

MODEL AGREEMENT

Between

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

And

NAME OF ARTIST

TO PROVIDE

**ART DESIGN, FABRICATION, TRANSPORTATION AND INSTALLATION
CONSULTATION SERVICES**

FOR THE

NAME OF STATION

BART AGREEMENT NO.

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ATTACHMENTS

- ATTACHMENT A: ARTIST SCOPE OF SERVICES
 - EXHIBIT 1: ARTIST’S CONCEPTUAL DESIGN PROPOSAL

- ATTACHMENT B: KEY PERSONNEL LIST
- ATTACHMENT C: ARTIST’S APPROVED COSTS
- ATTACHMENT D: ARTIST’S PAYMENT SCHEDULE
- ATTACHMENT E: STATE OF CALIFORNIA DEPARTMENT OF TRANSPORTATION REQUIREMENTS
- ATTACHMENT F: DISADVANTAGED BUSINESS ENTERPRISE PARTICIPATION
- ATTACHMENT G: UNITED STATES DEPARTMENT OF TRANSPORTATION (DOT) FEDERAL TRANSIT ADMINISTRATION (FTA) REQUIREMENTS

CONSULTING SERVICES

AGREEMENT NO.

Between

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

And

NAME OF ARTIST

THIS AGREEMENT ("Agreement") is made and entered into this ____ day of _____, _____, by and between SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT ("BART" or "District"), a rapid transit district established pursuant to California Public Utilities Code, Section 28500 et seq., and _____ ("Artist"), whose business is located at

RECITALS

This Agreement is made with reference to the following facts:

1. BART proposes to obtain design, fabrication, transportation and installation consultation services for public art for the (NAME OF) Station (the "Project"), and
2. The services required for the Project cannot be performed satisfactorily by the officers and employees of BART;
3. BART has applied for or received grants from the United States Department of Transportation, Federal Transit Administration and other Federal agencies to assist in financing portions of the Project; and,
4. BART has applied for or received grants from the State of California, Department of Transportation and other State agencies to assist in financing portions of the Project; and,
5. The parties hereto now wish to enter into this Agreement pursuant to which Artist will furnish professional services in connection with the Project as hereinafter provided.

AGREEMENT

In consideration of the mutual promises set forth herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

Definitions:

Where any word or phrase defined below, or a pronoun used in place thereof, is used in any part of this Agreement or the Contract Documents, it shall have the meaning set forth below:

- A. "Agreement" shall mean this agreement, including all addenda, appendices and modifications, whether created now or in the future.
- B. "Agreement Manager" shall mean the individual assigned by BART to oversee Artist's Scope of Services under this Agreement.
- C. "Approved Costs" shall mean such costs as are scheduled on Appendix C, "Artist's Approved Costs," including the maximum expenditure authorized for each item.
- D. "ARTIST" shall mean **NAME OF ARTIST**. Where there is more than one artist, all artists shall be referred to collectively as "Artist." If Artist is comprised of two or more individual persons or entities, each individual person or entity shall be jointly and severally responsible for satisfying Artist's obligations under this Agreement, and each individual person or entity shall be liable for the acts and omissions of every other individual person or entity comprising Artist.
- E. "Artwork" shall mean the work of art designed by Artist for the Site under the terms of this Agreement, as described and defined in the Artist's Conceptual Design Proposal, attached herein as Exhibit 1.
- F. BART shall mean the San Francisco Bay Area Rapid Transit District, "), a rapid transit district established pursuant to California Public Utilities Code, Section 28500 et seq.
- G. "Budget" shall mean a specific and detailed document identifying the cost of completion of all Work under this Agreement, including all approved modifications. The Budget shall include all design fees and associated costs; preliminary and final engineering if required; materials and labor for fabrication, including Artist and Artist's subcontractors' costs, crating and transportation of Artwork; required insurance; applicable sales taxes; and a contingency allowance.

- H. "Conceptual Proposal" shall mean drawings (in plan and elevation) and/or 3-dimensional models, a written description, proposed materials and samples and cost estimates. The information provided in Conceptual Design shall be complete enough to fully illustrate the design intent of the Artwork.
- I. "Construction Documents" shall mean final and complete architectural, structural, mechanical and engineering drawings, and written specifications as may be provided by BART to Artist for the purpose of designing and fabricating the Artwork.
- J. "Contingency Allowance" shall mean a portion of the Budget reserved by the Artist for design, construction, installation or other related costs that, due to factors beyond the control of the Artist, exceed the initial budget estimates. The contingency allowance may only be used if approved in advance by BART in writing.
- K. "Contract Documents" shall mean any work, including but not limited to, Design Development Documents, Shop Drawings, Mock-ups, models, approved installation plans, and all material samples and product data, project budget, and any and all additional documents and submittals produced by Artist under this Agreement that BART has approved and to which the completed Artwork is expected to conform.
- L. "Design Development Documents" shall mean presentation quality materials, which shall include colored drawings or computer-generated color images (in plan and elevation) and/or 3-dimensional models that accurately reflect the Artwork and how it will be installed at the Site, mock-ups, final color and materials samples, proposed fabrication methods, feasibility studies and final cost estimates at design completion. When used in reference to the proposed Artwork, Design Development Documents shall fix and describe the size and character of the Artwork with respect to its relationship to the Site, including architectural, structural, mechanical and electrical systems, materials and other elements as may be appropriate.
- M. "Final Documentation" shall mean a written maintenance manual that includes product specification data and procedures for maintenance of the Artwork.
- N. "General Contractor" shall mean the general contractor hired by BART to make improvements for the Station Modernization Program for the station that is the subject of this Agreement.
- O. "Mock-ups" or "Samples" shall mean illustrations such as standard schedules, performance charts, instructions, brochures, diagrams, and physical samples of all or any portion of the Work, and other information furnished by Artist to illustrate any materials or equipment for all or any portion of the Work. The purpose of the Mock-ups and Samples is to provide physical examples that illustrate materials, equipment or workmanship and establish the standards by which the Work will be judged.
- P. "Proposal" shall mean the proposed visual, aesthetic, and Artistic intent and design of the Artwork. The most recent design approved by BART is incorporated herein as

Exhibit 1 of the Contract Documents and is binding unless BART approves changes to the design in writing.

- Q. "Services" shall mean all of the work by Artist pertaining to providing BART with the Artwork and related services and deliverables as required under the Agreement, including as set forth in Attachment A, ARTIST SCOPE OF SERVICES, including Exhibit 1, ARTIST'S CONCEPTUAL DESIGN PROPOSAL, and any modifications thereto.
- R. "Shop Drawings" shall mean drawings, diagrams and other data specifically prepared by Artist or Artist's consultants, contractors, fabricators, manufacturers, suppliers, or distributors (collectively, "subcontractors") illustrating in detail exactly how the work, or any element thereof, is to be fabricated and installed. Shop Drawings shall be signed and stamped by a licensed design professional unless BART specifically waives this requirement.
- S. "Site" shall mean the **NAME OF** Station, specifically the (**SITE DESCRIPTION**) that has been identified to receive art.
- T. "Work" shall mean the work of Artist pertaining to providing BART with the services and deliverables as required under the Agreement. In addition to all other services and deliverables required, Work shall include the design, fabrication, delivery and installation oversight of the Artwork.

Whenever the words "as directed," "as required," "as permitted," or words of like effect are used, it shall be understood as the direction, requirement, or permission of BART. The words "sufficient," "necessary," or "proper," and the like, mean sufficient, necessary or proper in BART's judgment. The words "approval," "acceptable," "satisfactory," or words of like import, shall mean approved by, or acceptable to, or satisfactory to BART, unless otherwise specified. The terms "include," "included" or "including" and similar terms shall be deemed to be followed by the words "without limitation."

1.0 WORK TO BE PERFORMED

The parties agree that the work to be performed by Artist under this Agreement shall be as hereinafter set forth in this Article 1.0;

1.1 SCOPE OF SERVICES

Artist's Services are described in Attachment A, ARTIST'S SCOPE OF SERVICES, including Exhibit 1, ARTIST'S CONCEPTUAL DESIGN PROPOSAL, and any modifications thereto (both of which are incorporated herein and by this reference made a part hereof), and shall further include all of the work by Artist pertaining to providing BART with the Artwork and related services and deliverables as required under this Agreement (collectively, the "Services"). Artist

shall be responsible to perform or secure the performance of all requested Services in their entirety subject to the prior written approval of each Phase as set forth in Attachment A by (Name), the Agreement Manager, or a designated representative.

The Agreement Manager shall monitor Artist's performance with respect to compliance with the requirements of this Agreement.

1.2 PROJECT DIRECTION

A. Directions to Artist

The Services to be performed by Artist under this Agreement shall be subject to the project direction of the Agreement Manager. As used herein, the term "project direction" shall include, but not be limited to, the following:

1. Directions to Artist which redirect the Agreement effort, shift work emphasis between tasks, require pursuit of certain lines of inquiry, fill in details or otherwise provide project guidance to Artist in order to accomplish the Services.
2. Review and, where required, obtain approvals by appropriate BART staff of drawings, specifications, or other products prepared by Artist or any of her/his subcontractors in the performance of the Services.

B. Professional Responsibility

Notwithstanding any other provision in this Agreement or in the Artist's Scope of Services, the review and/or approval by BART, or any of its directors, officers, the Agreement Manager or its other employees or agents, of any drawings, specifications or other products or communications prepared by Artist or any of her/his subcontractors, or of any acts or failures to act by Artist or any of her/his subcontractors, shall not relieve Artist or any of her/his subcontractors of any professional responsibility for the Services performed.

1.3 PROCEDURE FOR EXECUTION OF WORK

- A. It is the general intent of the parties that Artist will complete the design, fabrication and installation oversight of the Artwork at the Site, provided that BART determines, in its sole discretion, to go forward with the completion of the Artwork. The Services shall be completed in separately defined, successive stages ("Phases"). Each Phase shall be governed by this Agreement, and by any modifications to this Agreement setting forth specific

terms and conditions governing each Phase. Each modification will include the Phase for which BART has given authorization, the scope of work covered by that Phase, the schedule of deliverables, insurance requirements, and payment terms.

- B. Artist shall not commence any Phase nor incur any expense in anticipation of commencing any Phase unless BART has given prior written authorization. Prior to beginning each Phase, Artist shall obtain the necessary approval of the previous Phase. In no event shall BART be liable for any claims or damages arising from Artist's unauthorized actions.
- C. The Services to be completed by Artist are unique and personal to Artist, and may not be capable of completion by anyone other than Artist or his subcontractors. Therefore, if Artist fails or refuses to modify this Agreement to include subsequent Phases after having been requested to do so by BART, or fails to complete the Services required by any Phase, BART may require that Artist return all payments made under this Agreement from the initiation of the Agreement. If BART determines, in its sole and reasonable discretion, that Artist's failure or refusal to complete subsequent Phases is justifiable and in good faith and for reasons beyond the control of Artist, BART may authorize Artist to keep payments made under this Agreement for prior completed Phases. In such case, BART may, at its option, engage another Artist or contractor to complete the Services.

1.4 MANAGEMENT PLAN

- A. In response to a request from BART, Artist shall submit the following:
 - 1. A list of key personnel assigned as defined by Article 1.6 below.
 - 2. Artist's DBE participation, if applicable. All DBEs shall be certified by BART or possess DBE certification which BART recognizes prior to proposal submission.
 - 3. Artist agrees not to make any substitution of subcontractors without prior approval of the Agreement Manager.

1.5 PROJECT AND ORGANIZATIONAL PROCEDURES

A. Modification of Procedures

At the direction of the Agreement Manager, and provided that the requested modifications are reasonably practicable, and further, that the requested modifications will not alter the aesthetic or physical integrity of the Artwork, Artist shall develop or modify Attachment A in accordance with a schedule and in a form approved by the Agreement Manager. Such

procedures as developed or modified shall be specifically related to activities performed for the Services and basic Artist procedural functions including, but not limited to, the process of budgeting, invoicing, and submitting reports to BART hereunder. The intention of the parties is for Artist to develop, implement and maintain clear and concise Project-specific procedures.

B. Additional Modifications

In addition to any specific procedures as described immediately above, BART may require Artist to revise the Scope of Services other than those set forth immediately above in Article 1.5.A that are used throughout its organization if they conflict with the requirements of this Agreement

1.6 PERSONNEL

A. Key Personnel

Artist and BART agree that the personnel listed in Attachment B, KEY PERSONNEL LIST, incorporated herein and by this reference made a part hereof, shall be designated as key personnel.

Artist shall not remove any such key personnel prior to the completion of his/her assignment under the Project without the prior written approval of the Agreement Manager, which approval will not be unreasonably withheld. Artist shall nominate a replacement individual to BART and shall not remove any individual from the Project until his/her replacement has been approved by the Agreement Manager.

B. Removal of Personnel

BART's Agreement Manager reserves the right to direct removal of any Artist or subcontractor's personnel assigned to the Project when in BART's opinion the individual's performance is unsatisfactory.

1.7 FINANCIAL ADMINISTRATION

Artist and her/his subcontractors at any tier shall establish and maintain records pertaining to the fiscal activities of the Project. Artist and subcontractors' accounting systems shall conform to generally accepted accounting principles. All such records shall provide, as a minimum, a breakdown of total costs charged to the Project, including properly executed payrolls, time records, invoices and vouchers.

2.0 TIME OF PERFORMANCE AND DELAYS

2.1 TIME OF PERFORMANCE

A. Performance of Services

Artist's performance of the Services shall commence upon execution of this Agreement, and shall be completed by the date specified in Attachment A, ARTIST'S SCOPE OF SERVICES, unless terminated earlier in accordance with Article 5.0, TERMINATION.

B. Term of Agreement

The term of this Agreement will be two (2) years from the date of execution of this Agreement subject to termination or the limit on maximum compensation as provided for in the Agreement. Any Services not completed within the term of this Agreement shall be completed by Artist as soon as practicable. To the extent that any Services are not completed during the term of this Agreement, the term of this Agreement shall be extended without further amendment to this Agreement through the full completion date. This Agreement shall govern Artist's and BART's rights and obligations with respect to such Services to the same extent as if the Services were completed during the Agreement term.

