

EXHIBIT B: PROPOSED AGREEMENT

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B. AUTHORITY's failure to insist in any one or more instances upon CONSULTANT's performance of any terms or conditions of this Agreement shall not be construed as a waiver or relinquishment of AUTHORITY's right to such performance or to future performance of such terms or conditions and CONSULTANT's obligation in respect thereto shall continue in full force and effect. Changes to any portion of this Agreement shall not be binding upon AUTHORITY except when specifically confirmed in writing by an authorized representative of the AUTHORITY by way of a written amendment to this Agreement and issue in accordance with the provisions of this Agreement CONSULTANT shall only commence work covered by an amendment after the amendment is executed and notification to proceed has been provided by AUTHORITY.

ARTICLE 2. AUTHORITY DESIGNEE

The Chief Executive Officer of AUTHORITY, or designee, shall have the authority to act for and exercise any of the rights of AUTHORITY, as set forth in this Agreement.

ARTICLE 3. SCOPE OF WORK

A. CONSULTANT shall perform the work necessary to complete in a manner satisfactory to AUTHORITY, the services set forth in Exhibit A, entitled "Scope of Work," which is attached to, and by this reference, incorporated in and made a part of this Agreement. All services shall be provided at the times and places designated by AUTHORITY.

B. CONSULTANT shall provide the personnel listed below to perform the above-specified services, which persons are hereby designated as key personnel under this Agreement.

<u>Names</u>	<u>Functions</u>

C. No person named in paragraph B of this Article, or his/her successor approved by AUTHORITY, shall be removed or replaced by CONSULTANT, nor shall his/her agreed-upon function or level of commitment hereunder be changed, without the prior written consent of AUTHORITY's Contract Administrator.

D. Should the services of any key person become no longer available to CONSULTANT, the resume and qualifications of the proposed replacement shall be submitted to AUTHORITY for approval as soon as possible, but in no event later than seven (7) calendar days prior to the departure of the incumbent key person, unless CONSULTANT is not provided with such notice by the departing employee. AUTHORITY shall respond to CONSULTANT within seven (7) calendar days following receipt of these qualifications concerning acceptance of the candidate for replacement.

ARTICLE 4. TERM OF AGREEMENT

A. This Agreement shall go into effect on _____, contingent upon approval by AUTHORITY, and CONSULTANT shall commence after notification to proceed by AUTHORITY's Contract Administrator. This Agreement shall end on _____, unless extended by amendment to the Agreement, or terminated as provided hereunder.

B. CONSULTANT is advised that any recommendation for contract award is not binding on AUTHORITY until the Agreement is fully executed and approved by AUTHORITY.

ARTICLE 5. ALLOWABLE COSTS AND PAYMENT

A. For CONSULTANT's full and complete performance of its obligations under this Agreement and subject to the maximum cumulative payment obligation provision set forth in Article 7 "Maximum Obligation" AUTHORITY shall pay CONSULTANT on a firm fixed price (lump sum) basis in accordance with the following provisions.

B. The following schedule shall establish the firm fixed payment to CONSULTANT by AUTHORITY for each tasks set forth in the Scope of Work.

<u>Task</u>	<u>Description</u>	<u>Firm Fixed Price</u>
1	Project Management / Coordination / Administration	\$____.00
2	35% PS&E	\$____.00
3	Draft PS&E (65%) Submittal	\$____.00
4	Initial PS&E (95%) Submittal	\$____.00
5	Final PS&E (100 %) Submittal	

6	Construction Bidding Phase	\$____.00
7	Construction Support Phase	\$____.00
8	Project Closeout	\$____.00
TOTAL FIRM FIXED PRICE (LUMP SUM) PAYMENT		\$____.00

C. The method of payment for this Agreement is based on lump sum. The total lump sum price paid CONSULTANT will include compensation for all work and deliverables, including travel and equipment described in Exhibit A entitled "Scope of Work" to this agreement. No additional compensation will be paid to CONSULTANT unless there is a change in the Scope of Work or the scope of the project. In the instance of a change in the scope of work or scope of the project, adjustment to the total lump sum compensation will be negotiated between CONSULTANT and AUTHORITY. Adjustment in the total lump sum compensation will not be effective until authorized by amendment to this Agreement that is approved by AUTHORITY. The total firm fixed price (lump sum) as specified in Paragraph B of this Article shall not be exceeded, unless authorized by an amendment to this Agreement.

D. The overhead rate established for this Agreement is extended through the term of this specific Agreement. In no event, will CONSULTANT be reimbursed for overhead costs at a rate that exceeds AUTHORITY's approved overhead rate set forth in this Agreement.

E. Reimbursement for transportation and subsistence costs shall not exceed the rates specified in the approved Cost Proposal.

F. Progress payments will be made monthly in arrears based on the percentage of work completed by the CONSULTANT. If CONSULTANT fails to submit the required deliverable items according to the schedule set forth in the Scope of Work, AUTHORITY shall have the right to delay payment or terminate this Agreement in accordance with the provisions of Article 14 entitled "Termination."

G. CONSULTANT shall not commence performance of work or services until this Agreement has been approved by AUTHORITY and notification to proceed has been issued by AUTHORITY. No payment will be made prior to approval of any work, or for any work performed prior to approval of this

Agreement.

H. For personnel subject to prevailing wage rates as described in the California Labor Code, all salary increases, which are the direct result of changes in the prevailing wage rates are reimbursable.

I. CONSULTANT will be reimbursed, less any retention amount withheld, as promptly as fiscal procedures will permit upon receipt by the AUTHORITY's Accounts Payable office of itemized invoices in duplicate. Invoices shall be submitted no later than thirty (30) calendar days after the performance of the work for which the CONSULTANT is billing. Invoices shall detail the work performed on each task/milestone, on each project as applicable. Invoices shall follow the format stipulated for the approved Cost Proposal and shall reference this Agreement number and project title. Final invoice must contain the final cost and all credits due the AUTHORITY that include any equipment purchased under the provisions of Article 47 entitled "Equipment Purchase" of this Agreement. The final invoice should be submitted to AUTHORITY within sixty (60) calendar days after completion of CONSULTANT's work.

J. CONSULTANT shall invoice AUTHORITY on a monthly basis for payments corresponding to the work actually completed by CONSULTANT. Percentage of work completed shall be documented in a monthly progress report prepared by CONSULTANT, which shall accompany each invoice submitted by CONSULTANT. The report should be sufficiently detailed for the AUTHORITY to determine, if CONSULTANT is performing to expectations, or is on schedule; or to provide communication of interim findings, and to sufficiently address any difficulties or special problems encountered, so remedies can be developed. CONSULTANT shall also furnish such other information as may be requested by AUTHORITY to substantiate the validity of an invoice. At its sole discretion, AUTHORITY may decline to make full payment for any task listed in Paragraph B of this Article until such time as CONSULTANT has documented to AUTHORITY's satisfaction, that CONSULTANT has fully completed all work required under the task. AUTHORITY's payment in full for any task completed shall not constitute AUTHORITY's final acceptance of CONSULTANT's work under such task.

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1 K. As partial security against CONSULTANT's failure to satisfactorily fulfill all its obligations
2 under this Agreement, AUTHORITY shall retain ten percent (10%) of the amount of each invoice
3 submitted for payment by CONSULTANT, and shall make prompt and regular incremental acceptances
4 of portions/milestones/tasks, as determined by AUTHORITY, of the Agreement work, and pay retainage
5 to CONSULTANT based on these acceptances. The CONSULTANT, or subconsultant, shall return all
6 monies withheld in retention from a subconsultant within thirty (30) calendar days after receiving payment
7 for work satisfactorily completed and accepted including incremental acceptances of
8 portions/milestones/tasks of the Agreement work by the AUTHORITY. CONSULTANT shall invoice
9 AUTHORITY for the release of the retention in accordance with this Article.

10 L. The prime consultant, or subconsultant, shall return all monies withheld in retention from
11 a subconsultant within seven (7) days for construction contracts and fifteen (15) days for consultant
12 contracts after receiving payment for work satisfactorily completed and accepted. Any subcontract
13 entered into as a result of this Agreement shall contain all of the provisions of this section. Federal law,
14 CFR Title 49, Part 26.29, requires that any delay or postponement of payment over seven (7) days for
15 construction contracts and fifteen (15) days for consultant contracts may take place only for good cause
16 and with the AUTHORITY's prior written approval. Any violation of this provision shall subject the violating
17 prime consultant or subconsultant to the penalties, sanctions and other remedies specified in Section
18 7108.5 of the California Business and Professions Code and Section 10262 of the California Public
19 Contract Code for construction contracts, and Section 3321 of the California Civil Code for consultant
20 contracts. These requirements shall not be construed to limit or impair any contractual, administrative,
21 or judicial remedies, otherwise available to the prime consultant or subconsultant in the event of a dispute
22 involving late payment or nonpayment by the prime consultant, deficient subconsultant performance, or
23 noncompliance by a subconsultant. This provision applies to both DBE and non-DBE CONSULTANT
24 and subconsultants.

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1 M. All retained funds shall be released by AUTHORITY and shall be paid to CONSULTANT
2 within sixty (60) calendar days of payment of final invoice, unless AUTHORITY elects to audit
3 CONSULTANT's records in accordance with Article 17 entitled "Audit and Inspection of Records", of this
4 Agreement. If AUTHORITY elects to audit, retained funds shall be paid to CONSULTANT within thirty
5 (30) calendar days of completion of such audit in an amount reflecting any adjustment required by such
6 audit. During the term of the Agreement, at its sole discretion, AUTHORITY reserves the right to release
7 all or a portion of the retained amount based on CONSULTANT's satisfactory completion of certain
8 portions/milestones/tasks. CONSULTANT shall invoice AUTHORITY for the release of the retention in
9 accordance with this Article.

10 N. Invoices shall be submitted by CONSULTANT on a monthly basis and shall be submitted
11 in duplicate to AUTHORITY's Accounts Payable office or may be emailed to VendorInvoices@octa.net.
12 Each invoice shall be accompanied by the monthly progress report specified in paragraph G of this Article.
13 Invoices shall be submitted no later than 30-calendar days after the performance of work for which
14 CONSULTANT is billing. AUTHORITY shall remit payment within thirty (30) calendar days of the receipt
15 and approval of each invoice. Each invoice shall include the following information:

- 16 1. Agreement No. C-1-3643;
- 17 2. Specific task number for which payment is being requested;
- 18 3. The time period covered by the invoice;
- 19 4. Total monthly invoice by task (including project to-date cumulative invoice amount);
20 and retention amount;
- 21 5. Monthly Progress Report;
- 22 6. Weekly certified payroll for personnel subject to prevailing wage requirements;
- 23 7. Certificate signed by the CONSULTANT or his/her designated alternate that a) The
24 invoice is a true, complete and correct statement of reimbursable costs and progress; b) The backup
25 information included with the invoice is true, complete and correct in all material respects; c) All payments
26 due and owing to subcontractors and suppliers have been made; d) Timely payments will be made to

1 subcontractors and suppliers from the proceeds of the payments covered by the certification and; e) The
2 invoice does not include any amount which CONSULTANT intends to withhold or retain from a
3 subcontractor or supplier unless so identified on the invoice.

4 8. Any other information as agreed or otherwise requested by AUTHORITY to
5 substantiate the validity of an invoice.

6 O. Invoices shall follow the format stipulated for the Cost Proposal and shall reference this
7 Agreement number and project title. Invoices shall include all reimbursable costs/expenditures to satisfy
8 Caltrans' Local Assistance Procedures Manual (LAPM), Chapter 5 Accounting/Invoices.

9 P. CONSULTANT shall not commence performance of work or services until this Agreement
10 has been approved by the AUTHORITY. No payment will be made prior to approval of any work, or for
11 any work performed prior to approval of this Agreement.

