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October 6, 2009

Addendum No. 1
To
Invitation for Bids
Dated September 14, 2009
For the Site Mitigation to the Bay Area Call Box System

Dear Contractor:

This letter is Addendum No. 1 to the Site Mitigation to the Bay Area Call Box System Invitation for Bids (IFB) dated September 14, 2009. Deleted text is shown in ~~strike-through~~ format and added text is shown in *italicized* format. The IFB is revised as follows:

Addendum Item	Reference	Change
1	Invitation for Bid, Letter of Invitation, Paragraph 5, Page 1 and all references to the Bid Due Date	Interested bidders must submit their bids in sealed envelopes by ~~4:00 p.m.~~ *4:00 p.m.* on ~~Tuesday, October 13, 2009~~ *October 19, 2009*.
2	Invitation for Bid, Letter of Invitation, Disadvantaged Business Enterprise Participation, Page 2	~~Disadvantaged Business Enterprises (DBEs) and other small businesses are strongly encouraged to participate in the performance of Agreements financed in whole or in part with federal funds (See 49 CFR 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs"). The Supplier should ensure that DBEs and other small businesses have the opportunity to participate in the performance of the work that is the subject of this solicitation and should take all necessary and reasonable steps for this assurance. The bidder/proposer shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of subcontracts.~~ ~~Bidders are encouraged to use services offered by financial institutions owned and controlled by DBEs.~~ ~~Bidders are required to document their activities in the solicitation and selection of subcontractors on *Appendix E-5*, Bidders List of Subcontractors (DBE and Non-DBE), Parts I and II. For the complete DBE participation provisions applicable to this procurement see *Appendix E-4*.~~

2, cont'd		*Effective June 2, 2009, the California Department of Transportation (Caltrans) requires recipients of DOT grant funds through Caltrans to impose the following DBE utilization requirements on its consultants and contractors. CONTRACTOR's DBE participation on this Agreement will assist Caltrans in meeting its federally mandated statewide overall DBE goal.* *MTC has established a Underutilized Disadvantaged Business Enterprise (UDBE) contract goal of 1% for the contract entered into as a result of this IFB. Respondents are required to document their activities in the solicitation and selection of subcontractors on Appendices E-4, E-5, and E-6, the Local Agency Proposer UDBE Information (Contractor Contracts), Local Agency Proposer DBE Information (Contractor Contracts), and UDBE Information-Good Faith Efforts respectively. A report on the Utilization of Disadvantaged Business Enterprises (DBE) First–Tier Subcontracts must be included with all invoices. MTC may withhold payment pending receipt of such report. For the complete DBE participation provisions applicable to this procurement, see Section III.S of the IFB and Appendix E.*
3	Invitation for Bid, Letter of Invitation, Minimum Qualifications, Page 2	To be eligible to submit a bid, a bidder must have~~;~~*:* 1) A valid California State Contractor's License 2) Successfully completed three (3) other construction contracts ~~related to emergency roadside call boxes or similar projects~~ on freeway shoulders within the last 5 years. ~~3) Successfully completed at least one (1) project pertaining to Call Box site upgrades within the last year.~~ Bidders may be required to verify these qualifications prior to the award of contract.
4	Invitation for Bid, Letter of Invitation, Bidders Conference, Page 3	~~A b~~*B*idders conferences will be held at 2:00 pm on September 29, 2009 in the 3rd floor "Fishbowl" Conference Room at MTC, *and at 10 AM on October 9, 2009 in the third floor Fishbowl Conference Room at MTC. The purpose of the second bidder's conference is to explain revised DBE requirements.*
5	Invitation for Bid, Letter of Invitation, Contractor Selection, Paragraph 1, Page 3	Bids will be initially evaluated for responsiveness and adherence to minimum qualifications. ***Proposers failing to meet the minimum qualifications or to satisfy the Underutilized Disadvantaged Business Enterprise (UDBE) requirements in this IFB will not be considered.*** Quality of work and experience are of the highest importance. In order to ensure superior service, references will be checked, and bidders may be required to provide additional information verifying their experience.

6	Invitation for Bid, Letter of Invitation, Bidder Selection Timetable, Page 4	Tuesday, September 29, 2009, 2:00 PM	Conference, MTC, 3rd Floor "Fishbowl" Conference Room, 101 Eighth St. Oakland, CA
		October 9, 2009, at 10 AM	*Bidders Conference, MTC, Third Floor Fishbowl Conference Room, 101 Eighth St. Oakland, CA*
		~~Tuesday,~~ October *19~~13~~* , 2009, 4:00 p.m.	Closing date & time for receipt of bids & bid opening.
		Friday, November 13, 2009	MTC Operations Committee consideration of recommendation for award
		November 19, 2009 (approximate)	Issuance of Purchase Order
		November 30 , 2011	Installation and Inspection of Site Improvements completed
7	Invitation for Bid, Letter of Invitation, General Conditions, Paragraph 3, Page 4	Attention is directed to the Special Conditions to the insurance and bonding requirements on page 10, Section III.N, and page 12, Section III.Q respectively. Any objections to the insurance or bonding requirements must be brought to the attention of the MTC SAFE Project Manager **at least** one week prior to the due date for bids otherwise, compliance with the insurance and bonding requirements will be assumed. *The resulting contract will be funded in part with federal funds. Federally required contract provisions are included in Appendices E.*	
8	Invitation for Bid, Section I, Article A. Directions, Page 2	This package contains the specifications regarding the work to be done and the schedule. (See Appendix A, **Scope of Work**). **All bids must be completed and submitted on the enclosed Bid Form, *Appendix B*, in order to be considered. *Appendix C*, Reference Form, and *Appendices E-2 and E-3*, Lobbying and Debarment Certificates, and ~~*Appendix E-5*, Bidder's List of Subcontractors (DBE and Non-DBE) Part I and Part II~~ *Appendices E-4, E-5, and E-6, the Local Agency Proposer UDBE Information (Consultant Contracts), Local Agency Proposer DBE Information (Consultant Contracts), and UDBE Information-Good Faith Efforts respectively,*** must also be submitted**.** Bidders who do not complete all appendices risk being found non-responsive. The provisions set forth below specify the standards by which bids will be received and considered by MTC SAFE. Bids not complying with these provisions may be considered non-responsive by MTC SAFE. Your bid package shall include the following: • Signed Bid Form (*Appendix B*) • Completed Reference Form (*Appendix C*) • Lobbying and Debarment Certificates (*Appendices E-2 and*	

