

**METRO GOLD LINE FOOTHILL EXTENSION
CONSTRUCTION AUTHORITY**

REQUEST FOR PROPOSALS (RFP)

**FOR PHASE 2A ALIGNMENT
DESIGN-BUILD-FINANCE PROJECT**

RFP C1135

AUGUST 30, 2010

VOLUME 2 – CONTRACT AND APPENDICES

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Appendices

Appendix 1 Abbreviations and Definitions

Appendix 2 Labor Code Requirements

Appendix 3 Federal Requirements

- Appendix 4 Bonds and Guaranty
- Appendix 5 Subcontract Schedule
- Appendix 6 SBE Program
- Appendix 7 Schedule of Payments and Deferrals
- Appendix 8 Maximum Payment Curve
- Appendix 9 Disputes Review Board Agreement
- Appendix 10 Designation of Initial Representatives
- Appendix 11 MTA Trust Agreement Provisions
- Appendix 12 Payment Schedule

THIS DESIGN-BUILD-FINANCE CONTRACT is entered into by and between the PASADENA METRO BLUE LINE CONSTRUCTION AUTHORITY, a public entity of the State of California also known as the Metro Gold Line Foothill Extension Construction Authority ("Authority"), and _____ [to be conformed in execution version] ("Design-Builder"), effective as of the last date set forth on the signature page hereto, with reference to the definitions contained in Appendix 1 hereto and the following facts:

A. Authority is a public entity created by the California State Legislature pursuant to Section 132400 of the Public Utilities Code for the purpose of developing the Metro Gold Line light rail project, extending from Union Station in the City of Los Angeles to Sierra Madre Villa Boulevard in the City of Pasadena ("Phase 1"), and an extension of said line to the City of Claremont ("Phase 2" or "Foothill Extension").

B. Phase 2 will be developed in two phases. The first phase ("Phase 2A"), is planned to extend the Phase 1 terminus from the Sierra Madre Villa Station in City of Pasadena approximately 11.5 miles to Citrus Avenue near the boundary of the City of Azusa and the City of Glendora. Upon completion of Phase 2A it will be transferred to the Los Angeles County Metropolitan Transportation Authority ("Metro").

C. The project which is the subject of the Contract is part of Phase 2A, and includes the systems and fixed facilities between the Sierra Madre Villa Station and Citrus Avenue, and other improvements, all as more specifically described in Volume 3- Technical Provisions (the "Project").

D. Authority has determined that use of a design-build-finance project delivery process will permit accelerated completion of Phase 2A, and that it is in the public interest to proceed with separate contracts for the Iconic Freeway Structure Project, the Parking Facilities Project, and the Project that is the subject of this Contract.

E. The parties intend for the Contract to be a lump sum design-build-finance contract obligating Design-Builder to perform all work necessary to obtain completion of the Project by the deadlines specified herein, for the Contract Price, subject only to

certain specified limited exceptions. In order to allow Authority to budget for the Project, and to reduce the risk of cost overruns, the Contract includes restrictions affecting Design-Builder's ability to make claims for an increase to the Contract Price or an extension of the Completion Deadlines.

F. Timely completion of the Project is necessary for timely completion of Phase 2A. Failure to complete the Project on schedule will cause Authority substantial losses and damages. Such losses and damages are impracticable and difficult to ascertain, and the Contract Documents therefore provide that Design-Builder shall pay Authority substantial liquidated damages if the Project is not completed within the time limitations provided herein.

G. Authority has provided the Advanced Conceptual Engineering and Reference Documents which set forth a conceptual design of and certain other information relating to the Work. Design-Builder may deviate from the Advanced Conceptual Engineering, as described in the Contract Documents, subject to obtaining appropriate approvals from Authority and third parties. Authority and Design-Builder both intend for Design-Builder to assume full responsibility and liability with respect to design of the Project. Design-Builder's responsibilities include correction of any errors, omissions, inconsistencies or other defects in the Advanced Conceptual Engineering and upon Substantial Completion for Design-Builder to indemnify and hold harmless Authority and others with respect to any defects in the Project which may relate to errors, omissions, inconsistencies or other defects in the Advanced Conceptual Engineering.

NOW, THEREFORE, in consideration of the sums to be paid to Design-Builder by Authority, the foregoing premises and the covenants and agreements set forth herein, the parties hereby agree as follows:

1.0 PROJECT DOCUMENTS

1.1 Certain Definitions

Appendix 1 hereto contains the meaning of various terms used in the Contract Documents.

1.2 Contract Documents

The term "Contract Documents" shall mean the Contract, including all appendices, and the documents listed in Section 1.3, including all amendments to the foregoing and all Change Orders issued.

1.3 Order of Precedence

Each of the Contract Documents is an essential part of the Contract, and a requirement occurring in one is as binding as though occurring in all. The Contract Documents are intended to be complementary and to describe and provide for a complete Contract. In the event of any conflict among the Contract Documents, the order of precedence shall be as set forth below.