12 **ARTICLE 6. PROMPT PAYMENT CLAUSE**

13 A. AUTHORITY has adopted a prompt payment provision on all U.S. DOT-assisted
14 contracts to facilitate timely payment to all subcontractors in accordance with regulatory mandates. The
15 provisions of this Article apply to both DBE and non-DBE subconsultants. Pursuant to Title 49 of the Code
16 of Federal Regulations (CFR) Part 26.29:

17 B. "CONSULTANT or subconsultant agrees to pay each subconsultant under this Agreement for
18 satisfactory performance of its Agreement no later than seven (7) days for construction contracts and
19 fifteen (15) days for consultant contracts from the receipt of each progress payment CONSULTANT
20 receives from AUTHORITY on account of the work performed by the subconsultant. CONSULTANT
21 agrees further to return retainage payments to each subconsultant within seven (7) days for construction
22 contracts and fifteen (15) days for consultant contracts after receiving payment for work satisfactorily
23 completed and accepted including incremental acceptances of portions of the Agreement work by
24 AUTHORITY. Any delay or postponement of payment from the above referenced time frame may take
25 place only for good cause and with AUTHORITY's prior written approval." CONSULTANT agrees further
26 to return retainage payments on construction-related contracts to each subcontractor within seven (7)

days after receiving payment for work satisfactorily completed and accepted including incremental acceptances of portions of the Agreement work by AUTHORITY. CONSULTANT shall incorporate this clause verbatim, set forth above, in all subcontract, broker, dealer, vendor, supplier, purchase order or other source agreements issued to both DBE and non-DBE firms. In the event that there is a dispute over all or any portion of the amount due on a progress payment from CONSULTANT or subconsultant to a subconsultant, CONSULTANT or subconsultant may withhold no more than 150 percent of the disputed amount.

C. Any violation of these provisions shall subject the violating CONSULTANT to the penalties, sanctions, and other remedies specified in Section 7108.5 of the California Business and Professions Code and Section 10262 of the California Public Contract Code for construction contracts, and Section 3321 of the California Civil Code for consultant contracts. This requirement shall not be construed to limit or impair any contractual, administrative or judicial remedies otherwise available to CONSULTANT or subconsultant in the event of a dispute involving late payment or nonpayment by CONSULTANT; deficient subcontract performance or noncompliance by a subconsultant.

D. Failure to comply with these provisions without prior written approval from AUTHORITY will constitute noncompliance, which shall result in the application of appropriate administrative sanctions to the licensee, including, but not limited to, a penalty payable to the subconsultant, of two percent (2%) of the invoice amount due per month, for every month that full payment is not made.

ARTICLE 7. MAXIMUM OBLIGATION

Notwithstanding any provisions of this Agreement to the contrary, AUTHORITY and CONSULTANT mutually agree that AUTHORITY's maximum cumulative payment obligation (including obligation for CONSULTANT's profit) shall be Dollars (\$_____) which shall include all amounts payable to CONSULTANT for its subcontracts, leases, materials and costs arising from, or due to termination of, this Agreement.

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ARTICLE 8. NOTICES

All notices hereunder and communications regarding the interpretation of the terms of this Agreement, or changes thereto, shall be effected by delivery of said notices in person or by depositing said notices in the U.S. mail, registered or certified mail, returned receipt requested, postage prepaid and addressed as follows:

TO CONSULTANT:

TO AUTHORITY:

Orange County Transportation Authority

550 SOUTH MAIN STREET

P.O. BOX 14184

ORANGE, CA 92863-1584

ATTENTION:

ATTENTION: Marjorie Morris-Threats

Title:

Title: Senior Contract Administrator

Phone:

Phone: (714) 560 - 5552

Email:

Email: mthreats@octa.net

Copy: Jeannie Lee

Title: Project Manager

Phone: (714) 560-5735

Email: jlee@octa.net

ARTICLE 9. INDEPENDENT CONTRACTOR

A. CONSULTANT's relationship to AUTHORITY in the performance of this Agreement is that of an independent contractor. CONSULTANT's personnel performing services under this Agreement shall at all times be under CONSULTANT's exclusive direction and control and shall be employees of CONSULTANT and not employees of AUTHORITY. CONSULTANT shall pay all wages, salaries and

other amounts due its employees in connection with this Agreement and shall be responsible for all reports and obligations respecting them, such as social security, income tax withholding, unemployment compensation, workers' compensation and similar matters.

B. Should CONSULTANT's personnel or a state or federal agency allege claims against AUTHORITY involving the status of AUTHORITY as employer, joint or otherwise, of said personnel, or allegations involving any other independent contractor misclassification issues, CONSULTANT shall defend and indemnify AUTHORITY in relation to any allegations made.

ARTICLE 10. INSURANCE

A. CONSULTANT shall procure and maintain insurance coverage during the entire term of this Agreement. Coverage shall be full coverage and not subject to self-insurance provisions. CONSULTANT shall provide the following insurance coverage:

1. Commercial General Liability, to include Products/Completed Operations, Independent Contractors', Contractual Liability, and Personal Injury Liability, and Property Damage with a minimum limit of \$1,000,000 per occurrence and \$2,000,000 general aggregate;

2. Automobile Liability Insurance to include owned, hired and non-owned autos with a combined single limit of \$1,000,000 each accident;

3. Workers' Compensation with limits as required by the State of California, including a waiver of subrogation in favor of AUTHORITY, its officers, directors, employees and agents;

4. Employers' Liability with minimum limits of \$1,000,000; and

5. Professional Liability with minimum limits of \$1,000,000 per claim.

B. Prior to commencement of any work hereof, CONSULTANT shall furnish to AUTHORITY's Contract Administrator broker-issued insurance certificate showing the required insurance coverages and further providing that:

1. AUTHORITY, its officers, directors, employees and agents must be named as additional insured on Commercial General Liability and Automobile Liability policy with respect to performance hereunder; and

2. The coverage shall be primary and noncontributory as to any other insurance with respect to performance hereunder; and

3. Thirty (30) days prior written notice of cancellation or material change be given to AUTHORITY.

C. "Occurrence," as used herein, means any event or related exposure to conditions, which result in bodily injury or property damage.

D. The Certificate of Insurance shall reference Agreement Number C-C-1-3643; and, the Contract Administrator's Name, Marjorie Morris-Threats, Senior Contract Administrator.

E. Upon AUTHORITY's request, certified, true and exact copies of each of the insurance policies shall be provided to AUTHORITY.

F. AUTHORITY shall notify CONSULTANT in writing of any changes in the requirements to insurance required to be provided by CONSULTANT. Except as set forth in this Article, any additional cost from such change shall be paid by AUTHORITY and any reduction in cost shall reduce the Agreement price pursuant to a change order.

G. CONSULTANT shall also include in each subcontract the stipulation that subcontractors shall maintain coverage in the amounts required as provided in this Agreement.

H. CONSULTANT shall be required to immediately notify AUTHORITY of any modifications or cancellation of any required insurance policies.

ARTICLE 11. ORDER OF PRECEDENCE

To the extent there are any conflicts or inconsistency arising between any provisions or documents incorporated in this Agreement, the order of precedence for conflict resolution in descending order shall be as follows: (1) the provisions of this Agreement, including all exhibits; (2) the provisions of RFP ; (3) CONSULTANT's technical proposal dated _____, CONSULTANT's cost proposal dated _____ and final cost proposal dated _____, and (4) all other documents, if any, cited herein or incorporated by reference.

ARTICLE 12. CHANGES

A. By written notice or order, AUTHORITY may, from time to time, order work suspension and/or make changes in the general scope of this Agreement, including, but not limited to, the services furnished to AUTHORITY by CONSULTANT as described in the Scope of Work. If any such work suspension or change causes an increase or decrease in the price of this Agreement or in the time required for its performance, CONSULTANT shall promptly notify AUTHORITY thereof and assert its claim for adjustment within ten (10) days after the change or work suspension is ordered, and an equitable adjustment shall be negotiated. However, nothing in this clause shall excuse CONSULTANT from proceeding immediately with the Agreement as changed.

B. This Agreement may be amended or modified only by mutual written agreement of the parties.

C. CONSULTANT shall only commence work covered by an amendment after the amendment is executed and notification to proceed has been provided by AUTHORITY's Contract Administrator.

ARTICLE 13. DISPUTES

A. Except as otherwise provided in this Agreement, when a dispute arises between CONSULTANT and AUTHORITY, the project managers shall meet to resolve the issue. If project managers do not reach a resolution, the dispute will be decided by AUTHORITY's Director of Contracts Administration and Materials Management (CAMM), who shall reduce the decision to writing and mail or otherwise furnish a copy thereof to CONSULTANT. The decision of the Director, CAMM, shall be the final and conclusive administrative decision.

B. Pending final decision of a dispute hereunder, CONSULTANT shall proceed diligently with the performance of this Agreement and in accordance with the decision of AUTHORITY's Director, CAMM. Nothing in this Agreement, however, shall be construed as making final the decision of any AUTHORITY official or representative on a question of law, which questions shall be settled in accordance with the laws of the State of California.

ARTICLE 14. TERMINATION

A. AUTHORITY reserves the right to terminate this Agreement upon thirty (30) calendar days written notice to CONSULTANT of intent to terminate, with effective date of termination and the reasons for termination stated in the notice, in accordance with the provisions of the FAR referenced above and Article 8 "Notices", herein. Upon receipt of said notification, CONSULTANT agrees to comply with all applicable provisions of the FAR pertaining to termination for convenience.

B. Upon termination, AUTHORITY shall be entitled to all work, including but not limited to, reports, investigations, appraisals, inventories, studies, analyses, drawings and data estimates performed to that date, whether completed or not.

C. AUTHORITY may temporarily suspend this Agreement, at no additional cost to AUTHORITY, provided that CONSULTANT is given written notice of temporary suspension. If AUTHORITY gives such notice of temporary suspension, CONSULTANT shall immediately suspend its activities under this Agreement. A temporary suspension may be issued concurrent with the notice of termination.

D. AUTHORITY may terminate this Agreement with CONSULTANT should CONSULTANT fail to perform the covenants herein contained at the time and in the manner herein provided. In the event of such termination, AUTHORITY may proceed with the work in any manner deemed proper by AUTHORITY. If AUTHORITY terminates this Agreement with CONSULTANT, AUTHORITY shall pay CONSULTANT the sum due to CONSULTANT under this Agreement prior to termination, unless the cost of completion to AUTHORITY exceeds the funds remaining in the Agreement, in which case the overage shall be deducted from any sum due CONSULTANT under this Agreement and the balance, if any, shall be paid to CONSULTANT upon demand. Said termination shall be construed in accordance with the provisions of the Code of Federal Regulations (CFR), Title 48, Chapter 1, Part 49, of the Federal Acquisition Regulation (FAR) and specific subparts and other provisions thereof applicable to termination for convenience.

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E. AUTHORITY may terminate this Agreement for CONSULTANT's default if a federal or state proceeding for the relief of debtors is undertaken by or against CONSULTANT, or if CONSULTANT makes an assignment for the benefit of creditors, or for cause if CONSULTANT fails to perform in accordance with the scope of work or breaches any term(s) or violates any provision(s) of this Agreement and does not cure such breach or violation within ten (10) calendar days after written notice thereof by AUTHORITY. CONSULTANT shall be liable for any and all reasonable costs incurred by AUTHORITY as a result of such default or breach including, but not limited to, reprocurement costs of the same or similar services defaulted by CONSULTANT under this Agreement. Such termination shall comply with CFR Title 48, Chapter 1, Part 49, of the FAR.

ARTICLE 15. INDEMNIFICATION

CONSULTANT shall indemnify, defend, and hold harmless AUTHORITY, its officers, directors, employees and agents from and against any and all claims (including attorneys' fees and reasonable expenses for litigation or settlement) for any loss, costs, penalties, fines, damages, bodily injuries, including death, damage to or loss of use of property, arising out of, resulting from, or in connection with the performance of CONSULTANT, its officers, directors, employees, agents, subconsultants or suppliers under the Agreement. Notwithstanding the foregoing, such obligation to defend, hold harmless, and indemnify AUTHORITY, its officers, directors, employees and agents shall not apply to such claims or liabilities arising from the sole or active negligence or willful misconduct of AUTHORITY.

ARTICLE 16. ASSIGNMENTS AND SUBCONTRACTS

A. Nothing contained in this Agreement or otherwise, shall create any contractual relation between AUTHORITY and any subconsultant(s), and no subcontract shall relieve CONSULTANT of its responsibilities and obligations hereunder. CONSULTANT agrees to be as fully responsible to AUTHORITY for the acts and omissions of its subconsultant(s) and of persons either directly or indirectly employed by any of them as it is for the acts and omissions of persons directly employed by CONSULTANT. CONSULTANT's obligation to pay its subconsultant(s) is an independent obligation from AUTHORITY's obligation to make payments to the CONSULTANT.

