

**THIS STAFF REPORT COVERS CALENDAR ITEM NO.: 8
FOR THE MEETING OF: September 9, 2010**

TRANSBAY JOINT POWERS AUTHORITY

BRIEF DESCRIPTION: Authorizing the Executive Director to execute a Professional Services Agreement for Legal Services with the law firm of Shute, Mihaly & Weinberger, LLP, for five years, with an option to extend the term for an additional three years, at a cost not to exceed \$4,000,000.

SUMMARY:

In April 2005, TJPA entered into a legal agreement with a consortium of law firms including Shute, Mihaly & Weinberger, for a three year term and maximum compensation of \$3 million. In January 2008, with nearly half of the contract budget remaining at the time, the TJPA Board authorized an extension of the agreement. The budget for that contract has now been nearly fully utilized, after five years and five months.

On June 11, 2010, an RFP for legal services was issued, seeking a single law firm to provide a broad range of legal assistance and advice for the TJPA. The RFP noted that the TJPA's Legal Counsel is the San Francisco City Attorney and that the outside counsel would be working with the City Attorney on a variety of issues. On July 16, 2010, nine proposals were received. A selection committee evaluated the proposals and conducted interviews with two firms that submitted proposals most responsive to all the areas of law described in the RFP. Shute, Mihaly & Weinberger (SMW) was ranked highest by the selection committee for general counsel; the Selection Committee Report is attached. (The selection committee also recommended that the TJPA negotiate a legal services agreement with Thompson Coburn LLP to provide specialized legal services related to federal grants, loans, requirements and legislation. Should the TJPA and Thompson Coburn successfully negotiate an agreement, it will be the subject of a separate calendar item.)

As with the current legal services agreement, work will be authorized under the proposed contract only when authorized by a written Request for Services (RFS) signed by the Executive Director. RFS will typically have authorized budgets between \$150,000 and \$250,000 each; the full \$4 million contract budget will not be authorized at the beginning of the contract. SMW's proposed hourly rates were less than the hourly rates of any other proposer, and the hourly rates will remain frozen for the first three years of the agreement. If requesting a rate increase after the initial three year period, SMW will have to justify the request by demonstrating increased cost of living or increased cost of doing business.

RECOMMENDATION:

TJPA staff recommends that the TJPA Board authorize the Executive Director to execute a Professional Services Agreement for Legal Services with the law firm of Shute, Mihaly & Weinberger, LLP, for five years, with an option to extend the term for an additional three years, at a cost not to exceed \$4,000,000.

ENCLOSURES:

1. Resolution
2. Selection Committee Report
3. Agreement

**TRANSBAY JOINT POWERS AUTHORITY
BOARD OF DIRECTORS**

Resolution No. _____

WHEREAS, The Transbay Joint Powers Authority (TJPA) is ultimately responsible for the Transbay Program, including the Transbay Transit Center and associated facilities, the Caltrain Downtown Rail extension, associated land acquisition, and for assisting the San Francisco Redevelopment Agency with the Transbay Redevelopment Plan, and requires legal services to fulfill this responsibility; and

WHEREAS, On June 11, 2010, the TJPA issued a Request for Proposals for Legal Services to provide a broad range of general and specialized legal advice and representation; and

WHEREAS, Of the nine proposals received on July 16, 2010, the proposal of Shute, Mihaly & Weinberger, LLP, was ranked highest by the selection committee; and

WHEREAS, The TJPA has negotiated an agreement with Shute, Mihaly & Weinberger to serve as general counsel, in coordination with the San Francisco City Attorney as required, for an initial term of five years, with an option to extend the agreement for three years, and maximum compensation not to exceed \$4,000,000; now, therefore, be it

RESOLVED, That the TJPA Board of Directors authorizes the Executive Director to execute a Professional Services Agreement for Legal Services with the law firm of Shute, Mihaly & Weinberger, LLP, for five years, with an option to extend the term for an additional three years, at a cost not to exceed \$4,000,000.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of September 9, 2010.

Secretary, Transbay Joint Powers Authority



Legal Services Selection Committee Report August 2010

Executive Summary and Recommendation

In response to Request for Proposals No. 10-04 for a Legal Services Consultant, issued on June 11, 2010, the TJPA received nine proposals from firms meeting all minimum qualifications on July 16, 2010. A selection committee convened on August 13, 2010 to evaluate the proposals and shortlisted two respondents. On August 19, 2010, the committee conducted oral interviews with the two respondents and finalized its scoring.

Based on the criteria outlined in the RFP, the selection committee recommends that the Transbay Joint Powers Authority (TJPA) negotiate an agreement with **Shute, Mihaly & Weinberger LLP** to provide general counsel legal services.

The selection committee also recommends that the TJPA negotiate a legal services agreement with **Thompson Coburn LLP** to provide specialized legal services related to federal grants, loans, requirements and legislation.

Finally, should the TJPA require bond counsel services in the future in relation to the TIFIA loan or other debt issuance, the selection committee recommends that the TJPA request cost proposals from Goodwin Procter LLP and Orrick, Herrington & Sutcliffe LLP, and negotiate an agreement with one of those two firms.

Background

The TJPA currently utilizes and anticipates a continuing need for legal services and advice in areas including, but not limited to: general counsel; land use, land acquisition, real estate and redevelopment law; labor and employment law; construction law; public transit/transportation law; environmental law; public contracting law including federal procurements and compliance; legislative matters; risk management; and litigation services in all these areas, on an if-and-as-needed basis. To accomplish these goals, the TJPA requires representation of its interests through qualified firms with an expertise to provide a full range of legal services.

The contracts to be negotiated will be for an initial five years with an option to extend for an additional three years, up to eight years total.

Schedule

- | | | |
|----|--|-----------------|
| 1) | RFP advertised/posted | June 11, 2010 |
| 2) | Receipt of proposals | July 16, 2010 |
| 3) | Selection committee evaluation meeting | August 13, 2010 |
| 4) | Interviews of short-listed firms and final scoring | August 19, 2010 |

Selection Committee Members

Robert Beck, TJPA Senior Program Manager
Sheryl Bregman, Deputy City Attorney
Nila Gonzales, TJPA Office Manager/Board Secretary
Ken Scheidig, AC Transit General Counsel

RFP Outreach

An announcement of the RFP appeared in the *San Francisco Examiner*. It was also posted on the City Purchaser's Bids and Contracts website; a copy of the announcement is Attachment A. On the same day, the TJPA posted the RFP on its website for the public to view and print and sent announcement of its availability to all interested parties who have signed up for TJPA updates/contracting opportunity notifications. In total, the announcement was sent to 31 law firms and 179 contacts who have signed up for notice of all TJPA professional services contracts.

The TJPA received nine proposals on or before the RFP submission date, from:

- Bell, Rosenberg & Hughes LLP
- Goodwin Procter LLP
- McKenna Long & Aldridge LLP
- Orrick, Herrington & Sutcliffe LLP
- Rosales Law Partners LLP
- Sheppard Mullin Richter & Hampton LLP
- Shute, Mihaly & Weinberger LLP
- Thompson Coburn LLP
- Wendel Rosen Black & Dean LLP

Selection Committee Evaluation

The selection committee met on August 13, 2010 to review the written proposals and evaluate strengths and weaknesses using the criteria listed on the score sheet (Attachment B). Following the discussion, each committee member individually filled out scoring sheets. The TJPA Contracts Compliance Manager tabulated and verified the scores. Two firms were invited to participate in interviews based on the scoring results. The selection committee chose to interview only the two firms in consideration for general counsel, based upon the scoring.

On August 19, 2010, the committee conducted oral Interviews of the two shortlisted Respondents. Each firm had up to twenty minutes to present, followed by up to an hour of questions from the selection committee. Following the interviews, the committee discussed the strengths and weaknesses of each Respondent firm, and then individually completed and signed scoring sheets and submitted them to the Contracts Compliance Manager for tabulation.

Shute, Mihaly & Weinberger was ranked highest by the selection committee. Scores are shown in Attachment C.

All proposals submitted in response to this RFP are available for review at TJPA offices. Proposals will be retained for two years, except for the selected consultant's proposal which will be maintained on permanent record.

Attachments

Attachment A, RFP Announcement
Attachment B, Scoring Sheets
Attachment C, Scores

Reference

Request for Proposals No. 10-04 for Legal Services issued by the Transbay Joint Powers Authority on June 11, 2010.

Attachment A

ANNOUNCEMENT

REQUEST FOR PROPOSALS NO. 10-04 LEGAL SERVICES

The Transbay Joint Powers Authority (TJPA) is issuing a Request for Proposals (RFP) for LEGAL SERVICES for the Transbay Transit Center Program from firms with expertise to provide a full range of legal services.

The TJPA may select one or more firms for contracts for a period up to five (5) years.

Proposal packages must be received by the TJPA no later than **12:00 p.m. on Friday, July 16, 2010**, at the address below. Late proposal packages will not be considered.

Transbay Joint Powers Authority
201 Mission Street, Suite 2100
San Francisco, CA 94105

Prospective Respondents may obtain copies of this RFP, including required forms, by visiting the TJPA's website at www.TransbayCenter.org (>TJPA>Doing Business with the TJPA>Current Contract Opportunities) or by contacting the TJPA at (415) 597-4620 or at LegalRFP@TransbayCenter.org.

Attachment B

EVALUATION SCORE SHEET Legal Counsel Services RFP

Name of Respondent: _____

Name of Panelist: _____

Signature of Panelist: _____

| Criteria | Value | Reviewer Comment |
|---|--------------|-------------------------|
| Understanding of Program and approach; method of handling conflicts of interest (30 point maximum) | | |
| Qualifications and experience of lead attorney(s) assigned (30 points maximum) | | |
| Qualifications and experience of other key staff assigned (30 points maximum) | | |
| Relevant experience of Respondent in representing governmental organizations, particularly those involved with public transit and development projects (30 points maximum) | | |
| Relevant experience of Respondent in litigation matters involving public transit and development projects, including trial experience (30 points maximum) | | |
| References (15 points maximum) | | |
| Reasonableness of rates and overall value to TJPA (15 points maximum) | | |

Total _____

FIRM NAME:

PANELIST:

DATE:

TJPA INTERVIEW SCORE SHEET

Legal Services

| <i>Description</i> | <i>Score</i> | <i>Notes</i> |
|--|--------------|--------------|
| Presentation (20 minutes maximum; 24 points) | | |
| Questions (maximum 126 points; 14 points/question) | | |
| 1. Describe transportation, construction or development projects for which lead attorney has provided representation | | |
| 2. Experience acting as general counsel, and familiarity with Brown Act, conflict of interest, public records, and similar laws | | |
| 3. Experience in real estate law, environmental law, contract law and public agency contracting, and labor and employment law in transportation or government agency contracts | | |
| 4. Taxpayer challenge question | | |
| 5. Neighboring building owner question | | |
| 6. Experience with the Department of Transportation and its funding requirements | | |
| 7. Experience with fixed-rail construction projects, highway projects, or other transit/transportation projects | | |
| 8. Summarize experience with representation of governmental agencies | | |
| 9. Approach to keeping costs within a limited budget | | |

