

**THIS STAFF REPORT COVERS CALENDAR ITEM NO.: 9**  
**FOR THE MEETING OF:** September 10, 2009

## **TRANSBAY JOINT POWERS AUTHORITY**

### **BRIEF DESCRIPTION:**

Authorize the Executive Director to execute a Professional Services Agreement with Enovity, Inc. to provide commissioning agent services for the Transbay Transit Center for a term extending to June 30, 2016 and at a cost not to exceed \$762,196.

### **EXPLANATION:**

The TJPA issued a Request for Proposals (RFP) on June 19, 2009, for a Commissioning Agent for the New Transbay Transit Center from qualified firms with expertise in transit facility certification and Leadership in Energy and Environmental Design (LEED) Commissioning credits. The primary role of the Commissioning Agent will be to develop and coordinate the execution of a testing plan, and observe and document performance of whether the systems are installed and functioning in accordance with the contract documents.

During the design phase, the Commissioning Agent will prepare a Commissioning Plan for the Transit Center Building project identifying which systems, subsystems, and equipment are to be subject to the commissioning process and defining the activities included in the commissioning process, team members' roles and responsibilities, scheduling parameters, and all other process-related issues. The Commissioning Agent will conduct commissioning design reviews of the Owner's Project Requirements (OPR), Basis of Design (BOD), and design documents prior to mid-point of the construction documents phase and back-check the review comments in subsequent design submissions. The Commissioning Agent will also prepare a Commissioning Specification section for the project contract documents defining the installation contractors' and subcontractors' responsibilities in the commissioning process.

During the construction phase, the Commissioning Agent will review contractor submittals for systems being commissioned for compliance with the OPR and BOD, develop a systems manual to provide future operating staff the information needed to understand and optimally operate commissioned systems, verify that operating personnel and building occupants receive required training, work with the Construction Manager/General Contractor (CM/GC) and the TJPA to coordinate all testing and inspecting of commissioned systems, and compile a Commissioning Report documenting the satisfactory completion of the commissioning process and training including all appropriate records, exceptions and recommendations.

During the warranty phase the Commissioning Agent will complete all required documentation for facility certification and for LEED Energy & Atmosphere Prerequisite Fundamental Commissioning and Enhanced Commissioning and shall participate in reviewing building operation with O&M staff and occupants within 10 months after substantial completion, including a plan for resolution of outstanding commissioning-related issues including any seasonal or deferred testing that might be required.

On August 14, 2009, the TJPA received six proposals in response to the RFP. A Selection Committee reviewed and scored the written proposals for technical merit, and interviews were

conducted with three shortlisted firms. The Selection Committee Report is attached. The Selection Committee determined that the firm of Enovity was well qualified to perform the required services and was most responsive to the RFP.

The attached contract was subsequently negotiated.

The contract would be for a maximum of \$762,196 for the term through June 30, 2016. The Commissioning Agent has developed a schedule of values for the work through the design, construction, and warranty phases and developed projections of the level of effort for each year based on the current project design and construction schedule. Funding for this contract has been allocated in a Regional Measure 2 allocation.

Enovity is a Small Business Enterprise certified by the State of California Department of General Services. Three subcontractors are also proposed, one of whom is a certified Disadvantaged Business Enterprise. Thus total committed SBE participation on this contract is 90 percent, significantly higher than the 5 percent SBE goal that was published in the RFP.

**RECOMMENDATION:**

Staff recommends that the Board of Directors authorize the Executive Director to execute a Professional Services Agreement with Enovity, Inc. to provide commissioning agent services for the Transbay Transit Center for a term extending to June 30, 2016 and at a cost not to exceed \$762,196.

**ENCLOSURES:**

1. Resolution
2. Agreement
3. Selection Committee Report

**TRANSBAY JOINT POWERS AUTHORITY  
BOARD OF DIRECTORS**

**Resolution No. \_\_\_\_\_**

WHEREAS, The Transbay Joint Powers Authority (TJPA) desires to contract with a qualified and experienced firm for Commissioning Agent Services (Services) including development, coordination, and documentation of functional performance testing of the systems in the new Transbay Transit Center; and

WHEREAS, On June 19, 2009, the TJPA issued a Request for Proposals (RFP) for the Services; and

WHEREAS, The TJPA received six responses to the RFP that met all minimum requirements; and

WHEREAS, A Selection Committee ranked the firm of Enovity, Inc. as highest and found that the firm was responsive to the RFP and well qualified to perform the scope of services in a cost-effective manner; and

WHEREAS, TJPA has negotiated the attached agreement with Enovity providing for a term through June 30, 2016 and compensation not to exceed \$762,196; now, therefore, be it

RESOLVED, That the TJPA Board of Directors authorizes the Executive Director to execute a Professional Services Agreement with Enovity, Inc. to provide commissioning agent services for the Transbay Transit Center for a term extending to June 30, 2010 and at a cost not to exceed \$762,196.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of September 10, 2009.

\_\_\_\_\_  
Secretary, Transbay Joint Powers Authority

## PROFESSIONAL SERVICES AGREEMENT

THIS AGREEMENT ("Agreement") is entered into as of the \_\_\_\_\_ day of \_\_\_\_\_ 2009, by and between the TRANSBAY JOINT POWERS AUTHORITY ("TJPA") and ENOVITY, INC. ("Contractor").

### Recitals

A. The TJPA requires a Commissioning Agent for the New Transbay Transit Center ("Services") for the Transbay Transit Center Program ("Program").

B. The Contractor submitted a written proposal ("Proposal") in response to the TJPA's Request for Proposals ("RFP"). Based on that Proposal, the TJPA's selection committee determined the Contractor to be the highest-ranked respondent to the RFP and the TJPA invited the Contractor for exclusive negotiations. This Agreement is the product of those negotiations.

C. The Contractor represents and warrants that it is qualified to perform the Services required by this Agreement as set forth in Appendix A ("Scope of Services").

D. The TJPA and the Contractor intend that this Agreement comply with the regulations of the Federal Transit Administration of the United States Department of Transportation ("FTA") and certain contracting requirements of the City and County of San Francisco (the "City").

E. On September 10, 2009, the TJPA Board of Directors adopted Resolution No. \_\_\_\_\_ authorizing the TJPA's Executive Director to execute this Agreement with the Contractor for the Services.

Now, THEREFORE, the parties agree as follows:

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

Charges under this Agreement will accrue only after prior written authorization certified by the TJPA's Finance Coordinator. The amount of the TJPA's obligation hereunder shall not at any time exceed the amount certified for the purpose and period stated in such advance authorization.

This Agreement will terminate without penalty, liability or expense of any kind to the TJPA at the end of any fiscal year if funds are not appropriated for the next succeeding fiscal year. If funds are appropriated for a portion of the fiscal year, this Agreement will terminate, without penalty, liability or expense of any kind at the end of the fiscal year for which funds are appropriated.

The TJPA has no obligation to make appropriations for this Agreement in lieu of appropriations for new or other agreements or Program costs. The TJPA's budget decisions are subject to the discretion of the TJPA Board of Directors. The Contractor's assumption of risk of possible non-appropriation is part of the consideration for this Agreement.

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

### 2. Term of the Agreement

Subject to Section 1, the term of this Agreement shall be from the Effective Date of the Agreement, as described in Section 3 below, to June 30, 2016.

### 3. Effective Date of Agreement

This Agreement shall become effective when the Finance Coordinator has certified to the availability of funds for the first notice to proceed ("NTP") and the Contractor has been notified in writing

via an NTP.

#### **4. Services Contractor Agrees to Perform**

The Contractor agrees to perform the services listed in Appendix A, Scope of Services, attached to this Agreement and incorporated here by reference as though fully set forth. The TJPA shall authorize work for specific period and group of activities by separate Notices To Proceed (NTPs). Each NTP shall relate to a specified part of the services, and shall include a not-to-exceed maximum price and duration for the specified scope. No NTP can be amended, except in writing and signed by an authorized representative of the TJPA.

To minimize the potential for a conflict of interest or unfair competitive advantage, the Contractor agrees that it shall not enter into a contract with any property owner with respect to any property that is planned for acquisition by the TJPA on Appendix C attached to this Agreement, and any properties that are subsequently added to this list.

#### **5. Compensation**

All work under this Agreement shall be compensated on a lump sum by schedule of values basis, subject to any maximum price set forth in a particular NTP (see the foregoing paragraph 4). In no event shall the total compensation under this Agreement exceed seven hundred sixty-two thousand, one hundred and ninety-six dollars (\$762,196). The breakdown of the Contractor's costs and fee appears in Appendix B, "Cost and Fee".

Hourly rates for services are to remain fixed during the entire contract period, except for 3% annual cost of living increases.

No charges shall be incurred under this Agreement nor shall any payments become due to the Contractor until the Services required under this Agreement are received from Contractor and approved by the Executive Director as being in accordance with this Agreement. The TJPA may withhold payment to the Contractor in any instance in which the Contractor has failed or refused to satisfy any material obligation provided for under this Agreement.

In no event shall the TJPA be liable for interest or late charges for any late payments.

#### **6. Guaranteed Maximum Costs**

a. The TJPA's obligation hereunder shall not at any time exceed the amount certified by the Finance Coordinator for the purpose and period stated in such certification, or the maximum price set forth in an NTP with respect to the work covered under that NTP.

b. Except as may be provided by laws governing emergency procedures, officers and employees of the TJPA are not authorized to request, and the TJPA is not required to reimburse the Contractor for, commodities or services in excess of the price set forth in an NTP and in excess of the total compensation under this Agreement as stated in Section 5, unless the changed scope is authorized by written amendment and approved as required by law.

c. Officers and employees of the TJPA are not authorized to offer or promise, nor is the TJPA required to honor, any offered or promised additional funding in excess of the maximum amount of funding for which the contract or NTP is certified without certification of the additional amount by the Finance Coordinator.

d. The Finance Coordinator is not authorized to make payments on any contract or NTP for which funds have not been certified as available in the budget or by supplemental appropriation.

#### **7. Payment**

Invoices furnished by the Contractor under this Agreement must be in a form acceptable to the TJPA and must include a unique invoice number. Invoices shall include the first and last day of a calendar month and be submitted within thirty (30) days of the end of said calendar month. Contractor must submit required DBE Progress Payment Reports with every invoice. All amounts paid to the Contractor shall be subject to audit by the TJPA.

The TJPA shall make payment to the Contractor at the address specified in the Section entitled "Notices to the Parties".

## **8. Submitting False Claims; Monetary Penalties**

Pursuant to San Francisco Administrative Code Chapter 6, Article V, any Contractor, subcontractor, or consultant who submits a false claim shall be liable to the TJPA for three times the amount of damages which the TJPA sustains because of the false claim. A Contractor, subcontractor or consultant who submits a false claim shall also be liable to the TJPA for the costs, including attorney's fees, of a civil action brought to recover any of those penalties or damages, and may be liable to the TJPA for a civil penalty of up to \$10,000 for each false claim. A Contractor, subcontractor or consultant will be deemed to have submitted a false claim to the TJPA if the Contractor, subcontractor or consultant (a) knowingly presents or causes to be presented to an officer or employee of the TJPA a false claim or request for payment or approval; (b) knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the TJPA; (c) conspires to defraud the TJPA by getting a false claim allowed or paid by the TJPA; (d) knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the TJPA; or (e) is a beneficiary of an inadvertent submission of a false claim to the TJPA, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the TJPA within a reasonable time after discovery of the false claim.

## **9. Disallowance**

If Contractor claims or receives payment from the TJPA for a service, reimbursement for which is later disallowed by the State of California or United States Government, the Contractor shall promptly refund the disallowed amount to the TJPA upon the TJPA's request. At its option, the TJPA may offset the amount disallowed from any payment due or to become due to Contractor under this Agreement or any other Agreement.

By executing this Agreement, the Contractor certifies that the Contractor is not suspended, debarred or otherwise excluded from participation in federal assistance programs. The Contractor acknowledges that this certification of eligibility to receive federal funds is a material term of the Agreement.

## **10. Taxes**

Payment of any taxes, including possessory interest taxes and California sales and use taxes, levied upon this Agreement, the transaction, or the services delivered pursuant hereto, shall be the obligation of the Contractor.

## **11. Payment Does Not Imply Acceptance of Work**

The granting of any payment by the TJPA, or the receipt thereof by the Contractor, shall in no way lessen the liability of the Contractor to correct or revise unsatisfactory work, even though the unsatisfactory character of such work may not have been apparent or detected at the time such payment was made.

## **12. Qualified Personnel**

The Contractor represents and warrants to the TJPA that the Contractor is qualified to perform the services as contemplated by this Agreement. The Contractor further represents and warrants to the TJPA that it has all required licenses and approvals to perform the work contemplated by this Agreement, and that all work performed under this Agreement shall be performed only by personnel under the supervision and in the employment of the Contractor. All personnel engaged in the work shall be fully qualified and shall be authorized, licensed and certified under state and local law to perform such work if authorization, licensing or certification is required. The persons performing professional services under this Agreement on behalf of the Contractor are shown in Appendix A attached hereto, and shall not be changed or substituted without the prior written consent of the TJPA, but all personnel, including those assigned at the TJPA's request, must be supervised by the Contractor. The Contractor shall commit adequate resources to complete the project within the project schedule specified in this Agreement.

### **13. Responsibility for Equipment**

The TJPA shall not be responsible for any damage to persons or property as a result of the use, misuse or failure of any equipment used by Contractor, or by any of its employees, even though such equipment be furnished, rented or loaned to Contractor by the TJPA.

### **14. Independent Contractor, Payment of Taxes and Other Expenses**

#### **a. Independent Contractor**

The Contractor or any agent or employee of Contractor shall be deemed at all times to be an independent contractor and is wholly responsible for the manner in which it performs the services and work requested by the TJPA under this Agreement. The Contractor or any agent or employee of the Contractor shall not have employee status with the TJPA, nor be entitled to participate in any plans, arrangements, or distributions by the TJPA pertaining to or in connection with any retirement, health or other benefits that the TJPA may offer its employees. The Contractor or any agent or employee of the Contractor is liable for the acts and omissions of itself, its employees and its agents. The Contractor shall be responsible for all obligations and payments, whether imposed by federal, state or local law, including, but not limited to, Federal Insurance Contributions Act (FICA), income tax withholdings, unemployment compensation, insurance, and other similar responsibilities related to the Contractor's performing services and work, or any agent or employee of the Contractor providing same. Nothing in this Agreement shall be construed as creating an employment or joint venture relationship between the TJPA and the Contractor.

Any terms in this Agreement referring to direction from the TJPA shall be construed as providing for direction as to policy and the result of the Contractor's work only, and not as to the means by which such a result is obtained.

#### **b. Payment of Taxes and Other Expenses**

Should the TJPA, in its discretion, or a relevant taxing authority such as the Internal Revenue Service or the State Employment Development Division, or both, determine that the Contractor is an employee for purposes of collection of any employment taxes, the amounts payable under this Agreement shall be reduced by amounts equal to both the employee and employer portions of the tax due (and offsetting any credits for amounts already paid by the Contractor which can be applied against this liability). The TJPA shall then forward those amounts to the relevant taxing authority.

Should a relevant taxing authority determine a liability for past services performed by the Contractor for the TJPA, upon notification of such fact by the TJPA, the Contractor shall promptly remit such amount due or arrange with the TJPA to have the amount due withheld from future payments to the Contractor under this Agreement (again, offsetting any amounts already paid by the Contractor which can be applied as a credit against such liability).

A determination of employment status pursuant to the preceding two paragraphs shall be solely for the

purposes of the particular tax in question, and for all other purposes of this Agreement, The Contractor shall not be considered an employee of the TJPA. Notwithstanding the foregoing, should any court, arbitrator, or administrative authority determine that the Contractor is an employee for any other purpose, then the Contractor agrees to a reduction in the TJPA's financial liability so that the TJPA's total expenses under this Agreement are not greater than they would have been had the court, arbitrator, or administrative authority determined that the Contractor was not an employee.

