & Specifications for bid opening February 2022.

## **Phase II – Bidding and Construction Administration**

Phase II work will include providing Bidding, Construction Administration, Resident Project Representative (Observer), and Project Closeout for items identified as Phase I design work.

- Conduct the Prebid Conference at the MET and conduct a site visit if the Contractors would like one.
- Attend the Bid Opening, review and tabulate all the Bids. Make recommendation for award if appropriate.
- Prepare Notice of Award and Contract Documents once the construction is recommended for award by FTA and is approved by City Council.
- Conduct the Preconstruction Conference at the MET.
- Prepare and submit FTA Requests for Reimbursement and Summaries of Project Cost to the Owner to submit.
- Review all shop drawings for the project and submittals. These will be provided to the MET for construction.
- Provide full time construction observation for the project.
- Prepare weekly construction observation reports for review by the Owner.
- Construction Survey
  - Set control for the Contractor.
  - Layout survey for paving areas and utility location and elevation.
  - Verify the paving layout and grades during construction.
- Quality Assurance Testing by a Geotechnical Firm, a subconsultant, for the paving and base course, as well as compaction testing for all storm drain trenches, if applicable.
- Final Inspection with the Owner.
- Final Project Closeout – Record drawings sent to the Owner.

## **ARTICLE II - ENGINEERING FEES**

Engineering fees for providing the scope of work are based on the methods described in Article II of the original agreement.

The items discussed above are finalized items of work that the Owner and AIP will fund.

### **Phase I – Design, Plans and Specifications**

Preparation of design plans and specifications for Phase I, Amendment 29 will be accomplished for a lump sum fee of **\$69,397.00** as per the Method A - Fee Determination as outlined in the original Agreement dated **April 10, 2017**. See Table 1A for engineering budgets.

### **Phase II – Bidding and Construction Administration**

The items discussed above involve the Phase II, Items for Amendment 29 scope of services and will be accomplished at a cost plus fixed fee with a ceiling price not to exceed **\$81,950** as per Method B - Fee Determination outlined below. See Table 2A for engineering budgets.

**COST SUMMARY OF  
Amendment 29**

Description		Labor & Expenses	Fixed Fee	Total Phase I	Total Phase II
<b><u>Training Lot Rehabilitation</u></b>					
Phase I - Design	Table 1A	\$69,397		\$69,397	
Phase II - Construction Administration	Table 2A	\$71,261	\$10,689		\$81,950
Subtotal Item 1				\$69,397	\$81,950
<b><u>Total This Amendment</u></b>					<b><u>\$151,347</u></b>

TABLE 1A

**Amendment 29  
ENGINEERING BUDGET  
PHASE 1 - Design Phase**

<b>Engineering Services PHASE 1 - Design Phase</b>	Total Man-hours	Labor Rate	Total
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Professional Services for	358	\$135.40	\$48,473
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**Expenses**

Vehicle (Company)	\$67
Vehicle (Rental)	\$0
Air Travel (Commercial)	\$0
Air Travel (Charter)	\$0
Meals	\$0
Lodging	\$0
Survey Supplies	\$0
Survey Equipment	\$400
Printing	\$100
Full Size ALP Printing + Postage	\$0
<b>Total Expenses</b>	<b>\$567</b>

Professional Charges	\$13,000	Subconsultants
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Total MU Labor	\$48,473
Total Direct Expenses	\$567
Total Fixed Fee	\$7,356
Total MU Labor & Expenses & Fixed Fee	<u>\$56,397</u>
Professional Expenses	\$13,000
<b>Total Lump Sum for Design Phase</b>	<b>\$69,397</b>

(Figure is rounded)

TABLE 2A

**Amendment 29  
ENGINEERING BUDGET  
Phase II - Construction Administration**

<b>Engineering Services</b>	Total Man-hours	Labor Rate	Total
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Professional Services	635	\$107.83	\$68,471
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**Expenses**

Vehicle (Company)	\$790
Vehicle (Rental)	\$0
Air Travel (Commercial)	\$0
Air Travel (Charter)	\$0
Meals	\$0
Lodging	\$0
Survey Supplies	\$0
Survey Equipment	\$2,000
Printing	\$0
Full Size ALP Printing + Postage	\$0
<b>Total Expenses</b>	<b>\$2,790</b>

Professional Charges                      \$0    Subconsultants

Total MU Labor	\$68,471
Total Direct Expenses	<u>\$2,790</u>
Total MU Labor & Expenses	\$71,261
Fixed Fee	\$10,689
Professional Expenses	<u>\$0</u>
<b>Total Cost Plus Fixed Fee for Construction Phase</b>	<b><u>\$81,950</u></b>

(Figure is rounded)

IN WITNESS WHEREOF, the parties hereto have made and executed the Amendment No. 29 on

\_\_\_\_\_.

CONSULTANT

**Morrison-Maierle, Inc.**

BY: Gill A. Cook

DATE: 12/2/21

OWNER

**City of Billings**

BY: \_\_\_\_\_

DATE: \_\_\_\_\_

ATTEST:

BY: \_\_\_\_\_  
City Clerk

APPROVED AS TO FORM:

BY: \_\_\_\_\_  
City Attorney

<b>Summary of Agreements for Professional Engineering Services</b>				
<b>Description</b>		<b>Labor &amp; Expenses</b>	<b>Fixed Fee</b>	<b>Total</b>
<b>Amendment No. 1</b> Curb and Sidewalk Construction				
PHASE I - DESIGN	TABLE 1A	\$14,391	\$0	\$14,391
PHASE II - CONSTRUCTION	TABLE 2A	\$10,979	\$1,504	\$12,483
<b>TOTAL Amendment No. 1</b>		<b>\$25,370</b>	<b>\$1,504</b>	<b>\$26,874</b>
<b>Amendment No. 2</b> Gate 33/BFS Access Road				
PHASE I - DESIGN	TABLE 1A	\$6,992	\$0	\$6,992
PHASE II - CONSTRUCTION	TABLE 2A	\$0	\$0	\$0
<b>TOTAL Amendment No. 2</b>		<b>\$6,992</b>	<b>\$0</b>	<b>\$6,992</b>
<b>Amendment No. 3</b> IP 8 Building and Site Plan				
PHASE I - DESIGN	TABLE 1A	\$62,104	\$0	\$62,104
PHASE II - CONSTRUCTION	TABLE 2A	\$25,561	\$3,642	\$29,203
<b>TOTAL Amendment No. 3</b>		<b>\$87,665</b>	<b>\$3,642</b>	<b>\$91,307</b>
<b>Amendment No. 4</b> AIP 057-2018 ARFF Ramp Rehabilitation				
PHASE I - DESIGN	TABLE 1A	\$68,521	\$0	\$68,521
PHASE II - CONSTRUCTION	TABLE 2A	\$59,694	\$8,541	\$68,235
<b>TOTAL Amendment No. 4</b>		<b>\$128,215</b>	<b>\$8,541</b>	<b>\$136,756</b>
<b>Amendment No. 5</b> Airline Support Facility and Site Plan				
PHASE I - DESIGN	TABLE 1A	\$21,566	\$0	\$21,566
PHASE II - CONSTRUCTION	TABLE 2A	\$9,920	\$1,409	\$11,329
<b>TOTAL Amendment No. 5</b>		<b>\$31,486</b>	<b>\$1,409</b>	<b>\$32,895</b>
<b>Amendment No.6</b> PFC Snow Removal Equipment				
PHASE I - DESIGN	TABLE 1A	\$4,835	\$0	\$4,835
PHASE II - CONSTRUCTION	TABLE 2A	\$4,834	\$0	\$4,834
<b>TOTAL Amendment No.6</b>		<b>\$9,669</b>	<b>\$0</b>	<b>\$9,669</b>
<b>Amendment No. 7</b> Executive Hangar Access Road				
PHASE I - DESIGN	TABLE 1A	\$5,986	\$0	\$5,986
PHASE II - CONSTRUCTION	TABLE 2A	\$3,980	\$576	\$4,556
<b>TOTAL Amendment No. 7</b>		<b>\$9,966</b>	<b>\$576</b>	<b>\$10,542</b>
<b>Amendment No. 8</b> Pavement Condition Index Survey				
PHASE I - DESIGN	TABLE 1A	\$67,714	\$0	\$67,714
PHASE II - CONSTRUCTION	TABLE 2A	\$0	\$0	\$0
<b>TOTAL Amendment No. 8</b>		<b>\$67,714</b>	<b>\$0</b>	<b>\$67,714</b>
<b>Amendment No. 9</b> 2016 Land Acquisition-Project Management				
PHASE I - DESIGN	TABLE 1A	\$12,837	\$0	\$12,837
PHASE II - CONSTRUCTION	TABLE 2A	\$0	\$0	\$0
<b>TOTAL Amendment No. 9</b>		<b>\$12,837</b>	<b>\$0</b>	<b>\$12,837</b>

