

**CITY AND COUNTY OF SAN FRANCISCO  
San Francisco Municipal Transportation Agency**

**Complete Rehabilitation of 16 PCC Historic Streetcars**

**CONTRACT No. 660  
(CCO No. 13-1241)**

**VOLUME 1**

## TABLE OF CONTENTS

	<u>Page</u>
1	Certification of Funds; Budget and Fiscal Provisions; Termination in the Event of Non-Appropriation ..... 7
2	Term of the Agreement..... 7
3	Effective Date of Agreement..... 8
4	Services Contractor Agrees to Perform ..... 8
5	Compensation ..... 8
6	Guaranteed Maximum Costs ..... 8
7	Payment; Invoice Format..... 9
8	Submitting False Claims; Monetary Penalties ..... 9
9	Disallowance ..... 9
10	Taxes..... 9
	10.1 Payment of Taxes ..... 9
	10.2 Possessory Interest ..... 10
11	Payment Does Not Imply Acceptance of Work..... 10
12	Qualified Personnel ..... 10
13	Responsibility for Equipment ..... 11
14	Independent Contractor; Payment of Taxes and Other Expenses..... 11
	14.1 Independent Contractor ..... 11
	14.2 Payment of Taxes and Other Expenses ..... 11
15	Insurance; Bonds..... 12
	15.1 Insurance ..... 12
	15.2 Bonds..... 14
16	Indemnification ..... 15
	16.1 General ..... 15
	16.2 Duty to Defend..... 15
	16.3 Intellectual Property ..... 15
	16.4 Limitation of Liability ..... 15
	16.5 Notice of Claim ..... 16
17	Incidental and Consequential Damages ..... 16
18	Liability of City ..... 16

19	Liquidated Damages.....	16
20	Default; Remedies .....	17
	20.1 Event of Default .....	17
	20.2 Remedies.....	17
21	Termination for Convenience.....	18
	21.1 Exercise of Option .....	18
	21.2 Contractor Actions .....	18
	21.3 Contractor Invoice.....	18
	21.4 Non-Recoverable Costs.....	19
	21.5 Deductions.....	19
	21.6 Survival .....	19
22	Rights and Duties Upon Termination or Expiration.....	19
	22.1 Survival of Sections .....	19
	22.2 Contractor Duties .....	20
23	Conflict of Interest.....	20
24	Proprietary or Confidential Information of City .....	20
25	Notices to the Parties .....	20
26	Ownership of Results .....	21
27	Works for Hire.....	21
28	Audits and Inspection of Records.....	21
29	Subcontracting.....	21
30	Assignment.....	22
31	Non-Waiver of Rights .....	22
32	Reserved .....	22
33	Claims .....	22
34	Nondiscrimination; Penalties .....	22
	34.1 Contractor Shall Not Discriminate.....	23
	34.2 Subcontracts.....	23
	34.3 Nondiscrimination in Benefits.....	23
	34.4 Incorporation of Administrative Code Provisions by Reference .....	23
35	Tropical Hardwoods and Virgin Redwood Ban .....	24
36	Drug-Free Workplace Policy.....	24
37	Resource Conservation .....	24

38	Compliance with Americans with Disabilities Act.....	24
39	Sunshine Ordinance .....	24
40	Public Access to Meetings and Records .....	25
41	Notification of Limitations on Contributions.....	25
42	Requiring Minimum Compensation for Covered Employees .....	25
43	Health Benefits for Covered Employees.....	26
44	Employment Training Program .....	26
45	Prohibition on Political Activity with City Funds.....	26
46	Preservative-treated Wood Containing Arsenic.....	26
47	Modification of Agreement.....	27
48	Authority of Engineer .....	27
49	Agreement Made in California; Venue.....	27
50	Construction .....	27
51	Entire Agreement.....	27
52	Compliance with Laws.....	28
53	Services Provided by Attorneys.....	28
54	Disputes .....	28
	54.1 Notice of Dispute .....	28
	54.2 Resolution of Disputes .....	28
	54.3 No Cessation of Work.....	28
	54.4 Alternative Dispute Resolution.....	28
	54.5 Claims for Additional Compensation.....	28
	54.6 Disputes among Contractor's Partners .....	29
55	Severability .....	29
56	Protection of Private Information .....	29
57	Time of Essence.....	29
58	Technical Specifications .....	29
	58.1 Fabrication.....	29
	58.2 Omission.....	29
	58.3 Priority.....	30
	58.4 Design Review.....	30
	58.5 Preliminary Drawings.....	30
	58.6 Materials/Accessories Responsibility .....	30

59	Project Planning, Scheduling and Control .....	30
59.1	Introduction .....	30
59.2	Scheduling Terms .....	31
59.2.1	Baseline Schedule .....	31
59.2.2	Current Schedule .....	31
59.2.3	Supplemental Schedule(s) .....	31
59.2.4	Monthly Work Plan and Reports.....	31
59.3	Descriptions of Submittals .....	31
59.3.1	Project Plan and Baseline Schedule .....	31
59.3.2	Management Plan .....	31
59.3.3	Monthly Work Plan and Reports.....	31
59.4	Modifications to the Schedule .....	32
60	Assumption of Risk of Loss .....	32
61	FTA Requirements .....	32
62	Cooperative Drafting.....	32
63	Warranty .....	32
64	Title.....	32
65	Small Business Enterprise Program .....	33
65.1	General .....	33
65.2	Compliance with SBE Program.....	33
66	MacBride Principles—Northern Ireland .....	33

**City and County of San Francisco  
San Francisco Municipal Transportation Agency  
One South Van Ness 7<sup>th</sup> Floor  
San Francisco, California 94103**

**Agreement between the City and County of San Francisco and  
Brookville Equipment Corporation**

This Agreement is made this \_\_\_\_\_ day of \_\_\_\_\_, 2014, in the City and County of San Francisco, State of California, by and between: Brookville Equipment Corporation, a Pennsylvania corporation ("Contractor"), and the City and County of San Francisco, a municipal corporation ("City"), acting by and through its San Francisco Municipal Transportation Agency ("SFMTA").

**Recitals**

**A.** SFMTA wishes to obtain the services of a qualified firm to perform system replacement and rehabilitation for up to 16 Presidential Conference Commission (PCC) Vehicles in its fleet.

**B.** A. Request for Proposals (RFP) was issued on April 1, 2013, and City selected Contractor as the highest-qualified proposer pursuant to the RFP.

**C.** Contractor represents and warrants that it is qualified to perform the services required by City as set forth under this Contract.

**D.** Approval for said Agreement was obtained from a Civil Service Commission Notice of Action for Contract Number 4093/12-13 on March 18, 2013.

Now, THEREFORE, the parties agree as follows:

**Definitions**

Where any word or phrase defined below, or a pronoun used in place thereof, is used in any part of the Conformed Contract Documents, it shall have the meaning set forth herein.

**Acceptance:** The formal written acceptance by the City and County of San Francisco that all work, or a specific portion thereof, under the contract has been satisfactorily completed.

**Award:** Notification from the City to Contractor of acceptance of Contractor's proposal, subject to the execution and approval of a satisfactory Contract therefore and bond to secure the performance thereof, and to such other conditions as may be specified or otherwise required by law.

Cars: SFMTA Presidential Conference Commission Streetcars, also referred to as "PCCs" and "Vehicles."

Certification: Certification by the Controller that funds necessary to make payments as required under the contract are available in accordance with the City's Charter.

City: City and County of San Francisco, a municipal corporation.

Conformed Contract Documents: The Contract documents revised to incorporate information included in the Contractor's Proposal and accepted by the City.

Contract (Agreement): The written Contract executed by the City and Contractor, covering the performance of the work and furnishing of labor, materials, equipment, tools, and services, including work incidental to the procurement, to include the Technical Specifications, all Conformed Contract Documents, Contractor's Proposal, the Contract bonds or other security, and all supplemental agreements.

Contract Modification: A written order, issued by the City to Contractor, covering changes in the Contract documents within the general scope of the Contract and establishing the basis of payment and time adjustments for the work affected by the changes.

Contractor: The proposer to whom award is made.

Controller: Controller of the City.

Days: Unless otherwise designated, the word "days" refers to working days of the City.

Engineer: The SFMTA Engineer assigned to the Contract or designated agent.

Final Acceptance: The formal written acceptance by the Director of Transportation that all contract deliverables for the Contract have been satisfactorily completed and accepted. This will authorize the Project Manager to release the final payment, including all retention, to the Contractor.

Muni: The San Francisco Municipal Railway, the public transit system of the City under the supervision and control of the San Francisco Municipal Transportation Agency.

Notice To Proceed: A written notice to the Contractor of the date on which it shall begin prosecution of the work to be done under the contract.

Project Manager: The Project Manager assigned to the Contract for the SFMTA, or designated agent.

Proposal: The technical and management information and prices submitted by Contractor in response to the Request for Proposals.

Request for Proposals; RFP: The Request for Proposals issued by the SFMTA on (Date), for component life cycle rehabilitation for 16 PCC Vehicles.

SFMTA: The San Francisco Municipal Transportation Agency, an agency of the City with responsibility for the Municipal Railway and the Division of Sustainable Streets (Parking and Traffic).

Subcontractor: Any individual, partnership, firm, or corporation, which undertakes integrally on the Project the partial or total design, manufacture, or performance of one or more items of work under the terms of the contract. As used herein, the terms subcontractor and supplier are synonymous.

Technical Specifications: The portion of the Conformed Contract Documents that contain the specifications, provisions, and requirements that detail the work and the materials, products (including the methods of manufacture, construction, assembly, and testing), and other requirements relative thereto.

Work: The furnishing of all labor, supervision, services, products, materials, machinery, equipment, tools, supplies, and facilities and the performance of all requirements called for by the Contract and necessary to the completion thereof.

**1 Certification of Funds; Budget and Fiscal Provisions; Termination in the Event of Non-Appropriation**

- 1.1** This Agreement is subject to the budget and fiscal provisions of the City's Charter. Charges will accrue only after prior written authorization certified by the Controller, and the amount of City's obligation hereunder shall not at any time exceed the amount certified for the purpose and period stated in such advance authorization.
- 1.2** This Agreement will terminate without penalty, liability or expense of any kind to City at the end of any fiscal year if funds are not appropriated for the next succeeding fiscal year. If funds are appropriated for a portion of the fiscal year, this Agreement will terminate, without penalty, liability or expense of any kind at the end of the term for which funds are appropriated.
- 1.3** City has no obligation to make appropriations for this Agreement in lieu of appropriations for new or other agreements. City budget decisions are subject to the discretion of the Mayor and the Board of Supervisors. Contractor's assumption of risk of possible non-appropriation is part of the consideration for this Agreement.

THIS SECTION CONTROLS AGAINST ANY AND ALL OTHER PROVISIONS OF THIS AGREEMENT.

**2 Term of the Agreement**

Subject to Section 1, the term of this Agreement shall not exceed six years from the Effective Date.



**3 Effective Date of Agreement**

This Agreement shall become effective when the Controller has certified to the availability of funds and Contractor has been notified in writing.

**4 Services Contractor Agrees to Perform**

The Contractor agrees to perform the services provided for in the Technical Specifications, and in the Contractor's Proposal (as incorporated into the Conformed Contract Documents), according to the Project Delivery Schedule set forth in Exhibit B.

**5 Compensation**

- 5.1** In no event shall the amount of this Agreement exceed Thirty-Four Million, Four Hundred Eighty-Two Thousand, Four Hundred Twenty-Eight Dollars (\$34,482,428). The breakdown of costs associated with this Agreement appears in the Price Schedule (Exhibit C) and Payment Schedule (Exhibit D), incorporated by reference as though fully set forth herein.
- 5.2** No charges shall be incurred under this Agreement nor shall any payments become due to Contractor until reports, services, or both, required under this Agreement are received from Contractor and approved by SFMTA as being in accordance with this Agreement. City may withhold payment to Contractor in any instance in which Contractor has failed or refused to satisfy any material obligation provided for under this Agreement.
- 5.3** In no event shall City be liable for interest or late charges for any late payments. City will not make price adjustments to this Contract to protect Contractor from economic inflation.

