

# CAPITAL METROPOLITAN TRANSPORTATION AUTHORITY

AUSTIN, TEXAS

## CONTRACT MODIFICATION

<b>1. CONTRACT NO: 200752, IDIQ for Construction Services</b>	<b>2. CONTRACT MODIFICATION NO.: 3</b>	<b>3. EFFECTIVE DATE OF C.M. See Block 9</b>	<b>4. CONTRACTOR NAME: Stacy and Witbeck, Inc.</b>
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### 5. AGREEMENT TO MODIFY CONTRACT:

The parties hereto agree to modify the Contract identified in Block 1, above, as described in Block 10, below, pursuant to the terms and conditions of the Contract. Except as modified herein, all other provisions of the Contract (including, but not limited to, price, delivery, and completion date) remain unchanged.

**6. AMOUNT OF THIS CONTRACT MODIFICATION: (\$0.00) NO CHANGE**

**7. TERM OR PERIOD OF PERFORMANCE: NO CHANGE**

### 8. CONTRACTOR'S EXECUTION: Stacy and Witbeck, Inc. ("Contractor"):

Name & Title: Armando Tiscareño, Exec VP  
(print or type)

Signature: 

Digitally signed by  
Armando  
Tiscareño  
Date: 2023.03.12  
16:39:08-05'00'

Date Executed: \_\_\_\_\_

### 9. CAPMETRO'S EXECUTION:

Name & Title: John Pena Contracts Administrator III  
(print or type)

Signature:   
E-SIGNED by John Pena  
on 2023-03-13 08:05:32 CDT

Date Executed: March 13, 2023

### 10. DESCRIPTION OF CONTRACT MODIFICATION:

This contract modification is made in accordance with Exhibit E-Revised-4, Contractual Terms and Conditions, Section 46. CHANGES, to be made part hereof for all pertinent purposes. The changes are as follows:

Refer to Exhibit E-Revised-4, CONTRACTUAL TERMS AND CONDITIONS. Exhibit E-Revised-4 is hereby replaced in its entirety with **Exhibit E-Revised-5**, attached hereto and incorporated herein for all pertinent purposes. This Modification removes Section 83, Cooperative Contract and removes Section 84, Austin Transit Partnership. Changes are reflected with highlighted text.

*The amount stated above is the final contract modification amount agreed to by both parties. Upon receipt of payments totaling this amount, the Contractor, for itself, its successors and assigns will release, acquit and forever discharge Capital Metropolitan Transportation Authority (CapMetro) from and against any claims, debts, demands, or cause of action which the Contractor has or may have had a result of furnishing labor, supplies, or materials for the change order stated above. This modification may be executed in multiple originals, and an executed facsimile or email copy shall have the same force and effect as the original document.*

**END OF MODIFICATION # 3**

**EXHIBIT E – REVISED – 5**  
**CONTRACTUAL TERMS AND CONDITIONS**  
**(CONSTRUCTION, ALTERATION OR REPAIR CONTRACT)**

**1. DEFINITIONS**

As used throughout this Contract, the following terms shall have the meaning set forth below:

(a) “Applicable Anti-Corruption and Bribery Laws” means international, federal, state, provincial and local laws, rules, regulations, directives and governmental requirements currently in effect and as they become effective relating in any way to the Contractor’s provision of goods and/or services to Authority, including without limitation “FCPA” or any applicable laws and regulations, including in the jurisdiction in which Contractor operates and/or manufactures goods for the Authority, relating to anti-corruption and bribery.

(b) “Architect/Engineer” (A/E) means a person registered as an Architect pursuant to Tex. Occ. Code § 1051.001 et seq, as a Landscape Architect pursuant to Tex. Occ. Code § 1052.003 et seq, and/or a person licensed as a Professional Engineer pursuant to Tex. Occ. Code § 1001.001, et seq or firm employed to provide professional architectural or engineering services and having overall responsibility for the design of a Project or a significant portion thereof, if applicable.

(c) “As-Built Drawings” means drawings that show Construction of a particular structure or Work as actually completed under the Contract.

(d) “Authority”, “Capital Metro”, “Cap Metro”, “CMTA” means Capital Metropolitan Transportation Authority.

(e) **“Authority Data” means all data, content and information (i) submitted by or on behalf of the Authority or its customers to the Contractor or loaded into the System, (ii) obtained, developed, produced or processed by the Contractor or by the Application or System in connection with the Contract, or (iii) to which the Contractor has access in connection with the Contract, and all derivative versions of such data, content and information, and any derivative versions thereof, in any form or format.**

(f) **“Authority Electronic Property” means (i) any websites controlled by the Authority, (ii) any Authority mobile device apps, (iii) any application programming interfaces (API) to the Authority’s information technology systems, (iv) any other kiosks, devices or properties for consumer interaction that are created, owned, or controlled by the Authority, and (v) versions and successors of the foregoing, any form or format now known or later developed, that may be used by customers obtaining products or services from the Authority.**

(g) “Bid” means the offer of the bidder, submitted on the prescribed form, stating prices for performing the Work described in the Plans and Specifications.

(h) “Bid Guarantee” or “Bid Bond” means a form of security assuring that the bidder will not withdraw a Bid within the bid acceptance period and will execute a contract and furnish required bonds and insurance within the time specified in the bid.

(i) “Change Order” means a written order to the Contractor signed by the Contracting Officer and the Architect/Engineer, if an Architect/Engineer is assigned to the Project, issued after execution of the Contract, authorizing a change in the term or scope of the Contract.

(j) “Construction” means the building, alteration, or repair (including dredging, excavating and painting) of structures, or other real property improvement.

(k) "Contract" or "Contract Documents" means this written agreement between the parties comprised of all the documents listed in the Table of Contents and any emergency field orders, Change Orders and/or Contract Modifications that may be entered into by the parties.

(l) "Contract Award Date" means the date of the Contract award notice, which may take the form of a purchase order, signed Contract or Notice of Award, issued by the Authority.

(m) "Contract Modification" means any changes in the terms or provisions of the Contract which are reduced to writing and fully executed by both parties.

(n) "Contract Sum" means the total compensation payable to the Contractor for performing the Work as originally contracted for or as subsequently adjusted by Contract Modification.

(o) "Contract Term" means period of performance set forth in the paragraph entitled "Period of Performance" contained in **Exhibit E-Revised-5**.

(p) "Contracting Officer" means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and finding on behalf of the Authority. The term includes certain authorized representatives of the Contracting Officer acting within the limits of their authority as delegated by the Contracting Officer.

(q) "Contractor" or "Prime Contractor" means the entity that has assumed the legal obligation to perform the Work as identified in the Contract.

(r) "Days" means calendar days. In computing any period of time established under this Contract, the day of the event from which the designated period of time begins to run shall not be included, but the last day shall be included unless it is a Saturday, Sunday, or Federal or State of Texas holiday, in which event the period shall run to the end of the next business day.

(s) "FAR" means the Federal Acquisition Regulations codified in 48 C.F.R. Title 48.

(t) "FCPA" means the United States Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, et seq., as amended.

(u) "Force Majeure Event" means strikes, lockouts, or other industrial disputes; explosions, epidemics, civil disturbances, acts of domestic or foreign terrorism, wars within the continental United States, riots or insurrections; embargos, natural disasters, including but not limited to landslides, earthquakes, floods or washouts; interruptions by government or court orders; declarations of emergencies by applicable federal, state or local authorities; and present or future orders of any regulatory body having proper jurisdiction.

(v) "FTA" means the Federal Transit Administration.

(w) "Good Industry Practice" means the exercise of the degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from time to time from a skilled and experienced designer, engineer, constructor, operator or maintenance provider seeking in good faith to comply with its contractual obligations, complying with all applicable laws and engaged in the same type of undertaking in the United States under similar circumstances and conditions.

(x) "Intellectual Property Rights" means the worldwide legal rights or interests evidenced by or embodied in: (i) any idea, design, concept, personality right, method, process, technique, apparatus, invention, discovery, or improvement, including any patents, trade secrets, and know-how; (ii) any work of authorship, including any copyrights, moral rights or neighboring rights, and any derivative works thereto; (iii) any trademark, service mark, trade dress, trade name, or other indicia of source or origin; (iv) domain name registrations; and (v) any other proprietary or similar rights. The Intellectual Property Rights of a party

include all worldwide legal rights or interests that the party may have acquired by assignment or license with the right to grant sublicenses.

(y) "Manufacturing Materials" mean any completed or partially completed supplies and materials, parts, dies, jigs, fixtures, Plans, drawings, information, and contract rights specifically produced or specially acquired by the Contractor for the performance of the Work.

(z) "Minor Informality" or "Minor Irregularity" means immaterial defects or variations from the exact requirements of a solicitation that can be corrected or waived without prejudice to other bidders.

(aa) "Notice of Award" means formal notice of award of the Contract to Contractor issued by the Contracting Officer.

(bb) "Notice to Proceed" means written authorization for the Contractor to start the Work.

(cc) "Plans" and "Specifications" mean drawings, specifications, and other formal data that describes the Work to be performed if Plans and Specifications are required for the Work.

(dd) "Project" means the Work as defined by the Contract Documents.

(ee) "Project Manager" means the designated individual to act on behalf of Capital Metro, to monitor and certify the technical progress of the Contractor's Work under the terms of this Contract.

(ff) "Shop Drawings" means drawings describing in detail (1) the proposed fabrication and assembly of structural elements, (2) the installation (i.e., form, fit, and attachment details) of materials or equipment, (3) both, including drawings, diagrams, layouts, schematics, descriptive literature, illustrations, schedules, performance and test data, and similar materials furnished by the Contractor to explain in detail specific portions of the Work required by the Contract.

(gg) "Statement of Work" means the detailed scope of work set forth in "**Exhibit F-Revised-3**" of this Contract, and which may or not reference Plans and Specifications.

(hh) "Subcontract" means the contract between the Contractor and its Subcontractors.

(ii) "Subcontractor" means subcontractors of any tier.

(jj) "Substantial Completion" means that the Work is sufficiently complete, in accordance with the terms of this Contract, so that the Authority may use or occupy the Work, or Contractor's designated portion of the overall Project, for the intended purpose, as determined by the Authority in its sole discretion.

(kk) "Work" means all labor, plant, materials, manufacture and fabrication of components, facilities, and all other things, which are required by the Statement of Work and/or the Plans and Specifications to be performed by the Contractor under this Contract.

(ll) "Work Site" means the location of the premises where the Work is being performed.

(mm) "Works" means any tangible or intangible items or things that have been or will be specifically, generated, prepared, created, or developed by the Contractor (or such third parties as the Contractor may be permitted to engage) at any time following the effective date of the Contract, for the exclusive use of, and ownership by, Authority under the Contract, including but not limited to any (i) works of authorship (such as literary works, musical works, dramatic works, choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings and architectural works, which includes but is not limited to manuals, instructions, printed material, graphics, artwork, images, illustrations, photographs, computer software, scripts, object code, source code or other programming code, HTML code, data, information, multimedia files, text web pages or web sites, other written or machine

readable expression of such works fixed in any tangible media, and all other copyrightable works), (ii) trademarks, service marks, trade dress, trade names, logos, or other indicia of source or origin, (iii) ideas, designs, concepts, personality rights, methods, processes, techniques, apparatuses, inventions, formulas, discoveries, or improvements, including any patents, trade secrets and know-how, (iv) domain names, (v) any copies, and similar or derivative works to any of the foregoing, and (vi) all documentation and materials related to any of the foregoing.

## **2. INDEFINITE QUANTITY, INDEFINITE DELIVERY CONTRACT**

(a) This is an indefinite quantity, indefinite delivery contract for the supplies or services specified elsewhere in the Contract, and effective for the period stated in Section 3 of this **Exhibit E-Revised-5**. **The quantities of supplies and services specified in the Exhibit A-Revised-2 are estimates only and are not purchased by this contract.** The annual program value for all Contracts is \$10,000,000. The Authority reserves the right to adjust the quantities base on the estimated annual program of \$10,000,000. The Authority will track the sum of all task orders awarded to ensure they do not exceed the total annual program value. Any required adjustments to pricing shall be done in accordance with the Variations in Estimated Quantities clause of Section 3 of this **Exhibit E-Revised-5**.

(b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. The Contactor shall furnish to the Authority, when and if ordered, the supplies or services specified in the **Exhibit F-Revised-3** up to and including the quantity designated in (e) of this paragraph as the "maximum". The Authority shall order at least the quantity of supplies or services designated in **Exhibit E-Revised-5** of this paragraph as the "minimum".

(c) Except for any limitations on quantities in the Order Limitations clause, there is no limit on the number of order that may be issued. The Authority may issue orders requiring delivery to multiple destinations or performance at multiple locations.

(d) Any order issued during the effective period of this contract and not completed within that period shall be completed by the Contractor within the time specified in the order. The contract shall govern the Contractor's and Authority's rights and obligations with respect to that order to the same extent as if the order were completed during the contract's effective period; provided, that the Contractor shall not be required to make any deliveries under this contract after 30 September 2027.

(e) This indefinite quantity, indefinite delivery is subject to the following minimum/maximum paragraph:

(1) Minimum order. The Authority will order a minimum of \$1,000 in Construction Services under this Contract. This minimum order amount shall apply to each contract awarded. The minimum order amount shall apply to the first year of the contract.

(2) Maximum order. The Authority will order a maximum of a total not-to-exceed amount of \$50,000,000, collectively, for all Contracts awarded for Construction Services under RFP 307090.

This is a fixed unit price/lump sum Contract [subject to the provisions of this **Exhibit E-Revised-5**, Paragraph entitled "Variation in Estimated Quantity"].

## **3. VARIATION IN ESTIMATED QUANTITY**

If the quantity of a unit-priced item in ~~this Contract~~ **the Task Order** is an estimated quantity and the actual quantity of the unit-priced item varies more than ten percent (10%) above or below the estimated quantity, an equitable adjustment in the ~~Contract~~ **Task Order** Sum shall be made upon demand of either party in accordance with **Exhibit E-Revised-5**, Paragraph entitled "Changes". The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above one hundred ten percent (110%) or below ninety percent (90%) of the estimated quantity. If the quantity variation is such as to cause

an increase in the time necessary for completion, the Contractor may request (in writing) an extension of time to be received by the Contracting Officer within ten days (10) days from the beginning of the delay, or within such further period as may be granted by the Contracting Officer before the date of final settlement of the ~~Contract~~ **Task Order**. Upon the receipt of a written request for an extension, the Contracting Officer shall ascertain the facts and make an adjustment for extending the completion date as, in the judgment of the Contracting Officer, is justified.

#### **4. TERM**

The term of the Contract shall be five (5) years from the Contract Award Date. No work shall be performed under this Contract prior to issuance of a written Task Order.

#### **5. ECONOMIC PRICE ADJUSTMENT – LABOR AND MATERIAL**

(a) The Contractor shall notify the Contracting Officer if, at any time during contract performance, the rate of pay for labor (including fringe benefits) or the unit prices for material shown in the Schedule either increase or decrease. The Contractor shall furnish this notice within 60 days after the increase or decrease, or within any additional period that the Contracting Officer may approve in writing, but not later than the date of final payment under this contract. The notice shall include the Contractor's proposal for an adjustment in the contract unit prices to be negotiated under paragraph (b) of this clause, and shall include, in the form required by the Contracting Officer, supporting data explaining the cause, effective date, and amount of the increase or decrease and the amount of the Contractor's adjustment proposal.

(b) Promptly after the Contracting Officer receives the notice and data under paragraph (a) of this clause, the Contracting Officer and the Contractor shall negotiate a price adjustment in the contract unit prices and its effective date. However, the Contracting Officer may postpone the negotiations until an accumulation of increases and decreases in the labor rates (including fringe benefits) and unit prices of material shown in the Schedule results in an adjustment allowable under paragraph (c)(3) of this clause. The Contracting Officer shall modify this contract (1) to include the price adjustment and its effective date and (2) to revise the labor rates (including fringe benefits) or unit prices of material as shown in the Schedule to reflect the increases or decreases resulting from the adjustment. The Contractor shall continue performance pending agreement on, or determination of, any adjustment and its effective date

(c) Any price adjustment under this clause is subject to the following limitations:

(1) Any adjustment shall be limited to the effect on unit prices of the increases or decreases in the rates of pay for labor as revised by Department of Labor's (DOL) current Davis Bacon Wage Rates (including fringe benefits) or unit prices for material shown in the Schedule. There shall be no adjustment for-

(i) Supplies or services for which the production cost is not affected by such changes;

(ii) Changes in rates or unit prices other than those shown in the Schedule; or

(iii) Changes in the quantities of labor or material used from those shown in the Schedule for each item.

(2) No upward adjustment shall apply to supplies or services that are required to be delivered or performed before the effective date of the adjustment, unless the Contractor's failure to deliver or perform according to the delivery schedule results from causes beyond the Contractor's control and without its fault or negligence, within the meaning of the Default clause.

(3) There shall be no adjustment for any change in rates of pay for labor (including fringe benefits) or unit prices for material which would not result in a net change of at least 3 percent of the then-current total contract price. This limitation shall not apply, however, if, after final delivery of all line items, either party requests an adjustment under paragraph (b) of this clause.

(4) The aggregate of the increases in any contract unit price made under this clause shall not exceed 10 percent of the original unit price. There is no percentage limitation on the amount of decreases that may be made under this clause.

## 6. WAGES RATES

**FOR THIS SOLICITATION, DAVIS-BACON AND RELATED ACTS IS APPLICABLE AS STATED IN EXHIBIT G, WAGE RATES. ADDITIONALLY, THE AUTHORITY MAY REQUIRE PROPOSERS TO COMPLY WITH AT LEAST A \$15 PER HOUR WAGE RATE REQUIREMENT FOR LABORERS PERFORMING WORK IN A CLASSIFICATION THAT HAS A WAGE RATE OF LESS \$15 PER HOUR IN EXHIBIT G, WAGE RATES AND PRICING SHOULD BE BASED ON THIS CONSIDERATION.**

## 7. PROCESS FOR AWARDING TASK ORDERS

The Authority will ensure that each contractor has a fair opportunity for award of Task Orders in accordance with the following procedures:

(a) Task Orders will be awarded on a rotational basis, following the order of the highest-to-lowest rated firm as assigned during the solicitation evaluation process. This rotation shall be followed for the duration of the Contract; however, the Authority reserves the right to consider other factors in the award of Task Orders. **Capital Metro will award a task order to the contracting in waiting after conducting a due diligence review for overall compliance and that the proposal adequately address the needs of the tasks order and the Authority. If the Authority cannot negotiate a fair and reasonable price, the Authority will cancel the Request for Task Order Proposal.**

The highest-rated firm will start the IDIQ rotational task order process with the assignment of the first task order. The remaining contractors, based on their ranking will follow the IDIQ rotational process for task order assignments as they are issued. The process will continue for the duration of this rotational IDIQ construction contract. A **Request for Task Order Proposal (RTOP)** will initiate the process and the Authority will prepare and provide an RTOP identifying the project and description, in drawings, specification and other appropriate materials, of the intended scope and character of the Task Order. Generally, RTOPs will be comprised of a Request for Task Order Proposal cover page containing instructions for submission, scope of work, and specific requirements for the individual task order, timeline for completion and related submission requirements. In response to the RTOP, the contractor shall submit a fixed priced **Task Order Proposal (TOP)** within the date and time specified. All TOPs will require a specific DBE Percentage Goal for the individual task order and the contractor will be required to make good faith efforts to reach the goal in accordance with the contractor's overall DBE Subcontracting Plan and the IDIQ Contract. The individual DBE Subcontracting Goal will be provided by the contractor at the time of each individual Task Order. In response to an RTOP, the Contractor will provide to the Authority a written Fixed Price Task Order Proposal in accordance with the terms of the contract. Capital Metro will award a task order to the contractor in waiting after conducting a due diligence review for overall compliance and that the proposal adequately address the needs of the task order and the Authority.