<b>Summary of Agreements for Professional Engineering Services (Cont.)</b>				
<b>Description</b>		<b>Labor &amp; Expenses</b>	<b>Fixed Fee</b>	<b>Total</b>
<b>Amendment No. 10</b>	2018 Chiller Replacement			
PHASE I - DESIGN	TABLE 1A	\$35,994	\$0	\$35,994
PHASE II - CONSTRUCTION	TABLE 2A	\$0	\$0	\$0
<b>TOTAL Amendment No. 10</b>		<b>\$35,994</b>	<b>\$0</b>	<b>\$35,994</b>
<b>Amendment No. 11</b>	2018 Long Term Parking Lot Improvements			
PHASE I - DESIGN	TABLE 1A	\$25,254	\$0	\$25,254
PHASE II - CONSTRUCTION	TABLE 2A	\$28,243	\$4,028	\$32,271
<b>TOTAL Amendment No. 11</b>		<b>\$53,497</b>	<b>\$4,028</b>	<b>\$57,525</b>
<b>Amendment No. 12</b>	AIP Commercial Concrete Apron			
PHASE I - DESIGN	TABLE 1A	\$214,628	\$0	\$214,628
PHASE II - CONSTRUCTION	TABLE 2A	\$0	\$0	\$0
<b>TOTAL Amendment No. 12</b>		<b>\$214,628</b>	<b>\$0</b>	<b>\$214,628</b>
<b>Amendment No. 13</b>	Makeup Air Unit Replacement			
PHASE I - DESIGN	TABLE 1A	\$20,973	\$0	\$20,973
PHASE II - CONSTRUCTION	TABLE 2A	\$0	\$0	\$0
<b>TOTAL Amendment No. 13</b>		<b>\$20,973</b>	<b>\$0</b>	<b>\$20,973</b>
<b>Amendment No. 13</b>	On Call Contract 2019			
PHASE I - DESIGN	TABLE 1A	\$20,000	\$0	\$20,000
PHASE II - CONSTRUCTION	TABLE 2A	\$0	\$0	\$0
<b>TOTAL Amendment No. 13</b>		<b>\$20,000</b>	<b>\$0</b>	<b>\$20,000</b>
<b>Amendment No. 14</b>	ARFF and SCBA Gear			
PHASE I - DESIGN	TABLE 1A	\$21,557	\$0	\$21,557
PHASE II - CONSTRUCTION	TABLE 2A	\$0	\$0	\$0
<b>TOTAL Amendment No. 14</b>		<b>\$21,557</b>	<b>\$0</b>	<b>\$21,557</b>
<b>Amendment No. 15</b>	QTA Camera Replacement			
PHASE I - DESIGN	TABLE 1A	\$14,123	\$0	\$14,123
PHASE II - CONSTRUCTION	TABLE 2A	\$0	\$0	\$0
<b>TOTAL Amendment No. 15</b>		<b>\$14,123</b>	<b>\$0</b>	<b>\$14,123</b>
<b>Amendment No. 16</b>	Transit On Call Contract 2020			
PHASE I - DESIGN	TABLE 1A	\$24,999	\$0	\$24,999
PHASE II - CONSTRUCTION	TABLE 2A	\$0	\$0	\$0
<b>TOTAL Amendment No. 16</b>		<b>\$24,999</b>	<b>\$0</b>	<b>\$24,999</b>
<b>Amendment No. 17</b>	Steam Boiler Replacement			
PHASE I - DESIGN	TABLE 1A	\$10,000	\$0	\$10,000
PHASE II - CONSTRUCTION	TABLE 2A	\$0	\$0	\$0
<b>TOTAL Amendment No. 17</b>		<b>\$10,000</b>	<b>\$0</b>	<b>\$10,000</b>

<b>Summary of Agreements for Professional Engineering Services (Cont.)</b>				
<b>Description</b>		<b>Labor &amp; Expenses</b>	<b>Fixed Fee</b>	<b>Total</b>
<b>Amendment No. 18</b> AIP 060-2019 Concrete Apron Construction				
PHASE I - DESIGN	TABLE 1A	\$136,902	\$0	\$136,902
PHASE II - CONSTRUCTION	TABLE 2A	\$295,116	\$36,169	\$331,285
<b>TOTAL Amendment No. 18</b>		<b>\$432,018</b>	<b>\$36,169</b>	<b>\$468,187</b>
<b>Amendment No. 19</b> On Call Aviation Contract 2020				
PHASE I - DESIGN	TABLE 1A	\$24,999	\$0	\$24,999
PHASE II - CONSTRUCTION	TABLE 2A	\$0	\$0	\$0
<b>TOTAL Amendment No. 19</b>		<b>\$24,999</b>	<b>\$0</b>	<b>\$24,999</b>
<b>Amendment No. 20</b> RWY 7/25 Preliminary Design				
PHASE I - DESIGN	TABLE 1A	\$281,289	\$0	\$281,289
PHASE II - CONSTRUCTION	TABLE 2A	\$0	\$0	\$0
<b>TOTAL Amendment No. 20</b>		<b>\$281,289</b>	<b>\$0</b>	<b>\$281,289</b>
<b>Amendment No. 21</b> Rimtop Road Overlay				
PHASE I - DESIGN	TABLE 1A	\$9,902	\$0	\$9,902
PHASE II - CONSTRUCTION	TABLE 2A	\$4,071	\$600	\$4,671
<b>TOTAL Amendment No. 21</b>		<b>\$13,973</b>	<b>\$600</b>	<b>\$14,573</b>
<b>Amendment No. 22</b> On Call Aviation Contract 2021				
PHASE I - DESIGN	TABLE 1A	\$24,999	\$0	\$24,999
PHASE II - CONSTRUCTION	TABLE 2A	\$0	\$0	\$0
<b>TOTAL Amendment No. 22</b>		<b>\$24,999</b>	<b>\$0</b>	<b>\$24,999</b>
<b>Amendment No. 23</b> Transit On Call Contract 2021				
PHASE I - DESIGN	TABLE 1A	\$24,999	\$0	\$24,999
PHASE II - CONSTRUCTION	TABLE 2A	\$0	\$0	\$0
<b>TOTAL Amendment No. 23</b>		<b>\$24,999</b>	<b>\$0</b>	<b>\$24,999</b>
<b>Amendment No. 24</b> Fiber Installation				
PHASE I - DESIGN	TABLE 1A	\$13,835	\$0	\$13,835
PHASE II - CONSTRUCTION	TABLE 2A	\$7,910	\$1,187	\$9,097
<b>TOTAL Amendment No. 24</b>		<b>\$21,745</b>	<b>\$1,187</b>	<b>\$22,932</b>
<b>Amendment No. 25</b> Boarding Bridges				
PHASE I - DESIGN	TABLE 1A	\$31,760	\$0	\$31,760
PHASE II - CONSTRUCTION	TABLE 2A	\$0	\$0	\$0
<b>TOTAL Amendment No. 25</b>		<b>\$31,760</b>	<b>\$0</b>	<b>\$31,760</b>
<b>Amendment No. 26</b> Apron Construction Schedule 3				
PHASE I - DESIGN	TABLE 1A	\$81,593	\$0	\$81,593
PHASE II - CONSTRUCTION	TABLE 2A	\$149,717	\$19,458	\$169,175
<b>TOTAL Amendment No. 26</b>		<b>\$231,310</b>	<b>\$19,458</b>	<b>\$250,768</b>