(a) For design standards and requirements:

1. Change Orders and Contract amendments;
2. Contract and Appendices (Volume 2);
3. Technical Provisions (Volume 3);
4. Environmental Requirements (Volume 4);
5. Agreements (Volume 5); and
6. Commitments made in the SOQ and Proposal, to the extent they are consistent with the requirements of, or provide enhancements to, the other Contract Documents.

(b) For construction-related standards, specifications and requirements and other matters:

1. Change Orders and Contract amendments;
2. Contract and Appendices (Volume 2);
3. Design Documents, with specifications contained therein having precedence over plans, and excluding any deviations from the requirements of the other Contract Documents contained therein which have not been specifically approved in writing as such by Authority;
4. Technical Provisions (Volume 3);

5. Environmental Requirements (Volume 4);
6. Agreements (Volume 5); and
7. Commitments made in the SOQ and Proposal, to the extent they are consistent with the requirements of, or provide enhancements to, the other Contract Documents.

Notwithstanding the foregoing, in the event of a conflict among any standard or specification applicable to the Project established by reference contained in the Contract Documents to a described publication, the more stringent applies regardless of the order of precedence of the documents in which such conflicting provisions are referenced, unless the Parties otherwise agree. Design-Builder shall notify Authority of any perceived conflict and request Authority's determination respecting the order of precedence among such perceived conflicting provisions promptly upon becoming aware of any such perceived conflict. Authority shall have the right to determine which standard or specification is more stringent in the event of ambiguity.

1.4 Interpretation

In the Contract Documents, where appropriate: the singular includes the plural and vice versa; references to statutes or regulations include all statutory or regulatory provisions consolidating, amending or replacing the statute or regulation referred to; the words "including," "includes" and "include" shall be deemed to be followed by the words "without limitation"; unless otherwise indicated references to sections, appendices or schedules are to the Contract, references to articles or sections include all subarticles or subsections under the article or section referenced, and references to subarticles include all sub-subarticles; words such as "herein," "hereof" and "hereunder" shall refer to the entire document in which they are contained and not to any particular provision or section; words not otherwise defined that have well-known technical or construction industry meanings, are used in accordance with such recognized meanings; references to Persons include their respective permitted successors and assigns and, in the case of Governmental Persons, Persons succeeding to their respective functions and capacities; and words of any gender used herein shall include each other gender where appropriate.

1.5 Omission of Details, Clarification from Authority

Omission of details of the Work from the Contract Documents or the misdescription of details of Work which are necessary to carry out the intent of the Contract Documents, or which are customarily performed, shall not relieve Design-Builder from performing such omitted Work, or the misdescribed details of the Work, and they shall be performed as if fully and correctly set forth and described in the Contract Documents, without entitlement to a Change Order hereunder.

Should it appear that the Work to be done or any of the matters relative thereto is not sufficiently detailed or explained in the Contract Documents, Design-Builder shall apply to Authority in writing for such further written clarifications as may be necessary and shall conform to the clarification provided. Design-Builder shall promptly notify Authority of all errors, omissions, inconsistencies or other defects (including inaccuracies and inconsistencies) which it may discover in the Contract Documents, and shall obtain from Authority specific instructions in writing regarding any such error, omission or defect before proceeding with the design Work affected thereby.

1.6 Computations of Periods

References to days contained in the Contract Documents shall mean calendar days unless otherwise specified; provided that if the date to perform any act or give any notice specified in the Contract Documents (including the last date for performance or provision of notice within a specified time period) falls on a non-Working Day, such act or notice may be timely performed on the next succeeding day which is a Working Day. Notwithstanding the foregoing, requirements contained in the Contract Documents relating to actions to be taken in the event of an emergency, and other requirements for which it is clear that performance is intended to occur on a non-Working Day, shall be required to be performed as specified, even though the date in question may fall on a non-Working Day.

1.7 Reference Information; Responsibility for Design

Authority has made available to Design-Builder the Contract Documents and Reference Documents and has allowed Design-Builder access to the Site for purposes of

inspection and testing. Design-Builder specifically acknowledges and agrees that Design-Builder is not entitled to rely on and has not relied on any documents or information provided by Authority except to the extent specifically permitted in the Contract Documents.

1.7.1 Design-Builder Responsible for Design

Design-Builder agrees that it has full responsibility for the design of the Project, regardless of the fact that certain conceptual design work occurred and was provided to Design-Builder prior to the date of execution of the Contract. Design-Builder acknowledges and agrees that:

(a) The Advanced Conceptual Engineering is preliminary and conceptual in nature, may contain errors, and may not be suitable as the basis for the final design.

(b) Design-Builder has diligently reviewed and verified the design contained in the Advanced Conceptual Engineering for errors, omissions, inconsistencies or other defects and has incorporated into the Contract Price all costs associated with correcting any such errors, omissions, inconsistencies and other defects.

(c) Design-Builder is responsible for providing Design Documents that comply with the requirements of the Contract Documents, regardless of any errors, omissions, deficiencies or other defects in the Advanced Conceptual Engineering. Such responsibility shall be undertaken without any right to an increase in compensation or extension of a Completion Deadline; except to the extent that Authority has agreed to issue Change Orders in accordance with, and subject to the restrictions and limitations set forth in, Section 12.