## 15. Insurance

a. Without in any way limiting the Contractor's other indemnification obligations under this Agreement, the Contractor must maintain in force, during the full term of the Agreement, insurance in the following amounts and coverages.

(1) If required under California law, Worker's Compensation, in statutory amounts, with Employers' liability limits not less than \$1,000,000 each accident, injury, or illness; and

(2) Commercial General Liability Insurance with limits not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Contractual Liability, Personal Injury, Products, and Completed Operations; and

(3) Business Automobile Liability Insurance with limits not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Owned, Non-Owned and Hired auto coverage, as applicable; and

(4) Professional Liability Insurance with limits not less than \$1,000,000 each claim, with respect to negligent acts, errors or omissions in connection with professional services to be provided under this Agreement.

b. Commercial General Liability and Business Automobile Liability Insurance policies must provide the following:

(1) Name as Additional Insured the TJPA, its members, directors, officers, agents, and employees.

(2) That such policies are primary insurance to any other insurance available to the Additional Insureds, with respect to any claims arising out of this Agreement, and that insurance applies separately to each insured against whom claim is made or suit is brought.

c. All policies shall provide thirty (30) days' advance written notice to the TJPA of reduction or nonrenewal of coverages or cancellation of coverages for any reason. Notices shall be sent to the address specified in the Section entitled "Notices to the Parties".

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

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

f. Should any required insurance lapse during the term of this Agreement, requests for payment originating after such lapse shall not be processed until the TJPA receives satisfactory evidence of reinstated coverage as required by this Agreement, effective as of the lapse date. If insurance is not



reinstated, the TJPA may, at its sole option, terminate this Agreement effective on the date of such lapse of insurance.

g. Before commencing any operations under this Agreement, the Contractor shall do the following: (a) furnish to the TJPA certificates of insurance and additional insured policy endorsements with insurers with ratings comparable to A-, VII or higher, that are authorized to do business in the State of California, and that are satisfactory to the TJPA, in form evidencing all coverages set forth above, and (b) furnish complete copies of policies promptly upon TJPA request. Failure to maintain insurance shall constitute a material breach of this Agreement.

h. Approval of the insurance by the TJPA shall not relieve or decrease the liability of the Contractor under this Agreement.

## **16. Indemnification**

### **a. General Indemnity**

To the fullest extent permitted by law, the Contractor shall assume the defense of, indemnify and save harmless the TJPA, its members, directors, officers, and employees (collectively "Indemnitees"), from any claim, loss, damage, injury (including, without limitation, injury to or death of an employee of the Contractor or its subconsultants) and liabilities of every kind, nature and description (including, without limitation, incidental and consequential damages, court costs, attorney's fees and costs of investigation), that arise directly or indirectly, in whole or in part, from (1) the services under this Agreement, or any part of such services, and (2) any negligent, reckless, or willful act or omission of the Contractor and subconsultant to the Contractor, anyone directly or indirectly employed by them, or anyone that they control (collectively, "Liabilities"), subject to the provisions set forth herein.

### **b. Limitations**

(1) No insurance policy covering the Contractor's performance under this Agreement shall operate to limit the Contractor's liability under this provision. Nor shall the amount of insurance coverage operate to limit the extent of such liability.

(2) The Contractor assumes no liability whatsoever for the sole negligence or willful misconduct of any Indemnitee or the contractors of any Indemnitee.

(3) The Contractor's indemnification obligations of claims involving "Professional Liability" (claims involving acts, errors or omissions in the rendering of professional services) and "Economic Loss Only" (claims involving economic loss which are not connected with bodily injury or physical damage to property) shall be limited to the extent of the Contractor's negligence or other breach of duty.

### **c. Copyright Infringement**

The Contractor shall also indemnify, defend and hold harmless all Indemnitees from all suits or claims for infringement of the patent rights, copyright, trade secret, trade name, trademark, service mark, or any other proprietary right of any person or persons in consequence of the use by the TJPA, or any of its members, directors, officers, or employees of articles or services to be supplied in the performance of the Contractor's services under this Agreement.

## **17. Incidental and Consequential Damages**

Contractor shall be responsible for incidental and consequential damages to the TJPA resulting in whole or in part from Contractor's acts or omissions. Nothing in this Agreement shall constitute a waiver or limitation of any rights that the TJPA may have under applicable law to seek a defense, indemnity, or damages for such acts or omissions.

## **18. Liability of TJPA**

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

## **19. Left blank by agreement of the parties**

## **20. Default; Remedies**

a. Each of the following shall constitute an event of default ("Event of Default") under this Agreement.

(1) Contractor fails or refuses to perform or observe any term, covenant or condition contained in any of the following Sections of this Agreement: Payment; Submitting False Claims, Monetary Penalties; Taxes; Insurance; Proprietary or Confidential Information of TJPA; Protection of Private Information; Assignment; Drug-Free Workplace; Compliance With Laws; FTA Requirements.

(2) Contractor fails or refuses to perform or observe any other term, covenant or condition contained in this Agreement, and such default continues for a period of ten (10) days after written notice thereof from TJPA to Contractor.

(3) The Contractor (a) is generally not paying its debts as they become due, (b) files, or consents by answer or otherwise to the filing against it of, a petition for relief or reorganization or arrangement or any other petition in bankruptcy or for liquidation or to take advantage of any bankruptcy, insolvency or other debtors' relief law of any jurisdiction, (c) makes an assignment for the benefit of its creditors, (d) consents to the appointment of a custodian, receiver, trustee or other officer with similar powers of the Contractor or of any substantial part of the Contractor's property, or (e) takes action for the purpose of any of the foregoing.

(4) A court or government authority enters an order (a) appointing a custodian, receiver, trustee or other officer with similar powers with respect to Contractor or with respect to any substantial part of the Contractor's property, (b) constituting an order for relief or approving a petition for relief or reorganization or arrangement or any other petition in bankruptcy or for liquidation or to take advantage of any bankruptcy, insolvency or other debtors' relief law of any jurisdiction, or (c) ordering the dissolution, winding-up or liquidation of the Contractor.

b. On and after any Event of Default, the TJPA shall have the right to exercise its legal and equitable remedies, including, without limitation, the right to terminate this Agreement or to seek specific performance of all or any part of this Agreement. In addition, the TJPA shall have the right (but no obligation) to cure (or cause to be cured) on behalf of the Contractor any Event of Default; the Contractor shall pay to the TJPA on demand all costs and expenses incurred by the TJPA in effecting such cure, with interest thereon from the date of incurrence at the maximum rate then permitted by law. The TJPA shall have the right to offset from any amounts due to Contractor under this Agreement or any other agreement between the TJPA and the Contractor all damages, losses, costs or expenses incurred by the TJPA as a result of such Event of Default and any liquidated damages due from the Contractor pursuant to the terms of this Agreement or any other agreement.

c. All remedies provided for in this Agreement may be exercised individually or in combination with any other remedy available hereunder or under applicable laws, rules and regulations. The exercise of any remedy shall not preclude or in any way be deemed to waive any other remedy.

## **21. Termination for Convenience**

a. The TJPA shall have the option, in its sole discretion, to terminate this Agreement, at any time during the term hereof, for convenience when it is in the TJPA's best interest, which best interest shall be determined at the TJPA's sole discretion. The TJPA shall exercise this option by giving the Contractor written notice of termination. The notice shall specify the date on which termination shall become effective.

b. Upon receipt of the notice, the Contractor shall commence and perform, with diligence, all actions necessary on the part of the Contractor to effect the termination of this Agreement on the date specified by the TJPA and to minimize the liability of the Contractor and the TJPA to third parties as a result of termination. All such actions shall be subject to the prior approval of the TJPA. Such actions shall include, without limitation:

(1) Halting the performance of all services and other work under this Agreement on the date(s) and in the manner specified by the TJPA.

(2) Not placing any further orders or subcontracts for materials, services, equipment or other items.

(3) Terminating all existing orders and subcontracts.

(4) At the TJPA's direction, assigning to the TJPA any or all of the Contractor's right, title and interest under the orders and subcontracts terminated. Upon such assignment, the TJPA shall have the right, in its sole discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts.

(5) Subject to the TJPA's approval, settling all outstanding liabilities and all claims arising out of the termination of orders and subcontracts.

(6) Completing performance of any services or work that the TJPA designates to be completed prior to the date of termination specified by the TJPA.

(7) Taking such action as may be necessary, or as the TJPA may direct, for the protection and preservation of any property related to this Agreement which is in the possession of the Contractor and in which the TJPA has or may acquire an interest.

c. Within thirty (30) days after the specified termination date, the Contractor shall submit to the TJPA an invoice, which shall set forth the reasonable cost to the Contractor for all services and other work the TJPA directed the Contractor to perform prior to the specified termination date, for which services or work the TJPA has not already tendered payment. The costs shall be determined as provided in Section 5, and shall be invoiced as provided in Section 7. The Contractor may also recover the reasonable cost of preparing the invoice.

d. In no event shall the TJPA be liable for costs incurred by the Contractor or any of its subcontractors after the termination date specified by the TJPA, except for those costs specifically enumerated and described in the immediately preceding subsection (c). Such non-recoverable costs include, but are not limited to, anticipated profits on this Agreement, post-termination employee salaries, post-termination administrative expenses, post-termination overhead or unabsorbed overhead, attorneys' fees or other costs relating to the prosecution of a claim or lawsuit, prejudgment interest, or any other expense which is not reasonable or authorized under such subsection (c).

e. In arriving at the amount due to the Contractor under this Section, the TJPA may deduct (1) all payments previously made by the TJPA for work or other services covered by the Contractor's final invoice; (2) any claim which the TJPA may have against the Contractor in connection with this Agreement; (3) any invoiced costs or expenses excluded pursuant to the immediately preceding subsection (d); and (4) in instances in which, in the opinion of the TJPA, the cost of any service or other

work performed under this Agreement is excessively high due to costs incurred to remedy or replace defective or rejected services or other work, the difference between the invoiced amount and the TJPA's estimate of the reasonable cost of performing the invoiced services or other work in compliance with the requirements of this Agreement.

f. The TJPA's payment obligation under this Section shall survive termination of this Agreement.

## **22. Rights and Duties Upon Termination or Expiration**

a. This Section and the following Sections of this Agreement shall survive termination or expiration of this Agreement: Submitting False Claims, Monetary Penalties; Disallowance; Taxes; Payment Does Not Imply Acceptance of Work; Responsibility for Equipment; Independent Contractor, Payment of Taxes and Other Expenses; Insurance; Indemnification; Incidental and Consequential Damages; Liability of TJPA; Proprietary or Confidential Information of TJPA; Protection of Private Information; Notices to the Parties; Ownership of Results; Works for Hire; Audit and Inspection of Records; Non-Waiver of Rights; Limitations on Contributions; Modification of Agreement; Administrative Remedy for Agreement Interpretation; Agreement Made in California, Venue; Construction; Entire Agreement; Severability; FTA Requirements; Prompt Payment of Subcontractors.

b. Subject to the immediately preceding subsection (a), upon termination of this Agreement prior to expiration of the term specified in Section 2, this Agreement shall terminate and be of no further force or effect. The Contractor shall transfer title to the TJPA, and deliver in the manner, at the times, and to the extent, if any, directed by the TJPA, any work in progress, completed work, supplies, equipment, and other materials produced as a part of, or acquired in connection with the performance of this Agreement, and any completed or partially completed work which, if this Agreement had been completed, would have been required to be furnished to the TJPA. This subsection shall survive termination of this Agreement.

## **23. Notices to the Parties**

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

To TJPA: Ms. Maria Ayerdi-Kaplan, Executive Director  
Transbay Joint Powers Authority  
201 Mission Street, Suite 2100  
San Francisco, CA 94105  
(415) 597-4615 fax  
[MAyerdi-Kaplan@TransbayCenter.org](mailto:MAyerdi-Kaplan@TransbayCenter.org)

To Contractor: Mr. Greg Cunningham, Principal  
Enovity, Inc.  
100 Montgomery, Suite 600  
San Francisco, CA 94104  
(415) 974-0399 fax  
[gcunningham@enovity.com](mailto:gcunningham@enovity.com)

Any notice of default must be sent by registered mail.

## **24. Proprietary or Confidential Information of the TJPA**

The Contractor understands and agrees that, in the performance of the work or services under the Agreement or in contemplation thereof, the Contractor may have access to private or confidential information which may be owned or controlled by the TJPA and that such information may contain proprietary or confidential details, the disclosure of which to third parties may be damaging to the TJPA. The Contractor agrees that all information disclosed by the TJPA to the Contractor shall be held in confidence and used only in performance of this Agreement. The Contractor shall exercise the same

standard of care to protect such information as a reasonably prudent contractor would use to protect its own proprietary data.

## **25. Protection of Private Information**

The Contractor agrees to comply fully with and be bound by all of the provisions of Chapter 12M of the San Francisco Administrative Code (the "Nondisclosure of Private Information Ordinance"), including the remedies provided. The provisions of the Nondisclosure of Private Information Ordinance are incorporated herein by reference and made a part of this Agreement as though fully set forth. Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in the Nondisclosure of Private Information Ordinance. Consistent with the requirements of the Nondisclosure of Private Information Ordinance, the Contractor agrees to all of the following:

a. Neither the Contractor nor any of its subcontractors shall disclose Private Information obtained from the TJPA or the City in the performance of this Agreement to any other subcontractor, person, or other entity, unless one of the following is true.

- (i) The disclosure is authorized by this Agreement;
- (ii) The Contractor received advance written approval from the TJPA to disclose the information; or
- (iii) The disclosure is required by law or judicial order.

b. Any disclosure or use of Private Information authorized by this Agreement shall be in accordance with any conditions or restrictions stated in this Agreement. Any disclosure or use of Private Information authorized by the TJPA shall be in accordance with any conditions or restrictions stated in the approval.

c. Private Information shall mean any information that (1) could be used to identify an individual, including without limitation, name, address, social security number, medical information, financial information, date and location of birth, and names of relatives or (2) the law forbids any person from disclosing.

d. Any failure of the Contractor to comply with the Nondisclosure of Private Information Ordinance shall be a material breach of this Agreement. In such an event, in addition to any other remedies available to it under equity or law, the TJPA may terminate this Agreement, debar Contractor, or bring a false claim action against the Contractor.

## **26. News Releases/Interviews**

All Contractor news releases, media interviews, testimony at hearings and public comment relating to the Transbay Transit Center Program shall be prohibited unless expressly authorized by the TJPA.

## **27. Ownership of Results**

Any interest of the Contractor or its subcontractors, in drawings, plans, specifications, blueprints, studies, reports, memoranda, computation sheets, computer files and media, or other documents prepared by the Contractor or its subcontractors in connection with services to be performed under this Agreement, shall become the property of and will be transmitted to the TJPA. However, the Contractor may retain and use copies for reference and as documentation of its experience and capabilities.

## **28. Works for Hire**

If, in connection with services performed under this Agreement, the Contractor or its subcontractors create artwork, copy, posters, billboards, photographs, videotapes, audiotapes, systems designs,

software, reports, diagrams, surveys, source codes or any other original works of authorship, such works of authorship shall be works for hire as defined under Title 17 of the United States Code, and all copyrights in such works are the property of the TJPA. If it is ever determined that any works created by the Contractor or its subcontractors under this Agreement are not works for hire under U.S. law, the Contractor hereby assigns all copyrights to such works to the TJPA, and agrees to provide any material and execute any documents necessary to effectuate such assignment. With the approval of the TJPA, the Contractor may retain and use copies of such works for reference and as documentation of its experience and capabilities.

## **29. Audit and Inspection of Records**

The Contractor agrees to maintain and make available to the TJPA, during regular business hours, accurate books and accounting records relating to its work under this Agreement. The Contractor will permit the TJPA to audit, examine and make excerpts and transcripts from such books and records, and to make audits of all invoices, materials, payrolls, records or personnel and other data related to all other matters covered by this Agreement, whether funded in whole or in part under this Agreement. The Contractor shall maintain such data and records in an accessible location and condition for a period of not less than five years after final payment under this Agreement or until after final audit has been resolved, whichever is later. The State of California or any governmental agency having an interest in the subject of this Agreement shall have the same rights conferred upon the TJPA by this Section.