(b) The Authority will consider the following factors in awarding Task Orders:

- (1) Past performance on earlier tasks under the multiple award Contract;
- (2) Quality of deliverables;
- (3) Cost controls;

- (4) Price;
- (5) Cost; or
- (6) Other factors that the Authority believes are relevant.

(c) Contractors may not be given an opportunity to be considered for a particular order in excess of \$10,000 under the following instances:

(1) The Authority's need for the Services is so urgent that providing the opportunity would result in unacceptable delays;

(2) The Contractor provides written notice stating the Contractor's intent not to provide Services and the reason;

(3) Only one contractor is capable of performing the Services at the level of quality required because the Services are unique or highly specialized; or

(4) The order should be issued on a sole-source basis in the interest of economy and efficiency as a logical follow-on to an order already issued under the Contract, provided that all Contractors were given a fair opportunity to be considered for the original order.

(5) Issuing a task order to meet the minimum guarantee in the Contract.

(d) The procedures in paragraphs (a) through (c) above do not apply to Task Orders under \$10,000. The Authority reserves the right to request a price proposal from a sole-source for Task Orders under \$10,000.

(e) The Contractor is not required to submit a price proposal for every request for proposals. However, failure to respond to a reasonable number of proposals during the Contract Term may result in the Authority not exercising its option to extend the Contract.

## **8. PREPARATION OF TASK ORDER PROPOSALS**

(a) Proposals must be (1) submitted on the forms furnished by the Authority, and (2) signed. The person signing a proposal must initial each erasure or change appearing on any proposal form.

(b) The proposal form may require offerors to submit proposed prices for one or more items on various bases, including

- (c)
  - (1) Lump sum price;
  - (2) Alternate prices;
  - (3) Units of construction; or
  - (4) Any combination of paragraphs (b)(1) through (b)(3) of this provision.

(d) If the solicitation requires submission of a proposal on all items, failure to do so may result in the proposal being rejected without further consideration. If a proposal on all items is not required, offeror should insert the word "no proposal" in the space provided for any item on which no price is submitted.

(e) Alternate proposals will not be considered unless this solicitation authorizes their submission.



## 9. ORDERING AND PRICING LIMITATIONS

- (a) Work to be performed under this Contract shall be ordered through issuance of written Task Orders. There is no limitation to the number of Task Orders issued under this Contract.
- (b) Prior to issuance of a written Task Order the Authority shall provide notification to the Contractor of the Construction Services required by the Task Order, which shall include a required date to submit pricing for this task.
- (c) The Authority may hold site visits prior to the receipt of the bid/proposal. The date/time/location of the site visit shall be provided in the RTOP.
- (d) The Contractor shall return a complete and itemized price/cost breakdown and other documents as stated in the RTOP in the format provided by the Authority, ~~inclusive of labor hours, material/travel/other reimbursable costs, etc.,~~ and a timeline with milestones for the completion of work within the time stated in the request. Failure to timely respond may result in award of the Task Order to the next contractor in rotation, if applicable. ~~Fully Burdened Labor Hour Rates shall be those specified in the Contract.~~ If the RTOP is being processed under the Best Value guidelines and if the Authority does not agree with the proposed **price, labor disciplines, number of labor hours, material/travel/other costs** or timelines, the Authority reserves the right to negotiate with the Contractor so as to arrive at a final agreement for the task. Following final agreement, a written Task Order may be issued.
- (e) Construction Services under this Contract shall commence upon the issuance of each fully executed Task Order. Completion of all requirements under each and every Task Order shall correlate to an expeditious prosecution of the milestones that are not dependent upon factors beyond the direct control of the Contractor.
- (f) ~~The Authority will reimburse actual travel expenses up to the not to exceed amount provided detailed travel expense records are provided with copies of receipts. The Authority will not pay travel expenses for local travel within the Austin metropolitan area, and all air fare cannot be reimbursed at a rate higher than coach fare. Fair and reasonable car rental rates are deemed to be \$50 per day. Any travel conducted pursuant to this Contract shall not be billed in excess of the maximum per diem rates for lodging and meals as established by the U.S. General Services Administration. First and Last Day of travel is limited to seventy five percent (75%) of meals and incidental expenses. Please see GSA Domestic Per Diem Rates at <http://www.gsa.gov/portal/category/100120>.~~
- (g) ~~Reimbursable expenses are limited to direct pass-through of all fees paid. All material/travel/other reimbursable costs (including Subcontractor costs) shall be reimbursed to the Contractor by task and at actual cost with no administrative or other mark-ups (including Subcontractor costs). In no event may the total of these costs by task exceed the total in the Task Order. In the event the Contractor believes material/other costs will be exceeded, the Contractor shall immediately notify the Authority and submit a revised estimate for these costs by task. The Contractor shall not proceed with work in excess of that described in the written Task Order unless the Task Order is modified in writing by the Authority.~~
- (h) Bids/Proposals must represent a complete cost projection. ~~including Fully Burdened Hourly Labor Rates by job classification, reimbursable expenses, and other activities associated with the proposed Task Order.~~ All Subcontractor costs must also be included and shall not be singled out as separate tasks in of themselves.
- (i) Written Task Orders shall contain a complete description of the work, an itemization of the ~~estimated material/travel~~ **Contract line items quantities and prices applicable to the task order**, and all other costs and the fixed labor fee agreed to by the parties.
- (j) ~~Labor hours shall not be billed as reimbursable expenses.~~

(k) No payment for costs incurred prior to issuance of a written Task Order shall be payable to the Contractor.

(l) Any order issued during the effective period of this Contract and not completed within that period shall be completed by the Contractor within the time specified in the order, except that no Task Order shall be issued if the performance period in the Task Order would extend more than one (1) year. The Contract shall govern the Contractor's and the Authority's rights and obligations with respect to that order to the same extent as if the order was completed during the Contract's effective period.

## **10. PERFORMANCE AND PAYMENT BONDS**

(a) **Performance Bond.** If the Task Order Sum exceeds \$100,000.00, the Contractor shall provide a Performance Bond to ensure the faithful performance of all Contractor's obligations under the Contract Documents in an amount equal to the Task Order Sum.

(b) **Payment Bond.** If the Task Order Sum exceeds \$25,000.00, the Contractor shall provide a Payment Bond to guarantee the Subcontractors and material suppliers on the Project will be paid in an amount of the Task Order Sum.

(c) The Contractor shall be required to submit all required bonds to the Contracting Officer within ten (10) days from the date of Contract Award Date. Upon receipt of the payment and/or performance bond, the Bid Guarantee, if applicable, shall be returned to the Contractor.

(d) Performance and Payment Bonds shall be issued in an amount of one hundred percent (100%) of the Task Order Sum by a surety company listed in the latest United States Treasury Department Circular 570, be authorized to do business in Texas and have an underwriting limitation equal to or greater than the penal sum of the bond. If any surety upon any bond furnished in connection with the Contract becomes insolvent, or otherwise not authorized to do business in the State, the Contractor shall promptly furnish equivalent security to protect the interest of the Authority and of persons supplying labor, materials and/or equipment in the prosecution of the Work.

(e) Each bond shall be accompanied by a valid Power-of-Attorney, issued by the surety company and attached, signed and sealed, with the corporate embossed seal, to the bond, authorizing the agent who signs the bond to commit the surety company to the terms of the bond, and stating on the face of the Power-of-Attorney the limit, if any, in the total amount for which he/she is empowered to issue a single bond.

(f) A surety bond rider increasing the dollar amount of any payment and performance bond will be required for any Change Order that increases the Task Order Sum.

(g) In addition, the Authority may request a surety bond increasing the dollar amount if:

- (1) any surety upon any bond furnished with this Contract becomes unacceptable to the Authority;  
or
- (2) any surety fails to furnish reports on its financial condition as required by the Authority.

## **11. INSURANCE**

(a) The Contractor shall furnish proof of Capital Metro-stipulated insurance requirements specified below. All insurance policies shall be primary and non-contributing with any other valid and collectible insurance or self-insurance available to the Authority and shall contain a contract waiver of subrogation in favor of the Authority. The Contractor shall furnish to the Authority certificate(s) of insurance evidencing the required coverage and endorsement(s) and, upon request, a certified duplicate original of any of those policies. Prior to the expiration of a certificate of insurance, a new certificate of insurance shall be furnished to the Authority showing continued coverage. Each policy shall be endorsed to provide thirty (30) days

written notice of cancellation or non-renewal to the Authority and the Authority shall be named as an Additional Insured under each policy, except Professional Liability insurance if required by this Contract. All insurance policies shall be written by reputable insurance company or companies acceptable to the Authority with a current Best's Insurance Guide Rating of A+ and Class XIII or better. All insurance companies shall be authorized to transact business in the State of Texas. The Contractor shall notify the Authority in writing of any material alteration of such policies, including any change in the retroactive date in any "claims-made" policy or substantial reduction of aggregate limits, if such limits apply or cancellation thereof at least thirty (30) days prior thereto. The below requirements only represent the minimum coverage acceptable to the Authority and these requirements are not intended to represent the maximum risk or the maximum liability of the Contractor. The Contractor shall be responsible for setting its own insurance requirements, if any, for the kind and amounts of insurance to be carried by its Subcontractors in excess of the insurance required by the Authority.

The Contractor shall carry and pay the premiums for insurance of the types and in the amounts stated below.

#### CAPITAL METRO MINIMUM COVERAGE REQUIREMENTS

(1) **Commercial General Liability Insurance** Coverage with limits of not less than One Million Dollars and No/100 Dollars (\$1,000,000) per occurrence Combined Single Limit of Liability for Bodily Injury and Property Damage with an aggregate of Two Million Dollars and No/100 Dollars (\$2,000,000) with coverage that includes:

- i. Products and Completed Operations Liability
- ii. Independent Contractors
- iii. Personal Injury Liability extended to claims arising from employees of Contractor and the Authority.
- iv. Contractual Liability pertaining to the liabilities assumed in the agreement.

(2) **Business Automobile Liability Insurance** with minimum coverage limits of not less than One Million Dollars and No/100 Dollars (\$1,000,000) with combined single limit of Two Million Dollars (\$2,000,000), covering all owned, hired and non-owned automobiles used in connection with work for Bodily Injury and Property Damage.

(3) **Builders Risk/Equipment Installation Insurance** covering the full value of the construction values at risk. Insurance should provide coverage for all perils and provide Replacement Cost for the equipment and construction materials in the event of a loss.

(4) **Workers' Compensation Insurance** providing statutory limits in accordance with the Texas Workers' Compensation Act and/or other State or Federal law as may be applicable to the work being performed under this Contract.

(5) **Employer Liability Insurance** with minimum limits of One Million Dollars and No/100 Dollars (\$1,000,000).

(6) **Rail Road Protective Liability** coverage with limits not less than Five Million Dollars and No/100 Dollars (\$5,000,000). Applicable for any construction or demolition within fifty (50) feet of the rail line.

(7) **Equipment Installation insurance** covering the full value of equipment being installed. Insurance should provide coverage for all peril and provide Replacement Cost for the equipment in the event of a loss.

(8) All policies shall include Terrorism.

(b) The limits of liability as required above may be provided by a single policy of insurance or by a combination of primary, excess or umbrella policies but in no event shall the total limits of liability available for any one occurrence or accident be less than the amount required above.

(c) The Contractor, and all of its insurers shall, in regard to the above stated insurance, agree to waive all rights of recovery or subrogation against the Authority, its directors, officers, employees, agents, successors and assigns, and the Authority's insurance companies arising out of any claims for injury(ies) or damages resulting from the work performed by or on behalf of the Contractor under this Contract and/or use of any Authority premises or equipment under this Contract.

(d) Each insurance policy shall contain the following endorsements: PRIMARY AND NON-CONTIBUTORY INSURANCE and WAIVER OF TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS, which shall be evidenced on the Certificate of Insurance. The General Liability insurance shall include contractual endorsement(s) which acknowledge all indemnification requirements under the Agreement. All required endorsements shall be evidenced on the Certificate of Insurance. Proof that insurance coverage exists shall be furnished to the Authority by way of a Certificate of Insurance before any part of the Contract work is started.

(e) If any insurance coverage required to be provided by the Contractor is canceled, terminated, or modified so that the required insurance coverages are no longer in full force and effect, the Authority may terminate this Contract or obtain insurance coverages equal to the required coverage, the full cost of which will be the responsibility of the Contractor and shall be deducted from any payment due the Contractor.

(f) If any part of the Contract is sublet, Contractor shall be liable for its Subcontractor's insurance coverages of the types and in the amounts stated above, and shall furnish the Authority with copies of such Certificates of Insurance. No delay in the work caused by the Contractor's enforcement of its Subcontractor's insurance requirements shall be excusable delay in the contract. In the event a Subcontractor is unable to furnish insurance in the limits required under the Contract, the Contractor shall endorse the Subcontractor as an ADDITIONAL INSURED on the Contractor's policies.

(g) All insurance required to be maintained or provided by the Contractor shall be with companies and through policies approved by the Authority. The Authority reserves the right to inspect in person, prior to the commencement of the Contract work, all of the Contractor's insurance policies required under this Contract.

(h) If the Contractor has procured insurance at the time of the Contractor's submission of the Contractor's bid, proof of the required insurance should be submitted with the Contractor's bid or proposal. Alternatively, the Contractor is requested to submit evidence of a commitment from an insurance company or companies, or a duly licensed agent, that the Contractor has made arrangements for the required insurance. If the bid or proposal is considered for award, and the Contractor has not previously furnished either the proof of insurance or evidence of commitment, the Contractor will be required to provide proof of the insurance or evidence of a commitment within five (5) days of request. If the Contractor is awarded the bid, and has submitted evidence of commitment rather than proof of the required insurance, the Contractor must furnish proof of the required insurance within five (5) days of the award of the contract. The Certificate of Insurance must indicate the Contract number and description. The insurance certificate should be furnished to the attention of the Contracting Officer.

(i) The Contractor and its lower tier Subcontractors are required to cooperate with the Authority and report all potential claims (workers' compensation, general liability and automobile liability) pertaining to this Contract to the Authority's Risk Management Department at (512) 389-7549 within two (2) days of the incident.

## 12. PLANS AND SPECIFICATIONS

(a) The Contractor shall perform the Work in accordance to the Plans and Specifications. The Contractor shall keep on the Work Site a copy of the building permit and Plans and Specifications and shall at all times give the Contracting Officer access thereto. Anything mentioned in the Specifications and not shown on the drawings, or shown on the drawings and not mentioned in the Specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and Specifications, the Specifications shall govern. In case of a discrepancy in the figures, in the drawings, or in the Specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Absent such submission, the most restrictive, greatest quantity, or highest standard shall govern. Any action or adjustment by the Contractor without such a determination shall be at its own risk and expense. The Contracting Officer shall furnish from time to time such detailed drawings and other information as considered necessary, unless otherwise provided.

(b) Wherever in the Specifications or upon the drawings the words "directed", "required", "ordered", "designated", "prescribed", or words of like import are used, it shall be understood that the "direction", "requirement", "order", "designation", or "prescription", of the Contracting Officer is intended; and similarly the words "approved", "acceptable", "satisfactory", or words of like import shall mean "approved by", or "acceptable to", or "satisfactory to" the Contracting Officer, unless otherwise expressly stated.

(c) Where "as shown", "as indicated", "as detailed", or words of similar import are used, it shall be understood that the reference is made to the drawings accompanying this Contract unless stated otherwise. The word "provided" as used herein shall be understood to mean, "provide complete in place" (that is, "furnished and installed").

(d) If this Contract requires Shop Drawings, the Contractor shall coordinate all such drawings and review them for accuracy, completeness, and compliance with Contract requirements and shall indicate its approval thereon as evidence of such coordination and review. Shop Drawings submitted to the Authority without evidence of the Contractor's approval may be returned for re-submission. The Authority will indicate an approval or disapproval of the Shop Drawings and, if not approved as submitted, shall indicate the Authority's reasons therefor. Any Work done before such approval shall be at the Contractor's risk. Approval by the Authority shall not relieve the Contractor from responsibility for any errors or omissions in such drawings or from responsibility for complying with the requirements of this Contract, except with respect to variations described and approved in accordance with subparagraph (i) below.

(e) If Shop Drawings show variations from the Contract requirements, the Contractor shall describe such variations in writing, separate from the drawings, at the time of submission. If the Authority approves any such variation, the Contracting Officer shall issue an appropriate Contract Modification, except that, if the variation is minor or does not involve a change in price or in time of performance, a modification need not be issued.

(f) The Contractor shall submit to the Authority for approval four (4) copies and an electronic copy (unless otherwise indicated) of all Shop Drawings as called for under the various headings of the Specifications. Three (3) sets (unless otherwise indicated) of all Shop Drawings will be retained by the Authority, and one set will be returned to the Contractor.

(g) The Contractor will be furnished, free of charge, five (5) complete sets of the Contract Drawings and Specifications. The Authority may duplicate, use, and disclose in any manner and for any purpose Shop Drawings delivered under this Contract.

(h) All Plans and/or Specifications and copies thereof furnished by the Authority are, and shall remain, the Authority's property.

(i) Should the Shop Drawings disagree one with another, or with the Specifications, the better quality or greater quantity of Work or materials shall be performed or furnished. Figures given on Shop Drawings govern small scale drawings.

(j) The "Scope of Work", where applicable, placed in the front part of each paragraph of the Specifications, is intended to designate the scope and locations of all items of the Work included therein, either generally or specifically. It is not intended to limit the Scope of Work should Plans, Schedules or notes indicate an increased scope. Inadvertent omission of an item from its proper paragraph of the Specifications and its inclusion in another paragraph shall not relieve the Contractor of responsibilities for the item specified.

(k) The provisions of this Paragraph "Plans and Specifications" shall be included in all Subcontracts at any tier.

### **13. PERFORMANCE OF WORK BY THE CONTRACTOR**

(a) Except as otherwise provided herein, the Contractor shall perform no less than thirty percent (30%) of the Work with its own organization. The on-site production of materials produced by other than the Contractor's forces shall be considered as being subcontracted. If, during the progress of Work hereunder, the Contractor requests a reduction in such performance percentage and the Authority determines that it would be to the Authority's advantage, the percentage of the Work required to be performed by the Contractor may be reduced; provided, written approval of such reduction is obtained by the Contractor from the Authority.

(b) The organization of the Specifications into divisions, paragraphs, and articles, and the arrangement and titles of Project drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of work to be performed by any trade.

### **14. INDEPENDENT CONTRACTOR**

The Contractor's relationship to the Authority in the performance of this Contract is that of an independent contractor. The personnel performing Work under this Contract shall at all times be under the Contractor's exclusive direction and control and shall be employees of the Contractor and not employees of the Authority. The Contractor shall be fully liable for all acts and omissions of its employees, Subcontractors, and their suppliers and shall be specifically responsible for sufficient supervision and inspection to assure compliance in every respect with Contract requirements. There shall be no contractual relationship between any Subcontractor or supplier of the Contractor and the Authority by virtue of this Contract. The Contractor shall pay wages, salaries and other amounts due its employees in connection with this Contract and shall be responsible for all reports and obligations respecting them, such as Social Security, income tax withholding, unemployment compensation, workers' compensation and similar matters.

### **15. COMPOSITION OF CONTRACTOR**

If the Contractor hereunder is comprised of more than one legal entity, each such entity shall be jointly and severally liable hereunder.

### **16. SUBCONTRACTORS AND OUTSIDE CONSULTANTS**

Any Subcontractors and outside associates or consultants required by the Contractor in connection with the Work covered by the Contract will be limited to such individuals or firms as were specifically identified and agreed to by the Authority in connection with the award of this Contract. Any substitution in such Subcontractors, associates, or consultants will be subject to the prior approval of the Authority.