<b>Summary of Agreements for Professional Engineering Services (Cont.)</b>					
<b>Amendment No. 27</b>		West Hangar Utilities & Road Development			
PHASE I - DESIGN	TABLE 1A	\$44,101	\$0	\$44,101	
PHASE II - CONSTRUCTION	TABLE 2A	\$66,994	\$10,049	\$77,043	
<b>TOTAL Amendment No. 27</b>		<b>\$111,095</b>	<b>\$10,049</b>	<b>\$121,144</b>	
<b>Amendment No. 28</b>		On Call Aviation Contract 2022			
PHASE I - DESIGN	TABLE 1A	\$24,999	\$0	\$24,999	
PHASE II - CONSTRUCTION	TABLE 2A	\$0	\$0	\$0	
<b>TOTAL Amendment No. 28</b>		<b>\$24,999</b>	<b>\$0</b>	<b>\$24,999</b>	
<b>Amendment No. 29</b>		MET - Training Lot Rehabilitation			
PHASE I - DESIGN	TABLE 1A	\$69,397	\$0	\$69,397	
PHASE II - CONSTRUCTION	TABLE 2A	\$71,261	\$10,689	\$81,950	
<b>TOTAL Amendment No. 29</b>		<b>\$140,658</b>	<b>\$10,689</b>	<b>\$151,347</b>	

**EXHIBIT A**  
**Federally Required Contract Clauses**

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**Table 1 – Applicability of Contract Clauses**

<b>CLAUSE</b>	<b>TYPE OF PROCUREMENT</b>
	<b>Professional Services/A&amp;E</b>
<i>No Federal government obligations to third parties by use of a disclaimer</i>	<i>All</i>
<i>Program fraud and false or fraudulent statements and related acts</i>	<i>All</i>
<i>Access to Records</i>	<i>All</i>
<i>Federal changes</i>	<i>All</i>
<i>Civil Rights (EEO, Title VI &amp; ADA)</i>	<i>All</i>
<i>Incorporation of FTA Terms</i>	<i>All</i>
<i>Energy Conservation</i>	<i>All</i>
<i>Termination Provisions (not required of states)</i>	<i>&gt;\$10,000</i>
<i>Debarment and Suspension</i>	<i>&gt;\$25,000</i>
<i>Buy America</i>	
<i>Provisions for resolution of disputes, breaches, or other litigation</i>	<i>&gt;\$150,000 (see Note)</i>
<i>Lobbying</i>	<i>&gt;\$100,000</i>
<i>Clean Air</i>	<i>&gt;\$100,000</i>
<i>Clean Water</i>	<i>&gt;\$100,000</i>
<i>Cargo Preference</i>	
<i>Fly America</i>	<i>Involving foreign transport or travel by air</i>
<i>Davis Bacon Act</i>	
<i>Copeland Anti-Kickback Act Section 1 Section 2</i>	

<b>CLAUSE</b>	<b>TYPE OF PROCUREMENT</b>
	<b>Professional Services/A&amp;E</b>
<i>Contract Work Hours &amp; Safety Standards Act</i>	
<i>Bonding (not required of states)</i>	
<i>Seismic Safety</i>	<i>A&amp;E for new buildings &amp; additions</i>
<i>Transit Employee Protective Arrangements</i>	
<i>Charter Service Operations</i>	
<i>School Bus Operations</i>	
<i>Drug and Alcohol Testing</i>	
<i>Patent Rights</i>	<i>Research &amp; development</i>
<i>Rights in Data and Copyrights requirements</i>	<i>Research &amp; development</i>
<i>Special DOL EEO clause for construction projects</i>	
<i>Disadvantaged Business Enterprises (DBEs)</i>	<i>All</i>
<i>Prompt Payment</i>	<i>All if threshold for DBE program met</i>
<i>Recycled Products</i>	
<i>ADA Access</i>	<i>A&amp;E</i>
<i>Special Notification Requirements for States</i>	<i>Limited to states</i>

## **A.1 ACCESS TO RECORDS AND REPORTS**

49 U.S.C. § 5325(g)

2 C.F.R. § 200.333

49 C.F.R. part 633

### **Access to Records and Reports**

- a. Record Retention. The Contractor will retain, and will require its subcontractors of all tiers to retain, complete and readily accessible records related in whole or in part to the contract, including, but not limited to, data, documents, reports, statistics, sub-agreements, leases, subcontracts, arrangements, other third party agreements of any type, and supporting materials related to those records.
- b. Retention Period. The Contractor agrees to comply with the record retention requirements in accordance with 2 C.F.R. § 200.333. The Contractor shall maintain all books, records, accounts and reports required under this Contract for a period of at not less than three (3) years after the date of termination or expiration of this Contract, except in the event of litigation or settlement of claims arising from the performance of this Contract, in which case records shall be maintained until the disposition of all such litigation, appeals, claims or exceptions related thereto.
- c. Access to Records. The Contractor agrees to provide sufficient access to FTA and its contractors to inspect and audit records and information related to performance of this contract as reasonably may be required.
- d. Access to the Sites of Performance. The Contractor agrees to permit FTA and its contractors access to the sites of performance under this contract as reasonably may be required.

## **A.2 ADA ACCESS**

49 U.S.C. § 5301 (d)

### **ADA ACCESS**

The contractor agrees to comply with the requirements of 49 U.S.C. § 5301 (d), which states the Federal policy that the elderly and persons with disabilities have the same right as other persons to use mass transportation service and facilities, and that special efforts shall be made in planning

and designing those services and facilities to implement that policy. The contractor also agrees to comply with all applicable requirements of section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, which prohibits discrimination on the basis of handicaps, with the Americans with Disabilities Act of 1990 (ADA), as amended, 42 U.S.C. §§ 12101 et seq., which requires that accessible facilities and services be made available to persons with disabilities, including any subsequent amendments to that Act, and with the Architectural Barriers act of 1968, as amended, 42 U.S.C. §§ 4151 et seq., which requires that buildings and public accommodations be accessible to persons with disabilities, including any subsequent amendments to that Act. In addition, the contractor agrees to comply with any and all applicable requirements issued by the FTA, DOT, DOJ, U.S. GSA, U.S. EEOC, U.S. FCC, any subsequent amendments thereto and any other nondiscrimination statute(s) that may apply to the Project.

**A.3 BONDING REQUIREMENTS**

2 C.F.R. § 200.325

31 C.F.R. part 223

**DOES NOT APPLY**

**A.4 BUS TESTING**

49 U.S.C. § 5318(e)

49 C.F.R. part 665

**DOES NOT APPLY**

**A.5 BUY AMERICA REQUIREMENTS**

49 U.S.C. 5323(j)

49 C.F.R. part 661

**DOES NOT APPLY**

**A.6 CARGO PREFERENCE REQUIREMENTS**

46 U.S.C. § 55305

46 C.F.R. part 381

**DOES NOT APPLY**

**A.7 CHARTER SERVICE**

49 U.S.C. 5323(d) and (r)

49 C.F.R. part 604

**DOES NOT APPLY**

**A.8 CLEAN AIR ACT AND FEDERAL WATER POLLUTION CONTROL ACT**

42 U.S.C. §§ 7401 – 7671q

33 U.S.C. §§ 1251-1387

2 C.F.R. part 200, Appendix II (G)

**Clean Air Act and Federal Water Pollution Control Act**

The Contractor agrees:

- 1) It will not use any violating facilities;
- 2) It will report the use of facilities placed on or likely to be placed on the U.S. EPA “List of Violating Facilities;”
- 3) It will report violations of use of prohibited facilities to FTA; and
- 4) It will comply with the inspection and other requirements of the Clean Air Act, as amended, (42 U.S.C. §§ 7401 – 7671q); and the Federal Water Pollution Control Act as amended, (33 U.S.C. §§ 1251-1387).

## A.9 CIVIL RIGHTS LAWS AND REGULATIONS

### Civil Rights and Equal Opportunity

The OWNER is an Equal Opportunity Employer. As such, the OWNER agrees to comply with all applicable Federal civil rights laws and implementing regulations. Apart from inconsistent requirements imposed by Federal laws or regulations, the OWNER agrees to comply with the requirements of 49 U.S.C. § 5323(h) (3) by not using any Federal assistance awarded by FTA to support procurements using exclusionary or discriminatory specifications.

Under this Agreement, the Contractor shall at all times comply with the following requirements and shall include these requirements in each subcontract entered into as part thereof.

