

THIS STAFF REPORT COVERS CALENDAR ITEM NO.:13
FOR THE MEETING OF: September 20, 2007

TRANSBAY JOINT POWERS AUTHORITY

BRIEF DESCRIPTION:

Approve an Intergovernmental Agreement between the Transbay Joint Powers Authority (TJPA) and the San Francisco Planning Department (Department) in the amount of \$730,000 for a three year term to provide land-use and implementation planning for the Transbay Transit Center Program (Program).

SUMMARY:

- The Department will issue and manage contracts to provide land-use plans and environmental review, and implement those plans for the Transbay District Plan and TJPA Properties Study.
- The Transbay District Plan and TJPA Properties Study area includes the Transit Tower site as well as certain private and public parcels inside and outside the Transbay Redevelopment Plan, designated "Zone 2" by the Department, and around the Transit Center.
- A small portion of the land-use planning effort will also include evaluation of air rights and proposed joint development of the 4th and King Caltrain Rail Yards.
- The Department's land-use planning is expected to be used as the basis for an amendment to the City and County of San Francisco's General Plan.
- The TJPA is proposing to enter into an agreement to compensate the Department in the amount of \$730,000 to perform these services.
- The City's adoption of the Transbay District Plan could result in significant benefit to the Program, including the provision of land-use analysis necessary to update the TJPA's funding projections and financial benefits from development in the Transbay District and TJPA properties. The value to the TJPA of these benefits would exceed the \$730,000 that the TJPA would compensate the Department under this agreement.
- The TJPA has included funding for the scope of services in its FY 2007-08 budget.
- The Department's services under this agreement would be provided over a three-year period, which could be extended by agreement of the parties.
- The Department is qualified to perform the scope of services for the TJPA.

The Agreement would be for a maximum of \$730,000 and for a term of three years to commence on the effective date of the Agreement, unless extended by the parties or earlier terminated.

RECOMMENDATION:

Approve the agreement between TJPA and Department to perform planning services in the Transbay District for \$730,000.

ENCLOSURES:

1. Agreement between TJPA and Department
2. Resolution

**TRANSBAY JOINT POWER AUTHORITY
BOARD OF DIRECTORS**

Resolution No. _____

WHEREAS, The Transbay Joint Powers Authority (TJPA) is a joint powers agency organized and existing under the laws of the State of California; and

WHEREAS, The San Francisco Planning Department (Department) is a department of the City and County of San Francisco; and

WHEREAS, The creation of the Transbay District Plan is one of the key recommendations of the Mayor's Interagency Working Group on the Transbay Transit Center Program; and

WHEREAS, The Department's Planning Director is authorized to enter into professional services contracts to perform planning studies for development in the Transbay District Plan and TJPA Properties Study and to implement those studies; and

WHEREAS, The Department will procure and award services in accordance with applicable law; and

WHEREAS, The TJPA will benefit from the Department's planning studies by obtaining updated planning and economic information from the Department that will be useful for the TJPA's funding projections; and

WHEREAS, The Department is qualified to provide land-use planning services to the TJPA; and

WHEREAS, \$730,000 for the Department's Transbay District Plan and TJPA Properties Study and implementation is programmed in the TJPA FY 2007-08 budget; and

WHEREAS, Staff recommends that the TJPA Board approve the agreement between the TJPA and the Department authorizing the Department to perform planning studies and implementation for the Transbay District Plan and TJPA Properties Study; now, therefore, be it

RESOLVED, That the TJPA Board authorizes the Executive Director to execute the agreement between the TJPA and the San Francisco Planning Department to perform planning and implementation services for the Transbay District Plan and TJPA Properties Study for a maximum compensation of \$730,000, and limited to a period of three years, unless extended by the parties or earlier terminated.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of September 20, 2007.

Secretary, Transbay Joint Powers Authority

INTERGOVERNMENTAL AGREEMENT BETWEEN TJPA AND THE SF PLANNING DEPARTMENT

THIS AGREEMENT is entered into as of the ____ day of _____, 2007 by and between the TRANSBAY JOINT POWERS AUTHORITY ("TJPA") and the SAN FRANCISCO PLANNING DEPARTMENT ("Department").

Recitals

A. TJPA wishes the services of the Department to provide a land-use and implementation plan for the Transbay Transit Center Program ("Program").

B. Department represents and warrants that it is qualified to perform the services required by TJPA as set forth under this Agreement ("Services").

D. TJPA and Department intend that this Agreement comply with the regulations of the Federal Transit Administration of the United States Department of Transportation ("FTA").

E. On September 20, 2007, the TJPA Board of Directors adopted Resolution No. _____, which authorized the Executive Director to execute this Agreement with the Department 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 Manager, and the amount of TJPA's obligation hereunder shall not at any time exceed the amount certified for the purpose and period stated in such advance authorization.

TJPA has no obligation to make appropriations for this Agreement in lieu of appropriations for new or other agreements or Program costs. TJPA budget decisions are subject to the discretion of the Board of Directors of the TJPA. Department's assumption of risk of possible non-appropriation is part of the consideration for this Agreement.

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

2. Term of the Agreement

Subject to Section 1, the term of this Agreement shall not exceed 3 years following the Effective Date of the Agreement, as described in Section 3 below; provided that: (i) TJPA shall have the right to extend this Agreement for an additional year by providing to Department 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 Department and the approval of such extension by resolution adopted by the TJPA's Board of Directors.

3. Effective Date of Agreement

This Agreement shall become effective when executed by both parties, following approval of this Agreement by TJPA's Board of Directors by resolution, and following the Finance Manager's certification to the availability of funds and notice thereof to Department in writing.

4. Services Department Agrees to Perform

Following full execution of this Agreement, Department agrees to perform the services provided for in Appendix A, "Scope of Services," attached to this Agreement and incorporated by reference as though fully set forth herein.

As part of its scope of work, Department agrees to provide an appropriate representative of Department to testify at TJPA's request if litigation is brought by or against TJPA in connection with Department's work.

Department represents and warrants to 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 Department. 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.

5. Compensation

In no event shall the total compensation under this Agreement exceed \$730,000.00

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

6. Guaranteed Maximum Costs

a. TJPA's obligation hereunder shall not at any time exceed the amount certified by the Finance Manager for the purpose and period stated in such certification.

b. Officers and employees of TJPA are not authorized to request, and the TJPA is not required to reimburse Department for, commodities or services beyond the agreed upon contract scope unless the changed scope is authorized by written amendment and approved as required by law.

c. Officers and employees of 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 is certified without certification of the additional amount by the Finance Manager.

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

7. Payment; Invoice Format

Invoices furnished by Department under this Agreement must be in a form reasonably acceptable to the TJPA. All amounts paid to Department shall be subject to audit by TJPA.

TJPA shall make payment to Department at the address specified in the section entitled "Notices to the Parties." In no event shall TJPA be liable for interest or late charges for any late payments.