B. Neither this Agreement nor any interest herein nor claim hereunder may be assigned by CONSULTANT either voluntarily or by operation of law, nor may all or any part of this Agreement be subcontracted by CONSULTANT, without the prior written consent of AUTHORITY. Consent by AUTHORITY shall not be deemed to relieve CONSULTANT of its obligations to comply fully with all terms and conditions of this Agreement.

C. The CONSULTANT shall perform the work contemplated with resources available within its own organization; and no portion of the work pertinent to this Agreement shall be subcontracted without written authorization by AUTHORITY's Contract Administrator, except that, which is expressly identified in the approved Cost Proposal.

D. CONSULTANT shall pay its subconsultants within seven (7) calendar days from receipt of each payment made to CONSULTANT by AUTHORITY.

E. All subcontracts entered into as a result of this Agreement, shall contain all of the provisions stipulated in this entire Agreement to be applicable to subconsultants unless otherwise noted.

F. Any substitution or addition of subconsultant(s) must be approved in writing by the AUTHORITY's Contract Administrator, in advance of assigning work to a substitute subconsultant(s).

G. AUTHORITY hereby consents to CONSULTANT's subcontracting of portions of the Scope of Work to the parties identified below for the functions described below. CONSULTANT shall include in the subcontract agreement the stipulation that CONSULTANT, not AUTHORITY, is solely responsible for payment to the subcontractor for the amounts owing and that the subcontractor shall have no claim, and shall take no action, against AUTHORITY, its officers, directors, employees or sureties for nonpayment by CONSULTANT.

<u>Subcontractor Name/Address</u>	<u>Subcontractor Amounts</u>

ARTICLE 17. AUDIT AND INSPECTION OF RECORDS

A. CONSULTANT and any subconsultant shall permit AUTHORITY, the State, and the FHWA if federal participating funds are used in this Agreement, to review and inspect the project activities and files at all reasonable times during the performance period of this Agreement.

B. For the purpose of determining compliance with the Public Contract Code 10115, et seq. and Title 21, California Code of Regulations, Chapter 21, Section 2500 et seq., when applicable and other matters connected with the performance of the contract pursuant to Government Code 8546.7; CONSULTANT, subconsultants, and AUTHORITY shall maintain and make available for inspection all books, documents, papers, accounting records, Independent certified public accountant (CPA) Audited Cost Rate workpapers, and other evidence pertaining to the performance of the Agreement, including but not limited to, the costs of administering the Agreement. All parties, including the CONSULTANT and Independent CPA, shall make such workpapers and materials available at their respective offices at all reasonable times during the Agreement period and for four (4) years from the date of final payment under the Agreement. AUTHORITY, or other agents of AUTHORITY, Caltrans Auditor, FHWA, or any duly authorized representative of the Federal government having jurisdiction under Federal laws or regulations (including the basis of Federal funding in whole or in part) shall have access to any books, records, payroll documents, facilities and documents of CONSULTANT, subconsultants, and the CONSULTANT's Independent (CPA), that are pertinent to the Agreement for audits, examinations, workpaper review, excerpts, and transactions, and copies thereof shall be furnished if requested without limitation.

C. CONSULTANT shall maintain such books, records, data and documents in accordance with generally accepted accounting principles and the CFR, Title 48, Chapter 1, Part 31 of the Federal Acquisition Regulation System (FAR) and shall clearly identify and make such items readily accessible to such parties during CONSULTANT's performance hereunder.

D. AUTHORITY's right to audit books and records directly related to this Agreement shall also extend to all first-tier subcontractors performing work identified in Article 16 "Assignments and Subcontracts" of this Agreement, and such language must be included in CONSULTANT's agreements

with its subcontractors.

ARTICLE 18. AUDIT REVIEW PROCEDURES

A. Any dispute concerning a question of fact arising under an interim or post audit of this Agreement that is not disposed of by agreement, shall be reviewed by AUTHORITY's Internal Audit.

B. Not later than 30 days after issuance of the final audit report, CONSULTANT may request a review by AUTHORITY's Internal Audit of unresolved audit issues. The request for review will be submitted in writing.

C. Neither the pendency of a dispute nor its consideration by AUTHORITY will excuse CONSULTANT from full and timely performance, in accordance with the terms of this Agreement.

D. CONSULTANT and subconsultant contracts, including cost proposals and ICR, are subject to audits or reviews such as, but not limited to, an Agreement audit, an incurred cost audit, an ICR Audit, or a CPA ICR audit work paper review. If selected for audit or review, the Agreement, cost proposal and ICR and related work papers, if applicable, will be reviewed to verify compliance with 48 CFR, Part 31 and other related laws and regulations. In the instances of a CPA ICR audit work paper review it is CONSULTANT's responsibility to ensure federal, state, or local government officials are allowed full access to the CPA's work papers including making copies as necessary. The Agreement, cost proposal, and ICR shall be adjusted by CONSULTANT and approved by AUTHORITY's Contract Administrator to conform to the audit or review recommendations. CONSULTANT agrees that individual terms of costs identified in the audit report shall be incorporated into the Agreement by this reference if directed by AUTHORITY at its sole discretion. Refusal by CONSULTANT to incorporate audit or review recommendations, or to ensure that the federal, state or local governments have access to CPA work papers, will be considered a breach of Agreement terms and cause for termination of the Agreement and disallowance of prior reimbursed costs.

E. CONSULTANT Cost Proposal is subject to a CPA ICR Audit Work Paper Review by The California Department of Transportation's Independent office of Audit and Investigation (IOAI). IOAI, at its sole discretion, may review and/or audit and approve the CPA ICR documentation. The Cost Proposal

shall be adjusted by the CONSULTANT and approved by the AUTHORITY's Contract Administrator to conform to the Work Paper Review recommendations included in the management letter or audit recommendations included in the audit report. Refusal by the CONSULTANT to incorporate the Work Paper Review recommendations included in the management letter or audit recommendations included in the audit report will be considered a breach of the Agreement terms and cause for termination of the Agreement and disallowance of prior reimbursed costs.

1. During IOAI review of the ICR audit work papers created by the CONSULTANT's independent CPA, IOAI will work with the CPA and/or CONSULTANT toward a resolution of issues that arise during the review. Each party agrees to use its best efforts to resolve any audit disputes in a timely manner. If IOAI identifies significant issues during the review and is unable to issue a cognizant approval letter, AUTHORITY will reimburse the CONSULTANT at a provisional ICR until a FAR compliant ICR {e.g. 48 CFR, part 31; GAGAS (Generally Accepted Auditing Standards); CAS (Cost Accounting Standards), if applicable; in accordance with procedures and guidelines of the American Association of State Highways and Transportation Officials (AASHTO) Audit Guide; and other applicable procedures and guidelines} is received and approved by A&I. Provisional rates will be as follows:

a. If the proposed rate is less than 150% - the provisional rate reimbursed will be 90% of the proposed rate.

b. If the proposed rate is between 150% and 200% - the provisional rate will be 85% of the proposed rate.

c. If the proposed rate is greater than 200% - the provisional rate will be 75% of the proposed rate.

2. If IOAI is unable to issue a cognizant letter per paragraph E.1. above, IOAI may require CONSULTANT to submit a revised independent CPA-audited ICR and audit report within three (3) months of the effective date of the management letter. IOAI will then have up to six (6) months to review the CONSULTANT's and/or the independent CPA's revisions.

3. If the CONSULTANT fails to comply with the provisions of this Section E, or if IOAI is still

unable to issue a cognizant approval letter after the revised independent CPA-audited ICR is submitted, overhead cost reimbursement will be limited to the accepted ICR that was established upon initial rejection of the ICR and set forth in paragraph E.1. above for all rendered services. In this event, this accepted ICR will become the actual and final ICR for reimbursement purposes under this Agreement.

4. CONSULTANT may submit to AUTHORITY final invoice only when all of the following items have occurred: (1) IOAI accepts or adjusts the original or revised independent CPA-audited ICR; (2) all work under this Agreement has been completed to the satisfaction of AUTHORITY; and, (3) IOAI has issued its final ICR review letter. The Consultant must submit its final invoice to the AUTHORITY, no later than sixty (60) calendar days after occurrence of the last of these items. The accepted ICR will apply to this Agreement and all other Agreements executed between AUTHORITY and the CONSULTANT, either as a prime or subconsultant, with the same fiscal period ICR.

ARTICLE 19. COST PRINCIPLES AND ADMINISTRATIVE REQUIREMENTS

A. CONSULTANT agrees that the CFR, Title 48, Chapter 1, Part 31, Contract Cost Principles and Procedures, shall be used to determine the cost allowability of individual terms of costs.

B. CONSULTANT also agrees to comply with Federal procedures in accordance with CFR, Title 2, Part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.

C. Any costs for which payment has been made to CONSULTANT that are determined by subsequent audit to be unallowable under CFR Title 48, Part 31 or CFR Title 2, Part 200, are subject to repayment by CONSULTANT to AUTHORITY.

D. When a CONSULTANT or Subconsultant is a Non-Profit Organization or an Institution of Higher Education, the Cost Principles for Title 2 CFR Part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards shall apply.

ARTICLE 20. FEDERAL, STATE AND LOCAL LAWS

CONSULTANT warrants that in the performance of this Agreement, it shall comply with all applicable federal, state and local laws, statutes and ordinances and all lawful orders, rules and

regulations promulgated thereunder.

ARTICLE 21. EQUAL EMPLOYMENT OPPORTUNITY

In connection with its performance under this Agreement, CONSULTANT shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, age or national origin. CONSULTANT shall take affirmative action to ensure that applicants are employed, and that employees are treated during their employment, without regard to their race, religion, color, sex, age or national origin. Such actions 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.

ARTICLE 22. PROHIBITED INTERESTS

A. CONSULTANT covenants that, for the term of this Agreement, no director, member, officer or employee of AUTHORITY during his/her tenure in office/employment or for one (1) year thereafter shall have any interest, direct or indirect, in this Agreement or the proceeds thereof.

B. No member of or delegate to the Congress of the United States shall have any interest, direct or indirect, in this Agreement or to the benefits thereof.

ARTICLE 23. OWNERSHIP OF REPORTS AND DOCUMENTS

A. The originals of all letters, documents, reports and other products and data produced under this Agreement shall be delivered to, and become the property of AUTHORITY, and CONSULTANT shall have no property right therein whatsoever. Copies may be made for CONSULTANT's records but shall not be furnished to others without written authorization from AUTHORITY. Immediately upon termination, AUTHORITY shall be entitled to, and CONSULTANT shall deliver to AUTHORITY, reports, investigations, appraisals, inventories, studies, analyses, drawings and data estimates performed to that date, whether completed or not, and other such materials as may have been prepared or accumulated to date by CONSULTANT in performing this Agreement which is not CONSULTANT's privileged information, as defined by law, or CONSULTANT's personnel information, along with all other property belonging exclusively to City which is in CONSULTANT's possession.

1 Publication of the information derived from work performed or data obtained in connection with services
2 rendered under this Agreement must be approved in writing by AUTHORITY.

3 B. Additionally, it is agreed that such deliverables shall be deemed works made for hire.
4 CONSULTANT acknowledges and agrees that the work (and all rights therein, including without limitation,
5 copyright) belongs to and shall be the sole and exclusive property of AUTHORITY without restriction or
6 limitation upon its use or dissemination by AUTHORITY.

7 C. All ideas, memoranda, specifications, plans, manufacturing, procedures, drawings,
8 descriptions, and all other written information submitted to CONSULTANT in connection with the
9 performance of this Agreement shall not, without prior written approval of AUTHORITY, be used for any
10 purposes other than the performance for this project, nor be disclosed to an entity not connected with the
11 performance of the project. CONSULTANT shall comply with AUTHORITY's policies regarding such
12 material. Nothing furnished to CONSULTANT, which is otherwise known to CONSULTANT or becomes
13 generally known to the related industry shall be deemed confidential. CONSULTANT shall not use
14 AUTHORITY's name, photographs of the project, or any other publicity pertaining to the project in any
15 professional publication, magazine, trade paper, newspaper, seminar or other medium without the
16 express written consent of AUTHORITY.