		E-3), and • *Local Agency Proposer UDBE Information (Consultant Contracts), Local Agency Proposer DBE Information (Consultant Contracts), and UDBE Information-Good Faith Efforts (Appendices E-4, E-5, and E-6)* ~~• Bidder's List of Subcontractors (DBE and Non-DBE) Part I & II (*Appendices E-5)*~~
9	Invitation for Bid, Section I, Article D.4, Selection of Contractor, Page 5	The award, if an award is made, will be to the responsible Bidder, whose bid, conforming in all material respects to the terms and conditions of this IFB, is the lowest in price for the work requested. ***Proposers failing to meet the minimum qualifications or to satisfy the Underutilized Disadvantaged Business Enterprise (UDBE) requirements in this IFB will not be considered.***
10	Invitation for Bids, Section III, Article A, Minimum Qualifications, Page 7	~~To be eligible to submit a bid, a bidder must have successfully completed three (3) other construction contracts related to emergency roadside call boxes or similar projects on freeway shoulders. An extensive of call box and their technology is not required.~~ ~~Bidders may be required to verify these qualifications prior to the award of contract.~~ **<u>Minimum Qualifications</u>** To be eligible to submit a bid, a bidder must have; 1) A valid California State Contractor's license; 2) Successfully completed three (3) other construction contracts ~~related to emergency roadside call boxes or similar projects~~ on freeway shoulders within the last <u>5</u> years; ~~and~~ ~~3) Successfully completed at least one (1) project pertaining to Call Box site upgrades within the last year.~~ Bidders may be required to verify these qualifications prior to the award of contract.
11	Invitation for Bids, Section III, Article S, Disadvantaged Business Enterprise (DBE) Policy, is added.	***S. Disadvantaged Business Enterprise (DBE) Policy*** *Effective June 2, 2009, the California Department of Transportation (Caltrans) requires recipients of DOT grant funds through Caltrans to impose the following DBE utilization requirements on its contractors and contractors. CONTRACTOR's DBE participation on this Agreement will assist Caltrans in meeting its federally mandated statewide overall DBE goal.* *MTC has established a Underutilized Disadvantaged Business Enterprise (UDBE) contract goal of 1% for this contract. Respondents are required to document their activities in the solicitation and selection of subcontractors on Appendices E-4, E-5, and E-6, the Local Agency Proposer UDBE Information (Consultant Contracts), Local Agency Proposer DBE Information (Consultant Contracts), and UDBE Information-Good Faith Efforts respectively. A report on the*

Utilization of Disadvantaged Business Enterprises (DBE) First–Tier Subcontracts must be included with all invoices. MTC may withhold payment pending receipt of such report.
For the complete DBE participation provisions applicable to this procurement, see the Letter of Invitation, and Appendix E.

1. Terms as used in this document:

- ***The term "Disadvantaged Business Enterprise" or "DBE" means a for-profit small business concern owned and controlled by a socially and economically disadvantaged person(s) as defined in Title 49, Part 26.5, Code of Federal Regulations (CFR).***
- ***The term "Underutilized Disadvantaged Business Enterprise" or "UDBE" is a firm meeting the definition of a DBE as specified in 49 CFR and is one of the following groups:***
  - ***Black American***
  - ***Asian-Pacific American***
  - ***Native American***
  - ***Women***
- ***The term "proposer" refers to firms submitting in response to this IFB; the term "proposal" means the proposal submitted in response to this IFB.***
- ***The term "Contract." also means Agreement.***
- ***The term "Small Business" or "SB" is as defined in 49 CFR 26.65.***
-

2. Authority and Responsibility

A. DBEs and other small businesses are strongly encouraged to participate in the performance of Agreements financed in whole or in part with federal funds (See 49 CFR 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs"). The Contractor should ensure that DBEs and other small businesses have the opportunity to participate in the performance of the work that is the subject of this solicitation and should take all necessary and reasonable steps for this assurance. The proposer shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of subcontracts.

B. Proposers are encouraged to use services offered by financial institutions owned and controlled by DBEs.

3. Submission of UDBE and DBE Information

If there is a UDBE goal on the contract, a "Local Agency Bidder/Proposer-UDBE (Consultant Contract) Commitment" (Exhibit 10-O(1)) form shall be included in the Request for Proposal. In order for a proposer to be considered responsible and responsive, the proposer must make good faith efforts to meet

the goal established for the contract. If the goal is not met, the proposer must document adequate good faith efforts. Only UDBE participation will be counted towards the contract goal; however, all DBE participation shall be collected and reported.

A "Local Agency Proposer/Bidder-DBE (Consultant Contract)-Information" (Exhibit 10-O(2)) form shall be included with the Request for Proposal. The purpose of the form is to collect data required under 49 CFR 26. For contracts with UDBE goals, this form collects DBE participation by DBEs owned by Hispanic American and Subcontinent Asian Americans. For contracts with no goals, this form collects information on all DBEs, including UDBEs. Even if no DBE participation will be reported, the successful bidder must execute and return the form.

4. DBE Participation – General Information

It is the proposer's responsibility to be fully informed regarding the requirements of 49 CFR, Part 26, and the Department's DBE program developed pursuant to the regulations. Particular attention is directed to the following:

A. A DBE must be a small business firm defined pursuant to 13 CFR 121 and be certified through the California Unified Certification Program (CUCP).

B. A certified DBE may participate as a prime contractor, subcontractor, joint venture partner, as a vendor of material or supplies, or as a trucking company.

C. A UDBE proposer, not submitting as a joint venture with a non-DBE, will be required to document one or a combination of the following:

1. The proposer is a UDBE and will meet the goal by performing work with its own forces.

2. The proposer will meet the goal through work performed by UDBE subcontractors, suppliers or trucking companies.

3. The proposer, prior to bidding, made adequate good faith efforts to meet the goal.

D. 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 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.

E. A DBE must perform a commercially useful function pursuant to 49 CFR 26.55; that is, a DBE firm 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.

F. The prime contractor shall list only one subcontractor for each portion of work as defined in its proposal and all DBE subcontractors should be listed in the list of subcontractors.

G. A prime contractor who is a certified DBE is eligible to claim all of the work in the Agreement toward the DBE participation except that portion of the work to be performed by non-DBE subcontractors.

5. Resources

A. The CUCP database includes the certified DBEs from all certifying agencies participating in the CUCP. If you believe a firm is certified that cannot be located on the database, please contact the Caltrans Office of Certification toll free number 1-866-810-6346 for assistance. Proposer may call (916) 440-0539 for web or download assistance.

B. Access the CUCP database from the Department of Transportation, Civil Rights, Business Enterprise Program website at: <http://www.dot.ca.gov/hq/bep/>.

- *Click on the link in the left menu titled Find a Certified Firm*
- *Click on Query Form link, located in the first sentence*
- *Click on Certified DBE's (UCP) located on the first line in the center of the page*
- *Click on Click To Access DBE Query Form*
- *Searches can be performed by one or more criteria*
- *Follow instructions on the screen*
- *"Start Search," "Civil Rights Home," and "Caltrans Home" links are located at the bottom of the query form*

C. How to Obtain a List of Certified DBEs without Internet Access

***DBE Directory**: If you do not have Internet access, Caltrans also publishes a directory of certified DBE firms extracted from the on-line database. A copy of the directory of certified DBEs may be ordered from the Caltrans Division of Procurement and Contracts/Material and Distribution Branch/Publication Unit, 1900 Royal Oaks Drive, Sacramento, CA 95815, Telephone: (916) 445-3520.*

6. Materials or supplies purchased from DBEs count towards DBE credit, and if a DBE is also a UDBE, purchases will count towards the UDBE goal under the following conditions:

		A. If the materials or supplies are obtained from a DBE manufacturer, count one hundred percent of the cost of the materials or supplies. A DBE manufacturer is a firm that operates or maintains a factory, or establishment that produces on the premises, the materials, supplies, articles, or equipment required under the Agreement and of the general character described by the specifications. *B. If the materials or supplies purchased from a DBE regular dealer, count sixty percent of the cost of the materials or supplies. A DBE regular dealer is a firm that owns, operates or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the Agreement are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a DBE regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A person may be a DBE regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone or asphalt without owning, operating or maintaining a place of business provided in this section.* *C. If the person both owns and operates distribution equipment for the products, any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not an ad hoc or Agreement-by -Agreement basis. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not UDBE regular dealers within the meaning of this section.* *D. Materials or supplies purchased from a DBE, which is neither a manufacturer nor a regular dealer, will be limited to the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on the job site, provided the fees are reasonable and not excessive as compared with fees charged for similar services.*
12	Invitation for Bids, Section III, Article T, Prompt Payment of Subcontractors, is added.	*T. Prompt Payment of Subcontractors* *Under 49 CFR Part 26, Contractors are required promptly to pay subcontractors (DBE and non-DBE) all amounts to which the subcontractors are entitled for work that has been satisfactorily performed and for which the Contractors have received payment, in accordance with the terms of the applicable subcontracts. (See 49 CFR § 26.69.) Accordingly, Contractor shall pay its subcontractors within ten (10) calendar days from receipt of each payment made to the Contractor by the MTC. Any subcontract in excess of $25,000, entered into as a result of this procurement, shall contain all the provisions*

		stipulated in this Agreement to be applicable to subcontractors.
13	Invitation for Bid, Appendix A, Pad Replacement, Page 14	Call box site types A, B, and C without a ~~concrete~~ *polycarbonate* pad or with an existing 3' x 3' pad will need a new 5' x 5' pre-fabricated armor cast ~~concrete~~ *polycarbonate* pad (minimum thickness *of 1" and maximum thickness* of 3"). Old pads shall be disposed of at Contractor's expense. Any pads installed shall be at the same grade as the shoulder or dirt surrounding the pad area to allow for wheelchair access. A list of call boxes requiring a pad replacement is attached in Appendix F.
14	Invitation for Bid, Appendix A, Removal of Call Box, Page 15	Call Boxes with an "X" in the "Remove Call Box" column of Appendix F shall be completely removed. All components of the removed call box including the pole, solar panel, blue signs, housing, Armorcast pads, and handrails shall be delivered to ~~the Caltrans maintenance yard at the San Francisco Bay Bridge~~ *an MTC designated storage facility*. Other components such as the retaining wall and concrete pad shall be disposed at Contractor's expense.
15	Invitation for Bid, Appendix A, Task Orders, Page 15	Task Orders will be primarily used to make unanticipated repairs to equipment at Call Box locations. Contractor shall be compensated for its work under Task 7 as specified in one or more Task Orders, signed by MTC SAFE and Supplier. Payment terms may be based on acceptance of deliverables or time and materials, at the rates listed in reimbursement, depending on the requirements of each Task Order. For time and materials-based Task Orders, the hourly rates provided in Appendix B, shall apply. The total amount available for Task Orders shall not exceed ~~twenty~~ *thirty-five* thousand dollars ($35,000). Task Order procedures and a sample Task Order are attached in Appendices H-1 and H-2.
16	Invitation for Bid, Appendix B: Bid Form, Page 16	Appendix B, Bid Form, is deleted in its entirety and replaced with the attached.
17	Invitation for Bid, Appendix E-1: Federal Requirements, Page 23	Appendix E-1, Federal Requirements, is deleted in its entirety and replaced with the attached.
18	Invitation for Bid, Appendix E-4: Disadvantaged Business Enterprise Participation, Page 30	Appendix E-4, Disadvantaged Business Enterprise Participation, is deleted in its entirety and replaced with the attached Attachment E-4, Local Agency Proposer UDBE Information (Consultant Contracts).

19	Invitation for Bid, Appendix E-5: Bidder's List of Subcontractors (DBE And NON-DBE) - PART I & II,, Page 32	Appendix E-5, Bidder's List of Subcontractors (DBE And NON-DBE) - PART I & II, is deleted in its entirety and replaced with the attached Appendix E-5, Local Agency Proposer DBE Information (Consultant Contracts).
20	Invitation for Bid, Appendix E-6: Local Agency Proposer/Bidder -DBE (Consultant Contracts) – Information, Page 34	Appendix E-6, Local Agency Proposer/Bidder -DBE (Consultant Contracts) –Information, is deleted in its entirety and replaced with the attached Appendix E-6, UDBE Information-Good Faith Efforts.
21	Invitation for Bid, Appendix E-7: Additional Federal Clauses, is added.	Appendix E-7, Additional Federal Clauses, is added as attached.

The remaining provisions of the IFB, dated September 14, 2009, remain unchanged. In the event of a conflict between this addendum and the previous version(s), this addendum shall take precedence.

Any questions concerning this addendum to the IFB should be directed to Joanna Fox, Project Manager, at (510) 817-5937 or <jfox@mtc.ca.gov>.

Sincerely,

Ann Flemer

Ann Flemer
Deputy Executive Director, Policy

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APPENDIX B,
BID FORM

Description of Improvements	Quantity	Materials Cost	Labor Cost	Extended Price*
Task 1 – Site Conversion	644	$	$	$
Task 2 – Pad Replacement	202	$	$	$
Task 3 – Asphalt Path	3194 ft^3	$	$	$
Task 4 – Relocation of Call Box	657	$	$	$
Task 5 – Removal of Call Box	24	$	$	$
Task 6 – Removal of Backwall	61	$	$	$
Task 7- Task Orders	-	-	-	$35,000
TOTAL BID PRICE		**$**	**$**	**$**

*Prices are firm fixed sums including all applicable surcharges such as taxes, insurance, and fringe benefits, as well as indirect costs, overhead and profit allowance.

KEY PERSONNEL

Name	Title	Expertise	Hourly Rate*

- The hourly rates listed include all applicable surcharges such as taxes, insurance and fringe benefits as well as indirect costs, overhead and profit allowance, materials and supplies. These rates shall apply to task order work alone.

Minimum Qualifications:

Check either yes or no	**Yes**	**No**
Does your company have a valid California State Contractor's license?		
Has your company successfully completed three (3) other construction contracts on freeway shoulders within the last 5 years?		

Signature of Authorizing Official:

Name of Bidding Company	
Address	
Phone Number	
Fax Number	
Email	
License Number and Type	

By signing below you acknowledge and agree to provide the required services, and comply with all the terms and conditions (including all applicable insurance and bonding requirements) listed in this IFB.	
Representative Name and Title	
Name of Authorizing Official	
Authorized Signature	

(Attach a copy of your standard warranty to this, *Appendix B*, Bid Form)

NON-COLLUSION DECLARATION:

TO BE EXECUTED BY BIDDER AND SUBMITTED WITH BID

_____, declares that he or she is
(Bidder's Name)

_____ of _____,
(Title) (Company's Name)

the party making the foregoing bid, that the bid is not made in the interest of, or on behalf of, any undisclosed person, partnership, company, association, organization, or corporation; that the bid is genuine and not collusive or sham; that the bidder has not directly or indirectly colluded, conspired, connived, or agreed with any bidder or anyone else to put in a sham bid, or that anyone shall refrain from bidding; that the bidder has not in any manner, directly or indirectly, sought by agreement, communication, or conference with anyone to fix to the bid price of the bidder or any other bidder, or to fix any overhead, profit, or cost element of the bid price, or of that of any other bidder, or to secure any advantage against the public body awarding the contract of anyone interested in the proposed contract; that all statements contained in the bid are true; and, further, that the bidder has not, directly or indirectly, submitted his or her bid price or any breakdown thereof, or paid, and will not pay, any fee to any corporation, partnership, company association, organization, bid depository, or to any member or agent thereof to effectuate a collusive or sham bid.