## **30. San Francisco Sunshine Ordinance**

In accordance with S.F. Administrative Code Section 67.24(e), the Contractors' bids, responses to solicitations and all other records of communications between the TJPA and persons or firms seeking contracts shall be open to inspection immediately after a contract has been awarded. Nothing in this provision requires the disclosure of a private person's or organization's net worth or other proprietary financial data submitted for qualification for a contract or other benefits until and unless that person or organization is awarded the contract or benefit. Information provided which is covered by this paragraph will be made available to the public upon request.

## **31. Public Access to Meetings and Records**

If the Contractor receives a cumulative total per year of at least \$250,000 in TJPA funds or TJPA-administered funds and is a nonprofit organization as defined in Chapter 12L of the S.F. Administrative Code, the Contractor shall comply with and be bound by all the applicable provisions of that Chapter. By executing this Agreement, the Contractor agrees to open its meetings and records to the public in the manner set forth in Sections 12L.4 and 12L.5 of the Administrative Code. The Contractor further agrees to make good faith efforts to promote community membership on its Board of Directors in the manner set forth in Section 12L.6 of the Administrative Code. The Contractor acknowledges that its material failure to comply with any of the provisions of this paragraph shall constitute a material breach of this Agreement. The Contractor further acknowledges that such material breach of the Agreement shall be grounds for the TJPA to terminate and/or not renew the Agreement, partially or in its entirety.

## **32. Subcontracting**

The Contractor is permitted to subcontract portions of the services to be performed under this Agreement as follows:

*Electrical Commissioning: RNM Engineering, 100 Montgomery St., Ste. 600, San Francisco, CA 94104*

*Civil Engineering (Ramp Geometry): OPAC Engineers, 315 Bay Street, 2<sup>nd</sup> Floor, San Francisco, CA 94133*

*Traffic Consulting: Fehr & Peers, 332 Pine Street, 4<sup>th</sup> Floor, San Francisco, CA 94104*

The Contractor will be permitted to subcontract additional portions of the work under this

Agreement subject to the prior written approval of the TJPA Executive Director. Subcontractors shall be solely responsible to the Contractor throughout the performance of their services under this Agreement. Assignment by the Contractor of work to subcontractors shall not relieve the Contractor of any obligation to the TJPA for the work performed.

### **33. Assignment**

The services to be performed by the Contractor are personal in character and neither this Agreement nor any duties or obligations hereunder may be assigned or delegated by the Contractor unless first approved by the TJPA by written instrument executed and approved in the same manner as this Agreement.

### **34. Non-Waiver of Rights**

The omission by either party at any time to enforce any default or right reserved to it, or to require performance of any of the terms, covenants, or provisions hereof by the other party at the time designated, shall not be a waiver of any such default or right to which the party is entitled, nor shall it in any way affect the right of the party to enforce such provisions thereafter. There shall be no waiver except in writing, signed by the party to be charged.

### **35. Services Provided by Attorneys**

Any services to be provided by a law firm or attorney must be reviewed and approved in writing in advance by the TJPA. No invoices for such services provided by law firms or attorneys, including, without limitation, as subcontractors of the Contractor, will be paid unless the provider received advance written approval from the TJPA.

### **36. Conflict of Interest**

Through its execution of this Agreement, the Contractor acknowledges that it is familiar with the provisions of the Conflict of Interest Code of the TJPA; Section 15.103 of the San Francisco City Charter; Article III, Chapter 2 of San Francisco's Campaign and Governmental Conduct Code; and Section 87100 et seq. and Section 1090 et seq. of the Government Code of the State of California, and certifies that it does not know of any facts which constitute a violation of said provisions.

### **37. Limitations on Contributions**

Through execution of this Agreement, the Contractor acknowledges that it is familiar with Section 1.126 of the San Francisco Campaign and Governmental Conduct Code, which prohibits any person who contracts with the TJPA for the rendition of personal services, for the furnishing of any material, supplies or equipment, or for the sale or lease of any land or building, from making any campaign contribution to (1) a TJPA elective officer if the contract must be approved by the individual, a board on which that individual serves, or a board on which an appointee of that individual serves, (2) a candidate for the office held by such individual, or (3) a committee controlled by such individual, at any time from the commencement of negotiations for the contract until the later of either the termination of negotiations for such contract or six months after the date the contract is approved. The Contractor acknowledges that the foregoing restriction applies only if the contract or a combination or series of contracts approved by the same individual or board in a fiscal year have a total anticipated or actual value of \$50,000 or more. The Contractor further acknowledges that the prohibition on contributions applies to each prospective party to the contract; each member of the Contractor's board of directors; the Contractor's chairperson, chief executive officer, chief financial officer and chief operating officer; any person with an ownership interest of more than 20 percent in the Contractor; any subcontractor listed in the bid or contract; and any committee that is sponsored or controlled by the Contractor. Additionally, the Contractor acknowledges that the Contractor must inform each of the persons described in the preceding sentence of the prohibitions contained in Section 1.126.

### **38. Prohibition on Political Activity with TJPA Funds**

In accordance with San Francisco Administrative Code Chapter 12.G, the Contractor may not participate in, support, or attempt to influence any political campaign for a candidate or for a ballot measure (collectively, "Political Activity") in the performance of the services provided under this Agreement. The Contractor agrees to comply with San Francisco Administrative Code Chapter 12.G and any implementing rules and regulations promulgated by the TJPA's Chief Financial Officer. The terms and provisions of Chapter 12.G are incorporated herein by this reference. In the event that the Contractor violates the provisions of this Section, the TJPA may, in addition to any other rights or remedies available hereunder, (i) terminate this Agreement, and (ii) prohibit the Contractor from bidding on or receiving any new TJPA contract for a period of two (2) years. The TJPA will not consider the Contractor's use of profit as a violation of this Section.

### **39. Equal Employment Opportunity/Nondiscrimination; Penalties**

#### **a. Contractor Shall Not Discriminate**

In the performance of this Agreement, the Contractor agrees not to discriminate against any TJPA or City employee working with such Contractor or subcontractor, applicant for employment with such Contractor or subcontractor, or against any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations, on the basis of the fact or perception of a person's race, color, creed, religion, national origin, ancestry, age, sex, sexual orientation, gender identity, domestic partner status, marital status, disability, weight, height or Acquired Immune Deficiency Syndrome or Human Immunodeficiency Virus (AIDS/HIV) status, or association with members of such protected classes, or in retaliation for opposition to discrimination against such classes.

Such action shall include, but shall not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; lay-offs or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. Contractor further agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause. The Contractor is encouraged to actively recruit minorities and women for its workforce and take other steps, such as on-the-job training and education, to ensure nondiscrimination in the Contractor's employment practices.

#### **b. Subcontracts**

The Contractor shall incorporate by reference in all subcontracts the provisions of Chapters 12B.2(a), 12B.2(c)-(k), and 12C.3 of the San Francisco Administrative Code (copies of which are available from the TJPA upon request) and shall require all subcontractors to comply with such provisions. Contractor's failure to comply with the obligations in this subsection shall constitute a material breach of this Agreement.

#### **c. Nondiscrimination in Benefits**

The Contractor does not as of the date of this Agreement and will not during the term of this Agreement, in any of its operations in San Francisco, on real property owned by San Francisco, or where the work is being performed for the TJPA elsewhere within the United States, discriminate in the provision of bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits, as well as any benefits other than the benefits specified above, between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees, where the domestic partnership has been registered with a governmental entity pursuant to state or local law authorizing such registration, subject to the conditions set forth in Chapter 12B.2(b) of the San Francisco Administrative Code.



d. Condition to Contract

As a condition to this Agreement, the Contractor shall execute the appropriate "San Francisco Administrative Code Chapters 12B & 12C Declaration: Nondiscrimination in Contracts and Benefits" form (Form HRC-12B-101, HRC-12B-102, or HRC-12B-103) with supporting documentation and file the form with the TJPA Contract Compliance Manager.

e. Incorporation of Administrative Code Provisions by Reference

The provisions of Chapters 12B and 12C of the San Francisco Administrative Code are incorporated in this Section by reference and made a part of this Agreement as though fully set forth herein. The Contractor shall comply fully with and be bound by all of the provisions that apply to this Agreement under such Chapters of the Administrative Code, including but not limited to the remedies provided in such Chapters. Without limiting the foregoing, the Contractor understands that pursuant to Section 12B.2(h) and 12C.3(g) of the San Francisco Administrative Code, a penalty of \$50 for each person for each calendar day during which such person was discriminated against in violation of the provisions of this Agreement may be assessed against the Contractor and/or deducted from any payments due the Contractor.

**40. Disadvantaged Business Enterprise (DBE) Requirements**

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

Pursuant to the monitoring requirements outlined in Section XIII of the TJPA's DBE Program (49 CFR 26.37), the Contractor will be required to update and submit the TJPA's "Bidders/Proposers Information Request Form," regardless of DBE participation. Upon award of the contract, the Contractor shall submit the TJPA's "Progress Payment Report" with every invoice, the "Subcontractor Payment Declaration" within five days of each Contractor payment to a subcontractor, and a "Final Expenditure Report" with the completion of the contract.

**41. Small Business Enterprise (SBE) Requirements**

Contractor shall comply with the SBE provisions contained in the TJPA Small Business Enterprise Program and incorporated into this Agreement as though fully set forth, including, but not limited to, achieving and maintaining the SBE goal as submitted by Contractor in its Proposal of 90 percent. Failure of the Consultant to comply with any of these requirements, or to submit compelling documentation acceptable to the TJPA detailing the good faith efforts to comply, shall be deemed a material breach of this Agreement.

Pursuant to the monitoring requirements outlined in Section IX of the TJPA's SBE Program, the Contractor will be required to update and submit the TJPA's "Bidders/Proposers Information Request Form," regardless of SBE participation. Upon award of the contract, the Contractor shall submit the TJPA's "Progress Payment Report" with every invoice, the "Subcontractor Payment Declaration" within five days of each Contractor payment to a subcontractor, and a "Final Expenditure Report" with the completion of the contract.

**42. Prompt Payment to Subcontractors**

a. Prompt Progress Payment to Subcontractors

A prime contractor or subcontractor shall pay a subcontractor not later than ten (10) days of receipt of each progress payment in accordance with the provision in Section 7108.5 of the California Business

and Professions Code concerning prompt payment to subcontractors. The ten (10) days is applicable unless, a longer period is agreed to in writing. Any violation of Section 7108.5 shall subject the violating contractor or subcontractor to the penalties, sanction and other remedies of that Section. Federal regulation (49 CFR 26.29) requires that any delay or postponement of payment over thirty (30) days of receipt of each payment may take place only for good cause and with the TJPA's prior written approval. These requirements shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise, available to the prime contractor or subcontractor in the event of a dispute involving late payment, or nonpayment by the prime contractor, deficient subcontract performance, or noncompliance by a subcontractor. This provision applies to both DBE and non-DBE prime contractors and subcontractors.

b. Prompt Payment of Withheld Funds to Subcontractors

If the TJPA requires retainage from the prime contractor and prompt and regular incremental acceptances of portions, as determined by the TJPA of the contract work and retainage is paid to the prime contractor based on these acceptances, then the prime contractor or subcontractor shall return all monies withheld in retention from all subcontractors within thirty (30) days after receiving payment for work satisfactorily completed and accepted including incremental acceptances of portions of the contract work by the TJPA. Any delay or postponement of payment may take place only for good cause and with the TJPA's prior written approval. Any violation of these provisions shall subject the violating prime contractor to the penalties, sanctions, and other remedies specified in Section 7108.5 of the California Business Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise, available to the prime contractor or subcontractor in the event of a dispute involving late payment, or nonpayment by the contractor, or deficient subcontractor's performance, or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

### 43. Requiring Minimum Compensation for Covered Employees

The Contractor agrees to comply fully with and be bound by all of the provisions of the Minimum Compensation Ordinance (MCO), as set forth in San Francisco Administrative Code Chapter 12P (Chapter 12P), including the remedies provided, and implementing guidelines and rules. The provisions of Chapter 12P are incorporated herein by reference and made a part of this Agreement as though fully set forth. The text of the MCO is available on the Web at <http://www.sfgov.org/olse>. Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 12P. Consistent with the requirements of the MCO, Contractor agrees to all of the following:

a. For each hour worked by a Covered Employee during a Pay Period on work funded under the TJPA contract during the term of this Agreement, the Contractor shall provide to the Covered Employee no less than the Minimum Compensation, which includes a minimum hourly wage and compensated and uncompensated time off consistent with the requirements of the MCO. Note that the gross hourly compensation for covered employees is \$11.54 as of January 2009.

If a Covered Employee of a Nonprofit Corporation works in San Francisco, then that employee is covered by San Francisco's Minimum Wage Ordinance, which is Chapter 12R of the San Francisco Administrative Code. As of January 1, 2009, Chapter 12R's minimum wage is \$9.79 per hour.

b. The Contractor shall not discharge, reduce in compensation, or otherwise discriminate against any employee for complaining to the TJPA with regard to the Contractor's compliance or anticipated compliance with the requirements of the MCO, for opposing any practice proscribed by the MCO, for participating in proceedings related to the MCO, or for seeking to assert or enforce any rights under the MCO by any lawful means.

c. The Contractor understands and agrees that the failure to comply with the requirements of the MCO shall constitute a material breach by the Contractor of the terms of this Agreement. The TJPA shall determine whether such a breach has occurred.

d. If, within thirty (30) days after receiving written notice of a breach of this Agreement for violating the MCO, the Contractor fails to cure such breach or, if such breach cannot reasonably be cured within such period of thirty (30) days, the Contractor fails to commence efforts to cure within such period, or thereafter fails diligently to pursue such cure to completion, the TJPA shall have the right to pursue the following rights or remedies and any rights or remedies available under applicable law:

(1) The right to charge the Contractor an amount equal to the difference between the Minimum Compensation and any compensation actually provided to a Covered Employee, together with interest on such amount from the date payment was due at the maximum rate then permitted by law;

(2) The right to set off all or any portion of the amount described in Subsection (d)(1) of this Section against amounts due to the Contractor under this Agreement;

(3) The right to terminate this Agreement in whole or in part;

(4) In the event of a breach by the Contractor of the covenant referred to in Subsection (b) of this Section, the right to seek reinstatement of the employee or to obtain other appropriate equitable relief; and

(5) The right to bar the Contractor from entering into future contracts with the TJPA for three (3) years.

