

**THIS STAFF REPORT COVERS CALENDAR ITEM NO.:** 7.2  
**FOR THE MEETING OF:** April 9, 2009

## **TRANSBAY JOINT POWERS AUTHORITY**

### **BRIEF DESCRIPTION:**

Approving an intergovernmental agreement between the Transbay Joint Powers Authority (TJPA) and the San Francisco Public Utilities Commission (SFPUC) in an amount not to exceed \$225,000 to provide As-Needed Design Review Services for the Transbay Transit Center Program (Program).

### **SUMMARY:**

The staff requests that the Board enter into an intergovernmental agreement with the SFPUC for as-needed design review and engineering support services. The agreement would be for a maximum of \$225,000 and for a term not to exceed five (5) years.

### **REPORT:**

The Program requires the relocation of existing water supply, wastewater and streetlight facilities in the area surrounding the existing Transbay Terminal and along the Downtown Extension alignment. The SFPUC is the agency responsible to maintain and review improvements to the City-owned water supply, streetlight and sanitary and storm sewer systems.

The staff requests that the SFPUC provide the following design review and engineering support services:

1. **WATER SYSTEM DESIGN ANALYSIS** – The SFPUC will review the hydraulic modeling and final design for the relocation of the water distribution system to minimize the amount of temporary relocation work and optimize the permanent water system installation to accommodate the needs of the Program.
2. **STREETLIGHT INFRASTRUCTURE DESIGN ANALYSIS** – The SFPUC will review the final design for the relocation of all City-owned streetlights and establish guidelines for the installation of new streetlight infrastructure and fixtures related to the Program.
3. **WASTEWATER SYSTEM DESIGN ANALYSIS** – The SFPUC will provide input during design stages and review and approve the final wastewater system relocation design.

The staff has negotiated an intergovernmental agreement with the SFPUC, and the SFPUC has signed the agreement. The agreement would be for a maximum of \$225,000 and for a term not to exceed five (5) years.

### **RECOMMENDATION:**

The staff recommends that the Board authorize the Executive Director to execute the intergovernmental agreement in the form attached to this report.

### **ATTACHMENTS:**

1. Intergovernmental Agreement
2. Resolution

**TRANSBAY JOINT POWERS AUTHORITY  
BOARD OF DIRECTORS**

**Resolution No. \_\_\_\_\_**

WHEREAS, The Transbay Transit Center Program (Program) requires the relocation of existing water supply, wastewater, and streetlight facilities in the area surrounding the existing Transbay Terminal and along the Downtown Extension alignment; and

WHEREAS, The San Francisco Public Utilities Commission (SFPUC) is responsible to maintain and review improvements to the City-owned water supply, streetlight and sanitary and storm sewer systems; and

WHEREAS, The SFPUC submitted a proposal for as-needed hydraulic model analysis for the sizing of water distribution facilities and for the review of final water system relocation design to the TJPA; and

WHEREAS, The SFPUC submitted a proposal for as-needed technical analysis and review of streetlight infrastructure relocation design services to the TJPA; and

WHEREAS, The SFPUC submitted a proposal for as-needed hydraulic model analysis for appropriate sewer sizing and review of wastewater system relocation design services to the TJPA; and

WHEREAS, Staff has reviewed the SFPUC's proposals and negotiated an intergovernmental agreement for As-Needed Design Review and Engineering Support Services (Agreement); and

WHEREAS, Staff recommends that the Board approve the Agreement; now, therefore, be it

RESOLVED, That the Board authorizes the Executive Director to execute the Agreement with SFPUC to provide As-Needed Design Review Services for a maximum compensation of \$225,000 and for a period not to exceed five (5) years.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of April 9, 2009.

\_\_\_\_\_  
Secretary, Transbay Joint Powers Authority

## **INTERGOVERNMENTAL REIMBURSEMENT AGREEMENT**

between

**TRANSBAY JOINT POWERS AUTHORITY**

and

**SAN FRANCISCO PUBLIC UTILITIES COMMISSION**

for

**Design Review Services**

for the

**Transbay Transit Center Program**

This Intergovernmental Reimbursement Agreement (Agreement) is entered into as of the \_\_\_\_\_ day of April, 2009, by and between the Transbay Joint Powers Authority (TJPA), a joint powers authority, and the San Francisco Public Utilities Commission (SFPUC) (each individually a Party and, collectively, the Parties).

### **RECITALS**

THIS Agreement is entered into with reference to the following facts and circumstances:

- A. The TJPA is a public entity authorized to perform construction of the new Transbay Transit Center Program (Program). The Program includes the construction of a new multimodal Transit Center on the site of the existing Transbay Terminal at First and Mission streets in San Francisco, an extension of Caltrain (Downtown Extension) from its existing terminus at Fourth and King streets through a tunnel to the new Transit Center, underground Utility Relocations, the construction of new Bus Ramps and a Bus Storage Facility.
- B. The Program includes the relocation by the TJPA of existing water distribution, wastewater and streetlight facilities in the area surrounding the existing Transbay Terminal.
- C. The SFPUC is responsible for San Francisco's water supply, wastewater and streetlight infrastructure.
- D. The SFPUC - City Distribution Division (CDD) has agreed to review water system relocation design.
- E. The SFPUC - Wastewater Enterprise (WWE) has agreed to review wastewater system relocation design.
- F. The SFPUC - Bureau of Light, Heat & Power (BLHP) has agreed to review streetlight infrastructure relocation design.
- G. The TJPA has agreed to reimburse the costs of the SFPUC's review of utility relocation design and implementation.
- H. The SFPUC acknowledges that the TJPA receives state and federal funding for the Program, including funding for the Services under this Agreement, and that in order for Program costs and expenses to be administered under state and federal programs, the Services must meet certain state and federal funding guidelines.

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## **TERMS AND CONDITIONS**

### **Section 1. SCOPE OF SERVICES**

The TJPA shall pay to the SFPUC the reasonable costs and expenses incurred by the SFPUC consistent with this Agreement to perform the review and approval services identified in Exhibit A, Scope of Services (Services), pursuant to SFPUC's jurisdictional authority over the utility systems being modified and/or affected by the TJPA project. The SFPUC will review the design solely for the purpose of assessing the TJPA's compliance with SFPUC's utility system standards and specifications. The TJPA shall design and construct all modifications to SFPUC utility systems in accordance with SFPUC standards and specifications for utility system design, construction and operations. The TJPA is solely responsible for the design and construction of the relocated facilities. This Agreement does not include construction inspection services by the SFPUC. It is anticipated that construction inspection services will be addressed in a subsequent agreement between the Parties.