## 17. INTELLECTUAL PROPERTY; DATA PRIVACY PROVISIONS

(a) ~~As between the Contractor and the Authority~~ **Unless otherwise specified in Exhibit A-Revised-2 to the Contract**, the Works Deliverables and Intellectual Property Rights therein are and shall be owned exclusively by Capital Metro, and not by the Contractor. **The Contractor may use its own previously developed data, documentation, software, concepts, materials, or information, in whatever form, or develop the Deliverables in performing its services for the Authority.** The Contractor specifically agrees that all Works shall be considered "works made for hire" and that the Works shall, upon creation, be owned exclusively by the Authority. To the extent that the Works, under applicable law, may not be considered works made for hire, the Contractor hereby effectively transfers, grants, conveys, assigns, and relinquishes exclusively to the Authority all right, title and interest in and to all worldwide ownership rights in the Works, and all Intellectual Property Rights in the Works, without the necessity of any further consideration, and the Authority shall be entitled to obtain and hold in its own name all Intellectual Property Rights in and to the Works. Further, the Contractor agrees that any and all Authority data or compilations thereof produced under this Contract shall be and remain the sole property of the Authority. Upon the request of the Authority, but in any event upon termination of this Contract, the Contractor shall surrender to the Authority all such data and compilations.

(1) ~~For the avoidance of doubt, it is understood that, in performing its obligations under the Contract, Contractor may use its own previously developed data, documentation, software, ideas, concepts, materials, or information, in whatever form, or develop new and unique products that will aid Contractor in performing its services to Authority as it relates solely to this Contract but are not created for the exclusive use, or ownership by, the Authority (collectively, "Contractor Works"). All Contractor Preexisting Works shall remain the sole, exclusive and unrestricted property of Contractor. Contractor shall supply to the Authority a non-exclusive, non-transferable license to the extent required for the use by the Authority of the Services provided pursuant to this Contract for the time that the Services are provided solely for the purposes of the Contract.~~

~~The Contractor, upon request and without further consideration, shall perform any acts that may be deemed necessary or desirable by the Authority to evidence more fully the transfer of ownership of all Works to the Authority to the fullest extent possible, including but not limited to the execution, acknowledgement and delivery of such further documents in a form determined by the Authority. In the event the Authority shall be unable for any reason to obtain the Contractor's signature on any document necessary for any purpose set forth in the foregoing sentence, the Contractor hereby irrevocably designates and appoints the Authority and its duly authorized officers and agents as the Contractor's agent and the Contractor's attorney-in-fact to act for and in the Contractor's behalf and stead to execute and file any such document and to do all other lawfully permitted acts to further any such purpose with the same force and effect as if executed and delivered by the Contractor.~~

(c b) ~~To the extent that any Contractor Works and/or third-party rights or limitations are embodied, contained, reserved or reflected in the Works, the Contractor shall~~ **either Unless otherwise specified in Exhibit A-Revised-2 to the Contract, the Contractor hereby:**

(1) grants to the Authority the irrevocable, perpetual, non-exclusive, worldwide, royalty-free right and license to:

use, execute, reproduce, display, perform, distribute copies of, and prepare derivative works based upon such pre-existing rights and any derivative works **based upon such pre-existing rights and any derivative works** thereof in connection with the sale, offering for sale, marketing, advertising, and promotion of the Authority's goods and services, and in all forms of media, media channels and/or publicity that may now exist or hereafter be created or developed, including but not limited to television, radio, print, Internet, and social media (e.g., Facebook, Twitter, YouTube, etc.) and

(ii) authorize its employees, contractors, personnel and service providers to do any or all of the foregoing, on behalf of or for the Authority. The Contractor hereby irrevocably and forever waives, and agrees never to assert, any moral rights or other rights of restraint or attribution in or to the Deliverables that the Contractor may now have or which may accrue to the Contractor's benefit under U.S. or foreign copyright laws and any and all other residual rights and benefits which arise under any other applicable law now in force or hereafter enacted. ☐

(c) To the extent that any Intellectual Property Rights owned by a third-party are embodied, contained, reserved or reflected in the Deliverables, the Contractor shall either:

grant to the Authority the irrevocable, perpetual, non-exclusive, worldwide, royalty-free right and license to use, execute, reproduce, display, perform, distribute copies of, and prepare derivative works based upon such pre-existing rights and any derivative works thereof in connection with the sale, offering for sale, marketing, advertising, and promotion of the Authority's goods and services, and in all forms of media, media channels and/or publicity that may now exist or hereafter be created or developed, including but not limited to television, radio, print, Internet, and social media (e.g., Facebook, Twitter, YouTube, etc.) and authorize others to do any or all of the foregoing, on behalf of or for the Authority; or

where the obtaining of worldwide such rights is not reasonably practical or feasible, provide written notice to the Authority of such pre-existing or third party rights or limitations, request the Authority's approval of such pre-existing or third party rights, obtain a limited right and license to use such pre-existing or third party rights on such terms as may be reasonably negotiated, and obtain the Authority's written approval of such pre-existing or third party rights and the limited use of same. The Contractor shall provide the Authority with documentation indicating a third party's written approval for the Contractor to use any pre-existing or third-party rights that may be embodied, contained, reserved or reflected in the Works. **THE CONTRACTOR SHALL INDEMNIFY, DEFEND AND HOLD THE AUTHORITY HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, REGULATORY PROCEEDINGS AND/OR CAUSES OF ACTION, AND ALL LOSSES, DAMAGES, AND COSTS (INCLUDING ATTORNEYS' FEES AND SETTLEMENT COSTS) ARISING FROM OR RELATING TO, DIRECTLY OR INDIRECTLY, ANY CLAIM OR ASSERTION BY ANY THIRD PARTY THAT THE WORKS INFRINGE ANY THIRD-PARTY RIGHTS.** The foregoing indemnity obligation shall not apply to instances in which the Authority either:

exceeded the scope of the limited license that was previously obtained by the Contractor and agreed to by the Authority, or

(ii) obtained information or materials, independent of the Contractor's involvement or creation, and provided such information or materials to the Contractor for inclusion in the Works, and such information or materials were included by the Contractor, in an unaltered and unmodified fashion, in the Works.

The Contractor hereby warrants and represents to the Authority that individuals or characters appearing or depicted in any advertisement, marketing, promotion, publicity or media, of any type or form that may now exist or hereafter be created or developed by or on behalf of the Contractor for the use by or benefit of the Authority, have provided their written consent for the use, reproduction, display, performance, and distribution of, and/or preparation of derivative works to, their persona or personality rights, including name, biographical information, picture, portrait, likeness, performance, voice and/or identity ("Personality Rights"), and have been compensated for such Personality Rights, if appropriate. If such permission has been obtained for a limited time, the Contractor shall be responsible for any costs associated with claims resulting from such use, etc., of the Personality Rights after the expiration of those time limits. **THE CONTRACTOR AGREES TO DEFEND, INDEMNIFY AND HOLD THE AUTHORITY HARMLESS FROM ANY CLAIMS, INCLUDING BUT NOT LIMITED TO CLAIMS FOR INVASION OF PRIVACY,**



**INFRINGEMENT OF THE RIGHT OF PUBLICITY, LIBEL, UNFAIR COMPETITION, FALSE ADVERTISING, INTENTIONAL OR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS, COPYRIGHT OR TRADEMARK INFRINGEMENT, AND/OR CLAIMS FOR ATTORNEY'S FEES, RESULTING FROM SUCH USE, ETC., OF THE PERSONALITY RIGHTS.**

~~The Contractor hereby irrevocably and forever waives, and agrees never to assert, any Moral Rights in or to the Works which the Contractor may now have or which may accrue to the Contractor's benefit under U.S. or foreign copyright laws and any and all other residual rights and benefits which arise under any other applicable law now in force or hereafter enacted. The term "Moral Rights" shall mean any and all rights of paternity or integrity of the Works and the right to object to any modification, translation or use of the Works, and any similar rights existing under the judicial or statutory law of any country in the world or under any treaty, regardless of whether or not such right is denominated or referred to as a Moral Right.~~

~~The Contract is intended to protect the Authority's proprietary rights pertaining to the Works, and the Intellectual Property Rights therein, and any misuse of such rights would cause substantial and irreparable harm to the Authority's business. Therefore, the Contractor acknowledges and stipulates that a court of competent jurisdiction should immediately enjoin any material breach of the intellectual property and confidentiality provisions of this Contract, upon a request by the Authority, without requiring proof of irreparable injury as same should be presumed.~~

~~Upon the request of the Authority, but in any event upon termination of this Contract, the Contractor shall surrender to the Authority all documents and things pertaining to the Works, including but not limited to drafts, memoranda, notes, records, drawings, manuals, computer software, reports, data, and all other documents or materials (and copies of same) generated or developed by the Contractor or furnished by the Authority to the Contractor, including all materials embodying the Works, any Authority confidential information, or Intellectual Property Rights, regardless of whether complete or incomplete. This subparagraph is intended to apply to all Works made or compiled by the Contractor, as well as to all documents and things furnished to the Contractor by the Authority or by anyone else that pertains to the Works.~~

~~(h e) The Contractor and its subcontractors and their respective employees and personnel may have access to the Authority Data (including without limitation, personally identifiable information ("PII")) in connection with the performance of the Contract. PII shall be any information that identifies or describes a person or can be directly linked to a specific individual, including ridership and usage data. Examples of PII include, but are not limited to, name, address, phone or fax number, signature, date of birth, e-mail address, method of payment, ridership and travel pattern data. Customer Personally Identifiable Information, or Customer PII, means any PII relating to the Authority's customers. **To the extent any Authority Data (including PII) is made available to the Contractor under the Contract,** the Contractor shall take reasonable steps maintain the confidentiality, security, safety, and integrity of all Customer-PII. **And other Authority Data in accordance with the Authority's Proprietary Rights and Data Security Addendum, which will be attached as an addendum to the Contract, as applicable.** Unless otherwise agreed to by the Authority in writing, Contractor will adhere to the following requirements concerning Customer PII:~~

~~(1) The Contractor shall take reasonable steps to maintain the confidentiality of and will not reveal or divulge to any person or entity any Customer PII that becomes known to it during the term of this Agreement.~~

~~(2) The Contractor must maintain policies and programs that prohibit unauthorized disclosure of Customer PII by its employees and subcontractors and promote training and awareness of information security policies and practices. The Contractor must comply, and must cause its employees, representatives, agents, and sub-Contractors to comply, with such commercially and operationally reasonable directions as the Authority may make to promote the safeguarding or confidentiality of Customer PII.~~

~~(3) The Contractor must conduct background checks for employees or sub-Contractors that have access to Customer PII or systems hosting Customer PII.~~

~~(4) The Contractor must limit access to computers and networks that host Customer PII, including without limitation through user credentials and strong passwords, data encryption both during transmission and at rest, firewall rules, and network-based intrusion detection systems~~

Notwithstanding the above, the Parties hereby expressly acknowledge and agree that:

~~(1) Contractor may disclose, divulge, or reveal PII and Customer PII in a manner approved by the Authority to the extent necessary to fulfill the requirements of this Contract or as otherwise approved in writing by the Authority; and~~

~~(2) Unless provided otherwise in the Contract, Contractor shall not be responsible for any security for the transmission of data over the internet, payment processing or credit or debit card transactions or the data security or data privacy associated with the services of third party vendors performing payment processing, hosting, or cloud vendor services.~~

**(f) The Contractor and its subcontractors, employees and consultants may have require access to the Authority Electronic Property and related Authority Data in connection with the performance of services under the Contract. In such event, the Contractor agrees that it will, and it will cause its subcontractors and any of their respective employees and personnel to execute the Authority's Access and Use Agreement, which will be attached as an addendum to the Contract, as applicable.**

This Section 12(h) will survive termination or expiration of this Agreement.

## **18. STANDARD OF PERFORMANCE**

(a) The Contractor shall supervise and direct the Work using its best skills and attention in accordance with Good Industry Practice.

(b) The Contractor shall be solely responsible for all Construction means, methods, techniques, safety, sequences and procedures, and for coordinating all portions of the Work under the Contract.

## **19. PERSONNEL ASSIGNMENTS**

The Contractor shall perform the Work in an orderly and workmanlike manner, and shall utilize persons skilled and qualified for the performance of the Work. The Authority will have the right to review the experience of each person assigned to perform the Work and approve personnel assignments, including those to be performed by Subcontractors.

The Contractor certifies that the Contractor, and each Subcontractor, have established a criminal history background policy that complies with guidance issued by the U.S. Equal Employment Opportunity Commission and that the Contractor and each Subcontractor conducts criminal history checks on its assigned personnel in accordance with such policy to identify, hire and assign personnel to work on this Contract whose criminal backgrounds are appropriate for the Work being performed, considering the risk and liability to the Contractor and the Authority. The Authority reserves the right to require the Contractor and any Subcontractor to disclose any criminal or military criminal convictions of assigned personnel and the right to disapprove the use of assigned personnel with criminal or military convictions.

€At the commencement of the Contract, the Contractor shall provide a list of candidates to be used to provide the services and shall certify that a criminal history background check has been completed on each candidate within the preceding 6-month period. Thereafter during the Term, the Contractor shall submit quarterly report containing a list of all persons (including Subcontractors) assigned to perform services

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under the Contract and a certification that each named person has undergone a criminal background check as required by this Contract. The Authority shall have the right to audit the Contractor's records for compliance with the provisions of this Section. Criminal background checks shall include the following:

- (1) **State Criminal History:** The Contractor shall research criminal history, including driving records (where applicable), covering all jurisdictions within the state, including local counties and municipalities.
- (2) **Out of State Criminal History:** The Contractor shall research criminal history, including state driving records (where applicable), for all 50 states.
- (3) **National Sex Offender Registry.**
- (4) **Military Discharge:** For any candidates that have served in the military, the Contractor shall review the DD Form 214 "Certificate of Release or Discharge from Active Duty" (Long Form).

\*Matters identified on the Long Form as military discipline will be considered in accordance with the corresponding crime listed below with respect to classification, severity and time elapsed.

The Contractor shall disclose to the Authority the type of arrests with pending dispositions and convictions for crimes according to the classification of offense and the timetable below:

<b>Offense Type</b>	<b>Action Required</b>
<b>Crimes Against the Person (other than sex crimes)</b>	
Felony	Submit to Capital Metro for review if less than 10 years from date of <b>release from confinement</b>
Class A or B Misdemeanor	Submit to Capital Metro for review if less than 7 years from date of <b>conviction</b>
Class C Misdemeanor	Submit to Capital Metro for review if less than 5 years from date of <b>conviction</b>
<b>Crimes Against the Person – Sex Crimes/Registered Sex Offenders</b>	
ALL	Submit to Capital Metro for review
<b>Crimes Against Property</b>	
Felony	Submit to Capital Metro for review if less than 10 years from date of <b>release from confinement</b>
<b>Moral Crimes, including, but not limited to: Drug Crimes, Prostitution, Bigamy, Illegal Gambling, Child Pornography</b>	
Felony	Submit to Capital Metro for review if less than 10 years from date of <b>release from confinement</b>
Class A or B Misdemeanor	Submit to Capital Metro for review if less than 7 years from date of <b>conviction</b>
Class C Misdemeanor	Submit to Capital Metro for review if less than 5 years from date of <b>conviction</b>
<b>Driving Offenses</b>	
Class A or B Misdemeanor, DWI/DUI or other "serious driving offense"	Disqualified if less than 7 years from date of conviction or deferred adjudication. Submit to Capital Metro for review if between 7-10 years since conviction or deferred adjudication or more than 2 convictions in a lifetime

Class C Misdemeanor Moving Violations	Disqualified from driving if more than 2 moving violations in the past 5 years (Any more than one driving safety course taken for a moving violation that appears on a five (5) year record will be treated as a moving violation and will count against the employee)
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The Contractor may not assign an employee to provide services if the employee has any conviction in the applicable categories listed above, unless an exception is granted by the Authority in accordance with subparagraph (d).

(d) The Contractor may request the Authority perform an individual assessment of a candidate with a criminal conviction meeting one of the above categories. In conducting an individual assessment, the Authority's review will include, but not be limited to, the following factors:

- (1) The nature and gravity of the offense or conduct;
- (2) The degree of harm caused by the offense or conduct;
- (3) The time that has elapsed since the conviction or completion of probation or jail time;
- (4) The nature of the job sought, including the job duties, environment and level of supervision;
- (5) Any incorrect criminal history;
- (6) Wrongful identification of the person;
- (7) The facts and circumstances surrounding the offense or conduct;
- (8) The number of offenses for which the candidate was convicted;
- (9) The subsequent conviction for another relevant offense;
- (10) The age of the person at the time of conviction or completion of probation or jail time;
- (11) Evidence that the person performed the same type of work, post-conviction, with the same or different employer, with no known incidents of criminal conduct;
- (12) The length and consistency of employment history before and after the conviction in a similar field as the current position sought;
- (13) Rehabilitation efforts, e.g., education, treatment, training;
- (14) Employment or character references and any other information regarding fitness for the particular position;
- (15) Whether the person is bonded or licensed under any federal, state or local program or any licensing authority;
- (16) The person's statement of the circumstances surrounding the offense and conviction and relevant factors is consistent with publicly available record related to the crime and conviction; and
- (17) Any other factors deemed relevant in the consideration of a particular assessment.

At the time a request is made for an individual assessment, the Contractor must include the following documentation:

- the candidate's application/resume;
- a copy of the criminal conviction history, including those tried in a military tribunal;
- available court information related to the conviction;
- any publicly available information related to the offense and conviction;
- a statement from the candidate addressing any/all factors set forth above and explaining why the person is qualified for the assignment notwithstanding the conviction; and
- a statement from the candidate explaining why the person is an acceptable risk for the work to be performed by the candidate.

The Authority will provide a written decision to the Contractor within five (5) working days of receipt of all required documentation from the Contractor.

(e) The Contractor will conduct new criminal history background checks on all assigned personnel every two (2) years during the Contract to ensure the preceding criterion are still met by the assigned personnel and notify the Authority if an employee has a subsequent arrest with pending disposition or conviction (or change in driving record, as applicable) that requires further review by the Authority using the criterion set forth above. The Authority reserves the right to request that the assigned individual be removed from performing work under this Contract.

## **20. REMOVAL OF ASSIGNED PERSONNEL**

The Authority may require, in writing, that the Contractor remove from the Work any employee or Subcontractor of Contractor that the Authority deems inappropriate for the assignment.

## **21. BADGES AND ACCESS CONTROL DEVICES**

Contractor and each of Contractor's employees, as well as each Subcontractor, of any tier, and any workers working on behalf of Subcontractor shall be required to wear a Capital Metro Contractor Photo Identification Badge ("badge") at all times while on the Authority's premises, including the Work Site. The badge will be provided by Capital Metro. If any badge holder loses or misplaces his or her badge, the Contractor shall immediately notify the Project Manager upon discovery. Contractor will be charged a \$50.00 replacement fee for each lost or misplaced badge, which fee shall be deducted any amounts due and owing to the Contractor or if the Contract is terminated upon demand by the Authority. Contractor shall return all badges provided when any badge holder is no longer working on the Project, and all badges shall be returned upon completion of the Contract. In the event the Contractor fails to do so, Contractor will pay a \$50.00 per badge fee deducted from any amounts due and owing to the Contractor or if the Contract is terminated upon demand by the Authority. All badges should be returned to the Project Manager. All requests for new and replacement badges must be submitted in writing to the Project Manager. The misuse of a badge may result in termination of the Contract.

Access Control Devices will be issued to employees of Contractor and to each Subcontractor of any tier and any worker working on behalf of Subcontractor as necessary to perform the Work. Access Control Devices are not transferable between Contractor employees or workers working on behalf of the Subcontractor. Contractor employees and workers on behalf of the Subcontractor are prohibited from loaning Access Control Devices or providing access to an unauthorized person into restricted areas without prior arrangements with the Project Manager. All requests for new and replacement Access Control Devices must be submitted in writing to the Project Manager. Lost Access Control Devices must be reported to the Project Manager immediately upon discovery. All

Access Control Devices should be returned to the Project Manager. All requests for new and replacement Access Control Devices must be submitted in writing to the Project Manager. The misuse of an Access Control Device(s) may result in termination of the Contract. Contractor shall return all Access Control Devices once an assigned employee or worker is no longer working on the Project or upon termination of the Contract. In the event the Contractor fails to do so, then Contractor shall be responsible for the replacement cost of an Access Control Device which shall be deducted from any amounts due and owing to the Contractor or payable on demand if the Contract has terminated. The replacement cost will be calculated at current market value to include labor and materials. The misuse of an Access Control Device(s) may result in termination of the Contract.

