

**SAN FRANCISCO
MUNICIPAL TRANSPORTATION AGENCY**

DIVISION: Finance and Information Technology

BRIEF DESCRIPTION:

Authorizing the Director of Transportation to execute a Public Private Partnership Agreement between the City and County of San Francisco, through the SFMTA, and FOCIL-MB, LLC (FOCIL), for the proposed implementation of transportation infrastructure improvements by FOCIL in the Mission Bay area of San Francisco, in an amount not to exceed \$6,515,770, which will supplement FOCIL's own project funding.

SUMMARY:

- FOCIL is responsible for the development of Mission Bay, including certain transportation improvements, as provided in the Owner Participation Agreement between FOCIL and the City.
- The SFMTA is designing a rail loop, the Mission Bay Loop (Loop Project), to increase the flexibility of current and future light rail service along the Third Street line.
- To partially fund both entities' needs, FOCIL and the SFMTA partnered to submit an application to FTA for \$15,500,000 in TIGER funds, a marquee grant program under the Obama administration.
- FTA has awarded the SFMTA a grant of \$10,000,000 of TIGER funds. The grant will be split between FOCIL and the SFMTA to support street-related improvements to be delivered by FOCIL and the Loop project.
- Under the Agreement, FOCIL will receive \$5,127,774 of the TIGER funds, with the remaining \$4,872,226 dedicated to the design and construction of the Loop.
- Because the TIGER grant was less than anticipated, SFMTA will supplement FOCIL's transportation improvements in the amount of \$1,387,996.

ENCLOSURES:

1. SFMTAB Resolution
2. TIGER Grant Funding Plan (Exhibit A)
3. Public Private Partnership Agreement

APPROVALS:

DATE

DIRECTOR _____

1/13/14

SECRETARY _____

1/13/14

ASSIGNED SFMTAB CALENDAR DATE: January 21, 2014

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PURPOSE

The purpose of this calendar item is to request approval of a Public Private Partnership Agreement between the SFMTA and FOCIL for the implementation by FOCIL of transportation improvements in Mission Bay.

GOAL

Goal 1: Customer Focus: To provide safe, accessible, clean, environmentally sustainable service and encourage the use of auto-alternative modes through the Transit First Policy

Objective 1.3: Reduce emissions as required by SFMTA Clean Air Plan

Objective 1.5: Increase percentage of trips using more sustainable modes

➤ *FOCIL's improvements will include new facilities for people who walk or bicycle.*

Goal 3: External Affairs/Community Relations: To improve the customer experience, community value, and enhance the image of the SFMTA, as well as ensure SFMTA is a leader in the industry

Objective 3.4 Enhance proactive participation and cooperatively strive for improved regional transportation

➤ *The TIGER program is the marquee transportation investment of the Obama administration. All TIGER-funded investments are defined as having regional, statewide and national benefits.*

DESCRIPTION

TIGER Grant

The two partners in this agreement, SFMTA and FOCIL, faced funding shortfalls in delivering key transportation infrastructure investments in Mission Bay. The SFMTA's proposed Loop Project, currently in design, will complete a loop from existing Third Street turn-outs at 18th and 19th Streets. The Loop is planned to go around the block defined by Third Street, 18th Street on the north, Illinois Street on the east, and 19th Street on the south. FOCIL, as a successor to Catellus Development Corporation, is obligated to the City, through the Mission Bay South Owner Participation Agreement (OPA), executed in November 1998 between the City and Catellus, to design and construct various transportation improvements in Mission Bay.

In 2009, the Obama administration established the Transportation Investment Generating Economic Recovery, or TIGER Discretionary Grant Program, as a unique opportunity for the U.S. Department of Transportation to invest in road, rail, transit and port projects that promise to achieve critical national objectives. The TIGER Grant Program is designed for projects that will have a significant impact on the nation, a metropolitan area, or a region.

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When the Recession slowed down development in Mission Bay, FOCIL proposed partnering with SFMTA in the submittal of an application for a TIGER Grant for the Mission Bay/UCSF Hospital Multimodal Transportation Project (TIGER Grant Project). At the same time, the SFMTA saw an opportunity to secure funds for the Loop Project. FOCIL, a private sector entity, is not eligible to apply directly for TIGER funds.

The TIGER Grant Project consists of four elements. Element 1 is street-related improvements serving the UCSF Medical Center. Element 2 consists of street related improvements in Mission Bay's Tech/Biotech Corridor, but, as explained below, this element will not receive TIGER Grant funds. Element 3 is traffic circle connectors, which include pedestrian, bikeway, auto and transit improvements. Element 4 is the design and construction of the Mission Bay Loop.

We submitted an application in March 2012, which was approved for funding during the fourth cycle of TIGER funding. We received broad support for our application, including from Leader Pelosi's office. Additionally, as time elapsed between the TIGER grant cycles, FOCIL made strides in meeting its infrastructure commitments. When this happens, an applicant is demonstrating project-readiness, a critical element of any grant application.

We requested \$15,500,000 in TIGER funds and were awarded \$10,000,000. Nonetheless, FTA stipulated that all four elements of the TIGER application needed to be completed despite the partial award. A dialog ensued between SFMTA, FOCIL, and FTA during which we agreed to complete three out of four of the proposed elements (Elements 1, 3 and 4, but not Element 2) using TIGER funds. Element 2 was not as advanced in its construction schedule and we agreed not to use the TIGER funds for that work.

FTA directed the SFMTA to program the TIGER funds in such a way that 80% of the Loop's design and construction costs are funded with the TIGER Grant. This results in SFMTA receiving \$4,872,226 of TIGER Grant funds, just less than half of the \$10,000,000 available, with FOCIL receiving \$5,127,774 of the TIGER Grant funds. This was less than FOCIL had anticipated or budgeted for.

In March 2013, negotiations ensued during which FOCIL proposed receiving \$7,750,000 of the TIGER funds, leaving SFMTA \$2,250,000 of the \$10,000,000. SFMTA's stance was that, at the bidding of FTA, 80% of the transit Loop's costs, \$4,718,461, needed to be paid for with TIGER funds. The difference between the two SFMTA figures was \$2,468,461. With the guidance of the Mayor's Office, SFMTA staff and FOCIL agreed to split the difference so that SFMTA could claim its intended \$4,718,461 of TIGER funds and make a payment of non-TIGER funds to FOCIL of \$1,234,231.

The SFMTA payment amount now proposed is \$1,387,996, an increase of \$153,765 because the amount of TIGER funds SFMTA needs for the Loop has gone up by the same amount. FOCIL has agreed to this split.

The Agreement outlines that as FOCIL spends its money on grant eligible costs, it will get reimbursed 75.5% from the TIGER grant and 24.5% with our funds until our \$1,387,996 obligation is met.

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The SFMTA is the overall fiscal agent for the TIGER grant with responsibilities to the FTA to ensure timely delivery of TIGER-funded scope in compliance with all applicable federal grant guidance. While the SFMTA often acts as a fiscal agent to pass grant funds through to ineligible partners, in this case the SFMTA will partially pass funds through to its partner while retaining some funds for its own work element.

The SFMTA will report monthly on all four elements to the FTA's Project Management Oversight Contractor (PMOC), will submit quarterly progress reports, and will make presentations at FTA Quarterly meetings attended by the Director of Transportation and FTA's Region 9 Administrator along with his senior staff.

Project Schedule/Environmental

- Loop Project: Although TIGER Grant funds will be used for construction of the Loop Project, SFMTA is not required to construct the Loop Project under this Agreement. For informational purposes, however, SFMTA needs to complete design of the Loop Project, but anticipates that it will return to this Board to award the construction contract for the Loop Project in June 2014. Under that schedule, substantial completion would be in December 2014, with revenue service anticipated in February 2015.

The Loop Project was evaluated in the Third Street Light Rail Project Final Environmental Impact Report in December 1998. The Planning Department determined on October 12, 2012 that no further assessment was required under CEQA. On July 20, 2013, the FTA issued a Finding of No Significant Impact (FONSI) under NEPA after an Environmental Assessment for the Loop Project was completed in May 2013.

- Street Elements: FOCIL will award its contract in March 2014. Substantial completion of the street elements will be March 2015 (excluding the Tech/Biotech Corridor element). The street elements will have a project opening date in May 2015. FOCIL has obtained all CEQA and NEPA clearances for its work.

Provisions of Agreement

- While the FTA does not require a legally binding written agreement between the public agency sponsor and the private partner, the Parties have negotiated the attached Agreement in order to (1) have a mechanism to reimburse FOCIL with Grant funds; (2) ensure that FOCIL constructs its Project Elements for which it will receive TIGER Grant funds; and (3) ensure that FOCIL expends Grant funds in compliance with FTA requirements. Note that the City's OPA with FOCIL also compels FOCIL to construct the construction elements and requires FOCIL to submit performance bonds to guarantee completion of the work. No additional performance guarantees are required under this Agreement, but FOCIL will only be reimbursed upon satisfactory completion of work.
- SFMTA will provide staff support at no charge to FOCIL for administrative services such as contract administration, grants administration, billing, encumbrance and disbursement of funds and other support activities. This is because SFMTA will be conducting similar activities for the Loop Project.

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- SFMTA payments to FOCIL: FOCIL will be reimbursed in an amount not to exceed \$6,515,770, which includes \$5,127,774 of TIGER Grant funds and a supplemental payment of \$1,387,996 from the SFMTA, as explained above.
- SFMTA will only reimburse FOCIL for its construction costs. SFMTA will not reimburse FOCIL for any “soft” costs, e.g., design, project management or administrative costs.
- The Agreement contains standard insurance and indemnity provisions.
- If FOCIL defaults under the Agreement, the SFMTA may withhold undisbursed grant funds and may demand that FOCIL return grant funds already disbursed.