1.7.2 Liability

Design-Builder understands and agrees that Authority shall not be responsible or liable in any respect for any loss, damage, injury, liability, cost or cause of action whatsoever suffered by any Design-Builder-Related Entity, by reason of any use of any information contained in the Advanced Conceptual Engineering or Reference Documents, or any action or forbearance in reliance thereon, except to the extent that Authority has

specifically agreed herein that Design-Builder shall be entitled to an increase in the Contract Price and/or extension of a Completion Deadline with respect to such matter. Design-Builder further acknowledges and agrees that (a) if and to the extent Design-Builder or anyone on Design-Builder's behalf uses any of said information in any way, such use is made on the basis that Design-Builder, not Authority, has approved and is responsible for said information, and (b) Design-Builder is capable of conducting and obligated hereunder to conduct any and all studies, analyses and investigations as it deems advisable to verify or supplement said information, and that any use of said information is entirely at Design-Builder's own risk and at its own discretion.

1.7.3 Disclaimer

AUTHORITY DOES NOT REPRESENT OR WARRANT THAT THE INFORMATION CONTAINED IN THE ADVANCED CONCEPTUAL ENGINEERING OR REFERENCE DOCUMENTS IS EITHER COMPLETE OR ACCURATE OR THAT SUCH INFORMATION IS IN CONFORMITY WITH THE REQUIREMENTS OF THE CONTRACT DOCUMENTS. THE FOREGOING SHALL IN NO WAY AFFECT AUTHORITY'S AGREEMENT HEREIN TO ISSUE CHANGE ORDERS IN ACCORDANCE WITH SECTION 12.

1.7.4 Professional Licensing Laws

Authority does not intend to contract for, pay for, or receive any design services which are in violation of any professional licensing laws, and by execution of the Contract, Design-Builder acknowledges that Authority has no such intent. It is the intent of the parties that Design-Builder is fully responsible for furnishing the design of the Project, although the fully licensed design firm(s) or individuals designated in accordance with Sections 2.1.2 and 4.8 will perform the design services required by the Contract Documents. Any references in the Contract Documents to Design-Builder's responsibilities or obligations to "perform" the design portions of the Work shall be deemed to mean that Design-Builder shall "furnish" the design for the Project. The terms and provisions of this Section 1.7.4 shall control and supersede every other provision of all Contract Documents.

1.8 Approvals

In all cases where approvals or consents are required to be provided by Authority or Design-Builder hereunder, such approvals or consents shall not be withheld unreasonably except in cases where a different standard (such as sole discretion) is specified. In cases where sole discretion is specified, the decision shall not be subject to dispute resolution hereunder.

2.0 OBLIGATIONS OF DESIGN-BUILDER

2.1 Design and Construction

Design-Builder shall furnish the design of the Project and shall construct the Project as designed, in accordance with all professional engineering principles and construction and manufacturing practices generally accepted as standards of the industry in the State of California, in a good and workmanlike manner, free from defects (other than design defects inherent in prescriptive specifications included in the Contract Documents provided by Authority) and in accordance with the terms and conditions set forth in the Contract Documents. Except for materials, services and efforts otherwise specifically excluded from Design-Builder's scope of work in the Contract Documents, all materials, services and efforts necessary to achieve Substantial Completion, Punch List Completion and Final Acceptance on or before the Substantial Completion Deadline, Punch List Completion Deadline, and Final Acceptance Deadline (respectively) shall be Design-Builder's sole responsibility; and, subject to the terms of Section 12, the cost of all such materials, services and efforts is included in the Contract Price.

2.1.1 General Obligations

Design-Builder shall furnish all design and perform all services, provide all materials and undertake all efforts necessary or appropriate (excluding only those materials, services and efforts that the Contract and Technical Provisions specify will be undertaken by Authority or other Persons) to construct the Project in accordance with the requirements of the Contract Documents, the approved Baseline Schedule or approved Current Project Schedule, as appropriate, all applicable Governmental Rules, all environmental mitigation of items identified in the Environmental Approvals, all Governmental Approvals, the approved Quality Control/Quality Assurance Program, Design-Builder's approved Construction Safety and Security Program, the approved Construction Documents and Design Documents, and all other applicable safety, environmental and other requirements, taking into account Right of Way constraints and other physical limits resulting from constraints affecting the Project, so as to achieve Substantial Completion, Punch List Completion and Final Acceptance by the deadlines specified

herein, and otherwise to do everything required by and in accordance with the Contract Documents.

2.1.2 Design

2.1.2.1 Design-Builder shall use the design firm(s) identified in the Proposal and the design firm designated as the lead designer in the Proposal shall be the designer of record. Design-Builder shall not change the designated designer(s) or shift work from one design firm to another (including changes in work performed by Subcontractors) without the prior written approval of Authority.