- (c) The provisions of this paragraph survive termination of the Contract.

## **22. SUBCONTRACTORS**

In addition to any other requirements under this Contract for the submission of any Subcontract agreement, the Contractor shall provide upon request to the Contracting Officer one (1) copy of all executed Subcontracts associated with this Contract, including any changes or modifications to Subcontracts, within three (3) days of their execution.

- (b) No Subcontractor shall be permitted to perform work associated with the Subcontract until the Subcontractor (or the Contractor on the Subcontractor's behalf) is in compliance with the insurance requirements specified elsewhere in this Contract, and has furnished satisfactory evidence of insurance to the Authority.

- (c) It is expressly understood and agreed that Contractor shall be liable for any default or failure to perform any provision of this Contract by any Subcontractor engaged by Contractor except for Force Majeure Events.

## **23. ADMINISTRATIVE CONTROL OF DOCUMENTS**

All correspondence related to this Contract shall refer to the Contract number identified on the cover sheet of this Contract. Correspondence shall be addressed to the appropriate Authority representative, and if it is addressed to any other individual other than the Contracting Officer, the Contractor shall also provide a copy of the correspondence to the Contracting Officer.

## **24. WORK SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK**

By submission of a bid, the Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the Work Site and that it has investigated and satisfied itself as to the general and local conditions which can affect the Work or its cost, including, but not limited to,

conditions bearing upon transportation, disposal, handling, and storage of materials;

the availability of labor, water, electric power, and roads;

uncertainties of weather, flooding patterns and water drainage, or similar physical conditions at the site;

the conformation and conditions of the ground; and

the character of equipment and facilities needed preliminary to and during work performance.

The Contractor acknowledges that its undertaking to complete the Contract within the Contract

Term includes an allowance for the number of days in which Contract work may be partially or totally delayed because of weather and at the location the Contract will be performed and that the Contractor shall not be entitled to excusable delays or compensation for such delays. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the Work Site, access to the Work Site, and territory surrounding the Work Site, including any exploratory work done by the Authority as well as from the drawings and Specifications made a part of this Contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the Work or for proceeding to perform the Work successfully without additional expense to the Authority.

The Authority assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Authority, nor does the Authority assume responsibility for any understanding reached or representation made concerning conditions, which can affect the Work by any of its officers or agents before the execution of this Contract, unless that understanding or representation is expressly stated in this Contract.

(d) Weather conditions shall be considered and included in the planning and scheduling of all work influenced by high and low ambient temperatures, precipitation and/or saturates soil ensure completion of all Work within the Contract Time based on the average climatic conditions for the preceding ten (10) years as published by the National Oceanographic and Atmospheric Administration (“NOAA”) and entitled, “Local Climatological Data – Austin/Central, Texas.”

## **25. LAYOUT OF WORK**

The Contractor shall lay out its work from Authority-established base lines and benchmarks indicated on the Plans and Specifications and shall be responsible for all measurements in connection with the layout. The Contractor shall furnish, at its own expense, all stakes, templates, platforms, equipment, tools, materials, and labor required to lay out any part of the Work. The Contractor shall be responsible for executing the Work to the lines and grades that may be established or indicated by the Project Manager. The Contractor shall also be responsible for maintaining and preserving all stakes and other marks established by the Project Manager until authorized to remove them. If such marks are destroyed by the Contractor or through its negligence before their removal is authorized, the Authority may replace them and deduct the expense of the replacement from any amounts due or to become due to the Contractor.

## **26. PROTECTION OF AUTHORITY PROPERTY**

(a) The Contractor shall use reasonable care to avoid damaging existing buildings, equipment, and vegetation on or about premises owned by, or under the control of, the Authority. If the Contractor causes damage to any of this property, the Contractor shall replace or repair the damage at no expense to the Authority as the Contracting Officer directs. If the Authority directs that the Contractor make the repair and Contractor fails or refuses to promptly make such repair or replacement, the Contractor shall be liable to the Authority for the cost, plus an administrative fee of ten percent (10%), which may be deducted from any invoice due and owing Contractor. If the Authority elects to make such repair or replacement, then the Contractor shall be liable for the cost, plus an administrative fee of ten percent (10%), which may be deducted from any invoice due and owing to the Contractor or on demand if the Contract is terminated. This provision shall survive termination of the Contract.

(b) The Contractor also shall be responsible for all materials delivered and work performed until completion and acceptance of the entire Work, except by any completed unit of Work that may have been accepted by the Authority under the Contract.

**27. PROTECTION OF EXISTING SITE CONDITIONS**

(a) The Contractor shall preserve and protect all structures, equipment, and vegetation (such as trees, shrubs, and grass) on or adjacent to the Work Site which are not to be removed and which do not unreasonably interfere with the Work required under this Contract. The Contractor shall promptly remove trees only when specifically authorized to do so and shall avoid damaging vegetation that will remain in place. If any limbs or branches of trees are broken during Contract performance, or by the careless operation of equipment, or by workmen, the Contractor shall trim those limbs or branches with a clean cut and paint the cut with a tree-pruning compound as directed by the Contracting Officer.

(b) The Contractor shall protect from damage all existing improvements and utilities (1) at or near the Work Site and (2) on adjacent property of a third party.

(c) If Contractor damages any such existing improvements or utilities, the Contractor shall promptly repair the damage at no expense to the Authority as the Contracting Officer directs. If the Authority directs that the Contractor make the repair and the Contractor fails or refuses to promptly make such repair, the Authority may make the repair and the Contractor shall be liable to the Authority for the cost, plus an administrative fee of ten (10%) percent, which may be deducted from any amounts due and owing Contractor or on demand if the Contract is terminated. If the Authority elects to make such repair or replacement, then the Contractor shall be liable to the Authority for the cost of such repair(s), plus an administrative fee of ten (10%) percent, which may be deducted from any invoice due and owing Contractor or on demand if the Contract is terminated.

(d) This provision shall survive the termination of the Contract.

**28. WORK BY THE AUTHORITY; OTHER CONTRACTS**

(a) The Authority may undertake, or award other contracts for, additional work at or near the Work Site. The Contractor shall fully cooperate with the other contractors and with employees of the Authority and shall carefully adapt scheduling and performing the Work under this Contract to accommodate the additional work, heeding any direction that may be provided by the Authority.

(b) The Contractor shall afford the Authority and separate contractors reasonable opportunity for the introduction and storage of their materials and equipment and performance of their activities and shall connect and coordinate the Contractor's construction and operations with their as required by the Contract Documents.

(c) If part of the Contractor's Work depends for proper execution or results upon the design, construction or operations by the Authority or a separate contractor, the Contractor shall, prior to proceeding with that portion of the Work promptly report to the Authority apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution and results. Failure of the Contractor to so report shall constitute an acknowledgement that the Authority's or separate Contractor's completed or partially completed construction is fit and proper to receive the Contractor's Work, except as to defects not reasonably discoverable.

(d) The Authority shall be reimbursed by the Contractor for costs incurred by the Authority which are payable to a separate contractor because of delays, improperly timed activities or defective construction of the Contractor. The Authority shall be responsible to the Contractor for costs incurred by the Contractor because of delays, improperly timed activities, damage to the work or defective construction of a separate contractor.

(e) The Contractor shall promptly remedy damage caused by the Contractor to completed or partially completed construction or to property of the Authority or separate contractors.



**29. CONSTRUCTION SCHEDULE**

Promptly after Contract award, the Contractor shall meet with the Contracting Officer to discuss Project scheduling and, at that meeting, shall submit a schedule showing the order in which the Contractor proposes to perform the Work and the dates on which the Contractor contemplates starting and completing the several milestone tasks of the Work (including acquiring materials, plant, and equipment). The schedule shall be in the form of a network analysis of suitable scale to indicate appropriately the percentage of the Contractor's work breakdown schedule which will be completed by any given date during the period. If the Contractor fails to submit a schedule within the time prescribed, the Contracting Officer may withhold approval of progress payments until the Contractor submits the required schedule.

The Contractor shall enter the actual progress on the schedule as directed by the Contracting Officer and, upon doing so, immediately shall deliver a copy of the annotated schedule to the Contracting Officer. If, in the opinion of the Contracting Officer, the Contractor falls behind the approved schedule, the Contractor shall take steps necessary to improve its progress, including those that may be required by the Contracting Officer, without additional cost to the Authority. In this circumstance, the Contracting Officer may require the Contractor to increase the number of shifts, overtime operations, days of work, and/or the amount of construction plant, and to submit for approval any supplementary schedule or schedules in chart form as the Contracting Officer deems necessary to demonstrate how the approved rate of progress will be regained.

Failure of the Contractor to comply with the requirements of the Contracting Officer under this paragraph shall be grounds for a determination by the Contracting Officer that the Contractor is not performing the Work with sufficient diligence to ensure completion within the time specified in the Contract. Upon making this determination, the Contracting Officer may terminate the Contractor's right to proceed with the Work, or any separable part thereof and/or pursue default remedies under this Contract.

**30. OPERATIONS AND STORAGE AREAS**

The Contractor shall confine all operations (including storage of materials) on the Worksite to areas authorized or approved by the Contracting Officer.

Temporary buildings (e.g., storage sheds, shops, offices) and utilities may be erected by the Contractor only with the approval of the Contracting Officer and shall be built with labor and materials furnished by the Contractor without expense to the Authority. The temporary buildings and utilities shall remain the property of the Contractor and shall be promptly removed by the Contractor at its expense upon completion of the Work. With the written consent of the Contracting Officer, the buildings and utilities may be abandoned and need not be removed.

(c) The Contractor shall, under regulations prescribed by the Contracting Officer, use only established roadways or use temporary roadways constructed by the Contractor when and as authorized by the Contracting Officer. When materials are transported in performing the Work, vehicles shall not be loaded beyond the loading capacity recommended by the manufacturer of the vehicle or prescribed by any federal, state, or local law or regulation.

(d) When it is necessary to cross curbs or sidewalks, the Contractor shall protect the materials from damage. The Contractor shall promptly repair any damaged curbs, sidewalks, or roads at its sole cost, as the Contractor Officer directs or the Authority may elect to make the repairs, at Contractor's expense. If the Contractor fails to promptly make such repair or replacement or if the Authority elects to make such repair or replacement, then the Contractor shall be liable to the Authority for the cost of such repair(s), plus an administrative fee of ten percent (10%), which may be deducted from any invoice due and owing Contractor or on demand if the Contract is terminated. This provision shall survive termination of the Contract.

### **31. DIFFERING WORK SITE CONDITIONS**

(a) Pursuant to Paragraph entitled "Work Site Investigation and Conditions Affecting the Work", the Contractor acknowledge that it had inspected the Work Site and satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered while performing the Work insofar as this information is reasonably ascertainable from an inspection of the Work Site. If the Contract encounters differing Work Site conditions from those identified under Paragraph entitled "Work Site Investigation and Conditions Affecting the Work", the Contractor shall within five (5) days, and before the conditions are disturbed, give written notice to the Contracting Officer of one (1) subsurface or latent physical conditions at the Work Site, which differ materially from those ascertainable from an inspection of the Work Site under Paragraph entitled "Work Site Investigations and Conditions Affecting the Work", or (2) unknown physical conditions at the Work Site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the Contract.

The Project Manager shall investigate the Work Site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the Work under this Contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made and the Contract modified in writing provided the Contractor complies with Paragraph entitled "Equitable Adjustments".

No request by the Contractor for an equitable adjustment to the Contract under this subparagraph shall be allowed unless the Contractor has given the written notice required; provided, that the time prescribed in (a), above, for giving written notice may be extended by the Contracting Officer in his or her discretion

No request by the Contractor for an equitable adjustment to the Contract for differing site conditions shall be allowed if made after final payment under this Contract.

### **32. PERMITS**

The Contractor shall, without additional expense to the Authority, be responsible for obtaining any and all necessary licenses and permits and for complying with any federal, state, county, and municipal laws, codes, and regulations applicable to the performance of the Work, including, but not limited to, any laws or regulations requiring the use of licensed contractors to perform parts of the Work.

### **33. SUPERINTENDENCE BY CONTRACTOR**

At all times during performance of this Contract and until the Work is completed and accepted, the Contractor shall directly superintend the Work or assign and have on the Work a competent superintendent. The superintendent shall be in attendance at the Project site during the progress of the Work. The superintendent shall be competent and satisfactory to the Authority, and shall not be changed except with the written approval of the Authority unless he or she leaves the employment of the Contractor. The superintendent shall represent the Contractor and shall have full authority to act on Contractor's behalf. All communications given to the superintendent shall be as binding as if given to the Contractor. All oral communications affecting Contract time, cost, and interpretation will be confirmed in writing.

### **34. CONTRACTOR CONTACT/AUTHORITY DESIGNEE**

The Contractor shall provide the Authority with a telephone number to ensure immediate communication with a person (not a recording) anytime during Contract performance. Similarly, the Authority shall designate an Authority representative who shall be similarly available to the Contractor.

### **35. MATERIAL AND WORKMANSHIP**

All equipment, material, and articles incorporated into the Work covered by this Contract shall be new and of the most suitable grade for the purpose intended unless otherwise specifically provided in this Contract. References in the Specifications to equipment, material, articles, or patented processes by trade name, make, or catalog number shall be regarded as establishing a standard of quality and shall not be construed as limiting competition. The Contractor may, at its option, use any equipment, material, article, or process that, in the judgment of the Contracting Officer is equal to that named in the Specifications, unless otherwise specifically provided in this Contract.

The Contractor shall obtain the Contracting Officer's approval of the machinery and mechanical and other equipment to be incorporated into the Work. When requesting approval, the Contractor shall furnish to the Contracting Officer the name of the manufacturer, the model number, and other information concerning the performance, capacity, nature, and rating of the machinery and mechanical and other equipment. When required by this Contract or by the Contracting Officer, the Contractor also shall obtain the Contracting Officer's approval of the material or articles, which the Contractor contemplates incorporating into the Work. When requesting approval, the Contractor shall provide full information concerning the material or articles. When directed to do so, the Contractor shall submit samples for approval at the Contractor's expense, with all shipping charges prepaid. Machinery, equipment, material, and articles that do not have the required approval shall be installed or used at the risk of subsequent rejection.

All work under this Contract shall be performed in a skillful and workmanlike manner. The Contracting Officer may require, in writing, that the Contractor remove from the Work any employee the Contracting Officer deems incompetent, careless, or otherwise objectionable.

### **36. USE AND POSSESSION PRIOR TO COMPLETION**

The Authority shall have the right to take possession of or use any completed or partially completed part of the Work. Before taking possession of or using any completed or partially completed Work, the Contracting Officer shall furnish the Contractor a list of items of Work remaining to be performed or corrected on those portions of the Work that the Authority intends to take possession of or use. However, failure of the Contracting Officer to list any item of Work shall not relieve the Contractor of responsibility for complying with the terms of the Contract. The Authority's possession or use shall not be deemed an acceptance of any Work under the Contract.

While the Authority has such possession or use, the Contractor shall be relieved of the responsibility for the loss of or damage to the Work resulting from the Authority's possession or use, notwithstanding the terms of **Exhibit E-Revised-5**, Paragraph entitled "Permits". If prior possession or use by the Authority delays the progress of the Work or causes additional expense to the Contractor, an equitable adjustment shall be made in the Contract Sum or the time of completion, and the Contract shall be modified in writing accordingly.

### **37. CONDITION OF THE WORK SITE**

The Contractor shall at all times keep the Work Site, including storage areas, free from accumulations of waste materials. Before completing the Work, the Contractor shall remove from the Work any rubbish, tools, scaffolding, equipment, and materials that are not the property of the Authority. Upon completing the Work, the Contractor shall leave the Work Site in a clean, neat, and orderly condition satisfactory to the Contracting Officer. If Contractor fails to do so, the Authority may withhold payment of the final invoice until such Work is completed.

**38. TITLE TO SUBMITTALS**

All information, drawings, or other submittals required to be furnished by the Contractor to the Authority under this Contract shall become the property of the Authority.

**39. ACCIDENT PREVENTION**

(a) In performing this Contract, the Contractor shall provide for protecting the lives and health of employees and other persons; preventing damage to property, materials, supplies, and equipment; and avoiding work interruptions. For these purposes, the Contractor shall: (1) provide appropriate safety barricades, signs, and signal lights; (2) comply with all safety standards required by federal, state, or local law and any additional standards customarily employed in connection with the type of work being performed or the conditions at the Work Site.

(b) The Contracting Officer shall notify the Contractor of any noncompliance with these requirements and of the corrective action required. This notice, when delivered to the Contractor or the Contractor's representative at the Work Site, shall be deemed sufficient notice of the noncompliance and corrective action required. After receiving the notice, the Contractor shall immediately take corrective action. If the Contractor fails or refuses to take corrective action promptly, the Contracting Officer may issue an order stopping all or part of the Work until satisfactory corrective action has been taken. The Contractor shall not base any claim or request for equitable adjustment for additional time or money on any stop order issued under these circumstances.

(c) The Contractor shall maintain an accurate record of exposure data on all accidents incident to Work performed under this Contract resulting in death, traumatic/acute injury, occupational disease, or damage to property, materials, supplies or equipment. Such data shall be submitted to the Authority; provided, however, in the event of accidents resulting a death or multiple severe injuries, any such accident shall be reported to the Contractor Officer within twenty-four (24) hours of such accident.

The Contractor shall be responsible for its Subcontractors' compliance with this paragraph.

**40. SUSPENSION OF WORK**

The Contracting Officer may order the Contractor in writing to suspend all or any part of the Work for such period of time as it may determine to be appropriate for the convenience of the Authority.

If the performance of all or any part of the Work is, for an unreasonable period of time, suspended or delayed by an act of the Contracting Officer in the administration of this Contract, or by its failure to act within the time specified in this Contract (or, if no time is specified, within a reasonable time), an adjustment shall be made for any increase in cost of performance of this Contract (excluding profit) necessarily caused by such unreasonable suspension or delay, and the Contract modified in writing accordingly. Any adjustment shall be made in accordance with paragraph entitled "Equitable Adjustments". However, no adjustment shall be made under this paragraph for any suspension or delay to the extent (1) that performance would have been suspended or delayed by any other cause, including the fault or negligence of the Contractor, or (2) for which an equitable adjustment is provided for or excluded under any other provision of this Contract.

No claim under this paragraph shall be allowed (1) for any costs incurred more than twenty (20) days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension or delay, but not later than the date of final payment. No part of any claim based on the provisions of this paragraph shall be allowed if not supported by adequate evidence showing that the cost would not have been incurred but for a delay within the provisions of this paragraph.

#### **41. AUTHORITY'S RIGHT TO CARRY OUT WORK**

(a) If Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a seven-day period after receipt of written notice from the Authority to commence and continue correction of such default or neglect with diligence and promptness, the Authority may, without prejudice to other remedies the Authority may have, correct such deficiencies. In such case, an appropriate adjustment shall be issued deducting from payments then or thereafter due the Contractor the reasonable cost of correcting such deficiencies, including the Authority's expenses and compensation for the A/E additional services made necessary by such default. If payments due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Authority.

(b) After the Work is completed, the Authority may make emergency repairs to the Work if necessary to prevent further damage or if the Contractor does not promptly respond to a notice of a condition requiring repairs. The Contractor shall be responsible to the Authority for this cost if the reason for the repairs is defects in the Contractor's Work. If payments then or thereafter due the Contractor are not sufficient to cover such costs, the Contractor shall pay the difference to the Authority.