8. Disallowance

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

9. Reserved

10. Payment Does Not Imply Acceptance of Work

The granting of any payment by TJPA, or the receipt thereof by Department, shall in no way lessen the liability of Department 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.

11. Insurance

The Department, as an agency of the City and County of San Francisco, is self-insured for workers' compensation, commercial general, automobile liability, and professional liability. The Department may rely on a self-insurance program to meet the Worker's Compensation insurance requirements under this Section, but only if the program of self-insurance complies fully with the provisions of the California Labor Code. Determination of whether a self-insurance program meets the standards of the Labor Code shall be evidenced by a State-issued Certificate of Self-Insurance. If at any time during the term of this Agreement, the Department ceases to be self-insured for workers' compensation, commercial general, automobile liability, or professional liability, or following the Department's replacement of a self-insured program with the insurance required by Section 11.1-11.4 below, and thereafter fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time required, the TJPA may, at its sole option exercise any of the following remedies, which are alternatives to other remedies the TJPA may have and are not the exclusive remedy for the Department's breach:

- Require the Department to reinstitute a program of self-insurance or obtain insurance of the types and amounts set forth below in Section 11.1-11.4;

- Obtain insurance of the types and amounts set forth below in Section 11.1-11.4 and deduct and retain the amount of the premiums for such insurance from any sums due under the Agreement;
- Order the Department to stop work under this Agreement or withhold any payment that becomes due to the Department hereunder, or both stop work and withhold any payment, until the Department has reinstituted a program of self-insurance or has obtained insurance of the types and amounts set forth below in Section 11.1-11.4; and/or
- Terminate this Agreement.

11.1 Workers' Compensation. The Department shall, at its sole cost and expense, maintain Statutory Workers' Compensation Insurance and Employer's Liability Insurance for the term of this Agreement for any and all persons employed directly or indirectly by the Department. The Department shall maintain Workers' Compensation Insurance for not less than statutory minimum amounts and shall maintain Employer's Liability Insurance with limits of not less than One Million Dollars (\$1,000,000.00) per accident. The insurer shall waive all rights of subrogation against the TJPA and its officers, officials, employees, and volunteers for loss arising from Services performed under this Agreement.

11.2 Commercial General and Automobile Liability Insurance.

11.2.1 General requirements. The Department, at its own cost and expense, shall maintain commercial general and automobile liability insurance for the term of this Agreement in an amount not less than One Million Dollars (\$1,000,000) per occurrence, combined single limit coverage for risks associated with the Services. The Department shall also maintain excess liability insurance in an amount not less than Two Million Dollars (\$2,000,000) aggregated for bodily injury, personal injury, and property damage. If the Department uses a Commercial General Liability Insurance or an Automobile Liability form or other form with a general aggregate limit, either the general aggregate limit shall apply separately to the Services to be performed under this Agreement or the general aggregate limit shall be at least twice the required occurrence limit. Such coverage shall include but shall not be limited to, protection against claims arising from bodily and personal injury, including death resulting from that injury, and damage to property resulting from activities contemplated under this Agreement, including the use of owned and non-owned automobiles.

11.2.2 Minimum scope of coverage. Commercial general coverage shall be at least as broad as Insurance Services Office Commercial General Liability occurrence form CG 0001 or GL 0002 (most recent editions) covering comprehensive General Liability and Insurance Services Office form GL 0404 covering Broad Form Comprehensive General Liability. Automobile coverage shall be at least as broad as Insurance Services Office Automobile Liability form CA 0001 (ed. 12/90) Code 8 and 9. No endorsement shall be attached limiting the coverage.

11.2.3 Additional requirements. Each of the following shall be included in the insurance coverage or added as an endorsement to the policy:

- a. The TJPA and its officers, employees, agents, and volunteers shall be covered as insureds with respect to each of the following: liability arising out of activities performed by or on behalf of the Department, including the TJPA's general supervision of the Department; products and completed operations of the Department; premises owned, occupied, or used by the Department; and automobiles owned, leased, or used by the Department. The coverage shall contain no special limitations on the scope of protection afforded to the TJPA or its officers, employees, agents, or volunteers.
- b. The insurance shall cover on an occurrence or an accident basis, and not on a claims-made basis.
- c. An endorsement must state that coverage is primary insurance with respect to the TJPA and its officers, officials, employees, and volunteers, and that no insurance or self-insurance maintained by the TJPA shall be called upon to contribute to a loss under the coverage.
- d. Any failure of the Department to comply with reporting provisions of the policy shall not affect coverage provided to the TJPA and its officers, employees, agents, and volunteers.

11.3 Professional Liability Insurance. Upon written request of the TJPA, the Department, at its own cost and expense, shall maintain, for the period covered by this Agreement, professional liability insurance for licensed professionals performing the Services in an amount not less than One Million Dollars (\$1,000,000) covering the licensed professionals' errors and omissions.

11.3.1 Deductible/Retention. Any deductible or self-insured retention shall not exceed \$1,000 per claim.

11.3.2 Claims Made Form. The following provisions shall apply if the professional liability coverages are written on a claims-made form:

- a. The retroactive date of the policy must be shown and must be before the date of the Agreement.
- b. Insurance must be maintained and evidence of insurance must be provided for at least five (5) years after completion of the Agreement or the Services, so long as commercially available at reasonable rates.
- c. If coverage is canceled or not renewed and it is not replaced with another claims-made policy form with a retroactive date that precedes the date of this Agreement, the Department must provide extended reporting coverage for a minimum of five (5) years after completion of the Agreement or the work. The TJPA shall have the right to exercise, at the Department sole cost and expense, any extended reporting provisions of the policy, if the Department cancels or does not renew the coverage.

d. A copy of the claim reporting requirements must be submitted to the TJPA prior to the commencement of any Services under this Agreement.

11.4 All Policies Requirements.

11.4.1 Acceptability of insurers. All insurance required by this section is to be placed with insurers with a Bests' rating of no less than A: VII.

11.4.2 Department's Commencement of Work. The Department and its consultants shall not commence work on any Task Order until the Department has obtained all insurance coverage required under Section 11 of this Agreement insuring the Department and consultants and provided evidence to the TJPA of such insurance coverage in the form of Certificates of Insurance with original endorsements, including the endorsements adding the TJPA as an Additional Insured for General Liability and Automobile coverage. The Department shall furnish separate certificates and endorsements for each subcontractor. The Department shall submit verification of the required insurance to the TJPA and such verification shall be made part of this Agreement prior to its execution. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. The TJPA reserves the right to require complete, certified copies of all required insurance policies, at any time.

11.4.3 Variation. The TJPA may approve a variation in the foregoing insurance requirements upon a determination that the coverages, scope, limits, and forms of such insurance are either not commercially available, or that the TJPA's interests are otherwise fully protected.

11.4.4 Deductibles and Self-Insured Retentions. The Department shall disclose to and obtain the approval of the TJPA for a self-insured retention and deductible before beginning work under a Task Order. During the period covered by this Agreement, the Department may increase such deductibles or self-insured retentions with respect to the TJPA, its officers, employees, agents, and volunteers only upon the prior express written authorization of the TJPA's Executive Director. The TJPA's Executive Director may condition approval of an increase in deductible or self-insured retention levels on a requirement that the Department procure a bond guaranteeing payment of losses and related investigations, claim administration, and defense expenses that is satisfactory in all respects to each of them.

