

**AGREEMENT BETWEEN
TRANSBAY JOINT POWERS AUTHORITY**

and

**Meyers, Nave, Riback, Silver & Wilson
For Professional Legal Services**

This Agreement, dated for convenience of reference as of _____, is by and between the Transbay Joint Powers Authority ("TJPA"), an Authority created under the California Joint Exercise of Powers Act, Government Code, §§ 6500, *et seq.*, acting by and through its Administrator, the City and County of San Francisco ("City"), and Meyers, Nave, Riback, Silver & Wilson ("Counsel").

This Agreement is made with reference to the following facts and circumstances:

A. On June 12, 2001, in Resolution 01-002, the TJPA appointed the City Attorney of the City and County of San Francisco to the position of Legal Counsel. Legal Counsel is an Officer of the TJPA under Section 9.1 of the TJPA Bylaws. The TJPA wishes to retain the City Attorney as Legal Counsel. But, to avoid any actual or apparent conflict of interest which could arise where the City's and the TJPA's interests are, or potentially are adverse, the TJPA, with the City Attorney's concurrence, wishes to have outside counsel to represent the TJPA where a conflict may exist or as otherwise set forth in this Agreement.

B. Specifically, the TJPA wishes Counsel to provide professional legal services on an as-needed basis, to assist the TJPA by advising the TJPA Executive Director ("Executive Director") and Board of Directors on certain matters where a conflict may exist (as determined by the City Attorney), or as otherwise requested by the City Attorney. Counsel's responsibilities are expected to include advice and assistance regarding the proposed condemnation of 80 Natoma Street and related matters, including assistance or appearance in litigation or administrative hearings regarding underground rail alignment at the 80 Natoma site, environmental review, and Transbay Terminal Project funding.

C. Counsel is known for its expertise in the area of condemnation, real estate and land use, and is well qualified to assist the TJPA in accordance with the provisions of this Agreement.

D. Subject to the City Attorney's conclusion that proposed work is within this Agreement's Scope of Services, Counsel will report to and work under the direction and control of the Executive Director as provided in this Agreement.

NOW, THEREFORE, the parties agree as follows:

1. SCOPE OF SERVICES

Upon request of the City Attorney, Counsel shall advise and assist the TJPA on the proposed condemnation of 80 Natoma Street and related matters, including assistance or appearance in litigation or administrative hearings regarding underground rail alignment at the 80 Natoma site, environmental review, and Transbay Terminal Project funding. This Scope of Services may be modified from time to time by the City Attorney, but all of Counsel's legal services shall be under the direction of the Executive Director of the TJPA.

2. TERM

The term of this Agreement (the "Term") shall be from _____, to _____, unless sooner terminated according to the terms of this Agreement, including, but not limited to, the TJPA's rights to terminate under Section 6 of this Agreement.

3. EFFECTIVE DATE

This Agreement shall become effective upon full execution and delivery of this Agreement by both parties, provided that Counsel shall not perform any work under this Agreement until the Executive Director gives Counsel either written or oral notice to proceed with performance of the Scope of Services under this Agreement.

4. COMPENSATION

4.1 Fee and Expense Schedule

TJPA shall compensate Counsel for all of the services rendered by Counsel under this Agreement as set forth in the *Rate Sheet* and *Statement of Fee and Billing Information*, both attached hereto as Exhibit A, subject to the terms and conditions contained in Exhibit A and elsewhere in this Agreement. Such compensation is the total compensation for all services this Agreement contemplates. To the extent there is any conflict or inconsistency between the terms of engagement set forth in Exhibit A and the terms of this Agreement, the parties agree that terms of this Agreement shall control.

The *Rate Sheet* may be amended from time to time, with the written approval of the parties to this Agreement. Notwithstanding anything to the contrary herein, the compensation of Counsel is conditioned upon the Executive Director's prior reasonable determination that the services have been satisfactorily rendered in accordance with this Agreement. Compensation shall be payable within a reasonable time from receipt of invoices in accordance with Section 5. In no event shall the TJPA be liable for interest or late charges.

4.2 Not to Exceed Contract Amount

In no event shall the total fees and reimbursable amounts payable under this Agreement exceed one hundred thousand dollars (\$100,000.00). Counsel shall keep the Executive Director informed on a periodic basis, not less than monthly, of the amount of its billings and notify the Executive Director in writing immediately upon determining that such amount is within ten thousand dollars (\$10,000.00) of the total amount of funds available under this Agreement.