TOTAL SCORE: _____ (150 maximum)

Attachment C

Evaluation Scores (180 points max)

| Firm | Panelist A | Panelist B | Panelist C | Panelist D | Total Score |
|-----------------------------------|-------------------|-------------------|-------------------|-------------------|--------------------|
| Bell, Rosenberg & Hughes | 52 | 80 | 73 | 117 | 322 |
| Goodwin Procter | 63 | 88 | 79 | 117 | 347 |
| McKenna Long & Aldridge | 138 | 125 | 137 | 152 | 552 |
| Orrick, Herrington & Sutcliffe | 57 | 75 | 73 | 85 | 290 |
| Rosales Law Partners | 74 | 78 | 93 | 105 | 350 |
| Sheppard Mullin Richter & Hampton | 80 | 118 | 114 | 97 | 409 |
| Shute, Mihaly & Weinberger | 178 | 175 | 172 | 175 | 700 |
| Thompson Coburn | 137 | 105 | 135 | 115 | 492 |
| Wendel Rosen Black & Dean | 50 | 79 | 113 | 135 | 377 |

Interview Scores (150 points max)

| Firm | Panelist A | Panelist B | Panelist C | Panelist D | Total Score |
|----------------------------|-------------------|-------------------|-------------------|-------------------|--------------------|
| McKenna Long & Aldridge | 100 | 121 | 130 | 127 | 478 |
| Shute, Mihaly & Weinberger | 146 | 137 | 135 | 136 | 554 |

Totals

| Firm | Evaluation | Interview | Total Score |
|----------------------------|-------------------|------------------|--------------------|
| McKenna Long & Aldridge | 552 | 478 | 1,030 |
| Shute, Mihaly & Weinberger | 700 | 554 | 1,254 |

LEGAL SERVICES AGREEMENT

THIS AGREEMENT ("Agreement") is entered into as of the _____ day of _____ 2010, by and between the TRANSBAY JOINT POWERS AUTHORITY ("TJPA") and Shute, Mihaly & Weinberger LLP ("Attorney").

Recitals

A. The TJPA requires Legal Services ("Services") for the Transbay Transit Center Program ("Program").

B. The Attorney submitted a written proposal ("Proposal") in response to the TJPA's Request for Proposals ("RFP"). Based on that Proposal, the TJPA's selection committee determined the Attorney to be the highest-ranked respondent to the RFP and the TJPA invited the Attorney for negotiations. This Agreement is the product of those negotiations.

C. The Attorney represents and warrants that it is qualified to perform the Services required by this Agreement as set forth in Appendix A ("Scope of Services").

D. The TJPA and the Attorney intend that this Agreement comply with the regulations of the Federal Transit Administration of the United States Department of Transportation ("FTA") and certain contracting requirements of the City and County of San Francisco (the "City").

E. On _____, 2010, the TJPA Board of Directors adopted Resolution No. _____ authorizing the TJPA's Executive Director to execute this Agreement with the Attorney for the Services.

Now, THEREFORE, the parties agree as follows:

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

Charges under this Agreement will accrue only after prior written authorization certified by the TJPA's Finance Coordinator. The amount of the TJPA's obligation hereunder shall not at any time exceed the amount certified for the purpose and period stated in such advance authorization.

This Agreement will terminate without penalty, liability or expense of any kind to the TJPA 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 fiscal year for which funds are appropriated.

The TJPA has no obligation to make appropriations for this Agreement in lieu of appropriations for new or other agreements or Program costs. The TJPA's budget decisions are subject to the discretion of the TJPA Board of Directors. The Attorney'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 be for five years from the Effective Date of the Agreement, as described in Section 3 below, provided that (i) the TJPA shall have the right to extend this Agreement for an additional three years by providing to the Attorney written notice of such extension on or before the expiration of this Agreement, and (ii) any such extension shall be subject to and conditioned upon the written agreement of the Attorney and the approval of such extension by resolution adopted by the TJPA Board of Directors.

3. Effective Date of Agreement

This Agreement shall become effective when the Finance Coordinator has certified to the availability of funds for the first notice to proceed ("NTP") and the Attorney has been notified in writing via an NTP.

4. Services Attorney Agrees to Perform

The Attorney agrees to perform the services listed in Appendix A, Scope of Services, attached hereto and incorporated by reference as though fully set forth within. No work shall be performed under this contract except as authorized in Appendix A, and after issuance of a written Request for Services ("RFS") signed by the Executive Director. The Executive Director or his or her designee may consult with Attorney prior to issuance of an RFS. Upon receipt of an RFS, the Attorney designated in the Section of this Agreement entitled "Notices to the Parties" may consult directly with the Executive Director and carry out any assigned tasks. Each RFS shall relate to a specified part of the services, and a not-to-exceed maximum price under that RFS. No RFS can be amended, except in writing and signed by an authorized representative of the TJPA.

The Attorney shall report to, and work under the direction and control of the TJPA Executive Director, TJPA Legal Counsel, or any designee of the Executive Director or Legal Counsel, in the performance of the services. Attorney agrees to be solely responsible, however, for its own actions and those of its subordinates and subcontractors throughout the term of this Agreement. Attorney shall handle any press contact it receives directly or indirectly in connection with the subject of this Agreement in coordination with the Executive Director.

Except as otherwise provided in this Agreement or as otherwise required by law, all approvals or consents requested or required hereunder may be given by the Executive Director or his or her designee. All such approvals or consents may be given or withheld in the Executive Director's sole discretion, unless otherwise expressly provided. Silence shall not be considered approval by the TJPA for any purposes hereof. Any legal advice given by Attorney with respect to this representation shall be rendered to the Executive Director or his or her designee.

To minimize the potential for a conflict of interest or unfair competitive advantage, the Attorney agrees that it shall not enter into a contract with any property owner with respect to any property that is planned for acquisition by the TJPA on Appendix C attached hereto, and any properties that are subsequently added to this list.

5. Compensation

All work under this Agreement shall be compensated on an hourly basis, subject to any maximum price set forth in a particular NTP. In no event shall the total compensation under this Agreement exceed Four Million Dollars (\$4,000,000). The breakdown of the Attorney's fees and allowable reimbursable amounts appears in Appendix B, "Fees".

Hourly rates for services are to remain fixed during the first three years of the contract period. Any change in hourly rates after that three-year period shall be subject to approval by the TJPA.

No charges shall be incurred under this Agreement nor shall any payments become due to the Attorney until the Services required under this Agreement are received from Attorney and approved by the Executive Director as being in accordance with this Agreement. The TJPA may withhold payment to the Attorney in any instance in which the Attorney has failed or refused to satisfy any material obligation provided for under this Agreement.

In no event shall the TJPA be liable for interest or late charges for any late payments.

6. Guaranteed Maximum Costs

a. The TJPA's obligation hereunder shall not at any time exceed the amount certified by the Finance Coordinator for the purpose and period stated in such certification, or the maximum price set forth in an NTP with respect to the work covered under that NTP.

b. Except as may be provided by laws governing emergency procedures, officers and employees of the TJPA are not authorized to request, and the TJPA is not required to reimburse the Attorney for, commodities or services in excess of the price set forth in an NTP and in excess of the total compensation under this Agreement as stated in Section 5, unless the changed scope is authorized by written amendment and approved as required by law.

c. Officers and employees of the TJPA are not authorized to offer or promise, nor is the TJPA required to honor, any offered or promised additional funding in excess of the maximum amount of funding for which the contract or NTP is certified without certification of the additional amount by the Finance Coordinator.

d. The Finance Coordinator is not authorized to make payments on any contract or NTP for which funds have not been certified as available in the budget or by supplemental appropriation.

7. Payment

Invoices furnished by the Attorney under this Agreement must be in a form acceptable to the TJPA and must include a unique invoice number. Invoices shall include the first and last day of a calendar month and be submitted within thirty (30) days of the end of said calendar month. Attorney must submit required DBE/SBE Progress Payment Reports with every invoice. All amounts paid to the Attorney shall be subject to audit by the TJPA.

The TJPA shall make payment to the Attorney at the address specified in the Section entitled "Notices to the Parties".

8. Submitting False Claims; Monetary Penalties

Pursuant to San Francisco Administrative Code Chapter 6, Article V, any contractor, subcontractor, or consultant who submits a false claim shall be liable to the TJPA for three times the amount of damages which the TJPA sustains because of the false claim, plus a civil penalty of up to \$10,000, and other damages as provided by statute. A contractor, subcontractor or consultant will be deemed to have submitted a false claim to the TJPA if the contractor, subcontractor or consultant (a) knowingly presents or causes to be presented to an officer or employee of the TJPA 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 TJPA; (c) conspires to defraud the TJPA by getting a false claim allowed or paid by the TJPA; (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 TJPA; or (e) is a beneficiary of an inadvertent submission of a false claim to the TJPA, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the TJPA within a reasonable time after discovery of the false claim.

9. Disallowance

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

By executing this Agreement, the Attorney certifies that the Attorney is not suspended, debarred or otherwise excluded from participation in federal assistance programs. The Attorney acknowledges that this certification of eligibility to receive federal funds is a material term of the Agreement.

10. Taxes

Payment of any taxes, including possessory interest taxes and California sales and use taxes, levied upon this Agreement, the transaction, or the services delivered pursuant hereto, shall be the obligation of the Contractor.

11. Payment Does Not Imply Acceptance of Work

The granting of any payment by the TJPA, or the receipt thereof by the Contractor, shall in no way lessen the liability of the Attorney to correct or revise unsatisfactory work, even though the unsatisfactory character of such work may not have been apparent or detected at the time such payment was made.

12. Qualified Personnel

The Attorney represents and warrants to the TJPA that the Attorney is qualified to perform the services as contemplated by this Agreement. The Attorney further represents and warrants to the TJPA that it has all required licenses and approvals to perform the work contemplated by this Agreement, and that all work performed under this Agreement shall be performed only by personnel under the supervision and in the employment of the Contractor. All personnel engaged in the work shall be fully qualified and shall be authorized, licensed and certified under state and local law to perform such work if authorization, licensing or certification is required. The persons performing professional services under this Agreement on behalf of the Attorney are shown in Appendix A attached hereto, and shall not be changed or substituted without the prior written consent of the TJPA, but all personnel, including those assigned at the TJPA's request, must be supervised by the Contractor. The Attorney shall commit adequate resources to complete the Services within any schedule specified in an RFS, and in a cost effective manner.