**6 Guaranteed Maximum Costs**

- 6.1** The City's obligation hereunder shall not at any time exceed the amount certified by the Controller for the purpose and period stated in such certification.
- 6.2** Except as may be provided by laws governing emergency procedures, officers and employees of the City are not authorized to request, and the City is not required to reimburse the Contractor for, Commodities or Services beyond the agreed upon contract scope unless the changed scope is authorized by amendment and approved as required by law.
- 6.3** Officers and employees of the City are not authorized to offer or promise, nor is the City required to honor, any offered or promised additional funding in excess of the maximum amount of funding for which the contract is certified without certification of the additional amount by the Controller.
- 6.4** The Controller is not authorized to make payments on any contract for which funds have not been certified as available in the budget or by supplemental appropriation.

## 7 **Payment; Invoice Format**

Invoices furnished by Contractor under this Agreement must be in a form acceptable to the Controller, and must include the Contract Progress Payment Authorization number. All amounts paid by City to Contractor shall be subject to audit by City. Progress payments shall be made by the City to Contractor at the address specified in the section entitled "Notices to the Parties." Progress payments shall be made as set forth in the Payment Schedule (Exhibit D).

## 8 **Submitting False Claims; Monetary Penalties**

Pursuant to San Francisco Administrative Code §21.35, any contractor, subcontractor or consultant who submits a false claim shall be liable to the City for three times the amount of damages which the City sustains because of the false claim. A contractor, subcontractor or consultant who submits a false claim shall also be liable to the City for the costs, including attorneys' fees, of a civil action brought to recover any of those penalties or damages, and may be liable to the City for a civil penalty of up to \$10,000 for each false claim. A contractor, subcontractor or consultant will be deemed to have submitted a false claim to the City if the contractor, subcontractor or consultant: (a) knowingly presents or causes to be presented to an officer or employee of the City a false claim or request for payment or approval; (b) knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the City; (c) conspires to defraud the City by getting a false claim allowed or paid by the City; (d) knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the City; or (e) is a beneficiary of an inadvertent submission of a false claim to the City, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the City within a reasonable time after discovery of the false claim.

## 9 **Disallowance**

If Contractor claims or receives payment from City for a service, reimbursement for which is later disallowed by the State of California or United States Government, Contractor shall promptly refund the disallowed amount to City upon City's request. At its option, City may offset the amount disallowed from any payment due or to become due to Contractor under this Agreement or any other Agreement.

## 10 **Taxes**

**10.1 Payment of Taxes.** Payment of any taxes, including possessory interest taxes and California sales and use taxes, levied upon or as a result of this Agreement, or the services delivered pursuant hereto, shall be the obligation of Contractor.

**10.2 Possessory Interest.** Contractor recognizes and understands that this Agreement may create a “possessory interest” for property tax purposes. Generally, such a possessory interest is not created unless the Agreement entitles the Contractor to possession, occupancy, or use of City property for private gain. If such a possessory interest is created, then the following shall apply:

- 10.1.1** Contractor, on behalf of itself and any permitted successors and assigns, recognizes and understands that Contractor, and any permitted successors and assigns, may be subject to real property tax assessments on the possessory interest;
- 10.1.2** Contractor, on behalf of itself and any permitted successors and assigns, recognizes and understands that the creation, extension, renewal, or assignment of this Agreement may result in a “change in ownership” for purposes of real property taxes, and therefore may result in a revaluation of any possessory interest created by this Agreement. Contractor accordingly agrees on behalf of itself and its permitted successors and assigns to report on behalf of the City to the County Assessor the information required by Revenue and Taxation Code section 480.5, as amended from time to time, and any successor provision.
- 10.1.3** Contractor, on behalf of itself and any permitted successors and assigns, recognizes and understands that other events also may cause a change of ownership of the possessory interest and result in the revaluation of the possessory interest. (see, e.g., Rev. & Tax. Code section 64, as amended from time to time). Contractor accordingly agrees on behalf of itself and its permitted successors and assigns to report any change in ownership to the County Assessor, the State Board of Equalization or other public agency as required by law.
- 10.1.4** Contractor further agrees to provide such other information as may be requested by the City to enable the City to comply with any reporting requirements for possessory interests that are imposed by applicable law.

## 11 **Payment Does Not Imply Acceptance of Work**

The granting of any payment by City, or the receipt thereof by Contractor, shall in no way lessen the liability of Contractor to replace unsatisfactory work, equipment, or materials, although the unsatisfactory character of such work, equipment or materials may not have been apparent or detected at the time such payment was made. Materials, equipment, components, or workmanship that does not conform to the requirements of this Agreement may be rejected by City and in such case must be replaced by Contractor without delay.

## 12 **Qualified Personnel**

Work under this Agreement shall be performed only by competent personnel under the supervision of and in the employment of Contractor. Contractor will comply with City’s reasonable requests regarding assignment of personnel, but all personnel, including those assigned at City’s request, must be supervised by Contractor. Contractor shall commit

adequate resources to complete the project within the project schedule specified in this Agreement.

**13 Responsibility for Equipment**

City shall not be responsible for any damage to persons or property as a result of the use, misuse or failure of any equipment used by Contractor, or by any of its employees, even though such equipment be furnished, rented or loaned to Contractor by City.

**14 Independent Contractor; Payment of Taxes and Other Expenses**

**14.1 Independent Contractor.** Contractor or any agent or employee of Contractor shall be deemed at all times to be an independent contractor and is wholly responsible for the manner in which it performs the services and work requested by City under this Agreement. Contractor or any agent or employee of Contractor shall not have employee status with City, nor be entitled to participate in any plans, arrangements, or distributions by City pertaining to or in connection with any retirement, health or other benefits that City may offer its employees. Contractor or any agent or employee of Contractor is liable for the acts and omissions of itself, its employees and its agents. Contractor shall be responsible for all obligations and payments, whether imposed by federal, state or local law, including, but not limited to, FICA, income tax withholdings, unemployment compensation, insurance, and other similar responsibilities related to Contractor's performing services and work, or any agent or employee of Contractor providing same. Nothing in this Agreement shall be construed as creating an employment or agency relationship between City and Contractor or any agent or employee of Contractor.

Any terms in this Agreement referring to direction from City shall be construed as providing for direction as to policy and the result of Contractor's work only, and not as to the means by which such a result is obtained. City does not retain the right to control the means or the method by which Contractor performs work under this Agreement.

**14.2 Payment of Taxes and Other Expenses.** Should City, in its discretion, or a relevant taxing authority such as the Internal Revenue Service or the State Employment Development Division, or both, determine that Contractor is an employee for purposes of collection of any employment taxes, the amounts payable under this Agreement shall be reduced by amounts equal to both the employee and employer portions of the tax due (and offsetting any credits for amounts already paid by Contractor which can be applied against this liability). City shall then forward those amounts to the relevant taxing authority.

Should a relevant taxing authority determine a liability for past services performed by Contractor for City, upon notification of such fact by City, Contractor shall promptly remit such amount due or arrange with City to have the amount due withheld from future payments to Contractor under this Agreement (again, offsetting any amounts already paid by Contractor which can be applied as a credit against such liability).

A determination of employment status pursuant to the preceding two paragraphs shall be solely for the purposes of the particular tax in question, and for all other purposes of this Agreement, Contractor shall not be considered an employee of City. Notwithstanding the foregoing, should any court, arbitrator, or administrative authority determine that Contractor is an employee for any other purpose, then Contractor agrees to a reduction in City's financial liability so that City's total expenses under this Agreement are not greater than they would have been had the court, arbitrator, or administrative authority determined that Contractor was not an employee.

## 15 Insurance; Bonds

### 15.1 Insurance

**15.1.1** Without in any way limiting Contractor's liability pursuant to the "Indemnification" section of his Agreement, Contractor shall maintain in force, during the full term of the Agreement, insurance in the following amounts and coverage's:

- (a) Workers' Compensation, in statutory amounts, with Employers' Liability Limits not less than \$1,000,000 each accident, illness or injury. The Worker's Compensation policy shall be endorsed with a waiver of subrogation in favor of the City for all work performed by the Consultant, its employees, agents and subcontractors; and
- (b) Commercial General Liability Insurance with limits not less than \$2,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Contractual Liability, Personal Injury, Products and Completed Operations; and
- (c) Commercial Automobile Liability Insurance with limits not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Owned, Non-Owned and Hired auto coverage, as applicable.
- (d) Garage Liability insurance, including coverage for garage operations arising from premises/operations, product/completed operations, contracts, owned vehicles, non-owned vehicles and damage to vehicles owned by others (bailment): Minimum limit of liability of \$2,000,000 each occurrence combined single limit bodily injury and property damage; and
- (e) Garage keepers' legal liability insurance, comprehensive form, with limits not less than \$2,000,000 each occurrence.

- (f) The shipping contractor shall carry, at a minimum, physical damage insurance (including destruction, damage, fire and theft) in the amount of not less than \$1,000,000 and commercial liability insurance in the amount of not less than \$1,000,000.

**15.1.2** Commercial General Liability, Business Automobile Liability Insurance, Garagekeepers' Legal Liability and Shippers Coverage policies must provide the following:

- (a) Name as Additional Insured the City and County of San Francisco, its Officers, Agents, and Employees.
- (b) That such policies are primary insurance to any other insurance available to the Additional Insured, with respect to any claims arising out of this Agreement, and that insurance applies separately to each insured against whom claim is made or suit is brought.

**15.1.3** Waiver of Subrogation – Contractor agrees to waive subrogation which any insurer of Contractor may acquire from Contractor by virtue of the payment of any loss. Contractor agrees to obtain any endorsement that may be necessary to effect this waiver of subrogation.

**15.1.4** All policies (and bonds, as described in Section 15.2 below) shall provide 30 days' advance written notice to City of cancellation or reduction in coverage for any reason, mailed to the following address:

San Francisco Municipal Transportation Agency  
425 Geneva Avenue, Room 210  
San Francisco, 94112  
Attn: Mr. Louis Maffei  
Contract No. CPT 660

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

**15.1.6** Should any of the required insurance be provided under a form of coverage that includes a general annual aggregate limit or provides that claims investigation or legal defense costs be included in such general annual aggregate limit, such general annual aggregate limit shall be double the occurrence or claims limits specified above.

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

**15.1.8** Before commencing any operations under this Agreement, Contractor shall do the following: (a) furnish to City certificates of insurance, and additional insured policy endorsements with insurers with ratings

comparable to AM Best A-, VIII or higher, that are authorized to do business in the State of California, and that are satisfactory to City, in form evidencing all coverage's set forth above, and (b) furnish complete copies of policies promptly upon City request.

**15.1.9** Approval of the insurance by City shall not relieve or decrease the liability of Contractor hereunder.

**15.1.10** If a subcontractor will be used to complete any portion of this agreement, the Contractor shall ensure that the subcontractor shall provide all necessary insurance and shall name the City and County of San Francisco, its officers, agents and employees and the Contractor listed as additional insureds.

## **15.2 Bonds**

**15.2.1** Within 20 days following the receipt of a notice of recommended award of contract and until completion of all Contract obligations and acceptance by City of the final Vehicle, the Contractor shall furnish to City a performance and a labor and materials bond each in an amount not less than 50 percent of the Contract amount to guarantee Contractor's faithful performance of all obligations of the Contract, including warranty obligations in existence until the last Vehicle is accepted, and to guarantee Contractor's payment to all suppliers of labor and materials under this Contract, excluding the period covered by the warranty bond described in Subsection (b) below.

**15.2.2** From acceptance by City of the last Vehicle, and throughout the warranty period of the last Vehicle accepted, Contractor shall supply a maintenance or warranty bond or irrevocable letter of credit in the amount of \$500,000 to guarantee Contractor's warranty of performance of all the Vehicles with unexpired warranties at the time of issuance of the warranty bond.

**15.2.3** Bonding entities on the performance bond must be legally authorized to engage in the business of furnishing performance bonds in the State of California. All bonding entities or letter of credit must be satisfactory to SFMTA and to the Controller and Risk Manager of the City and County of San Francisco.

**15.2.4** During the period covered by the Agreement, if any of the sureties upon the bond shall have an AM Best rating that falls below A-, VIII or become insolvent and unable to pay promptly the amount of such bond to the extent to which the surety might be liable, Contractor, within 30 days after notice given by SFMTA to Contractor, shall by supplemental bond or otherwise, substitute another and sufficient surety approved by SFMTA in place of the surety becoming insolvent or unable to pay. If Contractor fails within such 30-day period to substitute another and sufficient surety, Contractor, if SFMTA so elects, shall be deemed to be in default in the performance of its obligations hereunder and upon the said bond. The City, in addition to any and all other remedies, may terminate the Agreement or bring any proper suit or proceeding against moneys then due or which thereafter may become due Contractor under the Agreement. The amount for which the surety shall have justified on the bond and the moneys so deducted shall be held by City as collateral for the performance of the conditions of the bond.