1. **Nondiscrimination.** In accordance with Federal transit law at 49 U.S.C. § 5332, the Contractor agrees that it will not discriminate against any employee or applicant for employment because of race, color, religion, national origin, sex, disability, or age. In addition, the Contractor agrees to comply with applicable Federal implementing regulations and other implementing requirements FTA may issue.
2. **Race, Color, Religion, National Origin, Sex.** In accordance with Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e *et seq.*, and Federal transit laws at 49 U.S.C. § 5332, the Contractor agrees to comply with all applicable equal employment opportunity requirements of U.S. Department of Labor (U.S. DOL) regulations, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor," 41 C.F.R. chapter 60, and Executive Order No. 11246, "Equal Employment Opportunity in Federal Employment," September 24, 1965, 42 U.S.C. § 2000e note, as amended by any later Executive Order that amends or supersedes it, referenced in 42 U.S.C. § 2000e note. The Contractor agrees to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, national origin, or sex (including sexual orientation and gender identity). Such action shall include, but not be limited to, the following: employment, promotion, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.
3. **Age.** In accordance with the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-

634, U.S. Equal Employment Opportunity Commission (U.S. EEOC) regulations, “Age Discrimination in Employment Act,” 29 C.F.R. part 1625, the Age Discrimination Act of 1975, as amended, 42 U.S.C. § 6101 *et seq.*, U.S. Health and Human Services regulations, “Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance,” 45 C.F.R. part 90, and Federal transit law at 49 U.S.C. § 5332, the Contractor agrees to refrain from discrimination against present and prospective employees for reason of age. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.

4. **Disabilities.** In accordance with section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, the Americans with Disabilities Act of 1990, as amended, 42 U.S.C § 12101 *et seq.*, the Architectural Barriers Act of 1968, as amended, 42 U.S.C. §4151 *et seq.*, and Federal transit law at 49 U.S.C. § 5332, the Contractor agrees that it will not discriminate against individuals on the basis of disability. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.

#### **A.10 DISADVANTAGED BUSINESS ENTERPRISE (DBE)**

49 C.F.R. part 26

##### **Disadvantage Business Enterprise (DBE)**

For all DOT-assisted contracts, each FTA recipient must include assurances that third party contractors will comply with the DBE program requirements of 49 C.F.R. part 26, when applicable. The following contract clause is required in all DOT-assisted prime and subcontracts:

The contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 C.F.R. part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the Owner deems appropriate, which may include, but is not limited to:

- (1) Withholding monthly progress payments;

- (2) Assessing sanctions;
- (3) Liquidated damages; and/or
- (4) Disqualifying the contractor from future bidding as non-responsible. 49 C.F.R. § 26.13(b).

Further, Owners must establish a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from receipt of each payment the Owner makes to the prime contractor. 49 C.F.R. § 26.29(a). Finally, for contracts with defined DBE contract goals, each FTA Owner must include in each prime contract a provision stating that the contractor shall utilize the specific DBEs listed unless the contractor obtains the Owner's written consent; and that, unless the Owner's consent is provided, the contractor shall not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE. 49 C.F.R. § 26.53(f) (1).

As an additional resource, Owners can draw on the following language for inclusion in their federally funded procurements.

### **Overview**

It is the policy of the OWNER and the United States Department of Transportation ("DOT") that Disadvantaged Business Enterprises ("DBE's"), as defined herein and in the Federal regulations published at 49 C.F.R. part 26, shall have an equal opportunity to participate in DOT-assisted contracts. It is also the policy of the OWNER to:

1. Ensure nondiscrimination in the award and administration of DOT-assisted contracts;
2. Create a level playing field on which DBE's can compete fairly for DOT-assisted contracts;
3. Ensure that the DBE program is narrowly tailored in accordance with applicable law;
4. Ensure that only firms that fully meet 49 C.F.R. part 26 eligibility standards are permitted to participate as DBE's;
5. Help remove barriers to the participation of DBEs in DOT assisted contracts;
6. To promote the use of DBEs in all types of federally assisted contracts and procurement activities; and
7. Assist in the development of firms that can compete successfully in the marketplace outside the DBE program.

This Contract is subject to 49 C.F.R. part 26. Therefore, the Contractor must satisfy the requirements for DBE participation as set forth herein. These requirements are in addition to all other equal opportunity employment requirements of this Contract. The OWNER shall make all determinations with regard to whether or not a Bidder/Offeror is in compliance with the requirements stated herein. In assessing compliance, the OWNER may consider during its review of the Bidder/Offeror's submission package, the Bidder/Offeror's documented history of non-compliance with DBE requirements on previous contracts with the OWNER.

### **Contract Assurance**

The Contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Contract. The Contractor shall carry out applicable requirements of 49 C.F.R. part 26 in the award and administration of DOT-assisted contracts. Failure by the Contractor to carry out these requirements is a material breach of this Contract, which may result in the termination of this Contract or such other remedy as the OWNER deems appropriate.

### **DBE Participation**

For the purpose of this Contract, the OWNER will accept only DBE's who are:

1. Certified, at the time of bid opening or proposal evaluation, by the Unified Certification Program (UCP) or
2. An out-of-state firm who has been certified by either a local government, state government or Federal government entity authorized to certify DBE status or an OWNER whose DBE certification process has received FTA approval; or
3. Certified by another OWNER approved by the OWNER.

### **DBE Participation Goal**

DBE shall be race neutral utilizing Good Faith Efforts.

### **Proposed Submission**

Each Bidder/Offeror, as part of its submission, shall supply the following information:

1. A completed **DBE Utilization Form** (see below) that indicates the percentage and

dollar value of the total bid/contract amount to be supplied by Disadvantaged Business Enterprises under this Contract.

2. A list of those qualified DBE's with whom the Bidder/Offeror intends to contract for the performance of portions of the work under the Contract, the agreed price to be paid to each DBE for work, the Contract items or parts to be performed by each DBE, a proposed timetable for the performance or delivery of the Contract item, and other information as required by the **DBE Participation Schedule** (see below). No work shall be included in the Schedule that the Bidder/Offeror has reason to believe the listed DBE will subcontract, at any tier, to other than another DBE. If awarded the Contract, the Bidder/Offeror may not deviate from the DBE Participation Schedule submitted in response to the bid. Any subsequent changes and/or substitutions of DBE firms will require review and written approval by the OWNER.
3. An original **DBE Letter of Intent** (see below) from each DBE listed in the **DBE Participation Schedule**.
4. An original **DBE Affidavit** (see below) from each DBE stating that there has not been any change in its status since the date of its last certification.

### **Good Faith Efforts**

If the Bidder/Offeror is unable to meet the goal set forth above (DBE Participation Goal), the OWNER will consider the Bidder/Offeror's documented good faith efforts to meet the goal in determining responsiveness. The types of actions that the OWNER will consider as part of the Bidder/Offeror's good faith efforts include, but are not limited to, the following:

1. Documented communication with the OWNER's DBE Coordinator (questions of IFB or RFP requirements, subcontracting opportunities, appropriate certification, will be addressed in a timely fashion);
2. Pre-bid meeting attendance. At the pre-bid meeting, the OWNER generally informs potential Bidder/Offeror's of DBE subcontracting opportunities;
3. The Bidder/Offeror's own solicitations to obtain DBE involvement in general circulation media, trade association publication, minority-focus media and other reasonable and available means within sufficient time to allow DBEs to respond to

- the solicitation;
4. Written notification to DBE's encouraging participation in the proposed Contract; and
  5. Efforts made to identify specific portions of the work that might be performed by DBE's.

The Bidder/Offeror shall provide the following details, at a minimum, of the specific efforts it made to negotiate in good faith with DBE's for elements of the Contract:

1. The names, addresses, and telephone numbers of DBE's that were contacted;
2. A description of the information provided to targeted DBE's regarding the specifications and bid proposals for portions of the work;
3. Efforts made to assist DBE's contacted in obtaining bonding or insurance required by the Bidder or the Authority.

Further, the documentation of good faith efforts must include copies of each DBE and non-DBE subcontractor quote submitted when a non-DBE subcontractor was selected over a DBE for work on the contract. 49 C.F.R. § 26.53(b) (2) (VI). In determining whether a Bidder has made good faith efforts, the Authority may take into account the performance of other Bidders in meeting the Contract goals. For example, if the apparent successful Bidder failed to meet the goal, but meets or exceeds the average DBE participation obtained by other Bidders, the Authority may view this as evidence of the Bidder having made good faith efforts.

### **Administrative Reconsideration**

Within five (5) business days of being informed by the OWNER that it is not responsive or responsible because it has not documented sufficient good faith efforts, the Bidder/Offeror may request administrative reconsideration. The Bidder should make this request in writing to the OWNER. The OWNER will forward the Bidder/Offeror's request to a reconsideration official who will not have played any role in the original determination that the Bidder/Offeror did not document sufficient good faith efforts.