The City Attorney has reviewed this report.

ALTERNATIVES CONSIDERED

If the SFMTA does not execute a written agreement with FOCIL, we will not have a mechanism established to disburse TIGER grant funds to FOCIL.

FUNDING IMPACT

The SFMTA is obligated to make incremental payments totaling \$1,387,996 to FOCIL as well as provide local matching funds to our share of the TIGER project sufficient to complete the Loop. Per the attached funding table, SFMTA will devote an estimated \$26,059 of its own funds to the Loop. The combined cost to SFMTA is thus \$1,414,055. We will also devote \$1,381,539 of voter approved state infrastructure bond funds from the Public Transportation Modernization, Improvement, and Service Enhancement Account (PTMISEA) to the Loop as shown in Exhibit A, the TIGER Grant Funding Plan.

OTHER APPROVALS RECEIVED OR STILL REQUIRED

None.

RECOMMENDATION

Staff recommends that the SFMTA Board authorize the Director of Transportation to execute the Public Private Partnership Agreement between the City and FOCIL.

SAN FRANCISCO
MUNICIPAL TRANSPORTATION AGENCY
BOARD OF DIRECTORS

RESOLUTION No. _____

WHEREAS, In 2009, the Obama administration established the Transportation Investment Generating Economic Recovery, or TIGER Discretionary Grant program, as a unique opportunity for the U.S. Department of Transportation to invest in road, rail, transit and port projects that promise to achieve critical national objectives; and,

WHEREAS, The San Francisco Municipal Transportation Agency (SFMTA) needs to construct a rail transit loop in San Francisco's Mission Bay to meet current light rail and future Central Subway-related service plans; and,

WHEREAS, Under the Mission Bay South Owner Participation Agreement between the City and the Catellus Development Corporation, entered into in November 1998, Catellus' successor, FOCIL-MB, LLC (FOCIL), is responsible for the delivery of a wide array of street- and transportation-related infrastructure in Mission Bay; and,

WHEREAS, FOCIL and the SFMTA jointly applied for \$15,500,000 of TIGER funds to partially pay for the aforementioned Mission Bay improvements, known as the Mission Bay / UCSF Hospital Multimodal Transportation Project (Project); and,

WHEREAS, SFMTA, as the federally designated Project Lead, was awarded \$10,000,000 in TIGER Grant funds for the Project; and,

WHEREAS, SFMTA and FOCIL have agreed upon the terms of a Public Private Partnership Agreement (Agreement) between the two parties that outlines each party's roles and responsibilities regarding Project Scope, Schedule, Budget, and TIGER Grant fund disbursement; and

WHEREAS, TIGER Grant funds will be split between the parties such that SFMTA will receive \$4,872,226 of the TIGER Grant funds and FOCIL will receive \$5,127,774 of the TIGER Grant funds for eligible Project costs; in addition, SFMTA will meet the first \$1,387,996 of FOCIL's TIGER grant match obligations using local funds; now, therefore, be it

RESOLVED, That the San Francisco Municipal Transportation Agency Board of Directors authorizes the Director of Transportation to execute the Public Private Partnership Agreement between the City and County of San Francisco, through the SFMTA, and FOCIL, for the proposed implementation of street-related transportation investments as defined in the Agreement, in an amount not to exceed \$6,515,770, which will supplement FOCIL's own project funding.

I certify that the foregoing resolution was adopted by the San Francisco Municipal Transportation Agency Board of Directors at its meeting of January 21, 2014.

Secretary to the Board of Directors
San Francisco Municipal Transportation Agency

EXHIBIT A

TIGER GRANT FUNDING PLAN

**MISSION BAY / UCSF HOSPITAL MULTIMODAL TRANSPORTATION PROJECT
Distribution of TIGER Funds to SFMTA and FOCIL**

Funding plan and costs may change during project implementation

SFMTA's TIGER-funded Phases: Environmental, Design & Construction

Scope Element: Mission Bay Loop

| | |
|--------------------------|--------------------|
| Loop Project Cost | \$6,436,824 |
|--------------------------|--------------------|

| Funding sources* | Amount |
|-------------------------|--------------------|
| Local Prop K Sales Tax | \$157,000 |
| Local SFMTA | \$26,059 |
| State PTMISEA | \$1,381,539 |
| Federal TIGER | \$4,872,226 |
| Total Funds | \$6,436,824 |

FOCIL's TIGER-funded Elements (Construction Only)

Scope Elements: UCSF Med Center Transportation Infrastructure, Traffic Circle Connectors**

| | |
|-------------------------|--------------------|
| Cost of Projects | \$6,789,705 |
|-------------------------|--------------------|

| Funding sources | Amount |
|-----------------------------|--------------------|
| Local FOCIL / Tax Increment | \$273,935 |
| Local SFMTA | \$1,387,996 |
| Federal TIGER | \$5,127,774 |
| Total Funds | \$6,789,705 |

| | |
|---|---------------------|
| Total TIGER Funds for all Scope Elements | \$10,000,000 |
|---|---------------------|

*Includes \$183,059 for completion of environmental phase, with \$157,000 from SFCTA Prop K and \$26,059 from SFMTA.

**FOCIL's "Tech/Biotech" Corridor element is not receiving TIGER funding. The SFMTA is not responsible for the completion of this element, but will continue to report on its progress to the Department of Transportation through FTA.

PUBLIC-PRIVATE PARTNERSHIP AGREEMENT
BETWEEN THE CITY AND COUNTY OF SAN FRANCISCO
THROUGH ITS MUNICIPAL TRANSPORTATION AGENCY,
AND
FOCIL-MB, LLC

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PUBLIC-PRIVATE PARTNERSHIP AGREEMENT
BETWEEN THE CITY AND COUNTY OF SAN FRANCISCO
THROUGH ITS MUNICIPAL TRANSPORTATION AGENCY,
AND
FOCIL-MB, LLC

This Agreement, dated the ____ day of _____, 2014, is between the City and County of San Francisco (City), a municipal corporation, by and through its Municipal Transportation Agency (SFMTA), and FOCIL-MB, LLC, a Delaware limited liability company (FOCIL) (individually, a Party, or collectively, the Parties).

RECITALS

A. The Federal Transit Administration (FTA) has awarded a grant to the SFMTA in the amount of \$10 million in TIGER IV Discretionary Grant Funds pursuant to Title I of Division C of the Consolidated and Further Continuing Appropriations Act, 2012 (Pub. L. 112-55, Nov. 18, 2011) (the "TIGER Grant"). The TIGER Grant, which must be used for projects that will have a significant impact on the Nation, a metropolitan area, or a region, is for the Mission Bay/UCSF Hospital Multimodal Transportation Project (the "Project").

B. The Project consists of four elements, which are more fully described in Section 5 of this Agreement. The TIGER Grant will support three elements of the Project, Elements 1, 3 and 4: Element 1 is street-related improvements serving the UCSF Medical Center and Element 3 is traffic circle connectors, which include pedestrian, bikeway, auto and transit improvements. Element 4 is the design and construction of the Mission Bay Transit Loop, which will provide a short line/turnback option for the existing T-Third light rail line, as well as benefits for the Central Subway Project. Element 2 consists of street related improvements in Mission Bay's Tech/Biotech Corridor. Element 2 will not receive TIGER grant funding. However, because it was presented within the TIGER grant application, the FTA requests to be updated on its progress until all four Elements are completed.

C. FOCIL is the master developer of Mission Bay, and will provide financial support, and coordinate and implement construction of Elements 1, 2 and 3 of the Project. SFMTA will construct Element 4 of the Project.

D. The Parties have agreed to divide the TIGER Grant as follows: \$5,127,774 will be used by FOCIL for Element 1 and Element 3 (the "Elements 1 and 3 Funds") and \$4,872,226 will be used by SFMTA for Element 4 (the "Element 4 Funds"). SFMTA has agreed to provide an additional \$1,387,996 in appropriated SFMTA operating funds to FOCIL to be used for Elements 1 and 3 (the "SFMTA Funds," and together with the Elements 1 and 3 Funds, the "Grant Funds").

E. As the recipient of the TIGER Grant, SFMTA will be the fiscal agent responsible for disbursing Elements 1 and 3 Funds to FOCIL for the Project. FOCIL will not be paid administrative or other such fees from Grant Funds.

F. The purpose of this Agreement is to specify the intended use for the Grant Funds and the roles and responsibilities of the Parties in expending such funds.

AGREEMENT

Now, therefore, the Parties agree as follows:

1. Definitions

1.1. Agreement. This Agreement, including all exhibits to the Agreement and all amendments made in accordance with the provisions of the Agreement.

1.2. City. The City and County of San Francisco, a municipal corporation. The rights of City in this Agreement inure to the benefit of the City and County of San Francisco and all of its constituent departments. However, except as otherwise expressly provided herein, the powers and duties to be exercised by City pursuant to this Agreement shall be exercised by SFMTA by and through its Director of Transportation.

1.3. Director of Transportation. The Director of Transportation of the SFMTA, or his or her designee.

1.4. Elements 1 and 3 Funds. The \$5,127,774 of the TIGER Grant that will be used by FOCIL for Elements 1 and 3.

1.5. Element 4 Funds. The \$4,872,226 of the TIGER Grant that will be used by SFMTA for Element 4.

1.6. Federal Funds. Any grant or loan funds issued by an operating administration of the U.S. Department of Transportation, or as otherwise determined by the Federal Transit Administration.