5. METHOD OF PAYMENT

5.1 Invoices

As a condition to TJPA's obligation to pay any compensation, Counsel must furnish invoices under this Agreement in a form reasonably acceptable to the Executive Director. Counsel shall provide the Executive Director with monthly invoices that identify services by task with a brief descriptive narrative of the service provided, by whom rendered, and the time (hours and fractions thereof) expended.

Payments will be made to Counsel no more frequently than once each month. Counsel must submit all statements for services rendered and expenses incurred to the Executive Director or her designee. Payments will be made to Counsel upon approval of the Executive Director consistent with the terms and conditions of this Agreement. In addition, as a condition to TJPA's obligation to pay, Counsel shall have provided to the Executive Director a current certificate of insurance in accordance with Section 8.3.

5.2 Taxes

Counsel has the sole obligation to pay any taxes, including, without limitation, California sales and use taxes, levied on this Agreement, the transaction, or the services delivered.

5.3 Payment Does Not Imply Acceptance of Work

The granting of any payment by TJPA, or Counsel's receipt thereof by Counsel, shall not discharge Counsel's obligation to correct unsatisfactory work although the unsatisfactory character of such work may not have been apparent or detected at the time such payment was made. The Executive Director may reject work product that does not conform to the requirements of this Agreement, and in such case Counsel shall correct any deficiencies without delay and without additional charge under this Agreement.

6. TERMINATION

6.1 Termination Without Cause

The Executive Director, in her sole discretion, may terminate this Agreement for the TJPA's convenience and without cause, at any time, by giving Counsel at least thirty (30) days written notice of such termination.

In the event of such termination TJPA will pay Counsel for those services performed in accordance with this Agreement, and to the satisfaction of the TJPA, up to the date of termination. In no event will the TJPA be liable for costs incurred by Consultant after receipt of a notice of termination.

Such non-recoverable costs include, but are not limited to, anticipated profits on this Agreement, post-termination employee salaries, post-termination administrative expenses, or any other cost which is not reasonable or authorized under this Section or is not permitted under Section 11 or any other provision of this Agreement.

The limitations set forth in this Section shall not prevent Counsel from recovering costs that Counsel necessarily incurred in discontinuing further work after receipt of the termination notice to the extent such costs are otherwise payable under this Agreement.

6.2 Non Exclusive Remedies

The TJPA's right to terminate this Agreement under this Section 6 is not its exclusive remedy but is in addition to all other remedies available to the TJPA by law, in equity, or under the provisions of this Agreement.

6.3 Duties Upon Termination

Upon any termination of this Agreement, Counsel shall immediately provide TJPA with complete and accurate copies or originals - where appropriate - of all documents in its possession belonging to TJPA. Counsel further agrees to do all other

things reasonably necessary to cause an orderly transition of services without detriment to the rights of TJPA.

7. STAFFING

7.1 Commitment of Qualified Personnel

Services under this Agreement shall be performed only by competent personnel under the supervision of and in the employment of Counsel. Particular tasks must be performed by lawyers with appropriate levels of experience for the performance of such tasks.

7.2 Named Personnel

This Agreement retains the legal services of the law firm of Meyers, Nave, Riback, Silver & Wilson and not of a particular attorney.

Counsel has been selected due to the unique skills and experience of the following named personnel who will be the principal in charge of representing the TJPA's interests:

David W. Skinner, Lead Attorney

The lead attorney(s) named above shall be the principal contact with the Executive Director. Any change in the lead attorney(s) requires the Executive Director's prior written approval. Staffing decisions required to be taken by Counsel in an emergency for which prior written approval of the Executive Director is not feasible shall be limited to such emergency situation only, taken by Counsel in a reasonable manner and require immediate follow-up discussions with the Executive Director.

At all times Counsel shall staff meetings, hearings, proceedings and the other elements of the scope of services to be rendered under this Agreement in a cost effective manner, consistent with the requirements of Section 7.1 above and as otherwise provided in this Agreement.

8. INSURANCE

8.1 Required Coverage

Subject to approval by City's Risk Manager of the insurer and the policy forms, Counsel shall procure and maintain throughout the Term of this Agreement, at Counsel's sole expense, general liability and property damage insurance in the amount of \$1,000,000; professional errors and omissions insurance in an amount of \$2,000,000 per occurrence; and \$4,000,000 aggregate, which insurance may not be canceled or reduced in required limits of liability without at least ten days advance written notice to the Executive Director.