11.4.5 Notice of Change in Coverage. An endorsement to each of the Department's insurance policies shall state that coverage shall not be suspended, voided, canceled by either Party, or reduced in coverage or limits, except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the TJPA.

12. Indemnification

Department shall indemnify and save harmless TJPA, and its officers, directors, agents and employees from and against any and all loss, cost, damage, injury, liability, and claims

thereof for injury to or death of a person, including employees of Department, or loss of or damage to property, resulting directly or indirectly from Department's performance of this Agreement, including, but not limited to, the use of Department's facilities or equipment provided by TJPA or others, regardless of the negligence of, and regardless of whether liability without fault is imposed or sought to be imposed on TJPA, except to the extent that such indemnity is void or otherwise unenforceable under applicable law in effect on or validly retroactive to the date of this Agreement, and except where such loss, damage, injury, liability or claim is the result of the active negligence or willful misconduct of TJPA and is not contributed to by any act of, or by any omission to perform some duty imposed by law or agreement on Department, its subcontractors or either's agent or employee. The foregoing indemnity shall include, without limitation, reasonable fees of attorneys, consultants and experts and related costs and TJPA's costs of investigating any claims against the TJPA.

In addition to Department's obligation to indemnify TJPA, Department specifically acknowledges and agrees that it has an immediate and independent obligation to defend TJPA from any claim which actually or potentially falls within this indemnification provision, even if the allegations are or may be groundless, false or fraudulent, which obligation arises at the time such claim is tendered to Department by TJPA and continues at all times thereafter. Department shall have the exclusive right to select and retain attorneys to defend against such indemnified claims (subject to the reasonable approval of TJPA) and TJPA shall cooperate with Department and its attorneys, at no cost to the TJPA.

Department shall also indemnify and hold TJPA harmless from all loss and liability, including attorneys' fees, court costs and all other litigation expenses, for any infringement of the patent rights, copyright, trade secret or any other proprietary right or trademark and all other intellectual property claims of any person or persons in consequence of the use by TJPA, or any of its officers or agents, of articles, materials or services supplied by Department in the performance of this Agreement.

13. Incidental and Consequential Damages

Department shall be responsible for incidental and consequential damages resulting from Department's acts or omissions. Nothing in this Agreement shall constitute a waiver or limitation of any rights which TJPA may have under applicable law.

14. Liability of Authority

TJPA's monetary obligations under this agreement shall be limited to the payment of the compensation provided for in section 5 of this agreement. Notwithstanding any other provision of this agreement, in no event shall 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.

15. Termination for Convenience

a. The TJPA or the Department shall have the option to terminate this Agreement, at any time during the term hereof, for convenience and without cause. The TJPA shall exercise this option by giving Department written notice of termination. The Department shall exercise this option by giving the TJPA written notice of termination. The notice shall specify the date on which termination shall become effective.

b. Upon issue of the notice, Department shall commence and perform, with diligence, all actions necessary on the part of Department to effect the termination of this Agreement on the date specified by the notice and to minimize the liability of Department and TJPA to third parties as a result of termination. All such actions shall be subject to the prior approval of either the TJPA or the Department. 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 either TJPA or the Department.

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

(3) Terminating all existing orders, consultants and subcontracts.

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

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

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

(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 Department and in which TJPA has or may acquire an interest.

c. Within 30 days after the specified termination date, Department shall submit to TJPA an invoice, which shall set forth each of the following as a separate line item,

The reasonable cost to Department for all services and other work TJPA directed Department to perform prior to the specified termination date, for which services or work TJPA has not already tendered payment. The costs shall be determined as provided in Section 5 above, and shall be invoiced as provided in Section 7 above. The Department's consultant(s) or subcontractor(s) may also recover the reasonable cost of preparing the invoice.

d. In no event shall TJPA be liable for costs incurred by Department or any of its consultants or subcontractors after the termination date specified, 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 Department under this Section, TJPA may deduct: (1) all payments previously made by TJPA for work or other services covered by Department's final invoice; (2) any claim which TJPA may have against Department 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 TJPA's estimate of the reasonable cost of performing the invoiced services or other work in compliance with the requirements of this Agreement.

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

16. 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 by fax, and shall be addressed as follows:

To TJPA: Maria Ayerdi, Executive Director
Transbay Joint Powers Authority
201 Mission Street, Suite 1960
San Francisco, CA 94105
(415) 597-4615 fax
mayerdi@transbaycenter.org

To Department: Joshua Switzky
San Francisco Planning Department
1650 Mission Street, Suite 400
San Francisco, CA 94103
Joshua.Switzky@sfgov.org

Any notice of default must be sent by registered mail.

17. Audit and Inspection of Records

Department 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. Department will permit 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. Department 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 TJPA by this Section.

18. Subcontracting

The Department is permitted to contract portions of the services with third parties to be performed under this Agreement as follows:

The Department will be permitted to contract for all portions of the work under this Agreement. The services of Contractors shall be procured following FTA Third Party Contracting Guidelines, Circular 4220.1E. Contractors shall be solely responsible to the

Department throughout the performance of their services under this Agreement. Assignment by the Department of work to contractors shall not relieve the Department of any obligation to the TJPA for the work performed.

19. Assignment

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

20. 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.

21. Equal Employment Opportunity

Department is an equal opportunity employer and agrees to comply with all applicable state and federal regulations governing equal employment opportunity. Department will not discriminate against any employee or applicant for employment because of race, age, sex, creed, color, sexual orientation, marital status or national origin. Department will take affirmative action to ensure that applicants are treated during such employment without regard to race, age, sex, creed, color, sexual orientation, marital status or national origin. 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. Department further agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause. Department 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 Department's employment practices.

22. Nondiscrimination; Penalties

a. Department Shall Not Discriminate

In the performance of this Agreement, Department agrees not to discriminate against any employee, TJPA or City employee working with such Department or subcontractor, applicant for employment with such Department 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 or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status), or association with members of such protected classes, or in retaliation for opposition to discrimination against such classes.

b. Subcontracts

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

c. Non-Discrimination in Benefits

Department 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 Section 12B.2(b) of the San Francisco Administrative Code.

d. Condition to Contract

As a condition to this Agreement, Department shall execute the "Chapter 12B Declaration: Nondiscrimination in Contracts and Benefits" form (Form HRC-12B-101) with supporting documentation and secure the approval of the form by the San Francisco Human Rights Commission.

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. Department 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, Department understands that pursuant to Section 12B.2(h) of the San Francisco Administrative Code, a penalty of \$50 for each person for each calendar day during which such person was discriminated against in violation of the provisions of this Agreement may be assessed against Department and/or deducted from any payments due Department.