17 D. No copies, sketches, computer graphics or graphs, including graphic art work, are to be
18 released by CONSULTANT to any other person or agency except after prior written approval by
19 AUTHORITY, except as necessary for the performance of services under this Agreement. All press
20 releases, including graphic display information to be published in newspapers, magazines, etc., are to be
21 handled only by AUTHORITY unless otherwise agreed to by CONSULTANT and AUTHORITY.

22 E. Applicable patent rights provisions regarding rights to inventions shall be included in the
23 Agreements as appropriate (48 CFR 27, Subpart 27.3 - Patent Rights under Government Contracts for
24 federal-aid contracts).

25 F. AUTHORITY may permit copyrighting reports or other agreement products. If copyrights
26 are permitted, the Agreement shall provide that the FHWA shall have the royalty-free nonexclusive and

irrevocable right to reproduce, publish, or otherwise use; and to authorize others to use, the work for government purposes.

ARTICLE 24. PATENT AND COPYRIGHT INFRINGEMENT

A. In lieu of any other warranty by CONSULTANT against patent or copyright infringement, statutory or otherwise, it is agreed that CONSULTANT shall defend, at its expense, any claim or suit against AUTHORITY on account of any allegation that any item furnished under this Agreement or the normal use or sale thereof arising out of the performance of this Agreement, infringes upon any presently existing U.S. letters patent or copyright and CONSULTANT shall pay all costs and damages finally awarded in any such suit or claim, provided that CONSULTANT is promptly notified in writing of the suit or claim and given authority, information and assistance at CONSULTANT's expense for the defense of same. However, CONSULTANT will not indemnify AUTHORITY if the suit or claim results from: (1) AUTHORITY's alteration of a deliverable, such that said deliverable in its altered form infringes upon any presently existing U.S. letters patent or copyright; or (2) the use of a deliverable in combination with other material not provided by CONSULTANT when such use in combination infringes upon an existing U.S. letters patent or copyright.

B. CONSULTANT shall have sole control of the defense of any such claim or suit and all negotiations for settlement thereof. CONSULTANT shall not be obligated to indemnify AUTHORITY under any settlement made without CONSULTANT's consent or in the event AUTHORITY fails to cooperate fully in the defense of any suit or claim, provided, however, that said defense shall be at CONSULTANT's expense. If the use or sale of said item is enjoined as a result of such suit or claim, CONSULTANT, at no expense to AUTHORITY, shall obtain for AUTHORITY the right to use and sell said item, or shall substitute an equivalent item acceptable to AUTHORITY and extend this patent and copyright indemnity thereto.

ARTICLE 25. DESIGN WITHIN FUNDING LIMITATIONS

A. In order to ensure the accuracy of the construction budget for the benefit of the public works bidders and AUTHORITY's budget process, CONSULTANT shall accomplish the design services

required under this Agreement so as to permit the award of a contract, for the construction of the facilities designed at a price that does not exceed the estimated construction contract price as set forth by AUTHORITY. When bids or proposals for the construction contract are received that exceed the estimated price, CONSULTANT shall perform such redesign and other services as are necessary to permit contract award within the funding limitation. These additional services shall be performed at no increase in the price for which the services were specified. However, CONSULTANT shall not be required to perform such additional services at no cost to AUTHORITY if the unfavorable bids or proposals are the result of conditions beyond its reasonable control.

B. CONSULTANT will promptly advise AUTHORITY if it finds that the project being designed will exceed or is likely to exceed the funding limitations and it is unable to design a usable facility within these limitations. Upon receipt of such information, AUTHORITY will review CONSULTANT's revised estimate of construction cost. AUTHORITY may, if it determines that the estimated construction contract price is so low that award of a construction contract not in excess of such estimate is improbable, authorize a change in scope or materials as required to reduce the estimated construction cost to an amount within the estimated construction contract price set forth by AUTHORITY, or AUTHORITY may adjust such estimated construction contract price. When bids or proposals are not solicited or are unreasonably delayed, AUTHORITY shall prepare an estimate of constructing the design submitted and such estimate shall be used in lieu of bids or proposals to determine compliance within the funding limitation.

ARTICLE 26. REQUIREMENTS FOR REGISTRATION OF DESIGNERS

All design and engineering work furnished by CONSULTANT shall be performed by or under the supervision of persons licensed to practice architecture, engineering or surveying (as applicable) in the State of California, by personnel who are careful, skilled, experienced and competent in their respective trades or professions, who are professionally qualified to perform the work in accordance with the Agreement documents and who shall assume professional responsibility for the accuracy and completeness of the design documents and construction documents prepared or checked by them.

ARTICLE 27. FINISHED AND PRELIMINARY DATA

A. Upon completion of all work under this Agreement, ownership and title to all reports, documents, plans, specifications, and estimates, including, but not limited to, illustrations, photographs, tapes, software, software design documents, including without limitation source code, binary code, all media, technical documentation and user documentation, photoprints and other graphic information required to be furnished under this Agreement, will automatically be vested in AUTHORITY and no further agreement will be necessary to transfer ownership to AUTHORITY.

B. It is understood and agreed that all calculations, drawings and specifications, whether in hard copy or machine-readable form, are intended for one-time use in the construction of the project for which this Agreement has been entered into.

C. CONSULTANT is not liable for claims, liabilities, or losses arising out of, or connected with the modification, or misuse by AUTHORITY of the machine-readable information and data provided by CONSULTANT under this Agreement. Further, CONSULTANT is not liable for claims, liabilities, or losses arising out of, or connected with any use by AUTHORITY of the project documentation on other projects, or for the completion of this project by others, except only as such use as may be authorized in writing by CONSULTANT.

D. It is expressly understood that any title to preliminary technical data is not passed to AUTHORITY, but is retained by CONSULTANT. Preliminary data includes roughs, visualizations, software design documents, layouts and comprehensives prepared by CONSULTANT solely for the purpose of demonstrating an idea or message for AUTHORITY's acceptance before approval is given for preparation of finished artwork. Preliminary data title and right thereto shall be made available to AUTHORITY, if CONSULTANT causes AUTHORITY to exercise Article 14 "Termination", and a price shall be negotiated for all preliminary data.

E. All subcontracts entered into as a result of this Agreement shall contain all of the provisions of this Article.

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ARTICLE 28. STATE PREVAILING WAGE RATES

A. CONSULTANT shall comply with the State of California's General Prevailing Wage Rate requirements in accordance with California Labor Code, Section 1770, and all Federal, State, and local laws and ordinances applicable to the work.

B. When prevailing wages apply to the services described in the scope of work, transportation and subsistence costs shall be reimbursed at the minimum rates set by the Department of Industrial Relations (DIR) as outlined in the applicable Prevailing Wage Determination. See <http://www.dir.ca.gov>.

C. CONSULTANT warrants that all mechanics, laborers, journeypersons, workpersons, craftspersons or apprentices employed by CONSULTANT or subconsultant at any tier for any work hereunder, shall be paid unconditionally and not less often than once a week and without any subsequent deduction or rebate on any account (except such payroll deductions as are permitted or required by federal, state or local law, regulation or ordinance), the full amounts due at the time of payment, computed at a wage rate and per diem rate not less than the aggregate of the highest of the two basic hourly rates and rates of payments, contributions or costs for any fringe benefits contained in the current general prevailing wage rate(s) and per diem rate(s), established by the Director of the Department of Industrial Relations of the State of California, (as set forth in the Labor Code, commencing at Section 1770 et. seq.), or as established by the Secretary of Labor (as set forth in the Davis-Bacon Act, 40 U.S.C. 267a, et. seq.), regardless of any contractual relationship which may be alleged to exist between CONSULTANT or subconsultant and their respective mechanics, laborers, journeypersons, workpersons, craftspersons or apprentices. Copies of the current General Prevailing Wage Determinations and Per Diem Rates are on file at AUTHORITY's offices and will be made available to CONSULTANT upon request. CONSULTANT shall post a copy thereof at each job site at which work hereunder is performed.

D. In addition to the foregoing, CONSULTANT agrees to comply with all other provisions of the California Labor Code, which is incorporated herein by reference, pertaining to workers performing work hereunder including, but not limited to, those provisions for work hours, payroll records and

apprenticeship employment and regulation program.

E. Any subcontract entered into as a result of this Agreement, if for more than \$25,000 for public works construction or more than \$15,000 for the alteration, demolition, repair, or maintenance of public works, shall contain all of the provisions of this Article. CONSULTANT agrees to insert or cause to be inserted the preceding clause in all subcontracts which provide for workers to perform work hereunder regardless of the subcontractor tier.

ARTICLE 29. NON-DISCRIMINATION CLAUSE AND STATEMENT OF COMPLIANCE

During the performance of this Agreement, CONSULTANT, for itself, its assignees and successors in interest agree as follows:

A. CONSULTANT's signature affixed herein, and dated, shall constitute a certification under penalty of perjury under the laws of the State of California that CONSULTANT has, unless exempt, complied with, the nondiscrimination program requirements of Government Code Section 12990 and Title 2, California Code of Regulations, Section 8103.

B. Nondiscrimination: During the performance of this Agreement, Consultant and its subconsultants shall not unlawfully discriminate, harass, or allow harassment against any employee or applicant for employment because of sex, race, color, ancestry, religious creed, national origin, physical disability (including HIV and AIDS), mental disability, medical condition (e.g., cancer), age (over 40), marital status, and denial of family care leave. Consultant and subconsultants shall insure that the evaluation and treatment of their employees and applicants for employment are free from such discrimination and harassment. Consultant and subconsultants shall comply with the provisions of the Fair Employment and Housing Act (Gov. Code §12990 (a-f) et seq.) and the applicable regulations promulgated there under (California Code of Regulations, Title 2, Section 8100-8504 et seq.). The applicable regulations of the Fair Employment and Housing Commission implementing Government Code Section 12990 (a-f), are incorporated into this Agreement by reference and made a part hereof as if set forth in full. Consultant and its subconsultants shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other Agreement.

C. Compliance with Regulations: The Consultant shall comply with regulations relative to Title VI (nondiscrimination in federally-assisted programs of the Department of Transportation – Title 49 Code of Federal Regulations, Part 21 - Effectuation of Title VI of the 1964 Civil Rights Act). Title VI provides that the recipients of federal assistance will implement and maintain a policy of nondiscrimination in which no person in the State of California shall, on the basis of race, color, national origin, religion, sex, age, disability, be excluded from participation in, denied the benefits of or subject to discrimination under any program or activity by the recipients of federal assistance or their assignees and successors in interest.

D. Solicitations for Subcontracts, Including Procurement of Materials and Equipment: The Consultant, with regard to the work performed by it during the Agreement shall act in accordance with Title VI. Specifically, the Consultant shall not discriminate on the basis of race, color, national origin, religion, sex, age, or disability in the selection and retention of subconsultants, including procurement of materials and leases of equipment. The Consultant shall not participate either directly or indirectly in the discrimination prohibited by Section 21.5 of the U.S. DOT's Regulations, including employment practices when the Agreement covers a program whose goal is employment. CONSULTANT, subrecipient or subconsultant will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR 26 on the basis of race, color, sex, or national origin. In administering the LOCAL AGENCY components of the DBE Program Plan, CONSULTANT, subrecipient or subconsultant will not, directly, or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the DBE Program Plan with respect to individuals of a particular race, color, sex, or national origin.

E. Information and Reports: CONSULTANT shall provide all information and reports required by the Regulations or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by AUTHORITY to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any

information required of CONSULTANT is in the exclusive possession of another who fails or refuses to furnish this information, CONSULTANT shall so certify to AUTHORITY as appropriate, and shall set forth what efforts it has made to obtain the information.

F. Sanctions for Noncompliance: In the event of CONSULTANT's noncompliance with nondiscrimination provisions of this Agreement, AUTHORITY shall impose sanctions as it may determine to be appropriate, including, but not limited to:

1. Withholding of payments to CONSULTANT under the Agreement until CONSULTANT complies; and/or

2. Cancellation, termination, or suspension of the Agreement, in whole or in part.

G. The Americans with Disabilities Act of 1990, as amended (ADA), 42 U.S.C. Sections 12101 *et seq.*, prohibits discrimination against qualified individuals with disabilities in all programs, activities, and services of public entities, as well as imposes specific requirements on public and private providers of transportation.