Each of the rights provided in this Subsection (d) shall be exercisable individually or in combination with any other rights or remedies available to the TJPA. Any amounts realized by the TJPA pursuant to this subsection shall be paid to the Covered Employee who failed to receive the required Minimum Compensation.

e. The Contractor represents and warrants that it is not an entity that was set up, or is being used, for the purpose of evading the intent of the MCO.

f. The Contractor shall keep itself informed of the current requirements of the MCO, including increases to the hourly gross compensation due Covered Employees under the MCO, and shall provide prompt written notice to all Covered Employees of any increases in compensation, as well as any written communications received by the Contractor from the TJPA, which communications are marked to indicate that they are to be distributed to Covered Employees.

g. The Contractor shall provide reports to the TJPA in accordance with any reporting standards promulgated by the TJPA under the MCO, including reports on subcontractors.

h. The Contractor shall provide the TJPA with access to pertinent records after receiving a written request from the TJPA to do so and being provided at least five (5) business days to respond.

i. The TJPA may conduct random audits of the Contractor. Random audits shall be (1) noticed in advance in writing; (2) limited to ascertaining whether Covered Employees are paid at least the minimum compensation required by the MCO; (3) accomplished through an examination of pertinent records at a mutually agreed upon time and location within ten (10) days of the written notice; and (4) limited to one audit of Contractor every two years for the duration of this Agreement. Nothing in this Agreement is intended to preclude the TJPA from investigating any report of an alleged violation of the MCO.

j. Any subcontract entered into by the Contractor shall require the subcontractor to comply with the requirements of the MCO and shall contain contractual obligations substantially the same as those set forth in this Section. A subcontract means an agreement between the Contractor and a third party which requires the third party to perform all or a portion of the services covered by this Agreement. The Contractor shall notify the TJPA when it enters into such a subcontract and shall certify to the TJPA that it has notified the subcontractor of the obligations under the MCO and has imposed the requirements of the

MCO on the subcontractor through the provisions of the subcontract. It is the Contractor's obligation to ensure that any subcontractors of any tier under this Agreement comply with the requirements of the MCO. If any subcontractor under this Agreement fails to comply, the TJPA may pursue any of the remedies set forth in this Section against the Contractor.

k. Each Covered Employee is a third-party beneficiary with respect to the requirements of subsections (a) and (b) of this Section, and may pursue the following remedies in the event of a breach by the Contractor of subsections (a) and (b), but only after the Covered Employee has provided the notice, participated in the administrative review hearing, and waited the 21-day period required by the MCO. The Contractor understands and agrees that if the Covered Employee prevails in such action, the Covered Employee may be awarded (1) an amount equal to the difference between the Minimum Compensation and any compensation actually provided to the Covered Employee, together with interest on such amount from the date payment was due at the maximum rate then permitted by law; (2) in the event of a breach by the Contractor of subsections (a) or (b), the right to seek reinstatement or to obtain other appropriate equitable relief; and (3) in the event that the Covered Employee is the prevailing party in any legal action or proceeding against the Contractor arising from this Agreement, the right to obtain all costs and expenses, including reasonable attorney's fees and disbursements, incurred by the Covered Employee. The Contractor also understands that the MCO provides that if the Contractor prevails in any such action, the Contractor may be awarded costs and expenses, including reasonable attorney's fees and disbursements, from the Covered Employee if the court determines that the Covered Employee's action was frivolous, vexatious or otherwise an act of bad faith.

l. If the Contractor is exempt from the MCO when this Agreement is executed because the cumulative amount of agreements with this department for the fiscal year is less than \$25,000 (\$50,000 for nonprofits), but the Contractor later enters into an agreement or agreements that cause the Contractor to exceed that amount in a fiscal year, the Contractor shall thereafter be required to comply with the MCO under this Agreement. This obligation arises on the effective date of the agreement that causes the cumulative amount of agreements between the Contractor and the TJPA to exceed \$25,000 (\$50,000 for nonprofits) in the fiscal year.

#### **44. Requiring Health Benefits for Covered Employees**

Unless exempt, the Contractor agrees to comply fully with and be bound by all of the provisions of the Health Care Accountability Ordinance (HCAO), as set forth in San Francisco Administrative Code Chapter 12Q, including the remedies provided, and implementing regulations, as the same may be amended from time to time. The provisions of Chapter 12Q are incorporated herein by reference and made a part of this agreement as though fully set forth. The text of the HCAO is available on the Web at <http://www.sfgov.org/olse>. Capitalized terms used in this Section and not defined in this agreement shall have the meanings assigned to such terms in Chapter 12Q.

a. For each Covered Employee, the Contractor shall provide the appropriate health benefit set forth in Section 12Q.3 of the HCAO. If the Contractor chooses to offer the health plan option, such health plan shall meet the minimum standards set forth by the San Francisco Health Commission.

b. Notwithstanding the above, if the Contractor is a small business as defined in Section 12Q.3(e) of the HCAO, it shall have no obligation to comply with part (a) above.

c. The Contractor's failure to comply with the HCAO shall constitute a material breach of this agreement. The TJPA shall notify the Contractor if such a breach has occurred. If, within thirty (30) days after receiving the TJPA's written notice of a breach of this Agreement for violating the HCAO, the Contractor fails to cure such breach or, if such breach cannot reasonably be cured within such period of thirty (30) days, the Contractor fails to commence efforts to cure within such period, or thereafter fails diligently to pursue such cure to completion, the TJPA shall have the right to pursue the remedies set forth in 12Q.5(f)(1-6). Each of these remedies shall be exercisable individually or in combination with any other rights or remedies available to the TJPA.

d. Any Subcontract entered into by the Contractor shall require the subcontractors to comply with the requirements of the HCAO and shall contain contractual obligations substantially the same as those set forth in this Section. The Contractor shall notify the TJPA when it enters into such a subcontract and shall certify to the TJPA that it has notified the subcontractor of the obligations under the HCAO and has imposed the requirements of the HCAO on subcontractor through the Subcontract. Each Contractor shall be responsible for its subcontractors' compliance with this Chapter. If a subcontractor fails to comply, the TJPA may pursue the remedies set forth in this Section against Contractor based on the subcontractor's failure to comply, provided that TJPA has first provided Contractor with notice and an opportunity to obtain a cure of the violation.

e. The Contractor shall not discharge, reduce in compensation, or otherwise discriminate against any employee for notifying the TJPA with regard to Contractor's compliance or anticipated compliance with the requirements of the HCAO, for opposing any practice proscribed by the HCAO, for participating in proceedings related to the HCAO, or for seeking to assert or enforce any rights under the HCAO by any lawful means.

f. The Contractor represents and warrants that it is not an entity that was set up, or is being used, for the purpose of evading the intent of the HCAO.

g. The Contractor shall maintain employee and payroll records in compliance with the California Labor Code and Industrial Welfare Commission orders, including the number of hours each employee has worked on the TJPA agreement.

h. The Contractor shall keep itself informed of the current requirements of the HCAO.

i. The Contractor shall provide reports to the TJPA in accordance with any reporting standards promulgated by the TJPA under the HCAO, including reports on subcontractors and subtenants, as applicable.

j. The Contractor shall provide the TJPA with access to records pertaining to compliance with HCAO after receiving a written request from the TJPA to do so and being provided at least five (5) business days to respond.

k. The Contractor shall allow the TJPA to inspect the Contractor's job sites and have access to the Contractor's employees in order to monitor and determine compliance with HCAO.

l. The TJPA may conduct random audits of the Contractor to ascertain its compliance with HCAO. The Contractor agrees to cooperate with the TJPA when it conducts such audits.

m. If the Contractor is exempt from the HCAO when this Agreement is executed because its amount is less than \$25,000 (\$50,000 for nonprofits), but the Contractor later enters into an agreement or agreements that cause the Contractor's aggregate amount of all agreements with TJPA to reach \$75,000, all the agreements shall be thereafter subject to the HCAO. This obligation arises on the effective date of the agreement that causes the cumulative amount of agreements between the Contractor and the TJPA to be equal to or greater than \$75,000 in the fiscal year.

#### **45. First Source Hiring Program**

##### **a. Incorporation of Administrative Code Provisions by Reference**

The provisions of Chapter 83 of the San Francisco Administrative Code are incorporated in this Section by reference and made a part of this Agreement as though fully set forth herein. The Contractor shall comply fully with, and be bound by, all of the provisions that apply to this Agreement under such Chapter, including but not limited to the remedies provided therein. Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 83.

b. First Source Hiring Agreement

(1) The Contractor will comply with First Source interviewing, recruitment and hiring requirements, which will provide the San Francisco Workforce Development System with the exclusive opportunity to initially provide Qualified Economically Disadvantaged Individuals for consideration for employment for Entry Level Positions. The duration of the First Source interviewing requirement shall be ten (10) days, unless business necessity requires a shorter period of time.

(2) The Contractor will comply with requirements for providing timely, appropriate notification of available Entry Level Positions to the San Francisco Workforce Development System so that the System may train and refer an adequate pool of Qualified Economically Disadvantaged Individuals to participating Employers.

(3) The Contractor agrees to use good faith efforts to comply with the First Source hiring requirements. A Contractor may establish its good faith efforts by filling (i) its first available Entry Level Position with a job applicant referred through the First Source Program; and (ii) fifty percent (50%) of its subsequent available Entry Level Positions with job applicants referred through the San Francisco Workforce Development System. Failure to meet this target, while not imputing bad faith, may result in a review of the Contractor's employment records.

c. Hiring Decisions

The Contractor shall make the final determination of whether an Economically Disadvantaged Individual referred by the System is "qualified" for the position.

d. Exceptions

Upon application by Employer, the First Source Hiring Administration ("FSHA") may grant an exception to any or all of the requirements of Chapter 83 in any situation where it concludes that compliance with this Chapter would cause economic hardship.

e. Liquidated Damages

Violation of the requirements of Chapter 83 is subject to an assessment of liquidated damages in the amount of \$2,070 for every new hire for an Entry Level Position improperly withheld from the First Source hiring process. The assessment of liquidated damages and the evaluation of any defenses or mitigating factors shall be made by the FSHA.

f. Subcontracts

Any subcontract entered into by the Contractor shall require the subcontractor to comply with the requirements of Chapter 83 and shall contain contractual obligations substantially the same as those set forth in this Section.

#### **46. Earned Income Credit (EIC) Forms**

San Francisco Administrative Code Chapter 12O requires that employers provide their employees with IRS Form W-5 (Earned Income Credit Advance Payment Certificate) and the IRS EIC Schedule, as set forth below. Employers can locate these forms at the IRS Office, on the Internet, or anywhere that Federal Tax Forms can be found.

a. The Contractor shall provide EIC Forms to each Eligible Employee at each of the following times: (i) within thirty (30) days following the date on which this Agreement becomes effective (unless Contractor has already provided such EIC Forms at least once during the calendar year in which such effective date falls); (ii) promptly after any Eligible Employee is hired by the Contractor; and (iii) annually between January 1 and January 31 of each calendar year during the term of this Agreement.

b. Failure to comply with any requirement contained in subparagraph (a) of this Section shall constitute a material breach by the Contractor of the terms of this Agreement. If, within thirty (30) days after the Contractor receives written notice of such a breach, the Contractor fails to cure such breach or, if such breach cannot reasonably be cured within such period of thirty (30) days, the Contractor fails to commence efforts to cure within such period or thereafter fails to diligently pursue such cure to completion, the TJPA may pursue any rights or remedies available under this Agreement or under applicable law.

c. Any subcontract entered into by the Contractor shall require the subcontractor to comply, as to the subcontractor's Eligible Employees, with each of the terms of this Section.

d. Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 12O of the San Francisco Administrative Code.

#### **47. MacBride Principles – Northern Ireland**

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

#### **48. Drug-Free Workplace Policy**

The Contractor acknowledges that pursuant to the Federal Drug-Free Workplace Act of 1989, the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited on TJPA premises. The Contractor agrees that any violation of this prohibition by the Contractor, its employees, agents or assigns will be deemed a material breach of this Agreement.

#### **49. Resource Conservation**

Chapter 5 of the San Francisco Environment Code ("Resource Conservation") is incorporated herein by reference. Failure by the Contractor to comply with any of the applicable requirements of Chapter 5 will be deemed a material breach of contract.

#### **50. Tropical Hardwood/Virgin Redwood Ban**

Pursuant to Section 804(b) of the San Francisco Environment Code, the TJPA urges Contractors not to import, purchase, obtain, or use for any purpose, any tropical hardwood, tropical hardwood wood product, virgin redwood or virgin redwood wood product.

#### **51. Preservative-treated Wood Containing Arsenic**

The Contractor may not purchase preservative-treated wood products containing arsenic in the performance of this Agreement unless an exemption from the requirements of Chapter 13 of the San Francisco Environment Code is obtained from the Department of the Environment under Section 1304 of the Code. The term "preservative-treated wood containing arsenic" shall mean wood treated with a preservative that contains arsenic, elemental arsenic, or an arsenic copper combination, including, but not limited to, chromated copper arsenate preservative, ammoniacal copper zinc arsenate preservative, or ammoniacal copper arsenate preservative. Contractor may purchase preservative-treated wood products on the list of environmentally preferable alternatives prepared and adopted by the Department of the Environment. This provision does not preclude the Contractor from purchasing preservative-treated wood containing arsenic for saltwater immersion. The term "saltwater immersion" shall mean a pressure-treated wood that is used for construction purposes or facilities that are partially or totally immersed in saltwater.

## **52. Food Service Waste Reduction Requirements**

Contractor agrees to comply fully with and be bound by all of the provisions of the Food Service Waste Reduction Ordinance, as set forth in San Francisco Environment Code Chapter 16, including the remedies provided, and implementing guidelines and rules. The provisions of Chapter 16 are incorporated herein by reference and made a part of this agreement as though fully set forth. This provision is a material term of this agreement. By entering into this agreement, contractor agrees that if it breaches this provision, the TJPA will suffer actual damages that will be impractical or extremely difficult to determine; further, Contractor agrees that the sum of one hundred dollars (\$100.00) liquidated damages for the first breach, two hundred dollars (\$200.00) liquidated damages for the second breach in the same year, and five hundred dollars (\$500.00) liquidated damages for subsequent breaches in the same year is a reasonable estimate of the damage that the TJPA will incur based on the violation, established in light of the circumstances existing at the time this agreement was made. Such amounts shall not be considered a penalty, but rather agreed monetary damages sustained by the TJPA because of Contractor's failure to comply with this provision.

## **53. Graffiti Removal**

Graffiti is detrimental to the health, safety and welfare of the community in that it promotes a perception in the community that the laws protecting public and private property can be disregarded with impunity. This perception fosters a sense of disrespect of the law that results in an increase in crime; degrades the community and leads to urban blight; is detrimental to property values, business opportunities and the enjoyment of life; is inconsistent with the City and County of San Francisco's property maintenance goals and aesthetic standards; and results in additional graffiti and in other properties becoming the target of graffiti unless it is quickly removed from public and private property. Graffiti results in visual pollution and is a public nuisance. Graffiti must be abated as quickly as possible to avoid detrimental impacts on the City and County and its residents, and to prevent the further spread of graffiti.

The Contractor shall remove all graffiti from any real property owned or leased by the Contractor in the City and County of San Francisco within forty eight (48) hours of the earlier of the Contractor's (a) discovery or notification of the graffiti or (b) receipt of notification of the graffiti from the City's Department of Public Works or the TJPA. This Article is not intended to require the Contractor to breach any lease or other agreement that it may have concerning its use of the real property. The term "graffiti" means any inscription, word, figure, marking or design that is affixed, marked, etched, scratched, drawn or painted on any building, structure, fixture or other improvement, whether permanent or temporary, including by way of example only and without limitation, signs, banners, billboards and fencing surrounding construction sites, whether public or private, without the consent of the owner of the property or the owner's authorized agent, and which is visible from the public right-of-way. "Graffiti" shall not include (a) any sign or banner that is authorized by, and in compliance with, the applicable requirements of the San Francisco Public Works Code, the San Francisco Planning Code or the San Francisco Building Code; or (b) any mural or other painting or marking on the property that is protected as a work of fine art under the California Art Preservation Act (California Civil Code Sections 987 et seq.) or as a work of visual art under the Federal Visual Artists Rights Act of 1990 (17 U.S.C. Sections 101 et seq.).

## **54. Modification of Agreement**

This Agreement may not be modified, nor may compliance with any of its terms be waived, except by written instrument executed and approved according to TJPA requirements.

## **55. Administrative Remedy for Agreement Interpretation**

Should any question arise as to the meaning and intent of this Agreement, the question shall, prior



to any other action or resort to any other legal remedy, be referred to the TJPA who shall decide the true meaning and intent of the Agreement. Nothing in this Section shall be interpreted as the Contractor waiving any legal rights or remedies to which it is entitled.

## **56. Agreement Made in California; Venue**

The formation, interpretation and performance of this Agreement shall be governed by the laws of the State of California. Venue for all litigation relative to the formation, interpretation and performance of this Agreement shall be in San Francisco.

## **57. Construction**

All Section captions are for reference only and shall not be considered in construing this Agreement.

## **58. Entire Agreement**

This Agreement sets forth the entire Agreement between the parties, and supersedes all other oral or written provisions. This Agreement may be modified only as provided in the Section entitled "Modification of Agreement".

## **59. Severability**

Should the application of any provision of this Agreement to any particular facts or circumstances be found by a court of competent jurisdiction to be invalid or unenforceable, then (a) the validity of other provisions of this Agreement shall not be affected or impaired thereby, and (b) such provision shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be reformed without further action by the parties to the extent necessary to make such provision valid and enforceable.