1.7. Federal Transit Administration (FTA). An operating administration of the U.S. Department of Transportation.

1.8. Force Majeure Event. An inability for any Party to perform under this Agreement that the Party demonstrates could not have been avoided by the Party's exercise of due care, prudence, foresight, or diligence and that arises directly from: an act of God; fire; flood; windstorm; tornado; earthquake; war; riot; insurrection; epidemic; quarantine restrictions; acts of terrorism; inability of the Party, its suppliers, or subcontractors to procure labor; freight embargo; accident; priorities or privileges established for the manufacture, assembly or allotment of materials by order, decree, or otherwise of the United States or by any department, bureau, commission, committee, agent or administrator of any legally constituted public authority; the prevention by the one Party of the other Party from commencing or prosecuting any of its duties under the Agreement; inability of a Party to obtain applicable permits and licenses from relevant governmental authorities; change of law that prevents implementation of the Program; a

judgment, order, or decree issued by a court preventing implementation of the Program; or failure of public utility service outside the control of the Party. For purposes of Sections 5.2(c)(ii) and 15(a) only, Force Majeure Event shall not include failure or delay by the City to appropriate, reserve, allocate, or disburse the SFMTA Funds for the Project unless due to any of the conditions stated above.

1.9. Grant Agreement. The Grant Agreement under the Consolidated and Further Continuing Appropriations Act, 2012 for the National Infrastructure Investments Discretionary Grant Program (FY 2012 TIGER Discretionary Grants, Division C of the Transportation Housing and Urban Development, and Related Agencies Appropriations Act, 2012 (Pub. L. 112-55, Nov. 18, 2011)) by and between the City and the United States Department of Transportation dated August 22, 2013.

1.10. Grant Funds. The total amount of the SFMTA Funds and the TIGER Grant Funds.

1.11. Project. The Mission Bay/UCSF Hospital Multimodal Transportation Project.

1.12. San Francisco Municipal Transportation Agency; SFMTA. The Municipal Transportation Agency, an agency of the City and County of San Francisco established by San Francisco Charter Article VIII A, or any successor agency.

1.13. Schedule. The time schedules for construction of Elements 1 and 3 of the Project, attached hereto as **Exhibit B**.

1.14. SFMTA Funds. The \$1,387,996 in SFMTA operating funds to be provided to FOCIL to pay for a portion of Elements 1 and 3, in accordance with Section 5.2(c)(ii) below.

1.15. TIGER IV Grant Funds (TIGER Grant Funds). The \$10 million in TIGER IV Discretionary Grant Funds pursuant to Title I of Division C of the Consolidated and Further Continuing Appropriations Act, 2012 (Pub. L. 112-55, Nov. 18, 2011), awarded by the FTA.

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

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

THIS SECTION 2 CONTROLS AGAINST ANY AND ALL OTHER PROVISIONS OF THIS AGREEMENT.

3. Term of the Agreement.

Subject to Section 2, the term of this Agreement shall be four years from the Effective Date.

4. Effective Date of Agreement.

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

5. Project Elements.

5.1. Element 1 (UCSF Medical Center Multimodal Transportation Infrastructure). This Project component improves three existing substandard roadway segments (portions of 16th and Mariposa Streets) at the western edge of the UCSF Mission Bay Medical Center and campus. It also completes the final segment of Owens Street, which will be the western boundary of the UCSF Medical Center, providing the final critical link needed to connect the I-280 on- and off- ramps to the previously completed segment of Owens Street, located north of 16th Street. Roadway surface improvements included in this project component: Final segment of Owens Street, between 16th and Illinois Street, Improvements to existing Mariposa Street between Interstate 280 and Indiana Street, Improvements to Interstate 280 northbound off-ramp at Mariposa Street; Improvements at existing 16th Street, west of Owens Street. Scope is generally limited to grading and hardscape (curb and gutter, concrete and asphalt street and sidewalk paving, including sidewalks, crosswalks and ramps, bike lanes). The scope of work for Element 1 is more specifically set forth in the FTA's letter documenting its finding of categorical exclusion under 23 CFR Part 771.118(d)(1) of Element 1 and Element 3 dated August 6, 2013 (the "NEPA Exclusion Letter").

5.2. Element 2 (Tech/Biotech Corridor). This element includes street connections; the realignment and upgrade of Terry Francois Boulevard, including a new two-way cycletrack; the upgrade of substandard streets and sidewalks; and the completion of 16th Street and South Street, with pedestrian and bicycle improvements. This element is not included as part of the work under this Agreement, but will be performed by FOCIL under the Mission Bay South Owner Participation Agreement (MBSOPA) between FOCIL and the Successor Agency to the Redevelopment Agency of the City and County of San Francisco. Moreover, progress on the construction of this Element will be reported to FTA under the same TIGER Grant provisions as the elements of the Project that are funded by the TIGER Grant.

5.3. Element 3 (Traffic Circle Connectors). This component completes four connector roadways (portions of Channel Street, Long Bridge Street, Mission Bay Boulevard North and South) which provide the final connections needed to link previously completed but not yet connected roadway segments. Roadway surface improvements included in this Project component include without limitation: final segment of Channel Street between El Dorado and Mission Bay Circle (including bikeway and parking area adjacent to Channel Street); final segment of Long Bridge Street, between China Basin Street and Mission Bay Boulevard; final

segment of Mission Bay Boulevard North and South, between Merrimac and Mission Bay Circle. Scope is generally limited to grading and hardscape: curbs, gutters, and paving (including sidewalks, crosswalks, ramps, and bike lanes), as well as landscape and storm drain improvements associated with the biofiltration system treating storm water runoff from project roadway surfaces. The entirety of the scope of work for Element 2 is more specifically set forth in the Mission Bay UCSF Hospital Multimodal Transportation Infrastructure TIGER IV NEPA Support for Categorical Exclusion in accordance with Section 771.117(d) prepared by BKF and the NEPA Exclusion Letter.

5.4. Element 4 (Mission Bay Transit Loop). This component will provide turnaround capabilities for the existing T-Third light rail line through a connection from the Third Street main line to 18th, Illinois, and 19th Streets, facilitating an increase in the frequency of transit service in the Chinatown, Mission Bay, and South of Market neighborhoods. The increase in service would be achieved by allowing up to half of the trains traveling on Third Street via the Central Subway to turn around during peak hours at the Transit Loop and proceed back toward downtown San Francisco to Stockton and Washington Streets. This Project component involves constructing the remainder of the Transit Loop, consisting of installing tracks on the street right-of-way on one-third of the block on 18th and 19th Streets and one full block on Illinois Street, for a maximum length of 900 feet. (The turnouts extending over two-thirds of the block on 18th and 19th Streets towards Illinois Street have already been built). Other work on this Project component includes: providing accessible curb ramps; resurfacing streets within limits of the Project area; and providing bicycle lanes on both sides of Illinois Street.

6. Roles and Responsibilities of the Parties

6.1. SFMTA. SFMTA's responsibilities are as follows:

(a) **Project Sponsor.** As the recipient of the Grant from FTA, SFMTA will serve as the Project Sponsor and lead public partner for the Project as provided in the Grant Agreement.

(b) **Construction of Transit Loop.** SFMTA will be responsible for the design and construction of Element 4 as provided in the Grant Agreement.

(c) **Disbursement of Grant Funds.** SFMTA will disburse the Grant Funds to FOCIL in the manner specified in Section 7.2 subject to: (1) adequate documentation by FOCIL of costs incurred, and (2) compliance by FOCIL with the terms and conditions of this Agreement.

(d) **Administrative Services.** SFMTA will provide required administrative services to the Project in connection with the TIGER Grant. These services may include, but not be limited to, accounting services, financial services, contract administration, grants administration, services of its Contract Compliance Office, including administration of DBE matters, legal services, and other administrative services. SFMTA staff, after consultation with FOCIL, will be responsible for preparing procedures to implement the provisions of this Agreement. The procedures will include processes for billing, accounting, encumbrance and disbursement of funds, tracking of time, and other such functions.

(e) **Grant Manager.** SFMTA will designate one individual to be its Grant Manager for all activities involving the TIGER Grant. The Grant Manager's primary responsibility will be to ensure compliance with all requirements of the TIGER Grant, and will provide counsel and advice to FOCIL on TIGER Grant issues, including reimbursement of Grant Funds, and federal regulations. The Grant Manager may enlist and utilize other SFMTA resources or staff personnel as necessary to carry out such work and perform the administrative services described in subsection (d) above.

(f) **Project Manager.** SFMTA will designate one individual to be its Project Manager for all activities related to completing the work funded under this Agreement. He or she will manage the design and construction of Element 4 and provide counsel and advice to FOCIL on federal contracting policies. The Project Manager will also be responsible for evaluating and compiling Project data for reporting to FTA, as required, and reviewing and approving invoices for reimbursement from Grant Funds for all Elements.

(g) **Monitoring of Construction Activities.** SFMTA, in conjunction with DPW, shall monitor the construction activities of FOCIL for Element 1 and Element 3 to ensure that FOCIL's construction and procurement activities for the Project are consistent with the requirements of 49 CFR Part 18, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments" and the FTA Circular 4220.1F. Additionally, SFMTA will ensure that procurements comply with the federal Disadvantaged Business Enterprise requirements and the SFMTA's Small Business Enterprise (SBE) Program.

(h) SFMTA will approve Schedule changes reasonably requested by FOCIL pursuant to Section 6.2(g), such approval not to be unreasonably withheld, and any revised Schedule shall be memorialized in a letter signed by the Mission Bay Development Group Managing Principal on behalf of FOCIL and the SFMTA Director of Transportation, except that any Schedule change resulting in an extension of the term of this Agreement by over 25 percent of the original term shall require approval of the SFMTA Board of Directors.