23. Drug-Free Workplace Policy

Department 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. Department agrees that any violation of this prohibition by Department, its employees, agents or assigns will be deemed a material breach of this Agreement.

24. Compliance with Americans with Disabilities Act

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

25. 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.

26. 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 Department waiving any legal rights or remedies to which it is entitled.

27. 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.

28. Construction

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

29. Entire Agreement

This contract 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 Section 25.

30. Services Provided by Attorneys

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

31. 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.

32. News Releases/Interviews

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

33. Intentionally Omitted

34. 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 shall not bind the TJPA unless and until the Board of Directors of the TJPA approves the Agreement or authorizes the Executive Director of the TJPA to enter into this Agreement.

35. FTA Requirements

The provisions contained in "FTA Requirements for Professional Services Contracts," attached as Appendix B, are incorporated into this Agreement and Department agrees to abide by such provisions. Such provisions shall be supplementary to the provisions in this Agreement and interpreted in the broadest possible manner to avoid any conflicts. If there is an unavoidable conflict between the FTA terms and conditions and any other terms and conditions of this Agreement, the FTA terms and conditions shall take precedence.

36. DBE Requirements

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

36.1 Reporting. Under 49 CFR Section 26.13, in contracts and subcontracts assisted by the United States Department of Transportation ("DOT"), the Department and all its consultants, subcontractors, vendors, and joint venture partners (collectively, "subcontractors") shall not discriminate on the basis of race, color, national origin, or sex in the performance of the contract. Failure by the Department to carry out these requirements is a material breach of this contract, which may result in TJPA's termination of this contract or such other action as TJPA deems appropriate.

36.2 TJPA's DBE Program. On September 20, 2007, TJPA adopted the DBE Program for FY 2007-08. The Program is available on the TJPA website at <http://www.transbaycenter.org>. The Department shall implement the DBE Program in performing the Services.

36.3 Department's DBE Compliance. Under the monitoring requirements outlined in Section XIII of TJPA's FY 2007-08 DBE Program (49 CFR 26.37), the Agency shall submit the following documents to TJPA, attached as Appendix C:

36.3.1 Bidders/Proposers Information Request Form. The Department's subcontractor shall submit a Bidders/Proposers Information Request Form at the time of proposal, regardless of DBE participation.

36.3.2 Progress Payment Report. The Department's subcontractor shall submit a Progress Payment Report with every invoice request. This form provides a detailed summary of actual expenditures due to each subcontractor by billing period and to-date. It also serves to monitor ongoing DBE and non-DBE participation throughout the contract.

36.3.3 Subcontractor Payment Declaration. The Department's subcontractor shall submit a Subcontractor Payment Declaration after payments are issued to a lower tier subcontractor. This form serves as proof of payment to DBE and non-DBE subcontractors. As required under Section XII.2 of the DBE Program, the Department's subcontractor shall pay a lower tier subcontractor not later than 10 days of receipt of each progress payment unless a longer period is agreed to in writing.

36.3.4 Final Expenditure Report. The Department's subcontractor shall submit a Final Expenditure Report at the completion of this Agreement. This form provides a final record of actual expenditures for the contract. This form will be compared to the "Bidders/Proposers Information Request Form" submitted by the Department's subcontractor at the time of proposal. The DBEs shown on the completed records should be the same as those originally listed unless an authorized substitution was made or the Department's subcontractor used additional DBEs. The Department's subcontractor will be required to explain in writing why the names of the lower tier subcontractors, the work items, or the dollar figures are different from what was originally shown on the "Bidders/Proposers Information Request Form" when the Department's subcontractor has not provided a sufficient explanation in the comments section of the completed Final Expenditure Report.

37. Prompt Payment to Subcontractors

The Department shall include prompt payment language into its agreements with consultants (contractors) consistent with the following two paragraphs:

In accordance with the DBE Program, no later than ten (10) working days from the date of consultant's receipt of progress payments by the Department, the consultant shall pay any subcontractors, if any, for work that has been satisfactorily performed by said subcontractors, unless the prime contractor notifies the Department in writing within ten (10) working days prior to receiving payment from the Department that there is a bona fide dispute between the prime contractor and the subcontractor. Within five (5) days of such payment, consultant shall provide the Department with a declaration under penalty of perjury that it has promptly paid such subcontractors for the work they have

performed. Failure to provide such evidence shall be cause for the Department to suspend future progress payments to the consultant(s). Within forty (40) days of satisfactory completion of all work required of the subcontractors, the consultant shall release any retention withheld to the subcontractors.

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

38. Miscellaneous

(a) The section and other headings of this Agreement are for convenience of reference only and shall be disregarded in the interpretation of this Agreement. (b) Time is of the essence in all matters under this Agreement. (c) 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.

TRANSBAY TRANSIT CENTER PROGRAM

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

TRANSBAY JOINT POWERS AUTHORITY

CITY AND COUNTY OF SAN FRANCISCO
PLANNING DEPARTMENT

Maria Ayerdi, Executive Director

Dean Macris, Director of Planning

Approved as to Form:

Approved as to Form:

By _____
TJPA Legal Counsel

By _____
Deputy City Attorney

TJPA Board of Directors

Planning Commission

Resolution No. _____

Resolution No. _____

Dated: _____

Dated: _____

Attest:

Attest:

Secretary, TJPA Board

Secretary, Planning Commission

INTERGOVERNMENTAL AGREEMENT BETWEEN TJPA AND SF PLANNING DEPARTMENT

APPENDIX A

SCOPE OF SERVICES / COMPENSATION FOR SERVICES

Transbay District Plan and TJPA Properties Study San Francisco Planning Department

The San Francisco Planning Department proposes to prepare a land use and implementation plan for the Transbay District, the heart of the city's renowned Downtown Office District. The study will produce new planning policies and controls for land use, height and bulk, shadow studies, and design standards and guidelines. The study will also identify mechanisms to fund the Transbay Transit Center Program (Program) and other public infrastructure for the Transbay District and its surroundings. The study will stress ways to ensure excellence in the design of the public realm and city building, as well as stellar design of the built environment.

The creation of the Transbay District Plan is one of the key recommendations of the Mayor's Interagency Working Group on the Transbay Terminal Program. Over the course of approximately three months in early 2006, the Working Group reviewed development assumptions in the existing Program to determine the appropriate planning response to this important facility in the heart of downtown San Francisco and to assess ways of securing additional funding for the Program. This brief assessment identified the potential for up to \$150 to \$250 million in additional funds for the Program through increased tax increment, land sales, and assessments, which would result from changes in controls of land use and urban form consistent with the City's new vision for the Transbay district. Additional funding that might come from the 4th/King rail station and yards joint development was not included in the preliminary study and report by the Mayor's Interagency Working Group, it was not included in the estimates above.