2.2 DELAYS

Neither party hereto shall be considered in default in the performance of its obligations hereunder to the extent that the performance of any such obligation is prevented or delayed by unforeseen causes including acts of God, acts of the public enemy and governmental acts beyond the control and without fault or negligence of the affected party.

Each party hereto shall give notice promptly to the other of the nature and extent of any such circumstances claimed to delay, hinder or prevent performance of any obligations under this Agreement.

2.3 LIQUIDATED DAMAGES

A. By entering into this Agreement, Artist acknowledges that in the event the Work is delayed beyond the scheduled milestones and time lines provided in this Agreement, BART may suffer actual damages that will be extremely difficult to determine. Provided that a delay is caused solely by Artist, and not in whole or in part caused by BART, BART's contractors or vendors, or a Force Majeure Event, BART may determine that specification of liquidated damages is appropriate for some or all phases of Work under this Agreement and, if so, shall specify the standards and amount of liquidated damages in the appropriate phase of Work under Attachment A.

- B. Artist agree that the sum specified under each phase of work in Attachment A for damages per day for each calendar day of delay beyond scheduled milestones and timelines is not a penalty, but is a reasonable estimate of the loss that BART will incur based on the delay, established in light of the circumstances existing at the time this Agreement was awarded. BART may deduct a sum representing the liquidated damages from any money due to Artist. Such deductions shall not be considered a penalty, but rather agreed monetary damages sustained by BART because of Artist's failure to deliver to BART within the time fixed or such extensions of time permitted in writing by BART.

3.0 COMPENSATION AND PAYMENT

3.1 COMPENSATION

A. Basis

The compensation for each Phase performed under this Agreement will be on a fixed price basis, an incurred cost reimbursement basis plus a defined fee, or some combination thereof. Such compensation will be allowable only to the extent that costs incurred or cost estimates included in negotiated, or otherwise established prices, are consistent with the Federal Cost Principles (Title 48, Code of Federal Regulations, Chapter 1, Part 31).

B. Requirements

Such compensation shall be further subject to the following requirements:

1. Conform with:
 - a. the Work to be performed pursuant to the Artist's Scope of Services;
 - b. any compensation limits or sublimits set forth in the Artist's Scope of Services and this Agreement; and
 - c. all other terms of this Agreement.
2. Be necessary in order to accomplish the Work.
3. Be reasonable for the Services to be performed or goods to be purchased in connection with the performance of Services hereunder.
4. As used herein, the term "costs" shall include the following:

- a. Those costs recorded by Artist that result, at the time of the request for reimbursement, from payment by cash, check, or other form of actual payment for items or services purchased directly for the work.
 - b. When Artist is not delinquent in payment of costs of agreement performance in the ordinary course of business, costs incurred, but not necessarily paid, for:
 - (1) Direct labor;
 - (2) Other direct costs that are not subcontracted;
 - (3) Indirect costs.
 - c. The amount of reimbursement that has been paid by Artist for subcontracted services under similar cost standards.
5. Be for direct costs or prices incurred for work performed after the effective date of this Agreement, and presented for payment within 90 days of the incurrence.

3.2. RATE AGREEMENT

The total payment amount due to Artist under this Agreement shall not exceed \$ (\$). This total amount shall include Artist's fee and all reimbursable expenses. Out of the total Agreement amount, Artist shall be responsible for paying all of Artist's costs and expenses associated with the Services, including the costs of suppliers, subcontractors, fees, taxes, permits, insurance, transportation to and from meetings, and all other expenses associated with the scope of the Services specified in this Agreement (hereinafter "Artist's Costs").

- A. Fee: Artist's fee for the final design of the Artwork and for his/her efforts related to coordinating the production, transportation, and installation consultation of the Services (hereinafter "Artist's Fee") is (\$).
- B. Advance Payments: In addition to Artist's Fee, as set forth immediately above, Artist shall be provided with advance payments at the beginning of each project phase, for the purpose of assisting Artist with expenses associated with the deliverables in that phase. Upon completion of any deliverable for which expenses and costs have been paid by Artist, Artist shall submit proof of the payment in the form of original receipts and invoices from the payee.
- C. Artist shall be entitled to payment for these costs and expenses only to the extent Artist has actually incurred such costs, and BART shall retain all funds remaining or saved from the costs estimated in Attachment C.

- D. Compensation shall be made to Artist based upon Artist's successful completion, in BART'S sole reasonable discretion, of the milestones set forth in the Appendices to this Agreement.
- E. No charges shall be incurred under this Agreement nor shall any payments become due to Artist until Services, including deliverables, required under this Agreement are received from Artist and approved by BART as being in accordance with this Agreement. BART may withhold payment to Artist in any instance in which Artist has failed or refused to satisfy any material obligation provided for under this Agreement.

3.3. COMPENSATION LIMITS

Subject only to changes made in conformance with Article 4.0, CHANGES AND MODIFICATIONS, below, it is expressly understood and agreed that:

- 1. In no event shall Artist be compensated in an amount greater than the amount specified in Section 3.2 A. and Attachment C (ARTIST'S APPROVED COSTS).
- 2. In no event will the total compensation, including reimbursement for costs and expenses and the applicable fixed fee, to be paid Artist for Services described in Article 1.1, SCOPE OF SERVICES, above, and specified in Section 3.2, exceed (\$). However, there is no guaranteed minimum level of compensation.

3.4 DISALLOWED OR OTHERWISE UNRECOGNIZED COSTS

Artist understands and agrees to the following:

A. No Waiver

Any compensation or reimbursement received under this Agreement does not constitute a final decision by the District as to the allowability of such compensation or reimbursement and does not constitute a waiver of any violation by Artist of the terms of this Agreement (including, but not limited to, requirements of the Agreement to be included in Artist's subcontracts).

B. Final Determination

Unless approved otherwise by the Agreement Manager, the District will not make final determination about the allowability of compensation or reimbursement of cost received under this Agreement until an audit of the Services performed under this Agreement has been completed.

C. Notification

If the District determines that Artist or her/his subcontractor(s) is not entitled to either the compensation or reimbursement requested or received, the District will notify Artist stating the reasons therefor.

D. Return of Funds

Completion of the work under this Agreement will not alter Artist's or Artist's subcontractors' obligation to return any funds due the District as a result of later refunds, corrections, or other transactions, nor alter the District's right to disallow or otherwise not recognize costs on the basis of a later audit or other review.

3.5 METHOD OF PAYMENT

A. Monthly Invoices/Subcontractors Payment

Unless approved otherwise by the Agreement Manager, Artist's Services shall be invoiced and payment will be made within thirty (30) calendar days of receipt of an acceptable invoice with satisfactory backup documentation, approved by the Agreement Manager, provided a completed form W-9 is on file with BART Assistant Controller. As used herein, the term "invoice" shall include Artist's bill or written request for payment for Services performed under this Agreement.

Unless otherwise approved in writing by the Agreement Manager, Artist shall, within seven (7) days after receipt of payment made by BART, pay to each of his/her immediate subcontractors (or their respective assignees), for satisfactory performance of his/her contract, the amounts to which each is entitled, after deducting any prior payments and any amounts due and payable to Artist by those subcontractors. Any delay or postponement of payment among the parties may take place only for good cause and with the District's prior written approval. If Artist determines the work of the subcontractor to be unsatisfactory, Artist must immediately notify in writing the Agreement Manager (and the Office of Civil Rights if the subcontractor is a DBE) and state the reasons therefor. Failure by Artist to comply with this requirement will be construed to be a breach of contract and may result in sanctions as specified in this Agreement.

B. Invoice Procedures

Artist shall invoice for each successfully completed project Phase in conformance with procedures approved by the Agreement Manager and as set forth in Attachment D, ARTIST PAYMENT SCHEDULE.

In no case shall Artist submit an invoice for costs that BART has disallowed or otherwise indicated that it will not recognize.

C. Invoice Requirements

Invoices shall be, as a minimum, (i) mechanically accurate, (ii) substantially vouchered and properly supported and (iii) in compliance with the specific requirements of Article 1.7, FINANCIAL ADMINISTRATION above. Invoices must match PO line items. Invoices must also include both the Agreement number and the applicable Phase number that corresponds to the invoice.

D. Invoice Submittal Address

Artist shall submit a completed Form W-9 and all invoices directly to BART's Accounts Payable (AP) Department. Invoices shall be submitted using one (1) of the following three (3) methods:

(1) E-mail a PDF version of the invoice to: AP SUPPLIER@BART.gov. Please save the file name using Artist's Company name – Invoice No.

(2) Fax the invoice to: (510) 380-7635

(3) Mail the invoice to: San Francisco Bay Area Rapid Transit District
Accounts Payable Department – LKS-22
Subject: Invoice Submission
300 Lakeside Drive, 22nd Floor
Oakland, CA 94612

Invoices must include: the invoice number; Agreement Number, and the Phase number that corresponds to the invoice.

Artist shall direct questions regarding invoice submission to the Agreement Manager or email the request to PurchaseOrders@bart.gov. Invoice submission samples can be viewed at www.bart.gov/bap.

E. Taxpayer Identification Number

Artist represents that Artist's taxpayer identification number (TIN) is (#) evidenced by a completed Federal Form W-9 on file with the Assistant Controller on the date of execution of this Agreement. Artist agrees to file such tax forms as may be reasonably requested by BART to implement Internal Revenue Code Section 3406 and to accept as a part of any compensation due, any payments made by BART to the Internal Revenue Service pursuant to that Section.

F. Electronic Payments

If Artist is interested in receiving electronic payments, Artist shall send an E-mail request to SUPPLIERINFO@BART.gov.

3.6 WITHHOLDING OF PAYMENT

BART reserves the right to withhold payment(s) otherwise due Artist in the event of Artist's material non-compliance with any of the provisions of this Agreement, including, but not limited to, the requirements imposed upon Artist in Article 6.0, INSURANCE; Article 8.0, INDEMNIFICATION; and Article 9.0, WARRANTY OF SERVICES, below. BART shall provide notice of withholding, and may continue the withholding until Artist has provided evidence of compliance which is acceptable to BART.

4.0 CHANGES

BART reserves the right to order changes to this Agreement, to be performed pursuant to this Agreement, as set forth below.

4.1 CHANGE ORDERS

A. Services

BART reserves the right to order changes to this Agreement, including but not limited to, the Services to be performed by Artist, provided that such changes do not alter the aesthetic or physical integrity of the Artwork. All such changes shall be incorporated in written change orders duly executed by BART and Artist, which shall specify the changes ordered and the adjustment of compensation and completion time required therefor.

B. Execution

Any such services added to the scope of this Agreement by a change order shall be executed under all applicable conditions of this Agreement.

C. Additional Compensation

No claim for additional compensation or extension of time with respect to a Phase or to the Agreement as a whole shall be recognized unless contained in an accepted change order. The parties also understand and agree that Artist will not be reimbursed for costs prior to the effective date of a change order unless otherwise approved by the Agreement Manager.

5.0 TERMINATION

5.1 TERMINATION FOR CONVENIENCE

BART may, at any time prior to completion of the Services under any Phase, terminate any such Phase or this Agreement whenever BART determines that such termination is in its best interest, by written notice to Artist. BART's written notice to Artist shall state in detail the extent of such termination with respect to the Phase or this Agreement. Effective on receipt of such notice of termination from BART, no new work or obligation with respect to such Phase or this Agreement will be undertaken by Artist or his/her subcontractors unless so directed by BART in writing. Upon such termination, Artist shall submit an invoice or invoices to BART in amounts that represent the compensation specified herein for Services actually performed to the date of such termination and for which Artist has not been previously compensated. Upon payment of the amount due, BART shall be under no further obligation to Artist, financial or otherwise, with respect to terminated Services or this Agreement.

5.2 TERMINATION FOR CAUSE

If Artist is in default and fails to remedy this default within five days after receipt from BART of notice of such default, BART may in its discretion terminate this Agreement or such portion thereof as BART determines is most directly affected by the default.

The term "default" for purposes of this provision includes, but is not limited to, the performance of Services in violation of the terms of this Agreement; abandonment, assignment or subletting of the Agreement without approval of BART; bankruptcy or appointment of a receiver for Artist's property; failure of Artist to perform the Services or other required acts within the time specified for this Agreement or any extension thereof; refusal or failure to provide proper workmanship; failure to take effective steps to end a prolonged labor dispute; the performance of this Agreement in bad faith; and the breach of any warranty as set forth in this Agreement.

Upon BART's termination of this Agreement or any portion thereof for default by Artist, BART reserves the right to complete the Services, including the Artwork, by whatever means it deems expedient and the expense of completing such

Services as well as any and all damages proximately caused by the default shall be charged to Artist.

5.3 FORCE MAJEURE

The performance of work under this Agreement may be terminated by BART, in its discretion, upon application therefor by Artist for unforeseen causes beyond the control and without the fault or negligence of Artist, acts of God, acts of the public enemy, governmental acts, fires and epidemics if such causes irrevocably disrupt or render impossible Artist's performance hereunder. An "act of God" shall mean an earthquake, flood, cyclone, or other cataclysmic phenomenon of nature beyond the power of Artist to foresee or make preparation in defense against.

5.4 TRANSFER OF TITLE UPON TERMINATION

If the District terminates this Agreement for any reason, the District shall be automatically vested with title to any works comprising the Services produced under this Agreement up to the date of termination. Artist shall deliver any such works to the District in the manner, at the times, and to the extent directed by the District. If termination is due to the default of Artist, the District may, at its option, require Artist to refund to District any interim payments received under the Agreement; in such case, the District shall transfer title to such works to Artist.