As part of this reconsideration, the Bidder/Offeror will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The Bidder/Offeror will have the opportunity to meet in person with the assigned reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. The OWNER will send the Bidder/Offeror a written decision

on its reconsideration, explaining the basis for finding that the Bidder/Offeror did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the Department of Transportation.

### **Termination of DBE Subcontractor**

The Contractor shall not terminate the DBE subcontractor(s) listed in the **DBE Participation Schedule** (see below) without the OWNER's prior written consent. The OWNER may provide such written consent only if the Contractor has good cause to terminate the DBE firm. Before transmitting a request to terminate, the Contractor shall give notice in writing to the DBE subcontractor of its intent to terminate and the reason for the request. The Contractor shall give the DBE five days to respond to the notice and advise of the reasons why it objects to the proposed termination. When a DBE subcontractor is terminated or fails to complete its work on the Contract for any reason, the Contractor shall make good faith efforts to find another DBE subcontractor to substitute for the original DBE and immediately notify the OWNER in writing of its efforts to replace the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the Contract as the DBE that was terminated, to the extent needed to meet the Contract goal established for this procurement. Failure to comply with these requirements will be in accordance with Section 8 below (Sanctions for Violations).

### **Continued Compliance**

The OWNER shall monitor the Contractor's DBE compliance during the life of the Contract. In the event this procurement exceeds ninety (90) days, **it will be the responsibility of the Contractor to submit quarterly written reports to the OWNER that** summarize the total DBE value for this Contract. These reports shall provide the following details:

- DBE utilization established for the Contract;
- Total value of expenditures with DBE firms for the quarter;
- The value of expenditures with each DBE firm for the quarter by race and gender;
- Total value of expenditures with DBE firms from inception of the Contract; and
- The value of expenditures with each DBE firm from the inception of the Contract by race and gender.

Reports and other correspondence must be submitted to the DBE Coordinator with copies

provided to the OWNER. Reports shall continue to be submitted quarterly until final payment is issued or until DBE participation is completed.

The successful Bidder/Offeror shall permit:

- The OWNER to have access to necessary records to examine information as the OWNER deems appropriate for the purpose of investigating and determining compliance with this provision, including, but not limited to, records of expenditures, invoices, and contract between the successful Bidder/Offeror and other DBE parties entered into during the life of the Contract.
- The authorized representative(s) of the OWNER, the U.S. Department of Transportation, the Comptroller General of the United States, to inspect and audit all data and record of the Contractor relating to its performance under the Disadvantaged Business Enterprise Participation provision of this Contract.
- All data/record(s) pertaining to DBE shall be maintained as stated in Section [insert reference to record keeping requirements for the Project.]

### **Sanctions for Violations**

If at any time the OWNER has reason to believe that the Contractor is in violation of its obligations under this Agreement or has otherwise failed to comply with terms of this Section, the OWNER may, in addition to pursuing any other available legal remedy, commence proceedings, which may include but are not limited to, the following:

- Suspension of any payment or part due the Contractor until such time as the issues concerning the Contractor's compliance are resolved; and
- Termination or cancellation of the Contract, in whole or in part, unless the successful Contractor is able to demonstrate within a reasonable time that it is in compliance with the DBE terms stated herein.

**DBE UTILIZATION FORM**

The undersigned Bidder/Offeror has satisfied the requirements of the solicitation in the following manner (please check the appropriate space):

\_\_\_\_\_ The Bidder/Offer is committed to a minimum of \_\_\_\_\_% DBE utilization on this contract.

\_\_\_\_\_ The Bidder/Offeror (if unable to meet the DBE goal of \_\_\_\_\_%) is committed to a minimum of \_\_\_\_\_% DBE utilization on this contract and submits documentation demonstrating good faith efforts.

**DBE PARTICIPATION SCHEDULE**

The Bidder/Offeror shall complete the following information for all DBE's participating in the contract that comprises the DBE Utilization percent stated in the DBE Utilization Form. The Bidder/Offeror shall also furnish the name and telephone number of the appropriate contact person should the Authority have any questions in relation to the information furnished herein.

**DBE IDENTIFICATION AND INFORMATION FORM**

<b>Name and Address</b>	<b>Contact Name and Telephone Number</b>	<b>Participation Percent (Of Total Contract Value)</b>	<b>Description Of Work To Be Performed</b>	<b>Race and Gender of Firm</b>

## **A.11 EMPLOYEE PROTECTIONS**

49 U.S.C. § 5333(a)

40 U.S.C. §§ 3141 – 3148

29 C.F.R. part 5

18 U.S.C. § 874

29 C.F.R. part 3

40 U.S.C. §§3701-3708

29 C.F.R. part 1926

### **Prevailing Wage and Anti-Kickback**

For all prime construction, alteration or repair contracts in excess of \$2,000 awarded by FTA, the Contractor shall comply with the Davis-Bacon Act and the Copeland “Anti-Kickback” Act. Under 49 U.S.C. § 5333(a), prevailing wage protections apply to laborers and mechanics employed on FTA assisted construction, alteration, or repair projects. The Contractor will comply with the Davis-Bacon Act, 40 U.S.C. §§ 3141-3144, and 3146-3148 as supplemented by DOL regulations at 29 C.F.R. part 5, “Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction.” In accordance with the statute, the Contractor shall pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, the Contractor agrees to pay wages not less than once a week. The Contractor shall also comply with the Copeland “Anti-Kickback” Act (40 U.S.C. § 3145), as supplemented by DOL regulations at 29 C.F.R. part 3, “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in part by Loans or Grants from the United States.” The Contractor is prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled.

### **Contract Work Hours and Safety Standards**

For all contracts in excess of \$100,000 that involve the employment of mechanics or laborers, the Contractor shall comply with the Contract Work Hours and Safety Standards Act (40 U.S.C. §§ 3701- 3708), as supplemented by the DOL regulations at 29 C.F.R. part 5. Under 40 U.S.C. § 3702 of the Act, the Contractor shall compute the wages of every mechanic

and laborer, including watchmen and guards, on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. § 3704 are applicable to construction work and provide that no laborer or mechanic be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchase of supplies or materials or articles ordinarily available on the open market, or to contracts for transportation or transmission of intelligence.

In the event of any violation of the clause set forth herein, the Contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, the Contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of this clause in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by this clause.

The FTA shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the Contractor or subcontractor under any such contract or any other Federal contract with the same prime Contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime Contractor, such sums as may be determined to be necessary to satisfy any liabilities of such Contractor or subcontractor for unpaid wages and liquidated damages as provided in this section.

The Contractor or subcontractor shall insert in any subcontracts the clauses set forth in this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime Contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in this agreement.

### **Contract Work Hours and Safety Standards for Awards Not Involving Construction**

The Contractor shall comply with all federal laws, regulations, and requirements

providing wage and hour protections for non-construction employees, in accordance with 40 U.S.C. § 3702, Contract Work Hours and Safety Standards Act, and other relevant parts of that Act, 40 U.S.C. § 3701 *et seq.*, and DOL regulations, “Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (also Labor Standards Provisions Applicable to Non-construction Contracts Subject to the Contract Work Hours and Safety Standards Act),” 29 C.F.R. part 5.

The Contractor shall maintain payrolls and basic payroll records during the course of the work and shall preserve them for a period of three (3) years from the completion of the contract for all laborers and mechanics, including guards and watchmen, working on the contract. Such records shall contain the name and address of each such employee, social security number, correct classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid.

Such records maintained under this paragraph shall be made available by the Contractor for inspection, copying, or transcription by authorized representatives of the FTA and the Department of Labor, and the Contractor will permit such representatives to interview employees during working hours on the job.

The contractor shall require the inclusion of the language of this clause within subcontracts of all tiers.

## **A.12 ENERGY CONSERVATION**

42 U.S.C. 6321 *et seq.*

49 C.F.R. part 622, subpart C

### **Energy Conservation**

The contractor agrees to comply with mandatory standards and policies relating to energy efficiency, which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act.

## **A.13 FLY AMERICA**

49 U.S.C. § 40118

41 C.F.R. part 301-10

48 C.F.R. part 47.4

### **Fly America Requirements**

a) *Definitions.* As used in this clause--

“International air transportation” means transportation by air between a place in the United States and a place outside the United States or between two places both of which are outside the United States.

“United States” means the 50 States, the District of Columbia, and outlying areas.