I certify (or declare) under penalty or perjury under the laws of the State of California that the foregoing is true and correct.

_____ _____
Type/Print Appropriate Name, Title Signature

_____
Date

APPENDIX E-1,
DEPARTMENT OF TRANSPORTATION REQUIREMENTS

1. Equal Employment Opportunity. Contractor shall not, on the grounds of race, color, sex, age, religion, national origin, ancestry, physical handicap, medical condition, or marital status either discriminate or permit discrimination against any employee or applicant for employment in any manner prohibited by Federal, State or local laws. In the event of Contractor non-compliance, MTC may cancel, terminate or suspend the Agreement in whole or in part. Contractor may also be declared ineligible for further contracts with MTC.

Contractor and its subcontractors 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, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. Contractor and its subcontractors shall post in conspicuous places, available to all employees and applicants for employment, a notice setting forth these provisions.

2. Disadvantaged Business Enterprise (DBE) and Small Business Enterprise Policy.

A. This Agreement is subject to 49 CFR, Part 26 entitled "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs." Proposers who obtain DBE participation on this contract will assist Caltrans in meeting its federally mandated statewide overall DBE goal.

B. If the contract has an under-utilized DBE (UDBE) goal, the Contractor must meet the UDBE goal by using UDBEs as subcontractor or document a good faith effort to meet the goal. If a UDBE subcontractor is unable to perform, the Contractor must make a good faith effort to replace him/her with another UDBE subcontractor if the goal is not otherwise met. A UDBE is a firm meeting the definition of a DBE as specified in 49 CFR and is one of the following groups:

1. Black American
2. Asian-Pacific American
3. Native American
4. Women

C. DBE and other small businesses, as defined in 49 CFR, Part 26 are encouraged to participate in the performance of agreements financed in whole or in part with federal funds. The Contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement. The Contractor shall carry out applicable requirements of 49 CFR, Part 26 in the award and administration of US DOT- assisted agreements. Failure by the Contractor to carry out these requirements is a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy as the recipient deems appropriate.

D. Any subcontract entered into as a result of this Agreement shall contain all of the provisions of this section.

2.1 Prompt Payment of Funds Withheld to Subcontractors

MTC shall hold retainage from the prime Contractor and shall make prompt and regular incremental acceptances of portions, as determined by the agency, of the contract work, and pay retainage to the prime Contractor based on these acceptances. The prime Contractor, or subcontractor, shall return all monies withheld in retention from a subcontractor within 30 days after receiving payment for work satisfactorily completed and accepted including incremental acceptances of portions of the contract work by the agency. Federal law (49 CFR26.29) requires that any delay or postponement of payment over 30-days may take place only for good cause and with the agency's prior written approval. Any violation of this provision shall subject the violating prime Contractor or subcontractor to the penalties, sanctions and other remedies specified in Section 7108.5 of the Business and Professions Code. These requirements shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise available to the prime Contractor or subcontractor in the event of a dispute involving late payment or nonpayment by the prime Contractor, deficient subcontract performance, or noncompliance by a subcontractor. This provision applies to both DBE and non-DBE prime Contractors and subcontractors.

Any subcontract entered into as a result of this Agreement shall contain all of the provisions of this section.

2.2 DBE Records

A. The Contractor shall maintain records of materials purchased and/or supplied from all subcontracts entered into with certified DBEs. The records shall show the name and business address of each DBE or vendor and the total dollar amount actually paid each DBE or vendor, regardless of tier. The records shall show the date of payment and the total dollar figure paid to all firms. DBE prime Contractors shall also show the date of work performed by their own forces along with the corresponding dollar value of the work.

B. Upon completion of the Agreement, a summary of these records shall be prepared and submitted on the form entitled, "Final Report-Utilization of Disadvantaged Business Enterprises (DBE) First-Tier Subcontractors," CEM-2402F (Exhibit 17-F in Chapter 17 of the LAP), certified correct by the Contractor or the Contractor's authorized representative and shall be furnished to the Contract Manager with the final invoice. Failure to provide the summary of DBE payments with the final invoice will result in twenty-five percent (25%) of the dollar value of the invoice being withheld from payment until the form is submitted. The amount will be returned to the Contractor when a satisfactory "Final Report Utilization of Disadvantaged Business Enterprises (DBE) First-Tier Subcontractors"is submitted to the Contract Manager.

1) Prior to the fifteenth of each month, the Contractor shall submit documentation to the MTC's Project Manager showing the amount paid to DBE trucking companies. The Contractor shall also obtain and submit documentation to the Agency's Contract Manager showing the amount paid by DBE trucking companies to all firms, including owner-operators, for the leasing of trucks. If the DBE leases trucks from a non-DBE, the Contractor may count only the fee or commission the DBE receives as a result of the lease arrangement.

(2) The Contractor shall also submit to the MTC's Project Manager documentation showing the truck number, name of owner, California Highway Patrol CA number, and if applicable, the DBE certification number of the truck owner for all trucks used during that

month. This documentation shall be submitted on the Caltrans Monthly DBE Trucking Verification, CEM-2404(F) form provided to the Contractor by the Agency's Contract Manager.

2.3 DBE Certification and De-certification Status

If a DBE subcontractor is decertified during the life of the Agreement, the decertified subcontractor shall notify the Contractor in writing with the date of de-certification. If a subcontractor becomes a certified DBE during the life of the Agreement, the subcontractor shall notify the Contractor in writing with the date of certification. Any changes should be reported to the Agency's Contract Manager within 30 days.

2.4 Materials or supplies purchased from DBEs will count towards DBE credit, and if a DBE is also a UDBE, purchases will count towards the UDBE goal under the following conditions:

A. If the materials or supplies are obtained from a DBE manufacturer, 100 % of the cost of the materials or supplies will count toward the DBE participation. A DBE manufacturer is a firm that operates or maintains a factory or establishment that produces on the premises, the materials, supplies, articles, or equipment required under the Agreement and of the general character described by the specifications.

B. If the materials or supplies purchased from a DBE regular dealer, count 60 % of the cost of the materials or supplies toward DBE goals. A regular dealer is a firm that owns, operates or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the Agreement, are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone or asphalt without owning, operating or maintaining a place of business provided in this section.

C. f the person both owns and operates distribution equipment for the products, any supplementing of regular dealers' own distribution equipment, shall be by a long-term lease agreement and not an ad hoc or Agreement-by-Agreement basis. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this section.

D. Materials or supplies purchased from a DBE, which is neither a manufacturer nor a regular dealer, will be limited to the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on the job site, provided the fees are reasonable and not excessive as compared with fees charged for similar services.