8.2 Liability Policies

Except for Professional Liability Insurance, all liability policies that this Section requires Counsel to maintain shall provide for the following: (i) name as additional insureds the TJPA, its officers, agents and employees; (ii) name as additional insureds the City and County of San Francisco, its officers, agents and employees to the extent they or any of them are acting as Administrator of the Transbay Joint Powers Agreement; and (iii) specify that such policies are primary insurance to any other insurance available to the additional insureds, with respect to any claims arising out of this Agreement and that insurance applies separately to each insured against whom claim is made or suit is brought.

Such policies shall also provide for severability of interests and that an act or omission of one of the named insureds that would void or otherwise reduce coverage shall not reduce or void the coverage as to any insured, and shall afford coverage for all claims based on acts, omissions, injury or damage which occurred or arose (or the onset of which occurred or arose) in whole or in part during the policy period.

8.3 Certificates

Before the commencement date of this Agreement, Counsel shall deliver to the Executive Director a certificate of insurance for each required policy. Each policy and certificate shall provide that no cancellation, major change in coverage or expiration shall become effective or occur until at least thirty (30) days after receipt of written notice by the Executive Director.

8.4 General Annual Aggregate Limits

Should Counsel provide any of the required liability insurance under a form of coverage that includes a general annual aggregate limit or provides that claims investigation or legal defense costs be included in such general annual aggregate limit, either the general aggregate limit shall apply separately to this Agreement or the general aggregate limit shall be twice the occurrence or claims limits specified above.

8.5 Lapse in Coverage

Should any required insurance lapse during the term of this Agreement, Counsel shall immediately notify the Executive Director. Regardless of whether the Executive Director receives such notice from Counsel, the Executive Director shall have the sole option to direct Counsel to immediately discontinue all work under this Agreement. Requests for payments originating after such lapse shall not be processed until the Executive Director receives satisfactory evidence of reinstated coverage as

required by this Agreement, effective as of the lapse date. If insurance is not reinstated, the Executive Director may, at her sole option, terminate this Agreement upon the lapse of any required insurance, and TJPA shall have no further obligation to pay Counsel after such termination.

8.6 Claims Made Forms

Should any of the required insurance be provided under a claims-made form, Counsel shall maintain such coverage continuously throughout the term of this Agreement and, without lapse, for a period of three (3) years beyond the expiration of the term of this Agreement, so if any occurrences during the term of this Agreement give rise to claims made after expiration of the Agreement, such claims shall be covered by such claims-made policies.

8.7 Review of Requirements

At the request of the Executive Director, Counsel and the Executive Director shall periodically review the limits and types of insurance carried pursuant to this Section 8. If the general commercial practice in the City is to carry liability insurance in an amount or coverage materially greater than the amount or coverage being carried by Counsel for risks comparable to those associated with the activities to be conducted under this Agreement, then the amounts or coverage carried by Counsel shall be increased to conform to such general commercial practice.

9. ASSIGNMENT AND SUBCONTRACTING

9.1 Limitations on Assignment

Counsel shall not, without written consent of the Executive Director, assign or transfer any interest in this Agreement, or delegate its performance of duties under this Agreement, in whole or in part; and no approval of any assignment, transfer, or delegation of duties shall constitute approval of any subsequent assignment, transfer or delegation of duties. Counsel recognizes and agrees that the services to be performed under this Agreement are personal in nature, and the Executive Director may give, withhold or condition her consent in her sole and absolute discretion.

9.2 Limitations on Subcontracting

Counsel is prohibited from subcontracting this Agreement or any part of it unless Counsel first obtains the City Attorney's and Executive Director's written approval of the subcontractor and the scope of services to be performed under any subcontract. Any such subcontracting will be subject to the approval of the Executive Director in her sole and absolute discretion. An agreement made in violation of this provision shall confer no rights on any other party and shall, at TJPA's sole option, be void.

The TJPA understands and agrees that Counsel maintains *of counsel* agreements with certain legal specialists. Because these individuals are deemed independent contractors under the applicable provisions of the tax laws and not employees of the firm, the TJPA consents to dual representation by the firm and the specialist in the event the matter which the TJPA has engaged Counsel to handle requires the use of that specialist. The use of legal specialists shall have no effect whatsoever on the cost of legal services Counsel shall remain responsible for the quality. The TJPA understands and agrees that Counsel is disclosing its use of legal specialists as an ethical requirement and consents to such usage in entering this Agreement.