#### **42. CHANGE ORDER ACCOUNTING**

In the event that an equitable adjustment under the Paragraph entitled "Changes" cannot be agreed to in a timely manner, the Contracting Officer may issue a Change Order and require Change Order accounting. The Contractor, for each change or series of related changes, shall maintain separate accounts, by job order or other suitable accounting procedure, of all incurred, segregable, direct costs (less allocable credits) of Work, both changed and not changed, allocable to the change. The Contractor shall maintain such accounts until the parties agree to an adjustment for the changes ordered by the Contracting Officer or the matter is conclusively disposed of in accordance with Paragraph entitled "Interpretation of Contract – Disputes."

#### **43. WARRANTY**

(a) Contractor warrants that the Work shall be free of patent and latent defects in design, materials, equipment, and workmanship, as measured from the requirements, criteria, standards and Specifications set forth in the Contract. A defect shall be considered latent only if it is not known or disclosed to the Authority prior to Substantial Completion, of the overall Work, and such defect would not normally be discovered upon reasonable inspection and investigation in accordance with Good Industry Practice during the course of design and Construction and prior to the completion of the Work. This limited warranty also does not apply to and the Contractor shall not be responsible for, repair or replacement Work needed as a result of: (a) normal wear and tear; (b) defect caused by damage; or (c) failure by Authority to maintain, repair, or operate the Work Site in accordance with Good Industry Practice, to the extent the defect is caused by same.

(b) Contractor shall correct all Construction and material defects and deficiencies (other than latent defects and deficiencies which are discussed below) which may develop within the applicable of (i) a period of one (1) year from the date when all of the Work is completed and accepted by the Authority, or (ii) such longer period for any component of the Work which may be specified in the Contract Documents, or (iii) any warranty period which may be longer than the periods specified in (i) and (ii) above as provided in any specific warranty for such item. Nothing set forth above or otherwise in this Contract shall restrict in any way or operate as any limitation on the right of Authority to seek damages or other remedies against Contractor for any other period under any legal or equitable theory with respect to any defects and deficiencies which are latent in nature and not readily ascertainable in the ordinary course of observation, subject, however, to any limitations imposed under governing law.

(c) Contractor shall, within fifteen (15) days after receipt of written notice hereof, commence to correct, repair and make good any defects in the Work for which said materials, equipment and workmanship are warranted, and also make good any damage to other work caused by the repairing of such defects.

Contractor warrants to the Authority that such Work will be performed in a safe and careful manner and will conform to the requirements of the Contract Documents. None of the work performed in correcting such defects shall be the basis of a claim for additional compensation or damages.

(d) The Contractor shall issue in writing to the Authority as a condition precedent to final payment a "General Warranty" reflecting terms and conditions of this paragraph for all work under the Contract. This warranty shall specifically provide that all defects in materials and workmanship appearing during the warranty period shall be remedied to the satisfaction of the Authority at no additional cost to the Authority.

(e) The provisions of this paragraph shall survive termination of the Contract.

#### **44. INSPECTION AND TESTING OF WORK**

The Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the Work conforms to Contract requirements. The Contractor shall maintain complete inspection records and make them available to the Authority Immediately upon request. All Work is subject to inspection and testing by the Authority at all places and at all reasonable times before acceptance to ensure strict compliance with the terms of the Contract.

Inspections and tests by the Authority are for the sole benefit of the Authority and do not:

- (1) relieve the Contractor of responsibility for providing adequate quality control measures;
- (2) relieve the Contractor of responsibility for damage to or loss of the material before acceptance;
- (3) constitute or imply acceptance; or
- (4) affect the continuing rights of the Authority after acceptance of the completed Work.

The presence or absence of an inspector from the Authority does not relieve the Contractor from any Contract requirement, nor is the inspector authorized to change any term or condition of the Specifications without the Contracting Officer's written authorization.

The Contractor shall promptly furnish, without additional charge, all facilities, labor, and material reasonably needed for performing such safe and convenient inspections and tests as may be required by the Contracting Officer. The Authority may charge to the Contractor any additional cost of inspection or test when Work is not ready at the time specified by the Contractor for inspection or test, or when prior rejection makes re-inspection or retest necessary. The Authority may perform any inspections or tests in a manner that will not unnecessarily delay the Work.

The Contractor shall, without charge, replace or correct Work found by the Authority not to conform to Contract requirements, unless in the public interest the Authority consents to accept the Work with an appropriate downward adjustment in Contract Sum. The Contractor shall promptly segregate and remove rejected material from the Work Site.

If the Contractor does not promptly replace or correct rejected Work, the Authority may:

by Contract or otherwise, replace or correct the Work and charge the cost to the Contractor, plus an administrative fee of ten percent (10%), or

terminate for default the Contractor's right to proceed.

If, before acceptance of the entire Work, the Authority decides to examine already completed Work by removing it or tearing it out, the Contractor, on request, shall promptly furnish all necessary

facilities, labor, and material. If the Work is found to be defective or nonconforming in any material respect due to the fault of the Contractor or its Subcontractors, the Contractor shall defray the expenses of the examination and of satisfactory reconstruction. However, if the Work is found to meet Contract requirements, the Contracting Officer shall make an equitable adjustment for the additional services involved in the examination and reconstruction in accordance with Paragraph entitled "Equitable Adjustments" contained in this **Exhibit E-Revised-5**, including, if completion of the Work was thereby delayed, an extension of time.

Unless otherwise specified in the Contract, the Authority shall accept, as promptly as practicable after completion and inspection, all Work required by the Contract or that portion of the Work the Contracting Officer determines can be accepted separately. Subject to the provisions of Paragraph entitled "Warranty of Construction", acceptance by the Authority shall be final and conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or the Authority's rights under any warranty or guarantee.

#### **45. PRICING OF ADJUSTMENTS**

When costs are a factor in any determination of an adjustment to the Contract Sum pursuant to Paragraph entitled "Changes" or any other provision of this Contract, such costs shall be in accordance with Cost Principles of FAR.

#### **46. CHANGES**

The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a Change Order, make changes in the Work within the general scope of the Contract, including changes:

- (1) in the Specifications (including drawings and designs);
- (2) in the method or manner of performance of the Work;
- (3) in the facilities, equipment, materials, services, or site to be furnished by the Authority; or
- (4) directing acceleration in the performance of the Work.

Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change in the Contractor's obligations shall be treated as a Change Order under this paragraph; provided that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a Change Order.

Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this paragraph or entitle the Contractor to an equitable adjustment.

If any change under this paragraph causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the Work under this Contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the Contract in writing in accordance with the provisions in paragraph entitled, "Equitable Adjustments" contained in **Exhibit E-Revised-5**. However, except for a "proposal for adjustment" (hereafter referred to as "proposal") based on defective Specifications, no proposal for any change under paragraph (b), above, shall be allowed for any costs incurred more than twenty (20) days before the Contractor gives written notice as required. In the case of defective Specifications for which the Authority is responsible, the equitable adjustment shall include the increased cost reasonably incurred by the Contractor in attempting to comply with the defective Specifications.

The Contractor must submit any proposal under this paragraph within thirty (30) days after: (1) receipt of a written Change Order under paragraph (a), above, or (2) the furnishing of a written notice under paragraph (b), above, by submitting to the Contracting Officer a written statement describing the general nature and amount of the proposal, unless this period is extended by the Authority. The proposal may be included in the notice under paragraph (b), above.

No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this Contract.

#### **47. EQUITABLE ADJUSTMENTS**

Any requests for equitable adjustments under any provision shall be governed by the following provisions:

Upon written request, the Contractor shall submit a proposal, in accordance with the requirements and limitations set forth in this Paragraph, for Work involving contemplated changes covered by the request. The proposal shall be submitted within the time limit indicated in the request for any extension of such time limit as may be subsequently granted. The Contractor's written statement of the monetary extent of a claim for equitable adjustment shall be submitted in the following form:

Proposals totaling \$5,000 or less shall be submitted in the form of a lump sum proposal with supporting information to clearly relate elements of cost with specific items of Work involved to the satisfaction of the Contracting Officer, or his/her authorized representative.

For proposals in excess of \$5,000, the claim for equitable adjustment shall be submitted in the form of a lump sum proposal supported with an itemized breakdown of all increases and decreases in the Contract. The itemized breakdown shall, at the least, include the items specified in subparagraph (b), below.

Calculation of Direct Costs

Material quantities by trades and unit costs. Manufacturing burden associated with material fabrication performed will be considered to be part of the material costs of the fabricated item delivered to the Work Site.

Labor breakdown by trades and unit costs, identified with specific item of material to be placed or operation to be performed.

Construction equipment exclusively necessary for the change.

Costs of preparation and/or revision to Shop Drawings resulting from the change.

Employment taxes under FICA and FUTA.

Bond Costs – when size of change warrants revision.

#### **48. CALCULATION OF OVERHEAD, PROFIT AND COMMISSION**

The allowable overhead shall be determined in accordance with the contract cost principles and procedures in the FAR, § 31.201 et seq., but in no case shall exceed the following. The percentages for profit and commission shall be negotiated and may vary according to the nature, extent and complexity of the Work involved.

The Contractor or any Subcontractor shall not be allowed any commission on the allowable profit or commission of any lower-tiered Subcontractor. Equitable adjustments for deleted Work shall include credits for overhead, profit and commission. On proposals covering both increases and decreases in the amount



of the Contract, the application of overhead and profit shall be on the net change in direct costs for the Contractor or Subcontractor performing the Work.

**49. TIME EXTENSIONS**

(a) The time extensions for changes in the Work will depend upon the extent, if any, by which the changes cause delay in the completion of the various elements of construction. Any Contract Modification granting the time extension may provide that the Contract completion date will be extended only for those specific elements so delayed and that the remaining Contract completion dates for all other portions of the Work will not be altered and may further provide for an equitable readjustment of liquidated damages under the new completion schedule.

(b) The Contractor may be granted an extension of time because of changes ordered in the Contract or because of any Force Majeure Event.

(c) Claims for extensions of time must be made in writing within twenty (20) calendar days after the occurrence of the delay. All time extension claims shall be supported by sufficient written evidence to justify the claim. In the case of a continuing cause of delay, only one (1) claim is necessary. Claims for extensions of time shall be stated in numbers of whole or half calendar days.

(d) In cases of claims for extension of time because of weather, such claims will only be granted if the actual lost time exceeds the average historical climatic conditions for the preceding ten (10) years are published by the National Oceanographic and Atmospheric Administration ("NOAA") and entitled, "Local Climatological Data – Austin/Central, Texas" and only because such weather prevented the execution of major critical times of Work. Time extensions granted under this subparagraph for weather are not compensable.

(e) Although the Authority may extend Contract Time for justifiable reasons, the Contractor shall bear all responsibility for financial risks, which may accrue, from various causes of delay in Construction progress. However, for delays caused by failure of the Architect/Engineer or the Authority to make timely decisions or to take timely action, a claim for additional costs will be considered.

(f) The Contract Term for the completion of Work is an essential element of the Contract. Contractor's failure to complete the Work within such time will cause damage to the Authority.

(g) Should the Contractor fail to complete the Work within the Contract Term, including all officially approved extensions thereto, the Authority may collect from the Contractor or deduct from any funds owed Contractor an amount not to exceed the actual damages caused by such delay.

(h) **NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY, THE CONTRACTOR'S SOLE REMEDY FOR DELAY IS AN EXTENSION OF TIME TO ACHIEVE SUBSTANTIAL COMPLETION.** The Contractor will not receive any compensation or damages for delay, unless such delay is caused by acts constituting intentional interference by the Authority with the Contractor's performance of the Work and to the extent that such acts of the Authority continue after the Contractor's notice to the Authority of such interference. The Authority's exercise of any of its rights under the Contract, regardless of the extent or number of such changes or the Authority's exercise of any of its remedies of suspension of the Work or requirement of correction of any defective Work, shall not under any circumstances be construed as intentional interference with Contractor's performance of the Work.

**50. LIQUIDATED DAMAGES**

(a) If the Contractor fails to perform the Work within the time specified in this Contract, or any extension, **for reasons other than non-compliance with mandatory OSHA training or other OSHA violations,** the Contractor shall in place of actual damages, pay to the Authority the sum of \$1,200.00 for each calendar day of delay as liquidated damages and not as a penalty. **If the Contractor fails to perform the Work**

within the time specified in this Contract, or any extension, due to non-compliance with (i) mandatory OSHA training, in accordance with Section 62 of this Exhibit E-Revised-5 of this Contract or other applicable OSHA violations, (ii) Contractor Safety and Security Plan guidance, or (iii) Capital Metro Safety written policies, plans, or rules, the Contractor shall in place of actual damages, pay to the Authority the sum of \$1,200.00 for each calendar day. It is agreed that such liquidated damages represent an estimate of actual damages and are not intended as a penalty; and that such delay will cause the Authority to incur substantial economic damage in amounts which are difficult or impossible to ascertain with certainty. Liquidated damages do not limit the Authority's right to terminate this Contract for default or otherwise as provided elsewhere in this Contract. Liquidated damages do not limit the Authority's right to terminate this Contract for default or pursue other remedies available to the Authority elsewhere in this Contract. Liquidated damages may be deducted from any amounts due and owing Contractor under this Contract.

(b) In the event the Authority terminates this Contract for Default under Exhibit E-Revised-5, Paragraph entitled "Termination for Default", Contractor shall be liable for liquidated damages accruing until such time as the Authority may reasonable obtain deliver of performance of similar services. The liquidated damages shall be in addition to excess cost under Exhibit E-Revised-5, Paragraph entitled "Termination for Default".

(c) Contractor may not be charged with liquidated damages when the delay in performance is caused by a Force Majeure Event.

(d) The Contractor shall insert the substance of this paragraph, including this subparagraph (d), altered to reflect the proper identification of the contracting parties in all Subcontracts issued pursuant to this Contract.

(e) In the event the Authority terminates this Contract for Default under this Exhibit E-Revised-5, the Contractor shall be liable for liquidated damages accruing until such time as the Authority may reasonably obtain delivery of performance of similar services. The liquidated damages shall be in addition to excess cost under this Exhibit E-Revised-5 paragraph entitled "Termination for Default."

(f) For any delay caused to the project completion due to non-compliance of mandatory OSHA Training or any OSHA violation at the project site, liquidated damages will be imposed for each day of delay in the project substantial completion. A log will be maintained for any delays caused due to non-compliance of the OSHA regulations.

## **51. FORCE MAJEURE**

(a) If the Contractor is rendered unable to carry out, in whole or in part, its obligations hereunder, the Contractor shall give notice to the Authority and the full details of such Force Majeure Event. The Contractor will use commercially reasonable efforts to remedy the force majeure condition with all reasonable dispatch and will resume performance of any suspended obligation promptly after termination of such Force Majeure Event.

(b) Any Force Majeure Event that affects the Contractor's time for performance under this Contract shall be governed by Exhibit E-Revised-5, paragraph entitled "Time Extensions".

(c) The failure of the Authority to perform its obligations under this Contract shall be excused to the extent, and for the period of time, such failure is caused by the occurrence of any Force Majeure Event.

## **52. EXAMINATION OF BID DOCUMENTS**

The Authority shall have the right to examine and review the Contractor's original Bid and estimating documents used in preparing its Bid as a reference to aid in the Authority's evaluation of the Contractor's scheduling and Construction progress. A certified copy of such documents shall be submitted to the Authority if requested by the Contracting Officer. The Authority shall maintain in confidence all information

contained in such Bid and estimating documents. It is the Authority's position that the Contractor's estimating documents in support of its original Bid are exempt from mandatory release prior to award of Contract under the Texas Public Information Act ("Act"). After award, the documents will require individual review to determine whether or not an exemption from release under the Act is available.

### **53. TERMINATION FOR DEFAULT**

(a) The Authority may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this Contract in either one of the following circumstances:

(1) if the Contractor fails to make delivery of the supplies or to perform the Work within the time specified herein or any extension thereof; or

(2) if the Contractor fails to perform any of the other provisions of this Contract, or so fails to make progress as to endanger performance of this Contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of ten (10) days (or such longer period as the Authority may authorize in writing) after receipt of notice from the Authority specifying such failure.

(b) In the event the Authority terminates this Contract in whole or in part as provided in paragraph (a) of this clause, the Authority may procure, upon such terms and in such manner as the Authority may deem appropriate, supplies or services similar to those so terminated, and the Contractor shall be liable to the Authority for any excess costs for such similar supplies or services; provided, that the Contractor shall continue the performance of this Contract to the extent, if any, it has not been terminated under the provisions of this paragraph.

(c) Except with respect to the defaults of Subcontractors, the Contractor shall not be liable for any excess costs if the failure to perform the Contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to Force Majeure Events provided, however, in every case the failure to must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the default of a Subcontractor and if such default arises out of causes beyond the control of both the Contractor and Subcontractor and without the fault or negligence of either of them, the Contractor shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the Subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

(d) If this Contract is terminated as provided in subparagraph (a), the Authority, in addition to any other rights provided in this paragraph, may require the Contractor to transfer title and deliver to the Authority in the manner and to the extent directed by the Authority any Manufacturing Materials as the Contractor has specifically produced or specifically acquired for the performance of such part of this Contract as has been terminated; and the Contractor shall, upon direction of the Authority, protect and preserve property in possession of the Contractor in which the Authority has an interest. Payment for completed Manufacturing Materials delivered to and accepted by the Authority shall be at the Contract price. The Authority may withhold from amounts otherwise due the Contractor for such completed Manufacturing Materials such sum as the Authority determines to be necessary to protect the Authority against loss because of outstanding liens or claims of former lien holders.

(e) If, after notice of termination of this Contract under the provisions of this paragraph, it is determined by the Authority that the Contractor was not in default or that the default was excusable under the provisions of this paragraph, the rights and obligations of the parties shall be those provided in the paragraph entitled "Termination for Convenience" contained in this **Exhibit E-Revised-5**.

(f) The rights and remedies of the Authority provided in this paragraph shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Contract.

**54. TERMINATION FOR CONVENIENCE**

(a) The Authority may, whenever the interests of the Authority so require, terminate this Contract, in whole or in part, for the convenience of the Authority. The Authority shall give written notice of the termination to the Contractor specifying the part of the Contract terminated and when termination becomes effective.

(b) The Contractor shall incur no further obligations in connection with the terminated Work, and, on the date set forth in the notice of termination, the Contractor will stop Work to the extent specified. The Contractor also shall terminate outstanding orders and Subcontracts as they relate to the terminated Work. The Contractor shall settle the liabilities and claims arising out of the termination of Subcontracts and orders connected with the terminated Work. The Authority may direct the Contractor to assign the Contractor's right, title, and interest under terminated orders or Subcontracts to the Authority. The Contractor must still complete the Work not terminated by the notice of termination and may incur such obligations as are necessary to do so.

(c) The Authority may require the Contractor to transfer title and deliver to the Authority in the manner and to the extent directed by the Authority: (1) any completed supplies; and (2) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information and contract rights (hereinafter called "Manufacturing Materials") as the Contractor has specifically produced or specially acquired for the performance of the terminated part of this Contract. The Contractor shall, upon direction of the Authority, protect and preserve property in the possession of the Contractor in which the Authority has an interest. If the Authority does not exercise this right, the Contractor shall use its best efforts to sell such supplies and Manufacturing Materials.

(d) The Authority shall pay the Contractor the following amounts:

(1) Contract prices for supplies or services accepted under the Contract;

(2) costs incurred in preparing to perform and performing the terminated portion of the Work plus a fair and reasonable profit on such portion of the Work (such profit shall not include anticipatory profit or consequential damages), less amounts paid or to be paid for accepted supplies or services; provided, however, that if it appears that the Contractor would have sustained a loss if the entire Contract would have been completed, no profit shall be allowed or included, and the amount of compensation shall be reduced to reflect the anticipated rate of loss;

(3) costs of settling and paying claims arising out of the termination of Subcontracts (these costs must not include costs paid in accordance with subparagraph (2) of this paragraph);

(4) the reasonable settlement costs of the Contractor and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the Contract and for the termination and settlement of Subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to the terminated portion of this Contract; and

(5) the total sum to be paid the Contractor under this paragraph shall not exceed the total Contract price plus the reasonable settlement costs of the Contractor reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and Manufacturing Materials under this paragraph, and the Contract price of Work not terminated.