2.1.2.2 Design-Builder has full responsibility for the design of the Project as described in Section 1.7.1. Design-Builder shall notify Authority in writing regarding (a) all proposed deviations from the design contained in the Advanced Conceptual Engineering and (b) all proposed deviations from the “LACMTA Design Criteria and Standards” and all “Significant Changes” as such terms are defined in the Metro Cooperative Agreement. Design-Builder shall advise Authority regarding the reason for the proposed deviation, including whether Design-Builder believes the change is necessary to correct any errors, omissions, inconsistencies or other defects in such design. Design-Builder shall obtain Authority's approval of each proposed deviation or correction and shall also obtain all approvals required to be obtained from third parties (including approvals required to be obtained from Metro under the Metro Cooperative Agreement).

2.1.2.3 Design-Builder shall promptly notify Authority in writing regarding any design review comments received from Metro that Design-Builder believes constitute a Betterment.

2.1.3 Submittals

All submittals, documents and drawings shall be in American English. All dimensions shall be in English Units, except for metric parts.

2.2 Governmental Approvals

2.2.1 Design-Builder shall obtain and pay the costs of obtaining all Governmental Approvals required in connection with the Project (other than the Environmental Approvals and CPUC Grade Crossing Approvals); and prior to beginning any construction activities in the field, shall furnish Authority with fully executed copies of all relevant Governmental Approvals. Design-Builder shall undertake all actions required by and all actions necessary to maintain in full force and effect, all Governmental Approvals, including performance of all environmental mitigation measures required by the Contract Documents.

2.2.2 In the event that any Governmental Approvals required to be obtained by Design-Builder must formally be issued in the name of Authority, Design-Builder shall undertake all efforts to obtain such approvals subject to Authority's reasonable cooperation with Design-Builder, including execution and delivery of appropriate applications and other documentation in form approved by Authority. Design-Builder shall assist Authority in obtaining any Government Approvals which Authority may be obligated to obtain, including providing information requested by Authority and participating in meetings regarding such approvals.

2.3 Design-Builder Personnel

2.3.1 Project Manager

Design-Builder's Project Manager shall be full-time, solely dedicated, and shall have full responsibility for the prosecution of the Work and will act as a single point of contact in all matters on behalf of Design-Builder.

2.3.2 Key Personnel

The Proposal identifies certain job categories of key personnel for the Project in Form G ("Key Personnel"). Authority may at any time elect to add job categories to constitute Key Personnel. Authority shall have the right to review the qualifications of each individual to be appointed to a Key Personnel position (including personnel employed by Subcontractors) and to approve or disapprove use of such person in such position prior

to the commencement of any Work by such individual. Design-Builder shall not change any Key Personnel without the prior written consent of Authority.

2.3.3 Removal of Design-Builder Personnel

If Authority determines in its sole discretion that any individual employed by Design-Builder or by any Subcontractor is not performing the Work in a proper and skillful manner, then at the written request of Authority, Design-Builder or such Subcontractor shall remove such individual and such individual shall not be re-employed for any Work without the prior written approval of Authority. If Design-Builder or the Subcontractor fails to remove such individual or individuals or fails to furnish skilled and experienced personnel for the proper performance of the Work, then Authority may suspend the affected portion of the Work by delivery of written notice of such suspension to Design-Builder. Such suspension shall in no way relieve Design-Builder of any obligation contained in the Contract Documents or entitle Design-Builder to an extension of time, additional compensation or Change Order. In the event of such a suspension, Design-Builder shall be entitled to and shall promptly resume the Work upon compliance with the requirements set forth in Authority's written notice.

2.4 Meetings

Design-Builder is required to have staff with appropriate technical skills and decision making authority attend Project meetings. Design-Builder shall prepare and update calendars and schedules, coordinate with Authority, as well as conduct and participate in meetings and meeting-related related activities as set forth in Volume 3- Technical Provisions, Document 1- General Requirements, Section 6.

2.5 Community Impact and Communications

Design-Builder shall comply with the approved Public and Business Impacts Mitigation Plan and perform all other Work as set forth in Volume 3- Technical Provisions, Document 1- General Requirements, Section 1.5.

2.6 Compliance with Laws; Equal Employment Opportunity

2.6.1 Design-Builder shall comply with all requirements of all applicable Governmental Rules, including:

(a) The Labor Code and implementing regulations, including requirements with respect to prevailing wages, nondiscrimination, and employment and training of apprentices, as more specifically described in Appendix 2 hereto;

(b) All Environmental Laws, including requirements regarding the handling, generation, treatment, storage, transportation and disposal of Hazardous Substances (subject to the provisions contained in Section 11.2.2 limiting Design-Builder's obligation to execute hazardous waste manifests as a "generator"); and

(c) All requirements regarding nondiscrimination, including those set forth in Appendix 2 hereto.

2.6.2 During the performance of the Contract, Design-Builder will not discriminate against any person or group of persons on account of race, color, religion, creed, national origin, ancestry, physical handicap, medical condition, age, marital status, sex or sexual orientation.

2.6.3 Design-Builder confirms that it has an equal employment opportunity policy ensuring equal employment opportunity without regard to race, color, national origin, sex, age, religion or handicap; and that it maintains no employee facilities segregated on the basis of race, color, religion or national origin.