5.5 SURVIVAL

The rights and obligations of the parties as set forth in the following sections shall survive any termination of this Agreement: 1.7 (FINANCIAL ADMINISTRATION), 3.0 (COMPENSATION AND PAYMENT), 6.0 (INSURANCE), 7.0 (INDEPENDENT CONTRACTOR), 8.0 (INDEMNIFICATION), 9.0 (ARTIST'S WARRANTIES), 11.0 (ARTIST'S RIGHTS AND WAIVERS; BART'S OWNERSHIP OF WORK), 12.0 (PATENTS), 13.0 (MATTERS CONFIDENTIAL AND PRIVILEGED), 14.0 (SUBCONTRACTS), 15.0 (ASSIGNMENT OF AGREEMENT), 16.0 (RECORDS), 17.0 (AUDIT), 19.0 (NOTICES).

6.0 INSURANCE

At all times during the life of this Agreement to acceptance of the Services covered by the Agreement, or as may be further required by the Agreement, Artist, at her/his own cost and expense, shall provide the insurance specified in this Article 6.0, unless otherwise approved in advance and in writing by the District's Department Manager, Insurance.

A. Evidence Required

At or before execution of this Agreement and at such other times as the District may request, Artist shall provide the District with Certificate(s) of Insurance executed by an authorized representative of the insurer(s) evidencing the Artist's compliance with the insurance requirements in this Article 6.0. The Certificate(s) shall reference the District's Agreement Number and Title to which the Certificate relates. In addition, a copy of all required endorsements shall be included with and attached to the Certificate(s) of Insurance.

- B. Notice of Cancellation, Reduction or Material Change in Coverage. All policies shall be endorsed to provide the District with thirty (30) days prior written notice of any cancellation, reduction, or material change in coverage. Notices shall be sent to the Department Manager, Insurance, San Francisco Bay Area Rapid Transit District, P.O. Box 12688, Oakland, California, 94604-2688. Artist shall annually submit to the District's Department Manager, Insurance, certifications confirming that the insurance required has been renewed and continues in place.

C. Qualifying Insurers

Policies shall be issued by California admitted companies which hold a current policyholders alphabetic and financial size category rating of not less than A:VIII according to Best's Insurance Reports.

D. Insurance Provided by Artist

1. Commercial General Liability Insurance for bodily injury (including death) and property damage that provides limits of One Million Dollars (\$1,000,000) per occurrence and Two Million Dollars (\$2,000,000) annual general aggregate.
 - a. Coverage shall include:
 - (1) Premises and Operations;
 - (2) Broad Form Property Damage;
 - (3) Products and Completed Operations;
 - (4) Broad Form Contractual liability, expressly including liability assumed under the Agreement;
 - (5) Personal Injury Liability;
 - (6) Independent Contractors Liability;
 - (7) Cross Liability and Severability of Interest.
 - b. Such insurance shall include the following endorsements, copies of which shall be provided to the District:

- (1) Inclusion of the District, its directors, officers, representatives, agents and employees as additional insured as respects to Artist's operations under this Agreement; and
 - (2) Stipulation that the insurance is primary insurance and that no insurance or self-insurance of the District will be called upon to contribute to a loss
2. Automobile Liability Insurance for bodily injury (including death) and property damage which provides limits of liability of not less than One Million Dollars (\$1,000,000) combined single limit per occurrence applicable for all owned, non-owned and hired vehicles.
3. Workers' Compensation/Employers' Liability Insurance for Statutory Workers' Compensation and Employers' Liability Insurance for not less than One Million _ Dollars \$1,000,000 per accident applicable to Employers' Liability coverage for all employees engaged in services or operations under this Agreement. The policy shall include Broad Form All States/Other States coverage. Coverage shall be specifically endorsed to include the insurer's waiver of subrogation in favor of the District, its directors, officers, representatives, agents and employees; a copy of which shall be provided to the District. Should any such work be subcontracted, Artist shall require each subcontractor of any tier to similarly comply with this Article 6.0, all in strict compliance with Federal and State law.
4. Professional Liability Insurance for damages arising out of acts, errors or omissions for all design professionals (such as architects, landscape architects or engineers) who provide Artist with signed stamped drawing or calculations. The policy shall provide a coverage limit of not less than Three Million Dollars (\$3,000,000) per claim/aggregate as respects Artist's services provided under this Agreement. Such insurance shall be maintained for a period of not less than two (2) years following completion of services. Artist shall obtain such insurance when Artist subcontracts for any work from such a design professional, and prior to the submittal of Construction Documents. Any design professional required to obtain professional liability insurance must maintain proof of insurance for the term of this Agreement.
5. Risk of Loss Insurance or other insurance against loss in an amount equal to the total payment specified under Section 3 COMPENSATION AND PAYMENT of this Agreement. Artist shall

maintain such insurance until the Artwork has been delivered to, inspected and accepted by BART.

E. Special Provisions

1. The foregoing requirements as to the types and limits of insurance coverage to be maintained by Artist, and any approval of said insurance by the District is not intended to and shall not in any manner limit or qualify the liabilities and obligations otherwise assumed by Artist pursuant to this Agreement including but not limited to the provisions concerning indemnification.
2. The District acknowledges that some insurance requirements contained in this article may be fulfilled by a funded self-insurance program of Artist. However, this shall not in any way limit liabilities assumed by Artist under this Agreement. Any self-insurance program must be approved in writing by the District.
3. Should any of the work under this Agreement be subcontracted, Artist may impose these requirements upon each of her/his subcontractor (s) of any tier at her/his own discretion.
4. The District reserves the right to withhold payments to Artist in the event of material noncompliance with the insurance requirements of this Article 6.0.
5. The District reserves the right to terminate this Agreement in the event of material noncompliance with the insurance requirements of this Article 6.0.

7.0 INDEPENDENT CONTRACTOR

Artist is an independent contractor and not an employee or agent of BART and has no authority to contract or enter into any other agreement in the name of BART. Artist has, and hereby retains, full control over the employment, direction, compensation and discharge of all persons employed by Artist who are assisting in the performance of services under this Agreement. Artist shall be fully responsible for all matters relating to the payment of Artist's employees, including compliance with social security, withholding tax and all other laws and regulations governing such matters. Artist shall be responsible for her/his own

acts and those of Artist's agents and employees during the term of this Agreement.

In her/his capacity as an independent contractor, Artist shall comply with any and all BART operations rules and procedures that relate to the performance of the Services on BART property. Prior to commencing services, the Agreement Manager may loan Artist a copy of the District's Operations Rules and Procedures which shall be returned upon the completion or termination of Artist's:

7.1 CONFLICT OF INTEREST

Artist, Artist's subcontractors and suppliers shall perform all work under this Agreement in conformance with all applicable statutes and regulations pertaining to conflicts of interest, including but not limited to, the financial reporting requirements and the conflict prohibitions of federal law (see, e.g., Federal Transit Administration Circular 4220.1F, Third Party Contracting Guidance) and California law (see, e.g., Government Code Section 1090 et seq., Government Code Section 87100 et seq. and Title 2, Division 6 of the California Code of Regulations).

When, in the judgment of BART, it is necessary in order to avoid any potential conflicts of interest, Artist, Artist's subcontractors and suppliers may be precluded from subsequently participating as a vendor or contractor on projects for which they are providing services under this Agreement.

8.0 INDEMNIFICATION

Artist, to the extent permitted by law, shall defend, indemnify and hold harmless BART, its directors, officers, agents and employees from all claims, demands, suits, loss, damages, injury and liability, direct or indirect (including reasonable attorney's fees, and any and all costs and expenses in connection therewith), incurred by reason of any act, or failure to act, of Artist, Artist's officers, agents, employees and subcontractors or any of them, under or in connection with this Agreement; and Artist agrees at Artist's own cost, expense and risk to defend any and all claims, actions, suits, or other legal proceedings brought or instituted against BART, its directors, officers, agents and employees, or any of them, arising out of the Services, and to pay and satisfy any resulting judgments.

Such indemnification includes without limitation any violation of Artist's Warranties as set forth in Section 9.0 below, and any violation of proprietary rights, copyrights and rights of privacy, arising out of the publication, translation, reproduction, delivery, use or disposition of any deliverables furnished under this Agreement.

9.0 **ARTIST'S WARRANTIES**

9.1 **WARRANTY OF SERVICES**

9.1.A Warranty of Workmanship. Artist represents and warrants that, for a period of three years after final acceptance, the Artwork will be free of defects in workmanship or materials, including Inherent Defects (as defined below), and that the Artwork will be executed in permanent, non-fugitive materials that will not tend to degrade or fade over long-term installation at the Site. "Inherent Defect" refers to a quality within the material or materials, which comprise the Artwork which, either alone or in combination, results in the tendency of the Artwork to destroy itself. "Inherent Defect" does not include any tendency to deteriorate that is specifically identified in the Contract Documents approved by BART. Artist shall, at Artist's sole cost and expense, remedy any defects in workmanship or materials that appear within a period of three years from the date of final acceptance of the Artwork by BART.

9.1.B Warranty of Public Safety. Artist represents and warrants that the Artwork will not pose a danger to public health or safety in view of the possibility of misuse, if such misuse is in a manner that was reasonably foreseeable at any time during the term of this Agreement.

9.1.C Warranty of Acceptable Standard of Display and Operation. Artist represents and warrants that:

1. The Artwork will conform to design specifications and will function or perform in accordance with Artist's representations to BART without any costs beyond the final Budget for the Artwork or any additional staff assistance.
2. Occasional or minimal cleaning of the Artwork will maintain the Artwork within an acceptable standard of public display;
3. Foreseeable exposure to the elements and general wear and tear will not cause the Artwork to fall below an acceptable standard of public display;
4. With general routine cleaning and repair, and within the context of foreseeable exposure to the elements and general wear and tear, the Artwork will not experience irreparable conditions that do not fall within an acceptable standard of public display, including mold, rust, fracturing, staining, chipping, tearing, abrading and peeling.

9.1.D Manufacturer's Warranties. To the extent the Artwork incorporates products covered by a manufacturer's warranty, Artist shall provide copies of such warranties to BART.

9.1.E Warranty of Originality and Title.

1. Artist warrants and represents that (a) the Artwork is original to Artist, that Artist is the sole author of the Artwork within the meaning of the Copyright Act (17 U.S.C. § 101 et seq.), or, if any other persons are co-authors of the Artwork within the meaning of the Copyright Act, Artist has obtained full assignment to Artist of all rights including copyright in such person's contributions; and, (b) to the best of Artist's knowledge the Artwork does not infringe the copyright or other intellectual property rights of others. Artist further warrants and represents that upon completion of Services, Artist shall have disclosed the identities of all persons, including but not limited to subcontractors, who have performed any of the Services to date, and shall have disclosed fully each person's contribution to the Artwork.
2. Artist warrants that, upon acceptance and final payment by BART of all amounts due and payable for the Services, the Artwork shall be free and clear of any liens, claims, or other encumbrances that may affect BART'S title to the Artwork.

9.2 MATERIAL NONCOMPLIANCE BY ARTIST

BART reserves the right to withhold payments to Artist in the event of Artist's material noncompliance with Articles 8.0, INDEMNIFICATION, and 9.0, WARRANTY OF SERVICES, MATERIAL NONCOMPLIANCE BY ARTIST, RESPONSIBILITY FOR SERVICES AND DESIGN WITHIN FUNDING LIMITATIONS, above.

9.3 RESPONSIBILITY FOR SERVICES

Artist shall be responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other Services furnished by Artist under this Agreement. Neither BART's review, approval or acceptance of, nor payment for, the Services required under this Agreement shall be construed to operate as a waiver of any rights under this Agreement. In the event that any Services provided by Artist hereunder are deficient because of Artist's failure to perform said Services in accordance with such standards, BART shall report such deficiencies in writing to Artist within a reasonable time, not to exceed six months after the discovery thereof, but in no event later than the earlier of (a) five years after completion of all of the Services, or (b) one year after completion of construction of all facilities to which Services apply. BART

thereafter shall have the rights set forth in Article 9.1, above if within thirty days after written notice to Artist requiring such reperformance, Artist fails to give evidence satisfactory to BART that she/he has undertaken such reperformance.

10.0 DATA TO BE FURNISHED BY BART

All data, reports, surveys, studies, drawings, and any other documents and materials made available to Artist by BART for use by Artist in the performance of the Services shall be made available for information only and shall be returned to BART at the completion or termination of this Agreement.

11.0 COPYRIGHT

Except as provided in this Agreement, Artist retains all copyrights and other intellectual property interests in the Artwork and in the Design, drawings, sketches, prototypes and other materials for the Artwork. Artist may place a copyright notice on the Artwork and may, at her option, register the copyright with the Library of Congress.

11.1 REPRODUCTIONS

Artist hereby grants to BART the non-exclusive right to make, and to authorize the making of, photographs and other two-dimensional reproductions of the artwork for any Client-related or governmental purposes, including, but not limited to educational, advertising, marketing, public relations, promotion, replacement or maintenance of work, any documentation of Client's art collection or other noncommercial purposes. This license does not include the right to reproduce the Artwork for commercial merchandising purposes.

All drawings, designs, specifications, manuals, reports, studies, surveys, models, software (including source code), and any other documents, materials, data and products ("Work Products") prepared or assembled by Artist or obtained from others by Artist in connection with the Services shall be the property of BART; and copies shall be delivered to BART promptly upon the completion of the Services or upon an earlier termination of this Agreement. Artist shall be responsible for the preservation of any and all Work Products prior to transmittal to BART; and Artist shall replace any such Work Products as are lost, destroyed or damaged while in Artist's possession without additional cost to BART.

11.2 EDITION OF ONE AND ARTIST'S RIGHT TO CREATE SIMILAR WORKS

Unless otherwise agreed to in writing by BART, Artist warrants that the Artwork is an edition of one, and that neither Artist nor Artist's agents will execute or authorize another to execute another work of the exact same image(s) or design(s) comprising the Artwork. This warranty shall continue in effect for a period coextensive with the term of copyright protection for the Artwork under U.S. law, and shall be binding on Artist and Artist's heirs and assigns.