10. CONFLICTS OF INTEREST

10.1 Knowledge of Conflict Section

Through its execution of this Agreement, Counsel acknowledges that it is familiar with the provisions of Section 87100 et seq. of the Government Code of the State of California, and certifies that it does not know of any facts which constitute a violation of such provisions.

10.2 Disclosure of Any Conflicts

By executing this Agreement, Counsel further certifies that it has made a complete disclosure to the Executive Director of all facts bearing upon any possible interest, direct or indirect, which it believes any member of the TJPA, or other officer, agent or employee of City, presently has, or will have, in this Agreement, or in the performance thereof, or in any portion of the profits thereunder, except as disclosed in advance to and waived in writing. The existence of any actual or potential conflict must be promptly reported by Counsel to the Executive Director and resolved to the Executive Director's satisfaction before representation proceeds. Willful failure to make such disclosure, if any, shall constitute grounds for cancellation and termination of this Agreement by the Executive Director.

10.3 No Conflict of Interest

Counsel has done a conflicts check within its firm and certifies that it has no conflict of interest with respect to its assistance to the TJPA or has obtained a written conflicts waiver from the Executive Director, in her sole and absolute discretion.

11. NO SPECIAL DAMAGES

The TJPA's payment obligations under this Agreement shall be limited to the payment of compensation provided for in Exhibit A attached hereto. Notwithstanding any other provision of this Agreement, in no event shall the TJPA be liable, regardless of whether any claim is based on contract or tort, for any special, consequential, indirect or incidental damages, including, but not limited to, lost profits, arising out of or in connection with this Agreement or the services performed in connection with this Agreement.

12. NONDISCRIMINATORY EMPLOYMENT AND BUSINESS OPPORTUNITIES PRACTICES

12.1 Counsel Shall Not Discriminate

In the performance of this Agreement, Counsel agrees not to discriminate on the basis of the fact or perception of a person's race, color, creed, religion, national origin, ancestry, age, sex, height, weight, sexual orientation, gender identity, domestic partner status, marital status, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status) against any employee of, any TJPA or City employee working with, or applicant for employment with Counsel, in any of Counsel's operations within the United States, or against any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations operated by Counsel.

12.2 Subcontracts

Counsel shall not subcontract the performance of any work to outside attorneys without the express written approval of the City Attorney.

13. NOTICES

All notices or other communications to either party by the other as may be required by this Agreement shall be deemed given when made in writing and delivered in person or deposited in the United States mail as follows:

To the TJPA:

Transbay Joint Powers Authority

201 Mission Street, Suite 1960

San Francisco, CA 94105

Attn: Maria Ayerdi

Deputy Executive Director

Fax: (415) 554-6018

To the Counsel:

Meyers, Nave, Riback, Silver & Wilson

555 12th Street, Suite 1500

Oakland, CA 94607

Attn: David W. Skinner, Esq.

Fax: (510) 444-1108

or to such other address as either TJPA or Counsel may designate as its new address for such purpose by notice given to the other in accordance with the provisions of this Section 13 at least ten (10) days prior to the effective date of such change.

Any notice hereunder shall be deemed to have been given three (3) days after the date when it is mailed if sent by first class or certified mail, one day after the date it is made if sent by overnight courier, or upon the date personal delivery is made. For convenience of the parties, copies of notices may also be given by telefacsimile to the telephone number set forth herein or such other number as may be provided from time to time.

14. GENERAL CONDITIONS

14.1 Severability

Any provision or portion of this Agreement prohibited as unlawful or unenforceable under any applicable law of any jurisdiction shall as to such jurisdiction be ineffective without affecting other provisions of this Agreement. If the provisions of such applicable law may be waived, they are hereby waived to the end that this Agreement may be deemed to be a valid and binding Agreement enforceable in accordance with its terms.

14.2 Governing Law

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.

14.3 Compliance with Laws

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

14.4 Amendments

Neither this Agreement nor any term or provisions hereof may be changed, waived, discharged, or terminated, except by a written instrument signed by both parties hereto or except as otherwise expressly provided in this Agreement.

14.5 Survival

Termination, expiration or cancellation of this Agreement shall not affect any provision of this Agreement that states it shall survive termination, expiration or cancellation thereof.