H. Incorporation of Provisions: CONSULTANT shall include the provisions of paragraphs (A) through (G) in every lower-tier subcontract, which exceeds \$100,000, including procurements of materials and leases of equipment, unless exempt by the Regulations, or directives issued pursuant thereto, and that all such sub recipients shall certify and disclose accordingly. CONSULTANT shall take such action with respect to any subcontract or procurement as AUTHORITY may direct as a means of enforcing such provisions including sanctions for noncompliance. Provided, however, that in the event CONSULTANT becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of such direction, the CONSULTANT may request AUTHORITY to enter into such litigation to protect the interests of AUTHORITY, and, in addition, CONSULTANT may request the United States to enter into such litigation to protect the interests of the United States.

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**ARTICLE 30. RACE-CONSCIOUS DBE CONTRACT PROVISIONS FOR DOT-ASSISTED
CONSULTANT CONTRACTS**

A. AUTHORITY or CONSULTANT shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Contract. The CONSULTANT shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of U.S. DOT-assisted contracts. Failure by the CONSULTANT to carry out these requirements is a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy as the AUTHORITY deems appropriate, which may include, but is not limited to:

- (1) Withholding monthly progress payments;
- (2) Assessing sanctions;
- (3) Liquidated damages; and/or
- (4) Disqualifying the CONSULTANT from future proposing as non-responsible.

CONSULTANT agrees to include these requirements in all subcontracts at any tier.

B. In conformance with Title 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs," AUTHORITY has established a seventeen (17%) percent Disadvantaged Business Enterprise (DBE) participation goal for the services required in this Agreement.

C. At the time of contract execution, the CONSULTANT committed to utilize one or more Disadvantaged Business Enterprise (DBE) Firms in the performance of this DOT-assisted contract. CONSULTANT agrees to enter into agreements with the DBE subconsultants listed on Attachment "Consultant Contract DBE Commitment Caltrans Exhibit 10-O2" and ensure they perform work and/or supply materials in accordance with original commitments. No changes to CONSULTANT's DBE commitment shall be made until proper review and approval by AUTHORITY is rendered in writing.

D. CONSULTANT must take appropriate actions to ensure that it will satisfy good faith efforts to attain the DBE goal and/or the DBE commitment made at award (whichever is higher), when change orders or other modifications alter the dollar amount of the Agreement or the distribution of work.

1 CONSULTANT must apply and report its DBE goal commitment against the total current Agreement
2 value, including any change orders and/or amendments.

3 E. If there is a DBE goal and/or DBE commitment on the Agreement, CONSULTANT must
4 complete and submit within the specified timelines, DBE documentation electronically through an
5 AUTHORITY-approved electronic reporting system.

6 F. CONSULTANT shall comply with all the requirements set forth in Attachment A titled,
7 "DISADVANTAGED BUSINESS ENTERPRISE (DBE) CONTRACT PROVISIONS FOR U.S. DOT-
8 ASSISTED CONTRACTS", which is attached to and, by this reference, incorporated in and made a part
9 of this Agreement.

10 **ARTICLE 31. PRIVACY ACT**

11 A. CONSULTANT shall comply with, and assures the compliance of its employees with,
12 the information restrictions and other applicable requirements of the Privacy Act of 1974, 5
13 U.S.C. §552a. Among other things, CONSULTANT agrees to obtain the express consent of the
14 Federal Government before the CONSULTANT or its employees operate a system of records on
15 behalf of the Federal Government. CONSULTANT understands that the requirements of the Privacy
16 Act, including the civil and criminal penalties for violation of that Act, apply to those individuals
17 involved, and that failure to comply with the terms of the Privacy Act may result in termination of the
18 underlying Agreement.

19 B. CONSULTANT agrees to include this requirement in all its subcontracts at any tier.

20 **ARTICLE 32. CONFLICT OF INTEREST**

21 CONTRACTOR agrees to avoid organizational conflicts of interest. An organizational conflict of
22 interest means that due to other activities, relationships or contracts, the CONSULTANT is unable, or
23 potentially unable to render impartial assistance or advice to AUTHORITY; CONSULTANT's objectivity
24 in performing the work identified in the Scope of Work is or might be otherwise impaired; or
25 CONSULTANT has an unfair competitive advantage. CONSULTANT is obligated to fully disclose to
26 AUTHORITY in writing Conflict of Interest issues as soon as they are known to CONSULTANT. All

disclosures must be submitted in writing to AUTHORITY pursuant to the Notice provision herein. This disclosure requirement is for the entire term of this Agreement.

ARTICLE 33. CODE OF CONDUCT

A. CONSULTANT agrees to comply with the AUTHORITY's Code of Conduct as it relates to Third-Party contracts which is hereby referenced and by this reference is incorporated herein.

B. CONSULTANT agrees to include these requirements in all of its subcontracts.

ARTICLE 34. PROHIBITION ON PROVIDING ADVOCACY SERVICES

CONSULTANT and all subconsultants performing work under this Agreement, shall be prohibited from concurrently representing or lobbying for any other party competing for a contract with AUTHORITY, either as a prime consultant or subconsultant. Failure to refrain from such representation may result in termination of this Agreement.

ARTICLE 35. INCORPORATION OF FEDERAL TERMS

All contractual provisions required by United States Department of Transportation (USDOT), including the Federal Highway Administration (FHWA), whether or not expressly set forth in this document, are hereby incorporated by reference. Anything to the contrary herein notwithstanding, all federally mandated terms shall be deemed to control in the event of a conflict with other provisions contained in this Agreement. CONSULTANT shall not perform any act, fail to perform any act, or refuse to comply with any requests, which would cause AUTHORITY to be in violation of the USDOT or FHWA terms and conditions.

ARTICLE 36. FEDERAL CHANGES

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

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ARTICLE 37. NO FEDERAL GOVERNMENT OBLIGATION TO THIRD PARTIES

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

B. CONSULTANT agrees to include these requirements in all of its subcontracts.

ARTICLE 38. PROGRAM FRAUD AND FALSE OR FRAUDULENT STATEMENTS AND RELATED ACTS

A. CONSULTANT acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. §§3801 et seq., and USDOT regulations, "Program Fraud Civil Remedies," CFR, Title 49, Part 31, apply to its actions pertaining to this project. Accordingly, by signing this Agreement, CONSULTANT certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, it may make, or may cause to be made, pertaining to the underlying Agreement or the FTA assisted project for which this Agreement's work is being performed. CONSULTANT also 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 penalties set forth in the Program Fraud Civil Remedies Act of 1986 against the CONSULTANT to the extent the Federal Government deems appropriate.

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

C. CONSULTANT agrees to include this requirement in all of its subcontracts.

ARTICLE 39. RECYCLED PRODUCTS

A. CONSULTANT shall 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 CFR, Title 40, Part 247, and Executive Order 12873, as they apply to the procurement of the items designated in subpart B of CFR, Title 40, Part 247.

B. CONSULTANT agrees to include this requirement in all of its subcontracts.

ARTICLE 40. ENERGY CONSERVATION REQUIREMENTS

If the maximum cumulative payment obligation of this Agreement exceeds \$150,000, CONSULTANT shall comply with mandatory standards and policies relating to energy efficiency, which are contained in the state energy conservation plan issued in compliance with the Energy Policy Conservation Act.

ARTICLE 41. CLEAN AIR

A. CONSULTANT shall comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. §§ 7401 et seq. CONSULTANT shall report each violation to AUTHORITY, who will in turn, report each violation as required to assure notification to USDOT and the appropriate Environmental Protection Agency (EPA) Regional Office.

B. CONSULTANT agrees to include this requirement in each subcontract exceeding \$150,000.

ARTICLE 42. CLEAN WATER REQUIREMENTS

A. If the maximum cumulative payment obligation of this Agreement exceeds \$150,000, CONSULTANT shall comply with all applicable standards, orders or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. Section 1251 et seq. CONSULTANT shall report any violations of use of prohibited facilities to the USDOT and US EPA.

B. CONSULTANT agrees to include this requirement in each subcontract exceeding \$150,000.

ARTICLE 43. CONTINGENT FEE

CONSULTANT warrants, by execution of this Agreement that no person or selling agency has been employed, or retained, to solicit or secure this Agreement upon an agreement or understanding, for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees, or bona fide established commercial or selling agencies maintained by CONSULTANT for the purpose of securing business. For breach or violation of this warranty, AUTHORITY has the right to annul this Agreement without liability; pay only for the value of the work actually performed, or in its discretion to deduct from the contract price or consideration, or otherwise recover the full amount of such commission, percentage, brokerage, or contingent fee.

ARTICLE 44. DEBARMENT AND SUSPENSION CERTIFICATION

A. CONSULTANT's signature affixed herein, shall constitute a certification under penalty of perjury under the laws of the State of California, that CONSULTANT or any person associated therewith in the capacity of owner, partner, director, officer or manager:

1. Is not currently under suspension, debarment, voluntary exclusion, or determination of ineligibility by any federal agency;
2. Has not been suspended, debarred, voluntarily excluded, or determined ineligible by any federal agency within the past three (3) years;
3. Does not have a proposed debarment pending; and
4. Has not been indicted, convicted, or had a civil judgment rendered against it by a court of competent jurisdiction in any matter involving fraud or official misconduct within the past three (3) years.

B. Any exceptions to this certification must be disclosed in writing to the AUTHORITY. Exceptions will not necessarily result in denial of recommendation for award, but will be considered in determining CONSULTANT responsibility. Disclosures must indicate to whom exceptions apply, initiating agency, and the dates of agency action.

C. Exceptions to the Federal Government Excluded Parties List System maintained by the General Services Administration are to be determined by the Federal Highway Administration.

ARTICLE 45. PROHIBITION OF EXPENDING LOCAL AGENCY STATE OR FEDERAL FUNDS FOR LOBBYING

A. CONSULTANT certifies to the best of his or her knowledge and belief that:

1. No state, federal or local agency appropriated funds have been paid, or will be paid by-or-on behalf of CONSULTANT to any person for influencing or attempting to influence an officer or employee of any local, State or Federal agency; a Member of the State Legislature or United States Congress; an officer or employee of the Legislature or Congress; or any employee of a Member of the Legislature or Congress, in connection with the awarding or making of this Agreement, or with the extension, continuation, renewal, amendment, or modification of this Agreement.

2. If any funds other than Federal appropriated funds have been paid, or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Agreement, CONSULTANT shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying", in accordance with its instructions.

B. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by U.S. Code Title 31 Section 1352,. Any person who fails to file the required certification shall be subject to a civil penalty of not less than ten thousand (\$10,000) dollars and not more than one hundred thousand (\$100,000) Dollars for each such failure.

C. CONSULTANT also agrees by signing this document that he or she shall require that the language of this certification be included in all lower-tier subcontracts, which exceed one hundred thousand (\$100,000) dollars, and that all such sub recipients shall certify and disclose accordingly.

ARTICLE 46. FUNDING REQUIREMENTS

A. It is mutually understood between the parties that this Agreement may have been written before ascertaining the availability of funds or appropriation of funds, for the mutual benefit of both parties, in order to avoid program and fiscal delays that would occur if the Agreement were executed after that

determination was made.

B. This Agreement is valid and enforceable only if sufficient funds are made available to AUTHORITY for the purpose of this Agreement. In addition, this Agreement is subject to any additional restrictions, limitations, conditions, or any statute enacted by the Congress, State Legislature, or AUTHORITY governing board that may affect the provisions, terms, or funding of this Agreement in any manner.

C. It is mutually agreed that if sufficient funds are not appropriated, this Agreement may be amended to reflect any reduction in funds.

D. AUTHORITY has the option to terminate the Agreement pursuant to Article 14 Termination, or by mutual agreement to amend the Agreement to reflect any reduction of funds.

ARTICLE 47. EQUIPMENT PURCHASE

A. Prior authorization, in writing, by AUTHORITY's Project Manager shall be required before CONSULTANT enters into any unbudgeted purchase order, or subcontract exceeding five thousand (\$5,000.00) Dollars for supplies, equipment or CONSULTANT services. CONSULTANT shall provide an evaluation of the necessity or desirability of incurring such costs.

B. For purchase of any item, service or consulting work not covered in CONSULTANT's Cost Proposal and exceeding five thousand (\$5,000.00) Dollars prior authorization by AUTHORITY's Project Manager; three (3) competitive quotations must be submitted with the request, or the absence of bidding must be adequately justified.