6.2. FOCIL. FOCIL's responsibilities are as follows:

(a) **Contractor.** FOCIL will be treated as a sole source third party contractor for purposes of the expenditure of TIGER Grant Funds, as well as expenditure of local matching funds required to fulfill the obligations of the TIGER Grant.

(b) **Construction of Element 1 and Element 3.** FOCIL has designed and shall construct Element 1 and Element 3 of the Project in accordance with the Schedule and in compliance with the requirements of this Agreement.

(c) **Financing.** FOCIL will provide all financing for construction of Elements 1 and 3 except as follows:

(i) FOCIL will receive the Element 1 and 3 Funds to be disbursed by SFMTA as provided in Section 6.2(d) and Section 7.2 below;

(ii) FOCIL will receive the SFMTA Funds, which will be booked into the City's FAMIS accounting system pending execution of this Agreement. Said Funds shall only be used for construction of Elements 1 and/or 3.

(d) **Reimbursement of Costs from Grant Funds.** FOCIL shall document Project costs to be reimbursed with Grant Funds in the manner required by the FTA and SFMTA, and shall submit its requests for Grant Funds reimbursement of allowable costs incurred by its construction or other contractors to SFMTA, using the federal "SF-270 Request for Advance or Reimbursement Form."

(<http://www.whitehouse.gov/sites/default/files/omb/assets/omb/grants/sf270.pdf>.) SFMTA shall disburse Grant Funds to FOCIL in accordance with FOCIL's instruction for delivery of such funds. In no event shall FOCIL be reimbursed with Grant Funds for its planning design, environmental, administrative or staff costs associated with the Project.

(e) **Licenses, Permits, and Approvals.** FOCIL shall obtain and secure all required licenses, permits, and approvals, including all planning, building, and other required approvals from the City.

(f) **Construction.** Under this Agreement, FOCIL will be responsible for bidding out, administering, and managing the construction of Elements 1, and 3 of the Project. (As mentioned above, FOCIL will be responsible for constructing Element 2 as part of the MBSOPA.) As part of its construction management duties, FOCIL shall staff the construction with a resident engineer to provide oversight and quality assurance. FOCIL certifies that it will procure construction services as necessary for the Project and maintain Project files consistent with the applicable requirements of 49 CFR Part 18, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," and FTA Circular 4220.IF, including, but not limited to, ensuring full and open competition, procurement by sealed bids, implementation of DBE/SBE requirements, satisfaction of Buy America requirements, and including all required federal construction contract provisions (see **Exhibit C**).

(g) **Procurement Reporting Requirements.** FOCIL will provide a list to the SFMTA Project Manager of all procurements (including construction contracts) planned that will be funded in whole or in part with Grant Funds. FOCIL will provide the SFMTA Project Manager with quarterly progress reports regarding expenditure of the Grant Funds no later than 10 calendar days after each reporting period. The reporting periods will end December 31, March 31, June 30 and September 30. Narrative progress reports will contain the following information: a description of the work completed during the period; tasks expected to be performed during the next period; major project milestones, changes to milestones, and reasons for the changes; and explanations of problems or delays encountered or anticipated; and resulting necessary changes to the Schedule. Financial reports will include a balance sheet and a project expenditure statement by line item code.

7. Payments; Cost Principles.

7.1. Amount of Contract. In no event shall the funds to be disbursed to FOCIL under this Agreement exceed Six Million, Five Hundred Fifteen Thousand, Seven Hundred Seventy Dollars (\$6,515,770). A breakdown of the funding associated with this Program is listed in the

Funding Plan shown in **Exhibit A**, which may be modified from time to time with the consent of the Parties.

7.2. Payment of Grant Funds.

(a) The TIGER Grant Agreement specifies a TIGER fund contribution of \$5,127,774 and local match of \$1,661,931 for Elements 1 and 3 for a federal-local match split of 75.52%/24.48%.

(b) Following execution of this Agreement, the SFMTA, using Elements 1 and 3 Funds for 75.52% of the costs and SFMTA Funds for 24.48% of the costs, will periodically reimburse FOCIL for 100% of its approved, Grant-eligible costs until the SFMTA Funds of \$1,387,996 are exhausted. Following exhaustion of the SFMTA Funds, SFMTA, using only Elements 1 and 3 Funds, will periodically reimburse FOCIL for 75.52% of its approved, Grant-eligible costs until the Elements 1 and 3 Funds have been expended, and FOCIL shall provide local match funds in the amount of \$273,935 to cover the remaining 24.48% of approved, Grant-eligible costs. If the costs for Elements 1 and 3 exceed the TIGER Grant budget amount of \$6,789,705, FOCIL shall fund all such excess costs using any funds other than Federal Funds until construction of Elements 1 and 3 has been fully completed and approved by the City.

(c) Payments of Grant Funds for reimbursement of allowable costs for Element 1 and Element 3 under this Agreement shall be made no more often than monthly on or before the 30th day of each month for work, as set forth in Section 6 of this Agreement, that the SFMTA Project Manager, in his or her discretion, concludes has been performed as of the 30th day of the immediately preceding month.

7.3. City shall make payment of Grant Funds to FOCIL by wire at the following wire address:

Bank of America
345 Montgomery Street
San Francisco, CA 94104

ABA No.: 026-009-593
For the Account of: FOCIL MB, LLC
Account No.: 12332-11157
Reference: [Sender & Payment Description]

No charges to be reimbursed with Grant Funds shall be incurred under this Agreement nor shall any payments of Grant Funds become due to FOCIL until invoices, reports, services, or both, required under this Agreement are received from FOCIL and approved by SFMTA as being in accordance with this Agreement. City may withhold payment of Grant Funds to FOCIL in any instance in which FOCIL has failed or refused to satisfy any material obligation provided for under this Agreement. In no event shall City be liable for interest or late charges for any late payments.

7.4. Cost Principles; Disallowance.

(a) FOCIL agrees that the Contract Cost Principles and Procedures, 48 CFR, Federal Acquisition Regulations System, Chapter 1, Part 31.000 et seq., shall be used to determine the allowability of individual cost items to be paid with Grant Funds.

(b) If FOCIL claims or receives payment from Grant Funds for a service, reimbursement for which is later disallowed by the City or United States Government, FOCIL, as required, shall promptly refund the disallowed amount of Grant Funds to City upon City's request. At its option, City may offset the amount disallowed from any payment of Grant Funds due or to become due to FOCIL under this Agreement or any other Agreement. By executing this Agreement, FOCIL certifies that it is not suspended, debarred or otherwise excluded from participation in federal assistance programs. FOCIL acknowledges that this certification of eligibility to receive Federal Funds is a material term of the Agreement.

8. Guaranteed Maximum Costs.

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

9. Submitting False Claims; Monetary Penalties.

9.1. General. FOCIL acknowledges that any contractor, subcontractor or consultant who commits any of the acts listed in subsection 8.2 shall be liable to the City for three times the amount of damages which the City sustains because of the act of that contractor, subcontractor or consultant.

9.2. Acts Constituting False Claims. A contractor, subcontractor or consultant who commits any of the following acts shall also be liable to the City for the costs, including attorney's fees, of a civil action brought to recover any of those penalties or damages, and may be liable to the City for a civil penalty of up to \$10,000 for each false claim:

(a) Knowingly presents or causes to be presented to an officer or employee of the City a false claim or request for payment or approval; or

(b) Knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the City; or

(c) Conspires to defraud the City by getting a false claim allowed or paid by the City; or

(d) Knowingly makes uses or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the City; or

(e) Is a beneficiary of an inadvertent submission of a false claim to the City, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the City within a reasonable time after discovery of the false claim.

9.3. Debarment. In addition to the penalties described in this Section, any contractor, subcontractor, supplier, consultant or subconsultants who submit false claims may be declared an irresponsible bidder or an unqualified consultant and debarred according to the procedures set forth in Chapter 6 of the San Francisco Administrative Code.

10. Taxes.

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

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

(a) FOCIL, on behalf of itself and any permitted successors and assigns, recognizes and understands that FOCIL, and any permitted successors and assigns, may be subject to real property tax assessments on the possessory interest;

(b) FOCIL, on behalf of itself and any permitted successors and assigns, recognizes and understands that the creation, extension, renewal, or assignment of this Agreement may result in a "change in ownership" for purposes of real property taxes, and therefore may result in a revaluation of any possessory interest created by this Agreement. FOCIL accordingly agrees on behalf of itself and its permitted successors and assigns to report on behalf of the City to the County Assessor the information required by Revenue and Taxation Code section 480.5, as amended from time to time, and any successor provision.

(c) FOCIL, on behalf of itself and any permitted successors and assigns, recognizes and understands that other events also may cause a change of ownership of the possessory interest and result in the revaluation of the possessory interest. (see, e.g., Rev. & Tax. Code section 64, as amended from time to time). FOCIL accordingly agrees on behalf of itself and its permitted successors and assigns to report any change in ownership to the County Assessor, the State Board of Equalization or other public agency as required by law.

(d) FOCIL further agrees to provide such other information as may be requested by the City to enable the City to comply with any reporting requirements for possessory interests that are imposed by applicable law.