13. Reserved

14. Independent Contractor, Payment of Taxes and Other Expenses

a. Independent Contractor

The Attorney or any agent or employee of Attorney 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 the TJPA under this Agreement. The Attorney or any agent or employee of the Attorney shall not have employee status with the TJPA, nor be entitled to participate in any plans, arrangements, or distributions by the TJPA pertaining to or in connection with any retirement, health or other benefits that the TJPA may offer its employees. The Attorney or any agent or employee of the Attorney is liable for the acts and omissions of itself, its employees and its agents. The Attorney shall be responsible for all obligations and payments, whether imposed by federal, state or local law, including, but not limited to, Federal Insurance Contributions Act (FICA), income tax withholdings, unemployment compensation, insurance, and other similar responsibilities related to the Attorney's performing services and work, or any agent or employee of the Attorney providing same. Nothing in this Agreement shall be construed as creating an employment or joint venture relationship between the TJPA and the Attorney.

Any terms in this Agreement referring to direction from the TJPA shall be construed as providing for direction as to policy and the result of the Attorney's work only, and not as to the means by which such a result is obtained.

b. Payment of Taxes and Other Expenses

Should the TJPA, in its discretion, or a relevant taxing authority such as the Internal Revenue

Service or the State Employment Development Division, or both, determine that the Attorney 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 the Attorney which can be applied against this liability). The TJPA shall then forward those amounts to the relevant taxing authority.

Should a relevant taxing authority determine a liability for past services performed by the Attorney for the TJPA, upon notification of such fact by the TJPA, the Attorney shall promptly remit such amount due or arrange with the TJPA to have the amount due withheld from future payments to the Attorney under this Agreement (again, offsetting any amounts already paid by the Attorney 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, The Attorney shall not be considered an employee of the TJPA. Notwithstanding the foregoing, should any court, arbitrator, or administrative authority determine that the Attorney is an employee for any other purpose, then the Attorney agrees to a reduction in the TJPA's financial liability so that the TJPA's total expenses under this Agreement are not greater than they would have been had the court, arbitrator, or administrative authority determined that the Attorney was not an employee.

15. Insurance

a. Without in any way limiting the Attorney's other indemnification obligations under this Agreement, the Attorney must maintain in force, during the full term of the Agreement, insurance in the following amounts and coverages.

(1) If required under California law, Worker's Compensation, in statutory amounts, with Employers' liability limits not less than \$1,000,000 each accident, injury, or illness; and

(2) Commercial General Liability Insurance with limits not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Contractual Liability, Personal Injury, Products, and Completed Operations; and

(3) Business 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; and

(4) Professional Liability Insurance with limits not less than \$1,000,000 each claim, with respect to negligent acts, errors or omissions in connection with professional services to be provided under this Agreement.

b. Commercial General Liability and Business Automobile Liability Insurance policies must provide the following:

(1) Name as Additional Insured the TJPA, its members, directors, officers, agents, and employees.

(2) That such policies are primary insurance to any other insurance available to the Additional Insureds, 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.

c. All policies shall provide thirty (30) days' advance written notice to the TJPA of reduction or nonrenewal of coverages or cancellation of coverages for any reason. Notices shall be sent to the address specified in the Section entitled "Notices to the Parties".

d. Should any of the required insurance be provided under a claims-made form, the Attorney shall maintain such coverage continuously throughout the term of this Agreement, and without lapse, for a

period of three (3) years beyond the expiration of this Agreement, to the effect that, should occurrences during the agreement term give rise to claims made after expiration of the Agreement, such claims shall be covered by such claims-made policies.

e. 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 are included in such general annual aggregate limit, such general annual aggregate limit shall be double the occurrence or claims limits specified above.

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

g. Before commencing any operations under this Agreement, the Attorney shall do the following: (a) furnish to the TJPA certificates of insurance and additional insured policy endorsements with insurers with ratings comparable to A-, VII or higher, that are authorized to do business in the State of California, and that are satisfactory to the TJPA, in form evidencing all coverages set forth above, and (b) furnish complete copies of policies promptly upon TJPA request. Failure to maintain insurance shall constitute a material breach of this Agreement.

h. Approval of the insurance by the TJPA shall not relieve or decrease the liability of the Attorney under this Agreement.

16. Indemnification

Attorney shall indemnify and hold harmless TJPA, its officers, employees, agents and directors (each an "indemnified party") from and against any and all losses, claims, demands, damages, liabilities, actions, judgments and awards caused by the negligent or wrongful acts of Attorney in connection with the performance of its services under this Agreement; and Attorney shall promptly reimburse each indemnified party for any and all legal and other costs and expenses reasonably incurred by such indemnified party in investigating, defending or preparing to defend such action or claim.

Promptly after receipt by an indemnified party of written notice of the filing of any claim or the commencement of any action, the indemnified party shall, if a claim in respect thereof is to be made against Attorney under this Section 16, notify Attorney in writing of the filing or commencement thereof; but the omission to so notify Attorney shall not relieve Attorney from any liability which it may have to such indemnified party otherwise than under this Section 16. In case any such claim or action shall be brought against an indemnified party and the indemnified party shall notify Attorney of the filing or commencement thereof, Attorney shall be entitled to participate therein and, to the extent that it wishes, to assume the defense thereof, with counsel reasonably acceptable to the indemnified party. After timely written notice from Attorney to the indemnified party of its election to so assume the defense thereof, Attorney shall not be liable to the indemnified party under this Section 16 for any legal or other expenses subsequently incurred by such party in connection with the defense thereof, other than reasonable out-of-pocket costs or any investigation, so long as Attorney continues to diligently pursue such defense. However, any party shall have the right to select separate counsel to assert legal defenses that may be different from or additional to those available to Attorney and otherwise participate in the defense of such action on behalf of the party. In such event the fees and expenses of such separate counsel for the party in defending such claim or action shall be borne by the party. Nothing in this Section shall limit any of TJPA's rights or remedies under this Agreement or at law or in equity. The agreements contained in this Section shall survive the termination, expiration or cancellation of this Agreement.

17. Left blank by agreement of the parties

18. Liability of TJPA

The TJPA's monetary obligations under this agreement shall be limited to the payment of the compensation provided for in the Section of this Agreement entitled "Compensation". Notwithstanding any other provision of this Agreement, in no event shall the TJPA 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. Reserved

20. Default; Remedies

a. Each of the following shall constitute an event of default ("Event of Default") under this Agreement.

(1) Attorney fails or refuses to perform or observe any term, covenant or condition contained in any of the following Sections of this Agreement: Payment; Submitting False Claims, Monetary Penalties; Taxes; Insurance; Proprietary or Confidential Information of TJPA; Protection of Private Information; Assignment; Drug-Free Workplace; Compliance With Laws; FTA Requirements.

(2) Attorney 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 ten (10) days after written notice thereof from TJPA to Attorney.

(3) The Attorney (a) is generally not paying its debts as they become due, (b) 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, (c) makes an assignment for the benefit of its creditors, (d) consents to the appointment of a custodian, receiver, trustee or other officer with similar powers of the Attorney or of any substantial part of the Attorney's property, or (e) takes action for the purpose of any of the foregoing.

(4) A court or government authority enters an order (a) appointing a custodian, receiver, trustee or other officer with similar powers with respect to Attorney or with respect to any substantial part of the Attorney's property, (b) 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 (c) ordering the dissolution, winding-up or liquidation of the Attorney.

b. On and after any Event of Default, the TJPA 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, the TJPA shall have the right (but no obligation) to cure (or cause to be cured) on behalf of the Attorney any Event of Default; the Attorney shall pay to the TJPA on demand all costs and expenses incurred by the TJPA in effecting such cure, with interest thereon from the date of incurrence at the maximum rate then permitted by law. The TJPA shall have the right to offset from any amounts due to Attorney under this Agreement or any other agreement between the TJPA and the Attorney all damages, losses, costs or expenses incurred by the TJPA as a result of such Event of Default and any liquidated damages due from the Attorney pursuant to the terms of this Agreement or any other agreement.

c. 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

a. The TJPA shall have the option, in its sole discretion, to terminate this Agreement, at any time during the term hereof, for convenience when it is in the TJPA's best interest, which best interest shall be determined at the TJPA's sole discretion. The TJPA shall exercise this option by giving the Attorney written notice of termination. The notice shall specify the date on which termination shall become effective.

b. Upon receipt of the notice, the Attorney shall commence and perform, with diligence, all actions necessary on the part of the Attorney to effect the termination of this Agreement on the date specified by the TJPA and to minimize the liability of the Attorney and the TJPA to third parties as a result of termination. All such actions shall be subject to the prior approval of the TJPA. Such actions shall include, without limitation:

(1) Halting the performance of all services and other work under this Agreement on the date(s) and in the manner specified by the TJPA.

(2) Not placing any further orders or subcontracts for materials, services, equipment or other items.

(3) Terminating all existing orders and subcontracts.

(4) At the TJPA's direction, assigning to the TJPA any or all of the Attorney's right, title and interest under the orders and subcontracts terminated. Upon such assignment, the TJPA 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.

(5) Subject to the TJPA's approval, settling all outstanding liabilities and all claims arising out of the termination of orders and subcontracts.

(6) Completing performance of any services or work that the TJPA designates to be completed prior to the date of termination specified by the TJPA.

(7) Taking such action as may be necessary, or as the TJPA may direct, for the protection and preservation of any property related to this Agreement which is in the possession of the Attorney and in which the TJPA has or may acquire an interest.

c. Within thirty (30) days after the specified termination date, the Attorney shall submit to the TJPA an invoice, which shall set forth the reasonable cost to the Attorney for all services and other work the TJPA directed the Attorney to perform prior to the specified termination date, for which services or work the TJPA has not already tendered payment. The costs shall be determined as provided in Section 5, and shall be invoiced as provided in Section 7. The Attorney may also recover the reasonable cost of preparing the invoice.

d. In no event shall the TJPA be liable for costs incurred by the Attorney or any of its subcontractors after the termination date specified by the TJPA, except for those costs specifically enumerated and described in the immediately preceding subsection (c). 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 (c).

e. In arriving at the amount due to the Attorney under this Section, the TJPA may deduct (1) all payments previously made by the TJPA for work or other services covered by the Attorney's final invoice; (2) any claim which the TJPA may have against the Attorney in connection with this Agreement; (3) any invoiced costs or expenses excluded pursuant to the immediately preceding subsection (d); and (4) in instances in which, in the opinion of the TJPA, 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 the TJPA's estimate of the reasonable cost of performing the invoiced services or other work in compliance with the requirements of this Agreement.

f. The TJPA's payment obligation under this Section shall survive termination of this Agreement.

22. Rights and Duties Upon Termination or Expiration

a. This Section and the following Sections of this Agreement shall survive termination or expiration of this Agreement: Submitting False Claims, Monetary Penalties; Disallowance; Taxes; Payment Does Not Imply Acceptance of Work; Responsibility for Equipment; Independent Contractor, Payment of Taxes and Other Expenses; Insurance; Indemnification; Liability of TJPA; Proprietary or Confidential Information of TJPA; Protection of Private Information; Notices to the Parties; Ownership of Results; Works for Hire; Audit and Inspection of Records; Non-Waiver of Rights; Limitations on Contributions; Modification of Agreement; Administrative Remedy for Agreement Interpretation; Agreement Made in California, Venue; Construction; Entire Agreement; Severability; FTA Requirements; Prompt Payment of Subcontractors.

b. Subject to the immediately preceding subsection (a), 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. The Attorney shall transfer title to the TJPA, and deliver in the manner, at the times, and to the extent, if any, directed by the TJPA, 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 the TJPA. This subsection shall survive termination of this Agreement.