The Services provided by the SFPUC under this Agreement include the review and approval of the TJPA's proposed modifications of the SFPUC utility systems, and consist of a series of as-needed activities identified in **Exhibit A** that the TJPA will authorize by way of Task Orders.

**1.1 Request for Task Orders.** The TJPA shall initiate each Task Order by issuing a written request to the SFPUC to prepare a Task Order Proposal (Proposal). The request will describe the tasks the SFPUC is being requested to perform, the schedule for performance, and the required deliverables.

**1.2 SFPUC Proposals.** The SFPUC shall prepare an estimate for the Proposal and submit it to the TJPA. The Proposal shall describe the services being proposed by the SFPUC in sufficient detail to document its approach to performing the requested tasks. If applicable, the Proposal may include:

- a. A detailed description of the Services to be performed, by task and subtask
- b. A summary description of the means and methods that will be used to perform the Services
- c. A schedule that indicates milestones for completion of each task
- d. A Management Plan that lists SFPUC personnel and consultants assigned to each part of the Services and a rationale for the proposed staffing
- e. A Budget Plan that includes:
  1. A detailed cost estimate for each subtask, including consultant costs
  2. Estimated hours and direct salaries for each employee and consultant
  3. Overhead for the SFPUC's staff
  4. Other direct costs
- f. A list of deliverables

**1.3 TJPA Review and Negotiation.** The TJPA will review the Proposal and promptly negotiate the terms of the Task Order with the SFPUC.

**1.4 Notice to Proceed.** Following the Parties' agreement on the terms of a Task Order and any necessary approvals by other public agencies, the TJPA will provide a written Notice to Proceed (NTP) to the SFPUC to proceed with the Services. The SFPUC will not commence work without a written NTP.

**1.5 Subcontractors.** The TJPA acknowledges that the SFPUC may retain subcontractors to assist the SFPUC in the performance of the Services under this Agreement.

a. The SFPUC shall select all subcontractors through a competitive procurement process in compliance with Federal Transit Administration Circular 4220.1F as set forth in Section 2 of the FTA Regulations attached as Exhibit B.

b. Subcontractors contracting with the SFPUC shall work at the SFPUC's direction and under contract or agreement with the SFPUC. The subcontractors shall also be subject to the FTA Regulations. In the event of a conflict between the FTA Regulations and any term or condition of the contract between the SFPUC and the subcontractor, the provisions of the FTA Regulations shall control.

c. The TJPA shall assume no liability whatsoever to any such subcontractor. In any contract, agreement, or task order between the SFPUC and its subcontractors for the Services, the SFPUC shall require the following:

- i. The TJPA shall be recognized as a third-party beneficiary of any such agreement or task order;
- ii. The TJPA shall be named as additional insured of any insurance policy provided by a subcontractor covering general and professional liability for the project as set forth in section 6 of this Agreement; and
- iii. The subcontractor shall indemnify the TJPA consistent with the indemnification provisions set forth in this Agreement.

## **Section 2. TERM OF AGREEMENT AND TERMINATION**

The term of this Agreement shall be five (5) years from the Effective Date of this Agreement, unless earlier terminated. This Agreement may be terminated by either Party, with or without cause, upon thirty (30) days written notice. Termination of the Agreement does not relieve the TJPA from obtaining approval from the SFPUC for all work under its jurisdiction or payment of the associated costs of providing such approval.

## **Section 3. COMPENSATION**

The TJPA shall compensate the SFPUC for the Services at the hourly labor rates, including overhead costs as stated in **Exhibit C**, or as may be adjusted by labor contract agreements with

the City during the term of this Agreement. The SFPUC will provide advanced notice to the TJPA of any such labor cost adjustments, subject to the following provisions.

**3.1 Certification of Funds and Maximum Contract Amount.** The SFPUC will bill the TJPA on a cost reimbursable basis. SFPUC invoices shall be payable under this Agreement upon receipt of advance written certification by the Finance Coordinator of the TJPA, or her designee, of the total amount of available funds. The total amount of the TJPA's obligation hereunder shall not at any time exceed the amount certified for the purpose and period stated in such advance certification.

**3.2 Aggregate Amount of Contract.** The aggregate amount of payments under this Agreement shall not exceed \$225,000. Each payment to the SFPUC shall cover only those Services that the Executive Director of the TJPA, or her designee, determines, as set forth in Sections 1.4 and 2, has been performed as required in this Agreement.

**3.3 Invoice Format.** Invoices furnished by the SFPUC under this Agreement must be in a form reasonably acceptable to the TJPA. All amounts paid to the SFPUC shall be subject to audit by the TJPA.

**3.4 Terms of Payment.** The SFPUC shall submit invoices monthly for approval of the TJPA Executive Director, or her designee. The TJPA shall make a good faith effort to pay all undisputed amounts within forty-five (45) days following receipt of a proper invoice from the SFPUC. The TJPA may dispute any invoice or portion thereof by providing the SFPUC with a written Notice of Dispute objecting to the nature and amount of the invoice within thirty (30) days following receipt of the invoice. Upon SFPUC's receipt of a Notice of Dispute, the SFPUC and the TJPA shall meet and attempt to resolve the dispute at the earliest practicable time. If the dispute cannot be resolved within sixty (60) days of the TJPA's issuance of a written Notice of Dispute, the Parties shall proceed to mediation as set forth in this Agreement. However, in no event shall the TJPA be liable for interest or late charges for any late payments. The SFPUC acknowledges that the provisions of Public Contract Code Section 7107 do not apply to this Agreement.

**3.5 Payment Address.** The TJPA shall send all payments to the SFPUC under this Agreement by United States mail to the SFPUC's address :

**San Francisco Public Utilities Commission  
Finance Division  
1155 Market Street, 5<sup>th</sup> Floor  
San Francisco, CA 94103  
Attention: \_\_\_\_\_**

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**Section 4. EFFECTIVE DATE**

This Agreement shall become effective when the TJPA's Finance Coordinator, or her designee, has certified the availability of funds and the TJPA has issued the first NTP (Effective Date).

**Section 5. LEGAL REQUIREMENTS**

**5.1 Governing Law.** The laws of the State of California shall govern this Agreement.

**5.2 Compliance with Applicable Laws.** The SFPUC and any subcontractors shall comply with all laws applicable to the performance of the Services.