**55. NO DAMAGES FOR DELAY**

Unless otherwise specifically provided for by the Contract, the Contractor shall not be entitled to damages of any type resulting from hindrances, delays, or any other cause under this Contract except when the Work is stopped or suspended by a written order signed by the Contracting Officer or by intentional interference

by the Authority.

## **56. NOTICE OF LABOR DISPUTES**

(a) If the Contractor has knowledge that any actual or potential labor dispute is delaying or threatens to delay the timely performance of this Contract, the Contractor immediately shall give notice, including all relevant information, to the Contracting Officer.

(b) The Contractor agrees to insert the substance of this subparagraph, including this subparagraph (b), in any Subcontract under which a labor dispute may delay the timely performance of this Contract; except that each Subcontract shall provide that in the event its timely performance is delayed or threatened by delay by any actual or potential labor dispute, the Subcontractor shall immediately notify the next higher tier Subcontractor or the Contractor, as the case may be, of all relevant information concerning the dispute.

## **57. INTERPRETATION OF CONTRACT – DISPUTES**

All questions concerning interpretation or clarification of this Contract or the acceptable fulfillment of this Contract by the Contractor shall be immediately submitted in writing to the Authority's Contracting Officer for determination. All determinations, instructions, and clarifications of the Contracting Officer shall be final and conclusive unless the Contractor files with the Capital Metro President/CEO within two (2) weeks after the Authority notifies the Contractor of any such determination, instruction or clarification, a written protest, stating in detail the basis of the protest. The President/CEO shall consider the protest and notify the Contractor within two (2) weeks of the protest filing of his final decision. The President/CEO's decisions shall be conclusive subject to judicial review. Notwithstanding any disagreement the Contractor may have with the decisions of the President/CEO, the Contractor shall proceed with the Work in accordance with the determinations, instructions, and clarifications of the President/CEO. The Contractor shall be solely responsible for requesting instructions or interpretations and liable for any cost or expenses arising from its failure to do so. The Contractor's failure to protest the Contracting Officer's determinations, instructions, or clarifications within the two-week period shall constitute a waiver by the Contractor of all of its rights to further protest.

## **58. INVOICING AND PAYMENTS**

(a) **Schedule of Values.** In the case of a Lump Sum Contract, within ten (10) days of the Notice to Proceed, the Contractor shall submit to the Authority for Authority's approval an initial schedule of values allocated to various portions of the Work prepared in such a form and supported by such data to substantiate its accuracy as the Authority may require. This schedule, unless objected to by the Authority, shall be used as a basis for reviewing the Contractor's applications for payment. The schedule of values may be updated periodically to reflect changes in the allocation of the Contract Sum.

(b) Invoices may be submitted once per month for work completed and accepted by the Authority, and marked "Original" to:

Accounts Payable  
Capital Metropolitan Transportation Authority  
P.O. Box 6308  
Austin, Texas 78762-6308

Or via e-mail to [ap\\_invoices@capmetro.org](mailto:ap_invoices@capmetro.org)

and shall conform to policies or regulations adopted from time to time by the Authority. Invoices shall be legible and shall contain, as a minimum, the following information:

- (1) the Contract and order number (if any);

- (2) a complete itemization of all costs including quantities ordered and delivery order numbers (if any);
- (3) any discounts offered to the Authority under the terms of the Contract;
- (4) certified payroll report for the invoicing period;
- (5) evidence of the acceptance of the supplies or services by the Authority; and
- (6) any other information necessary to demonstrate entitlement to payment under the terms of the Contract.

Subject to the withholding regarding retainage as provided herein, all undisputed invoices shall be paid within the time period allowed by law through the Texas Prompt Payment Act, Tex. Gov't Code § 2251.021(b).

(c) The Authority shall make progress payments monthly as the Work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates approved by the Contracting Officer. If requested by the Contracting Officer, the Contractor shall furnish a breakdown of the total Contract price showing the amount included therein for each principal category of the Work, in such detail as requested, to provide a basis for determining progress payments. In the preparation of estimates, the Contracting Officer may authorize material delivered on the site and preparatory work done to be taken into consideration. Material delivered to the Contractor at locations other than the Work Site may also be taken into consideration if consideration is specifically authorized by this Contract and the Contractor furnishes satisfactory evidence that it has acquired title to such material and that the material will be used to perform this Contract.

(d) In making these progress payments, there shall be retained five percent (5%) of the estimated amount until final completion and acceptance of the Work by the Authority. However, if the Contracting Officer finds that satisfactory progress was achieved during any period for which a progress payment is to be made, the Contracting Officer may authorize payment to be made in full without retention of a percentage. When the Work is Substantially Complete, the Contracting Officer shall retain an amount that the Contracting Officer considers adequate protection of the Authority and may release to the Contractor all or a portion of any excess amount, in his or her sole discretion. Also, on completion and acceptance of each separate building, public work, or other division of the Work for which the price is stated separately in the Contract, payment may be made for the completed Work without retention of a percentage.

(e) All Mechanical Materials and Work covered by progress payments made shall, at the time of the payment, become the sole property of the Authority, but this shall not be construed as relieving the Contractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work, or waiving the right of the Authority to require the fulfillment of all of the terms of the Contract.

~~(f) The Authority shall, upon request, reimburse the Contractor for the entire amount of premiums paid for performance and payment bonds (including coinsurance and reinsurance agreements, when applicable) after the Contractor furnishes evidence of full payment to the surety. Such reimbursement shall be part of, and not in addition to, the Contract Price.~~

(g) The Contractor shall be responsible for all costs/expenses not otherwise specified in this Contract, including by way of example, all costs of equipment provided by the Contractor or Subcontractor(s), all fees, fines, licenses, bonds, or taxes required or imposed against the Contractor and Subcontractor(s), travel related expenses, and all other Contractor's costs of doing business.

(h) Final payment to the Contractor shall be paid by the Authority after:

- (1) completion and acceptance of all of the Work by the Authority;
- (2) presentation of an undisputed invoice; and
- (3) presentation of a properly executed "AFFIDAVIT OF TOTAL RELEASE AND CERTIFICATION OF ALL BILLS PAID", in the form required by the Authority.

(i) In the event an overpayment is made to the Contractor under this Contract or the Authority discovers that the Authority has paid any invoices or charges not authorized under this Contract, the Authority may offset the amount of such overpayment or unauthorized charges against any indebtedness owed by the Authority to the Contractor, whether arising under this Contract or otherwise, including withholding payment of an invoice, in whole or in part, or the Authority may deduct such amounts from future invoices. In the event an overpayment is made to the Contractor under this Contract, the Contractor shall remit the full overpayment amount to the Authority within thirty (30) calendar days of the date of the written notice of such overpayment or such other period as the Authority may agree. The Authority reserves the right to withhold payment of an invoice, in whole or in part, or deduct the overpayment from future invoices to recoup the overpayment.

#### **59. PAYMENT TO SUBCONTRACTORS**

- (a) Payments by Contractors to subcontracts associated with Authority contracts are subject to the time periods established in the Texas Prompt Payment Act, Tex. Gov't Code § 2251.
- (b) A false certification to the Authority under the provisions of the paragraph entitled, "Invoicing and Payments" hereof may be a criminal offense in violation of Tex. Penal Code § 10.

#### **60. FEDERAL, STATE, AND LOCAL TAXES**

- (a) The Contract Sum includes all applicable federal, state, and local taxes and duties. The Authority is exempt from taxes imposed by the State of Texas and local sales and use taxes, and any such taxes included on any invoice received by the Authority shall be deducted from the amount of the invoice for purposes of payment.
- (b) The Authority qualifies for exemption from State and Local Sales and Use Taxes pursuant to the provisions of the Texas Limited Sales, Excise and Use Tax Act (Taxation – General, Article 20.04, Texas Civil Statutes). The Contractor may claim exemption from payment of applicable State taxes by complying with such procedures as may be prescribed by the State Comptroller of Public Accounts. The Contractor bears sole and total responsibility for obtaining information pertaining to such exemption. Should the Contractor wish to take advantage of such exemption, Contractor may obtain specific information from the Texas Comptroller of Public Accounts.

#### **61. WAGE RATES**

All persons employed in the performance of the Work under this Contract, or any subcontracts hereunder, shall be paid not less than the general rates of per diem, holiday, and overtime wages prevailing in the locality for Work of a similar character (which wages are specified in an attachment to this Contract). Failure to comply with this provision shall subject the Contractor to the penalties prescribed in Tex. Gov't Code § 2258.

#### **62. FEDERAL, STATE AND LOCAL LAWS GOVERNING CONSTRUCTION**

- (a) The Contractor must comply with all applicable State and Federal laws, including but not limited to laws concerned with labor, equal employment opportunity, safety and minimum wages. The Contractor shall make itself familiar with and at all times shall observe and comply with all current Federal, State and local laws, ordinances and regulations which in any manner affect the conduct of the Work, and shall indemnify and save harmless the Authority, its officers, directors, employees, agents, representatives,

successors and assigns, against any claim arising from violation of any such law, ordinance or regulation by Contractor or Subcontractor.

(b) The Contractor shall cooperate with applicable city or other governmental officials at all times where their jurisdiction prevails. The Contractor shall make application for any permits and permanent utilities, which are required for the execution of the Contract. The Authority **is not** exempt from building permits, inspections, and related City requirements. The Authority does have a General Permit from the City of Austin but such permit applies only to transit support facilities that may be located in the public right-of-way. It is the Contractor's sole responsibility to obtain all building and related permits that may be required for the execution of this Contract, at Contractor's sole expense.

(c) The Contractor is required to pay not less than the wage scale of the various classes of labor as shown on the "Prevailing Wage Rate Schedule" provided by the Authority. The specified wage rates are minimum rates only, and the Authority will not consider any claims for additional compensation made by any Contractor because of payment by the Contractor of any wage rates in excess of the applicable minimum rate contained in the Contract.

(d) Certain Public Works require under the Prevailing Wage Rate Schedule to list not only "Building Construction" wage rates but also "Incidental Paving and Utilities" wage rates. The Contractor's attention is called to the fact that all classes of Work within the area of the building shall be paid "Building Construction" wage rates.

(e) The Prevailing Wage Rate Schedule shall be made available, upon request, to any employee of the Contractor and to any employee of its Subcontractors.

(f) Pursuant to the provisions of the Texas Prompt Payment Act, the Contractor shall forfeit as a penalty to the Authority, sixty dollars (\$60.00) for each laborer, workman or mechanic employed, for each calendar day, or portion thereof, such laborer, workman or mechanic is paid less than the said stipulated minimum rates for any Work done under said Contract, by him or her, or by any Subcontractor under him or her. The Contractor and each Subcontractor shall keep, or cause to be kept, an accurate record showing the names and occupations of all laborers, workmen and mechanics employed in connection with the Work, and showing also the actual per diem wages paid to such workers, which record shall be open at all reasonable hours for the inspection by the Authority.

(g) The Contractor shall assign to the Authority any and all claims for overcharges associated with this Contract which arise under the antitrust laws of the United States, 15 U.S.C. § 1 et seq.

**(h) Contractor will ensure that (i) all construction workers receive and complete a 10-hour, OSHA approved construction worker safety class no more than 2 years prior to commencing any Work and at least once every two years thereafter during the term of the Contract; and (ii) all safety supervisors receive and complete a 30-hour, OSHA approved construction worker safety class no more than 2 years prior to commencing any Work and at least once every two years thereafter during the term of the Contract. Contractor's failure to comply with the foregoing may, at Capital Metro's sole discretion, result in a partial or complete shut-down of the performance of the Work for purposes of safety, resulting in the assessment of liquidated damages in accordance with Section 50 of Exhibit E-Revised-5 of this Contract and/or Capital Metro seeking any other available remedy under law or this Contract. A log will be maintained for any delays caused due to non-compliance with the foregoing requirements or any applicable OSHA regulations.**

**(i) Contractor's compliance with worker protections required under this Contract and/or applicable law will be subject to on-site monitoring independent of Contractor and its affiliates.**



**63. INDEMNIFICATION**

(a) CONTRACTOR HEREBY AGREES TO INDEMNIFY, HOLD HARMLESS, AND DEFEND THE AUTHORITY AND EACH OF ITS AFFILIATES AND EACH OF THE AUTHORITY'S AND SUCH AFFILIATES' OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, REPRESENTATIVES, SUCCESSORS, ASSIGNS, CUSTOMERS, INVITEES AND GUESTS (THE AUTHORITY AND EACH SUCH PERSON OR ENTITY IS AN "INDEMNIFIED PARTY") AGAINST ANY AND ALL DAMAGES DIRECTLY OR INDIRECTLY RESULTING FROM, RELATED TO, ARISING OUT OF OR ATTRIBUTABLE TO ANY ACTION, INACTION, BREACH, INACCURACY, FAILURE TO PERFORM, FAILURE TO COMPLY, DEFAULT, VIOLATION, INTERFERENCE WITH, TERMINATION OR CANCELLATION BY OR THROUGH THE CONTRACTOR OR ANY SUBCONTRACTOR, OFFICER, DIRECTOR, EMPLOYEE, AGENT, REPRESENTATIVE, SUCCESSOR, ASSIGNEE, CUSTOMER, INVITEE, OR GUEST OF THE CONTRACTOR OR ANY SUBCONTRACTOR OF THE CONTRACTOR.

(b) FOR PURPOSES OF THIS CONTRACT:

(1) "DAMAGES" MEANS ANY AND ALL DIRECT OR INDIRECT LOSSES, DAMAGES (INCLUDING WITHOUT LIMITATION, INCIDENTAL, CONSEQUENTIAL, LOST PROFITS, INDIRECT, PUNITIVE OR EXEMPLARY DAMAGES), LIABILITIES, PAYMENTS, OBLIGATIONS, DEFICIENCIES, CLAIMS, ACTIONS, JUDGMENTS, SETTLEMENTS, INTEREST, AWARDS, PENALTIES, FINES, COSTS OR EXPENSES OF WHATEVER KIND, INCLUDING, WITHOUT LIMITATION, FEES AND EXPENSES OF ATTORNEYS, ACCOUNTANTS, AND OTHER PROFESSIONAL ADVISORS AND OF EXPERT WITNESSES AND OTHER COSTS (INCLUDING, WITHOUT LIMITATION, THE ALLOCABLE PORTION OF ANY INDEMNIFIED PARTY'S INTERNAL COSTS) RESULTING FROM, RELATED TO, ARISING OUT OF, ATTRIBUTABLE TO WITH ANY ACTION OR THREATENED ACTION OF ANY KIND OR NATURE WHATSOEVER;

(2) "LIABILITIES" MEANS ANY AND ALL LIABILITIES OR OBLIGATIONS, WHETHER KNOWN OR UNKNOWN, ASSERTED OR UNASSERTED, ABSOLUTE OR CONTINGENT, MATURED OR UNMATURED, CONDITIONAL OR UNCONDITIONAL, LATENT OR PATENT, ACCRUED OR UNACCRUED, LIQUIDATED OR UNLIQUIDATED, OR DUE OR TO BECOME DUE;

(3) "ACTION" MEANS ANY ACTION, APPEAL, PETITION, PLEAS, CHARGE, COMPLAINT, CLAIM, SUIT, DEMAND, LITIGATION, ARBITRATION, MEDIATION, HEARING, INQUIRY, INVESTIGATION OR SIMILAR EVENT, OCCURRENCE OR PROCEEDING;

(4) "THREATENED" MEANS A DEMAND OR STATEMENT HAS BEEN MADE (ORALLY OR IN WRITING) OR A NOTICE HAS BEEN GIVEN (ORALLY OR IN WRITING), OR ANY OTHER EVENT HAS OCCURRED OR ANY OTHER CIRCUMSTANCES EXIST THAT WOULD LEAD A PRUDENT PERSON OR ENTITY TO CONCLUDE THAT AN ACTION OR OTHER MATTER IS LIKELY TO BE ASSERTED, COMMENCED, TAKEN OR OTHERWISE PURSUED IN THE FUTURE;

(5) "LAW" MEANS ANY LAW (STATUTORY, COMMON, OR OTHERWISE), CONSTITUTION, TREATY, CONVENTION, ORDINANCE, EQUITABLE PRINCIPLE, CODE, RULE, REGULATION, EXECUTIVE ORDER, OR OTHER SIMILAR AUTHORITY ENACTED, ADOPTED, PROMULGATED, OR APPLIED BY ANY GOVERNMENTAL BODY, EACH AS AMENDED AND NOW AND HEREINAFTER IN EFFECT;

(6) "GOVERNMENTAL BODY" MEANS ANY LEGISLATURE, AGENCY, BUREAU, BRANCH, DEPARTMENT, DIVISION, COMMISSION, COURT, TRIBUNAL, MAGISTRATE, JUSTICE, MULTI-NATIONAL ORGANIZATION, QUASI-GOVERNMENTAL BODY, OR OTHER SIMILAR RECOGNIZED ORGANIZATION OR BODY EXERCISING SIMILAR POWERS OR AUTHORITY;

(7) "ORDER" MEANS ANY ORDER, RULING, DECISION, VERDICT, DECREE, WRIT, SUBPOENA, MANDATE, PRECEPT, COMMAND, DIRECTIVE, CONSENT, APPROVAL, AWARD,

JUDGMENT, INJUNCTION, OR OTHER SIMILAR DETERMINATION OR FINDING BY, BEFORE, OR UNDER THE SUPERVISION OF ANY GOVERNMENTAL AUTHORITY, ARBITRATOR, OR MEDIATOR;

(8) "PERMIT" MEANS ANY PERMIT, LICENSE, CERTIFICATE, APPROVAL, CONSENT, NOTICE, WAIVER, FRANCHISE, REGISTRATION, FILING, ACCREDITATION, OR OTHER SIMILAR AUTHORIZATION REQUIRED BY ANY LAW, GOVERNMENTAL BODY, OR CONTRACT;

(9) ANY "PERSON" MEANS ANY INDIVIDUAL, PARTNERSHIP, LIMITED LIABILITY COMPANY, CORPORATION, ASSOCIATION, JOINT STOCK COMPANY, TRUST, ENTITY, JOINT VENTURE, LABOR ORGANIZATION, UNINCORPORATED ORGANIZATION, OR GOVERNMENTAL BODY.

(c) IF ANY ACTION IS COMMENCED THAT MAY GIVE RISE TO A CLAIM FOR INDEMNIFICATION (AN "INDEMNIFICATION CLAIM") BY ANY INDEMNIFIED PARTY AGAINST CONTRACTOR, THEN SUCH INDEMNIFIED PARTY WILL PROMPTLY GIVE NOTICE TO CONTRACTOR AFTER SUCH INDEMNIFIED PARTY RECEIVES NOTICE OF SUCH ACTION. FAILURE TO NOTIFY CONTRACTOR WILL NOT RELIEVE CONTRACTOR OF ANY LIABILITY THAT IT MAY HAVE TO ANY INDEMNIFIED PARTY, EXCEPT TO THE EXTENT THE DEFENSE OF SUCH ACTION IS MATERIALLY AND IRREVOCABLY PREJUDICED BY THE INDEMNIFIED PARTY'S FAILURE TO GIVE SUCH NOTICE.