“U.S.-flag air carrier” means an air carrier holding a certificate under 49 U.S.C. Chapter 411.

- b) When Federal funds are used to fund travel, Section 5 of the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 40118) (Fly America Act) requires contractors, recipients, and others use U.S.-flag air carriers for U.S. Government-financed international air transportation of personnel (and their personal effects) or property, to the extent that service by those carriers is available. It requires the Comptroller General of the United States, in the absence of satisfactory proof of the necessity for foreign-flag air transportation, to disallow expenditures from funds, appropriated or otherwise established for the account of the United States, for international air transportation secured aboard a foreign-flag air carrier if a U.S.-flag air carrier is available to provide such services.
- c) If available, the Contractor, in performing work under this contract, shall use U.S.-flag carriers for international air transportation of personnel (and their personal effects) or property.
- d) In the event that the Contractor selects a carrier other than a U.S.-flag air carrier for international air transportation, the Contractor shall include a statement on vouchers involving such transportation essentially as follows:

**Statement of Unavailability of U.S.-Flag Air Carriers**

International air transportation of persons (and their personal effects) or property by U.S.-flag air carrier was not available or it was necessary to use foreign-flag air carrier service for the following reasons. See FAR § 47.403. *[State reasons]:*

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(End of Statement)

- e) The Contractor shall include the substance of this clause, including this paragraph (e), in each subcontract or purchase under this contract that may involve international air transportation.

(End of Clause)

## **A.14 GOVERNMENT-WIDE DEBARMENT AND SUSPENSION**

2 C.F.R. part 180

2 C.F.R part 1200

2 C.F.R. § 200.213

2 C.F.R. part 200 Appendix

II (I) Executive Order 12549

Executive Order 12689

### **Lobbying Restrictions**

The undersigned certifies, to the best of his or her knowledge and belief, that:

1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an OWNER, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any OWNER, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.
3. The undersigned shall require that the language of this certification be included in the award documents for all sub-awards at all tiers (including subcontracts, sub-grants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000

and not more than \$100,000 for each such failure.

\_\_\_\_\_ Signature of Contractor's Authorized Official

\_\_\_\_\_ Name and Title of Contractor's Authorized Official

\_\_\_\_\_ Date

### **Debarment and Suspension**

This contract is a covered transaction for purposes of 2 C.F.R. pt. 180 and 2 C.F.R. pt. 3000. As such the contractor is required to verify that none of the contractor, its principals (defined at 2 C.F.R. § 180.995), or its affiliates (defined at 2 C.F.R. § 180.905) are excluded (defined at 2 C.F.R. § 180.940) or disqualified (defined at 2 C.F.R. § 180.935).

C.F.R. pt. 3000, subpart C and must include a requirement to comply with these regulations in any lower tier covered transaction it enters into.

The accompanying certification is a material representation of fact relied upon by the subrecipient. If it is later determined that the contractor did not comply with 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C, in addition to remedies available to the Owner and subrecipient, the Federal Government may pursue available remedies, including but not limited to suspension and/or debarment.

The bidder or proposer agrees to comply with the requirements of 2 C.F.R. pt. 180, subpart C and 2 C.F.R. pt. 3000, subpart C while this offer is valid and throughout the period of any contract that may arise from this offer. The bidder or proposer further agrees to include a provision requiring such compliance in its lower tier covered transactions.

## DEBARMENT CERTIFICATION

### CERTIFICATION REGARDING DEBARMENT, SUSPENSION, OTHER INELIGIBILITY, AND VOLUNTARY EXCLUSION

The **CONTRACTOR**, \_\_\_\_\_, certifies to the best of its knowledge and belief, that it and its principals:

1. Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency.
2. Have not, within a three-year period preceding this Bid/Proposal, been convicted of or had a civil judgment rendered against them for commission of a fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public function (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property.
3. Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local) with commission of any of the offenses enumerated in Paragraph 2. of this certification.
4. Have not, within a three-year period preceding this Bid/Proposal, had one or more public transactions (Federal, State, or local) terminated for cause or default.

Where the **CONTRACTOR** is unable to certify to any of the statements in this certification, such **CONTRACTOR** shall attach an explanation to this Bid/Proposal.

I DO SOLEMNLY DECLARE AND AFFIRM UNDER THE PENALTIES OF PERJURY THAT THE CONTENTS OF THE FOREGOING DOCUMENT ARE TRUE AND CORRECT, AND THAT I AM AUTHORIZED, ON BEHALF OF THE ABOVE FIRM, TO MAKE THIS AFFIDAVIT.

\_\_\_\_\_  
CONTRACTOR

\_\_\_\_\_  
DATE

## **A.15 INCORPORATION OF FEDERAL TRANSIT ADMINISTRATION (FTA) TERMS**

### **Incorporation of Federal Administration (FTA) Terms**

These provisions include, in part, certain Standard Terms and Conditions required by DOT, whether or not expressly set forth in the preceding contract provisions. All contractual provisions required by DOT, as set forth in FTA Circular 4220 are hereby incorporated by reference. Anything to the contrary herein notwithstanding, all FTA mandated terms shall be deemed to control in the event of a conflict with other provisions contained in this Agreement. The Contractor shall not perform any act, fail to perform any act, or refuse to comply with any Owner requests which would cause the Owner to be in violation of the FTA terms and conditions.

## **A.16 NO GOVERNMENT OBLIGATION TO THIRD PARTIES**

### **No Federal Government Obligation to Third Parties**

The Owner and Contractor acknowledge and agree that, notwithstanding any concurrence by the Federal Government in or approval of the solicitation or award of the underlying Contract, absent the express written consent by the Federal Government, the Federal Government is not a party to this Contract and shall not be subject to any obligations or liabilities to the Owner, Contractor or any other party (whether or not a party to that contract) pertaining to any matter resulting from the underlying Contract.

The Contractor agrees to include the above clause in each subcontract financed in whole or in part with Federal assistance provided by the FTA. It is further agreed that the clause shall not be modified, except to identify the subcontractor who will be subject to its provisions.

## **A.17 NOTIFICATION TO FEDERAL TRANSIT ADMINISTRATION (FTA)**

2 C.F.R. § 180.220

2 C.F.R. § 1200.220

### **Notification to Federal Transit Administration (FTA)**

If a current or prospective legal matter that may affect the Federal Government emerges, the

Contractor must promptly notify the Owner, which will then notify the FTA Chief Counsel and FTA Regional Counsel for the Region in which the Owner is located. The Contractor is required to include an equivalent provision in its sub-agreements at every tier, for any agreement that is a “covered transaction” according to 2 C.F.R. § 180.220 and 1200.220.

(1) The types of legal matters that require notification include, but are not limited to, a major dispute, breach, default, litigation, or naming the Federal Government as a party to litigation or a legal disagreement in any forum for any reason.

(2) Matters that may affect the Federal Government include, but are not limited to, the Federal Government’s interests in the Award, the accompanying Underlying Agreement, and any Amendments thereto, or the Federal Government’s administration or enforcement of federal laws, regulations, and requirements.

(3) The Owner must promptly notify the U.S. DOT Inspector General in addition to the FTA Chief Counsel or Regional Counsel for the Region in which the Owner is located, if the Owner has knowledge of potential fraud, waste, or abuse occurring on a Project receiving assistance from FTA. The notification provision applies if a person has or may have submitted a false claim under the False Claims Act, 31 U.S.C. § 3729 et seq., or has or may have committed a criminal or civil violation of law pertaining to such matters as fraud, conflict of interest, bribery, gratuity, or similar misconduct involving federal assistance. This responsibility occurs whether the Project is subject to this Agreement or another agreement between the Owner and FTA, or an agreement involving a principal, officer, employee, agent, or Third Party Participant of the Owner. It also applies to subcontractors at any tier. Knowledge, as used in this paragraph, includes, but is not limited to, knowledge of a criminal or civil investigation by a Federal, state, or local law enforcement or other investigative agency, a criminal indictment or civil complaint, or probable cause that could support a criminal indictment, or any other credible information in the possession of the Owner.