**5.3 Nondiscrimination and Equal Opportunity.** The SFPUC shall not discriminate on the basis of a person's race, religion, color, national origin, age, physical or mental handicap or disability, medical condition, marital status, sex, or sexual orientation against any employee, applicant for employment, subcontractor, bidder for a subcontract, or participant in, recipient of, or applicant for any services or programs provided by the SFPUC under this Agreement. The SFPUC shall comply with all applicable federal, state, and local laws, policies, rules, and requirements related to equal opportunity and nondiscrimination in employment, contracting, and the provision of any Services that are the subject of this Agreement. Pursuant to this policy, the SFPUC is encouraged to actively recruit minorities, women, and other disadvantaged persons for its workforce and take other steps to ensure nondiscrimination in the SFPUC's employment practices such as on-the-job training and education.

**5.4 Drug-free Workplace Policy.** The SFPUC acknowledges that under the Federal Drug-Free Workplace Act of 1989, the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited on the TJPA's premises. The SFPUC agrees that any violation of this prohibition by the SFPUC, its employees, agents or assigns will be deemed a material breach of this Agreement.

**5.5 Conflict of Interest.** Through its execution of this Agreement, the SFPUC acknowledges that it is familiar with the provisions of the Conflict of Interest Code of the TJPA and Section 87100 et seq. of the Government Code of the State of California, and certifies that it does not know of any facts which constitute a violation of said provisions. The SFPUC must comply with all applicable conflict of interest codes at all times during the term of this Agreement.

**Section 6. COMPLIANCE WITH ORDINANCES**

**Government Code Section 6509.** The SFPUC acknowledges that the TJPA is subject to California Government Code Section 6509 which subjects the TJPA to restrictions applicable to the City and agrees to comply with City ordinances set forth in this section.

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**Section 7. KEEPING AND STATUS OF RECORDS**

**7.1 SFPUC's Books and Records.** The SFPUC shall maintain hard copies of any and all ledgers, books of account, invoices, vouchers, canceled checks, and other records or documents evidencing or relating to charges for services or expenditures and disbursements charged to the TJPA under this Agreement for three (3) years from the date of the TJPA's final payment to the SFPUC under this Agreement. At the conclusion of such three-year period, the SFPUC will provide the hard copies of the documents to the TJPA. The SFPUC will, however, retain electronic copies of such documents for any longer period required under law.

**7.2 Inspection and Audit of Records.** Any records or documents that the SFPUC is required to maintain under Section 9.2 of this Agreement shall be made available for inspection, audit, and/or copying at any time during regular business hours, upon oral or written request of the TJPA. Under California Government Code Section 8546.7, if the amount of public funds expended under this Agreement exceeds Ten Thousand Dollars (\$10,000.00), the Agreement shall be subject to the examination and audit of the State Auditor, at the request of the TJPA or as part of any audit of the TJPA, for a period of three (3) years after final payment under the Agreement.

**Section 8. NONASSIGNMENT**

This Agreement is not assignable either in whole or in part without the written consent of the TJPA.

**Section 9. AMENDMENTS**

This Agreement may be amended or modified only by written agreement signed by both Parties.

**Section 10. SEVERABILITY**

The invalidity, in whole or in part, of any provisions of this Agreement shall not void or affect the validity of any other provisions of this Agreement.

**Section 11. MEDIATION**

Should any dispute arise out of this Agreement, the Parties shall attempt to reach a resolution with the assistance of a mutually acceptable mediator. Neither Party shall be permitted to file legal action without first meeting in mediation and making a good faith attempt to reach a mediated resolution. The costs of the mediator, if any, shall be paid equally by the Parties. If a mediated settlement is reached, neither Party shall be deemed the prevailing Party for purposes of the settlement, and each Party shall bear its own legal costs.

**Section 12. ENTIRE AGREEMENT**

This Agreement, including the following exhibits comprise the entire Agreement:



Exhibit A – Scope of Services and Budget

Exhibit B – FTA Regulations

Exhibit C – SFPUC Hourly Rates

**Section 13. INDEMNITY**

To the extent that the SFPUC performs services under this Agreement, the SFPUC shall defend, indemnify, and hold the TJPA and its officers, directors, employees, and agents harmless from any and all claims and liabilities related to or as a result of the SFPUC's performance of this Agreement to the extent caused, in whole or in part, by (1) the negligence, recklessness, or willful misconduct, acts or omissions of the SFPUC, its employees, or subcontractors; or (2) acts for which the SFPUC's employees or subcontractors would be strictly liable.

The TJPA shall defend, indemnify and hold the SFPUC and its officers, directors, employees and agents harmless from all claims and liabilities related to or as a part of the TJPA's design and construction and other services performed pursuant to this Agreement, to the extent caused, in whole or in part, by (1) the negligence, recklessness, or willful misconduct, acts or omissions of the TJPA, its employees, or subcontractors; or (2) acts for which the TJPA's employees or subcontractors would be strictly liable.

**Section 14. NOTICES**

All notices required by this Agreement shall be given to the TJPA and the SFPUC in writing, by first-class mail, postage prepaid, addressed as follows:

TJPA: Ms. Maria Ayerdi-Kaplan  
Executive Director  
Transbay Joint Powers Authority  
201 Mission Street, Suite 2100  
San Francisco, CA 94105

SFPUC: Mr. Ed Harrington  
General Manager  
San Francisco Public Utilities Commission  
1155 Market Street, 11<sup>th</sup> Floor  
San Francisco, CA 94103

IN WITNESS WHEREOF, the PARTIES hereto have caused this Agreement to be executed on the date(s) indicated by their respective officers duly authorized on their behalf.

**TRANSBAY JOINT POWERS AUTHORITY**

DATED: \_\_\_\_\_, By:  
2009  
\_\_\_\_\_  
Maria Ayerdi-Kaplan, Executive Director

Resolution No. Adopted: \_\_\_\_\_ By:  
\_\_\_\_\_  
Attested by: Nila Gonzales, Secretary

**SAN FRANCISCO  
PUBLIC UTILITIES COMMISSION**

DATED: \_\_\_\_\_, By:  
2009  
\_\_\_\_\_  
Ed Harrington, General Manager

**APPROVED AS TO FORM FOR TJPA**

DATED: \_\_\_\_\_, By:  
2009  
\_\_\_\_\_  
Sheryl Bregman, Deputy City Attorney

**APPROVED AS TO FORM FOR SFPUC**

DATED: \_\_\_\_\_, BY:  
2009  
\_\_\_\_\_  
Noreen Ambrose, Deputy City Attorney

## **Exhibit A**

### **Scope of Services and Budget**

#### **A.1 Review Hydraulic Analysis – Transit Center Project**

The SFPUC will assist the TJPA and its consultants to perform hydraulic analyses using existing CDD hydraulic models to minimize the temporary relocation work and to optimize the permanent water distribution system to accommodate the Program. CDD will review and approve the final hydraulic analysis for the temporary and permanent water system relocations.