2.5 Performance of DBE Contractors and Other DBE Subcontractors/Suppliers

A. A DBE performs a commercially useful function when it is responsible for execution of the work of the Agreement and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible with respect to materials and supplies used on the

Agreement, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, evaluate the amount of work subcontracted, industry practices; whether the amount the firm is to be paid under the Agreement is commensurate with the work it is actually performing, and other relevant factors.

B. A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, Agreement, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, examine similar transactions, particularly those in which DBEs do not participate.

C. If a DBE does not perform or exercise responsibility for at least thirty percent of the total cost of its Agreement with its own work force, or the DBE subcontracts a greater portion of the work of the Agreement than would be expected on the basis of normal industry practice for the type of work involved, it will be presumed that it is not performing a commercially useful function.

3. Title VI of Civil Rights Act of 1964. Contractor agrees to comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) and its implementing regulations in 49 CFR Part 21.

4. Debarment. In contracts over $25,000, Contractor is required to certify, prior to executing a contract, that neither it nor its principals have been debarred from certain federal transactions by any Federal agency and to require any subcontractors with subcontracts over $25,000 to provide a similar certification. (A copy of the required certification is included with this Appendix.)

5. Audit and Inspection of Records. Contractor shall permit the authorized representatives of DOT, Federal Transit Administration (FTA) or the Federal Highway Administration (FHWA, and the Comptroller General of the United States to inspect and audit all data and records of the Contractor relating to its performance under this Agreement from the date of this Agreement until three (3) years after the close out of the federal grant from which this Agreement is financed, or four (4) years after the fiscal year of the expenditure, whichever is longer. This requirement must be passed along to subcontractors, excluding purchase orders not exceeding $25,000.

6. Subcontractors
   a. Nothing contained in this Agreement or otherwise, shall create any contractual relation between the MTC and any subcontractors, and no subcontract shall relieve the Contractor of his/her responsibilities and obligations hereunder. The Contractor agrees to be as fully responsible to the MTC for the acts and omissions of its subcontractors 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 the Contractor. The Contractor's obligation to pay its subcontractors is an independent obligation from the MTC’s obligation to make payments to the Contractor.

b. Any subcontract in excess of $25,000, entered into as a result of this Agreement, shall contain all the provisions stipulated in this Agreement to be applicable to subcontractors.

c. Contractor shall pay its subcontractors within ten (10) calendar days from receipt of each payment made to the Contractor by the MTC.

d. Any substitution of subcontractors must be approved in writing by the MTC's Project Manager in advance of assigning work to a substitute subcontractor.

7. Federal Grant Requirements. Those laws, statutes, ordinances, rules, regulations and procedural requirements which are imposed on MTC as a recipient of federal funds are imposed on Contractor, including compliance with 49 CFR Part 18, FTA Circular 4220.1D and the current FTA Master Agreement, a copy of which is available through MTC.

8. Identification of Documents. All reports and other documents completed as part of this Agreement shall carry the following notation on the front cover or title page:

The preparation of this report has been financed in part by grants from the Federal Transit Administration, U.S. Department of Transportation. The contents of this report do not necessarily reflect the official views or policy of the U.S. Department of Transportation.

9. Rights in Data. The Federal Government reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes: (a) the copyright in any work developed under this Agreement; and (b) any rights of copyright to which MTC or Contractor purchases ownership under this Agreement.

10. State Energy Conservation Plan. Contractor shall comply with all mandatory standards and policies relating to energy efficiency that are contained in the State Energy Conservation Plan issued in compliance with the Energy Policy and Conservation Act (42 U.S.C. § 6321 *et seq*.).

11. Clean Air and Water Pollution Act. Contractor agrees to comply with the applicable requirements of all standards, orders, or requirements issued under the Clean Air Act (42 U.S.C. § 7501 *et seq*.), the Clean Water Act (33 U.S.C. § 1251 *et seq*.), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR Part 15).

12. Restrictions on Lobbying. In agreements over $100,000, Contractor is required to execute a certificate indicating that no federal funds will be used to lobby federal officials and to disclose lobbying activities financed with non-federal funds. (Certificate attached.)

APPENDIX E-4
Exhibit 10-O1 Local Agency Proposer UDBE Commitment (Consultant Contracts)

NOTE: PLEASE REFER TO INSTRUCTIONS ON THE REVERSE SIDE OF THIS FORM

AGENCY:_____ LOCATION:_____

PROJECT DESCRIPTION: _____

CONTRACT GOAL: $_____

PROPOSAL DATE:_____

PROPOSER'S NAME:_____

WORK ITEM NO.	DESCRIPTION OR SERVICES TO BE SUBCONTRACTED	DBE Cert. No. AND EXPIRATION DATE	NAME OF UDBEs (Must be certified on the date the proposals are opened - include UDBE address and phone number)	PERCENTAGE AMOUNT OF EACH UDBE

For Local Agency to Complete:

Local Agency Contract Number: _____

Federal Aid Project Number: _____

Federal Share: _____

Proposal Award Date: _____

Local Agency certifies that the UDBE certification(s) has been verified and all information is complete and accurate.

_____ _____ _____
Print Name Signature Date
Local Agency Representative

(Area Code) Telephone Number: _____

Total Claimed Participation $_____

_____%

_____
Signature of Proposer

_____
Date (Area Code) Tel. No.

_____

For Caltrans Review:

_____ _____ _____
Print Name Signature Date
Caltrans District Local Assistance Engineer

Local Agency Bidder - UDBE Commitment (Rev 3/09)

Distribution: (1) Copy – If this Proposer is successful fax or scan a copy to the Caltrans District Local Assistance Engineer (DLAE) within 15 days of award. Failure to send a copy to the DLAE within 15 days of award may result in de-obligation of funds for this project.
(2) Original – Local agency files

INSTRUCTIONS - LOCAL AGENCY PROPOSER- UDBE COMMITMENT (CONSULTANT CONTRACTS) (Revised 03/09)

ALL PROPOSERS:

PLEASE NOTE: It is the proposer's responsibility to verify that the UDBE(s) falls into one of the following groups in order to count towards the UDBE contract goal: 1) Black American; 2) Asian-Pacific American; 3) Native American; 4) Women. This information shall be submitted with your proposal. Failure to submit the required UDBE commitment will be grounds for finding the proposal nonresponsive

UDBE is a firm meeting the definition of a DBE as specified in 49 CFR and is one of the following groups:

1. Black American
2. Asian-Pacific American
3. Native American
4. Women

The form requires specific information regarding the consultant contract: Agency, Location, Project Descriptions, Federal Aid Project Number (assigned by Caltrans-Local Assistance), Proposal Date, Proposer's Name, and Contract Goal.

The form has a column for the Work Item Number (or Item No's) and Description or Services to be Subcontracted to UDBEs. The UDBE should provide a certification number to the Consultant. Notify the Consultant in writing with the date of the decertification if their status should change during the course of the contract. The form has a column for the Names of certified UDBEs to perform the work (must be certified on the date proposals are received and include UDBE address and phone number). Enter the UDBE prime consultant and subconsultant certification numbers. Prime consultants shall indicate all work to be performed by UDBEs including, if the prime consultant is a UDBE, work performed by its own forces.