The Transbay Redevelopment Plan, adopted in 2004, contains a comprehensive land use, urban design, and open space program focusing on the publicly owned parcels in the area. The Plan also adopts streetscape and transportation recommendations for the entire redevelopment area. A primary objective of the Redevelopment Plan is to support the Program financially and physically. The Redevelopment Plan delegates jurisdiction over certain private parcels in the Redevelopment Plan Area to the Planning Code and Planning Commission, designated "Zone 2" in the Redevelopment Plan. This proposed Transbay District Plan will be faithful to most of the Redevelopment Plan while emphasizing development of private parcels around the Transit Center (both inside and outside of the Redevelopment Area), as well as future TJPA-owned properties in the area, including the Transit Center and the 4th/King station and rail yards. The 4th/King rail station and yards will be redesigned as part of the Caltrain extension project. Accordingly, the future uses of the site needs study, including the possibility for joint development that might help fund the Terminal and rail project as well as public amenities (e.g. open space). Using computer modeling, the technical analysis will focus on changes to the

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skyline and shadow impacts, taking into account recently proposed urban form changes in Rincon Hill, the Transbay Redevelopment Area, Mid-Market, Market-Octavia, Mission Bay, and Showplace Square.

The Plan will be developed in a series of meetings with an inter-agency working group. The Planning Department will conduct public outreach through regularly scheduled meetings of the Transbay CAC. The Planning Department will be assisted by a consultant team skilled in urban design, architecture, civil engineering, dynamic three-dimensional modeling, and technical shadow and wind analysis. The consultant team will include expertise in underwriting and tax consultation to support and refine the financial analysis already initiated by the Redevelopment Agency. Other City agencies will be invited to participate as full partners in the planning process, and then as principals in development of public improvements called for in the Plan.

The Planning Department anticipates that the primary product of this planning work will be a Transbay District Plan and implementing legislation, including Planning Code and Zoning Map amendments. It also will propose improvements for the 4th/King rail yards. In sum, the Transbay District Plan will have five primary purposes:

- It will establish a policy framework for the Transbay District as a supplement to the Downtown Plan of the General Plan or as a sub-area of the Downtown Plan.
- It will create a conceptual urban design and development plan and policy framework for the future of the 4th/King station and rail yards, consistent with the DTX needs and future high speed rail.
- It will recommend necessary controls and Planning Code modifications to enable and control the development envisioned for Transbay. Part of these controls will be the funding mechanisms for the Program and any necessary modifications to the Transferable Development Rights program ("TDR").
- It will identify appropriate improvements to the public realm, including streets, open spaces, and plazas as envisioned or planned, and provide standards and guidelines for the design and development of these public spaces.
- It will set out design standards and guidelines to ensure the appropriate development of the built environment.

Attachment A is an outline of the proposed scope of work. The Project will be overseen by the Planning Department in collaboration with the Transbay Joint Powers Authority (TJPA), the Redevelopment Agency and other relevant agencies.

Consultant Procurement

The Planning Department proposes to divide the scope of work into two discrete pieces:

- (1) Transbay District Plan and Caltrain Railyards Plan development, including urban design, architectural and financial analysis, but excluding primary civil engineering review of railyards and Caltrain facilities;
- (2) Environmental Review of Transbay District Plan.

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Schedule

The Planning Department anticipates the following schedule:

	Work Task	Task Completion Date
1.	Project Startup and Coordination (Staff)	August 2007
	a. Consultant RFP Release	May 2007
	b. Consultant Selection	August 2007
	<i>(Deliverables: Refined Project Task List, Scope, Budget Request For Proposals, Consultant Contract)</i>	
2.	Background and Existing Conditions	September 2007
	<i>(Deliverables: Background Conditions Reports)</i>	
3.	Planning Analysis (Consultant/Staff)	December 2007
	<i>(Deliverables: Consultant Technical Analysis Report)</i>	
4.	Financial Analysis (Consultant/SFRA Staff)	January 2008
5.	Draft District Plans Development (Consultant/Staff)	February 2008
	<i>(Deliverables: Draft Policy Plans for Transbay and Railyards, Implementation Plan, Financial Plan)</i>	
6.	Coordination	Throughout
7.	Public Outreach and Involvement	Throughout
8.	Transbay Program Coordination with Consultant Team (TJPA)	Throughout
9.	Draft Environmental Analysis (EIR Consultant)	November 2008
	<i>(Deliverables: Draft EIR/EIS)</i>	
10.	Final District Plans Development (Consultant/Staff)	December 2008
	<i>(Deliverables: Final Policy Plan for Transbay and Concept Plan for Railyards, Implementation Plan, Financial plan)</i>	
11.	General Plan and Planning Code/Zoning Map Ordinances (Staff) <i>(Deliverables: General Plan and Planning Code/Zoning Map Ordinances for Adoption)</i>	January 2009
12.	Final Environmental Analysis (EIR Consultant)	February 2009
	<i>(Deliverables: Final EIR/EIS)</i>	
13.	Plan and Funding Ordinance Adoption (Staff)	March -June 2009
14.	Transit Tower Entitlements (Staff)	April 2009

TRANSBAY TRANSIT CENTER PROGRAM

Proposed Scope of Work and Costs

1.	Project Startup and Coordination	N/A
2.	Background and Existing Conditions	\$25,000
	a. Development Capacity/Buildout Analysis (Current Controls, Approved Projects and Other Pipeline)	
	b. Existing/adopted land use and urban form plans and policies	
	c. Historic Resources and Landmarks	
	d. Open Space	
	e. Circulation	
	f. Review of Caltrain DTX and High-Speed rail plans and specifications as they relate to the railyards	
	g. Legal/institutional issues related to development of railyards	
3.	Planning Analysis	\$225,000
	a. Transportation Analysis	
	b. Historic Resource Analysis	
	c. TDR Program Analysis	
	d. Shadow and Wind Analysis	
	e. Urban Form Analysis (3-D modeling and photo-simulation analysis of selected urban form options)	
	f. Urban Design Analysis (Site concepts and urban form options for key opportunity sites, including development capacity)	
	g. Building Prototypes Analysis (Floorplates, Bulk Controls, Design Guidelines)	
4.	Financial Analysis	\$70,000
	a. Market Analysis	
	b. Mello-Roos Analysis	
5.	District Plan Development and Production	\$110,000
	a. Transbay District Plan	
	b. Railyards Concept Plan	
6.	Coordination	\$25,000
	a. Agency	
	b. Stakeholders	
7.	Public Outreach and Involvement	\$25,000
	a. Outreach	
	b. Public Workshops	
	c. Boards and Commissions	
8.	Transbay Program Coordination with Consultant Team (TJPA)	N/A
	a. Transbay District	
	b. 4 th and King Rail Yards	
9.	Environmental Impact Analysis *	\$250,000
	a. Draft EIR	
	i. Transportation and Traffic Analysis	

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- ii. Shadow and Wind
- iii. Historic Resources
- iv. Urban Form/Visual
- v. Land Use
- vi. Air Quality
- vii. Hydrology and Water Quality
- viii. Hazardous Materials
- b. Responses to Comments

10. Planning Department, TJPA, SFRA, City Attorney Staffing Costs N/A

Timeline of Costs/Cash Flow Needs

FY 2007/08 (Planning, EIR) \$730,000

* The Planning Department will require that the TJPA be reimbursed for the cost of CEQA review over time by development projects (proportionally) that subsequently gain approval under the new plan.