BART recognizes and acknowledges that the Artwork may be one of several artworks created by Artist embodying unique Artistic characteristics and expression comprising Artist's personal and distinctive style and agrees that, notwithstanding anything herein to the contrary and subject to the warranty provided herein, Artist shall have the nontransferable, perpetual right and license to create new artworks which may be considered "substantially similar" to or "derivative works" of the Artwork, as those terms are defined under the Copyright Act (17 U.S.C. § 101 et seq.)

11.3 SURVIVAL OF CERTAIN RIGHTS.

- A. Resale Royalty. If BART sells the Artwork as a fixture to real property, and if the resale value of the Artwork is not itemized separately from the value of the real property, the parties agree that the resale price of the Artwork shall be presumed to be less than the purchase price paid by BART under this Agreement. Thus, BART has no obligation to pay resale royalties pursuant to California Civil Code §986 or any other law requiring the payment of resale royalties. If BART sells the Artwork as an individual piece, separate from or itemized as part of a real property transaction, BART shall pay to Artist a resale royalty to the extent required by law, based upon the sale price of the Artwork.

11.4 CREDITS

- A. Credit on Site. Permanent credit identifying Artist as the creator of the Artwork shall be located in a prominent place adjacent to the Artwork as installed on the Site.
- B. Commercial Use. Neither party shall reproduce or distribute copies of the Artwork for sale without the prior written consent of the other party.

11.5 MUTILATIONS.

- A. BART shall not intentionally physically deface or mutilate the Artwork. Artist acknowledges, however, that the Artwork will be sited a BART station, a public transit facility, and that its installation, maintenance, repair or removal may result in non-intentional or grossly negligent physical defacement, distortion, mutilation, alteration, destruction or other modification of the Artwork (collectively "Mutilations"). BART shall not be liable for any Mutilations or any acts of vandalism to the Artwork whether by BART or third parties. Any Mutilations resulting from such vandalism shall be repaired, if at all, at BART's sole discretion, and such repairs, if any, would be at BART's expense.

- B. Artist's Waiver of Rights. Except as specifically provided herein, Artist for himself, and his heirs, beneficiaries, devisees and personal representatives expressly waives, as against BART, any and all rights she/he now has or may hereafter have to attribution, preservation or integrity of the Artwork, including any repairs or mutilations made to the Artwork after installation, provided by current applicable law, or hereinafter created under any future laws, including without limitation moral rights, the California Art Preservation Act ("CAPA"), and the 1990 Visual Artists Rights Act ("VARA"), and releases, acquits and discharges BART from all suits, claims, actions, liability, damages and expenses arising out of the installation, use, maintenance, repair, or Mutilations of the Artwork; provided, however, that Artist shall retain the right to disclaim authorship of the Artwork pursuant to CAPA and VARA. The waivers provided herein shall survive termination of the Agreement.
- C. Third Party Mutilations. Artist reserves the rights to prosecute third parties for violations by such third parties of Artist's moral rights including without limitation CAPA and VARA, provided that Artist consults with BART prior to pursuing such claims.
- D. Artwork Repair or Replacement. Where time permits, BART shall make reasonable good faith efforts to notify Artist at least 20 calendar days prior to authorizing any repair or replacement of the Artwork, at the last phone number or address provided by Artist to BART. After receiving such notice, Artist shall consult with BART to determine whether the Artwork can be restored or replaced and to attempt to come to a mutually agreeable plan for restoring or replacing the Artwork. Such consultation shall be without charge by Artist unless otherwise specifically agreed in writing by BART. If BART, in its sole discretion, intends to replace or repair the Artwork, BART shall make reasonable good faith efforts to engage Artist in the repair or restoration of the Artwork and to compensate Artist for Artist's time and efforts at fair market value, which may be the subject of a future agreement between Artist and BART. If, however, Artist fails or refuses to negotiate with BART in good faith and in a timely manner with respect to any repair or restoration, BART may contract with any other qualified art conservator or artist for such restoration. Notwithstanding the foregoing, BART has no obligation under this Agreement to repair or to restore the Artwork to its original condition, to compensate Artist for any restoration work, or to maintain the Artwork on display or in any specific location.

11.6 THIRD PARTY INFRINGEMENT

In the event of infringement of the Artwork by third parties, BART and Artist shall consult with each other to determine a course of action, whether by BART or by BART and Artist jointly, to address such infringement.

12.0 PATENTS

Artist agrees to communicate promptly to BART full particulars with respect to any and all improvements and inventions (whether or not patentable) conceived and reduced to practice by Artist in performance of the Services (collectively, "Inventions"). Subject to superceding rights due to the Federal or State governments assisting in the financing of this Agreement and pursuant to Attachments E and G, such improvements and inventions (if patentable) shall become the property of Artist, to the extent allowed by the terms of the aforementioned Federal or State grants and Artist hereby grants to BART the non-exclusive, perpetual, worldwide, royalty-free right and license to exploit the Inventions solely in connection with the Artwork.

13.0 MATTERS CONFIDENTIAL AND PRIVILEGED

All of the drawings, designs, specifications, manuals, reports, studies, surveys, models, or other data and products prepared or assembled by Artist, obtained from others by Artist or made available to Artist by BART in connection with the Services, shall be treated as confidential by Artist. At no time shall Artist use or disclose or make available, other than in the performance of Artist's services for BART, confidential information gained in the course of or by reason of Artist's retention by BART and/or performance of services for BART, nor shall Artist permit such use or disclosure, without prior written approval by BART. It is the intention of BART to preserve and make use of all applicable legal privileges, and Artist shall make all reasonable efforts to cooperate with BART in this regard.

Performance of Services under this Agreement may require the District to disclose Security Sensitive Information ("SSI") or require access to locations designated as security sensitive. In addition to the requirements set forth above and prior to commencement of any Services involving SSI, Artist agrees to execute a Non-Disclosure Agreement for Release of Security Sensitive Information ("NDA") and require applicable third parties who will need to access SSI to execute a Third Party Non-Disclosure Agreement for Release of Security Sensitive Information (Third Party NDA), which will be provided under separate cover by the District. In accordance with the NDA, and for purposes of services to be performed under this Agreement, confidential information shall include any documents designated as SSI.

14.0 SUBCONTRACTS

A. Approved Subcontracts

Artist shall use approved subcontractors as shown in Attachment B hereto and as listed in Attachment A. Artist shall not further subcontract all or any portion of the Services, without the prior written approval of the Agreement Manager and any attempt to do so shall be void and unenforceable. Written approval by the Agreement Manager of use of a subcontractor for specified Services shall not constitute approval for any other purpose. In the event that Artist enters into one or more subcontracts pursuant to this Article, it is understood and agreed that the participating subcontractors shall be solely and directly responsible to Artist, and BART shall have no obligation to them.

B. Subcontract Provisions

Artist agrees that the requirements in Articles 1.4 (PROCEDURE FOR EXECUTION OF WORK), 1.5 (MANAGEMENT PLAN), 1.6 (PROJECT AND ORGANIZATIONAL PROCEDURES), 1.7 (FINANCIAL ADMINISTRATION), 3.1 (COMPENSATION), 3.2 (RATE AGREEMENT) and 4.0 through 31.0, inclusive, of this Agreement, will be included in every subcontract entered into relating to the Services. Upon request, Artist shall provide BART with copies of all such subcontracts, with changes and amendments thereto.

15.0 ASSIGNMENT OF AGREEMENT

Artist shall not assign this Agreement, or any part thereof, without the prior express written consent of the Agreement Manager, and any attempt to do so shall be void and unenforceable.

16.0 RECORDS

Artist shall maintain full and adequate records to show the actual time devoted and the cost incurred by Artist with respect to the performance of the Services.

Artist and Artist's subcontractors shall establish and maintain records pertaining to the fiscal activities of the Project. Artist's and subcontractors' accounting systems shall conform to generally accepted accounting principles and all records shall provide a breakdown of total costs charged to the Project, including properly executed payrolls, time records, invoices and vouchers.

17.0 AUDIT

Artist and Artist's subcontractors shall permit BART and its authorized representatives to inspect, examine, make excerpts from, transcribe, and copy Artist's and subcontractors' books, work, documents, papers, materials, payrolls, records, accounts, and any and all data relevant to this Agreement at any

reasonable time for the purpose of auditing and verifying statements, invoices or bills submitted by Artist pursuant to this Agreement, and shall provide such assistance as may be reasonably required in the course of such inspection, but not limited to, the following:

A. Audit Interviews

Artist shall arrange audit entrance and exit interviews in which Artist and/or Artist's subcontractors and BART and/or its authorized representatives will participate.

B. Accessing Documents

Artist and Artist's subcontractors' accounting divisions shall provide instruction to BART on accessing documents.

C. Letter of Representation

Artist's management, or the management of a subcontractor, as well as the management of their appropriate units, will provide at BART's request a letter of representation concerning such matters as BART determines appropriate.

BART further reserves the right, for itself and its authorized representatives, to examine and re-examine said books, work, documents, papers, materials, payrolls, records, accounts and data during the three-year period following the final payment under this Agreement and until all pending matters are closed; and Artist and Artist's subcontractors shall in no event dispose of, destroy, alter or mutilate said books, work, documents, papers, materials, payrolls, records, accounts and any and all data in any manner whatsoever for three years after the final payment under this Agreement, or until all pending matters are closed, whichever is later.

Pursuant to California Government Code Section 8546.7, the parties to this Agreement shall be subject to the examination and audit of the State Auditor, at the request of BART or as part of any audit of BART by the State Auditor, for a period of three (3) years after final payment under this Agreement. The examination and audit shall be confined to those matters connected with the performance of this Agreement, including, but not limited to, the cost of administering this Agreement.

18.0 [LEFT BLANK]

19.0 NOTICES

Except for invoices submitted by Artist pursuant to Article 3.0, COMPENSATION AND PAYMENT, above, and insurance notices submitted pursuant to Article 6.0 B., Notice of Cancellation, Reduction or Material Change in Coverage, above, all notices required hereunder or other communications to either party by the other may be given by personal delivery, U.S. Mail, courier service (such as Federal Express), facsimile transmission, or email, with confirmation of receipt of such email. Notices shall be effective upon receipt at the following addresses:

To BART by US Mail: San Francisco Bay Area Rapid Transit District
P.O. Box 12688
Oakland, California 94604-2688
Attention: **STAFF CONTACT**

To BART by Personal Delivery or Courier Service: San Francisco Bay Area Rapid Transit District
300 Lakeside Drive, 21st Floor
Oakland, CA 94612
Attention:

To Artist:

By Facsimile Transmission:

To BART:

To Artist:

By email:

To BART:

To Artist:

Either party may change its address for notices by giving written notice of the new address as provided above.

20.0 NONDISCRIMINATION

Artist and subcontractors shall not discriminate on the basis of race, color, national origin or sex in the performance of this Agreement. Artist shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of U.S. Department of Transportation-assisted contracts. Failure by Artist 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 District deems appropriate.

In connection with the performance of services under this Agreement, Artist shall not, on the grounds of race, religious creed, color, national origin, ancestry, handicap, medical condition, marital status, sex, sexual orientation or age,

discriminate or permit discrimination against any person or group of persons in any manner prohibited by Federal, State or local laws.

For purposes of this Article "sexual orientation" shall mean a preference for heterosexuality, homosexuality or bisexuality; or having a history of, or being identified with, any such preference.

21.0 DISADVANTAGED BUSINESS ENTERPRISE PARTICIPATION

The District is committed to carrying out all of the Disadvantaged Business Enterprise ("DBE") requirements of Title 49, Code of Federal Regulations Part 26, as amended from time to time. The procedures contained in the District's DBE Program will ensure that all contracts and procurements are administered without discrimination on the basis of race, color, sex or national origin, and that DBEs have an equal opportunity to compete for and participate in the performance of all agreements, contracts and subcontracts awarded by the District.

A. BART Policy

It is the policy of the District to ensure nondiscrimination on the basis of race, color, sex, ethnicity or national origin in the award and administration of Federally funded contracts. It is the intention of the District to create a level playing field on which DBEs can compete fairly for agreements, contracts and subcontracts, including but not limited to construction, procurement and Invitation for Bids ("IFBs") contracts, professional and technical services agreements and purchase orders.

B. DBE Participation: No Goal

Although there is no DBE participation goal for this Agreement, Artist is encouraged to take all steps necessary to provide an equal opportunity for DBEs to participate.

C. DBE Participation Requirements

In the event Artist utilizes DBE firms in the performance of work under this Agreement, see the requirements set forth in Attachment F, DISADVANTAGED BUSINESS ENTERPRISE PARTICIPATION, attached hereto and incorporated herein by this reference. As used in Attachment F, the term "CONSULTANT" shall be deemed to refer to Artist, and the term "subconsultants" shall be deemed to refer to subcontractors.

22.0 SITE SECURITY AND ACCESS

Prior to commencement of services, Artist shall comply with BART's site security requirements which include, but are not limited to, requiring photographic identification badges and submitting names and dates of birth of all personnel, including subcontractors and suppliers of any tier, working on BART property or facilities. All badges shall be returned to BART at the completion of services hereunder. In the event Artist fails to comply with BART's site security requirements, Artist's personnel, including subcontractors and suppliers, may not be allowed on BART property or facilities. No extension of time for completion of services or additional compensation for delay claims shall be granted in the event such personnel are excluded from BART property or facilities.

23.0 LAWS AND REGULATIONS

Artist shall comply with any and all laws, statutes, ordinances, rules, regulations, and procedural requirements of any national, state or local government, and of any agency of such government, including BART, which relate to or in any manner affect the performance of this Agreement. This Agreement and any documents supplied hereunder are subject to public inspection of the California Public Records Act, California Government Code Section 6250 et seq., unless exempted by law.