## **A.18 PATENT RIGHTS AND RIGHTS IN DATA**

2 C.F.R. part 200, Appendix II (F) 37

C.F.R. part 401

### **Intellectual Property Rights**

This Project is funded through a Federal award with FTA for experimental, developmental, or research work purposes. As such, certain Patent Rights and Data Rights apply to all subject data

first produced in the performance of this Contract. The Contractor shall grant the OWNER intellectual property access and licenses deemed necessary for the work performed under this Agreement and in accordance with the requirements of 37 C.F.R. part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," and any implementing regulations issued by FTA or U.S. DOT. The terms of an intellectual property agreement and software license rights will be finalized prior to execution of this Agreement and shall, at a minimum, include the following restrictions: Except for its own internal use, the Contractor may not publish or reproduce subject data in whole or in part, or in any manner or form, nor may the Contractor authorize others to do so, without the written consent of FTA, until such time as FTA may have either released or approved the release of such data to the public. This restriction on publication, however, does not apply to any contract with an academic institution. For purposes of this agreement, the term "subject data" means recorded information whether or not copyrighted, and that is delivered or specified to be delivered as required by the Contract. Examples of "subject data" include, but are not limited to computer software, standards, specifications, engineering drawings and associated lists, process sheets, manuals, technical reports, catalog item identifications, and related information, but do not include financial reports, cost analyses, or other similar information used for performance or administration of the Contract.

The Federal Government reserves a royalty-free, non-exclusive and irrevocable license to reproduce, publish, or otherwise use, and to authorize others to use for "Federal Government Purposes," any subject data or copyright described below. For "Federal Government Purposes," means use only for the direct purposes of the Federal Government. Without the copyright owner's consent, the Federal Government may not extend its Federal license to any other party.

Any subject data developed under the Contract, whether or not a copyright has been obtained; and Any rights of copyright purchased by the Contractor using Federal assistance in whole or in part by the FTA.

Unless FTA determines otherwise, the Contractor performing experimental, developmental, or research work required as part of this Contract agrees to permit FTA to make available to the public, either FTA's license in the copyright to any subject data developed in the course of the Contract, or a copy of the subject data first produced under the Contract for which a copyright has not been obtained. If the experimental, developmental, or research work, which is the subject of this Contract, is not completed for any reason whatsoever, all data developed under the Contract shall become subject data as defined herein and shall be delivered as the Federal Government

may direct.

Unless prohibited by state law, upon request by the Federal Government, the Contractor agrees to indemnify, save, and hold harmless the Federal Government, its officers, agents, and employees acting within the scope of their official duties against any liability, including costs and expenses, resulting from any willful or intentional violation by the Contractor of proprietary rights, copyrights, or right of privacy, arising out of the publication, translation, reproduction, delivery, use, or disposition of any data furnished under that contract. The Contractor shall be required to indemnify the Federal Government for any such liability arising out of the wrongful act of any employee, official, or agents of the Federal Government.

Nothing contained in this clause on rights in data shall imply a license to the Federal Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Federal Government under any patent.

Data developed by the Contractor and financed entirely without using Federal assistance provided by the Federal Government that has been incorporated into work required by the underlying Contract is exempt from the requirements herein, provided that the Contractor identifies those data in writing at the time of delivery of the Contract work.

The Contractor agrees to include these requirements in each subcontract for experimental, developmental, or research work financed in whole or in part with Federal assistance.

#### **A.19 PRE-AWARD AND POST-DELIVERY AUDITS OF ROLLING STOCK PURCHASES**

49 U.S.C. 5323(m)

49 C.F.R. part 663

##### **Pre-Award and Post-Delivery Audit Requirements**

The Contractor agrees to comply with 49 U.S.C. § 5323(m) and FTA's implementing regulation at 49 C.F.R. part 663. The Contractor shall comply with the Buy America certification(s) submitted with its proposal/bid. The Contractor agrees to participate and cooperate in any pre-award and post-delivery audits performed pursuant to 49 C.F.R. part 663 and related FTA guidance.

## **A.20 PROGRAM FRAUD AND FALSE OR FRAUDULENT STATEMENTS AND RELATED ACTS**

49 U.S.C. § 5323(l) (1)

31 U.S.C. §§ 3801-3812

18 U.S.C. § 1001

49 C.F.R. part 31

### **Program Fraud and False or Fraudulent Statements or Related Acts**

The Contractor acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. § 3801 *et seq.* and U.S. DOT regulations, "Program Fraud Civil Remedies," 49 C.F.R. part 31, apply to its actions pertaining to this Project. Upon execution of the underlying contract, the Contractor certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, it may make, or causes to be made, pertaining to the underlying contract or the FTA assisted project for which this contract work is being performed. In addition to other penalties that may be applicable, the Contractor further acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification, the Federal Government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986 on the Contractor to the extent the Federal Government deems appropriate.

The Contractor also acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification to the Federal Government under a contract connected with a project that is financed in whole or in part with Federal assistance originally awarded by FTA under the authority of 49 U.S.C. chapter 53, the Government reserves the right to impose the penalties of 18 U.S.C. § 1001 and 49 U.S.C. § 5323(l) on the Contractor, to the extent the Federal Government deems appropriate.

The Contractor agrees to include the above two clauses in each subcontract financed in whole or in part with Federal assistance provided by FTA. It is further agreed that the clauses shall not be modified, except to identify the subcontractor who will be subject to the provisions.

## **A.21 PROMPT PAYMENT**

### **Prompt Payment**

The Contractor is required to pay its subcontractors performing work related to this contract for satisfactory performance of that work no later than thirty (30) days after the Contractor's receipt of payment for that work. In addition, the Contractor is required to return any retainage payments to those Subcontractors within thirty (30) days after the Subcontractor's work related to this contract is satisfactorily completed.

The Contractor must promptly notify the Owner, whenever a DBE subcontractor performing work related to this contract is terminated or fails to complete its work and must make good faith efforts to engage another DBE subcontractor to perform at least the same amount of work. The Contractor may not terminate any DBE subcontractor and perform that work through its own forces or those of an affiliate without prior written consent of the Owner.

## **A.22 PUBLIC TRANSPORTATION EMPLOYEE PROTECTIVE ARRANGEMENTS**

49 U.S.C. § 5333(b) ("13(c)")

29 C.F.R. part 215

**DOES NOT APPLY**

## **A.23 RECYCLED PRODUCTS**

42 U.S.C. § 6962

40 C.F.R. part 247

2 C.F.R. part § 200.322

**DOES NOT APPLY**

## **A.24 SAFE OPERATION OF MOTOR VEHICLES**

23 U.S.C. part 402

Executive Order No. 13043

Executive Order No. 13513

U.S. DOT Order No. 3902.10

## **Safe Operation of Motor Vehicles**

### **Seat Belt Use**

The Contractor is encouraged to adopt and promote on-the-job seat belt use policies and programs for its employees and other personnel that operate company-owned vehicles, company-rented vehicles, or personally operated vehicles. The terms “company-owned” and “company-leased” refer to vehicles owned or leased either by the Contractor or OWNER.

### **Distracted Driving**

The Contractor agrees to adopt and enforce workplace safety policies to decrease crashes caused by distracted drivers, including policies to ban text messaging while using an electronic device supplied by an employer, and driving a vehicle the driver owns or rents, a vehicle Contractor owns, leases, or rents, or a privately-owned vehicle when on official business in connection with the work performed under this agreement.

## **A.25 SCHOOL BUS OPERATIONS**

49 U.S.C. 5323(f)

49 C.F.R. part 605

**DOES NOT APPLY**

## **A.26 SEISMIC SAFETY**

42 U.S.C. 7701 *et seq.*

49 C.F.R. part 41

Executive Order (E.O.) 12699

### **Seismic Safety**

The contractor agrees that any new building or addition to an existing building will be designed and constructed in accordance with the standards for Seismic Safety required in

Department of Transportation (DOT) Seismic Safety Regulations 49 C.F.R. part 41 and will certify to compliance to the extent required by the regulation. The contractor also agrees to ensure that all work performed under this contract, including work performed by a subcontractor, is in compliance with the standards required by the Seismic Safety regulations and the certification of compliance issued on the project.

#### **A.27 SUBSTANCE ABUSE REQUIREMENTS**

49 U.S.C. § 5331

49 C.F.R. part 655

49 C.F.R. part 40

**DOES NOT APPLY**

#### **A.28 TERMINATION**

2 C.F.R. § 200.339

2 C.F.R. part 200, Appendix II (B)

#### **Termination for Convenience (General Provision)**

The OWNER may terminate this contract, in whole or in part, at any time by written notice to the Contractor when it is in the OWNER's best interest. The Contractor shall be paid its costs, including contract close-out costs, and profit on work performed up to the time of termination. The Contractor shall promptly submit its termination claim to OWNER to be paid the Contractor. If the Contractor has any property in its possession belonging to OWNER, the Contractor will account for the same, and dispose of it in the manner OWNER directs.