14.6 Approvals by TJPA; Point of Contact

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

14.7 Counsel Responsibility

Counsel shall report to, and work under the direction and control of, the Executive Director or her designee, in the performance of the services. Counsel agrees to be solely responsible, however, for its own actions and those of its subordinates and subcontractors throughout the term of this Agreement. Counsel shall handle any press contact it receives directly or indirectly in connection with the subject of this Agreement in coordination with the Executive Director. Counsel also agrees that any court and administrative filings, written opinions and any correspondence containing substantive advice shall be reviewed and approved by Executive Director before issuance.

14.8 Federal Requirements

The provisions contained in "FTA Requirements for Personal Services Contracts," attached as Exhibit B are incorporated into this Agreement. If there is any

conflict between the FTA terms and conditions and other terms and conditions of this Agreement, the FTA terms and conditions shall take precedence.

14.8 Execution in Counterparts

This Agreement may be executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same Agreement.

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

**TRANSBAY JOINT POWERS
AUTHORITY**

Meyers, Nave, Riback, Silver & Wilson

**by:
MARIA AYERDI, EXEC. DIR.**

**by:
DAVID W. SKINNER**

Federal Employee Number _____

**APPROVED AS TO FORM:
DENNIS J. HERRERA, CITY
ATTORNEY**

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

BY:

Deputy City Attorney

Secretary, TJPA Board

EXHIBIT A

**MEYERS, NAVE, RIBACK, SILVER & WILSON
RATE SHEET**

Sr. Principal	350
Principal	330
Sr. Of Counsel	350
Jr. Of Counsel	330
Sr. Associate	250
Associate	200
Paralegal	110
Law Clerk	80
Other	55

MEYERS, NAVE, RIBACK, SILVER & WILSON
STATEMENT OF FEE AND BILLING INFORMATION

The following is a general description of our fee and billing policies. These general policies may be modified by the specific engagement letter or agreement to which this summary is attached.

Professional Fees. Our fees for professional services are based on the fair value of the services rendered. To help us determine the value of our services, our attorneys and paralegals maintain time records for each client and matter. Our attorneys and paralegals are assigned hourly rates which are based on years of experience, specialization, training and level of professional attainment. We adjust our rates periodically (usually at the beginning of each year) to take into account inflation and the increased experience of our professional personnel.

To keep professional fees at a minimum, legal work that does not require more experienced attorneys will be performed, where feasible, by attorneys with lower billing rates. Of course, the quality of the work is paramount, and we do not sacrifice quality to economy.

Before undertaking a particular assignment, we will, if requested, provide you with a fee estimate to the extent possible. Estimates are not possible for some matters, however, and cannot be relied on in many others because the scope of our work will not be clear at the outset. When a fee estimate is given, it is only an estimate; it is not a maximum or minimum fee quotation. The actual fee may be more or less than the quoted estimate.

Retainer. Our normal practice is to require a retainer to cover a portion of the anticipated attorneys' fees and costs. Any retainer will be placed in the firm's trust account. At the conclusion of our services, we will return to our client any unapplied retainer, after deducting payment for charges billed or to-be-billed for services and any remaining out-of-pocket expenses.

Billing And Payment Procedures. Unless other arrangements are made at the time of the engagement, invoices will be sent monthly. Invoices for outside services exceeding \$100 may be billed separately. Occasionally, however, we may defer billing for a given month or months if the accrued fees and costs do not warrant current billing or if other circumstances would make it appropriate to defer billing.

Our invoices contain a brief narrative description of the work performed; if requested, the initials of the attorney who performed the work will appear on the statement. The invoice will include a line item reflecting in-house administrative costs. The firm's in-house administrative costs include, but are not limited to, duplicating, facsimile charges, telephone charges, E-mail, postage, mileage and other administrative expenses. We have determined that the most effective method of accounting for these administrative costs is to charge a flat 8% of the professional fees incurred.

The firm will be reimbursed for all outside services incurred in the course of providing legal services to our client(s). Outside services will include, but are not limited to, all third-party expenses, delivery charges, travel expenses, outside research services, filing fees, expert witness and expert consultant fees. To defray the firm's costs for administering these services, there will be an additional cost advance charge of 2% for all outside services of \$100 or more.

If you have any questions regarding an invoice, the Finance Director or Executive Director is available to answer your questions. For any unresolved matters, the Bar Association has an arbitration mechanism that can be used to resolve such matters.