## **60. FTA Requirements**

The provisions contained in "FTA Requirements for Professional Services Contracts," attached as Appendix D, are incorporated into this Agreement, and the Contractor agrees to abide by such provisions. Such provisions supplement the provisions in this Agreement, and shall be interpreted in the broadest possible manner to avoid any conflicts. If there is an unavoidable conflict between the FTA terms and conditions and any other terms and conditions of this Agreement, in the TJPA's sole determination, the FTA terms and conditions shall take precedence.

## **61. Compliance With Laws**

The Contractor shall keep itself fully informed of the Charter of the City and County of San Francisco, of codes, ordinances and regulations of the City, and of all state and federal laws and regulations in any manner affecting the performance of this Agreement, and must at all times comply with such codes, ordinances, regulations, and all applicable laws as they may be amended from time to time.

## **62. Compliance with Americans with Disabilities Act**

The Contractor acknowledges that, pursuant to the Americans with Disabilities Act (ADA), programs, services and other activities provided by a public entity to the public, whether directly or through a contractor, must be accessible to the disabled public. The Contractor shall provide the services specified in this Agreement in a manner that complies with the ADA and any and all other applicable federal, state and local disability rights legislation. The Contractor agrees not to discriminate against disabled persons in the provision of services, benefits or activities provided under this Agreement and further agree that any violation of this prohibition on the part of the Contractor, its employees, agents or assigns will constitute a material breach of this Agreement.

**63. Authority to Execute Agreement**

Each individual executing this Agreement, on behalf of one of the parties, represents that he or she is duly authorized to sign and deliver the Agreement on behalf of such party and that this Agreement is binding on such party in accordance with its terms. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.

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

TRANSBAY JOINT POWERS AUTHORITY

Approved as to Form by:

\_\_\_\_\_  
Maria Ayerdi-Kaplan, Executive Director

\_\_\_\_\_  
TJPA Legal Counsel

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

\_\_\_\_\_  
Secretary, TJPA Board

**CONTRACTOR**

By signing this Agreement, I certify that I comply with the requirements of the Minimum Compensation Ordinance, which entitles Covered Employees to certain minimum hourly wages and compensated and uncompensated time off.

I have read and understood the Section entitled "MacBride Principles—Northern Ireland", TJPA's statement urging companies doing business in Northern Ireland to move towards resolving employment inequities, encouraging compliance with the MacBride Principles, and urging San Francisco companies to do business with corporations that abide by the MacBride Principles

\_\_\_\_\_  
Authorized Signature

Address

\_\_\_\_\_  
City, State, Zip Code

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Phone Number

\_\_\_\_\_  
Title

\_\_\_\_\_  
Federal Employer ID Number

\_\_\_\_\_  
Company Name

# PROFESSIONAL SERVICES AGREEMENT

## APPENDIX A

### SCOPE OF SERVICES

The Commissioning Agent will oversee and manage facility certification requirements regarding the Program design, construction and final inspections. Certification requirements shall include all relevant transit operating criteria, building codes, design criteria, construction implementation and testing validation. Scope shall include assisting the TJPA and other consultants and contractors with overall facility startup and pre-revenue commissioning. There are the two different commissioning requirements (Leed and non-LEED systems); these are separate and unique commissioning scopes but both are integral to the Program.

The Commissioning Agent will provide all of the services typically used to review, oversee the completion of, and document the effective commissioning of building systems necessary to assure achievement of LEED for New Construction Fundamental Commissioning and Enhanced Commissioning credits. Because of the LEED credits as well as the overall sustainability goals of the Program, the Commissioning Agent will be involved with the new Transbay Transit Center from the design development phase through post-construction. The Program documents utilize BIM (Building Information Modeling) technology. The commissioning data and results shall be formatted by the Commissioning Agent for incorporation into this Program model.

#### **Design Development Phase (Design Development and Construction Documents)**

The primary role of the Commissioning Agent during the overall design phase is to develop detailed commissioning specifications and review design to ensure it meets the Owner's objectives. During this phase, the Commissioning Agent will specifically:

1. Assemble commissioning team, hold scoping meeting(s) and identify responsibilities.
2. Develop draft Commissioning Plan customized for the Transbay Transit Center Program (Program). The Commissioning Plan shall define the activities included in the commissioning process, team members and their roles and responsibilities, channels of communication and authority, scheduling parameters, and all other process-related issues. Although the Commissioning Plan should clearly identify which systems, subsystems, and equipment are to be subject to the commissioning process, the Commissioning Plan is not to include specific technical requirements for those systems. The commissioning-related performance parameters, checklists, test procedures, or other system-specific details shall be inherent to implementing the Commissioning Plan. The Commissioning Plan shall be used as the commissioning reference manual for the remainder of the project.
3. Review Owner objectives documentation (design intent) for clarity and completeness.
4. Coordinate commissioning work during the design phase, including developing and coordinating a commissioning schedule to coincide with the overall construction schedule.
5. Perform focused reviews of the design, drawings and specifications at the 100% design development stage and 50% and 100% construction document phases. Construction Documents may be issued in multiple and separate bid packages. The Commissioning Agent will conduct commissioning design reviews of the Owner's Project Requirements (OPR), Basis of Design (BOD), and design documents prior to mid-point of the construction documents phase and back-check the review comments in subsequent design submissions. Design review should include a written log, narrative and a red lined marked set of drawings for designer review.
6. Assist, review, comment and approve the development and updating of the Design Record documentation by Design Team members (Design Intent, BOD, and Design Narrative).
7. Provide draft structure, if requested by the TJPA, and review comments for the TJPA's OPR document for the systems to be commissioned. The OPR shall include, at a minimum, the following information:

- a. System performance requirements (functional objectives, temperature, humidity, air quality, light levels, power quality, redundancy, reliability, interface and integration requirements, etc.)
- b. Load assumptions (watts/square feet, light levels, occupancy, outdoor design conditions, etc.)
- c. Environmental and sustainability requirements (energy consumption, water usage, etc.)
- d. Operational parameters (occupancy schedules, flexible spaces, etc.)
- e. Future expansion provisions
- f. Validation of transit and design criteria, construction parameters and acceptance testing

The Commissioning Agent shall obtain this information from BOD documentation prepared by the Transit Center Design Team, the design drawings and specifications, and interviews (verbal or written) with key Design Team members and TJPA representatives. The TJPA shall review and approve the OPR.

8. The Commissioning Agent shall facilitate the identification, tracking, and resolution of any discrepancies between the Design Team's BOD and the approved OPR.
9. Develop full commissioning specifications for Division 1 of the project contract documents for all commissioned equipment. Coordinate with and integrate into the specifications of the Architect and Engineers. The commissioning specification will include a detailed description of the responsibilities of all parties, details of the commissioning process, reporting and documentation requirements including formats, alerts to coordination issues, deficiency resolution, construction installation checklists and startup requirements, the functional testing process, specific functional test requirements (including testing conditions) and acceptance criteria for each piece of equipment being commissioned. Checklists and test procedures shall be based on the Design Team's installation requirements and control system sequences of operation and shall include unambiguous pass/fail acceptance criteria for each checklist item and each step of the test procedure. The Commissioning Agent shall facilitate and document discussions with the TJPA and the Design Team as needed to clarify design requirements to a level of detail needed to prepare these checklists and test procedures.
10. The Commissioning Agent shall facilitate the coordination of commissioning requirements in the new Commissioning Specification with all other sections of the project specifications. This may include deletion of or editing of current references to commissioning and the addition of new references to the Division 1 Commissioning Specification. Because the Commissioning Specification may be used in determining entitlement to contractor-requested change orders during the commissioning of systems, it is imperative that it be detailed, project-specific and unambiguous with regard to scope.
11. Coordinate regular commissioning meetings with the design team to discuss integration issues between equipment, systems and controls to ensure that all responsibilities are clearly described in the specifications.
12. Attend pre-bid meetings for trade packages to answer commissioning-related questions.

### **Construction Phase**

During this phase, the Commissioning Agent will:

1. Perform the tasks and functions in the specifications ascribed to the Commissioning Agent.
2. Coordinate and direct the commissioning activities in a logical, sequential and efficient manner using consistent protocols and forms, centralized documentation, clear and regular communications and consultations with all necessary parties, and frequently updated timelines and schedules. The Commissioning Agent and Construction Manager/General Contractor (CM/GC) shall work in conjunction to coordinate all testing, inspecting and site specific activities pertaining to commissioning and in support of obtaining temporary and final certificates of occupancy. The Commissioning Agent must also ensure that all commissioning activities are incorporated into the construction schedule.

3. Plan and conduct commissioning meetings as needed (no fewer than 24) on site throughout the course of construction, start-up, and acceptance, and distribute minutes to the commissioning team, Design Team, CM/GC, and TJPA. The timing of the meetings shall be as appropriate to address project team questions regarding commissioning responsibilities and deliverables; review and help facilitate the integration of commissioning activities into the project schedule; and review progress in the resolution of outstanding commissioning-related action items.
4. Request and review additional information required to perform commissioning tasks, including O&M materials, contractor start-up and checkout procedures. Before startup, gather and review the current control sequences and interlocks and work with contractors and design engineers until sufficient clarity has been obtained, in writing, to be able to write detailed testing procedures.
5. Review contractor submittals applicable to systems being commissioned for compliance with the OPR and BOD. This review shall be concurrent with reviews by the Design Team and submitted to the Design Team and the TJPA.
6. Review requests for information and change orders for impact on commissioning and owner's objectives.
7. Review coordination drawings to ensure that trades are coordinating.
8. Write and distribute commissioning checklists for all applicable equipment prior to contractor start-up. The checklists shall include static inspections, pre-functional tests, functional tests and setpoint adjustments.
9. Perform site visits, as necessary, to observe component and system installations. Attend selected planning and job site meetings to obtain information on construction progress. Review construction meeting minutes for revisions/substitutions relating to the commissioning process. Assist in resolving any discrepancies regarding the commissioning of any system or single piece of equipment.

Evaluate the installation of system components for accessibility and maintainability for future operations and maintenance required for sustained proper operation of the systems. The Commissioning Agent shall document any concerns in the Commissioning Action Log. The Commissioning Agent shall modify the installation checklists (IC) as required to reflect final approved systems installation and start-up requirements. Such modifications may be required as a result of construction phase change orders, requests for information, and/or the shop drawing review and approval process. The Commissioning Agent shall collect and review final ICs filled out by the contractors upon completion of system installation, start-up, and balancing. The ICs shall be the contractors' certification that each system is ready for and will pass the final functional performance testing procedures.

10. Witness HVAC piping pressure test and flushing, sufficient to be confident that proper procedures were followed. Include testing documentation in the Commissioning Record.
11. Witness any ductwork testing and cleaning sufficient to be confident that proper procedures were followed. Include documentation in the Commissioning Record.
12. Complete commissioning checklist for both the static and pre-functional testing unless specified. Inspect 100 percent of the equipment unless otherwise specified.
13. Document systems start-up by reviewing start-up reports and by selected site observations.
14. Approve air and water systems balancing by spot testing and by reviewing completed reports.
15. With necessary assistance from the specifications and submittals, write the functional performance test (FPT) procedures for equipment and systems. This will include manual functional testing, energy management control system trending and may include stand alone data log monitoring. Submit to CM/GC, Construction Manager (CM) and TJPA for review and approval if required.
16. Analyze functional performance trend logs and monitoring data to verify performance.
17. Coordinate, witness and document manual functional performance tests performed by installing contractors. Coordinate retesting as necessary until satisfactory performance to meet the record

design documents is achieved. The functional testing shall include operating the system and components through each of the written sequences of operation, and other significant modes and sequences, including start-up, shutdown, unoccupied, manual, staging, miscellaneous alarms, power failure, security/fire alarm when impacted and interlocks with other systems or equipment. Sensors and actuators shall be calibrated during construction installation checklisting by the installing contractors, and spot-checked by the commissioning provider during functional testing.

Functional testing shall be done using conventional manual methods, control system trend logs, and read-outs or stand alone data loggers, to provide a high level of confidence in proper system function. The Commissioning Agent shall modify the functional testing procedures as required to reflect final approved systems configurations and controls. Such modifications may be required as a result of construction phase change orders, requests for information, and/or the shop drawing review and approval process.

18. Maintain a Commissioning Action Log as a single source of outstanding commissioning deliverables, installation concerns, and deficiencies discovered during testing. Each entry in the Commissioning Action Log shall include, at a minimum, a description of the item, the responsible commissioning team member, a resolution due date, a field for updating the status and final resolution of each item, and final closure date. All items shall remain in the Commissioning Action Log as a record of commissioning activities and their closure. Although closed items may be hidden from view during the course of commissioning, the entire Commissioning Action Log shall be included in the Commissioning Report.
19. Maintain a master deficiency log accessible to all team members via Internet and a separate record of functional testing. Report all issues as they occur directly to the CM/GC and CM. Provide directly to the CM/GC and CM written weekly reports and test results with deficiency updates and recommended actions.
20. Commissioning Agent shall retest failed systems on a time and material basis.
21. Review equipment warranties to ensure that the Owner's responsibilities are clearly defined.
22. Develop a systems manual that provides future operating staff the information needed to understand and optimally operate the commissioned systems.
23. Verify that the requirements for training operating personnel and building occupants are completed as required by the CM/GC.
24. Submit to the TJPA concise quarterly commissioning status reports documenting progress in implementing the Commissioning Plan. The quarterly reports shall also be used to formally document any concerns the Commissioning Agent may have about meeting the LEED Fundamental Commissioning requirements, as well as non-LEED systems covered by this scope of services.
25. Compile a Final Commissioning Report documenting the satisfactory completion of the commissioning process and training including all appropriate records, exceptions and recommendations. Report shall include, at a minimum:
  - a. A brief summary report documenting final system status, prefaced with an executive summary, that includes a list of participants and roles, brief building description, overview of commissioning and testing scope, a general description of testing and verification methods, and comparison of final system status to the criteria established in the OPR. For each piece of commissioned equipment, the report should contain the disposition of the Commissioning Agent regarding the adequacy of the equipment, documentation and training meeting the contract documents in the following areas:
    - i. Equipment meeting the specifications
    - ii. Equipment installation
    - iii. Functional performance and efficiency
    - iv. Equipment documentation
    - v. Operator training

- b. All outstanding non-compliance items shall be specifically listed. Recommendations for improvement to equipment or operations, future actions, commissioning process changes, etc., shall also be listed. Each non-compliance issue shall be referenced to the specific functional test, inspection, trend log, etc. where the deficiency is documented.
- c. Also included in the Commissioning Record shall be the issues log, commissioning plan, progress reports, submittal and O&M manual reviews, training record, test schedules, construction installation checklists, start-up reports, functional tests, and trend log analysis.

The Final Commissioning Report will be submitted electronically in a searchable format (e.g., native files including but not limited to Microsoft Word, Excel and Adobe Acrobat files created from a file that is itself searchable; an Adobe Acrobat file created from a scan or picture file would not be acceptable because it is not text-searchable).

### **Post Construction Phase**

Complete all required documentation (online template and any other supporting documentation as required) for facility certification and for LEED Energy & Atmosphere Prerequisite Fundamental Commissioning and Enhanced Commissioning. During this phase, the Commissioning Agent shall participate in reviewing building operation within 10 months after substantial completion (as established by the Design Team) with O&M staff and occupants. Include a plan for resolution of outstanding commissioning-related issues including any seasonal or deferred testing that might be required.