A. Federal Requirements

This Agreement may be funded in part under a grant from the United States Department of Transportation, Federal Transit Administration (FTA). Federal requirements are set forth in Attachment G, UNITED STATES DEPARTMENT OF TRANSPORTATION REQUIREMENTS, incorporated herein and by this reference made a part hereof. As used in Attachment G, the term "CONSULTANT" shall be deemed to refer to Artist, and the term "subconsultants" shall be deemed to refer to subcontractors.

B. State Requirements

This Agreement may also be funded in part from a grant from the State of California through its Business, Transportation and Housing Agency, Department of Transportation (State). State requirements are set forth in Attachment E, STATE OF CALIFORNIA REQUIREMENTS, incorporated herein and by this reference made a part hereof. As used in Attachment E, the term "CONSULTANT" shall be deemed to refer to Artist, and the term "subconsultants" shall be deemed to refer to subcontractors.

24.0 ADDITIONAL FUNDING AGREEMENT REQUIREMENTS

This Agreement is subject to any additional restrictions, limitations or conditions that may be required by any local, State or Federal funding agreements applicable to this Agreement.

25.0 CHOICE OF LAW

All questions pertaining to the validity and interpretation of this Agreement shall be determined in accordance with the laws of the State of California applicable to agreements made and to be performed within the State, without reference to conflicts of law principles.

26.0 SEVERABILITY

If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions shall nevertheless continue in full force without being impaired or invalidated in any way.

27.0 COVENANT AGAINST CONTINGENT FEES

Artist warrants that no person or selling agency has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by Artist for the purpose of securing business. For breach or violation of this warranty, BART will have the right to annul this Agreement without liability, or at its discretion, to deduct from the Agreement price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage or contingent fee.

28.0 COVENANT AGAINST GRATUITIES

Artist warrants that she/he will not and has not offered or given gratuities in the form of entertainment, gifts or otherwise, to any director, officer or employee of BART to secure favorable treatment in the awarding, amending or evaluating performance of the Agreement.

29.0 CAPTIONS

The captions of the Articles and paragraphs in this Agreement are for purposes of reference only, and shall not be construed to affect the meaning of any provision hereof.

30.0 BENEFIT OF AGREEMENT

This Agreement shall bind and benefit the parties hereto and their assignees, successors and permitted assigns.

31.0 ENTIRE AGREEMENT

This Agreement is the entire agreement of the parties, and supersedes and replaces all prior communications, written and oral, regarding the subject matter hereof. Artist represents that in entering into this Agreement, she/he has not relied on any previous representations, inducements, or understandings, written or oral, of any kind or nature.

[SIGNATURES ON NEXT PAGE]

IN WITNESS WHEREOF, this Agreement has been executed by the parties hereto as of the day and year first written above.

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

By: _____
(Signature)

and

Title: _____
Print or Type

ARTIST

EXHIBIT 1: ARTIST'S CONCEPTUAL DESIGN PROPOSAL

ATTACHMENT A:
ARTIST'S SCOPE OF SERVICES

**ART DESIGN, FABRICATION, AND TRANSPORTATION CONSULTATION
SERVICES**

For the San Francisco Rapid Transit District Oakland (NAME OF) Station

Artist agrees to design, fabricate, transport and consult as necessary during the installation of Artwork in accordance with Artist's Conceptual Design Proposal, a copy of which is attached hereto as Exhibit 1 and incorporated herein by reference.

PHASE I: DESIGN

SCOPE OF WORK

1. GENERAL

- A. Artist's Conceptual Design Proposal (the "Proposal") is incorporated herein by reference. The scope of work under this phase includes the development of the Proposal through all phases of final design.
- B. Artist shall not commence any Phase nor incur any expense in anticipation of commencing any Phase unless BART has given prior written authorization.
- C. The Work shall reflect the requirements of the project as expressed in the Request for Qualifications and the Proposal and as further discussed in communications with BART.
- D. Artist shall attend project meetings and make presentations to BART and other individuals and organizations, as needed.
- E. Artist agrees to collaborate closely with BART through in-person meetings and other necessary means of communication to successfully incorporate the Artwork into the station's design and construction schedule. Artist shall coordinate his/her communications with the BART through the Agreement Manager.

- F. Artist shall deliver documentation establishing that all Artist's employees, and all of Artist's consultants, contractors, fabricators, manufacturers, suppliers, or distributors (collectively, "Subcontractors"), have been paid in a timely manner (collectively, "Subcontracts and Documentation"). With each invoice, Artist shall submit Subcontracts evidencing Artist's payments to subcontractors subsequent to Artist's submittal of last invoice to BART.

2. DESIGN DEVELOPMENT

- A. BART shall provide Artist with final construction documents and specifications for the artwork as required for the Artist to complete Design Development Documents. The construction documents provided by BART shall indicate the height, width, and depth of the artwork.
- B. As required, Artist shall review the drawings, materials and documents submitted by BART for consistency with any documents previously reviewed by Artist and for accuracy of the integration of Artist's Proposal with the Site. Artist shall report any structural or constructability concerns in writing to BART.
- C. BART shall provide Artist will current renderings indicating the location of furnishings, signage, mechanical and electrical systems, and other structural or architectural elements that may affect, or be affected by, the placement of the Artwork, if applicable.
- D. If applicable, Artist shall submit Design Development Documents that illustrate the final design and placement of the Artwork. Artist's Design Development documents shall include presentation-quality materials, including computer-generated color images and/or 3-dimensional models that accurately reflect the design and location of the Artwork, final colors and materials, and final cost estimates. When used in reference to the proposed Artwork, Design Development Documents shall fix and describe the size and character of the Artwork with respect to its relationship to the Site, including architectural, structural, mechanical and electrical systems, materials and other elements as may be appropriate.
- E. If requested to do so by BART, Artist shall construct a one to one-scale Mock-Up of the Artwork. The Mock-Up will incorporate the same materials proposed for use in the final Work, and may be included in the final installed Artwork if appropriate.
- F. Artist will submit a Fabrication Schedule indicating anticipated dates for the Artwork to be at 25%, 50% and 100% completion.

3. PHASE 1 SCHEDULE OF DELIVERABLES

Deliverable	Due Date (TBD)
Final Artwork Budget, if different from Proposal	
Design Development Documents	
Mock Ups, if requested	

4. COMPENSATION. Artist's compensation for Phase I shall be in accordance with Attachment D, Artist's Payment Schedule, which is incorporated herein by reference. Such compensation shall cover all of Artist's fees, costs and expenses for Phase I.

5. PHASE 1 ADVANCE PAYMENT SCHEDULE. Artist's advance payments shall be made as follows:

Payment #1: \$

Purpose: Advance payment for final design and design development costs, including review of station Construction Documents and submittal of Design Documents.

Submittals: Risk of Loss Insurance, Invoice for Payment #1.

Approvals: Approval of Invoice for Payment #1.

Payment #2: \$

Purpose: Advance payment for purchase of materials for CAD or other Architectural Drawings, Artist's Design Fee payments; Artist's overhead costs.

Submittals: Design Development Documents; Fabrication Schedule; Subcontracts and Documentation; Invoice #2.

Phase II: Fabrication of Artwork

1. SCOPE OF WORK

- A. Artist shall deliver subcontracts prior to the start of fabrication of all or any Work under Phase II, as well as all Subcontracts and Documentation.
- B. Artist shall fabricate or cause the Artwork to be fabricated in accordance with all Contract Documents approved by BART.

2. INSPECTION OF ARTWORK

- A. Artist shall notify BART 30 working days in advance of date on which Artwork fabrication will be 25% complete so that BART can do a field inspection of the Artwork in studio. Alternatively, BART may choose to approve the Artwork based on accurate and detailed photo documentation submitted by Artist. Documentation of Artwork at 25% completion shall be sent to the Agreement Manager for approval prior to advancing to next phase of fabrication.
- B. Artist shall notify BART 30 working days in advance of date on which Artwork fabrication will be 50% complete so that BART can do a field inspection of the artwork in studio. Alternatively, BART may choose to approve the Artwork based on accurate and detailed photo documentation submitted by Artist. Documentation of Artwork at 50% completion shall be sent to the Agreement Manager for approval prior to advancing to next phase of fabrication.
- C. Artist shall notify BART 30 working days in advance of date on which Artwork fabrication will be 100% complete so that BART can do a field inspection of the Artwork in studio. Alternatively, BART may choose to approve the Artwork based on accurate and detailed photo documentation submitted by Artist. Documentation of Artwork at 100% completion shall be sent to the Agreement Manager for approval prior to advancing to transportation and installation.

4. TRANSPORTATION PLAN

Artist shall deliver a written Transportation Plan including a list of the company (ies), vehicles, and equipment that will be involved in the transportation of the Artwork to the Site. Evidence of General Liability, Automobile Liability and Risk of Loss insurance must be provided by the company or individual hired to transport the artwork prior to the Artwork leaving Artist's studio.

5. FINAL DOCUMENTATION

Artist will submit written maintenance manual and product specification data for the artwork ("Final Documentation").

6. PHASE II SCHEDULE OF DELIVERABLES (TBD)

7. COMPENSATION. Artist's compensation for Phase II shall be in accordance with Attachment D, Artist's Payment Schedule, which is incorporated herein by reference. Such compensation shall cover all of Artist's fees, costs and expenses for Phase II.

8. PHASE II PAYMENT SCHEDULE

Artist's payment schedule and milestones for Phase II shall be made as follows:

Payment #3: \$

Submittals: Notice of Artwork at 25% completion and approval by BART; Artwork fabricated to 50% completion and acceptance by BART; Transportation Plan, Subcontracts and Documentation; Invoice for Payment #3.

Approvals: BART approval of all Submittals for Payment #3.

Payment #4: \$

Submittals: Artwork fabricated to 100% completion and approval by BART; Final Documentation; Subcontracts and Documentation, Invoice for Payment #4.

Approvals: BART approval of all Submittals for Payment #4.

PHASE III: TRANSPORTATION AND CONSULTING SERVICES FOR INSTALLATION OF ARTWORK

1. SCOPE OF WORK

A. Artist shall provide for the transportation of the completed Artwork in accordance with the Transportation Plan approved by BART in Phase II. Artist shall prepare the Artwork for transportation in accordance with customary industry standards for the transportation of architectural glass and in accordance with the following additional specifications set forth below.

B. Artist shall not transport the Artwork until delivery to the Site has been approved and scheduled by BART. Notwithstanding the foregoing, Artist and BART will coordinate closely as to the date for the delivery of the Artwork ("Art Delivery Date") and shall give Artist at least 10 working days notice. It is anticipated that the Artwork will be completed and ready for

delivery within 14 weeks after Artist receives the Architectural glass from the General Contractor.

- C. If at any time or from time to time the BART changes the anticipated Art Delivery Date given to Artist, then the BART shall notify Artist in writing of the change as soon as reasonably practicable and the Art Delivery Date shall be adjusted accordingly. If at any time or from time to time BART changes the Art Installation Date to a date that is ninety (90) or more days later than the last previously specified date, then Artist, after providing reasonable notice to BART to arrange to receive the Artwork, shall have the option to deliver the Artwork to BART any day on or after the original Art Delivery Date. If Artist exercises this option, then, immediately upon receipt of the Artwork, BART shall provide and pay for adequate and safe storage for the Artwork until the Site is suitable for installation. BART shall be responsible for procuring insurance during such storage and delivery.
- D. All Artwork materials will be delivered to the site in securely packed crates that are clearly marked and ordered. Artist shall clearly mark each panel to identify top to bottom, right to left and inside/outside to assist the General Contractor in correctly siting the Artwork during installation.
- E. BART, or a designated representative, shall receive, unload, and inspect the Artwork upon delivery. Upon inspection and acceptance of the Artwork, the Artwork becomes the property of the General Contractor who shall provide Risk of Loss Insurance until such time that the Artwork becomes the property of BART.
- F. The preparation of the Site for installation of the Artwork shall be the responsibility of the General Contractor in accordance with a separate written agreement between the General Contractor and BART.
- G. Artist shall consult with BART and the General Contractor prior to and during the installation of the Artwork. Artist shall be on-site during the first two days of installation to provide consulting services for the correct handling and placement of the Artwork.
- H. Artist shall provide biographical materials, an artist statement, information on the design process, and other educational materials to be used by BART for marketing, educational outreach and publicity purposes.

4. PHASE III SCHEDULE OF DELIVERABLES

Deliverable	Due Date
Delivery of Artwork to Site	
Installation Consultation	C

5. COMPENSATION. Artist's compensation for Phase III shall be in accordance with Attachment D, Artist's Payment Schedule, which is incorporated herein by reference. Such compensation shall cover all of Artist's fees, costs and expenses for Phase III.

6. PHASE III PAYMENT SCHEDULE

Artist's payment schedule and milestones for Phase III shall be made as follows:

Payment #5: \$

Purpose: Final Costs for Crating and Transportation

Submittals: Delivery of Artwork to Site and Acceptance by BART; Biographical Materials, Subcontracts and Documentation; Invoice for Payment #5.

Approvals: BART approval of all Submittals for Payment #5.

7. LIQUIDATED DAMAGES

- A. Artist acknowledges that in the event the Work is delayed beyond the scheduled milestones and time lines provided in this Agreement, BART may suffer actual damages that will be extremely difficult to determine.
- B. BART may deduct the sum of \$200.00 per day for each day that Artist delays delivery of the Artwork to the Site once a final delivery date has been determined and the Artist has been given 10 working days notice to deliver.

8. **Payment #6:** \$

- A. Artist shall receive final payment in the amount of \$ following a two-day consultation for the installation of the Artwork. If BART waives the Artist's consultation services, the final payment of \$ shall be included in Payment #5.