11. Independent Contractor; Payment of Taxes and Other Expenses.

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

12. Insurance.

12.1. Without in any way limiting FOCIL's liability pursuant to the "Indemnification" Section of this Agreement, FOCIL and its contractor(s), as applicable and as approved by the City's Risk Manager, must maintain in force, during the full term of the Agreement, insurance in the following amounts and coverages:

(a) Workers' Compensation, in statutory amounts, with Employers' Liability Limits not less than \$1,000,000 each accident, injury, or illness; FOCIL shall ensure that its contractor(s) shall agree to waive subrogation rights which any insurer of the contractors may acquire from the contractors by virtue of the payment of any loss. The contractor(s) shall agree to obtain any endorsement that may be necessary to effect this waiver of subrogation. The Workers' Compensation policy shall be endorsed with a waiver of subrogation in favor of the City for all work performed by FOCIL's agents, contractors and subcontractors;

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

(c) Commercial Automobile Liability Insurance with limits not less than \$2,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Owned, Non-Owned and Hired auto coverage, as applicable.

(d) Engineering firms under contract with FOCIL for Elements 1 and Element 3 shall have professional liability insurance, with limits not less than \$1,000,000 each claim with respect to negligent acts, errors or omissions in connection with professional services to be provided for Element 1 and Element 3.

12.2. Commercial General Liability and Commercial Automobile Liability Insurance policies must be endorsed to provide:

(a) Name as Additional Insured the City and County of San Francisco, its Officers, Agents, and Employees. 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.

12.3. All policies shall provide thirty days' advance written notice to the City of reduction or nonrenewal of coverages or cancellation of coverages for any reason. Notices shall be sent to the City address in the "Notices to the Parties" section.

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

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

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

12.7. Before commencing any operations under this Agreement, FOCIL shall furnish to City certificates of insurance and additional insured policy endorsements with insurers with ratings comparable to A-, VIII or higher, that are authorized to do business in the State of California, and that are satisfactory to City, in form evidencing all coverages set forth above. Failure to maintain insurance shall constitute a material breach of this Agreement.

12.8. Approval of the insurance by City shall not relieve or decrease the liability of FOCIL hereunder. If a contractor or subcontractor of FOCIL will be used to complete any portion of this Agreement, FOCIL shall ensure that the contractor or subcontractor shall provide all necessary insurance and shall name the City and County of San Francisco, its officers, agents and employees as additional insureds.

13. Indemnification.

13.1. FOCIL and its contractors shall indemnify and save harmless City and its officers, agents and employees from, and, if requested, shall defend them against any and all loss, cost, damage, injury, liability, and claims thereof for injury to or death of a person, including employees of FOCIL or loss of or damage to property, arising directly or indirectly from

FOCIL's performance under this Agreement, including, but not limited to, FOCIL's use of facilities or equipment provided by City or others, 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 negligence or willful misconduct of City. The foregoing indemnity shall include, without limitation, reasonable fees of attorneys, consultants and experts and related costs and City's costs of investigating any claims against the City.

13.2. In addition to FOCIL's obligation to indemnify City, FOCIL specifically acknowledges and agrees that it has an immediate and independent obligation to defend City from any claim which actually or potentially falls within this indemnification provision, even if the allegations are or may be groundless, false or fraudulent, which obligation arises at the time such claim is tendered to FOCIL by City and continues at all times thereafter.

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

14. Liability of City.

CITY'S PAYMENT OBLIGATIONS UNDER THIS AGREEMENT SHALL BE LIMITED TO THE PAYMENT OF THE FUNDS PROVIDED FOR IN SECTION 7 OF THIS AGREEMENT. NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, IN NO EVENT SHALL CITY BE LIABLE, REGARDLESS OF WHETHER ANY CLAIM IS BASED ON CONTRACT OR TORT, FOR ANY SPECIAL, CONSEQUENTIAL, INDIRECT OR INCIDENTAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOST PROFITS, ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR THE SERVICES PERFORMED IN CONNECTION WITH THIS AGREEMENT.

15. Events of Default by FOCIL.

15.1. General. The occurrence of any one or more of the following events will constitute a "FOCIL Event of Default" under this Agreement with respect to any breach by FOCIL of its obligations under this Agreement:

(a) **False Statement.** Any statement, representation or warranty contained in this Agreement, or in any other document submitted to City by FOCIL under this Agreement that is materially false or misleading.

(b) **Failure to Comply With Agreement or with Applicable Laws.** FOCIL fails to perform a material provision of this Agreement or breaches any federal, state or local law or regulation applicable to this Agreement following written notice and 30 days opportunity to cure.

(c) **Voluntary Insolvency.** FOCIL, as applicable, (a) is generally not paying its debts as they become due, (b) files, or consents by answer or otherwise to the filing against it

of a petition for relief or reorganization or arrangement or any other petition in bankruptcy or for liquidation or to take advantage of any bankruptcy, insolvency or other debtors' relief law of any jurisdiction, (c) makes an assignment for the benefit of its creditors, (d) consents to the appointment of a custodian, receiver, trustee or other officer with similar powers of FOCIL, as applicable, or of any substantial part of the Authority's property or (e) takes action for the purpose of any of the foregoing.

(d) Involuntary Insolvency. Without consent by FOCIL, as applicable, a court or government authority enters an order, and such order is not vacated within 10 days, (a) appointing a custodian, receiver, trustee or other officer with similar powers with respect to FOCIL, as applicable, or with respect to any substantial part of FOCIL's property, (b) constituting an order for relief or approving a petition for relief or reorganization or arrangement or any other petition in bankruptcy or for liquidation or to take advantage of any bankruptcy, insolvency or other debtors' relief law of any jurisdiction or (c) ordering the dissolution, winding-up or liquidation of FOCIL.

15.2. Remedies Upon FOCIL Event of Default. Upon and during the continuance of a FOCIL Event of Default, City may do any of the following, individually or in combination:

(a) Withholding of Funds. With respect to a FOCIL Event of Default described in Section 15.1 above, City may withhold funds not yet disbursed regardless of whether FOCIL has previously submitted a request for such funds or whether City has approved the disbursement of the Funds under a prior request for such funds. Any Funds withheld pursuant to this Section and subsequently disbursed to FOCIL after cure of applicable FOCIL Events of Default will be disbursed without interest.

(b) Return of Funds. City may demand the immediate return of any previously disbursed Grant Funds that have been claimed or expended by FOCIL in breach of the terms of this Agreement, together with interest thereon from the date of disbursement at the maximum rate permitted under applicable law.

(c) Guarantees of Performance. The parties acknowledge that Elements 1, 2 and 3 are part of Subdivisions of land and Public Improvements as defined in and required by the MBSOPA. As part of the Subdivision process, each of these projects require a Public Improvement Agreement that requires security to guarantee performance. Accordingly, a 100 percent faithful performance bond must be posted to ensure successful completion of the work. In light of the above, there will no additional performance guaranties required under this Agreement. The Public Improvements affected are listed below:

- (i)** Element 1 is related to Block 40 and I-280 Mariposa Street Ramps Infrastructure.
- (ii)** Element 2 is related to Blocks 29 through 32 and Blocks 33 & 34 Infrastructure.
- (iii)** Element 3 is related to Blocks 11 & 12 Infrastructure, Parks P2, P11, and P11A

16. Default by City.

16.1. Failure to Disburse Grant Funds. City's failure to disburse Grant Funds in accordance with Sections 6.1(c) and 7.2 of this Agreement shall constitute a City Event of

Default provided such default continues for a period of 30 days after written notice thereof from FOCIL to City.

16.2. No Default. For the purposes of this Section 16.2, each of the following shall not constitute a City Event of Default:

(a) Where City's failure to perform under Sections 6.1(c) and 7.2 results from or is caused by FOCIL's failure to perform any other material term, covenants or condition contained in the Agreement.

(b) Where City's failure to perform under Sections 6.1(c) and 7.2 results from the failure of the FTA, or other granting agency, to provide funds through no fault of the City.

(c) Where City's failure to perform under Sections 6.1(c) and 7.2 results from or is caused by a Force Majeure Event.

16.3. Remedies upon City Event of Default. Upon and during the continuance of a City Event of Default, FOCIL may file an action to collect any and all payments then due to FOCIL under this Agreement.

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

To SFMTA: Vincent Harris, Director of Capital Programs and Construction
San Francisco Municipal Transportation Agency
1 South Van Ness Avenue, 3rd floor
San Francisco, CA 94103-5417
email: vincent.harris@sfmta.com
fax: (415) 701-4735

and Joel Goldberg, Manager, Capital Procurement and Management
San Francisco Municipal Transportation Agency
1 South Van Ness Avenue, 8th floor
San Francisco, CA 94103-5417
email: joel.goldberg@sfmta.com
fax: (415) 701-4734

To FOCIL: Seth Hamalian
Mission Bay Development Group, LLC
410 China Basin St.
San Francisco, CA 94158
email: SHamalian@mbaydevelopment.com
fax: (415) 355-6692

18. General Provisions

18.1. 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 in the same manner as this Agreement.

18.2. 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.

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

18.4. No Assignment. FOCIL shall not, either directly or indirectly, assign, transfer, hypothecate, subcontract or delegate all or any portion of this Agreement or any rights, duties or obligations of FOCIL hereunder without the prior written consent of the City. This Agreement will not, nor will any interest herein, be assignable as to the interest of FOCIL involuntarily or by operation of law without the prior written consent of the City. A change of ownership or control of FOCIL or a sale or transfer of substantially all of the assets of FOCIL will be deemed an assignment for purposes of this Agreement. **Any agreement made in violation of this Section will confer no rights on any person or entity and will automatically be null and void.**

18.5. Sunshine Ordinance. FOCIL acknowledges and agrees that this Agreement is subject to Section 67.24(e) of the San Francisco Administrative Code, which provides that contracts, including this Agreement, grantee's bids, responses to Requests for Proposals and all other records of communications between City and persons or entities seeking contracts, will be open to inspection immediately after a contract has been awarded. Nothing in such Section 67.24(e) (as it exists on the date hereof) requires the disclosure of a private person's or organization's net worth or other proprietary financial data submitted for qualification for a contract or other benefit until and unless that person or organization is awarded the contract or benefit. All information provided by FOCIL that is covered by such Section 67.24(e) (as it may be amended from time to time) will be made available to the public upon request.