16 **Indemnification**

- 16.1 General.** Contractor shall indemnify and save harmless City and its officers, agents and employees from, and, if requested, shall defend them against any and all loss, cost, damage, injury, liability, and claims thereof for injury to or death of a person, including employees of Contractor or loss of or damage to property, arising directly or indirectly from Contractor's performance of this Agreement, including, but not limited to, Contractor's use of facilities or equipment provided by City or others, regardless of the negligence of, and regardless of whether liability without fault is imposed or sought to be imposed on City, except to the extent that such indemnity is void or otherwise unenforceable under applicable law in effect on or validly retroactive to the date of this Agreement, and except where such loss, damage, injury, liability or claim is the result of the active negligence or willful misconduct of City and is not contributed to by any act of, or by any omission to perform some duty imposed by law or agreement on Contractor, its subcontractors or either's agent or employee. The foregoing indemnity shall include, without limitation, reasonable fees of attorneys, consultants and experts and related costs and City's costs of investigating any claims against the City.
- 16.2 Duty to Defend.** In addition to Contractor's obligation to indemnify City, Contractor specifically acknowledges and agrees that it has an immediate and independent obligation to defend City from any claim which actually or potentially falls within this indemnification provision, even if the allegations are or may be groundless, false or fraudulent, which obligation arises at the time such claim is tendered to Contractor by City and continues at all times thereafter.
- 16.3 Intellectual Property.** Contractor shall indemnify and hold City harmless from all loss and liability, including attorneys' fees, court costs and all other litigation expenses for any infringement of the patent rights, copyright, trade secret or any other proprietary right or trademark, and all other intellectual property claims of any person or persons in consequence of the use by City, or any of its officers or agents, of articles or services to be supplied in the performance of this Agreement.
- 16.4 Limitation of Liability.** Except as provided herein, Contractor's aggregate liability to the City under this Agreement shall be limited to the Contract amount stated in Section 5.1, as that amount may be modified by a properly approved and executed Contract Modification. Said limitation on liability shall not apply to:
- 16.4.1** damages and other liability caused by Contractor's willful misconduct or gross negligence;
  - 16.4.2** liability arising under or for violation of any applicable statute, City ordinance, regulation, or other laws;
  - 16.4.3** damages that fall within the insurance coverages required under the Agreement;
  - 16.4.4** Contractor's warranty obligations under the Agreement;
  - 16.4.5** damages and other liability arising under claims by third parties, including indemnity or contribution for claims brought by a third party (see Paragraph 16.1);



**16.4.6** damages and other liability for infringement of any intellectual property right as provided in Section 16.3.

**16.5 Notice of Claim; Tender of Defense.** The City shall use its best efforts to give prompt written notice to Contractor of any claim for which it requires indemnification from Contractor and will not admit liability or fault as to the allegations of the claim. Provided Contractor accepts the City's tender of defense without reservations, City agrees to grant Contractor sole control over the defense and settlement of the claim and provide timely assistance to Contractor in the defense of the claim.

**17 Incidental and Consequential Damages.**

Except for liquidated damages, Contractor shall not be responsible for incidental and consequential damages resulting from Contractor's acts or omissions. Nothing in this Agreement shall constitute a waiver or limitation of any rights that City may have under applicable law.

**18 Liability of City**

CITY'S PAYMENT OBLIGATIONS UNDER THIS AGREEMENT SHALL BE LIMITED TO THE PAYMENT OF THE COMPENSATION PROVIDED FOR IN SECTION 5 OF THIS AGREEMENT. NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, IN NO EVENT SHALL CITY BE LIABLE, REGARDLESS OF WHETHER ANY CLAIM IS BASED ON CONTRACT OR TORT, FOR ANY SPECIAL, CONSEQUENTIAL, INDIRECT OR INCIDENTAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOST PROFITS, ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR THE SERVICES PERFORMED IN CONNECTION WITH THIS AGREEMENT.

**19 Liquidated Damages**

By entering into this Agreement, Contractor agrees that in the event the Services, as provided under Section 4 herein, are delayed beyond the scheduled milestones and timelines as provided in the Project Delivery Schedule (Exhibit B), City will suffer actual damages that will be impractical or extremely difficult to determine; further, Contractor agrees that the amounts listed below for each day of delay beyond scheduled milestones and timelines are not a penalty, but is a reasonable estimate of the loss that City will incur based on the delay, established in light of the circumstances existing at the time this contract was awarded. City may deduct a sum representing the liquidated damages from any money due to Contractor. Such deductions shall not be considered a penalty, but rather agreed monetary damages sustained by City because of Contractor's failure to deliver to City within the time fixed or such extensions of time permitted in writing by SFMTA.

Failure to deliver the Vehicles by the times stated in Exhibit B	\$650 per car/day
Failure to deliver all other Project deliverables (spare parts, training, drawings, reports, documents)	\$300 /day/deliverable

Failure to provide a plan for correction of fleet defects	\$500/day
Failure to fully correct fleet defects according to approved plan	\$650 per car/day

20 **Default; Remedies**

**20.1 Event of Default.** Each of the following shall constitute an event of default (“Event of Default”) under this Agreement:

**20.1.1** Contractor fails or refuses to perform or observe any term, covenant or condition contained in any of the following Sections of this Agreement: 8, 10, 15, 24, 30, 36, 52, or 56.

**20.1.2** Contractor fails or refuses to perform or observe any other term, covenant or condition contained in this Agreement, and such default continues for a period of 10 days after written notice thereof from City to Contractor.

**20.1.3** Contractor (i) is generally not paying its debts as they become due, (ii) files, or consents by answer or otherwise to the filing against it of, a petition for relief or reorganization or arrangement or any other petition in bankruptcy or for liquidation or to take advantage of any bankruptcy, insolvency or other debtors' relief law of any jurisdiction, (iii) makes an assignment for the benefit of its creditors, (iv) consents to the appointment of a custodian, receiver, trustee or other officer with similar powers of Contractor or of any substantial part of Contractor's property or (v) takes action for the purpose of any of the foregoing.

**20.1.4** A court or government authority enters an order (i) appointing a custodian, receiver, trustee or other officer with similar powers with respect to Contractor or with respect to any substantial part of Contractor's property, (ii) constituting an order for relief or approving a petition for relief or reorganization or arrangement or any other petition in bankruptcy or for liquidation or to take advantage of any bankruptcy, insolvency or other debtors' relief law of any jurisdiction or (iii) ordering the dissolution, winding-up or liquidation of Contractor.

**20.2 Remedies.** On and after any Event of Default, City shall have the right to exercise its legal and equitable remedies, including, without limitation, the right to terminate this Agreement or to seek specific performance of all or any part of this Agreement. In addition, City shall have the right (but no obligation) to cure (or cause to be cured) on behalf of Contractor any Event of Default; Contractor shall pay to City on demand all costs and expenses incurred by City in effecting such cure, with interest thereon from the date of incurrence at the maximum rate then permitted by law. City shall have the right to offset from any amounts due to Contractor under this Agreement or any other agreement between City and Contractor all damages, losses, costs or expenses incurred by City as a result of such Event of Default and any liquidated damages due from Contractor pursuant to the terms of this Agreement or any other agreement. All remedies provided for in this Agreement may be exercised individually or in combination with any other remedy available hereunder or under applicable laws, rules and

regulations. The exercise of any remedy shall not preclude or in any way be deemed to waive any other remedy.

## 21 Termination for Convenience

- 21.1 Exercise of Option.** City shall have the option, in its sole discretion, to terminate this Agreement, at any time during the term hereof, for convenience and without cause. City shall exercise this option by giving Contractor written notice of termination. The notice shall specify the date on which termination shall become effective.
- 21.2 Contractor Actions.** Upon receipt of the notice, Contractor shall commence and perform, with diligence, all actions necessary on the part of Contractor to effect the termination of this Agreement on the date specified by City and to minimize the liability of Contractor and City to third parties as a result of termination. All such actions shall be subject to the prior approval of City. Such actions shall include, without limitation:
- 21.2.1** Halting the performance of all services and other work under this Agreement on the date(s) and in the manner specified by City.
  - 21.2.2** Not placing any further orders or subcontracts for materials, services, equipment or other items.
  - 21.2.3** Terminating all existing orders and subcontracts.
  - 21.2.4** At City's direction, assigning to City any or all of Contractor's right, title, and interest under the orders and subcontracts terminated. Upon such assignment, City shall have the right, in its sole discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts.
  - 21.2.5** Subject to City's approval, settling all outstanding liabilities and all claims arising out of the termination of orders and subcontracts.
  - 21.2.6** Completing performance of any services or work that City designates to be completed prior to the date of termination specified by City.
  - 21.2.7** Taking such action as may be necessary, or as the City may direct, for the protection and preservation of any property related to this Agreement which is in the possession of Contractor and in which City has or may acquire an interest.
- 21.3 Contractor Invoice.** Within 30 days after the specified termination date, Contractor shall submit to City an invoice, which shall set forth each of the following as a separate line item:
- 21.3.1** The reasonable cost to Contractor, without profit, for all services and other work City directed Contractor to perform prior to the specified termination date, for which services or work City has not already tendered payment. Reasonable costs may include a reasonable allowance for actual overhead, not to exceed a total of 10 percent of Contractor's direct costs for services or other work. Any overhead allowance shall be separately

itemized. Contractor may also recover the reasonable cost of preparing the invoice.

**21.3.2** A reasonable allowance for profit on the cost of the services and other work described in the immediately preceding subsection 21.3.1, provided that Contractor can establish, to the satisfaction of City, that Contractor would have made a profit had all services and other work under this Agreement been completed, and provided further, that the profit allowed shall in no event exceed five percent of such cost.

**21.3.3** The reasonable cost to Contractor of handling material or equipment returned to the vendor, delivered to the City or otherwise disposed of as directed by the City.

**21.3.4** A deduction for the cost of materials to be retained by Contractor, amounts realized from the sale of materials and not otherwise recovered by or credited to City, and any other appropriate credits to City against the cost of the services or other work.

**21.4 Non-Recoverable Costs.** In no event shall City be liable for costs incurred by Contractor or any of its subcontractors after the termination date specified by City, except for those costs specifically enumerated and described in the immediately preceding subsection 21.3. Such non-recoverable costs include, but are not limited to, anticipated profits on this Agreement, post-termination employee salaries, post-termination administrative expenses, post-termination overhead or unabsorbed overhead, attorneys' fees or other costs relating to the prosecution of a claim or lawsuit, prejudgment interest, or any other expense which is not reasonable or authorized under such subsection 21.3.

**21.5 Deductions.** In arriving at the amount due to Contractor under this Section, City may deduct: (a) all payments previously made by City for work or other services covered by Contractor's final invoice; (b) any claim which City may have against Contractor in connection with this Agreement; (c) any invoiced costs or expenses excluded pursuant to the immediately preceding subsection (21.4); and (d) in instances in which, in the opinion of the City, the cost of any service or other work performed under this Agreement is excessively high due to costs incurred to remedy or replace defective or rejected services or other work, the difference between the invoiced amount and City's estimate of the reasonable cost of performing the invoiced services or other work in compliance with the requirements of this Agreement.

**21.6 Survival.** City's payment obligation under this Section shall survive termination of this Agreement.

## 22 **Rights and Duties Upon Termination or Expiration**

**22.1 Survival of Sections.** This Section and the following Sections of this Agreement shall survive termination or expiration of this Agreement: 8 through 11, 13 through 18, 24, 26 through 28, 49 through 52, 56, 56, 61 and 62.

**22.2 Contractor Duties.** Subject to the immediately preceding subsection 22.1, upon termination of this Agreement prior to expiration of the term specified in Section 2, this Agreement shall terminate and be of no further force or effect. Contractor shall transfer title to City, and deliver in the manner, at the times, and to the extent, if any, directed by City, any work in progress, completed work, supplies, equipment, and other materials produced as a part of, or acquired in connection with the performance of this Agreement, and any completed or partially completed work which, if this Agreement had been completed, would have been required to be furnished to City. This subsection shall survive termination of this Agreement.