### **Systems to be Commissioned**

Commissioning activities shall be completed, including system integration, for all energy- and operation-related systems. Systems to be commissioned may include but not be limited to:

- Central building automation system
- All equipment of the heating, ventilating and air conditioning systems (such as condenser/hot/chilled water systems, radiant systems, natural ventilation systems, geothermal/cooling towers, boilers, air handling units, terminal units, exhaust fans, jet fans, smoke evacuation fans, etc.)
- Lighting controls (scheduled or occupancy sensors)
- Daylight dimming controls
- Refrigeration systems
- Electrical (including power supply, emergency power, switching, UPS, etc.)
- Fire alarm, fire detection, fire fighting, fire annunciation, and other required fire systems (non-LEED)
- Communication systems (including public address, phone, wireless, closed circuit television, audio visual, IT, static and variable signage, SCADA and other devices and elements that facilitate and provide system integration) (non-LEED)
- Vertical transportation systems including elevators, escalators, and other machinery devices (non-LEED)
- Domestic, grey and other water systems
- Plumbing (pumps, domestic hot water fixtures, and energy consuming components)
- Building envelope (non-LEED)
- Ramp geometry (non-LEED)
- Traffic signaling (non-LEED)
- On-site renewable energy systems

The Commissioning Agent shall provide the Services by personnel listed below. Any changes in personnel will be subject to the TJPA's review and approval.

The TJPA reserves the right, in its sole discretion, to change this Scope of Services at any time during the term of the Agreement. The Commissioning Agent shall be paid for any work that meets the requirements of the Agreement and that is performed prior to the date of such change.



# PROFESSIONAL SERVICES AGREEMENT

## APPENDIX B

### COST AND FEE

**Total Fee** **\$762,196**

#### Salient Assumptions

- Enovity's invoices will be on a Schedule of Values basis. The Schedule of Values is provided below.
- Commissioning of the temporary terminal facilities is not included.
- Renewable energy systems (solar/wind) are not included in the project.
- There are no refrigeration systems in the project.
- Commissioning of retail/concession tenant improvements is not included. However, a process to commissioning the base building HVAC systems that serve these area; i.e., condenser water/HW loop, will need to be included. This may require false-loading of these systems.
- The project schedule for completion of construction will be extended twelve months due to the change to the "bottom-up" approach. The new completion date is estimated to be the 2<sup>nd</sup> or 3<sup>rd</sup> Quarter of 2016.
- The result of the "bottom-up" approach is that the completion of the train box (Phase 2) will follow after the completion of the above ground portion of the project. Other than electrical panelboards, ventilation/exhaust fans and lighting that serve the train box, the major building systems are located in Phase 1.
- The Phase 2 project that is the extension of the Caltrain rail line is not included in the commissioning scope.
- The project is design/assist with Webcor in design phase CM role. It is not CM at Risk.
- There is an OPR document but it is not complete and will require Enovity to assist in its completion.
- There is a BOD document but it is not complete and will require Enovity to assist in its completion.
- DD documents are schedule to be completed at the end of 2009. The CD phase is approximately 14 months.
- Enovity's design phase services will include an informal review of the current design (50% DD), and a formal review of the 100% DD and 50% CD (latter required for LEED), with a back-check of the 90% or 100% CDs.
- Enovity will lead a meeting with the design team and Webcor, likely following the 100% DD submission, to present Enovity's general approach for commissioning of the project.
- Enovity will initially develop a Division 1 Commissioning specification for review by the design team and Webcor, prior to completion of the Commissioning trade specification sections.
- Bid documents will be issued in packages for specific systems. Separate packages for systems to be commissioned include: exterior skin (for operable windows), fire/LS systems, MEP and controls, vertical transportation, and communication systems.
- The building skin will likely be design-build but the remainder of the project related to commissioned systems will be design-bid-build by trade package.
- Building envelope commissioning will be limited to design review, inspections and functional testing of the operation of the automated vent windows. All other building envelope commissioning will be under a separate contract for independent NEMA testing entity for commissioning of various other envelope elements.
- Communication systems (public address, phone, wireless, closed circuit television, audio visual, IT, static and variable signage, SCADA and other devices), while not well defined at this stage of design, should be considered similar to those for an airport passenger terminal.

- We have included a \$17,600 allowance for re-testing of failed tests. The TJPA agrees to reimburse Enovity beyond this allowance for witnessing of additional tests by back-charging (withholding payments to) the contractor.
- Warranty phase commissioning will be limited to the LEED systems.
- Commissioning of ramp geometry will be included. This will be limited to the design phase only, and will involve review of OPR and BOD, design document reviews, and attendance at design phase meetings related to this element. These services are included in the proposal for Enovity's subcontractor.
- Commissioning of traffic signaling will be included. This will include some design phase tasks such as review of OPR and BOD, review of traffic control simulations, and functional testing of the traffic signaling element leading to customer acceptance. These services are included in the proposal for Enovity's subcontractor.
- We have included participation in 18 monthly coordination meetings for the design phase.
- Any significant change in the building systems could result in additional work for Enovity and would result in a change order.

**Commissioning of Transbay Transit Center  
Schedule of Values**

**Design Phase**

PM During Design Phase (Contract Administration, Invoicing, etc.)	\$11,951
Review 50% DD documents	\$3,951
Introductory Design Meeting	\$2,361
Review & coordinate OPR	\$9,095
Review & coordinate BOD	\$9,546
Review 100% DD documents	\$10,881
Eighteen(18) Monthly LEED & Commissioning Coordination Meetings During Design Phase	\$46,843
Review 50% documents for LEED Enhanced Cx	\$26,461
Back-check 90% documents for LEED Enhanced Cx	\$23,797
Prepare Initial Commissioning Plan	\$10,109
Complete Commissioning Specs	\$11,970
Subcontractors	\$44,620

**Construction Phase**

PM During Construction Phase (Contract Administration, Invoicing, etc.)	\$53,276
Update Commissioning Plan	\$6,597
Lead Commissioning Kickoff Meeting	\$2,432
Submittal Review	\$25,528
Attend Twenty-Four (24) Periodic Construction Meetings	\$21,669
Prepare IVs, Startup Forms, SRC Forms	\$27,662
Site Visits to Inspect Installation (IV forms)	\$56,165
Startup, TAB and Back-checks	\$59,654
Update Issues List	\$10,176
Write FPT Forms	\$38,322
Witness FPTs and Back-checks	\$77,119
Review BAS Trends and Analyze Faults	\$18,759
Lead Commissioning Coordination Acceptance Review Meeting	\$3,412
Assist in Developing Systems Manual	\$5,635
Review Training Plan and Delivery	\$2,818
Produce Commissioning Report	\$10,664
LEED Documents	\$2,963
Allowance - Retesting per the RFP	\$17,729
Subcontractors	\$61,126

**Warranty Phase**

PM During Warranty Phase (Contract Administration, Invoicing, etc.)	\$4,891
Site Visit to Perform Onsite Warranty Review	\$6,989
Re-Review BAS Trends and Analyze Faults	\$27,618
Update Commissioning Report	\$6,346
Subcontractors	\$3,060

**Project Total** **\$762,196**

### Projected Fee Distribution by Fiscal Year

<u>Year</u>	<u>Estimated Fee</u>
Fiscal Year 2009/2010	\$166,104
Fiscal Year 2010/2011	\$62,510
Fiscal Year 2011/2012	\$8,892
Fiscal Year 2012/2013	\$38,760
Fiscal Year 2013/2014	\$45,760
Fiscal Year 2014/2015	\$391,312
Fiscal Year 2015/2016	\$48,858

Notes:

Fee distribution by Fiscal Year is based on current project schedule and is included for reference. Authorizations will be established per NTP corresponding to the anticipated progress against the schedule of values.

<u>Enovity Personnel</u>	<u>2009/2010 Rate/Hr</u>
G. Cunningham, AIA, LEED AP	\$176.49
J. Soper, P.E.	\$176.49
E. Koepfel, P.E., CEM, LEED AP	\$123.55
D. Francis, LEED AP/J. Dunnavant, LEED AP	\$99.74
J. Sweeney, P.E.	\$92.66
D. Guthrie	\$99.74
Z. Gutman	\$99.74
R. Rodriguez	\$83.83
A. Collins	\$83.83
A. Tranovich	\$71.81

Notes:

Invoicing under the base agreement will be based on the Schedule of Values. Rates are included for reference and are subject to escalation per the Agreement.

## PROFESSIONAL SERVICES AGREEMENT

### APPENDIX C

#### PARCEL LIST

The private parcels listed below are planned to be acquired as part of the Transbay Transit Center Program in fee simple. This list is subject to change and requires verification by the TJPA.

Private Parcels			
	Address/Street	Block	Lot
1	580 Howard St.	3721	92-106
4	85 Natoma St.	3721	109-118
6	564 Howard St.	3721	19
7	568-576 Howard St.	3721	20
8	191 Second St.	3721	22
9	181 Second St.	3721	23
10	171 Second St.	3721	25
12	90 Natoma St.	3721	47
14	60 Tehama St.	3736	88
15	217 Second St.	3736	95
16	205-215 Second St.	3736	96
17	201 Second St.	3736	97
22	301 Brannan St.	3788	37
23	35 Stanford St. / 634 Second St.	3788	38
24	640 Second St.	3788	02
25	650 Second St.	3788	49-73
26	670 Second St.	3788	43
27	678-680 Second St.	3788	44
28	130 Townsend St.	3788	8
29	136 Townsend St.	3788	9
30	144-146 Townsend St.	3788	9A
31	148-154 Townsend St.	3788	10
32	164 Townsend St.	3788	74-85
33	166-178 Townsend St.	3788	12

## APPENDIX D

### FTA REQUIREMENTS FOR AGREEMENTS WITH THE TJPA

*The FTA's requirements for agreements between the TJPA and a third party are summarized below. Certain FTA provisions described below may not be applicable to all agreements with the TJPA. The italicized text is intended to assist the Contractor in understanding which Federal requirements may be applicable to an agreement. The FTA and the TJPA have sole discretion to apply any particular provision described below.*

*These provisions supplement the provisions in the Agreement, and shall be interpreted in the broadest possible manner to avoid any conflicts. If there is an unavoidable conflict between the FTA requirements and any other terms and conditions of the Agreement, in the TJPA's sole determination, the FTA requirements shall take precedence.*

#### 1. DEFINITIONS

*\*\* The Definitions apply to all Agreements.*

- (a). **Approved Project Budget** means the most recent statement, approved by the FTA, of the costs of the Project, the maximum amount of Federal assistance for which the TJPA is currently eligible, the specific tasks (including specified contingencies) covered, and the estimated cost of each task.
- (b). **Contractor** means the individual or entity awarded an Agreement financed in whole or in part with Federal assistance originally derived from FTA.
- (c). **Federal Cooperative Agreement** means the instrument by which FTA awards Federal assistance to the TJPA to support a particular Project, and in which FTA takes an active role or retains substantial control.
- (d). **FTA** is the acronym for the Federal Transit Administration, one of the operating administrations of the U.S. DOT.
- (e). **FTA Directive** includes any FTA regulation, policy, procedure, directive, circular, notice, order or guidance providing information about FTA's programs, application processing procedures, and Project management guidelines, including the Master Agreement between FTA and the TJPA. In addition to FTA Directives, certain U.S. DOT directives also apply to the Project.
- (f). **Grant Agreement** means the instrument by which FTA awards Federal assistance to the TJPA to support a particular Project, and in which FTA does not take an active role or retain substantial control, in accordance with 31 U.S.C. Section 6304.
- (g). **Government** means the United States of America and any executive department thereof.
- (h). **Project** means the task or set of tasks listed in the Approved Project Budget that is the subject of this Agreement, as well as any modifications stated in the Conditions to the Grant Agreement or Federal Cooperative Agreement applicable to the Project. In the case of the formula assistance programs for urbanized areas, for elderly and persons with disabilities, and non-urbanized areas, 49 U.S.C. sections 5307, 5310, and 5311, respectively, the term "Project" encompasses both a program and each project within a program, as the context may require, to effectuate the requirements of the Grant Agreement or Federal Cooperative Agreement.
- (i). **Recipient** means the TJPA.
- (j). **Secretary** means the U.S. DOT Secretary, including his or her duly authorized designee.

- (k). **Agreement** means a contract, purchase order, memorandum of understanding or other agreement awarded by the TJPA to a Contractor, financed in whole or in part with Federal assistance awarded by FTA.
- (l). **Subcontract** means a subcontract at any tier entered into by Contractor or its subcontractor relating to the Agreement, financed in whole or in part with Federal assistance originally derived from FTA. Unless otherwise specified, the Contractor must include each of these Federal provisions in any Subcontract related to this Agreement.
- (m). **U.S. DOT** is the acronym for the U.S. Department of Transportation, including its operating administrations.

## **2. FLY AMERICA REQUIREMENTS**

**\*\*** *This provision applies to all Agreements for more than \$2,500 that involve the transportation of persons or property, by air, between a place in the U.S. and a place outside the U.S., or between places outside the U.S.*

- (a). The Contractor agrees to comply with 49 U.S.C. Section 40118 (the "Fly America Act") in accordance with the General Services Administration's regulations at 41 CFR Part 301-10, which provide that recipients and subrecipients of Federal funds and their contractors are required to use U.S. flag air carriers for U.S Government-financed international air travel and transportation of their personal effects or property, to the extent such service is available, unless travel by foreign air carrier is a matter of necessity, as defined by the Fly America Act.
- (b). The Contractor shall submit the "Fly America Certification" if the regulation is applicable to the particular Agreement.
- (c). The Contractor shall submit, if a foreign air carrier was used, an appropriate certification or memorandum adequately explaining why service by a U.S. flag air carrier was not available or why it was necessary to use a foreign air carrier.
- (d). Notwithstanding the foregoing, transportation on a foreign air carrier is permissible when provided by a foreign air carrier under a code share agreement when the ticket identifies the U.S. air carrier's designator code and flight number. Transportation by a foreign air carrier is also permissible if there is a bilateral or multilateral air transportation agreement to which the U.S. Government and a foreign government are parties and which the U.S. DOT has determined meets the requirements of the Fly America Act.

## **3. BUY AMERICA REQUIREMENTS**

**\*\*** *This provision applies only to the following types of Agreements: construction agreements of any value; agreements for the acquisition of goods valued at more than \$100,000; and agreements for the acquisition of rolling stock valued at more than \$100,000.*

- (a). The Contractor agrees to comply with 49 U.S.C. Section 5323(j) and 49 CFR Part 661, which provide that Federal funds may not be obligated unless steel, iron, and manufactured products used in FTA-funded projects, such as the Transbay Transit Center Program that is the subject of this Agreement, are produced in the United States, unless a waiver has been granted by FTA or the product is subject to a general waiver. General waivers are listed in 49 CFR Section 661.7, and include final assembly in the United States for 15 passenger vans and 15 passenger wagons produced by Chrysler Corporation, and microcomputer equipment and software. Separate requirements for rolling stock are set out at 49 U.S.C. Section 5323(j)(2)(C) and 49 CFR Section 661.11. Rolling stock must be assembled in the United States and have a 60 percent domestic content.

- (b). The Prime Contractor shall submit the "Buy America Certification" at the time of bid/offer if the regulation is applicable to the particular agreement. The Prime Contractor is responsible for ensuring that lower tier subcontractors are in compliance.

#### **4. CARGO PREFERENCE REQUIREMENTS**

**\*\*** *This provision applies to all Agreements for more than \$2,500 involving equipment, materials, or commodities which may be transported by ocean vessels.*

- (a). The Contractor agrees to use privately owned United States flag commercial vessels to ship at least 50 percent of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers) involved, whenever shipping any equipment, material, or commodities pursuant to the Agreement to the extent such vessels are available at fair and reasonable rates for United States flag commercial vessels.
- (b). The Contractor agrees to furnish within twenty (20) working days following the date of loading for shipments originating within the United States or within thirty (30) working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, "on-board" commercial ocean bill-of-landing in English for each shipment of cargo described in the preceding paragraph to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590 and to the TJPA (through the Contractor in the case of a subcontractor's bill-of-landing).

#### **5. SEISMIC SAFETY REQUIREMENTS**

**\*\*** *This provision applies only to Agreements for the construction of new buildings or additions to existing buildings.*

The Contractor agrees that any new building or addition to an existing building that is the subject of this Agreement will be designed and constructed in accordance with the standards for Seismic Safety required in U.S. DOT Seismic Safety Regulations 49 CFR Part 41 and will certify to compliance with such regulations to the extent required by the regulations. The Contractor also agrees to ensure that all work performed under this Agreement, including work performed by a subcontractor, is in compliance with the standards required by the Seismic Safety Regulations and the certification of compliance issued on the project.