18.6. Drug-Free Workplace Policy. FOCIL acknowledges that pursuant to the Federal Drug-Free Workplace Act of 1989, the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited on City premises. FOCIL and its employees, agents or assigns will comply with all terms and provisions of such Act and the rules and regulations promulgated under such Act.

18.7. Compliance with ADA. FOCIL 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 grantee or contractor, must be accessible to the disabled public. FOCIL will not discriminate against any person protected under the ADA in connection with all or any portion of the Project and will comply at all times with the applicable provisions of the ADA.

18.8. No Waiver. No waiver by the City of any default or breach of this Agreement will be implied from any failure by the City to take action on account of such default if such default persists or is repeated. No express waiver by the City will affect any default other than the default specified in the waiver and will be operative only for the time and to the extent therein stated. Waivers by the City of any covenant, term or condition contained herein will not be construed as a waiver of any subsequent breach of the same covenant, term or condition. The consent or approval by the City of any action requiring further consent or approval will not be deemed to waive or render unnecessary the consent or approval to or of any subsequent similar act.

18.9. Headings. All article and section headings and captions contained in this Agreement are for reference only and will not be considered in construing this Agreement.

18.10. Relationship of the Parties. FOCIL will at all times remain solely liable for the acts and omissions of FOCIL, its officers and directors, employees and agents, and SFMTA will at all times remain solely liable for the acts and omissions of SFMTA. Nothing in this Agreement will be construed as creating a legal partnership, joint venture, employment or agency relationship between SFMTA and the Authority.

18.11. Conflict of Interest. Through its execution of this Agreement, FOCIL acknowledges that it is familiar with the provision of Section 15.103 of the City's Charter, Article III, Chapter 2 of the City's Campaign and Governmental Conduct Code, and Section 87100 et seq. and Section 1090 et seq. of the Government Code of the State of California, and certifies that it does not know of any facts which constitute a violation of said provisions and agrees that it will immediately notify the City if it becomes aware of any such fact during the term of this Agreement.

18.12. Entire Agreement. This Agreement sets forth the entire Agreement between the parties and supersedes all other oral or written provisions.

18.13. Successors; No Third-Party Beneficiaries. The terms of this Agreement will be binding upon, and inure to the benefit of, the parties hereto and their successors and assigns. Nothing in this Agreement, whether express or implied, will be construed to give any person or entity (other than the parties hereto and their respective successors and assigns) any legal or equitable right, remedy or claim under or in respect of this Agreement or any covenants, conditions or provisions contained herein.

18.14. Survival of Terms. This provision and the following provisions of this Agreement will survive and continue following expiration or termination of this Agreement:

7. Payments; Cost Principles
9. Submitting False Claims; Monetary Penalties
10. Taxes
11. Independent Contractor; Payment of Taxes and Other Expenses
12. Insurance
13. Indemnification
14. Liability of City
- 15.2. Remedies Upon FOCIL Event of Default

- 16.3 Remedies Upon City Event of Default
- 18.1. Modification of Agreement.
- 18.2. Agreement Made in California; Venue
- 18.3. Audit and Inspection of Records
- 18.8 No Waiver
- 18.10 Relationship of the Parties
- 18.12. Entire Agreement
- 18.13 Successors; No Third-Party Beneficiaries
- 18.18. Severability
- 18.19 Protection of Private Information
- 18.20. Proprietary or Confidential Information of Parties

18.15. Further Assurances. From and after the date of this Agreement, each party agrees to do such things, perform such acts, and make, execute, acknowledge and deliver such documents as may be reasonably necessary or proper and usual to complete the transactions contemplated by this Agreement and to carry out the purpose of this Agreement in accordance with this Agreement.

18.16. Debarment. FOCIL must not make any award or permit any award at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, "Debarment and Suspension." Therefore, by signing and submitting this Agreement, FOCIL, as subgrantee, certifies as follows:

The certification in this clause is a material representation of fact relied upon by the SFMTA. If it is later determined that FOCIL knowingly rendered an erroneous certification, in addition to remedies available to the SFMTA, the Federal Government may pursue available remedies, including but not limited to suspension and/or debarment. FOCIL agrees to comply with the requirements of 2 CFR Parts 180, Subpart C and 1200, Subpart C while this offer is valid and throughout the period of any contract that may arise from this offer. FOCIL further agrees to include a provision requiring such compliance in its lower tier covered transactions.

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

18.18. 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.

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

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

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

CITY

San Francisco Municipal
Transportation Agency

FOCIL-MB, LLC, a Delaware limited liability
company

Edward D. Reiskin
Director of Transportation

By: Farallon Capital Management, LLC, a
Delaware limited liability company,
Its Manager

Approved as to Form:

By: _____

Dennis J. Herrera
City Attorney

Name: _____

Title: _____

By: _____
Robin M. Reitzes
Deputy City Attorney

Vendor Address:
410 China Basin St.,
San Francisco, CA 94158

San Francisco Municipal
Transportation Agency
Board of Directors

City Vendor ID No: 89911

Federal Employer ID Number: 83-0410156

Resolution No. _____

Dated: _____

Attest:

Secretary

EXHIBIT A

TIGER GRANT FUNDING PLAN

**MISSION BAY / UCSF HOSPITAL MULTIMODAL TRANSPORTATION PROJECT
Distribution of TIGER Funds to SFMTA and FOCIL**

Funding plan and costs may change during project implementation

SFMTA's TIGER-funded Phases: Environmental, Design & Construction

Scope Element: Mission Bay Loop

| | |
|--------------------------|--------------------|
| Loop Project Cost | \$6,436,824 |
| Funding sources* | |
| Local Prop K Sales Tax | \$157,000 |
| Local SFMTA | \$26,059 |
| State PTMISEA | \$1,381,539 |
| Federal TIGER | \$4,872,226 |
| Total Funds | \$6,436,824 |

FOCIL's TIGER-funded Elements (Construction Only)

**Scope Elements: UCSF Med Center Transportation Infrastructure, Traffic Circle
Connectors****

| | |
|-----------------------------|--------------------|
| Cost of Projects | \$6,789,705 |
| Funding sources | |
| Local FOCIL / Tax Increment | \$273,935 |
| Local SFMTA | \$1,387,996 |
| Federal TIGER | \$5,127,774 |
| Total Funds | \$6,789,705 |

| | |
|---|---------------------|
| Total TIGER Funds for all Scope Elements | \$10,000,000 |
|---|---------------------|

*Includes \$183,059 for completion of environmental phase, with \$157,000 from SFCTA Prop K and \$26,059 from SFMTA.

**FOCIL's "Tech/Biotech" Corridor element is not receiving TIGER funding. The SFMTA is not responsible for the completion of this element, but will continue to report on its progress to the Department of Transportation through FTA.

EXHIBIT B

SCHEDULE

| SCHEDULE | Baseline Date |
|---|------------------------------------|
| Engineering/Design & Bid | |
| 65% Design | 10/30/13 – Loop |
| 95% Design | 1/29/14 – Loop |
| Bid & Award | |
| Bid Set Submittal | 2/14/14 - Loop |
| Contract Award / NTP | 6/10/14 – Loop 3/2/14 - Street |
| Construction | |
| Begin Construction | 6/25/14 – Loop 3/2/14 – Street |
| End Construction (Substantial Completion) | 12/15/14 – Loop 3/5/15 – Street |
| Revenue Service/Project Opening Date | 2/11/15 – Loop 5/5/15 - Street |

EXHIBIT C

FEDERAL TRANSIT ADMINISTRATION (FTA) REQUIREMENTS CONSTRUCTION CONTRACTS

1. DEFINITIONS

1.1. 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.

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

1.3. 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.

1.4. Federal Transit Administration (FTA) is an operating administration of the U.S. DOT.

1.5. 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.

1.6. 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.

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

1.8. 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.

1.9. 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.

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

1.11. 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.

1.12. 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.

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

2. BUY AMERICA

The Contractor agrees to comply with 49 U.S.C. 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 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 661.7, and include microcomputer equipment, software, and small purchases (less than \$100,000) made with capital, operating, or planning funds. Contractor agrees to be solely responsible for all costs relating to compliance with the Buy America requirements. Failure to comply with these requirements constitutes a material breach of this contract. See 49 CFR § 661.17. Contractors who intentionally or willfully fail to comply with the Buy America requirements may also be subject to debarment or suspension proceedings. 49 CFR §§ 661.18, 661.19.

3. CARGO PREFERENCE REQUIREMENTS - Use of United States-Flag Vessels

The Contractor agrees: (a) to use privately owned United States-Flag commercial vessels to ship at least 50 percent of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers) involved, whenever shipping any equipment, material, or commodities pursuant to the underlying contract to the extent such vessels are available at fair and reasonable rates for United States-Flag commercial vessels; (b) to furnish within 20 working days following the date of loading for shipments originating within the United States or within 30 working days following the date of leading for shipments originating outside the United States, a legible copy of a rated, "on-board" commercial ocean bill-of-lading in English for each shipment of cargo described above to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590 and to the FTA recipient (through the contractor in the case of a subcontractor's bill-of-lading.); and (c) to include these requirements in all subcontracts issued pursuant to this contract when the subcontract may involve the transport of equipment, material, or commodities by ocean vessel.