2.6.4 Design-Builder shall include Sections 2.6.2 and 2.6.3 in every Subcontract, and shall require that they be included in all Subcontracts at lower tiers, so that such provisions will be binding upon each Subcontractor.

2.7 Federal Requirements

Design-Builder shall comply with all contractual provisions required by the U.S. Department of Transportation, including the requirements set forth in the latest edition of FTA Circular 4220.1 and the requirements set forth in Appendix 3. Anything to the

contrary herein notwithstanding, all FTA mandated terms shall be deemed to control in the event of a conflict with other provisions contained in the Contract Documents. Design-Builder shall not perform any act, fail to perform any act, or refuse to comply with any Authority requests, which would cause a violation of the FTA terms and conditions. Design-Builder shall include the requirements of this Section 2.7 in every Subcontract, and shall require that they be included in all Subcontracts at lower tiers, so that such requirements will be binding upon each Subcontractor.

2.8 Coordination with Railroad Operator

During the performance of this Contract, Design-Builder shall be responsible for all necessary coordination with the Railroad Operator and for performance of specified obligations of the Authority under the Railroad Agreement. Design-Builder shall notify Authority of, and allow Authority the opportunity to participate in each meeting with a Railroad Operator representative as set forth in Volume 3- Technical Provisions, Document 1- General Requirements, Section 6. Design-Builder shall permit all inspections reasonably requested by the Railroad Operator.

2.9 Cooperation

Design-Builder shall cooperate with Authority, the Cities, Metro and all other Governmental Persons with jurisdiction over the Project in performance of the Work, including with regard to design reviews, construction inspections, testing, pre-revenue operations, and other matters relating to the Work. Design-Builder shall notify Metro of all systems factory testing, local field tests, and integration tests, so as to allow Metro the opportunity to monitor such testing.

2.10 Supervision

Design-Builder shall supervise and be responsible to Authority for acts and omissions of Design-Builder's employees, agents, officers and Subcontractors and other Persons performing portions of the Work, as though all such Persons were directly employed by Design-Builder.

2.11 Mitigation

Design-Builder shall mitigate delay to the Project in all circumstances, to the extent reasonably possible, including by resequencing, reallocating or redeploying its forces to other Work, as appropriate.

2.12 Work Performed on Metro Trackway / Right of Way

At all times following Substantial Completion, as well as at any time Design-Builder seeks to access Metro controlled Trackway/Right of Way, Design-Builder shall be responsible for obtaining any required Trackway/Right of Way access permits and shall comply with all applicable requirements of Metro's Operating Rules and Procedures that govern the area to which Design-Builder seeks access. All Work in such area shall be conducted at the direction of Authority and/or Metro and at the dates and times approved by Authority and/or Metro. Design-Builder shall bear all costs associated with the performance of such Work, excluding costs of Metro-supplied supervision and/or inspection services required in connection with authorization of access.

3.0 ROLE AND RESPONSIBILITIES OF AUTHORITY

3.1 Role of Authority

Authority has been charged by the California State Legislature with the responsibility to develop the Project and shall have full rights to review, inspect, test and approve the Project design and construction as well as undertake any action to fulfill the Authority's responsibility, including delegation of any such action to third-parties. Authority is the judge of Design-Builder's performance of the Contract, with full authority to give approval of and order changes in the Work and to review and approve Design-Builder's invoices and authorize payments.

3.2 Effect of Reviews, Inspections, Tests and Approvals

Design-Builder shall not be relieved of obligations to perform the Work in accordance with the Contract Documents by reviews, tests, inspections or approvals performed by any Persons, or by any failure of any Person to take such action. The reviews, inspections, tests and approvals conducted by Authority, Governmental Persons and others do not constitute acceptance of the materials or Work reviewed, tested or inspected, and Authority may reject or accept any Work or materials, request changes and/or identify additional Work which must be done at any time prior to the Final Acceptance Date, whether or not previous reviews, inspections, tests or approvals were conducted by any such Persons. Authority's approval of Design Documents for construction as described in the Volume 3-Technical Provisions shall constitute approval of the design by the Authority for purposes of Government Code section 830.6, but shall not be deemed to relieve Design-Builder of liability for the design.

3.3 Right of Way

3.3.1 Authority shall provide Design-Builder with access to the Authority-Provided Right of Way in order to allow Work to be performed in accordance with the approved Baseline Schedule or approved Current Project Schedule, as applicable. A list of the Right of Way scheduled for acquisition, and the anticipated availability dates, are provided in the Property Acquisition Matrix set forth in Volume 3- Technical Provisions, Document 2- Performance Specifications, Appendix 3. Design-Builder shall be

responsible for (a) obtaining any encroachment permits to gain access to areas within the jurisdiction of any Governmental Person and (b) ensuring that Design-Builder's Right of Way access is consistent with the Railroad Agreement. Except with respect to Utility Easements as provided in Volume 5- Agreements, Document 15- License Agreements, Design-Builder shall be responsible for obtaining, at its sole cost, any temporary easements, rights of entry, or other real property interests which Design-Builder deems necessary or advisable in connection with construction of the Project and/or Relocations.