ATTACHMENT B: KEY PERSONNEL

ATTACHMENT C: ARTIST'S APPROVED COSTS

ATTACHMENT D: ARTIST'S PAYMENT SCHEDULE

ATTACHMENT E

STATE OF CALIFORNIA
DEPARTMENT OF TRANSPORTATION
REQUIREMENTS

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Allowable Costs (See Article 3.0 of this Agreement)

Termination for Convenience (See Article 5.1 of this Agreement)

Termination for Cause (See Article 5.2 of this Agreement)

E.1 Fair Employment Practices

E.2 Audit, Inspection, Access to Records and Retention of Records

ATTACHMENT E

STATE OF CALIFORNIA DEPARTMENT OF TRANSPORTATION REQUIREMENTS

E.1 Fair Employment Practices. In the performance of work under this Agreement, CONSULTANT and its subconsultants will not unlawfully discriminate, harass or allow harassment, against any employee or applicant for employment because of sex, race, color, ancestry, religious creed, national origin, physical disability (including HIV and AIDS), mental disability, medical condition (including cancer), age (over 40), marital status and denial of family care leave. ¹ CONSULTANT and its subconsultants shall ensure that the evaluation and treatment of their employees and applicants for employment are free from such discrimination and harassment. CONSULTANT and its subconsultants shall comply with the provisions of the Fair Employment and Housing Act (Government Code, Section 12900 et seq.) and the applicable regulations promulgated thereunder (California Code of Regulations, Title 2, Section 7285.0 et seq.). The applicable regulations of the Fair Employment and Housing Commission implementing Government Code, Section 12900 (a-f), set forth in chapters of Division 4 of Title 2 of the California Code of Regulations are incorporated into this agreement by reference and made a part hereof as if set forth in full. CONSULTANT and its subconsultants shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other agreement. CONSULTANT and its subconsultants shall include the nondiscrimination and compliance provisions of this clause in all subconsultant agreements to perform work under this agreement.

CONSULTANT and its subconsultants will permit access to all records of employment, employment advertisements, application forms, and other pertinent data and records by the State Fair Employment Practices and Housing Commission, or any other agency of the State of California designated by BART for the purpose of investigation to ascertain compliance with this Fair Employment Practices Section.

E.2 Audit, Inspection, Access to Records and Retention of Records. CONSULTANT and its subconsultants shall establish and maintain an accounting system and records that properly accumulate and segregate incurred costs by line item for the project. CONSULTANT and its subconsultants' accounting systems shall conform to generally accepted accounting principles (GAAP) and all records shall provide a breakdown of total costs charged to the Project, including properly executed payrolls, time records, invoices and

¹ See State Government Code 12940 et seq. for further details.

vouchers as well as all accounting generated reports. CONSULTANT and its subconsultants shall permit representatives of the State and State Auditor to inspect, examine, make excerpts or transcribe CONSULTANT and its subconsultants' work, documents, papers, materials, payrolls, books, records, accounts, any and all data relevant to this Agreement at any reasonable time and to audit and verify statements, invoices or bills submitted by CONSULTANT and its subconsultants pursuant to this Agreement, and shall provide copies thereof upon request and shall provide such assistance as may be reasonably required in the course of such audit or inspection.

The State, its representatives and the State Auditor further reserve the right to examine, inspect, make copies, or excerpts of all work, documents, papers, materials, payrolls, books and accounts, and data pertaining to this Agreement and to inspect and re-examine said work, documents, papers, materials, manner whatsoever for three (3) years after final payment under this Agreement and all pending matters are closed.

Any costs for which CONSULTANT and its subconsultants has received payment that are determined by subsequent audit to be unallowable under the terms of this agreement may be required to be repaid to BART by the CONSULTANT and its subconsultants. Should CONSULTANT and its subconsultants fail to reimburse money due BART within 30 days of demand, or within such other period as may be agreed between the parties hereto, BART is authorized to withhold future payments due CONSULTANT and its subconsultants from any source.

The CONSULTANT agrees that the Contract Cost Principles and Procedures at least as restrictive as 48 CFR, Federal Acquisition Regulations System, Chapter 1, Part 31 et seq., shall be used to determine the allowability of individual items of costs.

The CONSULTANT agrees to comply with Federal procedures in accordance with 49 CFR, Part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

Any costs for which payments have been made to the CONSULTANT, which are determined by subsequent audit to be unallowable under 48 CFR, Federal Acquisition Regulations System, Chapter 1, Part 31 et seq., or 49 CFR, Part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, are subject to repayment by CONSULTANT to BART.

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

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ATTACHMENT F

DISADVANTAGED BUSINESS

ENTERPRISE PARTICIPATION

ATTACHMENT F

DISADVANTAGED BUSINESS ENTERPRISE PARTICIPATION

A. Definitions

1. Disadvantaged Business Enterprises (DBE)
 - a. "Disadvantaged Business Enterprise (DBE)" means a for-profit small business concern which is at least 51 percent owned by one or more socially and economically disadvantaged individuals, or, in the case of publicly-owned business, in which at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals; and whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it and which meets the requirements of 49 CFR Part 26.
 - b. "Small business concern" means a small business as defined in Section 3 of the United States Small Business Act (15 USC Section 632) and the Small Business Administration regulations implementing it (13 CFR Part 121), whose average annual gross receipts for the previous three fiscal years do not exceed \$19.75 million (as adjusted for inflation by the Secretary of DOT pursuant to 49 CFR Section 26.65(b).
 - c. "Socially and economically disadvantaged individuals" are presumed to include United States citizens (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans (including American Indians, Eskimos, Aleuts or Native Hawaiians), Asian-Pacific Americans, or Asian-Indian Americans, or any individuals found to be disadvantaged by the Small Business Administration pursuant to Section 8(a) of the United States Small Business Act (15 USC Section 637), or certified as socially and economically disadvantaged by the District pursuant to 49 CFR Part 26. An individual cannot be presumed or determined on a case-by-case basis to be economically disadvantaged if she/he has a personal net worth exceeding \$1.31 Million (excluding the individual's ownership interest in the small business concern and his/her primary residence).
2. Resolution of Conflict Between Definitions - If there is a conflict between the above three definitions and the definitions of the California Unified

Certification Program (CUCP) certification documents, the definitions in Section A.1 above shall prevail. A number of the firms listed in the CUCP DBE Database have been certified under prior DBE regulations. CONSULTANT may need to verify any such firm's continued eligibility under the current DBE regulations, 49 CFR Part 26.

- B. DBE Participation: No Goal. Although there is no DBE participation goal for this Agreement, CONSULTANT is encouraged to take all steps necessary to provide an equal opportunity for DBEs to participate.
- C. DBE Participation Requirements. The following provisions shall apply in the event the CONSULTANT utilizes DBE firms in the performance of work under this Agreement.
1. DBE Participation. DBE participation includes contracts (other than employee contracts) between DBEs and the CONSULTANT for any goods or services specifically required for the completion of the work under the Agreement. Only the work actually performed by a DBE's own forces will be counted toward DBE participation. The cost of supplies and materials obtained by the DBE or equipment leased (except from the CONSULTANT or its affiliate) may also be counted. A DBE may participate as a CONSULTANT, first-tier subconsultant, joint venture partner with a CONSULTANT or first-tier subconsultant, vendor of material or supplies incorporated or expended in the work, or a supplier of other services such as shipping, transportation, testing, equipment rental, insurance services and other support services necessary to fulfill the requirements of this Agreement provided that such vendor or supplier contracts directly with the CONSULTANT. A DBE may be a subconsultant on more than one Agreement. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE participation. The CONSULTANT assumes responsibility for accurately identifying the first-tier status of the DBE firms proposed.
 2. Joint Venture. A DBE joint venture partner must be responsible for a clearly defined portion of the work to be performed in addition to satisfying requirements for ownership and control. Only that portion of the work that is performed solely by the DBE's own forces can be counted towards DBE participation.
 3. Function. A DBE must perform a commercially useful function, i.e., must be responsible for the execution of a distinct element of work or services and must carry out its responsibility by actually performing, managing and supervising the work or services involved.
 4. Methodology for Determining Level of DBE Participation. Only those DBEs that have been certified prior to proposal submission and which are

listed in the Project Consultant Team Form (Attachment D to the Agreement as may be modified during the course of this Agreement) will be counted toward DBE participation. DBE participation will be counted as follows:

- a. If the Agreement is awarded to a DBE CONSULTANT, only the portion of work that is actually performed by the DBE CONSULTANT. If the Agreement is awarded to a joint venture, only the portion of the work that is actually performed by the DBE's own forces, or if the work is not clearly delineated between the DBE and the joint venture partner, the portion of the work equal to the DBE's percentage ownership interest in the joint venture will be counted.
- b. The dollar value of all DBE subcontracts for work or services under the Agreement.
- c. DBE participation will not be counted until the DBE firms have been paid.
- d. When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE participation only if the DBE's subconsultant is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE participation.

D. DBE Records

CONSULTANT shall maintain records to verify DBE participation as set forth in this Agreement and as modified in any way during the course of the Agreement. Such records shall show the name and business address of each DBE participating in the Agreement and the total dollar amount actually paid each DBE and the date of payment. A report based on these records and certified to be correct by CONSULTANT shall be submitted to the Agreement Manager with the monthly payment invoice. CONSULTANT shall include with the monthly report any other efforts made which are relevant to meeting the DBE participation, as applicable. CONSULTANT shall submit with the first monthly report copies of all DBE subcontracts and purchase orders that have been entered into or issued in connection with the Agreement and shall submit with subsequent monthly reports copies of any such additional subcontracts or purchase orders. The monthly report shall include copies of all invoices submitted by each DBE during the reporting period. The District will verify with each DBE the amount actually paid to the DBE. No invoice will be approved for payment unless the current report and all required attachments have been furnished. DBE participation will not be counted toward CONSULTANT's DBE achievement until the DBE has been paid. Upon completion of the Agreement, a summary of these records shall be prepared and

certified to be correct by CONSULTANT or its authorized representative, and shall be furnished to the District's Office of Civil Rights.

E. Change Orders

CONSULTANT is encouraged to make good faith efforts to obtain DBE participation in the performance of the services under any Change Orders that may be issued under this Agreement. As used in this Article, "good faith efforts" to be undertaken by a CONSULTANT in connection with Change Orders are those that, given all relevant circumstances, a CONSULTANT actively and aggressively seeking to obtain DBE participation would make.

F. Substitution of DBE Subconsultants or Suppliers

Should substitution of any DBE subconsultant or supplier become necessary, CONSULTANT shall, in cooperation with the Office of Civil Rights and subject to the approval of the District, replace the affected DBE with another DBE or show that it made good faith efforts to do so. As used in this Section, "good faith efforts" undertaken by a CONSULTANT in connection with these Agreement period activities requires the CONSULTANT to follow the good faith efforts criteria specified in Section G below. CONSULTANT shall provide completed DBE certification documents for each new DBE.

G. Good Faith Efforts Regarding Substitution of DBE Subconsultants and Suppliers

Good faith efforts regarding substitution of DBE subconsultants and suppliers are those that, given all relevant circumstances, a CONSULTANT would make to ensure that DBEs have an equal opportunity to compete for and participate in the performance of this Agreement. The CONSULTANT must show it took all necessary and reasonable steps to maintain DBE participation, which by their scope, intensity and appropriateness to the objective, could reasonably be expected to engage a certified DBE to substitute for a DBE that has to be replaced. Only those efforts made prior to the District's determination of a failure to comply with the DBE participation requirements will be considered for evaluation of good faith efforts. The CONSULTANT assumes responsibility for being informed and complying with this Agreement's DBE requirements.

In determining whether good faith efforts have been made, the District will consider the quality, quantity, and intensity of the different kinds of efforts that the CONSULTANT has made. The efforts employed by the CONSULTANT should be those that one could reasonably expect a CONSULTANT to take if the CONSULTANT were actively and aggressively trying to engage a certified DBE firm to substitute for a DBE firm that has to be replaced. Specifically, and without limitation, the District will consider, on the basis of documentation timely submitted by the CONSULTANT, whether the actions listed below have been

taken. The District considers each of the listed steps particularly significant in evaluating a CONSULTANT's good faith efforts.

1. Advertisements. The CONSULTANT shall have in place advertisements soliciting proposals from DBEs for substitution of DBE subconsultants. Advertisements shall be in place for a reasonable period of time to allow DBEs to respond. Such advertisements shall refer only to proposals for the District's Agreement and shall specify the categories of work for which subcontracting opportunities exist. The advertisements shall be placed in three or more paid daily or weekly minority focus publications or media. The advertisements shall be in publications or media that can be reasonably expected to reach both women and minority DBE firms that are likely to submit a proposal to the CONSULTANT.
2. Selecting Portions of the Work for Subcontracting. The CONSULTANT is encouraged to identify portions of the work it is willing to have performed by subconsultants in order to facilitate DBE participation and increase the likelihood that if a substitution is necessary, replacement DBE firms will be engaged. This includes, where appropriate, breaking out work items under this Agreement into economically feasible units, even when the CONSULTANT might otherwise prefer to perform these work items with its own forces.
3. Letters.
 - a. A CONSULTANT shall solicit proposals for additional work needed for substitution of DBE subconsultants by mailing registered or certified letters to DBE firms qualified to perform those categories of work which are needed. Solicitation letters shall be mailed with sufficient time to allow DBEs to respond. A sufficient number of letters shall be mailed to appropriate certified DBE firms for each category of work sought to be subcontracted based on the DBEs listed in the CUCP database for the category sought. As used herein, "appropriate" refers to those firms performing work related to the scope of work of this Agreement.
 - b. The letters to certified DBE firms shall:
 - (1) Clearly identify portions of the work which the CONSULTANT is willing to have performed by subconsultants.
 - (2) Offer assistance with regard to insurance requirements, where applicable, and/or financing (e.g. lines of credit), specifying the type of assistance that the CONSULTANT is offering. Assistance may include, but is not limited to:

- (a) Contacting insurance companies on behalf of DBEs.
 - (b) Paying for the cost of the insurance.
 - (c) Waiving insurance requirements
 - (d) Referring DBEs to Business Development Centers or other resource agencies, which may assist DBEs in obtaining insurance, or lines of credit.
 - (3) Offer to make plans and specifications available to DBEs at reasonable hours for viewing, copying, or borrowing.
 - (2) Offer assistance in obtaining necessary equipment, supplies, materials or related assistance or services.
 - (3) Offer pertinent information about the requirements of this Agreement in order to assist DBEs in responding to the solicitation.
 - c. The CONSULTANT is encouraged to use the CUCP database as a source of DBEs for solicitation. The CONSULTANT may review the names and addresses of firms certified under the CUCP on the following website: www.bart.gov. In addition to the use of the CUCP database, the CONSULTANT is encouraged to use the services of minority and women community organizations and/or suppliers' groups, in order to identify certified DBEs for work under the Agreement. A listing of such organizations is available from the District's Office of Civil Rights.
4. Follow-Up of Initial Solicitations. The CONSULTANT shall follow-up initial solicitations of DBE proposals after the mailing of the initial solicitation letters. The follow-up shall be conducted by someone familiar with the Agreement. Such follow-up activity shall be documented by telephone logs or other written documentation which shall provide, at a minimum, the following information:
- a. Type of contact, e.g., telephone call, visit, letter.
 - b. Name and position of person who made contact on behalf of the CONSULTANT.
 - c. Name and address of firm contacted.