Not to Exceed Budget for this Task: \$15,000

#### **A.2 Review Contract Documents – Transit Center Project**

The SFPUC will assist the TJPA and its consultants to set the design criteria for temporary and permanent water distribution system, wastewater and streetlight relocations. The SFPUC will provide the TJPA and its consultants standard plans and sample contracts, as applicable. The SFPUC will review and approve contract documents prepared by the TJPA and its consultants and provide input on cost estimates.

Not to Exceed Budget for this Task: \$60,000

#### **B.1 Review Hydraulic Analysis – Downtown Extension Project**

CDD will assist the TJPA and its consultants to perform hydraulic analyses using existing CDD hydraulic models to minimize the temporary relocation work and to optimize the permanent water distribution system to accommodate the Program. The CDD will review and approve the final hydraulic analysis for the temporary and permanent water system relocations.

Not to Exceed Budget for this Task: \$25,000

#### **B.2 Review Wastewater Analysis – Downtown Extension Project**

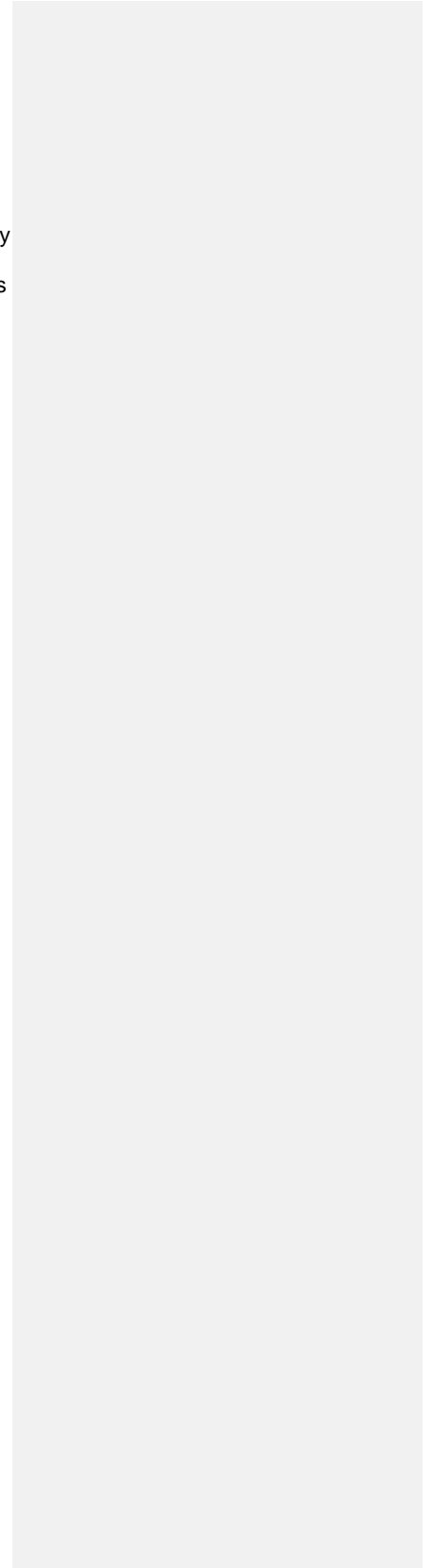
WWE will attend meetings and provide project review for the proposed realignment of the Fourth, Fifth and Sixth street sewers crossing Townsend Street. This is work separate and distinct from the sewer system project review that will be provided by the Department of Public Works Bureau of Engineering.

Not to Exceed Budget for this Task: \$50,000

**B.3 Review Contract Documents – Downtown Extension Project**

The SFPUC will assist the TJPA and its consultants to set the design criteria for temporary and permanent water distribution system, wastewater and streetlight relocations. The SFPUC will provide the TJPA and its consultants standard plans and sample contracts, as applicable. The SFPUC will review and approve contract documents prepared by the TJPA and its consultants and provide input on cost estimates.

Not to Exceed Budget for this Task: \$75,000



## **Exhibit B**

### **FTA Regulations**

*The FTA's requirements for agreements between the TJPA and a third party are summarized below. Certain FTA provisions described below may not be applicable to all agreements with the TJPA. The italicized text is intended to assist the Contractor in understanding which Federal requirements may be applicable to an agreement. The FTA and the TJPA have sole discretion to apply any particular provision described below.*

*These provisions supplement the provisions in the Agreement, and shall be interpreted in the broadest possible manner to avoid any conflicts. If there is an unavoidable conflict between the FTA requirements and any other terms and conditions of the Agreement, in the TJPA's sole determination, the FTA requirements shall take precedence.*

#### **1. DEFINITIONS**

*\*\* The Definitions apply to all Agreements.*

- (a). **Approved Project Budget** means the most recent statement, approved by the FTA, of the costs of the Project, the maximum amount of Federal assistance for which the TJPA is currently eligible, the specific tasks (including specified contingencies) covered, and the estimated cost of each task.
- (b). **Contractor** means the individual or entity awarded an Agreement financed in whole or in part with Federal assistance originally derived from FTA.
- (c). **Federal Cooperative Agreement** means the instrument by which FTA awards Federal assistance to the TJPA to support a particular Project, and in which FTA takes an active role or retains substantial control.
- (d). **FTA** is the acronym for the Federal Transit Administration, one of the operating administrations of the U.S. DOT.
- (e). **FTA Directive** includes any FTA regulation, policy, procedure, directive, circular, notice, order or guidance providing information about FTA's programs, application processing procedures, and Project management guidelines, including the Master Agreement between FTA and the TJPA. In addition to FTA Directives, certain U.S. DOT directives also apply to the Project.
- (f). **Grant Agreement** means the instrument by which FTA awards Federal assistance to the TJPA to support a particular Project, and in which FTA does not take an active role or retain substantial control, in accordance with 31 U.S.C. Section 6304.
- (g). **Government** means the United States of America and any executive department thereof.
- (h). **Project** means the task or set of tasks listed in the Approved Project Budget that is the subject of this Agreement, as well as any modifications stated in the Conditions to the Grant Agreement or Federal Cooperative Agreement applicable to the Project. In the case of the formula assistance programs for urbanized areas, for elderly and persons with disabilities, and non-urbanized areas, 49 U.S.C. sections 5307, 5310, and 5311, respectively, the term "Project" encompasses both a program and each project within a program, as the context may require, to effectuate the requirements of the Grant Agreement or Federal Cooperative Agreement.
- (i). **Recipient** means the TJPA.
- (j). **Secretary** means the U.S. DOT Secretary, including his or her duly authorized designee.