INTERGOVERNMENTAL AGREEMENT

APPENDIX B

FTA REQUIREMENTS FOR PROFESSIONAL SERVICES CONTRACTS

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

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

1. DEFINITIONS.

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

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

- (h). **Project** means the task or set of tasks listed in the Approved Project Budget that is the subject of this Agreement, as well as any modifications stated in the Conditions to the Grant Agreement or Federal Cooperative Agreement applicable to the Project. In the case of the formula assistance programs for urbanized areas, for elderly and persons with disabilities, and non-urbanized areas, 49 U.S.C. sections 5307, 5310, and 5311, respectively, the term "Project" encompasses both a program and each project within a program, as the context may require, to effectuate the requirements of the Grant Agreement or Federal Cooperative Agreement.
- (i). **Recipient** means the TJPA.
- (j). **Secretary** means the U.S. DOT Secretary, including his or her duly authorized designee.
- (k). **Agreement** means a contract, purchase order, memorandum of understanding or other agreement awarded by the TJPA to a Contractor, financed in whole or in part with Federal assistance awarded by FTA.
- (l). **Subcontract** means a subcontract at any tier entered into by Contractor or its subcontractor relating to the Agreement, financed in whole or in part with Federal assistance originally derived from FTA. Unless otherwise specified, the Contractor must include each of these Federal provisions in any Subcontract related to this Agreement.
- (m). **U.S. DOT** is the acronym for the U.S. Department of Transportation, including its operating administrations.

2. FLY AMERICA REQUIREMENTS.

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

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

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agreement to which the U.S. Government and a foreign government are parties and which the U.S. DOT has determined meets the requirements of the Fly America Act.

3. BUY AMERICA REQUIREMENTS.

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

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

4. CARGO PREFERENCE REQUIREMENTS.

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

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).

5. SEISMIC SAFETY REQUIREMENTS.

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

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

6. ENERGY CONSERVATION REQUIREMENTS.

*** This provision applies to all Agreements.*

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

7. CLEAN WATER REQUIREMENTS.

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

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

8. LOBBYING.

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

- (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.

9. ACCESS TO DOCUMENTS.

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

****** *Please be aware that the requirements in the Agreement, Section 17, 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 FTA Requirement below. The Contractor must comply with the requirements described below and in the Agreement.*

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

10. FEDERAL CHANGES.

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

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

11. BONDING REQUIREMENTS.

*** This provision applies to Agreements for construction or facility improvements. For those Agreements or Subcontracts exceeding \$100,000, however, FTA may accept the bonding policy and requirements of the TJPA, provided that the TJPA's bonding policy and requirements meet the minimum requirements as follows*

- (a). *A bid guarantee from each bidder equivalent to 5 percent of the bid price. The "bid guarantees" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.*
- (b). *A performance bond on the part to the Contractor for 100 percent of the Agreement price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the Contractor's obligations under such contract.*
- (c). *A payment bond on the part of the Contractor for 100 percent of the Agreement price. A "payment bond" is one executed in connection with a contract to assure payment, as required by law, of all persons supplying labor and material in the execution of the work provided for in the contract. Payment bond amounts required from Contractors are as follows:*
 - (1) *50 percent of the Agreement price if the Agreement price is not more than \$1 Million;*
 - (2) *40 percent of the Agreement price if the Agreement price is more than \$1 Million but not more than \$5 Million; or*
 - (3) *\$2.5 Million if the Agreement price is more than \$5 Million.*
- (d). *A cash deposit, certified check or other negotiable instrument may be accepted by a Recipient in lieu of performance and payment bonds, provided the Recipient has established a procedure to assure that the interest of FTA is adequately protected. An irrevocable letter of credit would also satisfy the requirement for a bond.*

(1). Bid Bond Requirements (Construction)

- (a). **Bid Security**
A Bid Bond must be issued by a fully qualified surety company acceptable to TJPA and listed as a company currently authorized under 31 CFR Part 223 as possessing a Certificate of Authority.
- (b). **Rights Reserved**
In submitting a bid, it is understood and agreed by bidder that the right is reserved by TJPA to reject any and all bids, or part of any bid, and it is agreed that a bid may not be withdrawn for a period of ninety (90) days subsequent to the opening of bids, without the written consent of the TJPA.

It is also understood and agreed that if a bidder should withdraw any part or all of its bid within ninety (90) days after the bid opening without the written consent of the TJPA, shall refuse or be unable to enter into this Agreement, or refuse or be unable to furnish adequate and acceptable Performance Bonds and Labor and

Material Payments Bonds, or refuse or be unable to furnish adequate and acceptable insurance, it shall forfeit its bid security to the extent of TJPA's damages occasioned by such withdrawal, or refusal, or inability to enter into an agreement, or provide adequate security therefor.

It is further understood and agreed that to the extent the defaulting bidder's Bid Bond, Certified Check, Cashier's Check, Treasurer's Check, and/or Official Bank Check (excluding any income generated thereby which has been retained by the TJPA) shall prove inadequate to fully recompense the TJPA for the damages occasioned by default, then a bidder agrees to indemnify the TJPA and pay over to the TJPA the difference between the bid security and the TJPA's total damages, so as to make the TJPA whole.

A bidder understands that any material alteration of any of the above or any of the material contained on this form, other than that requested, will render the bid unresponsive.

(2). **Performance and Payment Bonding Requirements (Construction)**

The Contractor shall be required to obtain performance and payment bonds as follows:

(a). **Performance Bonds**

1. The penal amount of performance bonds shall be 100 percent of the original Agreement price, unless the TJPA determines that a lesser amount would be adequate for the protection of the TJPA.
2. The TJPA may require additional performance bond protection when an Agreement price is increased. The increase in protection shall generally equal 100 percent of the increase in Agreement price. The TJPA may secure additional protection by directing the Contractor to increase the penal amount of the existing bond or to obtain an additional bond.

(b). **Payment Bonds**

1. The penal amount of the payment bonds shall equal:
 - (i) 50 percent of the Agreement price if the Agreement price is not more than \$1 Million;
 - (ii) 40 percent of the Agreement price if the Agreement price is more than \$1 Million but not more than \$5 Million; or
 - (iii) \$2.5 Million if the Agreement price is more than \$5 Million.
2. If the original Agreement price is \$5 Million or less, the TJPA may require additional protection, as required by subparagraph 1, if the Agreement price is increased.

(3). **Performance and Payment Bonding Requirements (Non-Construction)**

The Contractor also may be required to obtain performance and payment bonds when necessary to protect the TJPA's interest.

(a). The following situations may warrant a performance bond:

1. TJPA property or funds are to be provided to the Contractor for use in performing the Agreement or as partial compensation (as in retention of salvaged material).