4. SEISMIC SAFETY REQUIREMENTS

The Contractor agrees that any new building or addition to an existing building will be designed and constructed in accordance with the standards for Seismic Safety required in Department of Transportation Seismic Safety Regulations 49 CFR Part 41 and Contractor will certify to compliance to the extent required by the regulation. The Contractor also agrees to ensure that all work performed under this contract, 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.

5. ENERGY CONSERVATION REQUIREMENTS

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

6. ACCESS TO RECORDS AND REPORTS

6.1. 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 contract for the purposes of making audits, examinations, excerpts and transcriptions. Contractor also agrees, pursuant to 49 C.F.R. 633.17, to provide the FTA Administrator or his authorized representatives, including any PMO Contractor, access to Contractor's records and construction sites pertaining to a major capital project, defined at 49 U.S.C. 5302(a)1, which is receiving Federal financial assistance through the programs described at 49 U.S.C. 5307, 5309 or 5311.

6.2. In all contracts between the City and County of San Francisco and the Contractor for a capital project or improvement (defined at 49 U.S.C. 5302(a)1) entered into through other than competitive bidding, the Contractor shall make available records related to the contract to the Purchaser, the Secretary of Transportation and the Comptroller General or any authorized officer or employee of any of them for the purposes of conducting an audit and inspection.

6.3. 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.

6.4. The Contractor agrees to maintain all books, records, accounts and reports required under this contract for a period of not less than three years after the date of termination or expiration of this contract, except in the event of litigation or settlement of claims arising from the performance of this contract, in which case Contractor agrees to maintain same until the City and County of San Francisco, 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).

7. CLEAN AIR REQUIREMENTS *(Applicable to all contracts and subcontracts exceeding \$100,000, including indefinite quantities where the amount is expected to exceed \$100,000 in any year)*

7.1. 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. §§ 7401 et seq. The Contractor agrees to report each violation to the City and County of San Francisco and understands and agrees that the City and County of San Francisco will, in turn, report each violation as required to assure notification to FTA and the appropriate EPA Regional Office.

7.2. 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. CLEAN WATER REQUIREMENTS *(Applicable to contracts and subcontracts that exceed \$100,000)*

8.1. 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. 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.

8.2. 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.

9. RECYCLED PRODUCTS

The Contractor agrees to comply with all the requirements of Section 6002 of the Resource Conservation and Recovery Act (RCRA), as amended (42 U.S.C. 6962), 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 Subpart B of 40 CFR Part 247.

10. DAVIS-BACON AND COPELAND ANTI-KICKBACK ACTS

10.1. Minimum wages

(a) All laborers and mechanics employed or working upon 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), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics.

Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph A.4 of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in 29 CFR Part 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: Provided, That the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classifications and wage rates conformed under paragraph A.2 of this section) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

(b) The contracting officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:

(1) Except with respect to helpers as defined as 29 CFR 5.2(n)(4), the work to be performed by the classification requested is not performed by a classification in the wage determination; and

(2) The classification is utilized in the area by the construction industry; and

(3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination; and

(4) With respect to helpers as defined in 29 CFR 5.2(n)(4), such a classification prevails in the area in which the work is performed.

(ii) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(iii) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(iv) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs A.2.b. or c. of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(c) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(d) If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any

costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, Provided, That the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

(e) The contracting officer shall require that any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefor only when the following criteria have been met:

(1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and

(2) The classification is utilized in the area by the construction industry; and

(3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(ii) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(iii) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(iv) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs A.5.b or c. of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

10.2. Withholding - The Municipal Transportation Agency 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 the contractor under this contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics,

including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on 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), all or part of the wages required by the contract, MTA may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

10.3. Payrolls and basic records

(a) 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.

(b) a. The contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the MTA for transmission to the Federal Transit Administration. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under section 5.5(a)(3)(i) of Regulations, 29 CFR part 5. This information may be submitted in any form desired. Optional Form WH-347 is available for this purpose and may be purchased from the Superintendent of Documents (Federal Stock Number 029-005-00014-1), U.S. Government Printing Office, Washington, DC 20402. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors.

Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:

(1) That the payroll for the payroll period contains the information required to be maintained under section 5.5(a)(3)(i) of Regulations, 29 CFR part 5 and that such information is correct and complete;

(2) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations, 29 CFR part 3;

(3) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

(ii) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph C.2.b. of this section.

(iii) The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.

The contractor or subcontractor shall make the records required under paragraph C.1 of this section available for inspection, copying, or transcription by authorized representatives of the Federal Transit Administration or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, the Federal agency may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

10.4. Apprentices and trainees

(a) Apprentices - Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in

the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator of the Wage and Hour Division of the U.S. Department of Labor determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Bureau of Apprenticeship and Training, or a State Apprenticeship Agency recognized by the Bureau, withdraws approval of an apprenticeship program, the contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(b) Trainees - Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(c) Equal employment opportunity - The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR part 30.

10.5. Compliance with Copeland Act requirements - The contractor shall comply with the requirements of 29 CFR part 3, which are incorporated by reference in this contract.

10.6. Subcontracts - The contractor or subcontractor shall insert in any subcontracts the clauses contained in 29 CFR 5.5(a)(1) through (10) and such other clauses as the Federal Transit Administration may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.

10.7. Contract termination: debarment - A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

10.8. Compliance with Davis-Bacon and Related Act requirements - All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR parts 1, 3, and 5 are herein incorporated by reference in this contract.

10.9. Disputes concerning labor standards - Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

10.10. Certification of eligibility

(a) By entering into this contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(b) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(c) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

11. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT (*applies to any contract over \$100,000*)

11.1. 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 40 hours in such workweek.

11.2. Violation; liability for unpaid wages; liquidated damages - In the event of any violation of the clause set forth in paragraph A. of this section the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph A. of this section, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of 40 hours without payment of the overtime wages required by the clause set forth in paragraph A. of this section.

11.3. Withholding for unpaid wages and liquidated damages - The MTA 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.

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

12. NO GOVERNMENT OBLIGATION TO THIRD PARTIES

12.1. 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.

12.2. 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.

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

13.1. 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 C.F.R. Part 31, apply to its actions pertaining to this Project. Upon execution of the underlying contract, 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.

13.2. 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.

13.3. 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.

14. CIVIL RIGHTS REQUIREMENTS

14.1. 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.

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

(a) **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. DOL) regulations, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor," 41 C.F.R. 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.

(b) During the performance of this contract the Contractor agrees as follows:

(i) 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. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(ii) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive considerations for employment without regard to race, color, religion, sex, or national origin.

(iii) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(iv) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, as amended, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(v) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, as amended, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, as amended, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(vi) The contractor will include the provisions of subsections 1 and 2 in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, as amended, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, that in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency, the contractor may request the City and the United States to enter into such litigation to protect the interests of the City and the United States.

(c) **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.

(d) **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 C.F.R. Part 1630, pertaining to employment of persons with disabilities. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.

14.3. Equal Opportunity Clauses

(a) As used in these specifications:

(i) "Covered area" means the geographical area described in the solicitation from which this contract resulted;

(ii) "Director" means Director, Office of Federal Contract Compliance Programs, United States Department of Labor, or any person to whom the Director delegates authority;

(iii) "Employer identification number" means the Federal Social Security number used on the Employer's Quarterly Federal Tax Return, U.S. Treasury Department Form 941.

(iv) "Minority" includes:

(1) Black (all persons having origins in any of the Black African racial groups not of Hispanic origin);

(2) Hispanic (all persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race);

(3) Asian and Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands); and

(4) American Indian or Alaskan Native (all persons having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification).

(b) Whenever the Contractor, or any Subcontractor at any tier, subcontracts a portion of the work involving any construction trade, it shall physically include in each subcontract in excess of \$10,000 the provisions of these specifications and the Notice which contains the applicable goals for minority and female participation and which is set forth in the solicitations from which this contract resulted.

(c) If the Contractor is participating (pursuant to 41 CFR 60-4.5) in a Hometown Plan approved by the U.S. Department of Labor in the covered area either individually or through an association, its affirmative action obligations on all work in the Plan area (including goals and timetables) shall be in accordance with that Plan for those trades which have unions participating in the Plan. Contractors must be able to demonstrate their participation in and compliance with the provisions of any such Hometown Plan. Each Contractor or Subcontractor participating in an approved Plan is individually required to comply with its obligations under the EEO clause, and to make a good faith effort to achieve each goal under the Plan in each trade in which it has employees. The overall good faith performance by other Contractors or Subcontractors toward a goal in an approved Plan does not excuse any covered Contractor's or Subcontractor's failure to take good faith efforts to achieve the Plan goals and timetables.

(d) The Contractor shall implement the specific affirmative action standards provided in paragraphs 7.a through p of these specifications. The goals set forth in the solicitation from which this contract resulted are expressed as percentages of the total hours of employment and training of minority and female utilization the Contractor should reasonably be able to achieve in each construction trade in which it has employees in the covered area. Covered Construction contractors performing construction work in geographical areas where they do not have a Federal or federally assisted construction contract shall apply the minority and female goals established for the geographical area where the work is being performed. Goals are published periodically in the Federal Register in notice form, and such notices may be obtained from any Office of Federal Contract Compliance Programs office or from Federal procurement contracting officers. The Contractor is expected to make substantially uniform progress in meeting its goals in each craft during the period specified.

(e) Neither the provisions of any collective bargaining agreement, nor the failure by a union with whom the Contractor has a collective bargaining agreement, to refer either minorities or women, shall excuse the Contractor's obligations under these specifications, Executive Order 11246, as amended, or the regulations promulgated pursuant thereto.