#### **Termination for Default [Breach or Cause] (General Provision)**

If the Contractor does not deliver supplies in accordance with the contract delivery schedule, or if the contract is for services, the Contractor fails to perform in the manner called for in the contract, or if the Contractor fails to comply with any other provisions of the contract, the OWNER may terminate this contract for default. Termination shall be affected by serving a Notice

of Termination on the Contractor setting forth the manner in which the Contractor is in default. The Contractor will be paid only the contract price for supplies delivered and accepted, or services performed in accordance with the manner of performance set forth in the contract.

If it is later determined by the OWNER that the Contractor had an excusable reason for not performing, such as a strike, fire, or flood, events which are not the fault of or are beyond the control of the Contractor, the OWNER, after setting up a new delivery or performance schedule, may allow the Contractor to continue work, or treat the termination as a Termination for Convenience.

### **Opportunity to Cure (General Provision)**

The OWNER, in its sole discretion may, in the case of a termination for breach or default, allow the Contractor [an appropriately short period of time] in which to cure the defect. In such case, the Notice of Termination will state the time period in which cure is permitted and other appropriate conditions

If Contractor fails to remedy to OWNER's satisfaction the breach or default of any of the terms, covenants, or conditions of this Contract within [10 days] after receipt by Contractor of written notice from OWNER setting forth the nature of said breach or default, OWNER shall have the right to terminate the contract without any further obligation to Contractor. Any such termination for default shall not in any way operate to preclude OWNER from also pursuing all available remedies against Contractor and its sureties for said breach or default.

### **Waiver of Remedies for any Breach**

In the event that OWNER elects to waive its remedies for any breach by Contractor of any covenant, term or condition of this contract, such waiver by OWNER shall not limit OWNER's remedies for any succeeding breach of that or of any other covenant, term, or condition of this contract.

### **Termination for Convenience or Default (Architect and Engineering)**

The OWNER may terminate this contract in whole or in part, for the OWNER's convenience or because of the failure of the Contractor to fulfill the contract obligations. The OWNER shall terminate by delivering to the Contractor a Notice of Termination specifying the

nature, extent, and effective date of the termination. Upon receipt of the notice, the Contractor shall (1) immediately discontinue all services affected (unless the notice directs otherwise), and (2) deliver to the OWNER 's Contracting Officer all data, drawings, specifications, reports, estimates, summaries, and other information and materials accumulated in performing this contract, whether completed or in process. OWNER has a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, all such data, drawings, specifications, reports, estimates, summaries, and other information and materials.

If the termination is for the convenience of the OWNER, the OWNER's Contracting Officer shall make an equitable adjustment in the contract price but shall allow no anticipated profit on unperformed services.

If the termination is for failure of the Contractor to fulfill the contract obligations, the OWNER may complete the work by contract or otherwise and the Contractor shall be liable for any additional cost incurred by the OWNER.

If, after termination for failure to fulfill contract obligations, it is determined that the Contractor was not in default, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of OWNER.

#### **Termination for Convenience or Default (Cost-Type Contracts)**

The OWNER may terminate this contract, or any portion of it, by serving a Notice of Termination on the Contractor. The notice shall state whether the termination is for convenience of OWNER or for the default of the Contractor. If the termination is for default, the notice shall state the manner in which the Contractor has failed to perform the requirements of the contract. The Contractor shall account for any property in its possession paid for from funds received from the OWNER, or property supplied to the Contractor by the OWNER. If the termination is for default, the OWNER may fix the fee, if the contract provides for a fee, to be paid the Contractor in proportion to the value, if any, of work performed up to the time of termination. The Contractor shall promptly submit its termination claim to the OWNER and the parties shall negotiate the termination settlement to be paid the Contractor.

If the termination is for the convenience of OWNER, the Contractor shall be paid its contract close-out costs, and a fee, if the contract provided for payment of a fee, in proportion to

the work performed up to the time of termination.

If, after serving a Notice of Termination for Default, the OWNER determines that the Contractor has an excusable reason for not performing, the OWNER, after setting up a new work schedule, may allow the Contractor to continue work, or treat the termination as a Termination for Convenience.

## **A.29 VIOLATION AND BREACH OF CONTRACT**

2 C.F.R. § 200.326

2 C.F.R. part 200, Appendix II (A)

### **Rights and Remedies of the OWNER**

The OWNER shall have the following rights in the event that the OWNER deems the Contractor guilty of a breach of any term under the Contract.

1. The right to take over and complete the work or any part thereof as OWNER for and at the expense of the Contractor, either directly or through other contractors;
2. The right to cancel this Contract as to any or all of the work yet to be performed;
3. The right to specific performance, an injunction or any other appropriate equitable remedy; and
4. The right to money damages.

For purposes of this Contract, breach shall include [OWNER to define].

### **Rights and Remedies of Contractor**

Inasmuch as the Contractor can be adequately compensated by money damages for any breach of this Contract, which may be committed by the OWNER, the Contractor expressly agrees that no default, act or omission of the OWNER shall constitute a material breach of this Contract, entitling Contractor to cancel or rescind the Contract (unless the OWNER directs Contractor to do so) or to suspend or abandon performance.

### **Remedies**

Substantial failure of the Contractor to complete the Project in accordance with the terms

of this Agreement will be a default of this Agreement. In the event of a default, the OWNER will have all remedies in law and equity, including the right to specific performance, without further assistance, and the rights to termination or suspension as provided herein. The Contractor recognizes that in the event of a breach of this Agreement by the Contractor before the OWNER takes action contemplated herein, the OWNER will provide the Contractor with sixty (60) days written notice that the OWNER considers that such a breach has occurred and will provide the Contractor a reasonable period of time to respond and to take necessary corrective action.

### **Disputes**

- **Example 1:** Disputes arising in the performance of this Contract that are not resolved by agreement of the parties shall be decided in writing by the authorized representative of OWNER's [title of employee]. This decision shall be final and conclusive unless within [10] days from the date of receipt of its copy, the Contractor mails or otherwise furnishes a written appeal to the [title of employee]. In connection with any such appeal, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its position. The decision of the [title of employee] shall be binding upon the Contractor and the Contractor shall abide by the decision.
- **Example 2:** The OWNER and the Contractor intend to resolve all disputes under this Agreement to the best of their abilities in an informal manner. To accomplish this end, the parties will use an Alternative Dispute Resolution process to resolve disputes in a manner designed to avoid litigation. In general, the parties contemplate that the Alternative Dispute Resolution process will include, at a minimum, an attempt to resolve disputes through communications between their staffs, and, if resolution is not reached at that level, a procedure for review and action on such disputes by appropriate management level officials within the OWNER and the Contractor's organization.

In the event that a resolution of the dispute is not mutually agreed upon, the parties can agree to mediate the dispute or proceed with litigation. Notwithstanding any provision of this section, or any other provision of this Contract, it is expressly agreed and understood that any court proceeding arising out of a dispute under the Contract shall be heard by a Court de novo and the court shall not be limited in such proceeding to the issue of whether the Authority acted

in an arbitrary, capricious or grossly erroneous manner.

Pending final settlement of any dispute, the parties shall proceed diligently with the performance of the Contract, and in accordance with the OWNER's direction or decisions made thereof.

### **Performance during Dispute**

Unless otherwise directed by OWNER, Contractor shall continue performance under this Contract while matters in dispute are being resolved.

### **Claims for Damages**

Should either party to the Contract suffer injury or damage to person or property because of any act or omission of the party or of any of its employees, agents or others for whose acts it is legally liable, a claim for damages therefor shall be made in writing to such other party within a reasonable time after the first observance of such injury or damage.

### **Remedies**

Unless this Contract provides otherwise, all claims, counterclaims, disputes and other matters in question between the OWNER and the Contractor arising out of or relating to this agreement or its breach will be decided by arbitration if the parties mutually agree, or in a court of competent jurisdiction within the State in which the OWNER is located.

### **Rights and Remedies**

The duties and obligations imposed by the Contract documents and the rights and remedies available thereunder shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law. No action or failure to act by the OWNER or Contractor shall constitute a waiver of any right or duty afforded any of them under the Contract, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically agreed in writing.