2. A Contractor sells assets to or merges with another concern, and the TJPA, after recognizing the latter concern as the successor in interest, desires assurance that it is financially capable.
 3. Substantial progress payments are made before delivery of end items starts.
 4. Agreements are for dismantling, demolition, or removal of improvements.
- (b). When it is determined that a performance bond is required, the Contractor shall be required to obtain performance bonds as follows:
1. The penal amount of performance bonds shall be 100 percent of the original Agreement price, unless the TJPA determines that a lesser amount would be adequate for the protection of the TJPA.
 2. The TJPA may require additional performance bond protection when an Agreement price is increased. The increase in protection shall generally equal 100 percent of the increase in Agreement price. The TJPA may secure additional protection by directing the Contractor to increase the penal amount of the existing bond or to obtain an additional bond.
- (c). A payment bond is required only when a performance bond is required, and if the use of payment bond is in the TJPA's interest.
- (d). When it is determined that a payment bond is required, the Contractor shall be required to obtain payment bonds as follows:
1. The penal amount of payment bonds shall equal:
 - (i) 50 percent of the Agreement price if the Agreement price is not more than \$1 Million;
 - (ii) 40 percent of the Agreement price if the Agreement price is more than \$1 Million but not more than \$5 Million; or
 - (iii) \$2.5 Million if the Agreement price is increased.
- (4). **Advance Payment Bonding Requirements**
The Contractor may be required to obtain an advance payment bond if the Agreement contains an advance payment provision and a performance bond is not furnished. The TJPA shall determine the amount of the advance payment bond necessary to protect the TJPA.
- (5). **Patent Infringement Bonding Requirements (Patent Indemnity)**
The Contractor may be required to obtain a patent indemnity bond if a performance bond is not furnished and the financial responsibility of the Contractor is unknown or doubtful. The TJPA shall determine the amount of the patent indemnity to protect the TJPA.
- (6). **Warranty of the Work and Maintenance Bonds**
(a). The Contractor warrants to the TJPA, the architect and/or engineer that all materials and equipment furnished under this Agreement will be of highest quality and new unless otherwise specified by the TJPA, free from faults and defects and in conformance with the Agreement documents. All work not so conforming to these standards shall be considered defective. If required by the Executive Director, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

- (b). The work furnished under the Agreement must be of first quality and the workmanship must be the best obtainable in the various trades. The work must be of safe, substantial and durable construction in all respects. The Contractor hereby guarantees the work against defective materials or faulty workmanship for a minimum period of one (1) year after Final Payment by the TJPA and shall replace or repair any defective materials or equipment or faulty workmanship during the period of the guarantee at no cost to the TJPA. As additional security for these guarantees, the Contractor shall, prior to the release of final payment, furnish separate Maintenance (or Guarantee) Bonds in form acceptable to the TJPA written by the same corporate surety that provides the Performance Bond and Labor and Material Payment Bond for this Agreement. These bonds shall secure the Contractor's obligation to replace or repair defective materials and faulty workmanship for a minimum period of one (1) year after final payment and shall be written in an amount equal to 100 percent of the Agreement sum, as adjusted (if at all).

12. CLEAN AIR.

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

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

13. RECYCLED PRODUCTS.

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

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

14. RESERVED.

15. RESERVED.

16. NO GOVERNMENT OBLIGATION TO THIRD PARTIES.

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

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

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

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

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

18. TERMINATION.

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

****** *Please be aware that the requirements in the Agreement, Section 15, regarding termination for convenience are more broadly applicable than the FTA Requirements described below. Both the requirements described below and the provisions in the Agreement are applicable to the Agreement.*

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

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

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

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

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

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

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

The Contractor will only be paid the Agreement price for supplies delivered and accepted, or services performed in accordance with the manner or performance set forth in this Agreement.

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

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

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

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

- (h). **Termination for Default (Construction)** - If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will ensure its completion within the time specified in this Agreement or any extension or fails to complete the work within this time, or if the Contractor fails to comply with any other provisions of this Agreement, the TJPA may terminate this Agreement for default. The TJPA shall terminate by delivering to the Contractor a Notice of Termination specifying the nature of the default. In this event, the TJPA may take over the work and 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 or Default (Cost-Type Agreements)** - The TJPA may terminate this Agreement, or any portion of it, by serving a notice of termination on the Contractor. The notice shall state whether the termination is for convenience of the TJPA or for the default of the Contractor. If the termination is for default, the notice shall state the manner in which the Contractor has failed to perform the requirements of the Agreement. The Contractor shall account for any property in its possession paid for from funds received from the TJPA, or property supplied to the Contractor by the TJPA. If the termination is for default, the TJPA may fix the fee, if the Agreement provides for a fee, to be paid the Contractor in proportion to the value, if any, of work performed up to the time of termination. The Contractor shall promptly submit its termination claim to the TJPA and the parties shall negotiate the termination settlement to be paid the Contractor.

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

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

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

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

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

20. CIVIL RIGHTS REQUIREMENT.

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

****** *Please be aware that the requirements in the Agreement, sections 21, 22 and 24, regarding nondiscrimination are broader than the FTA Requirements described below. The Contractor must comply with the requirements described below and in the Agreement.*

- (a). **Nondiscrimination** - In accordance with Title VI of the Civil Rights Act, as amended, 42 U.S.C. Section 2000d, Section 303 of the Age Discrimination Act of 1975, as amended, 42 U.S.C. Section 6102, Section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. Section 12132, and Federal transit law at 49 U.S.C. Section 5332, the Contractor agrees that it will not discriminate against any employee or applicant for employment because of race, color, creed, national origin, sex, age, or disability. In addition, the Contractor agrees to comply with applicable Federal implementing regulations and other implementing requirements FTA may issue.
- (b). **Equal Employment Opportunity** - The following equal employment opportunity requirements apply to the Agreement:
 - (1). **Race, Color, Creed, National Origin, Sex** - In accordance with Title VII of the Civil Rights Act, as amended, 42 U.S.C. Section 2000e, and Federal transit laws at 49 U.S.C. Section 5332, the Contractor agrees to comply with all applicable equal employment opportunity requirements of U.S. Department of Labor (U.S. DOL) regulations, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor," 41 CFR Parts 60, (which implement Executive Order No. 11246, "Equal Employment Opportunity," as amended by Executive Order No. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," 42 U.S.C. Section 2000e note), and with any applicable Federal statutes, executive orders, regulations, and Federal

policies that may in the future affect construction activities undertaken in the course of the Project. The Contractor agrees to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, creed, national origin, sex, or age. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.

- (2). **Age** - In accordance with Section 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. Section 623, and Federal transit law at 49 U.S.C. Section 5332, the Contractor agrees to refrain from discrimination against present and prospective employees for reason of age. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.
- (3). **Disabilities** - In accordance with Section 102 of the Americans with Disabilities Act, as amended, 42 U.S.C. Section 12112, the Contractor agrees that it will comply with the requirements of U.S. Equal Employment Opportunity Commission, "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 29 CFR Part 1630, pertaining to employment of persons with disabilities. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.