23. Notices to the Parties

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

To TJPA: Ms. Maria Ayerdi-Kaplan, Executive Director
Transbay Joint Powers Authority
201 Mission Street, Suite 2100
San Francisco, CA 94105
(415) 597-4615 fax
MAyerdi-Kaplan@TransbayCenter.org

To Attorney: Andrew W. Schwartz
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102
schwartz@smwlaw.com

Any notice of default must be sent by registered mail.

24. Proprietary or Confidential Information of the TJPA

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

25. Protection of Private Information

The Attorney agrees to comply fully with and be bound by all of the provisions of Chapter 12M of the San Francisco Administrative Code (the "Nondisclosure of Private Information Ordinance"), including the remedies provided. The provisions of the Nondisclosure of Private Information Ordinance are incorporated herein by reference and made a part of this Agreement as though fully set forth. Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in the Nondisclosure of Private Information Ordinance. Consistent with the requirements of the Nondisclosure of Private Information Ordinance, the Attorney agrees to all of the following:

a. Neither the Attorney nor any of its subcontractors shall disclose Private Information obtained from the TJPA or the City in the performance of this Agreement to any other subcontractor, person, or other entity, unless one of the following is true.

- (i) The disclosure is authorized by this Agreement;
- (ii) The Attorney received advance written approval from the TJPA to disclose the information;
or
- (iii) The disclosure is required by law or judicial order.

b. Any disclosure or use of Private Information authorized by this Agreement shall be in accordance with any conditions or restrictions stated in this Agreement. Any disclosure or use of Private Information authorized by the TJPA shall be in accordance with any conditions or restrictions stated in the approval.

c. Private Information shall mean any information that (1) could be used to identify an individual, including without limitation, name, address, social security number, medical information, financial information, date and location of birth, and names of relatives or (2) the law forbids any person from disclosing.

d. Any failure of the Attorney to comply with the Nondisclosure of Private Information Ordinance shall be a material breach of this Agreement. In such an event, in addition to any other remedies available to it under equity or law, the TJPA may terminate this Agreement, debar Contractor, or bring a false claim action against the Attorney.

26. News Releases/Interviews

All Attorney news releases, media interviews, testimony at hearings and public comment relating to the Transbay Transit Center Program shall be prohibited unless expressly authorized by the TJPA.

27. Ownership of Results

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

28. Works for Hire

If, in connection with services performed under this Agreement, the Attorney or its subcontractors create artwork, copy, posters, billboards, photographs, videotapes, audiotapes, systems designs, software, reports, diagrams, surveys, 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 TJPA. If it is ever determined that any works created by

the Attorney or its subcontractors under this Agreement are not works for hire under U.S. law, the Attorney hereby assigns all copyrights to such works to the TJPA, and agrees to provide any material and execute any documents necessary to effectuate such assignment. With the approval of the TJPA, the Attorney may retain and use copies of such works for reference and as documentation of its experience and capabilities.

29. Audit and Inspection of Records

The Attorney agrees to maintain and make available to the TJPA, during regular business hours, accurate books and accounting records relating to its work under this Agreement. The Attorney will permit the TJPA 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. The Attorney 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 governmental agency having an interest in the subject of this Agreement shall have the same rights conferred upon the TJPA by this Section.

30. San Francisco Sunshine Ordinance

In accordance with S.F. Administrative Code Section 67.24(e), the Attorney's bids, responses to solicitations and all other records of communications between the TJPA 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's or organization's net worth or other proprietary financial data submitted for qualification for a contract or other benefits 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.

31. Public Access to Meetings and Records

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

32. Subcontracting

The Attorney will be permitted to subcontract additional portions of the work under this Agreement subject to the prior written approval of the TJPA Executive Director. Subcontractors shall be solely responsible to the Attorney throughout the performance of their services under this Agreement. Assignment by the Attorney of work to subcontractors shall not relieve the Attorney of any obligation to the TJPA for the work performed.

33. Assignment

The services to be performed by the Attorney are personal in character and neither this Agreement nor any duties or obligations hereunder may be assigned or delegated by the Attorney unless first approved by the TJPA by written instrument executed and approved in the same manner as this Agreement.

34. 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. There shall be no waiver except in writing, signed by the party to be charged.

35. Reserved

36. Conflict of Interest

Through its execution of this Agreement, the Attorney acknowledges that it is familiar with the provisions of the Conflict of Interest Code of the TJPA; Section 15.103 of the San Francisco City Charter; Article III, Chapter 2 of San Francisco's Campaign and Governmental Conduct Code; and Section 87100 et seq. and Section 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 provisions.

37. Limitations on Contributions

Through execution of this Agreement, the Attorney acknowledges that it is familiar with Section 1.126 of the San Francisco Campaign and Governmental Conduct Code, which prohibits any person who contracts with the TJPA for the rendition of personal services, for the furnishing of any material, supplies or equipment, or for the sale or lease of any land or building, from making any campaign contribution to (1) a TJPA elective officer 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. The Attorney 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. The Attorney further acknowledges that the prohibition on contributions applies to each prospective party to the contract; each member of the Attorney's board of directors; the Attorney's chairperson, chief executive officer, chief financial officer and chief operating officer; any person with an ownership interest of more than 20 percent in the Attorney; any subcontractor listed in the bid or contract; and any committee that is sponsored or controlled by the Attorney. Additionally, the Attorney acknowledges that the Attorney must inform each of the persons described in the preceding sentence of the prohibitions contained in Section 1.126.

38. Prohibition on Political Activity with TJPA Funds

In accordance with San Francisco Administrative Code Chapter 12.G, the Attorney 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. The Attorney agrees to comply with San Francisco Administrative Code Chapter 12.G and any implementing rules and regulations promulgated by the TJPA's Chief Financial Officer. The terms and provisions of Chapter 12.G are incorporated herein by this reference. In the event that the Attorney violates the provisions of this Section, the TJPA may, in addition to any other rights or remedies available hereunder, (i) terminate this Agreement, and (ii) prohibit the Attorney from bidding on or receiving any new TJPA contract for a period of two (2) years. The TJPA will not consider the Attorney's use of profit as a violation of this Section.

39. Equal Employment Opportunity/Nondiscrimination; Penalties

a. Attorney Shall Not Discriminate

In the performance of this Agreement, the Attorney agrees not to discriminate against any TJPA or

City employee working with such Attorney or subcontractor, applicant for employment with such Attorney 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, sex, sexual orientation, gender identity, domestic partner status, marital status, disability, weight, height or Acquired Immune Deficiency Syndrome or Human Immunodeficiency Virus (AIDS/HIV) status, or association with members of such protected classes, or in retaliation for opposition to discrimination against such classes.

Such action shall include, but shall not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; lay-offs or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. Attorney further agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause. The Attorney is encouraged to actively recruit minorities and women for its workforce and take other steps, such as on-the-job training and education, to ensure nondiscrimination in the Attorney's employment practices.

b. Subcontracts

The Attorney shall incorporate by reference in all subcontracts the provisions of Chapters 12B.2(a), 12B.2(c)-(k), and 12C.3 of the San Francisco Administrative Code (copies of which are available from the TJPA upon request) and shall require all subcontractors to comply with such provisions. Attorney's failure to comply with the obligations in this subsection shall constitute a material breach of this Agreement.

c. Nondiscrimination in Benefits

The Attorney 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 the work is being performed for the TJPA elsewhere within 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 Chapter 12B.2(b) of the San Francisco Administrative Code.

d. Condition to Contract

As a condition to this Agreement, the Attorney shall execute the appropriate "San Francisco Administrative Code Chapters 12B & 12C Declaration: Nondiscrimination in Contracts and Benefits" form (Form HRC-12B-101, HRC-12B-102, or HRC-12B-103) with supporting documentation and file the form with the TJPA Contract Compliance Manager.

e. 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. The Attorney shall comply fully with and be bound by all of the provisions that apply to this Agreement under such Chapters of the Administrative Code, including but not limited to the remedies provided in such Chapters. Without limiting the foregoing, the Attorney understands that pursuant to Section 12B.2(h) and 12C.3(g) 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 the Attorney and/or deducted from any payments due the Attorney.

40. Disadvantaged Business Enterprise (DBE) Requirements

The Attorney or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this agreement. The Attorney shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the Attorney to carry out these requirements is a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy as the TJPA deems appropriate.

Pursuant to the monitoring requirements outlined in Section XIII of the TJPA's DBE Program (49 CFR 26.37), the Attorney will be required to update and submit the TJPA's "Bidders/Proposers Information Request Form," regardless of DBE participation. Upon award of the contract, the Attorney shall submit the TJPA's "Progress Payment Report" with every invoice, the "Subcontractor Payment Declaration" within five days of each Attorney payment to a subcontractor, and a "Final Expenditure Report" with the completion of the contract.

41. Small Business Enterprise (SBE) Requirements

Attorney shall comply with the SBE provisions contained in the TJPA Small Business Enterprise Program and incorporated into this Agreement as though fully set forth, including, but not limited to, achieving and maintaining the SBE goal as submitted by Attorney in its Proposal of one hundred percent (100%), unless the TJPA requests or approves utilization of a legal services subcontractor that is a non-SBE. Failure of the Attorney to comply with any of these requirements, or to submit compelling documentation acceptable to the TJPA detailing the good faith efforts to comply, shall be deemed a material breach of this Agreement.

Pursuant to the monitoring requirements outlined in Section IX of the TJPA's SBE Program, the Attorney will be required to update and submit the TJPA's "Bidders/Proposers Information Request Form," regardless of SBE participation. Upon award of the contract, the Attorney shall submit the TJPA's "Progress Payment Report" with every invoice, the "Subcontractor Payment Declaration" within five days of each Attorney payment to a subcontractor, and a "Final Expenditure Report" with the completion of the contract.