Late Payments. N/A

Exhibit B
FTA Provisions

FTA REQUIREMENTS FOR PERSONAL SERVICES CONTRACTS

1. **DEFINITIONS**

a. **Approved Project Budget** means the most recent statement, approved by the FTA, of the costs of the Project, the maximum amount of Federal assistance for which the City is currently eligible, the specific tasks (including specified contingencies) covered, and the estimated cost of each task.

b. **Contractor** means the individual or entity awarded a third party contract financed in whole or in part with Federal assistance originally derived from FTA.

c. **Cooperative Agreement** means the instrument by which FTA awards Federal assistance to a specific Recipient to support a particular Project or Program, and in which FTA takes an active role or retains substantial control.

d. **Federal Transit Administration** is the current designation for the former Urban Mass Transportation Administration. Any reference in any law, map, regulation, document, paper, or other record of the United States to the Urban Mass Transportation Administration shall be deemed a reference to the Federal Transit Administration.

e. **Federal Transit Administrator** is the current designation for the former Urban Mass Transportation Administrator. Any reference in any law, map, regulation, document, paper, or other record of the United States to the Urban Mass Transportation Administrator shall be deemed a reference to the Federal Transit Administrator.

f. **FTA** is the acronym for the Federal Transit Administration, one of the operating administrations of the U.S. DOT. FTA replaces the acronym UMTA.

g. **FTA Directive** includes any FTA circular, notice, order or guidance providing information about FTA's programs, application processing procedures, and Project management guidelines. In addition to FTA directives, certain U.S. DOT directives also apply to the Project.

h. **Grant Agreement** means the instrument by which FTA awards Federal assistance to a specific Recipient to support a particular Project, and in which FTA does not take an active role

or retain substantial control, in accordance with 31 U.S.C. § 6304.

i. **Government** means the United States of America and any executive department or agency thereof.

j. **Project** means the task or set of tasks listed in the Approved Project Budget, and any modifications stated in the Conditions to the Grant Agreement or Cooperative Agreement applicable to the Project. In the case of the formula assistance program for urbanized areas, for elderly and persons with disabilities, and non-urbanized areas, 49 U.S.C. §§ 5307, 5310, and 5311, respectively, the term "Project" encompasses both "Program" and "each Project within the Program," as the context may require, to effectuate the requirements of the Grant Agreement or Cooperative Agreement.

k. **Recipient** means any entity that receives Federal assistance directly from FTA to accomplish the Project. The term "Recipient" includes each FTA "Grantee" as well as each FTA Recipient of a Cooperative Agreement. For the purpose of this Agreement, Recipient is the City.

l. **Secretary** means the U.S. DOT Secretary, including his or her duly authorized designee.

m. **Third Party Contract** means a contract or purchase order awarded by the Recipient to a vendor or contractor, financed in whole or in part with Federal assistance awarded by FTA.

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

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

2. **FEDERAL CHANGES**

Contractor shall at all times comply with all applicable FTA regulations, policies, procedures and directives, including without limitation those listed directly or by reference in the Agreement (Form FTA MA(3) dated October, 1996) between Purchaser and FTA, as they may be amended or promulgated from time to time during the term of this contract. Contractor's failure to so comply shall constitute a material breach of this contract.

3. **AUDIT AND INSPECTION**

A. The Contractor agrees to provide the City and County of

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

B. The Contractor agrees to permit any of the foregoing parties to reproduce by any means whatsoever or to copy excerpts and transcriptions as reasonably needed.

C. The Contractor agrees to maintain all books, records, accounts and reports required under this Agreement for a period of not less than three years after the date of termination or expiration of this Agreement, except in the event of litigation or settlement of claims arising from the performance of this Agreement, in which case Contractor agrees to maintain same until the City, the FTA Administrator, the Comptroller General, or any of their duly authorized representatives, have disposed of all such litigation, appeals, claims or exceptions related thereto. 49 CFR 18.36(i)(11).

4. DEBARMENT AND SUSPENSION

The Contractor agrees as follows:

A. The Contractor shall supply certifications on debarment and suspension and otherwise comply with the requirements of Executive Orders Nos. 12549 and 12689, "Debarment and Suspension," 31 U.S.C. § 6101; and U.S. DOT regulations on Debarment and Suspension at 49 CFR Part 29.