- d. Name and position of person contacted, telephone number, and date of contact.
- e. The response from the firm contacted with regard to its interest in submitting a proposal.
- f. Follow-up, if any, to the assistance offered in the initial solicitation letter with regard to breakdown of work into economically feasible units, insurance, lines of credit, and plans and specifications.
- g. For each DBE contacted who declined to submit a proposal, the reason provided by the DBE for declining to submit a proposal. If the reason cited relates to financing or insurance, the CONSULTANT must provide documentation describing in detail the assistance offered by the CONSULTANT to the DBE.

H. Documentation of Responses from Interested DBEs. The CONSULTANT shall submit records of responses, proposals received from DBEs, which shall include, at a minimum, the following information:

- 1. Names, positions, addresses and telephone numbers of all DBEs that responded to the CONSULTANT's solicitation.
- 2. All responses (including requests for assistance or information), proposals received, and whether such responses or proposals were in writing or verbal. In the case of written responses, copies of such responses.
- 3. The date each response was received by the CONSULTANT.

I. Negotiating in Good Faith with Interested DBEs.

- 1. Negotiating in good faith with interested DBEs. The CONSULTANT is encouraged to make a portion of the work available to DBEs and to select those portions of the work consistent with the available DBEs so as to facilitate DBE participation.
- 2. Use of good business judgment. A CONSULTANT using good business judgment shall consider a number of factors in negotiating with DBEs and should take a firm's price and capabilities into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a CONSULTANT's failure to substitute a DBE firm with another certified DBE firm, as long as such costs are reasonable. Also, the ability or desire of the CONSULTANT to perform the work of an Agreement with its own organization does not relieve the CONSULTANT of the responsibility to make good faith efforts.

The CONSULTANT is not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

- J. Not Unreasonably Rejecting DBEs as Unqualified. It is the CONSULTANT's responsibility not to reject DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The DBE's standing with the industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of proposals in the CONSULTANT's efforts to substitute DBE firms with certified DBE firms.
- K. CONSULTANT's Evaluation of Interested DBEs. The CONSULTANT shall submit documentation of its evaluation of proposals received from DBEs. For each DBE that responded to the CONSULTANT's solicitation, the CONSULTANT shall document the following:
1. A summary of all communications and negotiations, if any, between the CONSULTANT and the DBE.
 2. A description of the information provided regarding the plans and specifications and other Agreement requirements.
 3. A description of specific assistance agreed to be provided by the CONSULTANT to the DBE with regard to obtaining lines of credit, insurance, and obtaining services.
 4. If the proposal was rejected, the reasons for rejection. The District may deem that a CONSULTANT has not made good faith efforts if DBE proposals have been rejected without adequate reason. Price alone will not be considered to be an adequate reason for rejection unless each of the following factors has been met on the basis of documentation submitted.
 - a. The CONSULTANT contacted the DBE firm and ascertained that the DBE fully understood the scope of the work and did not include work beyond the scope and/or overhead items already covered by the District, e.g. insurance for general liability and workers' compensation if the Agreement is covered under the District's Owner-Controlled Insurance Program.
 - b. In view of all relevant circumstances, the DBE rejected for price alone was significantly higher than other proposals received for the work.
 5. If the DBE's proposal was rejected for any reason, a copy of the DBE's proposal along with copies of all proposals received by non-DBE firms for the same or similar scope of work.

6. If a DBE was rejected as unqualified, a description of the investigation conducted by the CONSULTANT prior to reaching the conclusion that the DBE was unqualified.
 7. If applicable, evidence as to why additional agreements could not be reached for DBEs to perform the work.
- L. Other Efforts. The CONSULTANT shall include in any report regarding substitution of DBE firms submitted to the District any other efforts made to meet the DBE requirements that are not listed above.
- M. Prompt Payment
- CONSULTANT shall promptly pay any and all subconsultants in accordance with Article 3.3, METHOD OF PAYMENT, of the Agreement.
- N. Noncompliance
- Failure to comply with the above requirements or failure to maintain the level of DBE participation offered in the RFP and incorporated into this Agreement, shall be grounds, at the discretion of the District, for termination of this Agreement in whole or in part, or, for withholding payments due the CONSULTANT during the period of noncompliance.
- O. DBE Participation Enforcement Procedures
1. Within five (5) working days of CONSULTANT receiving a notice from the District that it has failed to meet the DBE requirements, and has failed to demonstrate sufficient good faith efforts to do so, CONSULTANT may request a hearing on reconsideration of the District's recommendation. Such hearing will be held at the convenience of the District but no later than ten (10) business days after receipt of the request and in accordance with the Office of Civil Rights Hearing Procedures, copies of which are available upon request. At such hearing, the CONSULTANT shall bear the burden of demonstrating:
 - a. Compliance with the DBE participation requirements and reporting obligations; or
 - b. Compliance with applicable good faith effort requirements listed herein regarding substitution of DBE subconsultants made prior to the District's determination of deficiency that, given all relevant circumstances, could have been expected to result in meeting the DBE participation requirements; or

- c. Compliance with the applicable good faith requirements related to Change Orders made prior to the District's determination of a deficiency, that given all relevant circumstances, could have been expected to result in meeting the DBE requirements.

ATTACHMENT G

UNITED STATES DEPARTMENT OF TRANSPORTATION (DOT)

FEDERAL TRANSIT ADMINISTRATION (FTA)

REQUIREMENTS

- G1 General.** In performance of its obligations pursuant to this Agreement, the CONSULTANT agrees to comply with all applicable provisions of federal, state, and local law, regulations, and FTA directives. The terms of the most recent amendment to any federal, state or local laws, regulations, FTA directives, and amendments to the grant or cooperative agreement providing funding for this Agreement that may be subsequently adopted, are applicable to the Agreement to the maximum extent feasible, unless the FTA provides otherwise in writing. The Federal or State regulations set forth in this Agreement to be observed in the performance of the Agreement are subject to change, and such changed requirements will apply to this Agreement as required. CONSULTANT shall include in its Subcontracts, and require its subconsultants of every tier to include in their respective subcontracts, provisions incorporating the requirements of this Attachment. CONSULTANT's failure to comply with these requirements shall constitute a material breach of this Agreement and may, in addition to other remedies, result in the withholding of progress payments to the CONSULTANT.
- G2 False or Fraudulent Statements and Claims.** CONSULTANT shall comply with the following requirements:
- (a) The requirements of the Program Fraud Civil Remedies Act of 1986, as amended, 49 U.S.C. §§ 3801 *et seq.* and U.S. DOT regulations, "Program Fraud Civil Remedies," 49 C.F.R. Part 31, apply to CONSULTANT's actions pertaining to the Professional Services Agreement. Accordingly, by signing the Professional Services Agreement CONSULTANT certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, or it may make pertaining to the underlying Professional Services Agreement. If CONSULTANT makes 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, as amended, on CONSULTANT to the extent the Federal Government deems appropriate.
 - (b) If CONSULTANT makes a false, fictitious, or fraudulent claim, statement, submission, or certification to the Federal Government in connection with an urbanized area formula project financed with Federal assistance authorized by 49 U.S.C. § 5307, the Government reserves the right to impose on CONSULTANT the penalties of 19 U.S.C. § 1001 and 49

U.S.C. § 5307(n)(1), to the extent the Federal Government deems appropriate.

- G3 Exclusionary or Discriminatory Specifications.** Apart from inconsistent requirements imposed by Federal statute or regulations, CONSULTANT shall comply with the requirements of 49 U.S.C. § 5323(h)(2) by refraining from using any Federal assistance awarded by FTA to support procurements using exclusionary or discriminatory specifications.
- G4 No Federal Government Obligations to Consultant and Third Parties.** Absent the Federal Government's express written consent, the Federal Government shall not be subject to any obligations or liabilities to CONSULTANT, or any other third party in connection with the performance of the Agreement. Notwithstanding any concurrence provided by the Federal Government in or approval of any solicitation, contract, or subagreement subagreement, the Federal Government continues to have no obligations or liabilities to any party, including the CONSULTANT.
- G5 Geographic Restrictions.** CONSULTANT shall refrain from using state or local geographic preferences, except those expressly mandated or encouraged by Federal statute, and as permitted by BART.
- G6 Reporting, Record Retention and Access.** CONSULTANT shall comply with the following requirements:
- (a) Record Retention. CONSULTANT shall, during the course of the Agreement and for three years after final payment, maintain intact and readily accessible all data, documents, reports, records, contracts, and supporting materials relating to the Agreement as BART may require.
 - (b) Access to Records. CONSULTANT shall permit BART, the Secretary of Transportation and the Comptroller General of the United States, or their authorized representatives, to inspect all Project work, materials, payrolls, and other data, and to audit the books, records, and accounts of CONSULTANT and its subconsultants pertaining to the Agreement. In accordance with 49 U.S.C. § 5325(a), CONSULTANT shall require each subconsultant to permit BART, the Secretary of Transportation and the Comptroller General of the United States, or their duly authorized representatives, to inspect all work, materials, payrolls, and other data and records involving that subconsultant agreement and to audit the books, records, and accounts involving that subconsultant agreement as it affects the Agreement.
- G7 Debarment and Suspension.** CONSULTANT shall comply with the following requirements:

- (a) CONSULTANT shall comply with the requirements of Executive Orders Nos. 12549 and 12689, "Debarment and Suspension," 31 U.S.C. § 6101 note; and U.S. DOT regulations on Debarment and Suspension at 49 C.F.R. Part 29.
- (b) CONSULTANT shall refrain from entering into any subconsultant agreement of any amount with a party included in the "U.S. General Services Administration's (U.S. GSA) List of Parties Excluded from Federal Procurement or Nonprocurement Programs," implementing Executive Orders Nos. 12549 and 12689, "Debarment and Suspension" and 49 C.F.R. Part 29. The list also includes the names of parties debarred, suspended, or otherwise excluded by agencies, and contractors declared ineligible for contract award under statutory or regulatory authority other than Executive Order Nos. 12549 and 12689.
- (c) Before entering into any subagreement with a subconsultant, CONSULTANT shall obtain a debarment and suspension certification from each prospective subconsultant containing information about the debarment and suspension status and other specific information about the subconsultant and its "principals," as defined at 49 U.S.C. § 29.105(p). An example of the appropriate certification is contained in 49 C.F.R. Part 29, Appendix A.
- (d) CONSULTANT shall require each subconsultant to refrain from awarding any subagreement of any amount (at any tier) to a debarred or suspended subconsultant, and to obtain a similar certification from any subconsultant (at any tier) seeking a subagreement exceeding \$100,000. An example of the appropriate certification is contained in 49 C.F.R. Part 29, Appendix B.

G8 **Buy America.** CONSULTANT shall comply with 49 U.S.C. § 5323(j), FTA's Buy America regulations at 49 C.F.R. Part 661, and any amendments thereto, and any implementing guidance issued by FTA.

G9 **Certification Regarding Lobbying.** This Agreement is subject to the requirements of 31 U.S.C. Section 1352, as amended by the Lobbying Disclosure Act of 1995, P.L. 104-65 (to be codified at 2 U.S.C. Section 1601, et seq.) and U.S. DOT Regulations "New Restrictions on Lobbying" 49 C.F.R. Part 20. CONSULTANT shall require that the "Certification Regarding Lobbying" set out in Appendix A to those Regulations and in the Bid Form be executed by its Subconsultants or subsuppliers of any tier receiving an amount in excess of \$100,000 under this Agreement and shall require such Subconsultants and subsuppliers to forward such certifications to CONSULTANT, and CONSULTANT shall forward such certifications and any disclosure forms to the District. CONSULTANT and Subconsultants of each tier certifies that it will not or 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

department or 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. CONSULTANT and Subconsultants shall 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 that Federal contract, grant or award covered by 31 U.S.C. Section 1352. Such disclosures shall be forwarded from tier to tier to the District.

G10 Air Quality. CONSULTANT shall comply with the following requirements:

- (a) CONSULTANT shall comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. §§ 7401 et seq. Specifically:
 - (1) CONSULTANT shall comply with applicable requirements of U.S. EPA regulations, "Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Act," 40 C.F.R. Part 51, Subpart T; and "Determining Conformity of Federal Actions to State or Federal Implementation Plans," 40 C.F.R. Part 93.
- (b) CONSULTANT shall report and require each subconsultant at any tier to report any violation of these requirements resulting from any Agreement implementation activity of CONSULTANT or subconsultant to FTA and the appropriate U.S. EPA Regional Office.

G11 Clean Water. CONSULTANT shall comply with the following requirements:

- (a) CONSULTANT shall comply with all applicable standards, orders, or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251 et seq.
- (b) CONSULTANT shall report and require each subconsultant at any tier to report any violation of these requirements resulting from any Project implementation activity of a subconsultant or itself to FTA and the appropriate U.S. EPA Regional Office.