There is a column for the total UDBE percentage. Enter the Total Claimed UDBE Participation percentage of items of work submitted with the proposal pursuant to the Special Provisions. (If 100% of item is not to be performed or furnished by the UDBE, describe exact portion of time to be performed or furnished by the UDBE.) See Notice to Bidders/Proposers Disadvantaged Business Enterprise Information to determine how to count the participation of UDBE firms. Note: If the proposer has not met the contract goal, the local agency must evaluate the proposer's good faith efforts to meet the goal in order to be considered for award of the contract.

Exhibit 10-O (1) must be signed and dated by the consultant proposing. Also list a phone number in the space provided and print the name of the person to contact.

For the Success Proposer only, local agencies should complete the Contract Award Date and Federal Share fields and verify that all information is complete and accurate before signing and sending a copy of the form to the District Local Assistance Engineer within 15 days of award. Failure to submit a completed and accurate form within the 15-day time period may result in the de-obligation of funds on this project.

District DBE Coordinator should verify that all information is complete and accurate. Once the information has been verified, the **District Local Assistance Engineer** signs and dates the form.

APPENDIX E-5
Exhibit 10-O2 Local Agency Proposer DBE Information (Consultant Contracts)

NOTE: PLEASE REFER TO INSTRUCTIONS ON THE REVERSE SIDE OF THIS FORM

AGENCY:_____ LOCATION:_____

PROJECT DESCRIPTION: _____

TOTAL CONTRACT AMOUNT: $_____

PROPOSAL DATE:_____

PROPOSER'S NAME:_____

CONTRACT ITEM NO.	DESCRIPTION OR SERVICES TO BE SUBCONTRACTED	DBE Cert. No. AND EXPIRATION DATE	NAME OF DBEs (Must be certified on the date bids are opened - include DBE address and phone number)	PERCENTAGE OF DBE

Total Claimed Participation $_____

_____%

For Local Agency to Complete:

Local Agency Contract Number: _____

Federal Aid Project Number: _____

Federal Share: _____

Contract Award Date: _____

Local Agency certifies that the DBE certification(s) has been verified and all information is complete and accurate.

_____ _____ _____
Print Name Signature Date
Local Agency Representative

(Area Code) Telephone Number: _____

_____
Signature of Proposer

_____
Date (Area Code) Tel. No.

_____
Person to Contact (Please Type or Print)

For Caltrans Review:

_____ _____ _____
Print Name Signature Date
Caltrans District Local Assistance Engineer

Local Agency Bidder - DBE Commitment(Rev 3/09)

Distribution: (1) Copy – Fax or scan a copy to the Caltrans District Local Assistance Engineer (DLAE) within 15 days of contract execution. Failure to send a copy to the DLAE within 15 days of contract execution may result in de-obligation of funds for this project.
(2) Original – Local agency files

INSTRUCTIONS - LOCAL AGENCY PROPOSER DBE INFORMATION (CONSULTANT CONTRACTS) (Revised 03/09)

SUCCESSFUL PROPOSER:

The form requires specific information regarding the consultant contract: Agency, Location, Project Description, Federal Aid Project Number (assigned by Caltrans-Local Assistance), Proposal Date, and Successful Proposer's Name.

The form has a column for the Description or Services to be Subcontracted by DBEs. The DBE should provide a certification number to the prime consultant. The form has a column for the Names of DBE certified consultants to perform the work (must be certified on the date the proposal is received and include DBE address and phone number). Enter DBE prime consultant's and subconsultants' certification numbers. The prime consultant shall indicate all work to be performed by DBEs including, if the prime consultant is a DBE, work performed by its own forces.

Enter the Total Claimed DBE Participation percentage of items of work in the total DBE Dollar Amount column. (If 100% of item is not to be performed by the DBE, describe the exact portion of time to be performed by the DBE.) See Notice to Proposers/Bidders Disadvantaged Business Enterprise Information to determine how to count the participation of DBE firms.

Exhibit 10-O (2) must be signed and dated by the successful proposer at contract execution. Also list a phone number in the space provided and print the name of the person to contact.

For the successful proposer, Local agencies should complete the Contract Award Date and Federal Share fields and verify that all information is complete and accurate before signing and sending a copy of the form to the District Local Assistance Engineer within 15 days of contract execution. Failure to submit a completed and accurate form within the 15-day time period may result in the de-obligation of funds on this project.

District DBE Coordinator should verify that all information is complete and accurate. Once the information has been verified, the **District Local Assistance Engineer** signs and dates the form.

APPENDIX E-6

UDBE INFORMATION—GOOD FAITH EFFORTS

Federal-aid Project No. _____ Bid Opening Date _____

MTC established an Under-utilized Disadvantaged Business Enterprise (UDBE) goal of 1% for this project. The information provided herein shows that a good faith effort was made.

Bidders shall submit the following information to document adequate good faith efforts. Bidders should submit the following information even if the "Local Agency Bidder – UDBE Commitment" form indicates that the bidder has met the UDBE goal. This will protect the bidder's eligibility for award of the contract if the administering agency determines that the bidder failed to meet the goal for various reasons, e.g., a UDBE firm was not certified at bid opening, or the bidder made a mathematical error.

Submittal of only the "Local Agency Bidder – UDBE Commitment" form may not provide sufficient documentation to demonstrate that adequate good faith efforts were made.

The following items are listed in the Section entitled "Submission of UDBE Commitment" of the Special Provisions:

A. The names and dates of each publication in which a request for UDBE participation for this project was placed by the bidder (please attach copies of advertisements or proofs of publication):

Publications	Dates of Advertisement

B. The names and dates of written notices sent to certified UDBEs soliciting bids for this project and the dates and methods used for following up initial solicitations to determine with certainty whether the UDBEs were interested (please attach copies of solicitations, telephone records, fax confirmations, etc.):

Names of UDBEs Solicited	Date of Initial Solicitation	Follow Up Methods and Dates

C. The items of work which the bidder made available to UDBE firms, including, where appropriate, any breaking down of the contract work items (including those items normally performed by the bidder with its own forces) into economically feasible units to facilitate UDBE participation. It is the bidder's responsibility to demonstrate that sufficient work to facilitate UDBE participation was made available to UDBE firms.

Items of Work	Bidder Normally Performs Item (Y/N)	Breakdown of Items	Amount ($)	Percentage Of Contract

D. The names, addresses and phone numbers of rejected UDBE firms, the reasons for the bidder's rejection of the UDBEs, the firms selected for that work (please attach copies of quotes from the firms involved), and the price difference for each UDBE if the selected firm is not a UDBE:

_____
_____
_____
_____

Names, addresses and phone numbers of rejected UDBEs and the reasons for the bidder's rejection of the UDBEs:

_____
_____
_____
_____

E. Efforts made to assist interested UDBEs in obtaining bonding, lines of credit or insurance, and any technical assistance or information related to the plans, specifications and requirements for the work which was provided to UDBEs:

_____
_____
_____
_____

E. Efforts made to assist interested UDBEs in obtaining necessary equipment, supplies, materials, or related assistance or services, excluding supplies and equipment the UDBE subcontractor purchases or leases from the prime contractor or its affiliate:

_____

_____

_____

_____

G. The names of agencies, organizations or groups contacted to provide assistance in contacting, recruiting and using UDBE firms (please attach copies of requests to agencies and any responses received, i.e., lists, Internet page download, etc.):

Name of Agency/Organization	Method/Date of Contact	Results

H. Any additional data to support a demonstration of good faith efforts (use additional sheets if necessary):

_____

_____

_____

Appendix E-7
ADDITIONAL FEDERAL CLAUSES

A. Equipment Purchases

1. Buy America

2. Cargo Preference

B. Construction

1. Davis-Bacon Act

2. Contract Work Hours and Safety Standards Act

3. Copeland Anti-Kickback Act

4. Prompt Payment of Funds Withheld to Subcontractors

C. Experimental, Developmental & Research Work

A. EQUIPMENT PURCHASES

1. Buy America Requirements

49 U.S.C. § 5323(j) and 49 CFR Part 661

Note: This is the certification recommended by FTA. FHWA-funded equipment requires a modification of this clause by the Office of the General Counsel.