**23 Conflict of Interest**

Through its execution of this Agreement, Contractor acknowledges that it is familiar with the provisions of section 15.103 of the City's Charter, Article III, Chapter 2 of the City's Campaign and Governmental Conduct Code and sections 87100 et seq. and sections 1090 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 provision and agrees that if it becomes aware of any such fact during the term of this Agreement it shall immediately notify the City.

**24 Proprietary or Confidential Information of City**

Contractor understands and agrees that, in the performance of the work or services under this Agreement or in contemplation thereof, Contractor may have access to private or confidential information, which may be owned or controlled by City, and that such information may contain proprietary or confidential details, the disclosure of which to third parties may be damaging to City. Contractor agrees that all information disclosed by City to Contractor shall be held in confidence and used only in performance of the Agreement. Contractor shall exercise the same standard of care to protect such information as a reasonably prudent contractor would use to protect its own proprietary data.

**25 Notices to the Parties**

Unless otherwise indicated elsewhere in this Agreement, all written communications sent by the parties may be by U.S. mail or e-mail, and shall be addressed as follows:

To City: San Francisco Municipal Transportation Agency  
425 Geneva Avenue, Room 210  
San Francisco, CA 94112  
Attn: Louis Maffei  
louis.maffei@sfmta.com

To Contractor: Brookville Equipment Corporation  
175 Evans Street  
Brookville, PA 15825

jmcneil@brookvillecorp.com  
Fax: 814-849-2010

Any notice of default must be sent by registered mail.

26 **Ownership of Results**

Any interest of Contractor or its Subcontractors, in drawings, plans, specifications, blueprints, studies, reports, memoranda, computation sheets, computer files and media or other documents prepared by Contractor or its subcontractors in connection with services to be performed under this Agreement, shall become the property of and will be transmitted to City. However, Contractor may retain and use copies for reference and as documentation of its experience and capabilities.

27 **Works for Hire**

If, in connection with services performed under this Agreement, Contractor or its subcontractors create artwork, copy, posters, billboards, photographs, videotapes, audiotapes, systems designs, software, reports, diagrams, surveys, blueprints, source codes or any other original works of authorship, such works of authorship shall be works for hire as defined under Title 17 of the United States Code, and all copyrights in such works are the property of the City. If it is ever determined that any works created by Contractor or its subcontractors under this Agreement are not works for hire under U.S. law, Contractor hereby assigns all copyrights to such works to the City, and agrees to provide any material and execute any documents necessary to effectuate such assignment. With the approval of the City, Contractor may retain and use copies of such works for reference and as documentation of its experience and capabilities.

28 **Audits and Inspection of Records**

Contractor agrees to maintain and make available to the City, during regular business hours, accurate books and accounting records relating to its work under this Agreement. Contractor will permit City to audit, examine and make excerpts and transcripts from such books and records, and to make audits of all invoices, materials, payrolls, records or personnel and other data related to all other matters covered by this Agreement, whether funded in whole or in part under this Agreement. Contractor shall maintain such data and records in an accessible location and condition for a period of not less than five years after final payment under this Agreement or until after final audit has been resolved, whichever is later. The State of California or any federal agency having an interest in the subject matter of this Agreement shall have the same rights conferred upon City by this Section.

29 **Subcontracting**

Contractor is prohibited from subcontracting this Agreement or any part of it unless such subcontracting is first approved by City in writing. Neither party shall, on the basis of this

Agreement, contract on behalf of or in the name of the other party. An agreement made in violation of this provision shall confer no rights on any party and shall be null and void.

**30 Assignment**

The services to be performed by Contractor are personal in character and neither this Agreement nor any duties or obligations hereunder may be assigned or delegated by the Contractor unless first approved by City by written instrument executed and approved by the SFMTA.

**31 Non-Waiver of Rights**

The omission by either party at any time to enforce any default or right reserved to it, or to require performance of any of the terms, covenants, or provisions hereof by the other party at the time designated, shall not be a waiver of any such default or right to which the party is entitled, nor shall it in any way affect the right of the party to enforce such provisions thereafter.

**32 Reserved.**

**33 Claims**

Contractor shall not be entitled to the payment of any additional compensation for any action, or failure to act, by the SFMTA, including failure or refusal to issue a Contract Modification or for the happening of any event, thing, occurrence, or other cause, unless Contractor shall have given the Engineer due written notice of potential claim.

The written notice of potential claim shall set forth the reasons for which Contractor believes additional compensation will or may be due, the nature of the costs involved, and insofar as possible, the amount of the potential claim. The said notice as above required must have been given to the Engineer prior to the time that Contractor shall have performed the work giving rise to the potential claim for additional compensation, or in all other cases, within 15 days after the happening of the event, thing, occurrence, or other cause giving rise to the potential claim.

It is the intention of this Section that differences between the parties arising under and by virtue of the Contract be brought to the attention of the SFMTA at the earliest possible time in order that such matters may be settled, if possible, or other appropriate action promptly be taken. Contractor agrees that it shall have no right to additional compensation for any claim that may be based on any such act, failure to act, event, thing, or occurrence for which no written notice of potential claim as herein required was filed.

**34 Nondiscrimination; Penalties**

- 34.1 Contractor Shall Not Discriminate.** In the performance of this Agreement, Contractor agrees not to discriminate against any employee, City and County employee working with such contractor or subcontractor, applicant for employment with such contractor or subcontractor, or against any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations, on the basis of the fact or perception of a person's race, color, creed, religion, national origin, ancestry, age, height, weight, sex, sexual orientation, gender identity, domestic partner status, marital status, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status), or association with members of such protected classes, or in retaliation for opposition to discrimination against such classes.
- 34.2 Subcontracts.** Contractor shall incorporate by reference in all subcontracts the provisions of §§12B.2(a), 12B.2(c)-(k), and 12C.3 of the San Francisco Administrative Code (copies of which are available from SFMTA) and shall require all subcontractors to comply with such provisions. Contractor's failure to comply with the obligations in this subsection shall constitute a material breach of this Agreement.
- 34.3 Nondiscrimination in Benefits.** Contractor does not as of the date of this Agreement and will not during the term of this Agreement, in any of its operations in San Francisco, on real property owned by San Francisco, or where work is being performed for the City elsewhere in the United States, discriminate in the provision of bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits, as well as any benefits other than the benefits specified above, between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees, where the domestic partnership has been registered with a governmental entity pursuant to state or local law authorizing such registration, subject to the conditions set forth in §12B.2(b) of the San Francisco Administrative Code.. As a condition to this Agreement, Contractor shall execute the "Chapter 12B Declaration: Nondiscrimination in Contracts and Benefits" form (form HRC-12B-101) with supporting documentation and secure the approval of the form by the San Francisco Human Rights Commission.
- 34.4 Incorporation of Administrative Code Provisions by Reference,** The provisions of Chapters 12B and 12C of the San Francisco Administrative Code are incorporated in this Section by reference and made a part of this Agreement as though fully set forth herein. Contractor shall comply fully with and be bound by all of the provisions that apply to this Agreement under such Chapters, including but not limited to the remedies provided in such Chapters. Without limiting the foregoing, Contractor understands that pursuant to §12B.2(h) of the San Francisco Administrative Code, a penalty of \$50 for each person for each calendar day during which such person was discriminated against in violation of



the provisions of this Agreement may be assessed against Contractor and/or deducted from any payments due Contractor.

**35 Tropical Hardwoods and Virgin Redwood Ban.**

Pursuant to §804(b) of the San Francisco Environment Code, the City and County of San Francisco urges contractors not to import, purchase, obtain, or use for any purpose, any tropical hardwood, tropical hardwood wood product, virgin redwood or virgin redwood wood product.

**36 Drug-Free Workplace Policy.**

Contractor acknowledges that pursuant to the Federal Drug-Free Workplace Act of 1989, the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited on City premises. Contractor agrees that any violation of this prohibition by Contractor, its employees, agents or assigns will be deemed a material breach of this Agreement.

**37 Resource Conservation.**

Chapter 5 of the San Francisco Environment Code (“Resource Conservation”) is incorporated herein by reference. Failure by Contractor to comply with any of the applicable requirements of Chapter 5 will be deemed a material breach of contract.

**38 Compliance with Americans with Disabilities Act.**

Contractor acknowledges that, pursuant to the Americans with Disabilities Act (ADA), programs, services and other activities provided by a public entity to the public, whether directly or through a contractor, must be accessible to the disabled public. Contractor shall provide the services specified in this Agreement in a manner that complies with the ADA and any and all other applicable federal, state and local disability rights legislation. Contractor agrees not to discriminate against disabled persons in the provision of services, benefits or activities provided under this Agreement and further agrees that any violation of this prohibition on the part of Contractor, its employees, agents or assigns will constitute a material breach of this Agreement.

**39 Sunshine Ordinance.**

In accordance with San Francisco Administrative Code §67.24(e), contracts, contractors’ bids, responses to solicitations and all other records of communications between City and persons or firms seeking contracts, shall be open to inspection immediately after a contract has been awarded. Nothing in this provision requires the disclosure of a private person or organization’s net worth or other proprietary financial data submitted for qualification for a contract or other benefit until and unless that person or organization is awarded the

contract or benefit. Information provided which is covered by this paragraph will be made available to the public upon request.

#### 40 **Public Access to Meetings and Records.**

If the Contractor receives a cumulative total per year of at least \$250,000 in City funds or City-administered funds and is a non-profit organization as defined in Chapter 12L of the San Francisco Administrative Code, Contractor shall comply with and be bound by all the applicable provisions of that Chapter. By executing this Agreement, the Contractor agrees to open its meetings and records to the public in the manner set forth in §§12L.4 and 12L.5 of the Administrative Code. Contractor further agrees to make-good faith efforts to promote community membership on its Board of Directors in the manner set forth in §12L.6 of the Administrative Code. The Contractor acknowledges that its material failure to comply with any of the provisions of this paragraph shall constitute a material breach of this Agreement. The Contractor further acknowledges that such material breach of the Agreement shall be grounds for the City to terminate and/or not renew the Agreement, partially or in its entirety.

#### 41 **Notification of Limitations on Contributions.**

Through execution of this Agreement, Contractor acknowledges that it is familiar with section 1.126 of the City's Campaign and Governmental Conduct Code, which prohibits any person who contracts with the City for the rendition of personal services, for the furnishing of any material, supplies or equipment, for the sale or lease of any land or building, or for a grant, loan or loan guarantee, from making any campaign contribution to (1) an individual holding a City elective office if the contract must be approved by the individual, a board on which that individual serves, or a board on which an appointee of that individual serves, (2) a candidate for the office held by such individual, or (3) a committee controlled by such individual, at any time from the commencement of negotiations for the contract until the later of either the termination of negotiations for such contract or six months after the date the contract is approved. Contractor acknowledges that the foregoing restriction applies only if the contract or a combination or series of contracts approved by the same individual or board in a fiscal year have a total anticipated or actual value of \$50,000 or more. Contractor further acknowledges that the prohibition on contributions applies to each prospective party to the contract; each member of Contractor's board of directors; Contractor's chairperson, chief executive officer, chief financial officer and chief operating officer; any person with an ownership interest of more than 20 percent in Contractor; any subcontractor listed in the bid or contract; and any committee that is sponsored or controlled by Contractor. Additionally, Contractor acknowledges that Contractor must inform each of the persons described in the preceding sentence of the prohibitions contained in Section 1.126.

#### 42 **Requiring Minimum Compensation for Covered Employees**

Contractor agrees to pay covered employees no less than the minimum compensation required by San Francisco's Minimum Compensation Ordinance (MCO), and shall otherwise comply with the MCO as set forth in San Francisco Administrative Code Chapter 12P (Chapter  
page 25 of 34

12P). The provisions of Chapter 12P , including but not limited to the penalties for noncompliance provided therein, are incorporated herein by this reference, and made part of this Agreement as though fully set forth herein.

#### **43 Health Benefits for Covered Employees**

Contractor agrees to choose and perform one of the Health Care Accountability options set forth in Section 12Q.3 of the Health Care Accountability Ordinance (HCAO), and to comply with the HCAO as set forth in San Francisco Administrative Code Chapter 12Q.