(d) CONTRACTOR WILL HAVE THE RIGHT TO DEFEND AGAINST AN INDEMNIFICATION CLAIM, WITH COUNSEL OF ITS CHOICE THAT IS SATISFACTORY TO THE INDEMNIFIED PARTY, IF (I) WITHIN 10 DAYS FOLLOWING THE RECEIPT OF NOTICE OF THE INDEMNIFICATION CLAIM, THE CONTRACTOR NOTIFIES THE INDEMNIFIED PARTY IN WRITING THAT THE CONTRACTOR WILL INDEMNIFY THE INDEMNIFIED PARTY IN WRITING THAT THE CONTRACTOR WILL INDEMNIFY THE INDEMNIFIED PARTY FROM AND AGAINST THE ENTIRETY OF ANY DAMAGES THE INDEMNIFIED PARTY MAY SUFFER RESULTING FROM, RELATING TO, ARISING OUT OF, OR ATTRIBUTABLE TO THE INDEMNIFICATION CLAIM, (II) THE CONTRACTOR PROVIDES THE INDEMNIFIED PARTY WITH EVIDENCE REASONABLY ACCEPTABLE TO THE INDEMNIFIED PARTY THAT THE CONTRACTOR WILL HAVE THE FINANCIAL RESOURCES TO DEFEND AGAINST THE INDEMNIFICATION CLAIM AND PAY, IN CASE, ALL DAMAGES THE INDEMNIFIED PARTY MAY SUFFER RESULTING FROM, RELATING TO, ARISING OUT OF, OR ATTRIBUTABLE TO THE INDEMNIFICATION CLAIM, (III) THE INDEMNIFICATION CLAIM INVOLVES ONLY MONEY DAMAGES AND DOES NOT SEEK AN INJUNCTION OR OTHER EQUITABLE RELIEF, (IV) SETTLEMENT OF, OR AN ADVERSE JUDGMENT WITH RESPECT TO, THE INDEMNIFICATION CLAIM IS NOT IN THE GOOD FAITH JUDGMENT OF THE INDEMNIFIED PARTY LIKELY TO ESTABLISH A PRECEDENTIAL CUSTOM OR PRACTICE MATERIALLY ADVERSE TO THE CONTINUING BUSINESS INTERESTS OF THE INDEMNIFIED PARTY, AND (V) THE CONTRACTOR CONTINUOUSLY CONDUCTS THE DEFENSE OF THE INDEMNIFICATION CLAIM ACTIVELY AND DILIGENTLY.

(e) SO LONG AS THE CONTRACTOR IS CONDUCTING THE DEFENSE OF THE INDEMNIFICATION CLAIM IN ACCORDANCE WITH THE IMMEDIATELY PRECEDING PARAGRAPH, (I) THE INDEMNIFIED PARTY MAY RETAIN SEPARATE CO-COUNSEL AT ITS SOLE COST AND EXPENSE AND PARTICIPATE IN THE DEFENSE OF THE INDEMNIFICATION CLAIM, (II) THE INDEMNIFIED PARTY WILL NOT CONSENT TO THE ENTRY OF ANY ORDER WITH RESPECT TO THE INDEMNIFICATION CLAIM WITHOUT THE PRIOR WRITTEN CONSENT OF THE CONTRACTOR (NOT TO BE WITHHELD UNREASONABLY), AND (III) THE CONTRACTOR WILL NOT CONSENT TO THE ENTRY OF ANY ORDER WITH RESPECT TO THE INDEMNIFICATION CLAIM WITHOUT THE PRIOR WRITTEN CONSENT OF THE INDEMNIFIED PARTY (NOT TO BE WITHHELD UNREASONABLY, PROVIDED THAT IT WILL NOT BE DEEMED TO BE UNREASONABLE FOR AN INDEMNIFIED PARTY TO WITHHOLD ITS CONSENT (A) WITH RESPECT TO ANY FINDING OF OR ADMISSION (1) OF ANY BREACH OR VIOLATION OF ANY LAW, ORDER OR PERMIT, (2) OF ANY VIOLATION OF THE RIGHTS OF ANY PERSON, OR (3) WHICH INDEMNIFIED PARTY BELIEVES COULD HAVE AN ADVERSE EFFECT ON ANY OTHER ACTIONS TO WHICH THE INDEMNIFIED PARTY OR ITS AFFILIATES ARE PARTY OR TO WHICH INDEMNIFIED PARTY HAS A GOOD FAITH BELIEF IT OR

ANY OF ITS AFFILIATES MAY BECOME PARTY, OR (B) IF ANY PORTION OF SUCH ORDER WOULD NOT REMAIN SEALED). IF ANY CONDITION IN THE IMMEDIATELY PRECEDING PARAGRAPH IS OR BECOMES UNSATISFIED, (I) THE INDEMNIFIED PARTY MAY DEFEND AGAINST, AND CONSENT TO THE ENTRY OF, ANY ORDER WITH RESPECT TO AN INDEMNIFICATION CLAIM IN ANY MANNER IT MAY DEEM APPROPRIATE (AND THE INDEMNIFIED PARTY NEED NOT CONSULT WITH, OR OBTAIN ANY CONSENT FROM, THE CONTRACTOR IN CONNECTION THEREWITH), (II) THE CONTRACTOR WILL JOINTLY AND SEVERALLY BE OBLIGATED TO REIMBURSE THE INDEMNIFIED PARTY PROMPTLY AND PERIODICALLY FOR THE DAMAGES RELATING TO DEFENDING AGAINST THE INDEMNIFICATION CLAIM, AND (III) THE CONTRACTOR WILL REMAIN JOINTLY AND SEVERALLY LIABLE FOR ANY DAMAGES THE INDEMNIFIED PARTY MAY SUFFER RELATING TO THE INDEMNIFICATION CLAIM TO THE FULLEST EXTENT PROVIDED IN THIS INDEMNIFICATION.

(f) THE CONTRACTOR HEREBY CONSENTS TO THE NON-EXCLUSIVE JURISDICTION OF ANY GOVERNMENTAL BODY, ARBITRATOR, OR MEDIATOR IN WHICH AN ACTION IS BROUGHT AGAINST ANY INDEMNIFIED PARTY FOR PURPOSES OF ANY INDEMNIFICATION CLAIM THAT AN INDEMNIFIED PARTY MAY HAVE UNDER THIS AGREEMENT WITH RESPECT TO SUCH ACTION OR THE MATTERS ALLEGED THEREIN, AND AGREES THAT PROCESS MAY BE SERVED ON THE CONTRACTOR WITH RESPECT TO SUCH CLAIM ANYWHERE IN THE WORLD.

(g) THE INDEMNIFICATION OBLIGATIONS AND RIGHTS PROVIDED FOR IN THIS CONTRACT WILL BE AND ARE APPLICABLE WITH RESPECT TO ANY ACTION OR CLAIM (OR THREATENED ACTION OR CLAIM) AGAINST ANY INDEMNIFIED PARTY FOR THE BODILY INJURY OR DEATH OF AN EMPLOYEE OF THE CONTRACTOR, ITS AGENTS, AND/OR ITS SUBCONTRACTORS OF ANY TIER, WHETHER OR NOT THE SOLE, JOINT OR CONTRIBUTORY NEGLIGENCE OF ANY INDEMNIFIED PARTY IS ALLEGED OR PROVEN. THE CONTRACTOR AND THE AUTHORITY AGREE THAT ALL OF THE PROVISIONS OF THE IMMEDIATELY PRECEDING SENTENCE ARE CONSPICUOUS.

(h) EXCEPT AS PROVIDED IN SUBPARAGRAPH (g) ABOVE, THE INDEMNIFICATION OBLIGATIONS AND RIGHTS PROVIDED FOR IN THIS CONTRACT DO NOT REQUIRE (AND SHALL NOT BE CONSTRUED AS REQUIRING) CONTRACTOR TO INDEMNIFY, HOLD HARMLESS, OR DEFEND ANY INDEMNIFIED PARTY (OR ANY THIRD PARTY) AGAINST ANY ACTION OR CLAIM (OR THREATENED ACTION OR CLAIM) CAUSED BY THE NEGLIGENCE OR FAULT, THE BREACH OR VIOLATION OF A STATUTE, ORDINANCE, GOVERNMENTAL REGULATION, STANDARD, OR RULE, OR THE BREACH OF CONTRACT OF ANY INDEMNIFIED PARTY, ITS AGENTS OR EMPLOYEES, OR ANY THIRD PARTY UNDER THE CONTROL OR SUPERVISION OF ANY INDEMNIFIED PARTY, OTHER THAN THE CONTRACTOR OR ITS AGENTS, EMPLOYEES, OR SUBCONTRACTORS OF ANY TIER.

(i) THE PROVISIONS SET FORTH IN THIS PARAGRAPH WILL SURVIVE ANY TERMINATION OR EXPIRATION OF THIS CONTRACT.

#### **64. LIMITATION OF LIABILITY**

In no event shall the Authority or its officers, directors, agents or employees be liable in contract or tort, to the Contractor or its Subcontractors for special, indirect, incidental or consequential damages, resulting from the Authority's performance, nonperformance, or delay in performance of its obligations under this Contract, or the Authority's termination of the Contract with or without cause, or the Authority's suspension of the Work. This limitation of liability shall not apply to intentional tort or fraud. The Contractor shall include similar liability provisions in all its Subcontracts.

**65. LAWS, STATUTES AND OTHER GOVERNMENTAL REQUIREMENTS**

The Contractor agrees that it shall be in compliance with all laws, statutes, and other governmental requirements, regulations or standards prevailing during the term of this Contract.

**66. PUBLICITY RELEASES**

All publicity releases or releases of reports, papers, articles, maps, or other documents in any way concerning this Contract or the Work hereunder which the Contractor or any of its Subcontractors desires to make for purposes of publication in whole or in part, shall be subject to written approval by the Contracting Officer prior to release.

**67. REQUEST FOR INFORMATION**

(a) The Contractor shall not provide information generated or otherwise obtained in the performance of its responsibilities under this Contract to any party other than the Authority and its authorized agents except as otherwise provided by this Contract or after obtaining the prior written permission of the Authority.

(b) This Contract, all data and other information developed pursuant to this Contract shall be subject to the Texas Public Information Act. The Authority shall comply with all aspects of the Texas Public Information Act.

(c) The Contractor is instructed that any requests for information regarding this Contract and any deliverables shall be referred to the Authority.

(d) The requirements of Subchapter J, Chapter 552, Government Code, may apply to this contract and the contractor or vendor agrees that the contract can be terminated if the contractor or vendor knowingly or intentionally fails to comply with a requirement of that subchapter.

(1) The requirements of Subchapter J, Chapter 552, Government Code as amended currently applies to expenditures of at least \$1 million in public funds for the purchase of goods or services.

**68. INTEREST OF PUBLIC OFFICIALS**

The Contractor represents and warrants that no employee, official, or member of the Board of the Authority is or will be pecuniarily interested or benefited directly or indirectly in this Contract. The Contractor further represents and warrants that it has not offered or given gratuities (in the form of entertainment, gifts or otherwise) to any employee, official, or member of the Board of the Authority with a view toward securing favorable treatment in the awarding, amending, or evaluating the performance of this Contract. For breach of any representation or warranty in this paragraph, the Authority shall have the right to terminate this Contract without liability and/or have recourse to any other remedy it may have at law or in equity.

**69. GRATUITIES**

The Authority may cancel this Contract, without liability to the Contractor, if it is found that gratuities in the form of entertainment, gifts, or otherwise were offered or given by the Contractor or any agent or representative to any Authority official or employee with a view toward securing favorable treatment with respect to the performance of this Contract. In the event this Contract is canceled by the Authority pursuant to this provision, the Authority shall be entitled, in addition to any other rights and remedies, to recover from the Contractor a sum equal in amount to the cost incurred by the Contractor in providing such gratuities.

**70. DRUG-FREE WORKPLACE PROGRAM**

(a) Definitions. As used in this paragraph:

(1) "Controlled Substance Act" means the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 C.F.R. Paragraph 801 et seq.) or its successor statute.

(2) "Controlled Substance" means a controlled substance listed in Schedules I through V of Section 202 of the Controlled Substances Act (21 U.S.C. § 812) and as further defined in regulation at 21 C.F.R. §§ 1308.11 - 1308.15, or listed in Schedules I through V of Subchapter AB of the Texas Controlled Substances Act, Tex Health & Safety Code, Ch. 481, which include, but are not limited to, marijuana, heroin, LSD, concentrated cannabis or cannabinoids, hashish or hash oil, morphine or its derivatives, mescaline, peyote, phencyclidine (PCP, Angel Dust), opium, opiates, methadone, cocaine, Quaaludes, amphetamines, methamphetamines, depressants, "exotic/designer" drugs, benzodiazepines, Seconal, codeine, barbiturates, Phenobarbital, or Valium.

(3) "Conviction" means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.

(4) "Criminal drug statute" means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, possession, or use of any controlled substance.

(5) "Drug-free workplace" means the site(s) for the performance of work done by Contractor in connection with this Contract where employees of the Contractor are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

(6) "Employee" means an employee of Contractor directly engaged in the performance of Work under this Contract, and shall include all direct cost employees and any other Contractor employee who has other than a minimal impact or involvement in Contract performance.

(7) "Individual" means a Contractor that has no more than one employee including the Contractor.

(b) The Contractor, if other than an individual, shall, within thirty (30) days after award of the Contract (unless a longer period is agreed to in writing for contracts of thirty (30) days or more performance duration), or as soon as possible for contracts of less than thirty (30) days performance duration:

(1) Publish a statement notifying its employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the Contractor's workplace and specifying the actions that will be taken against employees for violations of such prohibition;

(2) Establish an ongoing drug-free awareness program to inform such employees about:

(i) The dangers of drug abuse in the workplace;

(ii) The Contractor's policy of maintaining a drug-free workplace;

(iii) Any available drug counseling, rehabilitation, and employee assistance programs; and

(iv) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace.

(3) Provide all employees engaged in performance of this Contract with a copy of the statement required by paragraph (b)(1) of this paragraph;

(4) Notify such employees in writing in the statement required by paragraph (b)(1) of this clause that, as a condition of continued employment on this Contract, the employee will:

(i) Abide by the terms of the statement; and

(ii) Notify the employer in writing of the employee's conviction under a criminal drug statute for a violation occurring in the workplace no later than five (5) days after such conviction.

(5) Notify the Contracting Officer in writing within ten (10) days after receiving notice under subdivision (b)(4)(ii) of this paragraph, from an employee or otherwise receiving actual notice of such conviction. The notice shall include the position title of the employee;

(6) Within thirty (30) days after receiving notice under subdivision (b)(4)(ii) of this paragraph of a conviction, take one (1) of the following actions with respect to any employee who is convicted of a drug abuse violation occurring in the workplace:

(i) Taking appropriate personnel action against such employee, up to and including termination; or

(ii) Require such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency; and

(7) Make a good faith effort to maintain a drug-free workplace through implementation of paragraphs (b)(1) through (b)(6) of this paragraph.

(c) The Contractor, if an individual, agrees not to engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance while performing this Contract.

(d) In addition to other remedies available to the Authority, the Contractor's failure to comply with the requirements of paragraph (b) or (c) of this paragraph shall constitute a default under this Contract, and if federal funds are involved, may render the Contractor subject to suspension or debarment in accordance with FAR, part 9.4.

## **71. TOBACCO FREE WORKPLACE**

Tobacco products: Tobacco products include cigarettes, cigars, pipes, snuff, snus, chewing tobacco, smokeless tobacco, dipping tobacco and any other non-FDA approved nicotine delivery device.

Capital Metro Property: The tobacco free workplace policy refers to all Capital Metro owned or leased property. Note that this includes all buildings, facilities, work areas, maintenance facilities, parking areas and all Authority owned vehicles.

(a) Tobacco use is not permitted at any time on the Work Site or Capital Metro owned or leased property, including personal vehicles parked in Capital Metro parking lots.

(b) Littering of tobacco-related products on the grounds or parking lots is also prohibited.

## **72. ORDER OF PRECEDENCE**

In the event of any inconsistency between the provisions of this Contract, the inconsistency shall be resolved by giving precedence in the following order:

1. **Exhibit A – Revised – 2, Pricing Schedule**
2. **Exhibit E – Revised – 5, Contractual Terms and Conditions**
3. **Exhibit E-1 Revised - 2– Addendum to Contractual Terms and Conditions, Federally Assisted**
4. **Exhibit F – Revised – 3, Scope of Services**
5. Plans, Drawings, Specifications
6. Exhibit G - Prevailing Wage Rates
7. **Exhibit B – Revised – 3, Representations and Certifications**
8. Exhibit B-1 – Buy America
9. Exhibit D – Disadvantaged Business Enterprise Program/DBE
10. Other provisions or attachments to the Contract

**73. HAZARDOUS MATERIALS**

(a) “Hazardous Materials” means any element, chemical, compound, material or substance, whether solid, liquid or gaseous, which at any time is defined, listed, classified or otherwise regulated in any way under any Environmental Laws, or any other such substances or conditions (including mold and other mycotoxins or fungi) which may create any unsafe or hazardous condition or pose any threat to human health and safety. “Hazardous Materials” includes the following:

(1) Hazardous wastes, hazardous material, hazardous substances, hazardous constituents, and toxic substances or related materials, whether solid, liquid or gas, including substances defined as or included in the definition of “hazardous substance”, “hazardous waste”, “hazardous material”, “extremely hazardous waste”, “acutely hazardous waste”, “radioactive waste”, “radioactive materials”, bio-hazardous waste”, “pollutant”, “toxic pollutant”, “contaminant”, “restricted hazardous waste”, “infectious waste”, “toxic substance”, “toxic waste”, “toxic material”, or any other term or expression intended to define, list or classify substances by reason of properties harmful to health, safety or the indoor or outdoor environment (including harmful properties such as ignitability, corrosivity, reactivity, carcinogenicity, toxicity, reproductive toxicity, “TCLP toxicity” or “EP toxicity” or words of similar import under any applicable Environmental Laws);

(2) Any petroleum, including crude oil and any fraction thereof, and including any refined petroleum product or any additive thereto or fraction thereof or other petroleum derived substance; and any waste oil or waste petroleum byproduct or fraction thereof or additive thereto;

(3) Any drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil, natural gas or geothermal resources;

(4) Any flammable substances or explosives;

(5) Any radioactive materials;

(6) Any asbestos or asbestos-containing materials;

(7) Any lead and lead-based paint;

(8) Any radon or radon gas;

(9) Any methane gas or similar gaseous materials;

(10) Any urea formaldehyde foam insulation;

(11) Electrical equipment which contains any oil or dielectric fluid containing regulated levels of polychlorinated biphenyls;

(12) Pesticides;

(13) Any other chemical, material or substance, exposure to which is prohibited, limited or regulated by any governmental entity or which may or could pose a hazard to the health and safety of the owners, operators, users or any persons in the vicinity of the Premises or to the indoor or outdoor environment;

(14) Those substances listed in the United States Department of Transportation Table (49 C.F.R. 172.101, as amended); and

(15) Soil, or surface water or ground water, contaminated with Hazardous Materials as defined above.

(b) "Release of Hazardous Materials" means any spill, leak, emission, release, discharge, injection, escape, leaching, dumping or disposal of Hazardous Materials into the soil, air, water, groundwater or environment, including any exacerbation of an existing release or condition of Hazardous Materials contamination.

(c) "Best Management Practices" has the meaning set forth in Storm Water Management for Construction Activities: Developing Pollution Prevention Plans and Best Management Practices (EPA Document 832 R 92-005).

(d) Neither the Contractor, nor any of the Contractor's agents, Subcontractors, employees, Contractors or invitees, shall at any time handle, use, manufacture, store or dispose of in or about the Work Site ("Premises") any Hazardous Materials. Contractor shall notify the Authority of any Release of Hazardous Materials within six (6) hours of discovering any such Release of Hazardous Materials. Contractor agrees to abide by Best Management Practices. Contractor shall protect, defend, indemnify and hold the Authority harmless from and against any and all loss, claims, liability or costs (including court costs and attorneys' fees) incurred by reason of any actual or asserted failure of Contractor to fully comply with all applicable Environmental Laws, or the presence, handling, use or disposition in or from the Premises of any Hazardous Materials, or by reason of any actual or asserted failure of Contractor to keep, observe, or perform any provision of this paragraph. The provisions of this paragraph shall survive termination of this Contract.