21. BREACHES AND DISPUTE RESOLUTION.

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

- (a). **Disputes** - Disputes arising in the performance of this Agreement which are not resolved by agreement of the parties shall be decided in writing by the authorized representative of TJPA's Executive Director. This decision shall be final and conclusive unless within ten (10) days from the date of receipt of its copy, the Contractor mails or otherwise furnishes a written appeal to the Executive Director. In connection with any such appeal, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its position. The decision of the Executive Director shall be binding upon the Contractor and the Contractor shall abide by the decision.
- (b). **Performance During Dispute** - Unless otherwise directed by the TJPA, Contractor shall continue performance under this Agreement while matters in dispute are being resolved.
- (c). **Claims for Damages** - Should either party to the Agreement suffer injury or damage to person or property because of any act or omission of the party or of any of the party's employees, agents or others for whose acts the party is legally liable, a claim for damages therefore shall be made in writing to such other party within a reasonable time after the first observance of such injury of damage.
- (d). **Remedies** - Unless this Agreement provides otherwise, all claims, counterclaims, disputes and other matters in question between the TJPA and the Contractor arising out of or relating to this Agreement or its breach will be decided by arbitration if the parties mutually agree, or in a court of competent jurisdiction within the state in which the TJPA is located.

- (e). **Rights and Remedies** - The duties and obligations imposed by the Agreement Documents and the rights and remedies available thereunder shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law. No action or failure to act by the TJPA or Contractor shall constitute a waiver of any right or duty afforded any of them under the Agreement, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically agreed in writing.

22. DISADVANTAGED BUSINESS ENTERPRISE (DBE).

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

- (a). This Agreement is subject to the requirements of 49 CFR Part 26, *Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs*. The national goal for participation of Disadvantaged Business Enterprises (DBEs) is 10 percent. The TJPA's annual anticipated DBE participation level for FY 2007-08 is 15.1 percent.

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

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

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

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

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

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

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

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

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

days after incremental acceptance of the subcontractor's work by the TJPA and Contractor's receipt of the partial retainage payment related to the subcontractor's work.

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

23. INCORPORATION OF FEDERAL TRANSIT ADMINISTRATION (FTA) TERMS

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

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

FLY AMERICA CERTIFICATION

49 U.S.C. Section 40118
41 CFR Part 301-10

The bidder or offeror hereby certifies that it will meet the requirements of 49 U.S.C. 40118 (the "Fly America" Act) in accordance with the General Services Administration's regulations at 41 CFR Part 301-10.

Date _____

Signature _____

Company Name _____

Title _____

BUY AMERICA CERTIFICATION

(A) Certification requirement relating to procurement of steel, iron, or manufactured products.

Certificate of Compliance

The Contractor hereby certifies that it will meet the requirements of 49 U.S.C. 5323(j)(1) and the applicable regulations in 49 CFR Part 661.5.

Date _____

Contractor Name _____

Authorized Representative Name _____

Signature _____

Title _____

OR

Certificate of Non-Compliance

The Contractor hereby certifies that it cannot comply with the requirements of 49 U.S.C. 5323(j)(1) and 49 CFR 661.5, but it may qualify for an exception pursuant to 49 U.S.C. 5323(j)(2)(A), 5323(j)(2)(B), or 5323(j)(2)(D), and 49 CFR 661.7.

Date _____

Contractor Name _____

Authorized Representative Name _____

Signature _____

Title _____

TRANSBAY TRANSIT CENTER PROGRAM

(B) Certification requirement relating to procurement of buses, other rolling stock and associated equipment.

Certificate of Compliance

The Contractor hereby certifies that it will comply with the requirements of 49 U.S.C. 5323(j)(2)(C) and the regulations at 49 CFR Part 661.11.

Date _____

Contractor Name _____

Authorized Representative Name _____

Signature _____

Title _____

OR

Certificate of Non-Compliance

The Contractor hereby certifies that it cannot comply with the requirements of 49 U.S.C. 5323(j)(2)(C) and 49 CFR 661.11, but may qualify for an exception pursuant to 49 U.S.C. 5323(j)(2)(A), 5323(j)(2)(B), or 5323(j)(2)(D), and 49 CFR 661.7.

Date _____

Contractor Name _____

Authorized Representative Name _____

Signature _____

Title _____

NEW RESTRICTIONS ON LOBBYING CERTIFICATION

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

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for making lobbying contacts to an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The Contractor shall require that the language of this certification be included in all Subcontracts, and that all subcontractors shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. Section 1352 (as amended by the Lobbying Disclosure Act of 1995). Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

The Contractor certifies and affirms the truthfulness and accuracy of each statement of this certification and disclosure. In addition, the Contractor understands and agrees that the provisions of 31 U.S.C. Section 3801 et seq., apply to this certification and disclosure.

Date _____

Contractor Name _____

Authorized Representative Name _____

Signature _____

Title _____

**CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER
RESPONSIBILITY MATTERS**

By signing and submitting its bid or proposal, the bidder or proposer certifies as follows:

The certification in this clause is a material representation of fact relied upon by the TJPA. If it is later determined that the bidder or proposer knowingly rendered an erroneous certification, in addition to remedies available to the TJPA, the Federal Government may pursue available remedies, including but not limited to suspension and/or debarment. The bidder or proposer agrees to comply with the requirements of 49 CFR 29, Subpart C while this offer is valid and throughout the period of any contract that may arise from this offer. The bidder or proposer further agrees to include a provision requiring such compliance in its lower tier covered transactions.

Part A: Primary Covered Transactions

- (1) The prospective primary participant certifies to the best of its knowledge and belief that it and its principals:
 - a. Are not presently debarred, suspended, proposed for disbarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;
 - b. Have not within a three-year period preceding this application been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
 - c. Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local) with commission of any of the offenses enumerated in paragraph (1) b. of this certification; and
 - d. Have not within a three-year period preceding this application had one or more public transactions (Federal, State, or local) terminated for cause or default.
- (2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective primary participant shall attach an explanation to this proposal.

TRANSBAY TRANSIT CENTER PROGRAM

Part B: Certification Regarding Debarment, Suspension, and Other Responsibility Matters
Lower Tier Covered Transactions (transactions between the bidder and persons other
than the Federal Government)

*CHECK ___ IF THIS CERTIFICATION IS FOR A LOWER TIER TRANSACTION AND IS
APPLICABLE.*

- (1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.
- (2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

As the authorized certifying official, I hereby certify that the above specified certifications are true.

Bidder/Offeror Name: _____

Authorized Representative Name: _____

Authorized Representative Title: _____

Authorized Representative Signature: _____

Date: _____

INTERGOVERNMENTAL AGREEMENT

APPENDIX C

DISADVANTAGED BUSINESS ENTERPRISE FORMS

1. Bidders/Proposers Information Request Form
2. Progress Payment Report
3. Subcontractor Payment Declaration
4. Final Expenditure Report

Excel versions of these forms can be downloaded from the TJPA website at www.TransbayCenter.org.