G12 Disadvantaged Business Enterprise. CONSULTANT shall take the following measures to facilitate participation by disadvantages business enterprises (DBE) in the Agreement:

- (a) CONSULTANT shall comply with current U.S. DOT regulations on DBE participation in U.S DOT financial assistance programs, at 49 C.F.R. Part 26. CONSULTANT shall take all necessary and reasonable steps

required by U.S. DOT regulations to ensure that eligible DBEs have an equal opportunity to compete for and participate in subagreements financed with Federal assistance awarded by U.S. DOT.

- (b) CONSULTANT shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of a subagreement financed with Federal assistance derived from the U.S. DOT.
- (c) CONSULTANT must promptly pay subconsultants for satisfactory performance of their contracts.

G13 Americans with Disabilities Act. CONSULTANT shall comply with all applicable requirements of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 et seq.; section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; 49 U.S.C. § 5301(d); and the following Federal regulations including any amendments thereto:

- (a) U.S. DOT regulations, "Transportation Services for Individuals with Disabilities (ADA)," 49 C.F.R. Part 37;
- (b) U.S. DOT regulations, "Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance," 49 C.F.R. Part 27;
- (c) U.S. DOT regulations, "Americans with Disabilities (DA) Accessibility Specifications for Transportation Vehicles," 49 C.F.R. Part 38;
- (d) U.S. DOT regulations, "Nondiscrimination on the basis of Disability in State and Local Government Services," 28 C.F.R. Part 35;
- (e) U.S. Department of Justice (DOJ) regulations, "Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities," 28 C.F.R. Part 36;
- (f) U.S. General Services Administration (GSA) regulations, "Accommodations for the Physically Handicapped," 41 C.F.R. Subpart 101-19;
- (g) U.S. Equal Employment Opportunity Commission, "Regulations to implement the Equal Employment Provisions of the Americans with Disabilities Act," 29 C.F.R. Part 1630;
- (h) U.S. Federal Communications Commission regulations, "Telecommunications Relay Services and Related Customer Premises Equipment for the Hearing and Speech Disabled," 47 C.F.R. Part 64, Subpart F;

- (i) FTA regulations, "Transportation for Elderly and Handicapped Persons," 49 C.F.R. Part 609; and
- (j) Any implementing requirements FTA may issue.

G14 Preference for Recycled Products. To the extent practicable and economically feasible, CONSULTANT shall use recycled products pursuant to U.S. Environmental Protection Agency (U.S.EPA).

G15 Equal Employment Opportunity. CONSULTANT shall comply with the following equal employment opportunity (EEO) requirements:

- (a) General Requirements. CONSULTANT shall not discriminate against any employee or applicant for employment because of race, color, creed, sex, disability, age, or national origin. CONSULTANT shall take affirmative action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, color, creed, sex, disability, age, or national origin. Such action shall include, but not be limited to, the following employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. CONSULTANT shall also comply with any implementing requirements FTA may issue.

G16 Civil Rights. CONSULTANT shall comply with the following requirements:

- (a) Compliance with Regulations. CONSULTANT shall comply and assure compliance by its subconsultants of any tier with all of the requirements of Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d, 49 U.S.C. § 5332, and with the Regulations relative to nondiscrimination in federally-assisted programs of the United States Department of Transportation (hereinafter called "DOT") Title 49, Code of Federal Regulations, Part 21, as they may be amended from time to time (hereinafter referred to as "Regulations"), which are herein incorporated by reference and made a part of this Agreement.
- (b) Nondiscrimination. CONSULTANT, with regard to the work performed by it during this Agreement, shall not discriminate on the grounds of race, color, sex or national origin in the selection and retention of subconsultants, including procurement of materials and leases of equipment. CONSULTANT shall not participate either directly or indirectly in the discrimination prohibited by Section 21.5 of the Regulations, including employment practices when the Agreement covers a program set forth in Appendix B of the Regulations

- (c) Solicitations for Subcontracts, Including Procurement of Materials and Equipment. In all solicitations either by competitive bidding or negotiation made by CONSULTANT for work to be performed under a subcontract, including procurement of materials or leases of equipment, each potential subconsultant or supplier shall be notified by CONSULTANT of CONSULTANT's obligations under this Agreement and the Regulations relative to nondiscrimination on the grounds of race, color, sex or national origin.
- (d) Information and Reports. CONSULTANT shall provide all information and reports required by the Regulations or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information and its facilities as may be determined by BART or the Federal Transit Administration (hereinafter called "FTA") to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any information required of CONSULTANT is in the exclusive possession of another who fails or refuses to furnish this information, CONSULTANT shall so certify to BART, or FTA, as appropriate, and shall set forth what efforts it has made to obtain the information.
- (e) Sanctions for Noncompliance. In the event of CONSULTANT's noncompliance with the nondiscrimination provisions of this Agreement, BART shall impose such Agreement sanctions as it or FTA may determine to be appropriate, including, but not limited to:
- (1) Withholding of payments to CONSULTANT under the Agreement until CONSULTANT complies, and/or
 - (2) Cancellation, termination or suspension of the Agreement, in whole or in part.
- (f) Incorporation of Provisions. CONSULTANT shall include the provisions of paragraphs (a) through (f) in every subcontract, including procurement of materials and leases of equipment, unless exempt by the Regulations, or directives issued pursuant thereto. CONSULTANT shall take such action with respect to any subcontract or procurement as BART or FTA may direct as a means of enforcing such provisions including sanctions for noncompliance, provided, however, that, in the event CONSULTANT becomes involved in, or is threatened with, litigation with a subconsultant or supplier as a result of such direction, CONSULTANT may request BART to enter into such litigation to protect the interests of BART and, in addition, CONSULTANT may request the United States to enter into such litigation to protect the interests of the United States.

G17 Employee Protection Requirements. CONSULTANT shall comply with section 102 of the Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. §§ 327 through 332, and shall ensure that the wages of every mechanic and laborer will be computed on the basis of a standard work week of 40 hours, and that each worker will be compensated for work exceeding the standard work week at a rate of not less than 1.5 times the basic rate of pay for all hours worked in excess of 40 hours in the work week. CONSULTANT shall comply with the determinations pertaining to these requirements that may be made in accordance with applicable U.S. Department of Labor (DOL) regulations, "Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction (also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act)," 29 C.F.R. Part 5.

G18 Fair Labor Standards Requirements. CONSULTANT shall comply with the minimum wage and overtime provisions of the Fair Labor Standards Act, as amended, 29 U.S.C. §§ 206 and 207, which apply to employees performing work under the Agreement.

G19 Seismic Safety. CONSULTANT shall comply with the requirements of U.S. DOT regulations applicable to seismic safety requirements for U.S. DOT assisted construction projects at 49 C.F.R. Part 41, (specifically, 49 C.F.R. Part 41.117), and any implementing guidance FTA may issue, to the acquisition of any new building and to additions to any existing building.

G20 Patent Rights.

(a) General. If any invention, improvement, or discovery of CONSULTANT or any of its subconsultants is conceived or first actually reduced to practice and paid for in the course of or under the Agreement, and that invention, improvement, or discovery is patentable under the laws of the United States of America or any foreign country, CONSULTANT shall notify BART immediately and provide a detailed report.

(b) Federal

(b) Federal Rights. Unless the Federal Government later makes a contrary determination in writing, the rights and responsibilities of BART, CONSULTANT, subconsultant and the Federal Government pertaining to that invention, improvement, or discovery will be determined in accordance with applicable Federal laws, regulations, including any waiver thereof. Unless the Federal Government later makes a contrary determination in writing, CONSULTANT agrees that, irrespective of its status or the status of any subconsultant or any subconsultant at any tier, CONSULTANT shall transmit to FTA those rights due the Federal

Government in any invention resulting from this Agreement and as further described in U.S. Department of Commerce regulations, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," 37 C.F.R. Part 401.

- (c) Restrictions on Access to Patent Rights. Nothing contained in this section shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

G21 Federal Rights in Data and Copyrights.

- (a) Definition. The term "subject data" used in this section means recorded information, whether or not copyrighted, that is delivered or specified to be delivered under the Agreement. The term includes graphic or pictorial delineation in media such as drawings or photographs; text in specifications or related performance or design-type documents; machine forms such as punched cards, magnetic tape, or computer memory printouts; and information retained in computer memory. Examples include, but are not limited to: computer software, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identifications, and related information. The term does not include financial reports, cost analyses, and similar information incidental to Project administration.
- (b) Federal Restrictions. The following restrictions apply to all subject data first produced in the performance of this Agreement:
 - (1) Except for its own internal use, the CONSULTANT may not publish or reproduce subject data in whole or in part, or in any manner or form, nor may the CONSULTANT authorize others to do so, without the written consent of the Government, until such time as the Government may have either released or approved the release of such data to the public.
- (c) Federal Rights in Data and Copyrights. In accordance with 49 C.F.R. § 18.34 and 49 C.F.R. § 19.36, the Government reserves a royalty-free, non-exclusive and irrevocable license to reproduce, publish, or otherwise use, and to authorize others to use, for Federal Government purposes:
 - (1) Any subject data developed under a grant, or under cooperative agreement, or under a third party contract or subcontract, irrespective of whether or not a copyright has been obtained; and

(2) Any rights of copyright to which CONSULTANT purchases ownership with Federal assistance.

(d) Special Federal Rights. CONSULTANT understands and agrees that, in addition to the rights set forth in Article (c) above, FTA may make available to any FTA recipient, subrecipient, third party CONSULTANT, or third party Subconsultant,

either FTA's license in the copyright to the subject data derived under this Agreement or a copy of the subject data first produced under this Agreement. In the event that the CONSULTANT is not completed for any reason whatsoever, all data developed under the Agreement shall become subject data as defined in Article (a) above and shall be delivered as the District or Government may direct. This Article (d), however, does not apply to adaptations of automatic data processing equipment or programs for the CONSULTANT's use.

(e) Hold Harmless. Unless prohibited by state law, the CONSULTANT agrees to indemnify, save, and hold harmless the district, the Government, its officers, agents, and employees acting within the scope of their official duties against any liability, including costs and expenses, resulting from any willful or intentional violation by the CONSULTANT of proprietary rights, copyrights, or right of privacy, arising out of the publication, translation, reproduction, delivery, use, or disposition of any data furnished under this Agreement. The CONSULTANT shall not be required to indemnify the Federal Government for any such liability arising out of the wrongful acts of employees or agents of the Government.

(f) Application to Material incorporated into the Agreement. The requirements of Articles (b), (c) and (d) above do not apply to material furnished to the CONSULTANT by the Government and incorporated in the Work carried out under the Agreement; provided that such incorporated material is identified by the CONSULTANT at the time of delivery of such Work.

G22 Energy Conservation. CONSULTANT shall comply with the mandatory energy efficiency standards and policies within the applicable state energy conservation plans issued in compliance with the Energy Policy and Conservation Act, 42 U.S.C. § 6321 et seq.

G23 Metric System. To the extent required by U.S. DOT or FTA, CONSULTANT shall use the metric system of measurement in its Agreement, as may be required by 49 U.S.C. §§ 205a et seq.; Executive Order No. 12770, "Metric Usage in Federal Government Programs," 15 U.S.C. § 205a note; and other regulations, guidelines, and policies issued by U.S. DOT or FTA. To the extent practicable and feasible, CONSULTANT shall accept products and services with dimensions expressed in the metric system of measurement.

G24 Privacy.

- (a) CONSULTANT shall comply with, as assures the compliance of its employees with, the information restrictions and other applicable requirements of the Privacy Act of 1974, 5 U.S.C. § 552a. Among other things, CONSULTANT agrees to obtain the express consent of the Federal Government before CONSULTANT or its employees operate a system of records on behalf of the Federal Government. CONSULTANT understands that the requirements of the Privacy Act, including the civil and criminal penalties for violation of that Act, apply to those individuals involved, and that failure to comply with the terms of the Privacy Act may result in termination of the underlying Agreement.
- (b) CONSULTANT shall also include these requirements in each subagreement to administer any system of records on behalf of the Federal Government financed in whole or in part with Federal assistance provided by FTA.

G25 Support of Agreement Costs. All costs charged to the Agreement shall be supported by properly executed payrolls, time records, invoices, contracts or vouchers evidencing in proper detail the nature and propriety of the charges. The CONSULTANT shall permit the Government's authorized representatives to inspect all payrolls, records of personnel, invoices of materials and other relevant data and records, and to audit its books, records and accounts.

G26 Fly America. CONSULTANT shall comply with 49 U.S.C. 40118 (the "Fly America" Act) in accordance with the General Services Administration's regulations at 41 CFR Part 301-10, which provide that recipients and subrecipients of Federal funds and their CONSULTANTS are required to use U.S. Flag air carriers for U.S. Government-financed international air travel and transportation of their personal effects or property, to the extent such service is available, unless travel by foreign air carrier is a matter of necessity, as defined by the Fly America Act. The CONSULTANT shall submit, if a foreign air carrier was used, an appropriate certification or memorandum adequately explaining why service by a U.S. flag air carrier was not available or why it was necessary to use a foreign air carrier and shall, in any event, provide a certificate of compliance with the Fly America requirements. The CONSULTANT agrees to include the requirements of this section in all subcontracts that may involve international air transportation.

G27 Environmental Protection. CONSULTANT shall comply with the following requirements:

- (a) CONSULTANT shall comply with all applicable requirements of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. §§

4321 et seq. consistent with Executive Order No. 11514, as amended, "Protection and Enhancement of Environmental Quality," 42 U.S.C. § 4321 note; FTA statutory requirements on environmental matters at 49 U.S.C. § 5324(b); Council on Environmental Quality regulations on compliance with the National Environmental Policy Act of 1969, as amended, 40 C.F.R. Part 1500 et seq.; and joint FHWA/FTA regulations, "Environmental Impact and Related Procedures," 23 C.F.R. Part 771 and 49 C.F.R. Part 622.

(b) CONSULTANT shall report and require each subconsultant at any tier to report any violation of these requirements resulting from any Contract activity of CONSULTANT or subconsultant to FTA and the appropriate U.S EPA Regional Off