3.3.2 Concurrently with review of the Baseline Schedule, Design-Builder and Authority shall discuss the Right of Way access requirements associated with the scheduled activities and mutually determine which parcels are on the Critical Path. For approval, the Baseline Schedule must be structured to provide reasonable work-arounds to progress the Project until these parcels become available, and reasonably minimize dependence on these parcels. In the event the Authority at any time determines it will be unable to provide access to a particular parcel or parcels prior to the scheduled date, Authority shall notify Design-Builder regarding the revised projected date for delivery of access. Design-Builder shall cooperate with Authority to work around such parcel until access can be provided, including rescheduling Work so as to avoid any delay to the overall Project. If delay to the overall schedule is unavoidable, the Design-Builder shall take appropriate action to minimize the cost and time impact thereof.

3.3.3 In addition to the requirements of Section 3.3.2, and as a necessary condition for obtaining any increase in the Contract Price or extension of the Contract Time related to Authority's delivery of access to the parcels, Design-Builder shall provide Authority with written notice within 14 calendar days after the anticipated availability date set forth in the Property Acquisition Matrix located in Volume 3- Technical Provisions, Document 2- Performance Specifications, Appendix 3 when lack of availability of a given parcel will result in an impact to the cost or schedule.

3.4 Notification of Third Party Claim

Authority and Design-Builder shall each provide timely notification to the other party of the receipt of any third party claim relating to the Contract.

3.5 Authority Covenants

Authority covenants that:

3.5.1 Authority will use reasonable efforts to enforce its rights under the Funding Agreement and the Metro Cooperative Agreement.

3.5.2 Authority will deliver to Design-Builder within five business days of receipt thereof any notice of breach or default under the Funding Agreement and Metro Cooperative Agreement.

3.5.3 Authority will use reasonable efforts to ensure that the Project is not removed from Metro's long-range plan. If Metro removes the Project from its long-range plan, Design-Builder shall have the right to suspend Work upon delivery of written notice to Authority that Design-Builder intends to suspend Work and the date of such suspension. Such suspension shall be considered a suspension under Section 6.4.1. In the event of a suspension under this Section 3.5.3 for more than 60 consecutive days, Design-Builder shall have the right to consider the Contract to have been terminated for convenience under Section 18. Design-Builder shall notify Authority of such election by delivering to Authority a written notice of termination due to such suspension specifying its effective date. Upon delivery by Design-Builder to Authority of a notice of termination under this Section 3.5.3, the provisions of Section 18 shall apply.

4.0 REPRESENTATIONS, WARRANTIES AND COVENANTS OF DESIGN-BUILDER

Design-Builder represents, warrants and covenants that:

4.1 Design-Builder has and throughout the term of the Contract shall maintain all required authority, license status, professional ability, skills and capacity to perform Design-Builder's obligations hereunder and shall perform them in accordance with the requirements contained in the Contract Documents.

4.2 The Project can and shall be designed and built in conformity with the Contract Documents and all Governmental Approvals.

4.3 Design-Builder has evaluated the feasibility of performing the Contract within the Contract Time and for the Contract Price, and has reasonable grounds for believing and does believe that such performance (including achievement of Substantial Completion, Punch List Completion and Final Acceptance by the applicable Completion Deadline, for the Contract Price) is feasible and practicable.

4.4 Design-Builder has, prior to submitting the Proposal, in accordance with prudent and generally accepted engineering practices and with due consideration of the Contract provisions relating to allocation of risk, undertaken appropriate activities sufficient to familiarize itself with surface conditions and subsurface conditions discernible from the surface affecting the Project to the extent Design-Builder deems necessary or advisable for performing its obligations under the Contract Documents, and as a result of such review, inspection, examination and other activities Design-Builder is familiar with and accepts the physical requirements of the Work. Design-Builder acknowledges and agrees that it has been afforded the opportunity to review information and documents and to conduct inspections and tests of the Site and surrounding locations as described above. Design-Builder further acknowledges and agrees that changes in conditions at the Site may occur after the date hereof, and that Design-Builder shall not be entitled to any Change Order in connection therewith except as specifically permitted under Section 12. Before commencing any Work on a

particular aspect of the Project, Design-Builder shall verify all governing dimensions at the Site, and shall examine all adjoining work which may have an impact on such Work. Design-Builder shall be responsible for ensuring that the Design Documents and Construction Documents accurately depict all governing and adjoining dimensions.

4.5 Design-Builder acknowledges and agrees that it has familiarized itself with the requirements of any and all applicable Governmental Rules and the conditions of any required licenses and permits prior to entering into the Contract. Design-Builder shall be responsible for complying with the foregoing at its sole cost and without any increase in Contract Price or extension of any Completion Deadline on account of such compliance, regardless of whether such compliance would require additional time for performance or additional labor, equipment and/or materials not expressly provided for in the Contract Documents. Design-Builder has no reason to believe that any Governmental Approval required to be obtained by Design-Builder will not be granted in due course and thereafter remain in effect so as to enable the Work to proceed in accordance with the Contract Documents.