B. (Applicable to contracts in excess of \$100,000) Contractor agrees to refrain from awarding any third party subcontract of any amount (at any tier) to a debarred or suspended subcontractor.

C. Before entering into any third party subcontract in excess of \$100,000, Contractor agrees to obtain a debarment and suspension certification from each prospective third party subcontractor (at any tier). The certificate shall contain information about the debarment and suspension status and other specific information about the subcontractor and its "principals," as defined at 49 CFR § 29.105(p). An example of the appropriate certification is contained in 49 CFR Part 29, Appendix B.

D. Contractor shall provide City with a copy of each conditioned debarment or suspension certification provided by a prospective third party subcontractor (at any tier).

5. NO FEDERAL GOVERNMENT OBLIGATIONS TO CONTRACTOR

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

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

6. CIVIL RIGHTS

A. **Nondiscrimination** - In accordance with Title VI of the Civil Rights Act, as amended, 42 U.S.C. § 2000d, section 303 of the Age Discrimination Act of 1975, as amended, 42 U.S.C. § 6102, section 202 of the Americans with Disabilities Act of 1990, 41 U.S.C. § 12132, and Federal transit law at 49 U.S.C. § 5332, the Contractor agrees that it will not discriminate against any employee or applicant for employment because of race, color, creed, national origin, sex, age, or disability. In addition, the Contractor agrees to comply with applicable Federal implementing regulations and other implementing requirements FTA may issue.

B. **Equal Employment Opportunity** - The following equal employment opportunity requirements apply to the underlying contract:

(1) **Race, Color, Creed, National Origin, Sex** - In accordance with Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e, and Federal transit laws at 49 U.S.C. § 5332, the Contractor agrees to comply with all applicable equal employment opportunity requirements of U.S. Department of Labor (U.S. DOT) regulations, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor," 41 CFR Parts 60 et seq., (which implement Executive Order No. 11246, "Equal Employment Opportunity," as amended by Executive Order No. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," 42 U.S.C. § 2000e note), and with any applicable Federal statutes, executive orders, regulations, and Federal policies that may in the future affect construction activities undertaken in the course of the Project. The Contractor agrees to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, creed, national origin, sex, or age. Such action shall include, but not be limited to, the

following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.

(2) **Age** - In accordance with section 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 623 and Federal transit law at 49 U.S.C. § 5332, the Contractor agrees to refrain from discrimination against present and prospective employees for reason of age. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.

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

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

7. **PATENT RIGHTS** (*required in contracts for experimental, research, or development projects financed by FTA*)

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

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

Government Grants, Contracts and Cooperative Agreements," 37 CFR Part 401.

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

8. **RIGHTS IN DATA AND COPYRIGHTS** (*Required in contracts for planning, research, or development financed by FTA*)

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

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

(1) **Publication of Data.** Except for its own internal use in conjunction with the Agreement, Contractor may not publish or reproduce subject data in whole or in part, or in any manner or form, nor may Contractor authorize others to do so, without the written consent of the Federal Government, until such time as the Federal Government may have either released or approved the release of such data to the public; this restriction on publication, however, does not apply to any contract with an academic institution.

(2) **Federal License.** In accordance with 49 CFR §§ 18.34 and 19.36, the Federal Government reserves a royalty-free, non-exclusive and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, "for Federal Government purposes," any subject

data or copyright described below. As used in the previous sentence, "for Federal Government purposes" means use only for the direct purposes of the Federal Government. Without the copyright owner's consent, the Federal Government may not extend its Federal license to any other party:

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

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

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

(4) **Hold Harmless.** Unless prohibited by state law, upon request by the Federal Government, the Contractor agrees to indemnify, save, and hold harmless the Federal Government, its officers, agents, and employees acting within the scope of their official duties, against any liability, including costs and expenses, resulting from any willful or intentional violation by the Contractor of proprietary rights, copyrights, or right of privacy, arising out of the publication, translation, reproduction, delivery, use, or disposition of any data furnished under this

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

(5) **Restrictions on Access to Patent Rights.**

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

(6) **Application to Data Incorporated into Work.**

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

(7) **Application to Subcontractors.**

Unless FTA determines otherwise, the Contractor agrees to include these requirements in each subcontract for experimental, developmental, or research work financed in whole or in part with Federal assistance provided by FTA.