(e) No Hazardous Materials shall be kept, stored, used or discharged on the Premises. Licensee shall comply strictly with all applicable Federal, State and local laws, ordinances, rules and regulations regarding Hazardous Materials, and shall indemnify, defend and hold Licensor harmless from and against any and all liability arising from Licensee's use, storage, or discharge of Hazardous Materials on the Premises or Release of Hazardous Materials. The provisions of this paragraph shall survive termination of this Contract.

(f) Neither the Contractor, nor any of the Contractor's agents, Subcontractors, employees, or invitees shall at any time handle, use, manufacture, store or dispose of in or about the Work Site any flammables, explosives, radioactive materials, hazardous wastes or materials, toxic wastes or materials, or other similar substances, petroleum products or derivatives, or any substance (collectively, "Hazardous Material") subject to regulation by or under any federal, state and local laws and ordinances relating to the protection of the environment or the keeping, use or disposition of environmentally hazardous materials, substances, or wastes, presently in effect or hereafter adopted, all amendments to any of them, and all rules and regulations issued pursuant to any of such laws or ordinances (collectively "Environmental Laws"). The Contractor shall indemnify and hold the Authority harmless from and against any and all loss, claims, liability or costs (including court costs and attorneys' fees) incurred by reason of any actual or asserted failure of the Contractor to fully comply with all applicable Environmental Laws, or the presence, handling, use or disposition in or from the Premises of any Hazardous Materials, or by reason of any actual or asserted failure of Contractor to keep, observe, or perform any provision of this paragraph. The provisions of this paragraph shall survive termination of this Contract.



**74. ENVIRONMENTAL LAW**

“Environmental Law” means any Law applicable to Contractor or the Work regulating or imposing liability or standards of conduct that pertains to the environment. Hazardous Materials, contamination or any type whatsoever, or environmental health and safety matters, and any lawful requirements and standards that pertain to the environment. Hazardous Materials, contamination or any type whatsoever, or environmental health and safety matters set forth in any permits, licenses, approvals, plans, rules, regulations or ordinances adopted, or other criteria and guidelines promulgated, pursuant to laws applicable to Contractor or the Work, as such have been or are amended, modified, or supplemented from time to time (including any present and future amendments thereto and reauthorizations thereof) including those related to:

- (a) The manufacture, processing, use, distribution, existence, treatment, storage, disposal, generation and transportation of Hazardous Materials;
- (b) Air, soil, surface and subsurface strata, stream sediments, surface water, and groundwater;
- (c) Releases of Hazardous Materials;
- (d) Protection of wildlife, Threatened or Endangered Species, sensitive species, wetlands, water courses and water bodies, historical, archeological, and paleontological resources, and natural resources;
- (e) The operation and closure of underground storage tanks;
- (f) Safety of employees and other persons; and
- (g) Notification, documentation and record keeping requirements relating to the foregoing.
- (h) Without limiting the above, the term “Environmental Laws” shall also include the following:
  - (1) The National Environmental Policy Act (42 U.S.C. §§4321 et. seq.), as amended;
  - (2) The Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §§9601 et. seq.), as amended;
  - (3) The Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (42 U.S.C. §§6901 et. seq.);
  - (4) The Emergency Planning and Community Right to Know Act of 1986 (42 U.S.C. §§1101 et. seq.), as amended;
  - (5) The Clean Air Act (42 U.S.C. §§7401 et. seq.), as amended;
  - (6) The Federal Water Pollution Control Act, as amended by the Clean Water Act (33 U.S.C. §§1251 et. seq.);
  - (7) The Resource Conservation and Recovery Act (42 U.S.C. §§6901, et. seq.), as amended;
  - (8) The Toxic Substances Control Act (15 U.S.C. §§2601 et. seq.), as amended;
  - (9) The Hazardous Materials Transportation Act (49 U.S.C. §§1801 et. seq.), as amended;
  - (10) The Oil Pollution Act (33 U.S.C. §§2701, et. seq.), as amended;
  - (11) The Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. §§136 et. seq.), as amended;

- (12) The Federal Safe Drinking Water Act (42 U.S.C. et. seq.), as amended;
- (13) The Federal Radon and Indoor Air Quality Research Act (42 U.S.C. §§7401 et sea.), as amended;
- (14) The Occupational Safety and Health Act (29 U.S.C. §§651 et seq.);
- (15) The Endangered Species Act (16 U.S.C. §§1531 et. seq.), as amended;
- (16) The Fish and Wildlife Coordination Act (16 U.S.C. §§661 et. seq.), as amended;
- (17) The National Historic Preservation Act (16 U.S.C. §§470 et. seq.), as amended;
- (18) The Coastal Zone Management Act (33 U.S.C. §§1451 et. seq.), as amended;
- (19) The Texas Health and Safety Code, including Chapter 382 (the Clean Air Act), Chapter 383 (the Clean Air Financing Act), Chapter 361 (the Texas Solid Waste Disposal Act), Chapter 362 (the Solid Waste Resource Recovery Financing Act), Chapter 363 (the Municipal Solid Waste Act), Chapter 364 (the County Solid Waste Control Act), Chapter 370 (the Texas Toxic Chemical Release Reporting Act), Chapter 371 (the Texas Used Oil Collection, Management, and Recycling Act), Chapter 401 (the Texas Radioactive Materials and Other Sources of Radiation Act), Chapter 402 (the Texas Low-Level Radioactive Waste Disposal Authority Act), Chapter 502 (the Texas Hazard Communication Act), Chapter 505 (the Texas Manufacturing Project Community Right-To-Know Act), Chapter 506 (the Texas Public Employer Community Right-To-Know Act), and Chapter 507 (the Texas Non-manufacturing Facilities Community Right-To-Know Act);
- (20) The Texas Natural Resources Code, including Chapter 40 (the Texas Oil Spill Prevention and Response Act of 1991);
- (21) The Texas Water Code;
- (22) The Texas Parks and Wildlife Code;
- (23) The Texas Agriculture Code, including Chapter 76 (Pesticide and Herbicide Regulation) and Chapter 125 (the Agricultural Hazard Communication Act);
- (24) The Texas Asbestos Health Protection Act (Texas Occupations Code, Chapter 1954); and
- (25) The Surface Coal Mining and Reclamation Act (Texas Natural Resources Act, Chapter 134).

**75. ORGANIZATIONAL CONFLICT OF INTEREST (“OCI”)**

(a) This Contract may task the Contractor to prepare or assist in preparing work statements that directly, predictably and without delay are used in future competitive acquisitions. The parties recognize that by the Contractor providing this support a potential conflict of interest arises.

(b) For the purposes of this clause, the term “Contractor” means the Contractor, its subsidiaries and affiliates, joint ventures involving the Contractor, any entity with which the Contractor may hereafter merge or affiliate and any other successor or assignee of the Contractor.

(c) The Contractor acknowledges the full force and effect of this paragraph. It agrees to be bound by its terms and conditions and understands that violation of this clause may, in the judgment of the Contracting Officer, be cause for Termination for Default. The Contractor also acknowledges that this does not represent the sole and exclusive remedy available to the Authority in the event the Contractor breaches this or any other Organizational Conflict of Interest paragraph.

**76. RECORD RETENTION; ACCESS TO RECORDS AND REPORTS**

(a) The Contractor will retain, and will require its Subcontractors of all tiers to retain, complete and readily accessible records related in whole or in part to the Contract, including, but not limited to, data, documents, reports, statistics, sub-agreements, leases, subcontracts, arrangements, other third party agreements of any type, and supporting materials related to those records.

(b) If this is a cost-reimbursement, incentive, time and materials, labor hour, or price determinable Contract, or any combination thereof, the Contractor shall maintain, and the Authority and its representatives shall have the right to examine, all books, records, documents, and other evidence and accounting procedures and practices sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this Contract.

(c) If the Contractor submitted certified cost or pricing data in connection with the pricing of this Contract or if the Contractor's cost of performance is relevant to any change or modification to this Contract, the Authority and its representatives shall have the right to examine all books, records, documents, and other data of the Contractor related to the negotiation, pricing, or performance of such Contract, change, or modification for the purpose of evaluating the costs incurred and the accuracy, completeness, and currency of the cost or pricing data submitted. The right of examination shall extend to all documents necessary to permit adequate evaluation of the costs incurred and the cost or pricing data submitted, along with the computations and projections used therein.

(d) The Contractor shall maintain all books, records, accounts and reports required under this paragraph for a period of at not less than three (3) years after the date of termination or expiration of this Contract, except in the event of litigation or settlement of claims arising from the performance of this Contract, in which case records shall be maintained until the disposition of all such litigation, appeals, claims or exceptions related thereto.

(e) The Contractor agrees to provide sufficient access to the Authority and its contractors to inspect and audit records and information related to performance of this Contract as reasonably may be required.

(f) The Contractor agrees to permit the Authority and its contractors access to the sites of performance under this Contract as reasonably may be required.

(g) If an audit pursuant to this paragraph reveals that the Authority has paid any invoices or charges not authorized under this Contract, the Authority may offset or recoup such amounts against any indebtedness owed by it to the Contractor, whether arising under this Contract or otherwise, over a period of time equivalent to the time period over which such invoices or charges accrued.

This Paragraph will survive any termination or expiration of this Contract.

**77. ANTI-CORRUPTION AND BRIBERY LAWS**

The Contractor shall comply with all Applicable Anti-Corruption and Bribery Laws. The Contractor represents and warrants that it has not and shall not violate or cause the Authority to violate any such Anti-Corruption and Bribery Laws. The Contractor further represents and warrants that, in connection with supplies or services provided to the Authority or with any other business transaction involving the Authority, it shall not pay, offer, promise, or authorize the payment or transfer of anything of value, directly or indirectly to: (a) any government official or employee (including employees of government owned or controlled companies or public international organizations) or to any political party, party official, or candidate for public office or (b) any other person or entity if such payments or transfers would violate applicable laws, including Applicable Anti-Corruption and Bribery Laws. Notwithstanding anything to the contrary herein contained, the Authority may withhold payments under this Contract, and terminate this Contract immediately by way of written notice to the Contractor, if it believes, in good faith, that the Contractor has violated or caused the Authority to violate

the Applicable Anti-Corruption and Bribery Laws. The Authority shall not be liable to the Contractor for any claim, losses, or damages related to its decision to exercise its rights under this provision.

**78. MISCELLANEOUS**

(a) This Contract does not intend to, and nothing contained in this Contract shall create any partnership, joint venture or other equity type agreement between the Authority and the Contractor.

(b) All notices, statements, demands, requests, consents or approvals required under this Contract or by law by either party to the other shall be in writing and may be given or served by depositing same in the United States mail, postage paid, registered or certified and addressed to the party to be notified, with return receipt requested; by personally delivering same to such party; an agent of such party; or by overnight courier service, postage paid and addressed to the party to be notified; or by e-mail with delivery confirmation. Notice deposited in the U.S. mail in the manner hereinabove described shall be effective upon such deposit. Notice given in any other manner shall be effective only if and when received by the party to be notified.

**If to the Contractor:** As set forth in **Exhibit B-Revised-3** to this Contract

**If to the Authority:**

Capital Metropolitan Transportation Authority  
Attn: Sr. Director/Chief Contracting Officer  
2910 E. 5th Street  
Austin, Texas 78702

Address for notice can be changed by written notice to the other party.

(c) In the event the Authority finds it necessary to employ legal counsel to enforce its rights under this Contract, or to bring an action at law, or other proceeding against the Contractor to enforce any of the terms, covenants or conditions herein, the Contractor shall pay to the Authority its reasonable attorneys' fees and expenses, regardless of whether suit is filed.

(d) If any term or provision of this Contract or any portion of a term or provision of this Contract or the application thereof to any person or circumstance shall, to any extent, be void, invalid or unenforceable, the remainder of this Contract will remain in full force and effect unless removal of such invalid terms or provisions destroys the legitimate purpose of the Contract in which event the Contract will be terminated.

(e) This Contract represents the entire agreement between the parties concerning the subject matter of this Contract and supersedes any and all prior or contemporaneous oral or written statements, agreements, correspondence, quotations and negotiations. In executing this Contract, the parties do not rely upon any statement, promise, or representation not expressed herein. This Contract may not be changed except by the mutual written agreement of the parties.

(f) A facsimile signature shall be deemed an original signature for all purposes. For purposes of this paragraph, the phrase "facsimile signature" includes without limitation, an image of an original signature.

(g) Whenever used herein, the term "including" shall be deemed to be followed by the words "without limitation". Words used in the singular number shall include the plural, and vice-versa, and any gender shall be deemed to include each other gender. All Exhibits attached to this Contract are incorporated herein by reference.

(h) All rights and remedies provided in this Contract are cumulative and not exclusive of any other rights or remedies that may be available to the Authority, whether provided by law, equity, statute, or otherwise.

The election of any one or more remedies the Authority will not constitute a waiver of the right to pursue other available remedies.

(i) The Contractor shall not assign the whole or any part of this Contract or any monies due hereunder without the prior written consent of the Contracting Officer. No assignment shall relieve Contractor from any of its obligations hereunder. Any attempted assignment, transfer or other conveyance in violation of the foregoing shall be null and void.

(j) The failure of the Authority to insist upon strict adherence to any term of this Contract on any occasion shall not be considered a waiver or deprive the Authority thereafter to insist upon strict adherence to that term or other terms of this Contract. Furthermore, the Authority is a governmental entity and nothing contained in this Contract shall be deemed a waiver of any rights, remedies or privileges available by law.

(k) This Contract shall be governed by and construed in accordance with the laws of the State of Texas. Any dispute arising with respect to this Contract shall be resolved in the state or federal courts of the State of Texas, sitting in Travis County, Texas and the Contractor expressly consents to the personal jurisdiction of these courts.

(l) This Contract is subject to the Texas Public Information Act, Tex. Gov't Code, Chapter 552.

(m) The Contractor represents, warrants and covenants that: (a) it has the requisite power and authority to execute, deliver and perform its obligations under this Contract; and (b) it is in compliance with all applicable laws related to such performance.

(n) The person signing on behalf of the Contractor represents for himself or herself and the Contractor that he or she is duly authorized to execute this Contract.

(o) No term or provision of this Contract is intended to be, or shall be, for the benefit of any person, firm, organization, or corporation for a party hereto, and no such other person, firm, organization or corporation shall have any right or cause of action hereunder.

(p) Capital Metro is a governmental entity and nothing in this Contract shall be deemed a waiver of any rights or privileges under the law.

(q) Funding for this Contract after the current fiscal year is subject to revenue availability and appropriation of funds in the annual budget approved by the Authority's Board of Directors.

(r) Time is of the essence for all delivery, performance, submittal, and completion dates in this Contract.

## **79. DRUG AND ALCOHOL TESTING PROGRAM**

(a) The Authority and its contractors and subcontractors are required to comply with the requirements of 49 C.F.R. Part 219 with no exceptions. Contractor has established and implemented, or agrees to establish and implement, and cause its applicable subcontractors to establish and implement, a drug and alcohol testing program for regulated employees (including volunteers, employees and probationary employees) whose duties include inspection, construction, maintenance or repair of roadway track; bridges, roadway, signal and communications systems, electric traction systems, roadway facilities or roadway maintenance machinery on or near track or with the potential of fouling a tack and flagmen and watchmen/lookouts ("Part 219 employees") that complies with 49 C.F.R. Part 219, produce any documentation necessary to establish its compliance with Part 219, and permit any authorized representative of the United States Department of Transportation or the Federal Railroad Administration ("FRA") and the Authority to inspect the facilities and records associated with the implementation and operation of the drug and alcohol testing program as required under 49 C.F.R. Part 219, including the review of the testing process.

(b) **Prior to the performance of any work under the Contract by any Part 219 employees on or**

**after June 12, 2017**, the Contractor shall furnish the Authority, and cause each subcontractor that provides part 219 employees to perform work under the Contract to furnish the Authority, with copies of all supporting compliance documentation including but not limited to the following:

- (1) A copy of the Contractor's 49 C.F.R. Part 219 Railroad Contractor Compliance Plan.
- (2) A copy of the Federal Railroad Administration's acceptance letter for 49 C.F.R. Part 219 Railroad Contractor Compliance Plan.
- (3) A certified list of the Contractor's Part 219 grandfathered employees (June 12, 2017).
- (4) A certified list of employees who are currently regulated by 49 C.F.R. Part 219 Railroad Contractor Compliance Plan Part 219.
- (5) Copies of the employees DOT 40-25 previous employer drug and alcohol record covered by 49 C.F.R. Part 219 Railroad Contractor Compliance Plan.
- (6) Updated list of the Contractor's employees when an employee status has changed or employee becomes ineligible, along with an updated certification required in subparagraph (4).
- (7) Rule G Observations when requested by the Authority.
- (8) Management Information System Report (MIS) each six (6) months.

Access to the work site will be prohibited to employees not named in the certified list required by subsections (4) and (6).

(c) Upon notice to the Contractor, Capital Metro may require the Contractor and any Subcontractor providing Part 219 employees to use a third-party compliance provider to track the Contractor's Part 219 compliance. If the Contractor or any of its Subcontractors fails to utilize such required compliance provider or an approved equivalent as required, then the Authority may suspend the Contractor's performance under this Contract and/or pursue default remedies under this Contract. The Authority reserves the right to change the required third-party compliance provider upon notice to the Contractor. In the event that Capital Metro requires the Contractor to use a third-party compliance service, any costs of the required service will be reimbursed by Capital Metro provided the Contractor follows the following reimbursement procedure: the Contractor shall provide the estimated costs of the compliance service within fourteen (14) calendar days following Capital Metro's notice to the Contractor of the adoption of a third-party compliance provider requirement and Contractor shall not incur any costs until a subsequent Contract Modification is fully executed.

(d) The Contractor shall provide the Authority with a list of the names of any Subcontractors performing Part 219 services, along with a certified list of the employees assigned by the Subcontractor to perform work under the Contract, at least ten (10) calendar days prior to the time a Subcontractor or its Part 219 employees enters the work site. The Contractor and each Subcontractor shall be solely responsible for their compliance with 49 C.F.R. Part 219.

(e) The Contractor shall include the substance of subparagraphs (a)-(e) of this clause, in each applicable subcontract under this Contract.

(f) If the Authority discovers that the Contractor or any of its Subcontractors are not in compliance with the requirements of 49 C.F.R. Part 219, the Authority may suspend the Contractor's performance under this Contract and/or pursue default remedies under this Contract.

**80. EQUAL OPPORTUNITY**

During the performance of this Contract, the Contractor agrees that it will, in good faith, afford equal opportunity required by applicable federal, state, or local law to all employees and applicants for employment without regard to race, color, religion, sex, national origin, disability or any other characteristic protected by federal, state or local law.

**81. CONTRACTOR CERTIFICATION**

The Contractor certifies that the fees in this Agreement have been arrived at independently without consultation, communication, or agreement for the purpose of restricting competition, as to any matter relating to such fees with any other firm or with any competitor.

**82. FUNDING AVAILABILITY**

Funding after the current fiscal year of any contract resulting from this solicitation is subject to revenue availability and appropriation of funds in the annual budget approved by the Authority's Board of Directors.

**~~83. COOPERATIVE CONTRACT~~**

~~(a) The Authority has entered into a master cooperative purchasing agreement with other governmental entities (with the Authority, the "Cooperative Members") to form the Texas Interlocal Purchase Cooperative, under which the Cooperative Members grant access and make available to one another certain contracts of the Cooperative Members, pursuant to the Interlocal Cooperation Act, Chapter 791 of the Texas Government Code and Chapter 271 of the Local Government Code. The Contractor agrees to offer to other eligible Cooperative Members the goods and services provided under this Contract with the same prices, and under terms and conditions, of this Contract.~~

~~(b) The Authority does not accept any responsibility or liability arising from or related to a separate contract between another Cooperative Member and Contractor based on this Contract or for any purchases made thereunder.~~

**~~84. AUSTIN TRANSIT PARTNERSHIP~~**

~~At the direction of Capital Metro, the services provided under the Contract may be performed on behalf of or in connection with Austin Transit Partnership (ATP), and ATP's projects, initiatives, and proposals.~~