C. Any equipment purchased as a result of this Agreement is subject to the following:

1. "CONSULTANT shall maintain an inventory of all nonexpendable property. Nonexpendable property is defined as having a useful life of at least two years and an acquisition cost of \$5,000.00 or more. If the purchased equipment needs replacement and is sold or traded in, AUTHORITY shall receive a proper refund or credit at the conclusion of this Agreement, or if the Agreement is terminated, CONSULTANT may either keep the equipment and credit AUTHORITY in an amount equal to the its fair market value, or sell such equipment at the best price obtainable at a

public or private sale, in accordance with established AUTHORITY procedures; and credit AUTHORITY in an amount equal to the sales price. If CONSULTANT elects to keep the equipment, fair market value shall be determined at CONSULTANT's expense, on the basis of a competent independent appraisal of such equipment. Appraisals shall be obtained from an appraiser agreeable to both AUTHORITY and CONSULTANT. If it is determined to sell the equipment, the terms and conditions of such sale must be approved in advance by AUTHORITY.

2. Regulation CFR, Title 2, Part 200 requires a credit to Federal funds when participating equipment with a fair market value greater than five thousand (\$5,000.00) Dollars is credited to the project.

ARTICLE 48. HEALTH AND SAFETY REQUIREMENTS

A. CONSULTANT shall comply with all the requirements set forth in Exhibit G, Modified Level 1 and 3 Safety Specifications. As used therein, "Contractor" shall mean "Consultant" and Subcontractor" shall mean "Sub-consultant."

B. CONSULTANT agrees to include this requirement in all of its subcontracts.

ARTICLE 49. CONFIDENTIALITY OF DATA

A. All financial, statistical, personal, technical, or other data and information relative to the AUTHORITY's operations, which are designated confidential by the AUTHORITY and made available to the CONSULTANT in order to carry out this Agreement, shall be protected by the CONSULTANT from unauthorized use and disclosure.

B. Permission to disclose information on one occasion, or public meeting held by the AUTHORITY relating to the Agreement, shall not authorize the CONSULTANT to further disclose such information or disseminate the same on any other occasion.

C. CONSULTANT shall not comment publicly to the press or any other media regarding the Agreement or LOCAL AGENCY's actions on the same, except to LOCAL AGENCY's staff, CONSULTANT's own personnel involved in the performance of this Agreement, at public hearings, or in response to questions from a Legislative committee.

1 D. CONSULTANT shall not issue any news release or public relations item of any nature,
2 whatsoever, regarding work performed or to be performed under this Agreement without prior review of
3 the contents thereof by the AUTHORITY, and receipt of the AUTHORITY's written permission.

4 **ARTICLE 50. REBATES, KICKBACKS OR OTHER UNLAWFUL CONSIDERATION**

5 CONSULTANT warrants that this Agreement was not obtained or secured through rebates,
6 kickbacks or other unlawful consideration, either promised or paid to any AUTHORITY employee. For
7 breach or violation of this warranty, AUTHORITY shall have the right in its discretion, to terminate the
8 Agreement without liability, to pay only for the value of the work actually performed, or to deduct from the
9 Agreement price, or otherwise recover the full amount of such rebate, kickback or other unlawful
10 consideration.

11 **ARTICLE 51. NATIONAL LABOR RELATIONS BOARD CERTIFICATION**

12 In accordance with Public Contract Code Section 10296, CONSULTANT hereby states under
13 penalty of perjury that no more than one final unappealable finding of contempt of court by a federal court
14 has been issued against CONSULTANT within the immediately preceding two-year period because
15 of CONSULTANT's failure to comply with an order of a federal court that orders CONSULTANT to comply
16 with an order of the National Labor Relations Board.

17 **ARTICLE 52. EVALUATION OF CONSULTANT**

18 CONSULTANT's performance will be evaluated by AUTHORITY. A copy of the evaluation will be
19 sent to CONSULTANT for comments. The evaluation together with any comments shall be retained as
20 part of the Agreement record.

21 **ARTICLE 53. PROHIBITION**

22 To prevent potential conflicts of interest the prime consultant and all subconsultants, (at any tier)
23 awarded this contract for design services to develop the PS&E for State Route 55 Improvement Project
24 Between Interstate 5 and State Route 91 will be ineligible to participate, in any tier in any of the separate
25 contracts for the construction management services and construction services required to deliver the
26 State Route 55 improvement Project Between Interstate 5 and State Route 91.

ARTICLE 54. FORCE MAJEURE

Either party shall be excused from performing its obligations under this Agreement during the time and to the extent that it is prevented from performing by an unforeseeable cause beyond its control, including but not limited to: any incidence of fire, flood; acts of God; commandeering of material, products, plants or facilities by the federal, state or local government; national fuel shortage; or a material act or omission by the other party; when satisfactory evidence of such cause is presented to the other party, and provided further that such nonperformance is unforeseeable, beyond the control and is not due to the fault or negligence of the party not performing.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement No. C-1-3643 to be executed as of the date of the last signature below.

ORANGE COUNTY TRANSPORTATION AUTHORITY

By: _____ By: _____
Darrell E. Johnson
Chief Executive Officer

APPROVED AS TO FORM:

By: _____
James M. Donich
General Counsel

APPROVED:

By: _____
James G. Beil, P.E.
Executive Director, Capital Programs

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DISADVANTAGED BUSINESS ENTERPRISE (DBE) CONTRACT PROVISIONS FOR U.S. DOT-ASSISTED CONTRACTS

I. DBE Participation

It is the CONSULTANT'S responsibility to be fully informed regarding the requirements of 49 CFR, Part 26 and AUTHORITY's DBE program developed pursuant to these regulations.

CONSULTANT must complete and submit, within the specified timelines, the required DBE documentation in Section IV. of this Attachment, through the AUTHORITY's electronic reporting system (ECAT). CONSULTANT's submitted "DBE Participation Commitment Form," executed subcontracts and/or purchase orders, as well as on-going DBE documentation will be utilized to monitor CONSULTANT's DBE commitment. Unless otherwise directed and/or approved in writing by AUTHORITY prior, CONSULTANT must not effectuate any changes to its DBE participation commitment.

CONSULTANT must complete and submit all required DBE documentation to effectively capture DBE utilization on AUTHORITY's U.S. DOT-assisted contracts whether achieved race neutrally or race consciously. No changes to CONSULTANT'S DBE commitment shall be made until proper review and approval by AUTHORITY is rendered in writing.

To ensure full compliance with the requirements of 49 CFR, Part 26 and AUTHORITY's DBE Program, CONSULTANT must:

- A. Take appropriate actions to ensure that it will satisfy good faith efforts to meet the DBE agreement goal and continue to meet the DBE commitment made at award, when change orders or other modifications alter the dollar amount of the Agreement or the distribution of work. CONSULTANT must apply and report its DBE goal commitment against the total Agreement value, including any change orders and/or amendments.

II. DBE Policy and Applicability

In accordance with federal financial assistance agreements with the U.S. Department of Transportation ("U.S. DOT"), AUTHORITY has adopted a Disadvantaged Business Enterprise ("DBE") Policy and Program in conformance with Title 49 CFR, Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs".

The project is subject to these stipulated regulations and AUTHORITY's DBE Program. To ensure that AUTHORITY achieves its overall DBE Program goals and objectives, AUTHORITY encourages the participation of DBEs as defined in 49 CFR, Part 26, in the performance of

agreements financed in whole or in part with U.S. DOT funds. Pursuant to the intent of these Regulations, it is also the policy of AUTHORITY to:

Fulfill the spirit and intent of the DBE Program regulations published under U.S. DOT Title 49 CFR, Part 26, by ensuring that DBEs have an equitable opportunity to compete for and participate in AUTHORITY's U.S. DOT-assisted contracts and subcontracts. AUTHORITY is firmly committed to the DBE Program objectives, which are designed to:

- A. Ensure non-discrimination in the award and administration of AUTHORITY's U.S. DOT-assisted contracts;
- B. Create a level playing field by which DBE's can fairly compete for AUTHORITY's U.S. DOT-assisted contracts;
- C. Ensure that AUTHORITY's DBE Program and Overall Goals are narrowly tailored in accordance with applicable law;
- D. Ensure that only firms that fully meet 49 CFR, Part 26 eligibility standards are permitted to participate as DBE's in the AUTHORITY's DBE Program;
- E. Help remove barriers which impede the participation of DBE's in AUTHORITY's U.S. DOT-assisted contracts;
- F. Promote the use of DBE's in all types of U.S. DOT-assisted contracts and procurement activities conducted by AUTHORITY;
- G. Provide training and other assistance through our resource partners to address capital, bonding, and insurance needs;
- H. Assist in the development of DBE firms that can compete successfully in the marketplace outside of the DBE Program; and
- I. Establish and provide opportunities for DBEs by providing flexibility in the implementation of AUTHORITY's DBE Program.

CONSULTANT must not discriminate on the basis of race, color, national origin, or sex in the award and performance of subconsultant. Any terms used in this section that are defined in 49 CFR, Part 26, or elsewhere in the Regulations, must have the meaning set forth in the Regulations. In the event of any conflicts or inconsistencies between the Regulations and AUTHORITY's DBE Program with respect to U.S. DOT-assisted contracts, the Regulations must prevail.

III. AUTHORITY's DBE Policy Implementation Directives

Pursuant to the provisions associated with Title 49 CFR, Part 26, the Disadvantaged Business Enterprise ("DBE") Program exists to ensure participation, equitable competition, and assistance to participants in the U.S. DOT DBE program. Accordingly, based on the AUTHORITY's analysis of its past utilization data, coupled with Overall Goal Methodology findings and examination of similar Agencies' disparity studies, AUTHORITY's DBE Program is implemented utilizing both race-conscious and race-neutral means. When a contract-specific DBE goal is assigned to a project, meeting the contract-specific goal by committing to utilize DBEs, or documenting a bona fide good faith effort to do so, is a condition of award.

A. Definitions

The following definitions apply to the terms used in these provisions:

1. **"Disadvantaged Business Enterprise (DBE)"** means a small business concern:
(a) which is at least fifty-one percent (51%) owned by one or more socially and economically disadvantaged individuals or, in the case of any publicly-owned business, at least fifty-one percent (51%) of the stock of which is owned by one or more socially and economically disadvantaged individuals; and (b) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.
2. **"Small Business Concern"** means a small business as defined pursuant to Section 3 of the Small Business Act and Small Business Administration (SBA) regulations implementing it (13 CFR Part 121) that also does not exceed the cap on average annual gross receipts specified in §26.65(b).
3. **"Socially and Economically Disadvantaged Individuals"** means any individual who is a citizens (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of groups and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control.
 - a) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis. An individual must demonstrate that he or she has held himself or herself out, as a member of a designated group if you require it.
 - b) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
 - i. "Black Americans," which includes persons having origins in any of

- the Black racial groups of Africa”;
 - ii. "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race”;
 - iii. "Native Americans," which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaskan Natives, or Native Hawaiians”;
 - iv. "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Samoa, Macao, Fiji, Tonga, Kirbati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong”;
 - v. "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;”
 - vi. Women; and
 - vii. Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.
- c) Being born in a particular country does not, standing alone, mean that a person is necessarily a member of one of the groups listed in this definition.
4. **“Owned and Controlled”** means a business: (a) which is at least 51 percent owned by one or more “Socially and Economically Disadvantaged Individuals” or, in the case of a publicly-owned business, at least 51 percent of the stock of which is owned by one or more “Socially and Economically Disadvantaged Individuals”; and (b) whose management and daily business operations are controlled by one or more such individuals.
5. **“Manufacturer”** means a firm that operates or maintains a factory or establishment that produces on the premises the materials or supplies obtained by the CONSULTANT.
6. **“Regular Dealer”** means a firm that owns, operates or maintains a store, warehouse, or other establishment in which the materials or supplies required for the performance of the Agreement are bought, kept in stock, and regularly sold to the public in the usual course of business. The firm must engage in, as its principal business, and in its own name, the purchase and sale of the product in question. A regular dealer in such bulk items as steel, cement, gravel, stone and petroleum products need not keep such products in stock if it owns or operates distribution equipment.
7. **“Fraud”** includes a firm that does not meet the eligibility criteria of being a certified

DBE and attempts to participate in a U.S. DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations, or under circumstances indicating a serious lack of business integrity or honesty. AUTHORITY may take enforcement action under 49 CFR, Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action under 49 CFR, Part 31. AUTHORITY may refer cases of identified fraud to the Department of Justice, for prosecution under 18 U.S.C. 1001, or any other applicable provisions of law. Any person who makes a false or fraudulent statement in connection with participation of a DBE in any U.S. DOT-assisted program or otherwise, violates applicable Federal statutes.