42. Prompt Payment to Subcontractors

a. Prompt Progress Payment to Subcontractors

A prime contractor or subcontractor shall pay a subcontractor not later than ten (10) days of receipt of each progress payment in accordance with the provision in Section 7108.5 of the California Business and Professions Code concerning prompt payment to subcontractors. The ten (10) days is applicable unless, a longer period is agreed to in writing. Any violation of Section 7108.5 shall subject the violating Attorney or subcontractor to the penalties, sanction and other remedies of that Section. Federal regulation (49 CFR 26.29) requires that any delay or postponement of payment over thirty (30) days of receipt of each payment may take place only for good cause and with the TJPA's prior written approval. These requirements shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise, available to the prime contractor or subcontractor in the event of a dispute involving late payment, or nonpayment by the prime contractor, deficient subcontract performance, or noncompliance by a subcontractor. This provision applies to both DBE and non-DBE prime contractors and subcontractors.

b. Prompt Payment of Withheld Funds to Subcontractors

If the TJPA requires retainage from the prime contractor and prompt and regular incremental acceptances of portions, as determined by the TJPA of the contract work and retainage is paid to the prime Attorney based on these acceptances, then the prime contractor or subcontractor shall return all monies withheld in retention from all subcontractors within thirty (30) days after receiving payment for work satisfactorily completed and accepted including incremental acceptances of portions of the contract work by the TJPA. Any delay or postponement of payment may take place only for good cause and with the TJPA's prior written approval. Any violation of these provisions shall subject the violating prime Attorney to the penalties, sanctions, and other remedies specified in Section 7108.5 of the California

Business Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise, available to the prime contractor or subcontractor in the event of a dispute involving late payment, or nonpayment by the contractor, or deficient subcontractor's performance, or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

43. Requiring Minimum Compensation for Covered Employees

The Attorney agrees to comply fully with and be bound by all of the provisions of the Minimum Compensation Ordinance (MCO), as set forth in San Francisco Administrative Code Chapter 12P (Chapter 12P), including the remedies provided, and implementing guidelines and rules. The provisions of Chapter 12P are incorporated herein by reference and made a part of this Agreement as though fully set forth. The text of the MCO is available on the Web at <http://www.sfgov.org/olse>. Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 12P. Consistent with the requirements of the MCO, Attorney agrees to all of the following:

a. For each hour worked by a Covered Employee during a Pay Period on work funded under the TJPA contract during the term of this Agreement, the Attorney shall provide to the Covered Employee no less than the Minimum Compensation, which includes a minimum hourly wage and compensated and uncompensated time off consistent with the requirements of the MCO. Note that the gross hourly compensation for covered employees is \$11.54 as of January 2009.

If a Covered Employee of a Nonprofit Corporation works in San Francisco, then that employee is covered by San Francisco's Minimum Wage Ordinance, which is Chapter 12R of the San Francisco Administrative Code. As of January 1, 2009, Chapter 12R's minimum wage is \$9.79 per hour.

b. The Attorney shall not discharge, reduce in compensation, or otherwise discriminate against any employee for complaining to the TJPA with regard to the Attorney's compliance or anticipated compliance with the requirements of the MCO, for opposing any practice proscribed by the MCO, for participating in proceedings related to the MCO, or for seeking to assert or enforce any rights under the MCO by any lawful means.

c. The Attorney understands and agrees that the failure to comply with the requirements of the MCO shall constitute a material breach by the Attorney of the terms of this Agreement. The TJPA shall determine whether such a breach has occurred.

d. If, within thirty (30) days after receiving written notice of a breach of this Agreement for violating the MCO, the Attorney fails to cure such breach or, if such breach cannot reasonably be cured within such period of thirty (30) days, the Attorney fails to commence efforts to cure within such period, or thereafter fails diligently to pursue such cure to completion, the TJPA shall have the right to pursue the following rights or remedies and any rights or remedies available under applicable law:

(1) The right to charge the Attorney an amount equal to the difference between the Minimum Compensation and any compensation actually provided to a Covered Employee, together with interest on such amount from the date payment was due at the maximum rate then permitted by law;

(2) The right to set off all or any portion of the amount described in Subsection (d)(1) of this Section against amounts due to the Attorney under this Agreement;

(3) The right to terminate this Agreement in whole or in part;

(4) In the event of a breach by the Attorney of the covenant referred to in Subsection (b) of this Section, the right to seek reinstatement of the employee or to obtain other appropriate equitable relief; and

(5) The right to bar the Attorney from entering into future contracts with the TJPA for three (3) years.

Each of the rights provided in this Subsection (d) shall be exercisable individually or in combination with any other rights or remedies available to the TJPA. Any amounts realized by the TJPA pursuant to this subsection shall be paid to the Covered Employee who failed to receive the required Minimum Compensation.

e. The Attorney represents and warrants that it is not an entity that was set up, or is being used, for the purpose of evading the intent of the MCO.

f. The Attorney shall keep itself informed of the current requirements of the MCO, including increases to the hourly gross compensation due Covered Employees under the MCO, and shall provide prompt written notice to all Covered Employees of any increases in compensation, as well as any written communications received by the Attorney from the TJPA, which communications are marked to indicate that they are to be distributed to Covered Employees.

g. The Attorney shall provide reports to the TJPA in accordance with any reporting standards promulgated by the TJPA under the MCO, including reports on subcontractors.

h. The Attorney shall provide the TJPA with access to pertinent records after receiving a written request from the TJPA to do so and being provided at least five (5) business days to respond.

i. The TJPA may conduct random audits of the Attorney. Random audits shall be (1) noticed in advance in writing; (2) limited to ascertaining whether Covered Employees are paid at least the minimum compensation required by the MCO; (3) accomplished through an examination of pertinent records at a mutually agreed upon time and location within ten (10) days of the written notice; and (4) limited to one audit of Attorney every two years for the duration of this Agreement. Nothing in this Agreement is intended to preclude the TJPA from investigating any report of an alleged violation of the MCO.

j. Any subcontract entered into by the Attorney shall require the subcontractor to comply with the requirements of the MCO and shall contain contractual obligations substantially the same as those set forth in this Section. A subcontract means an agreement between the Attorney and a third party which requires the third party to perform all or a portion of the services covered by this Agreement. The Attorney shall notify the TJPA when it enters into such a subcontract and shall certify to the TJPA that it has notified the subcontractor of the obligations under the MCO and has imposed the requirements of the MCO on the subcontractor through the provisions of the subcontract. It is the Attorney's obligation to ensure that any subcontractors of any tier under this Agreement comply with the requirements of the MCO. If any subcontractor under this Agreement fails to comply, the TJPA may pursue any of the remedies set forth in this Section against the Attorney.

k. Each Covered Employee is a third-party beneficiary with respect to the requirements of subsections (a) and (b) of this Section, and may pursue the following remedies in the event of a breach by the Attorney of subsections (a) and (b), but only after the Covered Employee has provided the notice, participated in the administrative review hearing, and waited the 21-day period required by the MCO. The Attorney understands and agrees that if the Covered Employee prevails in such action, the Covered Employee may be awarded (1) an amount equal to the difference between the Minimum Compensation and any compensation actually provided to the Covered Employee, together with interest on such amount from the date payment was due at the maximum rate then permitted by law; (2) in the event of a breach by the Attorney of subsections (a) or (b), the right to seek reinstatement or to obtain other appropriate equitable relief; and (3) in the event that the Covered Employee is the prevailing party in any legal action or proceeding against the Attorney arising from this Agreement, the right to obtain all costs and expenses, including reasonable attorney's fees and disbursements, incurred by the Covered Employee. The Attorney also understands that the MCO provides that if the Attorney prevails in any such action, the Attorney may be awarded costs and expenses, including reasonable attorney's fees and disbursements, from the Covered Employee if the court determines that the Covered Employee's action was frivolous, vexatious or otherwise an act of bad faith.

l. If the Attorney is exempt from the MCO when this Agreement is executed because the

cumulative amount of agreements with this department for the fiscal year is less than \$25,000 (\$50,000 for nonprofits), but the Attorney later enters into an agreement or agreements that cause the Attorney to exceed that amount in a fiscal year, the Attorney shall thereafter be required to comply with the MCO under this Agreement. This obligation arises on the effective date of the agreement that causes the cumulative amount of agreements between the Attorney and the TJPA to exceed \$25,000 (\$50,000 for nonprofits) in the fiscal year.

44. Requiring Health Benefits for Covered Employees

Unless exempt, the Attorney agrees to comply fully with and be bound by all of the provisions of the Health Care Accountability Ordinance (HCAO), as set forth in San Francisco Administrative Code Chapter 12Q, including the remedies provided, and implementing regulations, as the same may be amended from time to time. The provisions of Chapter 12Q are incorporated herein by reference and made a part of this agreement as though fully set forth. The text of the HCAO is available on the Web at <http://www.sfgov.org/olse>. Capitalized terms used in this Section and not defined in this agreement shall have the meanings assigned to such terms in Chapter 12Q.

a. For each Covered Employee, the Attorney shall provide the appropriate health benefit set forth in Section 12Q.3 of the HCAO. If the Attorney chooses to offer the health plan option, such health plan shall meet the minimum standards set forth by the San Francisco Health Commission.

b. Notwithstanding the above, if the Attorney is a small business as defined in Section 12Q.3(e) of the HCAO, it shall have no obligation to comply with part (a) above.

c. The Attorney's failure to comply with the HCAO shall constitute a material breach of this agreement. The TJPA shall notify the Attorney if such a breach has occurred. If, within thirty (30) days after receiving the TJPA's written notice of a breach of this Agreement for violating the HCAO, the Attorney fails to cure such breach or, if such breach cannot reasonably be cured within such period of thirty (30) days, the Attorney fails to commence efforts to cure within such period, or thereafter fails diligently to pursue such cure to completion, the TJPA shall have the right to pursue the remedies set forth in 12Q.5(f)(1-6). Each of these remedies shall be exercisable individually or in combination with any other rights or remedies available to the TJPA.

d. Any Subcontract entered into by the Attorney shall require the subcontractors to comply with the requirements of the HCAO and shall contain contractual obligations substantially the same as those set forth in this Section. The Attorney shall notify the TJPA when it enters into such a subcontract and shall certify to the TJPA that it has notified the subcontractor of the obligations under the HCAO and has imposed the requirements of the HCAO on subcontractor through the Subcontract. Each Attorney shall be responsible for its subcontractors' compliance with this Chapter. If a subcontractor fails to comply, the TJPA may pursue the remedies set forth in this Section against Attorney based on the subcontractor's failure to comply, provided that TJPA has first provided Attorney with notice and an opportunity to obtain a cure of the violation.

e. The Attorney shall not discharge, reduce in compensation, or otherwise discriminate against any employee for notifying the TJPA with regard to Attorney's compliance or anticipated compliance with the requirements of the HCAO, for opposing any practice proscribed by the HCAO, for participating in proceedings related to the HCAO, or for seeking to assert or enforce any rights under the HCAO by any lawful means.

f. The Attorney represents and warrants that it is not an entity that was set up, or is being used, for the purpose of evading the intent of the HCAO.

g. The Attorney shall maintain employee and payroll records in compliance with the California Labor Code and Industrial Welfare Commission orders, including the number of hours each employee has worked on the TJPA agreement.

h. The Attorney shall keep itself informed of the current requirements of the HCAO.

i. The Attorney shall provide reports to the TJPA in accordance with any reporting standards promulgated by the TJPA under the HCAO, including reports on subcontractors and subtenants, as applicable.

j. The Attorney shall provide the TJPA with access to records pertaining to compliance with HCAO after receiving a written request from the TJPA to do so and being provided at least five (5) business days to respond.

k. The Attorney shall allow the TJPA to inspect the Attorney's job sites and have access to the Attorney's employees in order to monitor and determine compliance with HCAO.

l. The TJPA may conduct random audits of the Attorney to ascertain its compliance with HCAO. The Attorney agrees to cooperate with the TJPA when it conducts such audits.

m. If the Attorney is exempt from the HCAO when this Agreement is executed because its amount is less than \$25,000 (\$50,000 for nonprofits), but the Attorney later enters into an agreement or agreements that cause the Attorney's aggregate amount of all agreements with TJPA to reach \$75,000, all the agreements shall be thereafter subject to the HCAO. This obligation arises on the effective date of the agreement that causes the cumulative amount of agreements between the Attorney and the TJPA to be equal to or greater than \$75,000 in the fiscal year.