- (k). **Agreement** means a contract, purchase order, memorandum of understanding or other agreement awarded by the TJPA to a Contractor, financed in whole or in part with Federal assistance awarded by FTA.
- (l). **Subcontract** means a subcontract at any tier entered into by Contractor or its subcontractor relating to the Agreement, financed in whole or in part with Federal assistance originally derived from FTA. Unless otherwise specified, the Contractor must include each of these Federal provisions in any Subcontract related to this Agreement.
- (m). **U.S. DOT** is the acronym for the U.S. Department of Transportation, including its operating administrations.

## 2. FLY AMERICA REQUIREMENTS

**\*\*** *This provision applies to all Agreements for more than \$2,500 that involve the transportation of persons or property, by air, between a place in the U.S. and a place outside the U.S., or between places outside the U.S.*

- (a). The Contractor agrees to comply with 49 U.S.C. Section 40118 (the "Fly America Act") in accordance with the General Services Administration's regulations at 41 CFR Part 301-10, which provide that recipients and subrecipients of Federal funds and their contractors are required to use U.S. flag air carriers for U.S. Government-financed international air travel and transportation of their personal effects or property, to the extent such service is available, unless travel by foreign air carrier is a matter of necessity, as defined by the Fly America Act.
- (b). The Contractor shall submit the "Fly America Certification" if the regulation is applicable to the particular Agreement.
- (c). The Contractor shall submit, if a foreign air carrier was used, an appropriate certification or memorandum adequately explaining why service by a U.S. flag air carrier was not available or why it was necessary to use a foreign air carrier.
- (d). Notwithstanding the foregoing, transportation on a foreign air carrier is permissible when provided by a foreign air carrier under a code share agreement when the ticket identifies the U.S. air carrier's designator code and flight number. Transportation by a foreign air carrier is also permissible if there is a bilateral or multilateral air transportation agreement to which the U.S. Government and a foreign government are parties and which the U.S. DOT has determined meets the requirements of the Fly America Act.

## 3. BUY AMERICA REQUIREMENTS

**\*\*** *This provision applies only to the following types of Agreements: construction agreements of any value; agreements for the acquisition of goods valued at more than \$100,000; and agreements for the acquisition of rolling stock valued at more than \$100,000.*

- (a). The Contractor agrees to comply with 49 U.S.C. Section 5323(j) and 49 CFR Part 661, which provide that Federal funds may not be obligated unless steel, iron, and manufactured products used in FTA-funded projects, such as the Transbay Transit Center Program that is the subject of this Agreement, are produced in the United States, unless a waiver has been granted by FTA or the product is subject to a general waiver. General waivers are listed in 49 CFR Section 661.7, and include final assembly in the United States for 15 passenger vans and 15 passenger wagons produced by Chrysler Corporation, and microcomputer equipment and software. Separate requirements for rolling stock are set out at 49 U.S.C. Section 5323(j)(2)(C) and 49 CFR Section 661.11. Rolling stock must be assembled in the United States and have a 60 percent domestic content.
- (b). The Prime Contractor shall submit the "Buy America Certification" at the time of bid/offer if the regulation is applicable to the particular agreement. The Prime Contractor is responsible for ensuring that lower tier subcontractors are in compliance.

**4. CARGO PREFERENCE REQUIREMENTS**

**\*\*** *This provision applies to all Agreements for more than \$2,500 involving equipment, materials, or commodities which may be transported by ocean vessels.*

- (a). The Contractor agrees to use privately owned United States flag commercial vessels to ship at least 50 percent of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers) involved, whenever shipping any equipment, material, or commodities pursuant to the Agreement to the extent such vessels are available at fair and reasonable rates for United States flag commercial vessels.
- (b). The Contractor agrees to furnish within twenty (20) working days following the date of loading for shipments originating within the United States or within thirty (30) working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, "on-board" commercial ocean bill-of-landing in English for each shipment of cargo described in the preceding paragraph to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590 and to the TJPA (through the Contractor in the case of a subcontractor's bill-of-landing).

**5. SEISMIC SAFETY REQUIREMENTS**

**\*\*** *This provision applies only to Agreements for the construction of new buildings or additions to existing buildings.*

The Contractor agrees that any new building or addition to an existing building that is the subject of this Agreement will be designed and constructed in accordance with the standards for Seismic Safety required in U.S. DOT Seismic Safety Regulations 49 CFR Part 41 and will certify to compliance with such regulations to the extent required by the regulations. The Contractor also agrees to ensure that all work performed under this Agreement, 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.

**6. ENERGY CONSERVATION REQUIREMENTS**

**\*\*** *This provision applies to all Agreements.*

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, 42 U.S.C. Section 6201 et seq.

**7. CLEAN WATER REQUIREMENTS**

**\*\*** *This provision applies to all Agreements greater than \$100,000.*

- (a). The Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. Section 1251 et seq. The Contractor agrees to report each violation to the TJPA and understands and agrees that the TJPA will, in turn, report each violation as required to assure notification to FTA and the appropriate EPA Regional Office.
- (b). The Contractor also agrees to include these requirements in each Subcontract exceeding \$100,000 financed in whole or in part with Federal assistance provided by FTA.

**8. LOBBYING**

**\*\*** *This provision applies to the following types of Agreements, if the Agreement is equal to or greater than \$100,000: construction, architectural and engineering; acquisition of rolling stock; professional services; operational services; and Turnkey.*

**\*\*** Please be aware that the requirements in the Agreement regarding limitations on contributions may be more restrictive than the FTA Requirements described below. The Contractor must comply with the requirements described below and in the Agreement.

- (a). The Prime Contractor shall submit the "New Restrictions on Lobbying Certification" if the regulation is applicable to the particular agreement.
- (b). The Contractor and each subcontractor shall certify to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any federal agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. Section 1352. The Contractor and each subcontractor shall also disclose the name of any registrant under the Lobbying Disclosure Act of 1995 who has made lobbying contacts on its behalf with non-Federal funds with respect to a Federal contract, grant or award covered by 31 U.S.C. Section 1352. Such disclosures are forwarded from tier to tier up to the TJPA.