#### **44 Employment Training Program**

In furtherance of its existing company policy to promote job training for disadvantaged individuals, Contractor agrees to undertake an employment training program to provide disadvantaged individuals with the skills necessary to work at various trades in the production department of Contractor's firm. At a minimum, Contractor agrees to recruit disadvantaged individuals through various organizations and supply all necessary training at its expense for the following positions:

- 3 individuals for careers as welders

- 2 individuals for careers as electronics and electrical technicians

- 2 individuals for careers as general mechanics

#### **45 Prohibition on Political Activity with City Funds**

In accordance with San Francisco Administrative Code Chapter 12.G, Contractor may not participate in, support, or attempt to influence any political campaign for a candidate or for a ballot measure (collectively, "Political Activity") in the performance of the services provided under this Agreement. Contractor agrees to comply with San Francisco Administrative Code Chapter 12.G and any implementing rules and regulations promulgated by the City's Controller. The terms and provisions of Chapter 12.G are incorporated herein by this reference. In the event Contractor violates the provisions of this section, the City may, in addition to any other rights or remedies available hereunder, (i) terminate this Agreement, and (ii) prohibit Contractor from bidding on or receiving any new City contract for a period of two (2) years.

#### **46 Preservative-treated Wood Containing Arsenic**

Contractor may not purchase preservative-treated wood products containing arsenic in the performance of this Agreement unless an exemption from the requirements of Chapter 13 of the San Francisco Environment Code is obtained from the Department of the Environment under Section 1304 of the Code. The term "preservative-treated wood containing arsenic" shall mean wood treated with a preservative that contains arsenic, elemental arsenic, or an arsenic copper combination, including, but not limited to, chromate copper arsenate preservative, ammonia cal copper zinc arsenate preservative, or ammonia cal copper arsenate preservative. Contractor may purchase preservative-treated wood products on the list of environmentally preferable alternatives prepared and adopted by the Department of the

Environment. This provision does not preclude Contractor from purchasing preservative-treated wood containing arsenic for saltwater immersion. The term "saltwater immersion" shall mean a pressure-treated wood that is used for construction purposes or facilities that are partially or totally immersed in saltwater.

#### 47 **Modification of Agreement**

This Agreement may not be modified, nor may compliance with any of its terms be waived, except by written instrument executed and approved as required by law. Contractor shall cooperate with the SFMTA to submit to the Contract Compliance Office any amendment, modification, supplement or change order that would result in a cumulative increase of the original amount of this Agreement by more than 20%.

#### 48 **Authority of Engineer**

The Engineer shall decide all questions, which may arise as to the quality or acceptability of materials furnished and work performed and as to the manner of performance and rate of progress of the work; all questions, which may arise as to the acceptable fulfillment of the Contract on the part of the Contractor; and all questions as to compensation. In discharging the responsibilities outlined above, the Engineer shall at all times act fairly and reasonably. Any appeal of the Engineer's decisions shall be in accordance with the provisions of Section 54.2 of this Agreement. As with any claim, change, extra or additional work, Contractor shall be paid in accordance with the payment provisions of this Contract when the dispute is finally resolved.

Should any questions arise as to the meaning and intent of the Contract, the matter shall be referred to the Engineer, who, with input from SFMTA staff and from the Contractor, shall decide the true meaning and intent of the Contract. The Engineer's decision in this regard shall be administratively final and conclusive.

#### 49 **Agreement Made in California; Venue**

The formation, interpretation and performance of this Agreement shall be governed by the laws of the State of California. Venue for all litigation relative to the formation, interpretation and performance of this Agreement shall be in San Francisco.

#### 50 **Construction**

All paragraph captions are for reference only and shall not be considered in construing this Agreement.

#### 51 **Entire Agreement**

This contract sets forth the entire Agreement between the parties, and supersedes all other oral or written provisions. This contract may be modified only as provided in Section 47.

## 52 **Compliance with Laws**

Contractor shall keep itself fully informed of the City's Charter, codes, ordinances and regulations of the City and of all state, and federal laws in any manner affecting the performance of this Agreement, and must at all times comply with such local codes, ordinances, and regulations and all applicable laws as they may be amended from time to time.

## 53 **Services Provided by Attorneys**

Any services to be provided by a law firm or attorney must be reviewed and approved in writing in advance by the City Attorney. No invoices for services provided by law firms or attorneys, including, without limitation, as subcontractors of Contractor, will be paid unless the provider received advance written approval from the City Attorney.

## 54 **Disputes**

- 54.1 Notice of Dispute.** For any dispute involving a question of fact that does not involve a claim for additional compensation, the aggrieved party shall furnish the other party with a notice of dispute within 15 days of the determination of the dispute. The party receiving a notice of dispute shall submit a written reply with 14 days of delivery of the notice. The notice and response shall contain the following: (a) a statement of the party's position and a summary of the arguments supporting that position, and (b) any evidence supporting the party's position.
- 54.2 Resolution of Disputes.** Disputes arising in the performance of this Agreement that are not resolved by negotiation between the SFMTA Project Manager and Contractor shall be decided in writing by the SFMTA Manager of Fleet Engineering. The decision shall be administratively final and conclusive unless within 10 days from the date of such decision, the Contract Consultant mails or otherwise furnishes a written appeal to the Director of Transit, or his/her designee. In connection with such an appeal, the Consultant shall be afforded an opportunity to be heard and to offer evidence in support of its position. The decision of the Director of Transit shall be administratively final and conclusive. This section applies to all disputes unless a specific provision of this Agreement provides that the Engineer's decision as to a particular dispute is final.
- 54.3 No Cessation of Work.** Pending final resolution of a dispute hereunder, the Contractor shall proceed diligently with the performance of its obligations under this Agreement in accordance with the written directions of the Engineer.
- 54.4 Alternative Dispute Resolution.** If agreed to by both parties, disputes may be resolved by a mutually agreed to alternative dispute resolution process.
- 54.5 Claims for Additional Compensation.** For disputes involving a claim for additional compensation, parties involved shall attempt to resolve such disputes expediently and in good faith so as not to impact the performance or schedule of the Project. Under no circumstances shall the Contractor or its sub-contractors stop work due to an unresolved dispute.

**54.6 Disputes among Contractor's Partners.** The resolution of any contractual disputes related to Contractor's Joint Venture or Association partners (if any) shall be the sole responsibility of the Contractor. Each party of the Joint Venture or Association shall resolve all such disputes within 30 calendar days of when the dispute first surfaced so as not to impact the performance of the contract with the City. Any such disputes which impact the Project and which are left unresolved for more than one month shall be cause for the City to withhold and/or reduce invoice payments to the Contractor's Joint Venture or Association firms until the dispute is resolved.

**55 Severability**

Should the application of any provision of this Agreement to any particular facts or circumstances be found by a court of competent jurisdiction to be invalid or unenforceable, then (a) the validity of other provisions of this Agreement shall not be affected or impaired thereby, and (b) such provision shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be reformed without further action by the parties to the extent necessary to make such provision valid and enforceable.

**56 Protection of Private Information**

Contractor has read and agrees to the terms set forth in San Francisco Administrative Code Sections 12M.2, "Nondisclosure of Private Information," and 12M.3, "Enforcement" of Administrative Code Chapter 12M, "Protection of Private Information," which are incorporated herein as if fully set forth. Contractor agrees that any failure of Contractor to comply with the requirements of Section 12M.2 of this Chapter shall be a material breach of the Contract. In such an event, in addition to any other remedies available to it under equity or law, the City may terminate the Contract, bring a false claim action against the Contractor pursuant to Chapter 6 or Chapter 21 of the Administrative Code, or debar the Contractor

**57 Time of Essence**

Time is of the essence in this Agreement.

**58 Technical Specifications**

**58.1 Fabrication.** The Vehicles shall be rehabilitated and guaranteed in accordance with the "Technical Specifications."

**58.2 Omission.** Notwithstanding the Technical Specifications or other data provided by the Engineer, the Contractor shall have the responsibility of supplying all parts and details required to make these Vehicles complete and ready for service even though such details may not be specifically mentioned in the Specifications. Items that are installed by SFMTA shall not be the responsibility of the Contractor unless they are included in this Contract or should have been installed by the Contractor. If additional repairs are needed to make any Vehicles complete and ready for service beyond what is in the Specifications,

these repairs will be handled by change orders through a Contract Modification, as approved by the SFMTA and the SFMTA Board, as required.

- 58.3 Priority.** In the event of any deviation between the description of these Vehicles or the description of the Work in the Technical Specifications and in this document or the Contractor's Proposal, the Technical Specifications shall govern.
- 58.4 Design Review.** Prior to commencement of Vehicle rehabilitation, the Contractor and the Engineer shall agree to the specific details of the rehabilitation. These details may include, but not be limited to, items such as: engineering and design details, test plans and procedures, appropriate training, sub-suppliers equipment, colors, wording, and placement of numbers and signs. In cases where consensus cannot be reached, the opinion of the Engineer as to design details shall be administratively final unless clearly arbitrary or capricious. Disputes regarding cost and other matters shall be subject to the provisions of Sections 33 and 54. When plans, drawings, requests for information, procedures or other contract deliverables are submitted to SFMTA for approval and/or comments, the Contractor shall delineate any deviations from the Technical Specifications in such deliverables. SFMTA shall approve, disapprove and/or comment on such deliverables within 30 days after receipt. However, no extension of time will be allowed for review of submittals that have been disapproved. Such disapproved submittals shall be resubmitted and will be reviewed and returned within 30 days after subsequent receipt. Neither review nor approval of any plans, drawings, procedures, other contract deliverables or the materials supplied under this contract shall in any way relieve the Contractor of its obligations to perform work under the provision of this Contract.
- 58.5 Preliminary Drawings.** Preliminary drawings shall provide enough detail to conduct preliminary engineering evaluations of structural, electrical, mechanical, and other subsystems. Drawings shall show the general arrangement of equipment layout and subsystems and such detail as is necessary to give a comprehensive idea of the product contemplated.
- 58.6 Materials/Accessories Responsibility.** The Contractor shall be responsible for all materials and workmanship in the rehabilitation of the Vehicles and all components used, whether the same are manufactured by the Contractor or purchased from a Subcontractor. This provision excludes equipment leased or supplied by SFMTA, except insofar as such equipment is damaged by the failure of a part or component for which the Contractor is responsible, or except insofar as the damage to such equipment is caused by the Contractor during the rehabilitation of the Vehicle.

## 59 Project Planning, Scheduling and Control

- 59.1 Introduction.** This Section specifies the requirements for project planning, scheduling and progress reporting to be performed by the Contractor in conjunction with the Contract work. Critical Path Method scheduling (CPM) shall be employed by the Contractor for planning, scheduling and reporting all work required by the Contract Documents.

## 59.2 Scheduling Terms

**59.2.1 Baseline Schedule:** The detailed schedule, in bar-chart format, prepared by the Contractor, indicating the Contractor's plan for executing the Contract work. The Baseline Schedule shall be developed using Microsoft Project Software or approved equal. The Baseline Schedule shall be revised as necessary to incorporate approved Contract modifications. The Contractor's performance or other avoidable delays shall not be considered justification for Baseline Schedule revision.

**59.2.2 Current Schedule:** The updated logic network and supporting reports indicating actual progress to date and forecasted logic and progress for the remaining work. The update will be, at a minimum, to the same level of detail as the Baseline Schedule.

**59.2.3 Supplemental Schedule(s):** Detailed schedules prepared by the Contractor, at the request of the Engineer, to substantiate proposed Contractor changes that may have a schedule impact.

**59.2.4 Monthly Work Plan and Reports:** A detailed plan of the work, in bar-chart format, to be accomplished in the coming weeks. Contractor shall provide SFMTA with monthly project and production status and schedule reports by E-mail. Contractor shall also provide monthly and quarterly schedule reports in Microsoft Project and Power Point, or SFMTA-approved equivalents, and per SFMTA Engineer requirements for reporting to funding agencies..

## 59.3 Descriptions of Submittals

**59.3.1 Project Plan and Baseline Schedule:** The schedule documents, reports, lists, computer software with documentation and computer diskettes and E-mail files are required with each submittal. The Baseline Schedule shall be submitted within 30 days from NTP or by the first design review meeting, whichever comes first. Baseline schedule will include dates for submittal of contract deliverables listed in the Technical Specification. This is further described in Technical Specification section 1.1.6

**59.3.2 Management Plan:** Contractor shall submit a Management Work Plan within thirty (30) days after NTP. The Management Plan shall include protocols, procedures, and assignments of responsibility for key personnel and correspondence forms for all phases of the contract and all project activities for the duration of the contract. Once the Management Plan is approved, key personnel shall not be substituted without approval from the SFMTA. If the Contractor plans to substitute key personnel, a 30-day advance notice, and qualification of new personnel shall be required. At the request of the SFMTA, or when approved changes are made, the Contractor's Management Plan shall be updated to include the latest revision to the project scope or other changes in project circumstances. Plan is further described in Technical Specification section 1.1.1

**59.3.3 Monthly Work Plan and Reports:** Contractor shall provide SFMTA with monthly project and production status and schedule reports by E-mail. Contractor shall also provide monthly and quarterly schedule reports in Microsoft Project and Power Point, or SFMTA-approved equivalents, and per SFMTA Engineer requirements for reporting to funding agencies..