45. First Source Hiring Program

a. Incorporation of Administrative Code Provisions by Reference

The provisions of Chapter 83 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. The Attorney shall comply fully with, and be bound by, all of the provisions that apply to this Agreement under such Chapter, including but not limited to the remedies provided therein. Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 83.

b. First Source Hiring Agreement

(1) The Attorney will comply with First Source interviewing, recruitment and hiring requirements, which will provide the San Francisco Workforce Development System with the exclusive opportunity to initially provide Qualified Economically Disadvantaged Individuals for consideration for employment for Entry Level Positions. The duration of the First Source interviewing requirement shall be ten (10) days, unless business necessity requires a shorter period of time.

(2) The Attorney will comply with requirements for providing timely, appropriate notification of available Entry Level Positions to the San Francisco Workforce Development System so that the System may train and refer an adequate pool of Qualified Economically Disadvantaged Individuals to participating Employers.

(3) The Attorney agrees to use good faith efforts to comply with the First Source hiring requirements. A Attorney may establish its good faith efforts by filling (i) its first available Entry Level Position with a job applicant referred through the First Source Program; and (ii) fifty percent (50%) of its subsequent available Entry Level Positions with job applicants referred through the San Francisco Workforce Development System. Failure to meet this target, while not imputing bad faith, may result in a review of the Attorney's employment records.

c. Hiring Decisions

The Attorney shall make the final determination of whether an Economically Disadvantaged Individual referred by the System is "qualified" for the position.

d. Exceptions

Upon application by Employer, the First Source Hiring Administration ("FSHA") may grant an exception to any or all of the requirements of Chapter 83 in any situation where it concludes that compliance with this Chapter would cause economic hardship.

e. Liquidated Damages

Violation of the requirements of Chapter 83 is subject to an assessment of liquidated damages in the amount of \$2,070 for every new hire for an Entry Level Position improperly withheld from the First Source hiring process. The assessment of liquidated damages and the evaluation of any defenses or mitigating factors shall be made by the FSHA.

f. Subcontracts

Any subcontract entered into by the Attorney shall require the subcontractor to comply with the requirements of Chapter 83 and shall contain contractual obligations substantially the same as those set forth in this Section.

46. Earned Income Credit (EIC) Forms

San Francisco Administrative Code Chapter 12O requires that employers provide their employees with IRS Form W-5 (Earned Income Credit Advance Payment Certificate) and the IRS EIC Schedule, as set forth below. Employers can locate these forms at the IRS Office, on the Internet, or anywhere that Federal Tax Forms can be found.

a. The Attorney shall provide EIC Forms to each Eligible Employee at each of the following times: (i) within thirty (30) days following the date on which this Agreement becomes effective (unless Attorney has already provided such EIC Forms at least once during the calendar year in which such effective date falls); (ii) promptly after any Eligible Employee is hired by the Contractor; and (iii) annually between January 1 and January 31 of each calendar year during the term of this Agreement.

b. Failure to comply with any requirement contained in subparagraph (a) of this Section shall constitute a material breach by the Attorney of the terms of this Agreement. If, within thirty (30) days after the Attorney receives written notice of such a breach, the Attorney fails to cure such breach or, if such breach cannot reasonably be cured within such period of thirty (30) days, the Attorney fails to commence efforts to cure within such period or thereafter fails to diligently pursue such cure to completion, the TJPA may pursue any rights or remedies available under this Agreement or under applicable law.

c. Any subcontract entered into by the Attorney shall require the subcontractor to comply, as to the subcontractor's Eligible Employees, with each of the terms of this Section.

d. Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 12O of the San Francisco Administrative Code.

47. MacBride Principles – Northern Ireland

Pursuant to San Francisco Administrative Code Section 12F.5, the TJPA urges companies doing business in Northern Ireland to move towards resolving employment inequities, and encourages such companies to abide by the MacBride Principles. The TJPA 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 the Attorney acknowledges and agrees that he or she has read and understood this Section.

48. Drug-Free Workplace Policy

The Attorney 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 TJPA premises. The Attorney agrees that any violation of this prohibition by the Contractor, its employees, agents or assigns will be deemed a material breach of this Agreement.

49. Resource Conservation

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

50. Tropical Hardwood/Virgin Redwood Ban

Pursuant to Section 804(b) of the San Francisco Environment Code, the TJPA urges Attorney not to import, purchase, obtain, or use for any purpose, any tropical hardwood, tropical hardwood wood product, virgin redwood or virgin redwood wood product.

51. Preservative-treated Wood Containing Arsenic

The Attorney 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, chromated copper arsenate preservative, ammoniacal copper zinc arsenate preservative, or ammoniacal copper arsenate preservative. Attorney 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 the Attorney 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.

52. Food Service Waste Reduction Requirements

Attorney agrees to comply fully with and be bound by all of the provisions of the Food Service Waste Reduction Ordinance, as set forth in San Francisco Environment Code Chapter 16, including the remedies provided, and implementing guidelines and rules. The provisions of Chapter 16 are incorporated herein by reference and made a part of this agreement as though fully set forth. This provision is a material term of this agreement. By entering into this agreement, Attorney agrees that if it breaches this provision, the TJPA will suffer actual damages that will be impractical or extremely difficult to determine; further, Attorney agrees that the sum of one hundred dollars (\$100.00) liquidated damages for the first breach, two hundred dollars (\$200.00) liquidated damages for the second breach in the same year, and five hundred dollars (\$500.00) liquidated damages for subsequent breaches in the same year is a reasonable estimate of the damage that the TJPA will incur based on the violation, established in light of the circumstances existing at the time this agreement was made. Such amounts shall not be considered a penalty, but rather agreed monetary damages sustained by the TJPA because of Attorney's failure to comply with this provision.

53. Graffiti Removal

Graffiti is detrimental to the health, safety and welfare of the community in that it promotes a perception in the community that the laws protecting public and private property can be disregarded with impunity. This perception fosters a sense of disrespect of the law that results in an increase in crime; degrades the community and leads to urban blight; is detrimental to property values, business opportunities and the enjoyment of life; is inconsistent with the City and County of San Francisco's property maintenance goals and aesthetic standards; and results in additional graffiti and in other

properties becoming the target of graffiti unless it is quickly removed from public and private property. Graffiti results in visual pollution and is a public nuisance. Graffiti must be abated as quickly as possible to avoid detrimental impacts on the City and County and its residents, and to prevent the further spread of graffiti.

The Attorney shall remove all graffiti from any real property owned or leased by the Attorney in the City and County of San Francisco within forty eight (48) hours of the earlier of the Attorney's (a) discovery or notification of the graffiti or (b) receipt of notification of the graffiti from the City's Department of Public Works or the TJPA. This Article is not intended to require the Attorney to breach any lease or other agreement that it may have concerning its use of the real property. The term "graffiti" means any inscription, word, figure, marking or design that is affixed, marked, etched, scratched, drawn or painted on any building, structure, fixture or other improvement, whether permanent or temporary, including by way of example only and without limitation, signs, banners, billboards and fencing surrounding construction sites, whether public or private, without the consent of the owner of the property or the owner's authorized agent, and which is visible from the public right-of-way. "Graffiti" shall not include (a) any sign or banner that is authorized by, and in compliance with, the applicable requirements of the San Francisco Public Works Code, the San Francisco Planning Code or the San Francisco Building Code; or (b) any mural or other painting or marking on the property that is protected as a work of fine art under the California Art Preservation Act (California Civil Code Sections 987 et seq.) or as a work of visual art under the Federal Visual Artists Rights Act of 1990 (17 U.S.C. Sections 101 et seq.).

54. 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 according to TJPA requirements.

55. Administrative Remedy for Agreement Interpretation

Should any question arise as to the meaning and intent of this Agreement, the question shall, prior to any other action or resort to any other legal remedy, be referred to the TJPA who shall decide the true meaning and intent of the Agreement. Nothing in this Section shall be interpreted as the Attorney waiving any legal rights or remedies to which it is entitled.

56. 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.

57. Construction

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

58. Entire Agreement

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

59. 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.

60. USDOT Requirements

The provisions contained in "USDOT Requirements for Professional Services Contracts," attached as Appendix D, are incorporated into this Agreement, and the Attorney agrees to abide by such provisions. Such provisions supplement the provisions in this Agreement, and shall be interpreted in the broadest possible manner to avoid any conflicts. If there is an unavoidable conflict between the USDOT terms and conditions and any other terms and conditions of this Agreement, in the TJPA's sole determination, the USDOT terms and conditions shall take precedence.

61. Compliance With Laws

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

62. Compliance with Americans with Disabilities Act

The Attorney 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. The Attorney 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. The Attorney agrees not to discriminate against disabled persons in the provision of services, benefits or activities provided under this Agreement and further agree that any violation of this prohibition on the part of the Attorney, its employees, agents or assigns will constitute a material breach of this Agreement.

63. Authority to Execute Agreement

Each individual executing this Agreement, on behalf of one of the parties, represents that he or she is duly authorized to sign and deliver the Agreement on behalf of such party and that this Agreement is binding on such party in accordance with its terms. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.

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

TRANSBAY JOINT POWERS AUTHORITY

Approved as to Form by:

Maria Ayerdi-Kaplan, Executive Director

TJPA Legal Counsel

Transbay Joint Powers Authority
Board of Directors
Resolution No. _____
Adopted: _____
Attest:

Secretary, TJPA Board

ATTORNEY

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

I have read and understood the Section entitled "MacBride Principles—Northern Ireland", San Francisco's statement urging companies doing business in Northern Ireland to move towards resolving employment inequities, encouraging compliance with the MacBride Principles, and urging San Francisco companies to do business with corporations that abide by the MacBride Principles

Authorized Signature

Address

Printed Name

City, State, Zip Code

Title

Phone Number

Company Name

Federal Employer ID Number

PROFESSIONAL SERVICES AGREEMENT
APPENDIX A
SCOPE OF SERVICES

From time to time, and upon request of the TJPA's Executive Director, the TJPA may request Attorney to provide legal services to the TJPA and to advise and assist Legal Counsel in the areas of law set forth below. A written Request for Service ("RFS"), signed by the Executive Director, shall be issued before Attorney commences any work for the TJPA. The Executive Director will consult with the Attorney before issuing or amending a Request for Services ("RFS"). Each RFS will be in writing and will designate a specific scope of work as a subset of the services listed below. The RFS will also designate the maximum amount payable by the TJPA. Any RFS may be modified from time to time in writing, to change the scope of services or the maximum payable amount. To the extent there is any conflict or inconsistency between the terms set forth in any RFS and the terms of this Agreement, this Agreement shall control.