8. ***“Other Socially and Economically Disadvantaged Individuals”*** means those individuals who are citizens of the United States (or lawfully admitted permanent residents), and who, on a case-by-case basis, are determined by Small Business Administration or AUTHORITY to meet the social and economic disadvantage criteria described below.

a) Social Disadvantage

1. The individual's social disadvantage must stem from his/her color, national origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar cause beyond the individual's control.
2. The individual must demonstrate that he/she has personally suffered social disadvantage.
3. The individual's social disadvantage must be rooted in treatment which he/she has experienced in American society, not in other countries.
4. The individual's social disadvantage must be chronic, longstanding and substantial; not fleeting or insignificant.
5. The individual's social disadvantage must have negatively affected his/her entry into and/or advancement in the business world.
6. A determination of social disadvantage must be made before proceeding to make a determination of economic disadvantage.

b) Economic Disadvantage

1. The individual's ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same line of business and competitive market area that are not socially disadvantaged.

2. The following criteria will be considered when determining the degree of diminished credit and capital opportunities of a person claiming social and economic disadvantage:

With respect to the individual:

- availability of financing
- bonding capability
- availability of outside equity capital
- available markets

With respect to the individual and the business concern:

- personal and business assets
- personal and business net worth
- personal and business income and profits

IV. Submission of DBE Information and Ongoing Reporting Requirements (Post-Award)

CONSULTANT must complete and submit within the specified timelines, the following DBE and Non-DBE documentation, electronically through the submission process detailed below:

Form/Electronic Submittal	Frequency of Submission	Process for Submission:
Monthly DBE Attainment and Subconsultant Prompt Payment Verification Report	Monthly by the 10 th of each month	Enter data and submit via ECAT to AUTHORITY
(CALTRANS) Exhibit 9- F: Disadvantaged Business Enterprise Running Tally of Payments	After submitting an invoice for reimbursement that includes a payment to a DBE, but no later than the 10th of the following month	Submit to Caltrans by e-mail: business.support.unit@dot.ca.gov and copy AUTHORITY
DBE Subcontract Agreements	Within ten (10) days of prime contract award, or with Request to Add for DBE firms added post-award	Upload Subcontract to Subconsultant profile and submit via ECAT to AUTHORITY
Request to Add Subconsultant	As needed (see instructions below)	Enter data and submit via ECAT to AUTHORITY
DBE Commitment Change Request(s)	As needed (see instructions below)	Enter data and submit via ECAT to AUTHORITY
On-Going Good Faith Efforts (GFE) Post-Award	As needed (see instructions below)	Upload GFE attachment and submit via ECAT to AUTHORITY
(CALTRANS) Exhibit 17-F: Final Report-Utilization of Disadvantaged Business	Within thirty (30) days from the date of project completion.	Enter data and submit via ECAT to AUTHORITY

Enterprises (DBE) and First-Tier Subcontractors		
(CALTRANS) Exhibit 17-O: Disadvantaged Business Enterprises (DBE) Certification Status Change	Within thirty (30) days from the date of project completion.	Enter data and submit via ECAT to AUTHORITY

A penalty of ten dollars (\$10) per day, per Form/Electronic submittal will be implemented for late submission of any of the above.

A. Monthly DBE Attainment and Subconsultant Prompt Payment Verification Data Submission

This submission serves to ensure CONSULTANT's DBE commitments are attained, properly reported, and credited in accordance with DBE crediting provisions based on the capacity the DBE performs the scope of work/service.

This submission further serves to monitor prompt payment to both DBE and non-DBE firms, and collect DBE utilization data as required under 49 CFR, Part 26.

CONSULTANT is required to enter data directly into ECAT and submit by the 10th of each month until completion of the Agreement. CONSULTANT's first submission is due following the first month of Agreement activity. Even if no DBE participation will be reported within a period, CONSULTANT must complete and submit Monthly by the required timelines.

If there is not a DBE goal and no DBE commitment has been made by CONSULTANT, CONSULTANT is required to enter data directly into ECAT and submit by bi-annually on April 10th and October 10th of each year. Additionally, upon completion of the contract, a final report must be submitted and marked final.

Data required for submission includes the amount(s) received by CONSULTANT from AUTHORITY and the amount(s) paid to lower-tier subconsultants during the Month. CONSULTANT to submit pertinent payment details for any firm (DBE and Non-DBE) to whom they have reported a payment within the reporting period. CONSULTANT is advised not to report the participation of DBE(s) toward the CONSULTANT's DBE attainment until the amount being claimed has been paid to the DBE.

Pertinent payment details include:

- Invoice Number
- Invoice Amount
- Payment Amount
- Invoice Date
- Check Number
- Date of Payment

- Corresponding Prime Invoice (associated to subconsultants' invoice)
- Retention
- Disputed or Withheld invoice amounts

Firms will receive a notification from ECAT when a payment is reported to them and will be required to log-in to ECAT to verify the payment information provided by CONSULTANT. A reported payment to a lower-tier DBE firm will not be credited towards the DBE goal until the DBE firm has validated the payment through ECAT. All payments reported by CONSULTANT must be validated by affected firm, prior to the 10th of each month following the reporting period.

Electronic submission of the Monthly DBE Commitment and Attainment Summary and Subconsultant Prompt Pay Verification Data includes a certification under penalty of perjury of the prompt payment assurance statement of compliance, providing assurance that timely payments have been issued to all subconsultants in accordance with regulatory mandates and as required by 49 CFR Part 26.29.

After submitting an invoice for reimbursement that includes a payment to a DBE, but no later than the 10th of the following month, CONSULTANT shall complete and email the "Exhibit 9- F: Disadvantaged Business Enterprise Running Tally of Payments" to Caltrans by e-mail (business.support.unit@dot.ca.gov) with a copy uploaded to the AUTHORITY via ECAT. The Exhibit 9-F can be completed on-line and downloaded via ECAT, for submission to Caltrans, after CONSULTANT's submission of the monthly reporting data captured above.

B. DBE Subcontract Agreements

CONSULTANT must electronically submit to AUTHORITY via ECAT, copies of executed subcontracts and/or purchase orders (PO) for all DBE firms participating on the contract within ten (10) working days of award. CONSULTANT must immediately notify AUTHORITY in writing, of any problems it may have in obtaining the subcontract agreements from listed DBE firms within the specified time.

C. Additional DBE Firms

In the event CONSULTANT identifies additional DBE Subconsultants or suppliers not previously identified by CONSULTANT for DBE participation under the Agreement, CONSULTANT must notify AUTHORITY by filling out and submitting a "Request to Add," through ECAT. This will enable AUTHORITY to verify the firm's eligibility, capacity, CUF and scope of work. Proposed firms will not be applied towards CONSULTANT'S DBE participation until approved by AUTHORITY.

CONSULTANT must also submit, for each DBE identified after contract execution, a written confirmation from the DBE acknowledging that it is participating in the contract for a specific value, including the corresponding scope of work (a subcontract agreement can serve in lieu of

the written confirmation). This supporting documentation is a required upload by ECAT when submitting a Request to Add.

D. DBE Commitment Change Request(s), DBE Substitution, Termination and Increasing or Decreasing Commitment Values

CONSULTANT shall utilize the specific DBEs listed to perform the work and supply the materials for which each is listed unless the CONSULTANT obtains AUTHORITY's written consent. CONSULTANT shall not terminate, decrease or substitute a listed DBE for convenience and perform work originally designated for a DBE with its own work force or those of an affiliate, a non-DBE firm, another DBE firm or obtain materials from other sources without prior written authorization from AUTHORITY. CONSULTANT shall not be entitled to any payment for work or materials unless it is performed or supplied by the listed DBE on the (Caltrans) Exhibit 10-O2 Consultant Contract DBE Commitment form, unless the DBE is terminated in accordance with this section and is approved by AUTHORITY. This includes partial terminations.

CONSULTANT shall provide written notification to AUTHORITY in a timely manner of any changes to its anticipated DBE participation. This notice should be provided prior to the commencement of that portion of the work.

AUTHORITY shall only provide written consent to a request to use other forces or sources of materials if CONSULTANT has good cause to terminate or decrease its DBE commitment to a DBE firm. For the purposes of this section good cause includes any of the following justifications:

1. Listed DBE fails or refuses to execute a written contract based on the requirements of the project.
2. Listed DBE firm fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE Subconsultant to perform its work on the subcontract results from the bad faith or discriminatory action of CONSULTANT.
3. Listed DBE firm fails or refuses to meet the CONSULTANT's reasonable, nondiscriminatory bond requirements.
4. Listed DBE becomes bankrupt or insolvent, or exhibits credit unworthiness.
5. Listed DBE firm is ineligible to work on public works projects because of suspension and debarment proceedings pursuant 2 CFR Parts 180, 215 and 1,200 or applicable state law.
6. AUTHORITY has determined that the listed DBE firm is not a responsible firm.
7. Listed DBE firm voluntarily withdraws from the project and provides written notice of its withdrawal.
8. Listed DBE is ineligible to receive credit for the type of work required.
9. Listed DBE owner dies or becomes disabled resulting in the inability of the DBE to perform the work on the Contract.
10. Other documented good cause that the Authority determines compels the

termination (inclusive of decreases to commitment values and substitutions) of a DBE firm.

To submit a request to substitute, decrease or terminate a DBE subconsultant commitment, CONSULTANT is required to submit a DBE Commitment Change Request through ECAT. The DBE Commitment Change Request includes options to increase, decrease, substitute or terminate a DBE commitment.

If decrease, substitute or terminate is selected, CONSULTANT must give notice in writing to the DBE, with a copy to AUTHORITY, of its intent to decrease, substitute and/or terminate, and provide justification, allowing the DBE five (5) days to respond to CONSULTANT of the reasons, if any, why it objects to the proposed termination of its contract and why AUTHORITY should not approve CONSULTANT's request. The following documentation will be required by ECAT when submitting the DBE Commitment Change Request.

1. One or more of the good cause justifications listed above.
2. Notices from CONSULTANT to the DBE regarding the request.
3. Responses from the DBEs to CONSULTANT regarding the request.
4. Any documentation necessary to validate the good cause justification.
5. Proof of DBE certification of proposed firm (if requesting to substitute).
6. Written confirmation of work and amount signed by proposed firm (if requesting to substitute).

In the event of an approved DBE substitution, termination, or failure of a DBE to complete its work on the contract for any reason, the DBE must be substituted with another DBE or adequate good faith efforts must be documented by CONSULTANT within five (5) days, to the extent needed to meet the contract-specific DBE goal. Note: The five (5) day period may be extended for an additional five (5) days if necessary, at the request of the CONSULTANT. The substitute DBE must be certified as a DBE within the appropriate NAICS categories at the time of request for substitution.

CONSULTANT shall not be entitled to any payment for work or materials unless it is performed or supplied by the listed DBE, unless the DBE is terminated in accordance with this section and is approved by AUTHORITY in writing. This includes partial terminations.

Should CONSULTANT elect to submit a good faith effort documentation in lieu of proposing additional DBE participation, AUTHORITY will review the documentation and provide a determination through ECAT to CONSULTANT stating whether or not good faith efforts have been adequately demonstrated.

The substitute DBE cannot work on the Agreement until its work eligibility has been confirmed by AUTHORITY.

E. On-Going Good Faith Efforts Post-Award

During the term of the contract, CONSULTANT shall continue to make a Good Faith Effort (GFE) to ensure that DBEs have an opportunity to successfully perform in the contract, and that the CONSULTANT meets the DBE contract goal. These efforts shall include, but shall not be limited to, the following:

- a. Negotiating in good faith to attempt to finalize and execute a subconsultant agreement with the DBEs committed to;
- b. Continuing to provide assistance to DBE firms in obtaining bonding, lines of credit, etc.
- c. Notifying a DBE in writing of any potential problem and attempting to resolve the problem prior to formally requesting AUTHORITY approval to substitute the DBE.
- d. Paying all firms (DBEs and non-DBEs) in a timely manner, as listed in the contract specifications;
- e. Alerting AUTHORITY in a timely manner of any problems anticipated in attaining the DBE participation committed to in the proposal;
- f. If a DBE substitution is necessary, making a Good Faith Effort to replace the DBE with another DBE, subject to the approval of AUTHORITY.