(f) In order for the nonworking training hours of apprentices and trainees to be counted in meeting the goals, such apprentices and trainees must be employed by the Contractor during the training period, and the Contractor must have made a commitment to employ the apprentices and trainees at the completion of their training, subject to the availability of employment opportunities. Trainees must be trained pursuant to training programs approved by the U.S. Department of Labor.

(g) The Contractor shall take specific affirmative actions to ensure equal employment opportunity. The evaluation of the Contractor's compliance with these specifications shall be based upon its effort to achieve maximum results from its actions. The Contractor shall document these efforts fully, and shall implement affirmative action steps at least as extensive as the following:

(i) Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and in all facilities at which the Contractor's employees are assigned to work. The Contractor, where possible, will assign two or more women to each construction project. The Contractor shall specifically ensure that all foremen, superintendents, and other on-site supervisory personnel are aware of and carry out the Contractor's obligation to maintain such a working environment, with specific attention to minority or female individuals working at such sites or in such facilities.

(ii) Establish and maintain a current list of minority and female recruitment sources, provide written notification to minority and female recruitment sources and to community organizations when the Contractor or its unions have employment opportunities available, and maintain a record of the organizations' responses.

(iii) Maintain a current file of the names, addresses and telephone numbers of each minority and female off-the-street applicant and minority or female referral from a union, a recruitment source or community organization and of what action was taken with respect to each such individual. If such individual was sent to the union hiring hall for referral and was not referred back to the Contractor by the union or, if referred, not employed by the Contractor, this shall be documented in the file with the reason therefor, along with whatever additional actions the Contractor may have taken.

(iv) Provide immediate written notification to the Director when the union or unions with which the Contractor has a collective bargaining agreement has not referred to the Contractor a minority person or woman sent by the Contractor, or when the Contractor has other information that the union referral process has impeded the Contractor's efforts to meet its obligations.

(v) Develop on-the-job training opportunities and/or participate in training programs for the area which expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the Contractor's employment needs, especially those programs funded or approved by the Department of Labor. The Contractor shall provide notice of these programs to the sources compiled under 7.b above.

(vi) Disseminate the Contractor's EEO policy by providing notice of the policy to unions and training programs and requesting their cooperation in assisting the Contractor in meeting its EEO obligations; by including it in any policy manual and collective bargaining agreement; by publicizing it in the company newspaper, annual report, etc.; by specific review of the policy with all management personnel and with all minority and female employees at least once a year; and by posting the company EEO policy on bulletin boards accessible to all employees at each location where construction work is performed.

(vii) Review, at least annually, the company's EEO policy and affirmative action obligations under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination or other employment decisions, including specific review of these items with onsite supervisory personnel such as Superintendents, General Foremen, etc., prior to the initiation of construction work at any job site. A written record shall be made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter.

(viii) Disseminate the Contractor's EEO policy externally by including it in any advertising in the news media, specifically including minority and female news media, and providing written notification to and discussing the Contractor's EEO policy with other Contractors and Subcontractors with whom the Contractor does or anticipates doing business.

(ix) Direct its recruitment efforts, both oral and written, to minority, female and community organizations, to schools with minority and female students and to minority and female recruitment and training organizations serving the Contractor's recruitment area and employment needs. Not later than one month prior to the date for the acceptance of applications for apprenticeship or other training by any recruitment source, the Contractor shall send written notification to organizations such as the above, describing the openings, screening procedures, and tests to be used in the selection process.

(x) Encourage present minority and female employees to recruit other minority persons and women and, where reasonable, provide after school, summer and vacation employment to minority and female youth both on the site and in other areas of a Contractor's work force.

(xi) Validate all tests and other selection requirements where there is an obligation to do so under 41 CFR Part 60-3.

(xii) Conduct, at least annually, an inventory and evaluation at least of all minority and female personnel for promotional opportunities and encourage these employees to seek or to prepare for, through appropriate training, etc., such opportunities.

(xiii) Ensure that seniority practices, job classifications, work assignments and other personnel practices, do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the EEO policy and the Contractor's obligations under these specifications are being carried out.

(xiv) Ensure that all facilities and company activities are nonsegregated, except that separate or single-user toilet and necessary changing facilities shall be provided to assure privacy between the sexes.

(xv) Document and maintain a record of all solicitations of offers for subcontracts from minority and female construction contractors and suppliers, including circulation of solicitations to minority and female contractor associations and other business associations.

(xvi) Conduct a review, at least annually, of all supervisors' adherence to and performance under the Contractor's EEO policies and affirmative action obligations.

(h) Contractors are encouraged to participate in voluntary associations which assist in fulfilling one or more of their affirmative action obligations (7.a through p). The efforts of a contractor association, joint contractor-union, contractor-community, or other similar group of which the Contractor is a member and participant, may be asserted as fulfilling any one or more of its obligations under 7.a through p of these Specifications provided that the contractor actively participates in the group, makes every effort to assure that the group has a positive impact on the employment of minorities and women in the industry, ensures that the concrete benefits of the program are reflected in the Contractor's minority and female workforce participation, makes a good faith effort to meet its individual goals and timetables, and can provide access to documentation which demonstrates the effectiveness of actions taken on behalf of the Contractor. The obligation to comply, however, is the Contractor's and failure of such a group to fulfill an obligation shall not be a defense for the Contractor's noncompliance.

(i) A single goal for minorities and a separate single goal for women have been established. The Contractor, however, is required to provide equal employment opportunity and to take affirmative action for all minority groups, both male and female, and all women, both minority and non-minority. Consequently, the Contractor may be in violation of the Executive Order if a particular group is employed in a substantially disparate manner (for example, even though the Contractor has achieved its goals for women generally, the Contractor may be in violation of the Executive Order if a specific minority group of women is underutilized).

(j) The Contractor shall not use the goals and timetables or affirmative action standards to discriminate against any person because of race, color, religion, sex, or national origin.

(k) The Contractor shall not enter into any Subcontract with any person or firm debarred from Government contracts pursuant to Executive Order 11246.

(l) The Contractor shall carry out such sanctions and penalties for violation of these specifications and of the Equal Opportunity Clause, including suspension, termination and cancellation of existing subcontracts as may be imposed or ordered pursuant to Executive Order 11246, as amended, and its implementing regulations, by the Office of Federal Contract Compliance Programs. Any Contractor who fails to carry out such sanctions and penalties shall be in violation of these specifications and Executive Order 11246, as amended.

(m) The Contractor, in fulfilling its obligations under these specifications, shall implement specific affirmative action steps, at least as extensive as those standards prescribed in paragraph 7 of these specifications, so as to achieve maximum results from its efforts to ensure equal employment opportunity. If the Contractor fails to comply with the requirements of the Executive Order, the implementing regulations, or these specifications, the Director shall proceed in accordance with 41 CFR 60-4.8.

(n) The Contractor shall designate a responsible official to monitor all employment related activity to ensure that the company EEO policy is being carried out, to submit reports relating to the provisions hereof as may be required by the Government and to keep records. Records shall at least include for each employee the name, address, telephone numbers, construction trade, union affiliation if any, employee identification number when assigned, social security number, race, sex, status (e.g., mechanic, apprentice trainee, helper, or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed. Records shall be maintained in an easily understandable and retrievable form; however, to the degree that existing records satisfy this requirement, Contractors shall not be required to maintain separate records.

(o) Nothing herein provided shall be construed as a limitation upon the application of other laws which establish different standards of compliance or upon the application of requirements for the hiring of local or other area residents (e.g., those under the Public Works Employment Act of 1977 and the Community Development Block Grant Program).

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

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

15. SUBSTANCE ABUSE

Contractor shall comply with U.S. DOT regulations, "Drug Free Workplace Requirements (Grants)" 49 C.F.R. Part 29, Subpart F, and other applicable U.S. DOT and FTA regulations and guidance pertaining to substance abuse (drugs and alcohol) that may be promulgated.

16. BONDS

[Refer to contract provision requiring 100% performance and payment bonds]

17. DEBARMENT AND SUSPENSION (*Applicable to contracts greater than or equal to \$25,000*)

[Include following -- may be in IFB (use language below) or contract (use language similar to 18.16)]:

Certification Regarding Debarment, Suspension, and Other Responsibility Matters-

Lower Tier Covered Transactions (Third Party Contracts over \$25,000)

Grantees and subgrantees must not make any award or permit any award (subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, "Debarment and Suspension." Therefore, 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 San Francisco Municipal Transportation Agency ("SFMTA"). If it is later determined that the bidder or proposer knowingly rendered an erroneous certification, in addition to remedies available to the SFMTA, 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 2 CFR Parts 180, Subpart C and 1200, 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.

18. FLY AMERICA

The Contractor agrees to comply with 49 U.S.C. 40118 (the "Fly America" Act) in accordance with the General Services Administration's regulations at 41 CFR Part 301-10, which provide that recipients and 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.

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 4220.1F, are hereby incorporated by reference. Anything to the contrary herein notwithstanding, all FTA-mandated terms shall be deemed to control in the event of a conflict with other provisions contained in this Agreement. The Contractor shall not perform any act, fail to perform any act, or refuse to comply with any (name of grantee) requests which would cause (name of grantee) to be in violation of the FTA terms and conditions.

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

If providing Intelligent Transportation Systems (ITS) property or services, Contactor shall comply with the National ITS Architecture and standards to the extent required by 23

U.S.C. § 512, FTA Notice, "FTA National ITS Architecture Policy on Transit Projects," 66 FR 1455, et seq., January 8, 2001, and later published policies or implementing directives FTA may issue.

21. TEXTING WHILE DRIVING; DISTRACTED DRIVING

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

22. SEAT BELT USE

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

23. FEDERAL CHANGES

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