**59.4 Modifications to the Schedule.** When requested by the Engineer, the Contractor shall submit Supplemental Schedules to the Engineer to substantiate proposed Contract changes that may have an impact on the schedule. Contractor shall submit such schedules to the Engineer for review and approval within three (3) working days from the request; otherwise, any proposed Contract change will not be considered by the City. On approval of a Contract modification by the City, the approved change will be incorporated in the Baseline Schedule during the monthly update process.

**60 Assumption of Risk of Loss**

Prior to acceptance of the rehabilitated Vehicles, the Contractor shall bear risk of loss of the Vehicles, including any damage sustained during transportation to the delivery site or during acceptance testing. The City shall assume risk of loss of the Vehicles only after acceptance.

**61 FTA Requirements**

The provisions contained in "FTA Requirements for Personal Services Contracts," attached as Exhibit A, are incorporated into this Agreement. If there is any conflict between the FTA terms and conditions and any other terms and conditions of this Agreement, the FTA terms and conditions shall take precedence.

**62 Cooperative Drafting**

This Agreement has been drafted through a cooperative effort of both parties, and both parties have had an opportunity to have the Agreement reviewed and revised by legal counsel. No party shall be considered the drafter of this Agreement, and no presumption or rule that an ambiguity shall be construed against the party drafting the clause shall apply to the interpretation or enforcement of this Agreement.

**63 Warranty**

Contractor shall provide warranties of Vehicles, training, parts and special tools as described in the Technical Specifications.

**64 Title**

The Contractor covenants and warrants that the SFMTA continuously retains good and exclusive title to all Vehicles, subcomponents, parts and supplies supplied by the SFMTA to the Contractor as part of this Contract, that the Contractor shall not assign or have any lien or mortgage of any type applied against these goods, and that all additions made to the Vehicles furnished under the Contract shall vest in the SFMTA immediately upon acceptance by the SFMTA of such additions. Title to the spare parts to be delivered under this Contract shall vest in the SFMTA immediately upon acceptance by the SFMTA.

65 **Small Business Enterprise Program.**

**65.1 General.** The SFMTA is committed to a Small Business Enterprise Program (“SBE Program”) for the participation of SBEs in contracting opportunities. In addition, the Consultant must comply with all applicable federal regulations regarding Disadvantaged Business Enterprise (DBE) participation, as set out in Title 49, Part 26 of the Code of Federal Regulations, with respect to DBEs performing work under this Agreement. More information on federal DBE requirements can be found on the internet at: [www.fta.dot.gov/civilrights/12326.html](http://www.fta.dot.gov/civilrights/12326.html).

**65.2 Compliance with SBE Program.** Consultant shall comply with the SBE provisions contained in Exhibit E attached to this Agreement and incorporated by reference as though fully set forth, including, but not limited to, achieving and maintaining the SBE goal set for the total dollar amount awarded for the services to be performed under this Agreement and timely completing all forms that may be required by the SFMTA’s Contract Compliance Office. Failure of Consultant to comply with any of these requirements shall be deemed a material breach of this Agreement.

66 **MacBride Principles—Northern Ireland**

Pursuant to San Francisco Administrative Code §12F.5, the City and County of San Francisco urges companies doing business in Northern Ireland to move towards resolving employment inequities, and encourages such companies to abide by the MacBride Principles. The City and County of San Francisco urges San Francisco companies to do business with corporations that abide by the MacBride Principles. By signing below, the person executing this agreement on behalf of Contractor acknowledges and agrees that he or she has read and understood this section.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day first mentioned above.

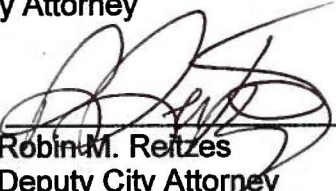
CITY

San Francisco Municipal Transportation Agency

\_\_\_\_\_  
Edward D. Reiskin  
Director of Transportation

Approved as to Form:

Dennis J. Herrera  
City Attorney

By  \_\_\_\_\_  
Robin M. Reitzes  
Deputy City Attorney

San Francisco Municipal Transportation Agency  
Board of Directors

Resolution No. \_\_\_\_\_  
Dated: \_\_\_\_\_

Attest:

\_\_\_\_\_  
Secretary


Board of Supervisors  
Resolution No. \_\_\_\_\_  
Dated: \_\_\_\_\_  
Attest:

\_\_\_\_\_  
Clerk

CONTRACTOR

Brookville Equipment Corporation

By signing this Agreement, I certify that I comply with the requirements of the Minimum Compensation Ordinance, which entitle Covered Employees to certain minimum hourly wages and compensated and uncompensated time off.

  
\_\_\_\_\_  
Larry Conrad, President  
175 Evans Street / P.O. Box 130  
Brookville, PA 15825

City vendor number: 65901

CITY

San Francisco Municipal Transportation Agency

\_\_\_\_\_  
Edward D. Reiskin  
Director of Transportation

Approved as to Form:

Dennis J. Herrera  
City Attorney

By \_\_\_\_\_  
Robin M. Reitzes  
Deputy City Attorney

San Francisco Municipal Transportation Agency  
Board of Directors

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

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CONTRACTOR

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\_\_\_\_\_  
Larry Conrad, President  
175 Evans Street / P.O. Box 130  
Brookville, PA 15825

City vendor number: 65901

**Exhibits:**

**Exhibit A: FTA Requirements For Personal Services Contracts**

**Exhibit B: Project Delivery Schedule**

**Exhibit C: Schedule of Prices**

**Exhibit D: Payment Schedule**

**EXHIBIT A:  
FTA REQUIREMENTS FOR PERSONAL SERVICES CONTRACTS**

**I. DEFINITIONS**

- 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 City 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 a third party contract financed in whole or in part with Federal assistance originally derived from FTA.
- C. Cooperative Agreement** means the instrument by which FTA awards Federal assistance to a specific Recipient to support a particular Project or Program, and in which FTA takes an active role or retains substantial control.
- D. Federal Transit Administration (FTA)** is an operating administration of the U.S. DOT.
- E. FTA Directive** includes any FTA circular, notice, order or guidance providing information about FTA's programs, application processing procedures, and Project management guidelines. 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 a specific Recipient 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. § 6304.
- G. Government** means the United States of America and any executive department or agency thereof.
- H. Project** means the task or set of tasks listed in the Approved Project Budget, and any modifications stated in the Conditions to the Grant Agreement or Cooperative Agreement applicable to the Project. In the case of the formula assistance program for urbanized areas, for elderly and persons with disabilities, and non-urbanized areas, 49 U.S.C. §§ 5307, 5310, and 5311, respectively, the term "Project" encompasses both "Program" and "each Project within the Program," as the context may require, to effectuate the requirements of the Grant Agreement or Cooperative Agreement.
- I. Recipient** means any entity that receives Federal assistance directly from FTA to accomplish the Project. The term "Recipient" includes each FTA "Grantee" as well as each FTA Recipient of a Cooperative Agreement. For the purpose of this Agreement, Recipient is the City.
- J. Secretary** means the U.S. DOT Secretary, including his or her duly authorized designee.
- K. Third Party Contract** means a contract or purchase order awarded by the Recipient to a vendor or contractor, financed in whole or in part with Federal assistance awarded by FTA.

**L. Third Party Subcontract** means a subcontract at any tier entered into by Contractor or third party subcontractor, financed in whole or in part with Federal assistance originally derived from FTA.

**M. U.S. DOT** is the acronym for the U.S. Department of Transportation, including its operating administrations.

## **II. FEDERAL CHANGES**

Contractor shall at all times comply with all applicable FTA regulations, policies, procedures and directives, including without limitation those listed directly or by reference in the Master Agreement between the City and FTA, as they may be amended or promulgated from time to time during the term of this contract. Contractor's failure to so comply shall constitute a material breach of this contract.

## **III. ACCESS TO RECORDS**

**A.** The Contractor agrees to provide the City and County of San Francisco, the FTA Administrator, the Comptroller General of the United States or any of their authorized representatives access to any books, documents, papers and records of the Contractor which are directly pertinent to this Agreement for the purposes of making audits, examinations, excerpts and transcriptions.

**B.** 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.

**C.** The Contractor agrees to maintain all books, records, accounts and reports 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 City, 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. 49 CFR 18.36(i)(11).

## **IV. DEBARMENT AND SUSPENSION**

See Certification Regarding Debarment, Suspension, and Other Responsibility Matters.

## **V. NO FEDERAL GOVERNMENT OBLIGATIONS TO CONTRACTOR**

**A.** The City 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 City, Contractor, or any other party (whether or not a party to that contract) pertaining to any matter resulting from the underlying contract.

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

## **VI. CIVIL RIGHTS**

**A. Nondiscrimination** - In accordance with Title VI of the Civil Rights Act, as amended, 42 U.S.C. § 2000d, section 303 of the Age Discrimination Act of 1975, as amended, 42 U.S.C. § 6102, section 202 of the Americans with Disabilities Act of 1990, 41 U.S.C. § 12132, and 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, 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 underlying contract:

**1. Race, Color, Creed, National Origin, Sex** - In accordance with Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e, 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. DOT) regulations, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor," 41 CFR Parts 60 et seq., (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. § 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. § 623 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.

**3. Disabilities** - In accordance with section 102 of the Americans with Disabilities Act, as amended, 42 U.S.C. § 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.

**C. Flow Down.** The Contractor also agrees to include these requirements in each subcontract financed in whole or in part with Federal assistance provided by FTA, modified only if necessary to identify the affected parties.



**VII. PATENT RIGHTS** (*applicable to contracts for experimental, research, or development projects financed by FTA*)

**A. General.** If any invention, improvement, or discovery is conceived or first actually reduced to practice in the course of or under this Agreement, and that invention, improvement, or discovery is patentable under the laws of the United States of America or any foreign country, the City and Contractor agree to take actions necessary to provide immediate notice and a detailed report to the FTA.

**B.** Unless the Federal Government later makes a contrary determination in writing, irrespective of the Contractor's status (large business, small business, state government or instrumentality, local government, nonprofit organization, institution of higher education, individual), the City and Contractor agree to take the necessary actions to provide, through FTA, those rights in that invention due the Federal Government described in U.S. Department of Commerce regulations, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," 37 CFR Part 401.

**C.** The Contractor also agrees to include the requirements of this clause in each subcontract for experimental, developmental, or research work financed in whole or in part with Federal assistance provided by FTA.

**VIII. RIGHTS IN DATA AND COPYRIGHTS** (Applicable to contracts for planning, research, or development financed by FTA)

**A. Definition.** The term "subject data" used in this section means recorded information, whether or not copyrighted, that is delivered or specified to be delivered under this Agreement. The term includes graphic or pictorial delineation in media such as drawings or photographs; text in specifications or related performance or design-type documents; machine forms such as punched cards, magnetic tape, or computer memory printouts; and information retained in computer memory. Examples include, but are not limited to, computer software, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identifications, and related information. The term "subject data" does not include financial reports, cost analyses, and similar information incidental to contract administration.

**B. Federal Restrictions.** The following restrictions apply to all subject data first produced in the performance of this Agreement.

**1. Publication of Data.** Except for its own internal use in conjunction with the Agreement, Contractor may not publish or reproduce subject data in whole or in part, or in any manner or form, nor may Contractor authorize others to do so, without the written consent of the Federal Government, until such time as the Federal Government 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.

**2. Federal License.** In accordance with 49 CFR §§ 18.34 and 19.36, 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. As used in the previous sentence, “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:

a. Any subject data developed under this Agreement, whether or not a copyright has been obtained; and

b. Any rights of copyright purchased by City or Contractor using Federal assistance in whole or in part provided by FTA.