A. Master Scope of Work

Attorney shall provide the following legal services to the TJPA, in each case through a specific RFS:

- Advise and represent the TJPA on all aspects of land use, land acquisition and transfer, including real property law and redevelopment law, eminent domain, easements, leases, license agreements and options, real estate development, joint development, and relocation benefits. Participate in negotiations relative to these matters.
- Advise and represent the TJPA on labor and employment matters, labor issues related to construction, and draft procedural documents.
- Review construction liability issues and protect and defend TJPA against construction-related claims and litigation.
- Monitor and advise on legislation and federal, state, and local case law affecting the TJPA; draft legislation as needed; testify before legislative bodies.
- Draft and review requests for proposals, contracts, agreements, and memorandums of understanding with consultants and other governmental entities (local, state and federal).
- Advise on insurance coverage and risk management.
- Provide legal guidance to assure that the TJPA is in compliance with all federal, state, regional and local laws and regulations and agreements, including procurement requirements; federal, state and local environmental laws; public financing program requirements (including Transportation Infrastructure Finance and Innovation Act and Railroad Rehabilitation and Improvement Financing); U.S. Department of Transportation law (including Federal Transit Administration, Federal Railroad Administration, and Federal Highway Administration), rules and regulations; and labor, employment and civil rights laws.
- Serve as counsel at TJPA Board meetings; provide practical advice to assist the TJPA Board in achieving the policy goals and objectives of the TJPA.
- Furnish day-to-day legal advice as needed; attend staff and other meetings as requested.
- Provide litigation services and support as needed.

B. Attorneys Providing Services

| | |
|---|---------------|
| <i>Andrew Schwartz and Ellen Garber</i> | <i>Tier 1</i> |
| <i>Deborah (Keeth) Miller</i> | <i>Tier 2</i> |
| <i>Heather Minner</i> | <i>Tier 3</i> |

Attorney will utilize Tier 3 personnel whenever that would be most cost effective for the TJPA. Similarly, Attorney will utilize Non-lawyer Assistants, such as paralegals, law clerks and legal assistants, for appropriate tasks whenever that would be most cost effective for the TJPA.

PROFESSIONAL SERVICES AGREEMENT
APPENDIX B
FEES

Payments for legal services are subject to all provisions of the Legal Services Agreement, including Sections 1 and 4-7. Except as specified in an RFS, the TJPA will pay for professional services at the rates indicated below, which shall not be changed during the first three years of the Legal Services Agreement. Any change in hourly rates after that three-year period shall be subject to agreement of the parties.

A. In addition to charges for professional services set forth in an RFS, the TJPA shall reimburse Attorney for its reasonable and necessary actual out-of-pocket expenses incurred in the course of rendering such services, consisting only of costs of toll telephone calls, document binding, filing fees, express mail, delivery and courier services, in-house photocopying up to \$0.10 per page, and outside reproduction services at actual cost. No mark up or surcharges shall be added to outside service costs. Any single out-of-pocket expenditure in excess of \$2,000.00, including expert fees and costs, are subject to advance approval by the Executive Director.

B. Attorney shall render services in an efficient and cost-effective manner and shall attend staff meetings, hearing, proceedings only as absolutely necessary. In no event shall Attorney bill, nor shall TJPA pay, more than the amount set forth in the Agreement or a specific RFS. Charges for preparing, processing or reviewing bills are not payable or reimbursable under this Agreement. Attorney shall keep the TJPA apprised of the cumulative total of all bills and notify the TJPA in writing immediately upon determining that accumulated time bills and expenses are within \$10,000.00 of the amount set forth in an RFS.

C. TJPA shall not be billed for the following:

- travel outside of the San Francisco Bay Area unless requested by the TJPA
- time spent in travel from Attorney's home or office to San Francisco
- time spent in travel on TJPA-approved travel outside of the San Francisco Bay Area
- taxicab or transit fares or automobile rental fees incurred to attend meetings
- taxicab or transit fares or automobile rental fees incurred from Attorney's office to an employee's residence
- parking expenses incurred to attend meetings
- meals for working overtime
- secretarial overtime
- cost of receiving facsimiles
- cost of emails for transmission of documents

Travel that is requested of the Attorney by the TJPA may be reimbursed under the Agreement per the Travel, Business and Relocation Policy for TJPA Consultants updated October 2009.

Hourly Rates

| | | |
|--------------------------|--|-------|
| Tier 1 Attorneys: | Andrew Schwartz and Ellen Garber | \$350 |
| Tier 2 Attorneys: | Deborah (Keeth) Miller | \$310 |
| Tier 3 Attorneys: | Heather Minner (and other firm associates in times of particularly heavy workload and when cost effective) | \$260 |
| Non-attorney assistants: | | \$150 |

**PROFESSIONAL SERVICES AGREEMENT
APPENDIX C
PARCEL LIST**

The parcels listed below are planned to be acquired as part of the Transbay Transit Center Program. This list is subject to change and requires verification by the TJPA.

| Private Parcels | | |
|----------------------------------|--------------|------------|
| Address/Street | Block | Lot |
| 580 Howard St. | 3721 | 92-106 |
| 564 Howard St. | 3721 | 19 |
| 568-576 Howard St. | 3721 | 20 |
| 191 Second St. | 3721 | 22 |
| 181 Second St. | 3721 | 23 |
| 171 Second St. | 3721 | 25 |
| 90 Natoma St. | 3721 | 47 |
| 60 Tehama St. | 3736 | 88 |
| 217 Second St. | 3736 | 95 |
| 205-215 Second St. | 3736 | 96 |
| 201 Second St. | 3736 | 97 |
| 301 Brannan St. | 3788 | 37 |
| 35 Stanford St. / 634 Second St. | 3788 | 38 |
| 640 Second St. | 3788 | 02 |
| 650 Second St. | 3788 | 49-73 |
| 670 Second St. | 3788 | 43 |
| 678-680 Second St. | 3788 | 44 |
| 130 Townsend St. | 3788 | 8 |
| 136 Townsend St. | 3788 | 9 |
| 144-146 Townsend St. | 3788 | 9A |
| 148-154 Townsend St. | 3788 | 10 |
| 164 Townsend St. | 3788 | 74-85 |
| 166-178 Townsend St. | 3788 | 12 |

USDOT REQUIREMENTS FOR AGREEMENTS WITH THE TJPA

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

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

The following provisions (1-11) apply to all Agreements (excluding micropurchases).

1. DEFINITIONS

*** The Definitions apply to all Agreements.*

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

Federal Cooperative Agreement applicable to the Project. In the case of the formula assistance programs for urbanized areas, for elderly and persons with disabilities, and non-urbanized areas, 49 U.S.C. sections 5307, 5310, and 5311, respectively, the term "Project" encompasses both a program and each project within a program, as the context may require, to effectuate the requirements of the Grant Agreement or Federal Cooperative Agreement.

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

2. NO GOVERNMENT OBLIGATION TO THIRD PARTIES

** *This requirement applies to all Agreements.*

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

3. PROGRAM FRAUD AND FALSE OR FRAUDULENT STATEMENTS AND RELATED ACTS

** *This provision applies to all Agreements.*

- (a). The Contractor acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. Section 3801 et seq., and U.S. DOT regulations, "Program Fraud Civil Remedies," 49 CFR Part 31, apply to its actions under the Agreement. Upon execution of the Agreement, the Contractor certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, it may make, or causes to be made, pertaining to the Agreement or the FTA- or FRA-assisted Project for which this Agreement work is being performed. In addition to other penalties that may be applicable, the Contractor further acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification, the Federal Government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986 on the Contractor to the extent the Federal Government deems appropriate.
- (b). The Contractor also acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification to the Federal Government under an Agreement connected with a project that is financed in whole or in part with Federal assistance originally awarded by FTA or FRA under the authority of 49 U.S.C. Section 5307, the Government reserves the right to impose the penalties of 18 U.S.C. Section 1001 and 49 U.S.C. Section 5307(n)(1) on the Contractor, to the extent the Federal Government deems appropriate.

4. ACCESS TO DOCUMENTS

****** *This requirement applies to all Agreements. FRA requires the inclusion of these requirements in Subcontracts over \$100,000.*

****** *Please be aware that the requirements in the Agreement regarding audit and inspection of records may require the Contractor to maintain files relating to this Agreement for a longer period of time than described in the requirement below. Please also be aware that, as described in the Agreement, the TJPA follows the provisions of the City and County of San Francisco Sunshine Ordinance regarding responses to public requests for certain bid documents. The Contractor must comply with the requirements described below and in the Agreement.*

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

5. FEDERAL CHANGES

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

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

6. CIVIL RIGHTS REQUIREMENT

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

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

- (a). **Nondiscrimination** - In accordance with Title VI of the Civil Rights Act, as amended, 42 U.S.C. Section 2000d, Section 303 of the Age Discrimination Act of 1975, as amended, 42 U.S.C. Section 6102, Section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. Section 12132, and Federal transit law at 49 U.S.C. Section 5332, the Contractor agrees that it will not discriminate against any employee or applicant for employment because of race, color, creed, national origin, sex, age, or disability. In addition, the Contractor agrees to comply with applicable Federal implementing regulations and other implementing requirements FTA or FRA may issue.
- (b). **Equal Employment Opportunity** - The following equal employment opportunity requirements apply to the Agreement:
- (1). **Race, Color, Creed, National Origin, Sex** - In accordance with Title VII of the Civil Rights Act, as amended, 42 U.S.C. Section 2000e, and Federal transit laws at 49 U.S.C. Section 5332, the Contractor agrees to comply with all applicable equal employment opportunity requirements of U.S. Department of Labor (U.S. DOL) regulations, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor," 41 CFR Parts 60, (which implement Executive Order No. 11246, "Equal Employment Opportunity," as amended by Executive Order No. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," 42 U.S.C. Section 2000e note), and with any applicable Federal statutes, executive orders, regulations, and Federal policies that may in the future affect construction activities undertaken in the course of the Project. The Contractor agrees to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, creed, national origin, sex, or age. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. In addition, the Contractor agrees to comply with any implementing requirements FTA or FRA may issue.
- (2). **Age** - In accordance with Section 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. Section 623, and Federal transit law at 49 U.S.C. Section 5332, the Contractor agrees to refrain from discrimination against present and prospective employees for reason of age. In addition, the Contractor agrees to comply with any implementing requirements FTA or FRA may issue.
- (3). **Disabilities** - In accordance with Section 102 of the Americans with Disabilities Act, as amended, 42 U.S.C. Section 12112, the Contractor agrees that it will comply with the requirements of U.S. Equal Employment Opportunity Commission, "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 29 CFR Part 1630, pertaining to employment of persons with disabilities. In addition, the Contractor agrees to comply with any implementing requirements FTA or FRA may issue.