Buy America - The contractor must agree to comply with 49 U.S.C. 5323(j) and 49 CFR Part 661, which provide that Federal funds may not be obligated unless steel, iron, and manufactured products used in FTA-funded projects are produced in the United States, unless a waiver has been granted by FTA or the product is subject to a general waiver. General waivers are listed in 49 CFR 661.7, and include final assembly in the United States for 15 passenger vans and 15 passenger wagons produced by Chrysler Corporation, microcomputer equipment, software, and small purchases (currently less than $100,000) made with capital, operating, or planning funds.

A bidder or offeror must submit to MTC the appropriate Buy America certification (below) with all bids on FTA-funded contracts, except those subject to a general waiver. Bids or offers that are not accompanied by a completed Buy America certification must be rejected as nonresponsive. This requirement does not apply to lower tier subcontractors.

Certification requirement for procurement of steel, iron, or manufactured products.

Certificate of Compliance with 49 U.S.C. 5323(j)(1)

The bidder or offeror hereby certifies that it will meet the requirements of 49 U.S.C. 5323(j)(1) and the applicable regulations in 49 CFR Part 661.

Date _____

Signature_____

Company Name_____

Title _____

(next page)

Certificate of Non-Compliance with 49 U.S.C. 5323(j)(1)

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

Date_____

Signature _____

Company Name _____

Title _____

2. Cargo Preference Requirements

46 U.S.C. 1241 and 46 CFR Part 381

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

14. **Bonding Requirements.** For those construction or facility improvement contracts or subcontracts exceeding $100,000, Contractor shall obtain:

a. A bid guarantee from each bidder equivalent to 5% of the bid price. The bid guarantees shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

b. A performance bond on the part of the contractor for 100% of the contract price.

c. A payment bond on the part of the contractor for 100% of the contract price. Penal amounts required from contractors are as follows:

(1) 50% of the contract price if the contract price is not more than $1 million; or

(2) 40% of the contract price if the contract price is more than $1million but not more than $5 million.

d. A cash deposit, certified check or other negotiable instrument may be accepted by a grantee in lieu of performance and payment bonds, provided the grantee has established a procedure to assure that the interest of FTA is adequately protected. An irrevocable letter of credit would also satisfy the requirement for a bond.

B. CONSTRUCTION

1. DAVIS-BACON ACT

40 U.S.C. 167; 276a -276a-5 (1995) and 29 CFR Section 5 (1995)

Note: Applies to construction contract and subcontracts over $2,000.

(1) **Minimum wages -** (i) All laborers and mechanics employed or working upon the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics.

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

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

(iii) If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, Provided, That the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

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

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

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

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

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

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

(D) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs (1)(iv) (B) or (C) of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(2) **Withholding** - MTC shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the contractor under this contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), all or part of the wages required by the contract, MTC may, after written notice to the contractor,

sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(3) **Payrolls and basic records** - (i) Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work (or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project). Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

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

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

(1) That the payroll for the payroll period contains the information required to be maintained under 29 CFR part 5 and that such information is correct and complete;

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

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

(C) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph (3)(ii)(B) of this section.

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

(iii) The contractor or subcontractor shall make the records required under paragraph (3)(i) of this section available for inspection, copying, or transcription by authorized representatives of the Federal Transit Administration or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, the Federal agency may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

(4) **Apprentices and trainees** - (i) Apprentices - Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator of the Wage and Hour Division of the U.S. Department of Labor determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Bureau of Apprenticeship and Training, or a State Apprenticeship Agency recognized by the Bureau, withdraws approval of an apprenticeship program, the contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

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

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

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

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

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

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

(9) **Disputes concerning labor standards** - Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes

between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

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

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

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

3. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT

40 U.S.C. § 327 -333 (1995); 29 C.F.R. § 5 (1995); 29 C.F.R. § 1926 (1995)

Applicability to Contracts *Section 102 of the Act, which deals with overtime requirements, applies to:*

- all construction contracts in excess of $2,000 and;

- all turnkey, rolling stock and operational contracts (excluding contracts for transportation services) in excess of $2,500.

(The dollar threshold for this requirement is contained in the current regulation 29 C.F.R.' 5.15.)

Section 107 *of the Act which deals with OSHA requirements applies to construction contracts in excess of $2,000 only. The requirements of this section do not apply to contracts or subcontracts for the purchase of supplies or materials or articles normally available on the open market.*

Flow Down *Applies to third party contractors and subcontractors.*

(These clauses are specifically mandated under DOL regulation 29 C.F.R. § 5.5 and when preparing a construction contract in excess of $2,000, these clauses should be used in conjunction with the Davis-Bacon Act clauses as discussed previously. For non-construction contracts, this is the only section required along with the payroll section.)

Model Clauses/Language Pursuant to Section 102 (Overtime):

(1) **Overtime requirements** - No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

(2) **Violation; liability for unpaid wages; liquidated damages** - In the event of any violation of the clause set forth in paragraph (1) of this section the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (1) of this section, in the sum of $ 10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (1) of this section.

(3) **Withholding for unpaid wages and liquidated damages** - The (**write in the name of the grantee or recipient**) shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (2) of this section.

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

(*Section 102 non-construction contracts should also have the following provision:****)***

(5) **Payrolls and basic records** - (i) Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work (or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project). Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

Section 107 (OSHA):

(This section is applicable to construction contracts only)

Contract Work Hours and Safety Standards Act - (i) The Contractor agrees to comply with section 107 of the Contract Work Hours and Safety Standards Act, 40 U.S.C. section 333, and applicable DOL regulations, " Safety and Health Regulations for Construction " 29 C.F.R. Part 1926. Among other things, the Contractor agrees that it will not require any laborer or mechanic to work in unsanitary, hazardous, or dangerous surroundings or working conditions.

(ii)**Subcontracts -** The Contractor also agrees to include the requirements of this section in each subcontract. The term "subcontract" under this section is considered to refer to a person who agrees to perform any part of the labor or material requirements of a contract for construction, alteration or repair. A person who undertakes to perform a portion of a contract involving the furnishing of supplies or materials will be considered a "subcontractor" under this section if the work in question involves the performance of construction work and is to be performed: (1) directly on or near the construction site, or (2) by the employer for the specific project on a customized basis. Thus, a supplier of materials which will become an integral part of the construction is a "subcontractor" if the supplier fabricates or assembles the goods or materials in question specifically for the construction project and the work involved may be said to be construction activity. If the goods or materials in question are ordinarily sold to other customers from regular inventory, the supplier is not a "subcontractor." The requirements of this section do not apply to contracts or subcontracts for the purchase of supplies or materials or articles normally available on the open market.