**3. FTA Intention.** When FTA awards Federal assistance for a experimental, research or developmental work, it is FTA’s general intention to increase transportation knowledge available to the public, rather than to restrict the benefits resulting from the work to participants in the work. Therefore, unless FTA determines otherwise, the Contractor performing experimental, research, or developmental work required by the underlying Agreement 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 Agreement, or a copy of the subject data first produced under the Agreement for which a copyright has not been obtained. If the experimental, research, or developmental work which is the subject of this Agreement is not completed for any reason whatsoever, all data developed under this Agreement shall become subject data as defined in Subsection a. above and shall be delivered as the Federal Government may direct. This subsection does not apply to adaptations of automatic data processing equipment or programs for the City’s use the costs of which are financed with Federal transportation funds for capital projects.

**4. Hold Harmless.** 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 this Agreement. The Contractor shall not be required to indemnify the Federal Government for any such liability arising out of the wrongful acts of employees or agents of the Federal Government.

**5. Restrictions on Access to Patent Rights.** Nothing contained in this section 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.

**6. Application to Data Incorporated into Work.** The requirements of Subsections (2), (3) and (4) of this Section do not apply to data developed by the City or Contractor and incorporated into the work carried out under this Agreement, provided that the City or Contractor identifies the data in writing at the time of delivery of the work.

**7. Application to Subcontractors.** Unless FTA determines otherwise, 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 provided by FTA.

**C. Provision of Rights to Government.** Unless the Federal Government later makes a contrary determination in writing, irrespective of the Contractor's status (large business, small business, state government or instrumentality, local government, nonprofit organization, institution of higher education, individual, etc.), the City and Contractor agree to take the necessary actions to provide, through FTA, those rights in that invention due the Federal Government described in U.S. Department of Commerce regulations, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," 37 CFR Part 401.

**D. Flow Down.** The Contractor also agrees to include these requirements in each subcontract for experimental, developmental, or research work financed in whole or in part with Federal assistance provided by FTA.

**IX. CONTRACT WORK HOURS AND SAFETY STANDARDS** (*applicable to non-construction contracts in excess of \$100,000 that employ laborers or mechanics on a public work*)

**A. Overtime requirements** - No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

**B. Violation; liability for unpaid wages; liquidated damages** - In the event of any violation of the clause set forth in paragraph A of this section the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph A of this section, 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 the clause set forth in paragraph A of this section.

**C. Withholding for unpaid wages and liquidated damages** - The City and County of San Francisco 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 the clause set forth in paragraph (2) of this section.

**D. Subcontracts** - The contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraphs A through D of 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 paragraphs A through D of this section.

## **X. ENERGY CONSERVATION REQUIREMENTS**

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.

## **XI. CLEAN WATER REQUIREMENTS** (*applicable to all contracts in excess of \$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. §§ 1251 et seq. Contractor agrees to report each violation of these requirements to the City and understands and agrees that the City 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.

## **XII. CLEAN AIR** (*applicable to all contracts and subcontracts in excess of \$100,000, including indefinite quantities where the amount is expected to exceed \$100,000 in any year.*)

**A.** Contractor agrees to comply with applicable standards, orders, or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. §§ 7401 et seq. The Contractor agrees to report each violation to the City and understands and agrees that the City 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.

## **XIII. PRIVACY**

If Contractor or its employees administer any system of records on behalf of the Federal Government, Contractor and its employees agree to comply with the information restrictions and other applicable requirements of the Privacy Act of 1974, 5 U.S.C. § 552a (the Privacy Act). Specifically, Contractor agrees to obtain the express consent of the Federal Government before the Contractor or its employees operate a system of records on behalf of the Government. Contractor acknowledges that the requirements

of the Privacy Act, including the civil and criminal penalties for violations of the Privacy Act, apply to those individuals involved, and that failure to comply with the terms of the Privacy Act may result in termination of this Agreement. The Contractor also agrees to include these requirements in each subcontract to administer any system of records on behalf of the Federal Government financed in whole or in part with Federal assistance provided by FTA.

#### **XIV. DRUG AND ALCOHOL TESTING**

To the extent Contractor, its subcontractors or their employees perform a safety-sensitive function under the Agreement, Contractor agrees to comply with, and assure compliance of its subcontractors, and their employees, with 49 U.S.C. § 5331, and FTA regulations, "Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations," 49 CFR Part 655.

#### **XV. TERMINATION FOR CONVENIENCE OF CITY** *(required for all contracts in excess of \$10,000)*

See Agreement Terms and Conditions.

#### **XVI. TERMINATION FOR DEFAULT** *(required for all contracts in excess of \$10,000)*

See Agreement Terms and Conditions.

#### **XVII. FALSE OR FRAUDULENT STATEMENTS AND CLAIMS**

**A.** 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 CFR Part 31, apply to its actions pertaining to this Project. Upon execution of the underlying 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 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.

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

**C.** 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.

## **XVIII. FLY AMERICA**

The Contractor agrees to comply with 49 U.S.C. 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 sub-recipients 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. 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 and shall, in any event, provide a certificate of compliance with the Fly America requirements. The Contractor agrees to include the requirements of this section in all subcontracts that may involve international air transportation.

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

The preceding 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 4220.1F, 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 (name of grantee) requests which would cause (name of grantee) to be in violation of the FTA terms and conditions.

**XX. TRANSIT EMPLOYEE PROTECTIVE AGREEMENTS** (applicable to each contract for transit operations performed by employees of a Contractor recognized by FTA to be a transit operator)

**A.** The Contractor agrees to comply with applicable transit employee protective requirements as follows:

**1. General Transit Employee Protective Requirements** - To the extent that FTA determines that transit operations are involved, the Contractor agrees to carry out the transit operations work on the underlying contract in compliance with terms and conditions determined by the U.S. Secretary of Labor to be fair and equitable to protect the interests of employees employed under this contract and to meet the employee protective requirements of 49 U.S.C. A 5333(b), and U.S. DOL guidelines at 29 C.F.R. Part 215, and any amendments thereto. These terms and conditions are identified in the letter of certification from the U.S. DOL to FTA applicable to the FTA Recipient's project from which Federal assistance is provided to support work on the underlying contract. The Contractor agrees to carry out that work in compliance with the conditions stated in that U.S. DOL letter. The requirements of this subsection A, however, do not apply to any contract financed with Federal assistance provided by FTA either for projects for elderly individuals and individuals with disabilities authorized by 49 U.S.C. § 5310(a)(2), or for projects for non-urbanized areas authorized by 49 U.S.C. § 5311. Alternate provisions for those projects are set forth in subsections (2) and (3) of this clause.

**2. Transit Employee Protective Requirements for Projects Authorized by 49 U.S.C. § 5310(a)(2) for Elderly Individuals and Individuals with Disabilities -**

If the contract involves transit operations financed in whole or in part with Federal assistance authorized by 49 U.S.C. § 5310(a)(2), and if the U.S. Secretary of Transportation has determined or determines in the future that the employee protective requirements of 49 U.S.C. § 5333(b) are necessary or appropriate for the state and the public body sub-recipient for which work is performed on the underlying contract, the Contractor agrees to carry out the Project in compliance with the terms and conditions determined by the U.S. Secretary of Labor to meet the requirements of 49 U.S.C. § 5333(b), U.S. DOL guidelines at 29 C.F.R. Part 215, and any amendments thereto. These terms and conditions are identified in the U.S. DOL's letter of certification to FTA, the date of which is set forth Grant Agreement or Cooperative Agreement with the state. The Contractor agrees to perform transit operations in connection with the underlying contract in compliance with the conditions stated in that U.S. DOL letter.

**3. Transit Employee Protective Requirements for Projects Authorized by 49 U.S.C. § 5311 in Non-urbanized Areas -**

If the contract involves transit operations financed in whole or in part with Federal assistance authorized by 49 U.S.C. § 5311, the Contractor agrees to comply with the terms and conditions of the Special Warranty for the Non-urbanized Area Program agreed to by the U.S. Secretaries of Transportation and Labor, dated May 31, 1979, and the procedures implemented by U.S. DOL or any revision thereto.

**B.** The Contractor also agrees to include the any applicable requirements in each subcontract involving transit operations financed in whole or in part with Federal assistance provided by FTA.

**XXI NATIONAL ITS ARCHITECTURE POLICY (Applicable to contracts for ITS projects)**

If providing Intelligent Transportation Systems (ITS) property or services, Contractor shall comply with the National ITS Architecture and standards to the extent required by 23 U.S.C. § 512, FTA Notice, "FTA National ITS Architecture Policy on Transit Projects," 66 FR 1455, et seq., January 8, 2001, and later published policies or implementing directives FTA may issue.

**XXII. TEXTING WHILE DRIVING; DISTRACTED DRIVING**

Consistent with Executive Order 13513 "Federal Leadership on Reducing Text Messaging While Driving", Oct. 1, 2009 (available at <http://edocket.access.gpo.gov/2009/E9-24203.htm>) and DOT Order 3902.10 "Text Messaging While Driving", Dec. 30, 2009, SFMTA encourages Contractor to promote policies and initiatives for employees and other personnel that adopt and promote safety policies to decrease crashes by distracted drivers, including policies to ban text messaging while driving, and to include this provision in each third party subcontract involving the project.

### **XXIII. SEAT BELT USE**

In compliance with Executive Order 13043 "Increasing Seat Belt Use in the United States", April 16, 1997 23 U.S.C. Section 402 note, the SFMTA encourages Contractor to adopt and promote on-the-job seat belt use policies and programs for its employees and other personnel that operate company owned, rented, or personally operated vehicles, and to include this provision in each third party subcontract involving the project.



**EXHIBIT B: PROJECT DELIVERY SCHEDULE**

Item	Maximum Time after Notice to Proceed
Project Plan	1 month
Delivery of 1 <sup>st</sup> Vehicle to SFMTA	24 months
Completion of 1 <sup>st</sup> Vehicle, including testing	27 months
Delivery of 2 <sup>nd</sup> Vehicle to SFMTA	3 months after delivery of the 1 <sup>st</sup> Vehicle
Delivery of remaining PCCs	One car every 1.5 months
	<b>OTHER DELIVERABLES</b>
Monthly Progress Updates	10 <sup>th</sup> day of the month for the previous month
Delivery of Publications (Manuals, Parts Book, Drawings)	Drafts for review at delivery of 1 <sup>st</sup> Vehicle. Finals with delivery of 5 <sup>th</sup> Vehicle

**Deliveries:**

**Note 1:** All deliveries to SFMTA shall be to the SFMTA Muni Metro East facility, weekday working hours, **Monday through Friday, 9 a.m. – 3 p.m.**, except SFMTA holidays, or as otherwise specified in writing by SFMTA. Contractor shall provide at least five Days notice to SFMTA prior to delivery.

**Note 2:** Due to service demands, SFMTA can only allow up to three PCCs at the Contractor’s site at any one time and one PCC in Acceptance testing, for a total of up to four PCCs out of service at any one time.

Assuming that the SFMTA discovers no Defects with a Vehicle, the SFMTA will make every effort to test, burn-in, and Accept a Vehicle within 1.5 months (45 calendar days) after delivery. If the SFMTA has not completed acceptance of a Vehicle within that time period, then Contractor can deliver the next Vehicle, temporarily exceeding the above requirement of one Car in Acceptance testing at a time. If a Defect delays Acceptance Testing, then the 1.5-month time period will begin when the Defect is resolved. The term “Defect” as used in this paragraph is as defined in Section 17.1 of Volume 2 (Technical Specifications) of this Agreement.

**Note 3:** The SFMTA will release a Vehicle to Contractor upon delivery of a rehabilitated Vehicle from the Contractor subject to the limitation in Note 2 above.

### EXHIBIT C: SCHEDULE OF PRICES

City is exempt from federal excise taxes. All bid item prices shall be accurate reflections of the bid items proposed.