7. **DISADVANTAGED BUSINESS ENTERPRISE (DBE)**

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

- (a). This Agreement is subject to the requirements of 49 CFR Part 26, *Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs*. The national goal for participation of Disadvantaged Business Enterprises (DBEs) is 10 percent. The TJPA's Anticipated DBE Participation Level for each Federal Fiscal Year is published on the TJPA website by August 1 of each year.

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

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

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

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

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

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

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

- (d). The Contractor is required to pay its subcontractors performing work related to this Agreement for satisfactory performance of that work no later than ten (10) days after the Contractor's receipt of payment for that work from the TJPA. In addition, the Contractor is required to return any retainage payments to those subcontractors within thirty (30) days after incremental acceptance of the subcontractor's work by the TJPA and Contractor's receipt of the partial retainage payment related to the subcontractor's work.
- (e). The Contractor must promptly notify the TJPA whenever a DBE subcontractor performing work related to this Agreement is terminated or fails to complete its work, and must make good faith efforts to engage another DBE subcontractor to perform at least the same amount of work. The Contractor may not terminate any DBE subcontractor and perform that work through its own forces or those of an affiliate without prior written consent of the TJPA.

8. INCORPORATION OF U.S. DEPARTMENT OF TRANSPORTATION TERMS

** *This requirement applies to all Agreements.*

The preceding provisions include, in part, certain standard terms and conditions required by U.S. DOT of the TJPA's agreements, whether or not expressly set forth in the preceding Agreement provisions. All contractual provisions required by U.S. DOT, as set forth in FTA Circular 4220.1F and any replacement or revision thereof, and any provisions set forth by FRA, are hereby incorporated by reference. Anything to the contrary herein notwithstanding, all USDOT-mandated terms shall be deemed to control in the event of a conflict with other provisions contained in this Agreement. The Contractor shall not perform any act, fail to perform any act, or refuse to comply with any TJPA requests which would cause the TJPA to be in violation of the USDOT terms and conditions.

9. FLY AMERICA REQUIREMENTS

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

- (a). The Contractor agrees to comply with 49 U.S.C. Section 40118 (the "Fly America Act") in accordance with the General Services Administration's regulations at 41 CFR Part 301-10, which provide that recipients and subrecipients of Federal funds and their contractors are required to use U.S. flag air carriers for U.S Government-financed international air travel and transportation of their personal effects or property, to the extent such service is available, unless travel by foreign air carrier is a matter of necessity, as defined by the Fly America Act.

- (b). The Contractor shall submit the "Fly America Certification" if the regulation is applicable to the particular Agreement.
- (c). The Contractor shall submit, if a foreign air carrier was used, an appropriate certification or memorandum adequately explaining why service by a U.S. flag air carrier was not available or why it was necessary to use a foreign air carrier.
- (d). Notwithstanding the foregoing, transportation on a foreign air carrier is permissible when provided by a foreign air carrier under a code share agreement when the ticket identifies the U.S. air carrier's designator code and flight number. Transportation by a foreign air carrier is also permissible if there is a bilateral or multilateral air transportation agreement to which the U.S. Government and a foreign government are parties and which the U.S. DOT has determined meets the requirements of the Fly America Act.

10. CARGO PREFERENCE REQUIREMENTS

****** *This provision applies to all Agreements involving equipment, materials, or commodities which may be transported by ocean vessels.*

The Contractor agrees to:

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

11. ENERGY CONSERVATION REQUIREMENTS

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

The Contractor agrees to comply with mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act, 42 U.S.C. Section 6201 et seq.

The following provisions (12-13) apply to Agreements exceeding \$10,000.

12. TERMINATION

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

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

- (a). **Termination for Convenience (General Provision)** - The TJPA may terminate this Agreement, in whole or in part, at any time by written notice to the Contractor when it is in the Government's

best interest. The Contractor shall be paid its costs, including Agreement close-out costs, and profit on work performed up to the time of termination. The Contractor shall promptly submit its termination claim to the TJPA. If the Contractor has any property in its possession belonging to the TJPA, the Contractor will account for the same, and dispose of it in the manner the TJPA directs.

- (b). **Termination for Default [Breach or Cause] (General Provision)** - If the Contractor (1) does not deliver supplies in accordance with the Agreement delivery schedule, or (2) if the Agreement is for services the Contractor fails to perform in the manner called for in the Agreement, or (3) if the Contractor fails to comply with any other provisions of the Agreement, the TJPA may terminate this Agreement for default. Termination shall be effected by serving a notice of termination on the Contractor setting forth the manner in which the Contractor is in default. The Contractor will only be paid the Agreement price for supplies delivered and accepted, or services performed in accordance with the manner of performance set forth in the Agreement.

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

- (c). **Opportunity to Cure (General Provision)** - The TJPA in its sole discretion may, in the case of a termination for breach or default, allow the Contractor a period of time in which to cure the defect. In such case, the notice of termination will state the time period in which cure is permitted and other appropriate conditions.

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

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

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

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

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

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

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

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

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

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

- (i) **Termination for Convenience or Default (Architect and Engineering)** - The TJPA may terminate this Agreement in whole or in part, for the TJPA's convenience or because of the failure of the Contractor to fulfill the Agreement obligations. The TJPA shall terminate by delivering to the Contractor a Notice of Termination specifying the nature, extent, and effective date of the termination. Upon receipt of the notice, the Contractor shall (1) immediately discontinue all services affected (unless the notice directs otherwise), and (2) deliver to the contracting officer all

data, drawings, specifications, reports, estimates, summaries, and other information and materials accumulated in performing this Agreement, whether completed or in process.

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

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

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

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

If the termination is for the convenience of the TJPA, the Contractor shall be paid its Agreement close-out costs, and a fee, if the Agreement provided for payment of a fee, in proportion to the work performed up to the time of termination.

If, after serving a notice of termination for default, the TJPA determines that the Contractor has an excusable reason for not performing, such as strike, fire, flood, events which are not the fault of and are beyond the control of the Contractor, the TJPA, after setting up a new work schedule, may allow the Contractor to continue work, or treat the termination as a termination for convenience.

13. RECYCLED PRODUCTS

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

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

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

The following provision (14) applies to Agreements exceeding \$25,000.

14. GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

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

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

The following provisions (15-16) apply to Agreements exceeding \$50,000.

15. CLEAN AIR

****** *This provision applies to all Agreements greater than \$50,000 and to subcontracts greater than \$50,000.*

- (a) The Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. Section 7401 et seq. The Contractor agrees to report each violation to the TJPA and understands and agrees that the TJPA will, in turn, report each violation as required to assure notification to FTA and FRA and the appropriate EPA Regional Office.
- (b) The Contractor also agrees to include these requirements in each subcontract exceeding \$50,000.

16. CLEAN WATER REQUIREMENTS

****** *This provision applies to all Agreements greater than \$50,000.*

- (a). The Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. Section 1251 et seq. The Contractor agrees to report each violation to the TJPA and understands and agrees that the TJPA will, in turn, report each violation as required to assure notification to FTA and FRA and the appropriate EPA Regional Office.
- (b). The Contractor also agrees to include these requirements in each Subcontract exceeding \$50,000 financed in whole or in part with Federal assistance provided by FTA and FRA.

The following provisions (17-20) apply to Agreements exceeding \$100,000.

17. BUY AMERICA REQUIREMENTS

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

- (a). The Contractor agrees to comply with 49 U.S.C. Section 5323(j) and 49 CFR Part 661, which provide that Federal funds may not be obligated unless steel, iron, and manufactured products used in FTA- and FRA-funded projects, such as the Transbay Transit Center Program that is the subject of this Agreement, are produced in the United States, unless a waiver has been granted by FTA, FRA, or the product is subject to a general waiver. General waivers are listed in 49 CFR Section 661.7. Separate requirements for rolling stock are set out at 49 U.S.C. Section 5323(j)(2)(C) and 49 CFR Section 661.11. Rolling stock must be assembled in the United States and have a 60 percent domestic content.

(b). The Contractor shall submit the "Buy America Certification" at the time of bid/offer if the regulation is applicable to the particular agreement. The Prime Contractor is responsible for ensuring that lower tier subcontractors are in compliance.

18. BREACHES AND DISPUTE RESOLUTION

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

- (a). **Disputes** - Disputes arising in the performance of this Agreement which are not resolved by agreement of the parties shall be decided in writing by the authorized representative of TJPA's Executive Director. This decision shall be final and conclusive unless within ten (10) days from the date of receipt of its copy, the Contractor mails or otherwise furnishes a written appeal to the Executive Director. In connection with any such appeal, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its position. The decision of the Executive Director shall be binding upon the Contractor and the Contractor shall abide by the decision.
- (b). **Performance During Dispute** - Unless otherwise directed by the TJPA, Contractor shall continue performance under this Agreement while matters in dispute are being resolved.
- (c). **Claims for Damages** - Should either party to the Agreement suffer injury or damage to person or property because of any act or omission of the party or of any of the party's employees, agents or others for whose acts the party is legally liable, a claim for damages therefore shall be made in writing to such other party within a reasonable time after the first observance of such injury or damage.
- (d). **Remedies** - Unless this Agreement provides otherwise, all claims, counterclaims, disputes and other matters in question between the TJPA and the Contractor arising out of or relating to this Agreement or its breach will be decided by arbitration if the parties mutually agree, or in a court of competent jurisdiction within the state in which the TJPA is located.
- (e). **Rights and Remedies** - The duties and obligations imposed by the Agreement Documents and the rights and remedies available thereunder shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law. No action or failure to act by the TJPA or Contractor shall constitute a waiver of any right or duty afforded any of them under the Agreement, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically agreed in writing.

19. LOBBYING

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

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

- (a). The contractor shall submit the "New Restrictions on Lobbying Certification" if the regulation is applicable to the particular agreement.
- (b). The Contractor and each subcontractor shall certify to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any federal agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. Section 1352. The Contractor and each subcontractor shall also disclose the name of any registrant under the

Lobbying Disclosure Act of 1995 who has made lobbying contacts on its behalf with non-Federal funds with respect to a Federal contract, grant or award covered by 31 U.S.C. Section 1352. Such disclosures are forwarded from tier to tier up to the TJPA.

20. AGREEMENT WORK HOURS AND SAFETY STANDARDS ACT

****** *This requirement applies to Agreements and Subcontracts for construction over \$100,000, and to non-construction Agreements valued at more than \$100,000 that employ "laborers or mechanics on a public work," as defined by 42 U.S.C. Section 3701.*

- (a). **Overtime requirements** - No Contractor or subcontractor contracting for any part of the Agreement 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 (1) of this section.

- (c). **Withholding for unpaid wages and liquidated damages** - The TJPA 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 Agreement or any other Federal contract with the same Contractor, or any other federally assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same 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 (b) of this section.