#### **9. ACCESS TO DOCUMENTS**

**\*\*** This requirement applies to all Agreements. FTA does not require the inclusion of these requirements in Subcontracts.

**\*\*** Please be aware that the requirements in the Agreement section entitled "Audit and Inspection of Records" may require the Contractor to maintain files relating to this Agreement for a longer period of time than described in the FTA Requirement below. Please also be aware that, as described in the Agreement section entitled "San Francisco Sunshine Ordinance", the TJPA follows the provisions of the City and County of San Francisco Sunshine Ordinance regarding responses to public requests for certain bid documents. The Contractor must comply with the requirements described below and in the Agreement.

- (a). Where the TJPA is considered a "local government" and is a Recipient or a subgrantee of a Recipient, in accordance with 49 CFR Section 18.36(i), the Contractor agrees to provide the TJPA, the FTA Administrator, the Comptroller General of the United States and/or any of their authorized representatives access to any books, documents, accounts papers and records of the Contractor which are directly pertinent to this Agreement ("Documents") for the purposes of making audits, examinations, excerpts and transcriptions. Contractor also agrees, pursuant to 49 CFR Section 633.17, to provide the FTA Administrator or its authorized representatives, including any project management oversight Contractor, access to Contractor's Documents and construction sites pertaining to a major capital project, defined at 49 U.S.C. Section 5302(a)1, which is receiving Federal financial assistance through the programs described at 49 U.S.C. sections 5307, 5309 or 5311.
- (b). Where the TJPA is a Recipient or a subgrantee of a Recipient, in accordance with 49 U.S.C. Section 5325(a), and enters into a contract for a capital project or improvement (defined at 49 U.S.C. Section 5302[a]1) through other than competitive bidding, the Contractor agrees to provide the TJPA, the Secretary and the Comptroller General, or any authorized officer or employee of any of them, access to any Documents for the purposes of conducting an audit and inspection.
- (c). The Contractor agrees to permit any of the foregoing parties to reproduce, by any means whatsoever, or to copy excerpts and transcriptions, as reasonably needed, of any Documents.
- (d). The Contractor agrees to maintain all Documents required under this Agreement for a period of not less than three years after the date of termination or expiration of this Agreement, except in the event of litigation or settlement of claims arising from the performance of this Agreement, in which case Contractor agrees to maintain same until the TJPA, the FTA Administrator, the Comptroller General, or any of their duly authorized representatives, have disposed of all such litigation, appeals, claims or exceptions related thereto. (See 49 CFR Section 18.39[i][11]).



**10. FEDERAL CHANGES**

\*\* *This requirement applies to all Agreements.*

Contractor shall at all times comply with all applicable federal laws and regulations, and all FTA Directives and U.S. DOT Directives applicable to the Project, as they may be amended or promulgated from time to time during the term of this Agreement. It is Contractor's responsibility to be aware of any amendments or changes to such federal requirements and directives. Contractor's failure to so comply shall constitute a material breach of this Agreement.

**11. RESERVED****12. CLEAN AIR**

\*\* *This provision applies to all Agreements greater than \$100,000 and to subcontracts greater than \$100,000.*

- (a) The Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. Section 7401 et seq. The Contractor agrees to report each violation to the TJPA and understands and agrees that the TJPA will, in turn, report each violation as required to assure notification to FTA and the appropriate EPA Regional Office.
- (b) The Contractor also agrees to include these requirements in each subcontract exceeding \$100,000.

**13. RECYCLED PRODUCTS**

\*\* *This provision applies to all Agreements to procure \$10,000 or more of any one item designated by the EPA under 40 CFR Part 247, Subpart B in a single fiscal year, and to all Agreements to procure any items designated in 40 CFR Part 247, Subpart B where the TJPA or the Contractor has used Federal funds to procure \$10,000 or more of any one item in the previous fiscal year.*

\*\* *Please be aware that the requirements in the Agreement regarding resource conservation may be more restrictive than the FTA Requirements described below. The Contractor must comply with the requirements described below and in the Agreement.*

The Contractor agrees to comply with the requirements of Section 6002 of the Resource Conservation and Recovery Act (RCRA), as amended (42 U.S.C. Section 6962 et seq.), including but not limited to the regulatory provisions of 40 CFR Part 247, and Executive Order 12873, as they apply to the procurement of the items designated in 40 CFR Part 247, Subpart B.

**14. RESERVED****15. RESERVED****16. NO GOVERNMENT OBLIGATION TO THIRD PARTIES**

\*\* *This requirement applies to all Agreements.*

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

**17. PROGRAM FRAUD AND FALSE OR FRAUDULENT STATEMENTS AND RELATED ACTS**

\*\* *This provision applies to all Agreements.*

- (a) The Contractor acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. Section 3801 et seq., and U.S. DOT regulations, "Program Fraud

Civil Remedies," 49 CFR Part 31, apply to its actions under the Agreement. Upon execution of the Agreement, 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 Agreement or the FTA-assisted Project for which this Agreement 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.

- (b). 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 an Agreement 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. Section 5307, the Government reserves the right to impose the penalties of 18 U.S.C. Section 1001 and 49 U.S.C. Section 5307(n)(1) on the Contractor, to the extent the Federal Government deems appropriate.

#### 18. TERMINATION

**\*\*** *This requirement applies to all Agreements in excess of \$10,000, except when the Contractor is a nonprofit organization or institution of higher education. When the Contractor is a nonprofit organization or institution of higher education, this requirement applies to all Agreements greater than \$100,000.*

**\*\*** *Please be aware that the requirements in the Agreement regarding termination for convenience are more broadly applicable than the FTA Requirements described below. Both the requirements described below and the provisions in the Agreement are applicable to the Agreement.*

- (a). **Termination for Convenience (General Provision)** - The TJPA may terminate this Agreement, in whole or in part, at any time by written notice to the Contractor when it is in the Government's best interest. The Contractor shall be paid its costs, including Agreement close-out costs, and profit on work performed up to the time of termination. The Contractor shall promptly submit its termination claim to the TJPA. If the Contractor has any property in its possession belonging to the TJPA, the Contractor will account for the same, and dispose of it in the manner the TJPA directs.
- (b). **Termination for Default [Breach or Cause] (General Provision)** - If the Contractor (1) does not deliver supplies in accordance with the Agreement delivery schedule, or (2) if the Agreement is for services the Contractor fails to perform in the manner called for in the Agreement, or (3) if the Contractor fails to comply with any other provisions of the Agreement, the TJPA may terminate this Agreement for default. Termination shall be effected by serving a notice of termination on the Contractor setting forth the manner in which the Contractor is in default. The Contractor will only be paid the Agreement price for supplies delivered and accepted, or services performed in accordance with the manner of performance set forth in the Agreement.