Should CONSULTANT's DBE commitment fall below the DBE contract goal, submittal of good faith effort documentation will be required on a monthly basis until the goal has been met through executed DBE contract agreements. Documentation should include but is not limited to:

- a. Conducting market research to identify and solicit DBE firms that have the capability to perform the work on the Agreement. All reasonable and available means should be utilized. . This may include attendance at matchmaking meetings and events, advertising, written notices or emails to all DBEs listed in the State's directory of transportation firms that specialize in the areas of work desired and which are located in the area or surrounding areas of the project.
- b. CONSULTANT should solicit this interest as early in the process as practicable to allow the DBEs to respond to the solicitation and submit a timely proposal. CONSULTANT should determine with certainty if the DBEs are interested by taking appropriate steps to follow up on initial solicitations.
- c. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units (for example, smaller tasks or quantities) to facilitate DBE participation, even when CONSULTANT might otherwise prefer to perform these work items with its own forces. This may include, where possible, establishing flexible timeframes for performance.

- d. Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, State, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

F. Final Report-Utilization of Disadvantaged Business Enterprises (Exhibit 17-F)

Upon completion of the project, CONSULTANT must electronically designate their last Monthly DBE Commitment and Attainment Summary and Subconsultant Prompt Pay Verification Report as final to facilitate reporting and capturing DBE attainments and prompt release of retention to all subconsultants.

CONSULTANT must electronically submit an Exhibit 17-F: Final Report-Utilization of Disadvantaged Business Enterprises (DBE) and First-Tier Subcontractors (F-PDF) to AUTHORITY within thirty (30) days from the date of project completion. The amount of ten-thousand dollars (\$10,000) will be withheld from payment until a satisfactory form is submitted.

The Exhibit 17-F can be completed on-line and downloaded via ECAT, for submission to Caltrans, upon CONSULTANT's submission of the Final Monthly DBE Attainment Summary and Subconsultant Prompt Payment Verification Report.

G. Disadvantaged Business Enterprises Certification Status Change (Exhibit 17-O)

If a DBE Subconsultant is decertified during the life of the project, the decertified subconsultant must notify the CONSULTANT in writing with the date of decertification and last date of work on the project while still certified. Within ten (10) days of receipt of decertification documentation, CONSULTANT must electronically furnish the written documentation to AUTHORITY via ECAT. Upon completion of the project, "Exhibit 17-O: Disadvantaged Business Enterprises Certification Status Change" must be signed and certified correct by the CONSULTANT indicating each DBE's existing certification status utilizing ECAT. The Exhibit 17-O can be completed on-line and submitted to the Authority via ECAT.

If there are no changes, CONSULTANT indicates "No Changes." The signed and certified form must be furnished to AUTHORITY within thirty (30) days from the date of project completion.

Failure to submit any of the required submittals above and their support documentation within the specified timeline shall result in a penalty of ten dollars (\$10) per day, per submittal document.

AUTHORITY requires CONSULTANT to maintain records and documents of payments to lower-tiers, including DBEs, for a period of four (4) years from the date of final payment by AUTHORITY, unless otherwise provided by applicable record retention requirements for CONSULTANT'S agreement, whichever is longer. These records will be made available for inspection upon request in accordance with Article 17 entitled "Audit and Inspection of Records", of this Agreement. This reporting requirement extends to all lower-tiers, both DBE and non-DBE.

AUTHORITY reserves the right, at its sole discretion, to demonstrate responsiveness to requirements of CFR 49 Part 26.37 by posting CONSULTANT payment data to a website, database, or other place accessible to Subconsultants to assist them in determining when they should expect to receive payment.

V. DBE Eligibility and Commercially Useful Function Standards

A DBE must be certified at the time of bid/proposal submission:

A DBE must be a small business firm defined pursuant to 13 CFR Part 121 and be certified through the California Unified Certification Program ("CUCP") at the time of bid/proposal submission. A listing of DBEs certified by the CUCP is available at the link to the CUCP web site, which can be accessed at:

<https://ucp.dot.ca.gov/licenseForm.htm>

1. A DBE may participate as a prime CONSULTANT, Subconsultant, joint venture partner, vendor of material or supplies, or as a trucking company.
2. A DBE joint venture partner must be responsible for specific contract items of work, or clearly defined portions thereof. Responsibility means actually performing, managing, and supervising the work with its own work forces. The DBE joint venture partner must share in the capital contribution, control, management, risks, and profits of the joint venture commensurate with its ownership interest.
3. The use of joint-checks for DBE firms must be approved by AUTHORITY prior to execution, and a joint-check agreement must accompany the request to AUTHORITY.
4. A DBE must perform a commercially useful function in accordance with 49 CFR Part 26.55 (i.e. must be responsible for the execution of a distinct element of the work, and must carry out its responsibility by actually performing, managing, and supervising the work). A DBE should perform at least thirty percent (30%) of the total cost of its contract with its own workforce to presume it is performing a commercially useful function.

VI. DBE Crediting Provisions

- A. When a DBE is proposed to participate in the Agreement, at any tier, only the value of the work proposed to be performed by the DBE with its own work force may be counted towards DBE participation. If CONSULTANT is a DBE joint venture participant, only the DBE proportionate interest in the joint venture must be counted.

1. If a DBE intends to subcontract part of the work of its subcontract to a lower-tier Subconsultant, the value of the subcontracted work may be counted toward DBE participation only if the Subconsultant is a certified DBE and performs the work with their own forces. Services subcontracted to a non-DBE firm may not be credited toward the CONSULTANT'S DBE attainment.
2. CONSULTANT is to calculate and credit participation by eligible DBE vendors of equipment, materials, and supplies toward DBE attainment as follows:
 - a) Sixty percent (60%) of expenditures for equipment, materials, and supplies required under the Agreement obtained from a regular dealer; or
 - b) One hundred percent (100%) of expenditures for equipment, materials, and supplies required under the Agreement obtained from a DBE manufacturer.
3. The following types of fees or commissions paid to DBE Subconsultants, Brokers, and Packagers may be credited toward CONSULTANT'S DBE attainment, provided that the fee or commission is reasonable and not excessive, as compared with fees or commissions customarily allowed for similar work including:
 - a) Fees and commissions charged for providing bona fide professional or technical services, or procurement of essential personnel, facilities, equipment, materials, or supplies required in the performance of the Agreement;
 - b) Fees charged for delivery of material and supplies (excluding the cost of materials or supplies themselves), when the licensed hauler, trucker, or delivery service is not also the manufacturer of, or a regular dealer in, the material and supplies;
 - c) Fees and commissions charged for providing any insurance specifically required in the performance of the Agreement.
4. If the CONSULTANT listed a non-certified, 1st tier Subconsultant to perform work on this Agreement, and the non-certified Subconsultant subcontracts a part of its work or purchases materials and/or supplies from a lower tier DBE certified Subconsultant or Vendor, the value of work performed by the lower tier DBE firm's own forces can be counted toward DBE participation on the Agreement. If a DBE CONSULTANT performs the installation of purchased materials and supplies, they are eligible for full credit of the cost of the materials.
5. CONSULTANT is advised not to report the participation of DBE(s) toward the CONSULTANT'S DBE attainment until the amount being claimed has been paid to the DBE.

VII. DBE “Frauds” and “Fronts”

Only legitimate DBEs are eligible to participate as DBEs in the AUTHORITY’s U.S. DOT-assisted contracts. CONSULTANT is cautioned against knowingly and willfully using “fronts.” The use of “fronts” and “pass through” subcontracts to non-disadvantaged firms constitute criminal violations. Further, any indication of fraud, waste, abuse, or mismanagement of Federal funds should be immediately reported to the Office of Inspector General, U.S. Department of Transportation at the toll-free hotline: (800) 424-9071; or email at hotline@oig.dot.gov, or by mail to the following: DOT Inspector General, 1200 New Jersey Ave SE, West Bldg 7th Floor, Washington, DC 20590.

VIII. Dispute Resolution

All contracts in excess of five-hundred thousand dollars (\$500,000) shall contain provisions or conditions which will allow for dispute resolution remedies in instances where CONSULTANTS violate or breach DBE Program requirements, inclusive but not limited to, prompt payment and provide for such sanctions and penalties as may be appropriate.

CONSULTANT shall incorporate this Section into each subcontract related to work arising under this Agreement and shall not incorporate by reference.

CONSULTANT and subconsultant agree to notify AUTHORITY within five (5) business days of any prompt payment and/or DBE Program disputes which cannot be settled by discussions between the parties involved.

CONSULTANT and subconsultant further agree to proceed through informal meetings, mediation, or any combination thereof as further detailed below. Dispute submittals shall include the method(s) of dispute resolution selected, terms, timeframes, and a detailed summary of assistance being requested (as applicable).

A. Informal Meetings

AUTHORITY is available to assist CONSULTANT with coordination of informal meeting requests to assist in the resolution of disputes between CONSULTANT and subconsultant. AUTHORITY’s DBELO or a designated DBE support representative will conduct the informal meetings with parties in dispute. Representatives from CONSULTANT and subconsultant for the purpose of dispute resolution, must include individuals authorized to bind each interested party. All parties must agree to the procedure.

B. Mediation

The parties to a contract may agree to endeavor to settle a dispute through informal mediation under independent third-party organizations. AUTHORITY’s DBELO and his/her designated support staff is considered an independent third party. Submission to informal mediation is voluntary; it is not binding and offers advisory opinions.

Performance During Dispute: Unless otherwise directed by AUTHORITY, CONSULTANT and its sub tiers shall continue performance under the Agreement while matters in dispute are being resolved.

Flow Down Requirements: The dispute resolution provisions flow down to all tiers.

These provisions shall not apply to disputes between CONSULTANT and AUTHORITY. These provisions do not alter in any way or waive compliance with other provisions in the Agreement.

IX. Administrative Remedies and Enforcement

CONSULTANT must fully comply with the DBE contract requirements, including the Authority's DBE Program and Title 49 CFR, Part 26 "Participation of Disadvantaged Businesses in Department of Transportation Financial Assistance Programs," and ensure that all subconsultants, regardless of tier, are also fully compliant. Failure by CONSULTANT to carry out these requirements is a material breach of this Agreement, which may result in the termination of this Agreement, or such other remedy as AUTHORITY deems appropriate, which may include, but is not limited to:

1. Withholding monthly progress payments;
2. Assessing sanctions;
3. Assessing liquidated damages; and/or
4. Disqualifying CONSULTANT from future bidding/proposing as non-responsible.

In instances of identified non-compliance, a Cure Notice will be issued to CONSULTANT identifying the DBE non-compliance matter(s) and specifying the required course of action for remedy.

CONSULTANT must be given ten (10) working days from the date of the Cure Notice to remedy or to: (1) File a written appeal accompanied by supporting documentation; and/or (2) Request a hearing with AUTHORITY to reconsider AUTHORITY's DBE determination.

Failure to respond within the ten (10) business day period will constitute a waiver of CONSULTANT'S right to appeal. If CONSULTANT files an appeal, AUTHORITY, must issue a written determination and/or set a hearing date within ten (10) business days of receipt of the written appeal, as applicable. A final Determination will be issued within ten (10) business days after the hearing, as applicable.

If after review of CONSULTANT'S appeal, AUTHORITY decides to uphold the decision to impose DBE administrative remedies on CONSULTANT, the written determination must state the specific remedy(ies) to be imposed.

Failure to comply with the Cure Notice and/or to remedy the identified DBE non-compliance matter(s) is a material breach of the Agreement and is subject to administrative remedies including withholding a minimum of two percent (2%) of the invoice amount due per month for every month that the identified non-compliance matter(s) is not remedied. Upon satisfactory compliance, AUTHORITY will release all withholdings.

In addition to administrative remedies defined in this section, AUTHORITY is not precluded from invoking other contractual and/or legal remedies available under federal, state or local laws.