#### **6. ENERGY CONSERVATION REQUIREMENTS**

**\*\*** *This provision applies to all Agreements.*

The Contractor agrees to comply with mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act, 42 U.S.C. Section 6201 et seq.

#### **7. CLEAN WATER REQUIREMENTS**

**\*\*** *This provision applies to all Agreements greater than \$100,000.*

- (a). The Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. Section 1251 et seq. The Contractor agrees to report each violation to the TJPA and understands and agrees that the TJPA will, in turn, report each violation as required to assure notification to FTA and the appropriate EPA Regional Office.
- (b). The Contractor also agrees to include these requirements in each Subcontract exceeding \$100,000 financed in whole or in part with Federal assistance provided by FTA.



## **8. LOBBYING**

**\*\*** *This provision applies to the following types of Agreements, if the Agreement is equal to or greater than \$100,000: construction, architectural and engineering; acquisition of rolling stock; professional services; operational services; and Turnkey.*

**\*\*** *Please be aware that the requirements in the Agreement regarding limitations on contributions may be more restrictive than the FTA Requirements described below. The Contractor must comply with the requirements described below and in the Agreement.*

- (a). The Prime Contractor shall submit the "New Restrictions on Lobbying Certification" if the regulation is applicable to the particular agreement.
- (b). The Contractor and each subcontractor shall certify to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any federal agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. Section 1352. The Contractor and each subcontractor shall also disclose the name of any registrant under the Lobbying Disclosure Act of 1995 who has made lobbying contacts on its behalf with non-Federal funds with respect to a Federal contract, grant or award covered by 31 U.S.C. Section 1352. Such disclosures are forwarded from tier to tier up to the TJPA.

## **9. ACCESS TO DOCUMENTS**

**\*\*** *This requirement applies to all Agreements. FTA does not require the inclusion of these requirements in Subcontracts.*

**\*\*** *Please be aware that the requirements in the Agreement section entitled "Audit and Inspection of Records" may require the Contractor to maintain files relating to this Agreement for a longer period of time than described in the FTA Requirement below. Please also be aware that, as described in the Agreement section entitled "San Francisco Sunshine Ordinance", the TJPA follows the provisions of the City and County of San Francisco Sunshine Ordinance regarding responses to public requests for certain bid documents. The Contractor must comply with the requirements described below and in the Agreement.*

- (a). Where the TJPA is considered a "local government" and is a Recipient or a subgrantee of a Recipient, in accordance with 49 CFR Section 18.36(i), the Contractor agrees to provide the TJPA, the FTA Administrator, the Comptroller General of the United States and/or any of their authorized representatives access to any books, documents, accounts papers and records of the Contractor which are directly pertinent to this Agreement ("Documents") for the purposes of making audits, examinations, excerpts and transcriptions. Contractor also agrees, pursuant to 49 CFR Section 633.17, to provide the FTA Administrator or its authorized representatives, including any project management oversight Contractor, access to Contractor's Documents and construction sites pertaining to a major capital project, defined at 49 U.S.C. Section 5302(a)1, which is receiving Federal financial assistance through the programs described at 49 U.S.C. sections 5307, 5309 or 5311.
- (b). Where the TJPA is a Recipient or a subgrantee of a Recipient, in accordance with 49 U.S.C. Section 5325(a), and enters into a contract for a capital project or improvement (defined at 49 U.S.C. Section 5302[a]1) through other than competitive bidding, the Contractor agrees to provide the TJPA, the Secretary and the Comptroller General, or any authorized officer or employee of any of them, access to any Documents for the purposes of conducting an audit and inspection.
- (c). The Contractor agrees to permit any of the foregoing parties to reproduce, by any means whatsoever, or to copy excerpts and transcriptions, as reasonably needed, of any Documents.

- (d). The Contractor agrees to maintain all Documents required under this Agreement for a period of not less than three years after the date of termination or expiration of this Agreement, except in the event of litigation or settlement of claims arising from the performance of this Agreement, in which case Contractor agrees to maintain same until the TJPA, the FTA Administrator, the Comptroller General, or any of their duly authorized representatives, have disposed of all such litigation, appeals, claims or exceptions related thereto. (See 49 CFR Section 18.39[i][11]).

## **10. FEDERAL CHANGES**

\*\* *This requirement applies to all Agreements.*

Contractor shall at all times comply with all applicable federal laws and regulations, and all FTA Directives and U.S. DOT Directives applicable to the Project, as they may be amended or promulgated from time to time during the term of this Agreement. It is Contractor's responsibility to be aware of any amendments or changes to such federal requirements and directives. Contractor's failure to so comply shall constitute a material breach of this Agreement.

## **11. RESERVED**

## **12. CLEAN AIR**

\*\* *This provision applies to all Agreements greater than \$100,000 and to subcontracts greater than \$100,000.*

- (a) The Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. Section 7401 et seq. The Contractor agrees to report each violation to the TJPA and understands and agrees that the TJPA will, in turn, report each violation as required to assure notification to FTA and the appropriate EPA Regional Office.
- (b) The Contractor also agrees to include these requirements in each subcontract exceeding \$100,000.

## **13. RECYCLED PRODUCTS**

\*\* *This provision applies to all Agreements to procure \$10,000 or more of any one item designated by the EPA under 40 CFR Part 247, Subpart B in a single fiscal year, and to all Agreements to procure any items designated in 40 CFR Part 247, Subpart B where the TJPA or the Contractor has used Federal funds to procure \$10,000 or more of any one item in the previous fiscal year.*

\*\* *Please be aware that the requirements in the Agreement regarding resource conservation may be more restrictive than the FTA Requirements described below. The Contractor must comply with the requirements described below and in the Agreement.*

The Contractor agrees to comply with the requirements of Section 6002 of the Resource Conservation and Recovery Act (RCRA), as amended (42 U.S.C. Section 6962 et seq.), including but not limited to the regulatory provisions of 40 CFR Part 247, and Executive Order 12873, as they apply to the procurement of the items designated in 40 CFR Part 247, Subpart B.

## **14. RESERVED**

## **15. AGREEMENT WORK HOURS AND SAFETY STANDARDS ACT**

\*\* *This requirement applies to Agreements and Subcontracts for construction over \$100,000, and to non-construction Agreements valued at more than \$100,000 that employ "laborers or mechanics on a public work," as defined by 42 U.S.C. Section 3701.*

- (a). **Overtime requirements** - No Contractor or subcontractor contracting for any part of the Agreement work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed

on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

- (b). **Violation; liability for unpaid wages; liquidated damages** - In the event of any violation of the clause set forth in paragraph (a) of this section the Contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such Contractor and subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (a) of this section, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (1) of this section.
- (c). **Withholding for unpaid wages and liquidated damages** - The TJPA shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the Contractor or subcontractor under any such Agreement or any other Federal contract with the same Contractor, or any other federally assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same Contractor, such sums as may be determined to be necessary to satisfy any liabilities of such Contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (b) of this section.

**16. NO GOVERNMENT OBLIGATION TO THIRD PARTIES**

\*\* *This requirement applies to all Agreements.*

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

**17. PROGRAM FRAUD AND FALSE OR FRAUDULENT STATEMENTS AND RELATED ACTS**

\*\* *This provision applies to all Agreements.*

- (a). The Contractor acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. Section 3801 et seq., and U.S. DOT regulations, "Program Fraud Civil Remedies," 49 CFR Part 31, apply to its actions under the Agreement. Upon execution of the Agreement, the Contractor certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, it may make, or causes to be made, pertaining to the Agreement or the FTA-assisted Project for which this Agreement work is being performed. In addition to other penalties that may be applicable, the Contractor further acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification, the Federal Government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986 on the Contractor to the extent the Federal Government deems appropriate.
- (b). The Contractor also acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification to the Federal Government under an Agreement connected with a project that is financed in whole or in part with Federal assistance originally awarded by FTA under the authority of 49 U.S.C. Section 5307, the Government reserves the right to impose the penalties of 18 U.S.C. Section 1001 and 49 U.S.C. Section 5307(n)(1) on the Contractor, to the extent the Federal Government deems appropriate.

## 18. TERMINATION

\*\* *This requirement applies to all Agreements in excess of \$10,000, except when the Contractor is a nonprofit organization or institution of higher education. When the Contractor is a nonprofit organization or institution of higher education, this requirement applies to all Agreements greater than \$100,000.*

\*\* *Please be aware that the requirements in the Agreement regarding termination for convenience are more broadly applicable than the FTA Requirements described below. Both the requirements described below and the provisions in the Agreement are applicable to the Agreement.*

- (a). **Termination for Convenience (General Provision)** - The TJPA may terminate this Agreement, in whole or in part, at any time by written notice to the Contractor when it is in the Government's best interest. The Contractor shall be paid its costs, including Agreement close-out costs, and profit on work performed up to the time of termination. The Contractor shall promptly submit its termination claim to the TJPA. If the Contractor has any property in its possession belonging to the TJPA, the Contractor will account for the same, and dispose of it in the manner the TJPA directs.
- (b). **Termination for Default [Breach or Cause] (General Provision)** - If the Contractor (1) does not deliver supplies in accordance with the Agreement delivery schedule, or (2) if the Agreement is for services the Contractor fails to perform in the manner called for in the Agreement, or (3) if the Contractor fails to comply with any other provisions of the Agreement, the TJPA may terminate this Agreement for default. Termination shall be effected by serving a notice of termination on the Contractor setting forth the manner in which the Contractor is in default. The Contractor will only be paid the Agreement price for supplies delivered and accepted, or services performed in accordance with the manner of performance set forth in the Agreement.
- If it is later determined by the TJPA that the Contractor had an excusable reason for not performing, such as a strike, fire, or flood, events which are not the fault of or are beyond the control of the Contractor, the TJPA, after setting up a new delivery of performance schedule, may allow the Contractor to continue work, or treat the termination as a termination for convenience.
- (c). **Opportunity to Cure (General Provision)** - The TJPA in its sole discretion may, in the case of a termination for breach or default, allow the Contractor a period of time in which to cure the defect. In such case, the notice of termination will state the time period in which cure is permitted and other appropriate conditions.
- If Contractor fails to remedy to the TJPA's satisfaction the breach or default of any of the terms, covenants, or conditions of this within ten (10) days after receipt by Contractor of written notice from the TJPA setting forth the nature of said breach or default, the TJPA shall have the right to terminate the Agreement without any further obligation to Contractor. Any such termination for default shall not in any way operate to preclude the TJPA from also pursuing all available remedies against Contractor and its sureties for said breach or default.
- (d). **Waiver of Remedies for any Breach** - In the event that TJPA elects to waive its remedies for any breach by Contractor of any covenant, term or condition of this Agreement, such waiver by the TJPA shall not limit the TJPA's remedies for any succeeding breach of that or of any other term, covenant, or condition of this Agreement.
- (e). **Termination for Convenience (Professional or Transit Service Agreements)** - The TJPA, by written notice, may terminate this Agreement, in whole or in part, when it is in the Government's interest. If this Agreement is terminated, the TJPA shall be liable only for payment under the payment provisions of this Agreement for services rendered before the effective date of termination.
- (f). **Termination for Default (Supplies and Service)** - If the Contractor fails to deliver supplies or to perform the services within the time specified in this Agreement or any extension or if the

Contractor fails to comply with any other provisions of this Agreement, the TJPA may terminate this Agreement for default. The TJPA shall terminate by delivering to the Contractor a Notice of Termination specifying the nature of the default. The Contractor will only be paid the Agreement price for supplies delivered and accepted, or services performed in accordance with the manner or performance set forth in this Agreement.

If, after termination for failure to fulfill Agreement obligations, it is determined that the Contractor was not in default, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the TJPA.

- (g). **Termination for Default (Transportation Services)** - If the Contractor fails to pick up the commodities or to perform the services, including delivery services, within the time specified in this Agreement or any extension or if the Contractor fails to comply with any other provisions of this Agreement, the TJPA may terminate this Agreement for default. The TJPA shall terminate by delivering to the Contractor a Notice of Termination specifying the nature of default. The Contractor will only be paid the Agreement price for services performed in accordance with the manner of performance set forth in this Agreement.

If this Agreement is terminated while the Contractor has possession of TJPA goods, the Contractor shall, upon direction of the TJPA, protect and preserve the goods until surrendered to the TJPA or its agent. The Contractor and the TJPA shall agree on payment for the preservation and protection of goods. Failure to agree on an amount will be resolved under the Dispute clause.

If, after termination for failure to fulfill Agreement obligations, it is determined that the Contractor was not in default, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the TJPA.

- (h). **Termination for Default (Construction)** - If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will ensure its completion within the time specified in this Agreement or any extension or fails to complete the work within this time, or if the Contractor fails to comply with any other provisions of this Agreement, the TJPA may terminate this Agreement for default. The TJPA shall terminate by delivering to the Contractor a Notice of Termination specifying the nature of the default. In this event, the TJPA may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to the TJPA resulting from the Contractor's refusal or failure to complete the work within specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the TJPA in completing the work.

The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause if:

- (1). The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include acts of God, acts of the TJPA, acts of another Contractor in the performance of a Agreement with the TJPA, epidemics, quarantine restrictions, strikes, freight embargoes; and
- (2). The Contractor, within ten (10) days from the beginning of any delay, notifies the TJPA in writing of the causes of delay. If in the judgment of the TJPA, the delay is excusable, the time for completing the work shall be extended. The judgment of the TJPA shall be final and conclusive on the parties, but subject to appeal under the Disputes clauses.

If, after termination of the Contractor's right to proceed, it is determined that the Contractor was not in default, or that the delay was excusable, the rights and obligations

of the parties will be the same as if the termination had been issued for the convenience of the TJPA.

- (i) **Termination for Convenience or Default (Architect and Engineering)** - The TJPA may terminate this Agreement in whole or in part, for the TJPA's convenience or because of the failure of the Contractor to fulfill the Agreement obligations. The TJPA shall terminate by delivering to the Contractor a Notice of Termination specifying the nature, extent, and effective date of the termination. Upon receipt of the notice, the Contractor shall (1) immediately discontinue all services affected (unless the notice directs otherwise), and (2) deliver to the contracting officer all data, drawings, specifications, reports, estimates, summaries, and other information and materials accumulated in performing this Agreement, whether completed or in process.

If the termination is for the convenience of the TJPA, the contracting officer shall make an equitable adjustment in the Agreement price but shall allow no anticipated profit on unperformed services.

If the termination is for failure of the Contractor to fulfill the Agreement obligations, the TJPA may complete the work by contract or otherwise and the Contractor shall be liable for any additional cost incurred by the TJPA.

If, after termination for failure to fulfill Agreement obligations, it is determined that the Contractor was not in default, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the TJPA.

- (j). **Termination for Convenience or Default (Cost-Type Agreements)** - The TJPA may terminate this Agreement, or any portion of it, by serving a notice of termination on the Contractor. The notice shall state whether the termination is for convenience of the TJPA or for the default of the Contractor. If the termination is for default, the notice shall state the manner in which the Contractor has failed to perform the requirements of the Agreement. The Contractor shall account for any property in its possession paid for from funds received from the TJPA, or property supplied to the Contractor by the TJPA. If the termination is for default, the TJPA may fix the fee, if the Agreement provides for a fee, to be paid the Contractor in proportion to the value, if any, of work performed up to the time of termination. The Contractor shall promptly submit its termination claim to the TJPA and the parties shall negotiate the termination settlement to be paid the Contractor.

If the termination is for the convenience of the TJPA, the Contractor shall be paid its Agreement close-out costs, and a fee, if the Agreement provided for payment of a fee, in proportion to the work performed up to the time of termination.

If, after serving a notice of termination for default, the TJPA determines that the Contractor has an excusable reason for not performing, such as strike, fire, flood, events which are not the fault of and are beyond the control of the Contractor, the TJPA, after setting up a new work schedule, may allow the Contractor to continue work, or treat the termination as a termination for convenience.