If it is later determined by the TJPA 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 TJPA, after setting up a new delivery of performance schedule, may allow the Contractor to continue work, or treat the termination as a termination for convenience.

- (c). **Opportunity to Cure (General Provision)** - The TJPA in its sole discretion may, in the case of a termination for breach or default, allow the Contractor a 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 the TJPA's satisfaction the breach or default of any of the terms, covenants, or conditions of this within ten (10) days after receipt by Contractor of written notice from the TJPA setting forth the nature of said breach or default, the TJPA shall have the right to terminate the Agreement without any further obligation to Contractor. Any such termination for

default shall not in any way operate to preclude the TJPA from also pursuing all available remedies against Contractor and its sureties for said breach or default.

- (d). **Waiver of Remedies for any Breach** - In the event that TJPA elects to waive its remedies for any breach by Contractor of any covenant, term or condition of this Agreement, such waiver by the TJPA shall not limit the TJPA's remedies for any succeeding breach of that or of any other term, covenant, or condition of this Agreement.
- (e). **Termination for Convenience (Professional or Transit Service Agreements)** - The TJPA, by written notice, may terminate this Agreement, in whole or in part, when it is in the Government's interest. If this Agreement is terminated, the TJPA shall be liable only for payment under the payment provisions of this Agreement for services rendered before the effective date of termination.
- (f). **Termination for Default (Supplies and Service)** - If the Contractor fails to deliver supplies or to perform the services within the time specified in this Agreement or any extension or if the Contractor fails to comply with any other provisions of this Agreement, the TJPA may terminate this Agreement for default. The TJPA shall terminate by delivering to the Contractor a Notice of Termination specifying the nature of the default. The Contractor will only be paid the Agreement price for supplies delivered and accepted, or services performed in accordance with the manner or performance set forth in this Agreement.

If, after termination for failure to fulfill Agreement 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 the TJPA.

- (g). **Termination for Default (Transportation Services)** - If the Contractor fails to pick up the commodities or to perform the services, including delivery services, within the time specified in this Agreement or any extension or if the Contractor fails to comply with any other provisions of this Agreement, the TJPA may terminate this Agreement for default. The TJPA shall terminate by delivering to the Contractor a Notice of Termination specifying the nature of default. The Contractor will only be paid the Agreement price for services performed in accordance with the manner of performance set forth in this Agreement.

If this Agreement is terminated while the Contractor has possession of TJPA goods, the Contractor shall, upon direction of the TJPA, protect and preserve the goods until surrendered to the TJPA or its agent. The Contractor and the TJPA shall agree on payment for the preservation and protection of goods. Failure to agree on an amount will be resolved under the Dispute clause.

If, after termination for failure to fulfill Agreement 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 the TJPA.

- (h). **Termination for Default (Construction)** - If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will ensure its completion within the time specified in this Agreement or any extension or fails to complete the work within this time, or if the Contractor fails to comply with any other provisions of this Agreement, the TJPA may terminate this Agreement for default. The TJPA shall terminate by delivering to the Contractor a Notice of Termination specifying the nature of the default. In this event, the TJPA may take over the work and compete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to the TJPA resulting from the Contractor's refusal or failure to complete the work within specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the TJPA in completing the work.

The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause if:

- (1). The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include acts of God, acts of the TJPA, acts of another Contractor in the performance of a Agreement with the TJPA, epidemics, quarantine restrictions, strikes, freight embargoes; and
- (2). The Contractor, within ten (10) days from the beginning of any delay, notifies the TJPA in writing of the causes of delay. If in the judgment of the TJPA, the delay is excusable, the time for completing the work shall be extended. The judgment of the TJPA shall be final and conclusive on the parties, but subject to appeal under the Disputes clauses.

If, after termination of the Contractor's right to proceed, it is determined that the Contractor was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of the TJPA.

- (i) **Termination for Convenience or Default (Architect and Engineering)** - The TJPA may terminate this Agreement in whole or in part, for the TJPA's convenience or because of the failure of the Contractor to fulfill the Agreement obligations. The TJPA 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 contracting officer all data, drawings, specifications, reports, estimates, summaries, and other information and materials accumulated in performing this Agreement, whether completed or in process.

If the termination is for the convenience of the TJPA, the contracting officer shall make an equitable adjustment in the Agreement price but shall allow no anticipated profit on unperformed services.

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

If, after termination for failure to fulfill Agreement 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 the TJPA.

- (j). **Termination for Convenience or Default (Cost-Type Agreements)** - The TJPA may terminate this Agreement, 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 the TJPA 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 Agreement. The Contractor shall account for any property in its possession paid for from funds received from the TJPA, or property supplied to the Contractor by the TJPA. If the termination is for default, the TJPA may fix the fee, if the Agreement 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 TJPA and the parties shall negotiate the termination settlement to be paid the Contractor.

If the termination is for the convenience of the TJPA, the Contractor shall be paid its Agreement close-out costs, and a fee, if the Agreement 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 TJPA determines that the Contractor has an excusable reason for not performing, such as strike, fire, flood, events which are not the fault of and are beyond the control of the Contractor, the TJPA, after setting up a new work schedule, may allow the Contractor to continue work, or treat the termination as a termination for convenience.

**19. GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NON-PROCUREMENT)**

**\*\*** *This requirement applies to all Agreements and Subcontracts greater than or equal to \$25,000, and to any Agreement for auditing services at any dollar value.*

- (a). This Agreement is a "covered transaction" for purposes of 49 CFR Part 29, and the Contractor is required to comply with 49 CFR Section 29, Subpart C. In particular, the Contractor is required to verify that the Contractor, its "principals," as defined at 49 CFR Section 29.995, and its "affiliates," as defined at 49 CFR Section 29.905, are not "excluded" or "disqualified," as defined at 49 CFR sections 29.940 and 29.945.
- (b). The Contractor shall submit the "Certification Regarding Debarment, Suspension, and Other Responsibility Matters" if the regulation is applicable to the particular agreement.