4.6 Design-Builder is aware of the provisions of Section 3700 of the Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that Code, and Design-Builder will comply with such provisions before commencing performance of the Work under the Contract Documents and at all times during the term hereof, whether by provision of its own insurance or self-insurance.

4.7 Design-Builder shall comply with all requirements of the approved Quality Control/Quality Assurance Program.

4.8 All design and engineering Work furnished by Design-Builder shall be performed by or under the supervision of Persons licensed to practice architecture, engineering or surveying (as applicable) in the State of California, by personnel who are skilled, experienced and competent in their respective trades or professions, who are professionally qualified to perform the Work in accordance with the Contract Documents

and who shall assume professional responsibility for the accuracy and completeness of the Design Documents and Construction Documents prepared or checked by them.

4.9 Design-Builder shall at all times schedule and direct its Work to provide an orderly progression of the Work to achieve Substantial Completion, Punch List Completion and Final Acceptance by the specified Completion Deadlines and in accordance with the approved Baseline Schedule or approved Current Project Schedule, as appropriate, including furnishing such employees, materials, facilities and equipment and working such hours, including extra shifts, overtime operations, Sundays and holidays as may be necessary to achieve such goal, all at Design-Builder's own cost except as otherwise specifically provided in Section 12.

4.10 At all times during the term hereof, including during the course of, and notwithstanding the existence of, any dispute, Design-Builder shall perform as directed by Authority, in a diligent manner and without delay, shall abide by Authority's decision or order, and shall comply with all applicable provisions of the Contract Documents. In the event a dispute arises regarding such performance or direction, the dispute shall be resolved in accordance with Section 16.

4.11 Design-Builder is a _____ duly organized and validly existing under the laws of the State of _____, with all requisite power to own its properties and assets and carry on its business as now conducted or proposed to be conducted. Design-Builder is composed of _____, a _____ and _____, a _____. [*execution version to include each member or partner of Design-Builder*] _____ is duly organized and validly existing under the laws of the State of _____, with all requisite power to own its properties and assets and carry on its business as now conducted or proposed to be conducted. [*execution version to include such statement for each member or partner*] Guarantor is duly organized and validly existing under the laws of the State of _____, with all requisite power to own its properties and assets and carry on its business as now conducted or proposed to be conducted. Design-Builder, each member of Design-Builder and Guarantor are duly qualified to do business, and is in good standing, in the State of California, and will

remain in good standing throughout the term of the Contract and for as long thereafter as any obligations remain outstanding under the Contract Documents. [*to be conformed in execution version*]

4.12 The execution, delivery and performance of the Contract have been duly authorized by all necessary action of Design-Builder, Design-Builder's members and Guarantor and will not result in a breach of or a default under Design-Builder's organizational documents or any indenture or loan or credit agreement or other material agreement or instrument to which Design-Builder or any member of Design-Builder or Guarantor is a party or by which its properties and assets may be bound or affected.

4.13 The Contract constitutes the legal, valid and binding obligation of Design-Builder, enforceable in accordance with its terms. The Guaranty constitutes the legal, valid and binding obligation of Guarantor, enforceable in accordance with its terms.

4.14 Design-Builder has not committed or caused, and will not commit or cause, a violation of Government Code section 1090 or 84308 or 87100 or 2 California Administrative Code sections 18438.1 through 18438.8 or Public Utilities Code section 132410, in connection with the Contract.

4.15 Each Subcontractor performing Remediation Work shall have all necessary licenses including a Hazardous Substances Removal Certification from the State of California Contractors State License Board.

5.0 SUBCONTRACTS; SMALL BUSINESS ENTERPRISE PROGRAM

5.1 Subcontracts

5.1.1 Subcontractors Identified in Proposal

Design-Builder shall not have the right to make any substitution of Subcontractors identified in the Proposal with a price in excess of 4% of the Total Amount or enter into new Subcontracts with a price in excess of 4% of the Total Amount except with Authority's prior written consent. In addition, Design-Builder shall not have the right to make any substitution of identified Subcontractors (whether identified in the Proposal or at a later date) with a price in excess of ½ of 1% of the Total Amount except in accordance with the provisions of the Subletting and Subcontracting Fair Practices Act, Public Contract Code sections 4100 *et seq.* Design-Builder shall not amend any such existing Subcontracts to result in an aggregate increase of 10% or more in the Subcontract price, without Authority's prior written approval.

5.1.2 Compliance with Authority Subcontracting Policy

Design-Builder shall, prior to soliciting any bids for performance of work or labor or rendering of services in or about the construction of the Project or for special fabrication and installation of a portion of the Work, submit to Authority for its review and approval a reasonable procedure for the conduct of the bidding and approval process applicable to all Subcontracts (or combination of Subcontracts with a single Subcontractor) with a price in excess of ½ of 1% of the Total Amount and less than 4% of the Total Amount. Such procedure shall conform generally with Authority's Administrative Code and the Instructions to Proposers. Design-Builder shall promptly notify Authority in writing of the identity of each Subcontractor selected. Design-Builder shall not enter into any Subcontracts (or combinations of Subcontracts with a single Subcontractor) with a total price in excess of ½ of 1% of the Total Amount and less than 4% of the Total Amount, except with Subcontractors listed in the Proposal or Subcontractors selected in accordance with the foregoing procedure.