3. COPELAND ANTI-KICKBACK ACT

40 U.S.C. § 276c (1995); 29 C.F.R. § 3 (1995); 29 C.F.R. § 5 (1995)

Applicability to Contracts *All construction contracts in excess of $2,000.*

Flow Down *Applicable to all third party contractors and subcontractors.*

Model Clauses/Language *3.1 of the Copeland Act makes it clear that the purpose of the Act is to assist in "the enforcement of the minimum wage provisions of the Davis- Bacon Act." In keeping with this intent DOL has included a section on the Copeland Act in the mandatory language of the Davis-Bacon provisions. The language can be found at '5.5(a)(5) of the Davis-Bacon model clauses and reads as follows:*

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

4. PROMPT PAYMENT OF FUNDS WITHHELD TO SUBCONTRACTORS

(The local agency must include one of the following three provisions (if using Caltrans Standard Specification, delete paragraphs 9-1.06 and 9-1 .06 *5)* to ensure prompt and full payment of any retainage from the prime contractor or subcontractor to a subcontractor)

(EITHER)

No retainage will be withheld by the agency from progress payments due the prime contractor. Retainage by the prime contractor or subcontractors is prohibited, and no retainage will be held by the prime contractor from progress due subcontractors. Any violation of this provision shall subject the violating prime contractor or subcontractor to the penalties, sanctions, and other remedies specified in Section 7108.5 of the California Business and Professions Code. These requirements shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise, available to the prime contractor or subcontractor in the event of a dispute involving late payment, or nonpayment by the prime contractor, deficient subcontract performance, or noncompliance by a subcontractor. This provision applies to both DBE and non-DBE prime contractors and subcontractors.

(OR)

No retainage will be withheld by the agency from progress payments due the prime contractor. Any retainage held by the prime contractors or subcontractors from progress payments due subcontractors shall be promptly paid in full to subcontractors within 30 days after the subcontractor's work is satisfactorily completed. Federal regulation (49 CFR 26.29) requires that any delay or postponement of payment over the 30 days may take place only for good cause and with the agency's prior written approval. Any violation of this provision shall subject the violating prime contractor or subcontractor to the penalties, sanctions, and other remedies specified in Section 7108.5 of the California Business and Professions Code. These requirements shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise, available to the prime contractor or subcontractor in the event of a dispute involving late payment, or nonpayment by the prime contractor, deficient subcontract performance, or noncompliance by a subcontractor. This provision applies to both DBE and non-DBE prime contractors and subcontractors.

(OR)

The agency shall hold retainage from the prime contractor and shall make prompt and regular incremental acceptances of portions, as determined by the agency of the contract work and pay retainage to the prime contractor based on these acceptances. The prime contractor or subcontractor shall return all monies withheld in retention from a subcontractor within 30 days after receiving payment for work satisfactorily completed and accepted including incremental acceptances of portions of the contract work by the agency. Federal regulation (49 CFR 26.29) requires that any delay or postponement of payment over 30 days may take place only for good cause and with the agency's prior written approval. Any violation of this provision shall subject the violating prime contractor or subcontractor to the penalties, sanctions, and other remedies specified in Section 7108.5 of the California Business and Professions Code. These requirements shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise, available to the prime contractor or subcontractor in the event of a dispute involving late payment, or nonpayment by the prime contractor, deficient subcontract performance, or noncompliance by a subcontractor. This provision applies to both DBE and non-DBE prime contractors and subcontractors.

C. Experimental, Developmental & Research Work

Rights in Data *- This following requirements apply to each contract involving experimental, developmental or research work:*

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

(2) The following restrictions apply to all subject data first produced in the performance of the contract to which this Attachment has been added:

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

(b) In accordance with 49 C.F.R. § 18.34 and 49 C.F.R. § 19.36, the Federal Government reserves a royalty-free, non-exclusive and irrevocable license to reproduce, publish, or otherwise use, and to authorize others to use, for "Federal Government purposes," any subject data or copyright described in subsections (2)(b)1 and (2)(b)2 of this clause below. As used in the previous sentence, "for Federal Government purposes," means use only for the direct purposes of the Federal Government. Without the copyright owner's consent, the Federal Government may not extend its Federal license to any other party.

1. Any subject data developed under that contract, whether or not a copyright has been obtained; and

2. Any rights of copyright purchased by the Purchaser or Contractor using Federal assistance in whole or in part provided by FTA.

(c) When FTA awards Federal assistance for experimental, developmental, or research work, it is FTA's general intention to increase transportation knowledge available to the public, rather than to restrict the benefits resulting from the work to participants in that work. Therefore, unless FTA determines otherwise, the Purchaser and the Contractor performing experimental, developmental, or research work required by the underlying contract to which this Attachment is added agrees to permit FTA to make available to the public, either FTA's license in the copyright to any subject data developed in the course of that contract, or a copy of the subject data first produced under the contract for which a copyright has not been obtained. If the experimental, developmental, or research work, which is the subject of the underlying contract, is not completed for any reason whatsoever, all data developed under that contract shall become

subject data as defined in subsection (a) of this clause and shall be delivered as the Federal Government may direct. This subsection (c) , however, does not apply to adaptations of automatic data processing equipment or programs for the Purchaser or Contractor's use whose costs are financed in whole or in part with Federal assistance provided by FTA for transportation capital projects.

(d) Unless prohibited by state law, upon request by the Federal Government, the Purchaser and the Contractor agree to indemnify, save, and hold harmless the Federal Government, its officers, agents, and employees acting within the scope of their official duties against any liability, including costs and expenses, resulting from any willful or intentional violation by the Purchaser or Contractor of proprietary rights, copyrights, or right of privacy, arising out of the publication, translation, reproduction, delivery, use, or disposition of any data furnished under that contract. Neither the Purchaser nor the Contractor shall be required to indemnify the Federal Government for any such liability arising out of the wrongful act of any employee, official, or agents of the Federal Government.

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

(f) Data developed by the Purchaser or Contractor and financed entirely without using Federal assistance provided by the Federal Government that has been incorporated into work required by the underlying contract to which this Attachment has been added is exempt from the requirements of subsections (b), (c), and (d) of this clause , provided that the Purchaser or Contractor identifies that data in writing at the time of delivery of the contract work.

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

(3) Unless the Federal Government later makes a contrary determination in writing, irrespective of the Contractor's status (i.e. , a large business, small business, state government or state instrumentality, local government, nonprofit organization, institution of higher education, individual, etc.), the Purchaser and the Contractor agree to take the necessary actions to provide, through FTA, those rights in that invention due the Federal Government as described in

U.S. Department of Commerce regulations, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," 37 C.F.R. Part 401.

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

B. **Patent Rights** - This following requirements apply to each contract involving experimental, developmental, or research work:

(1) General - If any invention, improvement, or discovery is conceived or first actually reduced to practice in the course of or under the contract to which this Attachment has been added, and

that invention, improvement, or discovery is patentable under the laws of the United States of America or any foreign country, the Purchaser and Contractor agree to take actions necessary to provide immediate notice and a detailed report to the party at a higher tier until FTA is ultimately notified.

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

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