**20. CIVIL RIGHTS REQUIREMENT**

**\*\*** *This requirement applies to all Agreements.*

**\*\*** *Please be aware that the requirements in the Agreement regarding nondiscrimination are broader than the FTA Requirements described below. The Contractor must comply with the requirements described below and in the Agreement.*

- (a). **Nondiscrimination** - In accordance with Title VI of the Civil Rights Act, as amended, 42 U.S.C. Section 2000d, Section 303 of the Age Discrimination Act of 1975, as amended, 42 U.S.C. Section 6102, Section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. Section 12132, and Federal transit law at 49 U.S.C. Section 5332, the Contractor agrees that it will not discriminate against any employee or applicant for employment because of race, color, creed, national origin, sex, age, or disability. In addition, the Contractor agrees to comply with applicable Federal implementing regulations and other implementing requirements FTA may issue.
- (b). **Equal Employment Opportunity** - The following equal employment opportunity requirements apply to the Agreement:
  - (1). **Race, Color, Creed, National Origin, Sex** - In accordance with Title VII of the Civil Rights Act, as amended, 42 U.S.C. Section 2000e, and Federal transit laws at 49 U.S.C. Section 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 CFR Parts 60, (which implement Executive Order No. 11246, "Equal Employment Opportunity," as amended by Executive Order No. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," 42 U.S.C. Section 2000e note), and with any applicable Federal statutes, executive orders, regulations, and Federal policies that may in the future affect construction activities undertaken in the course of the Project. 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, creed, national origin, sex, or age. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.
  - (2). **Age** - In accordance with Section 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. Section 623, and Federal transit law at 49 U.S.C. Section 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.

- (3). **Disabilities** - In accordance with Section 102 of the Americans with Disabilities Act, as amended, 42 U.S.C. Section 12112, the Contractor agrees that it will comply with the requirements of U.S. Equal Employment Opportunity Commission, "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 29 CFR Part 1630, pertaining to employment of persons with disabilities. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.

## 21. BREACHES AND DISPUTE RESOLUTION

\*\*

*This requirement applies to all Agreements in excess of \$100,000.*

- (a). **Disputes** - Disputes arising in the performance of this Agreement which are not resolved by agreement of the parties shall be decided in writing by the authorized representative of TJPA's Executive Director. This decision shall be final and conclusive unless within ten (10) days from the date of receipt of its copy, the Contractor mails or otherwise furnishes a written appeal to the Executive Director. 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 Executive Director shall be binding upon the Contractor and the Contractor shall abide by the decision.
- (b). **Performance During Dispute** - Unless otherwise directed by the TJPA, Contractor shall continue performance under this Agreement while matters in dispute are being resolved.
- (c). **Claims for Damages** - Should either party to the Agreement suffer injury or damage to person or property because of any act or omission of the party or of any of the party's employees, agents or others for whose acts the party is legally liable, a claim for damages therefore shall be made in writing to such other party within a reasonable time after the first observance of such injury of damage.
- (d). **Remedies** - Unless this Agreement provides otherwise, all claims, counterclaims, disputes and other matters in question between the TJPA 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 TJPA is located.
- (e). **Rights and Remedies** - The duties and obligations imposed by the Agreement 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 TJPA or Contractor shall constitute a waiver of any right or duty afforded any of them under the Agreement, 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.

## 22. DISADVANTAGED BUSINESS ENTERPRISE (DBE)

\*\*

*The specific provisions checked below apply to this Agreement.*

- (a). This Agreement is subject to the requirements of 49 CFR Part 26, *Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs*. The national goal for participation of Disadvantaged Business Enterprises (DBEs) is 10 percent. The TJPA FY2008-09 Annual Anticipated DBE Participation Level is 29.2 percent.

A separate Agreement goal of \_\_\_\_\_ percent DBE participation has been established for this Agreement.

A separate Agreement goal **has not** been established for this Agreement.

(b). The Contractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement. The Contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of this DOT-assisted Agreement. Failure by the Contractor to carry out these requirements is a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy as the TJPA deems appropriate. Each Subcontract the Contractor signs with a subcontractor must include the assurance in this paragraph (see 49 CFR Section 26.13[b]).

(c). *(Checked box is applicable to this Agreement.)*

*(If a separate Agreement goal has been established, use the following)*

The Contractor was required to document sufficient DBE participation to meet the separate Agreement goal established for this Agreement or, alternatively, document adequate good faith efforts to do so, as provided for in 49 CFR Section 26.53.

*(If no separate Agreement goal has been established, use the following)*

The Contractor is required to report its DBE participation obtained through race-neutral means throughout the period of performance.

(d). The Contractor is required to pay its subcontractors performing work related to this Agreement for satisfactory performance of that work no later than ten (10) days after the Contractor's receipt of payment for that work from the TJPA. In addition, the Contractor is required to return any retainage payments to those subcontractors within thirty (30) days after incremental acceptance of the subcontractor's work by the TJPA and Contractor's receipt of the partial retainage payment related to the subcontractor's work.

(e). The Contractor must promptly notify the TJPA whenever a DBE subcontractor performing work related to this Agreement 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 TJPA.

**23. INCORPORATION OF FEDERAL TRANSIT ADMINISTRATION (FTA) TERMS**

\*\* *This requirement applies to all Agreements.*

The preceding provisions include, in part, certain standard terms and conditions required by U.S. DOT of the TJPA's agreements, whether or not expressly set forth in the preceding Agreement provisions. All contractual provisions required by U.S. DOT, as set forth in FTA Circular 4220.1E and its successors, 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 TJPA requests which would cause the TJPA to be in violation of the FTA terms and conditions.

**EXHIBIT C**

**SFPUC Hourly Rates (FY 08/09)**

SFPUC Rules and Regulations Governing Water Service to Customers specify that SFPUC will provide services at costs. The hourly rates provided below are for Fiscal Year 2008/2009.

SFPUC Hourly Rates:

Class 5201, Junior Engineer	\$70.18
Class 5203, Assistant Engineer	\$79.47
Class 5207, Associate Engineer	\$92.27
Class 5241, Engineer	\$106.79
Class 5211, Senior Engineer	\$123.64
Class 5212, Principal Engineer	\$154.46
Class 5362, Civil Engineer Assistant	\$59.19
Class 5364, Civil Engineer Associate I	\$65.56
Class 7373, Senior Stationary Engineer	\$78.99
Class 5130, Superintendent	\$116.59
Class 5620, Regulatory Specialists (LID)	\$83.96
Class 5602, Utility Specialists (LID)	\$99.90

**Note:**

The hourly rates shown include overhead (CDD 1.75 multiplier and CMB 2.85 multiplier) and will be adjusted annually based on the City's contract obligations.