## 19. GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

\*\* *This requirement applies to all Agreements and Subcontracts greater than or equal to \$25,000, and to any Agreement for auditing services at any dollar value.*

- (a). This Agreement is a "covered transaction" for purposes of 49 CFR Part 29, and the Contractor is required to comply with 49 CFR Section 29, Subpart C. In particular, the Contractor is required to verify that the Contractor, its "principals," as defined at 49 CFR Section 29.995, and its "affiliates," as defined at 49 CFR Section 29.905, are not "excluded" or "disqualified," as defined at 49 CFR sections 29.940 and 29.945.

- (b). The Contractor shall submit the "Certification Regarding Debarment, Suspension, and Other Responsibility Matters" if the regulation is applicable to the particular agreement.

## 20. CIVIL RIGHTS REQUIREMENT

\*\* *This requirement applies to all Agreements.*

\*\* *Please be aware that the requirements in the Agreement regarding nondiscrimination are broader than the FTA Requirements described below. The Contractor must comply with the requirements described below and in the Agreement.*

- (a). **Nondiscrimination** - In accordance with Title VI of the Civil Rights Act, as amended, 42 U.S.C. Section 2000d, Section 303 of the Age Discrimination Act of 1975, as amended, 42 U.S.C. Section 6102, Section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. Section 12132, and Federal transit law at 49 U.S.C. Section 5332, the Contractor agrees that it will not discriminate against any employee or applicant for employment because of race, color, creed, national origin, sex, age, or disability. In addition, the Contractor agrees to comply with applicable Federal implementing regulations and other implementing requirements FTA may issue.
- (b). **Equal Employment Opportunity** - The following equal employment opportunity requirements apply to the Agreement:
- (1). **Race, Color, Creed, National Origin, Sex** - In accordance with Title VII of the Civil Rights Act, as amended, 42 U.S.C. Section 2000e, and Federal transit laws at 49 U.S.C. Section 5332, the Contractor agrees to comply with all applicable equal employment opportunity requirements of U.S. Department of Labor (U.S. DOL) regulations, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor," 41 CFR Parts 60, (which implement Executive Order No. 11246, "Equal Employment Opportunity," as amended by Executive Order No. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," 42 U.S.C. Section 2000e note), and with any applicable Federal statutes, executive orders, regulations, and Federal policies that may in the future affect construction activities undertaken in the course of the Project. The Contractor agrees to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, creed, national origin, sex, or age. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.
  - (2). **Age** - In accordance with Section 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. Section 623, and Federal transit law at 49 U.S.C. Section 5332, the Contractor agrees to refrain from discrimination against present and prospective employees for reason of age. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.
  - (3). **Disabilities** - In accordance with Section 102 of the Americans with Disabilities Act, as amended, 42 U.S.C. Section 12112, the Contractor agrees that it will comply with the requirements of U.S. Equal Employment Opportunity Commission, "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 29 CFR Part 1630, pertaining to employment of persons with disabilities. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.

**21. BREACHES AND DISPUTE RESOLUTION**

\*\* *This requirement applies to all Agreements in excess of \$100,000.*

- (a). **Disputes** - Disputes arising in the performance of this Agreement which are not resolved by agreement of the parties shall be decided in writing by the authorized representative of TJPA's Executive Director. This decision shall be final and conclusive unless within ten (10) days from the date of receipt of its copy, the Contractor mails or otherwise furnishes a written appeal to the Executive Director. In connection with any such appeal, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its position. The decision of the Executive Director shall be binding upon the Contractor and the Contractor shall abide by the decision.
- (b). **Performance During Dispute** - Unless otherwise directed by the TJPA, Contractor shall continue performance under this Agreement while matters in dispute are being resolved.
- (c). **Claims for Damages** - Should either party to the Agreement suffer injury or damage to person or property because of any act or omission of the party or of any of the party's employees, agents or others for whose acts the party is legally liable, a claim for damages therefore shall be made in writing to such other party within a reasonable time after the first observance of such injury of damage.
- (d). **Remedies** - Unless this Agreement provides otherwise, all claims, counterclaims, disputes and other matters in question between the TJPA and the Contractor arising out of or relating to this Agreement or its breach will be decided by arbitration if the parties mutually agree, or in a court of competent jurisdiction within the state in which the TJPA is located.
- (e). **Rights and Remedies** - The duties and obligations imposed by the Agreement Documents and the rights and remedies available thereunder shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law. No action or failure to act by the TJPA or Contractor shall constitute a waiver of any right or duty afforded any of them under the Agreement, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically agreed in writing.

**22. DISADVANTAGED BUSINESS ENTERPRISE (DBE)**

\*\* *The specific provisions checked below apply to this Agreement.*

- (a). This Agreement is subject to the requirements of 49 CFR Part 26, *Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs*. The national goal for participation of Disadvantaged Business Enterprises (DBEs) is 10 percent. The TJPA FY2009-10 Annual Anticipated DBE Participation Level is 25.4 percent.
  - A separate Agreement goal of \_\_\_\_\_ percent DBE participation has been established for this Agreement.
  - A separate Agreement goal **has not** been established for this Agreement.
- (b). The Contractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement. The Contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of this DOT-assisted Agreement. Failure by the Contractor to carry out these requirements is a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy as the TJPA deems appropriate. Each Subcontract the Contractor signs with a subcontractor must include the assurance in this paragraph (see 49 CFR Section 26.13[b]).
- (c). *(Checked box is applicable to this Agreement.)*



(If a separate Agreement goal has been established, use the following)

The Contractor was required to document sufficient DBE participation to meet the separate Agreement goal established for this Agreement or, alternatively, document adequate good faith efforts to do so, as provided for in 49 CFR Section 26.53.

(If no separate Agreement goal has been established, use the following)

The Contractor is required to report its DBE participation obtained through race-neutral means throughout the period of performance.

- (d). The Contractor is required to pay its subcontractors performing work related to this Agreement for satisfactory performance of that work no later than ten (10) days after the Contractor's receipt of payment for that work from the TJPA. In addition, the Contractor is required to return any retainage payments to those subcontractors within thirty (30) days after incremental acceptance of the subcontractor's work by the TJPA and Contractor's receipt of the partial retainage payment related to the subcontractor's work.
- (e). The Contractor must promptly notify the TJPA whenever a DBE subcontractor performing work related to this Agreement is terminated or fails to complete its work, and must make good faith efforts to engage another DBE subcontractor to perform at least the same amount of work. The Contractor may not terminate any DBE subcontractor and perform that work through its own forces or those of an affiliate without prior written consent of the TJPA.

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

\*\* *This requirement applies to all Agreements.*

The preceding provisions include, in part, certain standard terms and conditions required by U.S. DOT of the TJPA's agreements, whether or not expressly set forth in the preceding Agreement provisions. All contractual provisions required by U.S. DOT, as set forth in FTA Circular 4220.1E, are hereby incorporated by reference. Anything to the contrary herein notwithstanding, all FTA-mandated terms shall be deemed to control in the event of a conflict with other provisions contained in this Agreement. The Contractor shall not perform any act, fail to perform any act, or refuse to comply with any TJPA requests which would cause the TJPA to be in violation of the FTA terms and conditions.



## Commissioning Agent Selection Committee Report August 2009

### Executive Summary and Recommendation

In response to Request for Proposals No. 09-03 for a Commissioning Agency for the New Transbay Transit Center, issued on June 19, 2009, the TJPA received six proposals on or by the due date of August 14 from firms meeting all minimum qualifications. A selection committee convened on August 18, 2009 to evaluate the proposals and shortlisted three respondents. On August 25, 2009, the committee conducted oral interviews with the three respondents and finalized its scoring.

Based on the criteria outlined in the RFP, the selection committee recommends that the TJPA negotiate a contract for services with the highest ranked firm, **Enovity, Inc.**

### Background

The TJPA has both LEED and non-LEED commissioning requirements that are integral to the Program, and wishes to retain a Commissioning Agent during the design development phase of the Transit Center. The primary role of the Commissioning Agent will be to develop and coordinate the execution of a testing plan, and observe and document performance of whether the systems are installed and functioning in accordance with the contract documents. The Commissioning Agent will plan, develop, research, document, update, coordinate, maintain and record facility certification requirements pertaining to Program design, construction and final inspections, as well as assist the TJPA with overall facility startup and pre-revenue commissioning.

An allocation of Regional Measure 2 funds in the amount of \$850,000 is available to fund the Commissioning Agent agreement. A term with sufficient options to extend the contract through the warranty phase of the Transit Center will be negotiated. **Compensation will be paid on a cost plus fixed fee basis.**

### Schedule

- |    |  |                 |
|----|--|-----------------|
| 1) | RFP advertised/posted                              | June 19, 2009   |
| 2) | Pre-proposal conference                            | July 6, 2009    |
| 3) | Addendum 1 issued                                  | July 21, 2009   |
| 4) | Receipt of proposals                               | August 14, 2009 |
| 5) | Selection committee evaluation meeting             | August 18, 2009 |
| 6) | Interviews of short-listed firms and final scoring | August 25, 2009 |

### Selection Committee Members

Robert Beck, TJPA Senior Program Manager  
Gerry MacClelland, TJPA Program Management Program Manager  
Clark Bisel, Senior Vice President, Flack + Kurtz, Transit Center Design Team  
Lynn N. Simon, Simon & Associates, TJPA Program Management Sustainability Representative  
Victor Yuen, SFMTA Construction Management Manager

### **RFP Outreach**

An announcement of the RFP appeared in the *San Francisco Examiner* and the *San Francisco Bay View*. It was also posted on the City Purchaser's Bids and Contracts website; a copy of the announcement is Attachment A. On the same day, the TJPA posted the RFP on its website for the public to view and print and sent announcement of its availability to all interested parties who have signed up for TJPA updates/contracting opportunity notifications. In total, the announcement was sent to 517 firms and individuals.

An optional pre-proposal conference was held on July 6, 2009, with eighteen attendees. TJPA issued an addendum to the RFP on July 21, 2009, clarifying the minimum necessary qualifications and extending the due date from July 31 to August 14, 2009.

The TJPA received six proposals on or before the RFP submission date, from:

- Cogent Energy, Inc.
- Engineering Economics, Inc.
- Enovity, Inc.
- Mazzetti Nash Lipsey Burch with Dabri, Inc.
- TMAD Taylor & Gaines
- WCS|CA

### **Selection Committee Evaluation**

The selection committee met on August 18, 2009 to review the written proposals and evaluate strengths and weaknesses using the criteria listed on the score sheet (Attachment B). Following the discussion, each committee member individually filled out scoring sheets. The TJPA Contracts Compliance Manager tabulated and verified the scores. Three firms were invited to participate in interviews based on the scoring results.

On August 25, 2009, the committee conducted oral Interviews of the three shortlisted Respondents. Following the interviews, the committee discussed the strengths and weaknesses of each Respondent firm, and then individually completed and signed scoring sheets and submitted them to the Contracts Compliance Manager for tabulation.

Enovity, Inc. achieved the highest score. Scores are shown in Attachment C.

All proposals submitted in response to this RFP are available for review at 201 Mission Street, Suite 2100 upon contacting the TJPA's Office Manager. Proposals will be retained for two years, except for the selected consultant's proposal will be maintained on permanent record.

### **Attachments**

Attachment A, RFP Announcement  
Attachment B, Scoring Sheets  
Attachment C, Scores

### **Reference**

Request for Proposals No. 09-03 for Commissioning Agent for New Transbay Transit Center issued by the Transbay Joint Powers Authority on June 19, 2009.

## **Attachment A**

### **ANNOUNCEMENT**

#### **REQUEST FOR PROPOSALS NO. 09-03 COMMISSIONING AGENT**

The Transbay Joint Powers Authority (TJPA) is issuing a Request for Proposals (RFP) for a COMMISSIONING AGENT FOR THE NEW TRANSBAY TRANSIT CENTER from firms or individuals with expertise in transit facility certification and Leadership in Energy and Environmental Design (LEED) Prerequisite Credit EAP1 (Fundamental Commissioning) and Credit EA3 (Enhanced Commissioning).

The successful Respondent must demonstrate experience in successfully providing commissioning agent services for one or more similar facilities. The TJPA will select a qualified Respondent to perform services for a period up to six (6) years.

An optional pre-proposal conference will be held on Monday, July 6, 2009, at 3:30 p.m. at TJPA offices, 201 Mission Street, Ste. 2100, San Francisco.

Prospective Respondents may obtain copies of this RFP, including required forms, by visiting the TJPA's website at [www.TransbayCenter.org](http://www.TransbayCenter.org) (>Documents >RFPs/RFQs) or by contacting the TJPA at (415) 597-4620 or at [Commissioning@TransbayCenter.org](mailto:Commissioning@TransbayCenter.org). Proposal packages must be received by the TJPA no later than 3:00 p.m. on Friday, July 31, 2009, at the address below. Late proposal packages will not be considered.

## Attachment B

### EVALUATION SCORE SHEET Commissioning Agent

Name of Respondent: \_\_\_\_\_

Name of Panelist: \_\_\_\_\_

Signature of Panelist: \_\_\_\_\_

Criteria	Value	Reviewer Comments
Resumes of Project Team ( <i>40 point maximum</i> )		
Example Projects Illustrating Qualifications ( <i>30 point maximum</i> )		
Narrative explaining approach and past performance ( <i>20 point maximum</i> )		
References will be scored as part of the interview process		

**Total** \_\_\_\_\_ **(90 maximum)**

FIRM NAME:

PANELIST:

DATE:

**TJPA INTERVIEW SCORE SHEET**  
**COMMISSIONING AGENT SERVICES**

Evaluate and score presentations and interview responses based on the following criteria:

	<b>Description</b>	<b>Score</b>	<b>Notes</b>
1.	Presentation (10 minutes maximum) focusing on: <ul style="list-style-type: none"><li>• Understanding of issues related to TTC</li><li>• Qualifications of key staff</li><li>• Approach to team management</li></ul> <i>(maximum 20 points)</i>		
2.	Responses to questions <i>(maximum 80 points; 5 points/question)</i>		
	1. Scope evaluation/handling in-house		
	2. Proposed team and staffing involvement		
	3. Evaluation of BOD report		
	4. Development of commissioning spec		
	5. Issuance of commissioning spec/QC		
	6. Expectations of owner		
	7. Expectations of design team		
	8. Expectations of contractor		
	9. Techniques working with contractor		
	10. Differences in commissioning for LEED		
	11. Interface with LEED consultant		
	12. LEED charette		
	13. LEED follow up with USGBC?		

	14. Software for tracking system testing/acceptance		
	15. Training for TJPA maintenance staff		
	16. Additional question for each proposer		

**TOTAL SCORE:** \_\_\_\_\_ (100 maximum for interviews)

References ( <i>maximum 10 points</i> )		
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**TOTAL SCORE:** \_\_\_\_\_ (110 with references)

## Attachment C

### Evaluation Scores (90 points max)

<b>Firm</b>	<b>Panelist A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>	<b>Total Score</b>
Cogent Energy	87	65	71	67	55	<b>345</b>
Engineering Economics	71	40	63	75	40	<b>289</b>
Enovity	84	80	83	83	60	<b>390</b>
Mazetti Nash Lipsey Burch	45	30	63	62	40	<b>240</b>
TMAD Taylor Gaines	50	20	50	49	35	<b>204</b>
WCS Ca	65	40	78	68	50	<b>301</b>

### Interview Scores (110 points max with references)

<b>Firm</b>	<b>Panelist A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>	<b>Total Score</b>
Cogent Energy	96	100	100	87	92	<b>475</b>
Enovity	96	109	98	98	101	<b>502</b>
WCS Ca	82	81	72	77	57	<b>369</b>

### Totals (Average Score (out of 200))

<b>Firm</b>	<b>Evaluation</b>	<b>Interview</b>	<b>Total Score</b>
Cogent Energy	69	95	<b>164</b>
Enovity	78	100	<b>178</b>
WCS Ca	60	74	<b>134</b>