<b>Item</b>	<b>Description</b>	<b>Quantity</b>	<b>Unit Price</b>	<b>Total Price</b>
1	Mechanical and electrical rehabilitation of 13 PCCs, including site support and warranty	16	\$1,990,381	\$31,846,096
2	Vehicle shipping	16	\$39,653	\$634,448
3	Training	Lump Sum	\$150,000	\$150,000
4	Spare parts & special tools	Lump Sum	\$500,000	\$500,000
5	Taxes (8.75% of taxable Items)	Lump Sum		\$1,351,884
	<b>BASE CONTRACT TOTAL</b>			<b>\$34,482,428</b>

## EXHIBIT D: PAYMENT SCHEDULE

### 1. Rehabilitation of PCC Vehicles

1a.	Delivery and approval of all plans required by Technical Specifications	5% of the total amount on line items 1 and 2
1b.	Completion of Vehicle disassembly as approved by SFMTA	10% of the amount of Unit Price for Line Items 1 and 2, as per approved Price Schedule
1c.	Completion of all Vehicle rehabilitation on each PCC Vehicle as approved by SFMTA, prior to shipment to SFMTA	50% of the amount of Unit Price for Line Items No. 1 and 2, as per approved Price Schedule
1d.	Successful completion of all Vehicle acceptance testing of PCC Vehicle on SFMTA Property	30% of the amount of Line Items No. 1 and 2 on Price Schedule

### 2. Training

2.	Completion of all training	95% of Item 3 on Price Schedule.
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### 3. Spare Parts and Special Tools

3.	Delivery and Acceptance of Spare Parts and Special Tools	Cost of items delivered
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### 4. Final acceptance of all contract deliverables

4.	Final acceptance of all contract deliverables by SFMTA	5% of Items 1 and 2 and 3 on Price Schedule
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Note 1: Invoices can only be processed and approved when a Progress Payment Application is submitted with all required forms correctly completed and attached with the invoice.

## EXHIBIT E

### SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY

#### SBE REQUIREMENTS

##### Architects, Engineers, Planners, and Environmental Scientists and Other Professional Services

### I. POLICY

The San Francisco Municipal Transportation Agency (SFMTA), recipient of federal financial assistance from the Federal Transit Administration (FTA), is committed to and has adopted, a Small Business Enterprise (SBE) Program to implement the Disadvantaged Business Enterprise regulations in 49 C.F.R. Part 26 (the "Regulations"), issued by the Department of Transportation (DOT).

It is the policy of the SFMTA to ensure nondiscrimination in the award and administration of DOT-assisted contracts and to create a level playing field on which SBEs can compete fairly for contracts and subcontracts relating to SFMTA's construction, procurement and professional services activities. To this end, SFMTA has developed procedures to remove barriers to SBE participation in the bidding and award process and to assist SBEs to develop and compete successfully outside of the SBE program. In connection with the performance of this contract, the Contractor will cooperate with SFMTA in meeting these commitments and objectives.

Pursuant to 49 C.F.R. Section 26.13, the Contractor is required to make the following assurance in its agreement with SFMTA and to include this assurance in any agreements it makes with subcontractors in the performance of this contract:

The Contractor 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 or Subcontractor 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 SFMTA deems appropriate.

#### A. Applicability

Pursuant to 49 C.F.R. Sections 26.3 and 26.21, the SFMTA, a recipient of federal financial assistance from the FTA, is required to implement an SBE Program in accordance with the Regulations. The Regulations are incorporated into this Program as though fully set forth herein. This Program applies to all SFMTA contracts that are funded, in whole or in part, by DOT federal financial assistance.

## **B. Objectives**

The objectives of this program are to:

1. Remove barriers to SBE participation in the bidding, award and administration of SFMTA contracts;
2. Assist SBEs to develop and compete successfully outside of the Program;
3. Ensure that the Program is narrowly tailored in accordance with 49 C.F.R. Part 26;
4. Ensure that only SBEs meeting the eligibility requirements are allowed to participate as SBEs;
5. Identify business enterprises that are qualified as SBEs and are qualified to provide SFMTA with required materials, equipment, supplies and services; and to develop a good rapport with the owners, managers and sales representatives of those enterprises;
6. Develop communications programs and procedures which will acquaint prospective SBEs with SFMTA's contract procedures, activities and requirements and allow SBEs to provide SFMTA with feedback on existing barriers to participation and effective procedures to eliminate those barriers; and
7. Administer the Program in close coordination with the various divisions within SFMTA so as to facilitate the successful implementation of this Program.

## **C. Administration of Program**

The Director of Transportation is responsible for adherence to this policy. The Director of the SFMTA Contract Compliance Office (CCO) shall be responsible for the development, implementation and monitoring of this program. It is the expectation of the Municipal Transportation Board of Directors and the Director of Transportation that all SFMTA personnel shall adhere to the provisions and the spirit of this program.

## **D. Prohibited Discrimination**

SFMTA shall not exclude persons from participation in, deny benefits to, or otherwise discriminate against any persons in connection with the award and performance of any contract governed by the Regulations on the basis of race, color, sex or national origin. The City and County of San Francisco also prohibits discrimination on the basis of (the fact or perception of a person's) race, color, creed,

religion, national origin, ancestry, age, sex, sexual orientation, gender identity, domestic partner status, marital status, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status).

SFMTA shall not directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of this program with respect to individuals in the groups or categories or having the characteristics listed above.

SFMTA has signed the federal assurances regarding non-discrimination required under 49 C.F.R. Section 26.13. See Exhibit E, Section VII (DBE Assurances) for requirements of Contractor and Subconsultants.

## **II. DEFINITIONS**

Any terms used in SFMTA's SBE Program that are defined in 49 C.F.R. Section 26.5 or elsewhere in the Regulations shall have the meaning set forth in the Regulations. An SBE is defined as follows:

**Small Business Enterprise (SBE):** An SBE is a for-profit, small business concern with a three- (3-) year average gross revenue not exceeding \$12 million and is certified under any of the following programs: the State of California's Small Business Program with the Department of General Services, the California Unified Certification Program with a U.S. Department of Transportation recipient, or the City and County of San Francisco's LBE program with the Human Rights Commission.

## **III. SBE PARTICIPATION AND SUBCONTRACTING REQUIREMENTS**

### **A. SBE Participation Goal**

A goal of five percent SBE participation has been established for this contract. This SBE goal will apply to the following types of contracts or scope of work in the contract: Construction – Building, Heavy; Construction-Dredging and Surface Cleanup; Construction (specialty trades); General Freight Trucking; Hazardous Waste Collection, Trucking; Remediation; Testing Labs; Computer Programming and Design; Architecture & Engineering services (to include professional and technical services); Surveying and Mapping; Drafting (Design Services); Landscape Architecture; Building Inspection; Machinery and Equipment Rental (Construction); Merchant Wholesalers, Durable Goods; Public Relations; and Telecommunications.

### **B. Determining the Amount of SBE Participation**

The SFMTA strongly encourages the prime contractor to make every good faith effort to include SBEs to perform meaningful work in all aspects of the projects. To accomplish this goal, the following guidance is provided:

## **1. SBE Participation**

SBE participation includes contracts (other than employee contracts) with SBEs for any goods or services specifically required for the completion of the work under the Agreement. An SBE may participate as a prime contractor/consultant, subcontractor/consultant, joint venture partner with a prime or consultant, vendor of material or supplies incorporated or expended in the work, or a supplier of other services such as shipping, transportation, testing, equipment rental, insurance services and other support services necessary to fulfill the requirements of the Agreement.

## **2. Function**

An SBE must perform a commercially useful function, i.e., must be responsible for the execution of a distinct element of work and must carry out its responsibility by actually performing, managing and supervising the work. However, an SBE may contract out a portion of the work if it is considered to be a normal industry practice. If an SBE contractor subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the SBE shall be presumed not to be performing a commercially useful function.

## **3. Determining the amount of SBE Participation**

SBE participation includes that portion of the contract work actually performed by a certified SBE with its own forces. An SBE may participate as a prime contractor, subcontractor, joint venture partner, or vendor or supplier of materials or services required by the contract.

An SBE's participation can only be counted if it is performing a commercially useful function.. An SBE is performing a commercially useful function when it actually performs, manages and supervises a portion of the work involved. There is a rebuttable presumption that if the SBE is not responsible for at least 30% of the work with its own forces, or subcontracts a greater portion of the work than the normal industry standard, it is not performing a commercially useful function.

The Contractor shall determine the amount of SBE participation for each SBE performing work on the contract in terms of both the total value of the work in dollars and the percentage of the total contract bid price. The Contractor shall also determine the total amount of SBE participation for the entire contract. The Contractor shall count SBE participation according to the following guidelines:

### **a. SBE Prime Contractor**

Count the entire dollar amount of the work performed or services provided by the SBE's own forces, including the cost of materials and supplies obtained for the work and the reasonable fees and commissions charged for the services. Do not count any work subcontracted to another firm as SBE participation by the SBE Prime Contractor.

**b. SBE Subcontractor**

Count the entire amount of the work performed or services provided by the SBE's own forces, including the cost of materials and supplies obtained for the work (except for materials and supplies purchased or leased from the Prime Contractor) and reasonable fees and commissions charged for the services. Do not count any work subcontracted by an SBE subcontractor to another firm as SBE participation by said SBE subcontractor. If the work has been subcontracted to another SBE, it will be counted as SBE participation by that other SBE.

**c. SBE Joint Venture Partner**

Count the portion of the work that is performed solely by the SBE's forces or if the work is not clearly delineated between the SBE and the joint venture partner, count the portion of the work equal to the SBE's percentage of ownership interest in the joint venture.

**d. SBE Regular Dealer**

Count 60% of the costs of materials and supplies obtained from an SBE regular dealer that owns, operates or maintains a store or warehouse in which the materials and supplies are regularly bought, kept in stock and sold or leased to the public in the usual course of business (except regular dealers of bulk items such as petroleum, cement and gravel who own and operate distribution equipment in lieu of maintaining a place of business). This applies whether an SBE is a prime contractor or subcontractor.

**e. Other SBEs**

Count the entire amount of fees or commissions charged for assistance in procuring or delivering materials and supplies when purchased from an SBE that is not a manufacturer or regular dealer. Do not count the cost of the materials and supplies.

**C. Submission of Certification for SBEs**

All firms wishing to work for the City and County of San Francisco must be certified as bona fide SBEs with the SFMTA. This requires submission of the



completed certification applications for either SBEs, DBEs, or LBEs. For information where to obtain applications for these certifications, please contact the SFMTA Contract Compliance at:

San Francisco Municipal Transportation Agency  
Contract Compliance Office  
One South Van Ness Avenue  
San Francisco, California 94103  
(415) 701-4362

#### **D. Prompt Payment to Subcontractors**

In accordance with SFMTA's SBE Program, no later than three days from the date of Contractor's receipt of progress payments by SFMTA, the Contractor shall pay any subcontractors for work that has been satisfactorily performed by said subconsultants. Unless the prime consultant notifies the CCO Director in writing within 10 working days prior to receiving payment from the City that there is a bona fide dispute between the prime consultant and the subconsultant. Within five working days of such payment, Consultant shall provide City with a declaration under penalty of perjury that it has promptly paid such subconsultants for the work they have performed. Failure to provide such evidence shall be cause for City to suspend future progress payments to Consultants.

Consultant may withhold retention from subconsultants if City withholds retention from Consultant. Should retention be withheld from Consultant, within 30 days of City's payment of retention to Consultant for satisfactory completion of all work required of a subconsultant, Contractor shall release any retention withheld to the subconsultant. Satisfactory completion shall mean when all the tasks called for in the subcontract with subconsultant have been accomplished and documented as required by City.

If the Consultant does not pay its subconsultant as required under the above paragraph, it shall pay interest to the subconsultant at the legal rate set forth in subdivision (a) of Section 685.010 of the California Code of Civil Procedure.

### **IV. MONITORING AND COMPLIANCE**

#### **A. SBE Records; Reporting Requirements**

The Contractor shall maintain records of all SBE participation in the performance of the contract including subcontracts entered into with certified SBEs and all materials purchased from certified SBEs.

The Contractor shall submit SBE participation reports to SFMTA on a monthly basis, or as otherwise directed by the CCO. The reports shall identify the name and address of each SBE performing work on the project, and show the total dollar amount requested for payment and the total dollar amount actually paid to each SBE. Within

thirty (30) days of completion of the contract, or as otherwise directed by the CCO, the Contractor shall submit a final summary SBE report to the CCO.

**B. Noncompliance; Administrative Remedies**

SFMTA will implement appropriate mechanisms to ensure that its prime contractors and subcontractors comply with SBE Program regulatory requirements. SFMTA will apply legal and contractual remedies available under federal, state and local law.

SFMTA will also include a monitoring and enforcement mechanism to verify that the work committed to SBEs at contract award is actually performed by the SBEs. This mechanism will provide for a running tally of actual SBE attainments and include a provision ensuring that SBE participation is credited toward overall or contract goals only when payments are actually made to SBE firms.