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

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

9. **EMPLOYEE PROTECTIONS** (*applicable to nonconstruction contracts in excess of \$2,500*)

A. **Overtime requirements** - No contractor or subcontractor

contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

B. Violation; liability for unpaid wages; liquidated damages - In the event of any violation of the clause set forth in paragraph (A) of this section the Contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, Contractor and subcontractors shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (A) of this section, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (A) of this section.

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

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

E. Payrolls and basic records - Payrolls and basic records relating thereto shall be maintained by the Contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work (or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the Project). Such records shall contain the name, address, and social security number of each such worker,

his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the Contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

10. **ENERGY CONSERVATION REQUIREMENTS**

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

11. **CLEAN WATER REQUIREMENTS** (*The Clean Water requirements apply to all contracts in excess of \$100,000.*)

A. The Contractor agrees to comply with all applicable standards, orders, or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251 et seq. Contractor agrees to report each violation of these requirements to the City and understands and agrees that the City will, in turn, report each violation as required to assure notification to FTA and the appropriate EPA regional office.

B. The Contractor also agrees to include these requirements in each subcontract exceeding \$100,000 financed in whole or in part with Federal assistance provided by FTA.

12. **CLEAN AIR** (*The Clean Air requirements apply to all contracts in excess of \$100,000, including indefinite quantities where the amount is expected to exceed \$100,000 in any year.*)

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

assure notification to FTA and the appropriate EPA Regional Office.

B. The Contractor also agrees to include these requirements in each subcontract exceeding \$100,000 financed in whole or in part with Federal assistance provided by FTA.

13. **METRIC SYSTEM**

To the extent practicable and feasible, the City will accept products and services with dimensions expressed in the metric system of measurement.

14. **PRIVACY**

If Contractor or its employees administer any system of records on behalf of the Federal Government, Contractor and its employees agree to comply with the information restrictions and other applicable requirements of the Privacy Act of 1974, 5 U.S.C. § 552a (the Privacy Act). Specifically, Contractor agrees to obtain the express consent of the Federal Government before it or its employees operates a system of records on behalf of the Government. Contractor acknowledges that the requirements of the Privacy Act, including the civil and criminal penalties for violations of the Privacy Act, apply to those individuals administering a system of records for the Federal Government under the Project, and that failure to comply with the terms of the Privacy Act may result in termination of this Agreement. The Contractor also agrees to include these requirements in each subcontract to administer any system of records on behalf of the Federal Government financed in whole or in part with Federal assistance provided by FTA.

15. **DRUG AND ALCOHOL TESTING**

To the extent Contractor, its subcontractors or their employees perform a safety-sensitive function under the Agreement, Contractor agrees to comply with, and assure compliance of its subcontractors, and their employees, with 49 U.S.C. § 5331, and FTA regulations, "Prevention of Prohibited Drug Use in Transit Operations," 49 CFR Parts 653 and "Prevention of Alcohol Misuse in Transit Operations," 49 CFR Part 654.

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

See Agreement Terms and Conditions.

17. **TERMINATION FOR DEFAULT** (required by FTA for all contracts in excess of \$10,000)

See Agreement Terms and Conditions.

18. **FALSE OR FRAUDULENT STATEMENTS AND CLAIMS**

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

B. The Contractor also acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification to the Federal Government under a contract connected with a project that is financed in whole or in part with Federal assistance originally awarded by FTA under the authority of 49 U.S.C. § 5307, the Government reserves the right to impose the penalties of 18 U.S.C. § 1001 and 49 U.S.C. § 5307(n)(1) on the Contractor, to the extent the Federal Government deems appropriate.

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

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

- The preceding provisions include, in part, certain Standard Terms and Conditions required by DOT, whether or not expressly set forth in the preceding contract provisions. All contractual provisions required by DOT, as set forth in FTA Circular 4220.1D, dated April 15, 1996, 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 City request which would cause the City to be in violation of the FTA terms and conditions.

20. **FLY AMERICA REQUIREMENTS** - The Contractor agrees to comply with 49 U.S.C. 40118 (the "Fly America" Act) in accordance with the General Services Administration's regulations at 41 CFR Part 301-10, which provide that recipients and 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. The Contractor shall submit, if a foreign air carrier was used, an appropriate certification or memorandum adequately explaining why service by a U.S. flag air carrier was not available or why it was necessary to use a foreign air carrier and shall, in any event, provide a certificate of compliance with the Fly America requirements. The Contractor agrees to include the requirements of this section in all subcontracts that may involve international air transportation.