5.2 Requirements

5.2.1 Each Subcontract shall provide that, pursuant to terms in form and substance satisfactory to Authority, (a) Authority is a third party beneficiary of the Subcontract and shall have the right to enforce all of the terms of the Subcontract for its own benefit, and (b) all guarantees and warranties, express or implied, shall inure to the benefit of Authority, and its respective successors and assigns.

5.2.2 Notwithstanding any Subcontract or agreement with any Subcontractor, Design-Builder shall be fully responsible for all of the Work. Authority shall not be bound by any Subcontract, and no Subcontract shall include a provision purporting to bind it. Each Subcontract shall include the following provision:

Nothing contained herein shall be deemed to create any privity of contract between Pasadena Metro Blue Line Construction Authority, also known as the Metro Gold Line Foothill Extension Construction Authority (Authority) and the Subcontractor, nor does it create any duties, obligations, or liabilities on the part of Authority to the Subcontractor except those allowed under California law. In the event of any claim or dispute arising under the Subcontract and/or Design-Builder's Contract with Authority, the Subcontractor shall look only to Design-Builder for any payment, redress, relief, or other satisfaction. The Subcontractor hereby waives any claim or cause of action against Authority arising out of the Subcontract or otherwise arising in connection with the Subcontractor's Work.

5.2.3 Design-Builder shall ensure that each Subcontract (at all tiers) shall include those terms that are specifically required by the Contract Documents to be included therein as well as such additional terms and conditions as are sufficient to ensure compliance by the Subcontractor with all applicable requirements of the Contract Documents. Design-Builder shall ensure that all Subcontracts (at all tiers, including

Subcontracts with Suppliers) shall include an agreement by the Subcontractor to participate in any dispute review proceeding pursuant to Section 16, if such participation is requested by Authority.

5.2.4 Within ten days after the commencement date stated in NTP, Design-Builder shall complete and provide to Authority a schedule listing all of its current Subcontractors, using the form attached hereto as Appendix 5. Design-Builder shall provide an updated schedule each month thereafter. Such matrix form may be modified so that it can be used to comply with SBE reporting requirements as set forth on the form in Appendix 6B-2. Design-Builder shall allow Authority access to all Subcontracts and records regarding Subcontracts and shall deliver to Authority, within ten days after execution, true and complete copies of all Subcontracts (or combination of Subcontracts with a single Subcontractor) valued at or greater than ½ of 1% of the Total Amount and all SBE Subcontracts of any value and, within ten days after receipt of a request from Authority, true and complete copies of all other Subcontracts as may be requested.

5.2.5 Pursuant to Section 6109 of the Public Contract Code, no Subcontractor shall perform Work if that Subcontractor is ineligible to perform work on public works projects pursuant to Section 1777.1 or 1777.7 of the Labor Code.

5.3 Subcontract Work

Design-Builder shall be fully responsible to Authority for all acts and omissions of its own employees and of Subcontractors and their employees. Design-Builder shall also be responsible for coordinating the Work performed by Subcontractors. When a portion of the subcontracted Work is not performed in accordance with the Contract Documents, or if a Subcontractor commits or omits any act that would constitute a breach of the Contract, or if Authority makes reasonable objection to the use or continued use of such Subcontractor, the Subcontractor shall be replaced at the request of Authority and shall not again be employed on the Project. Design-Builder shall not be entitled to any increase in the Contract Price and/or time extension as a result of such removal and/or replacement.

5.4 Form of Subcontract

Authority shall have the right, but not the obligation, to review the form of subcontract used by Design-Builder for the Project and to require modifications thereto to conform to the requirements set forth herein.

5.5 Contingent Assignment of Subcontracts

Design-Builder hereby assigns to Authority (and its assigns) all of Design-Builder's rights and interests in all Subcontracts, whether now existing or hereinafter entered into by Design-Builder, provided that:

5.5.1 Such assignment is conditioned upon termination of the Contract by Authority and will be effective only for those Subcontract agreements which Authority accepts by notifying the Subcontractor in writing;

5.5.2 Such assignment is subject to the rights of the surety(ies) issuing the Performance Bond; and

5.5.3 Each Subcontract shall specifically provide that Authority shall only be responsible to the Subcontractor for those obligations of Design-Builder that accrue subsequent to Authority's exercise of any rights under this conditional assignment.

5.6 Small Business Enterprises

Authority has adopted a Small Business Enterprise Program as set forth in Appendix 6. Said program has been supplemented by special provisions applicable to the Project, as set forth in Appendices 6A and 6B. Said program, as modified and supplemented, is referred to herein as the "SBE Program." Design-Builder shall comply with all requirements of the SBE Program and with the commitments made in its Proposal.

5.6.1 Contract Statements

Design-Builder agrees with and shall comply with the following statements.

5.6.1.1 SBE Obligations

Design-Builder agrees to ensure that SBEs have a full and equal opportunity to participate in the performance of the Work. Design-Builder shall take all necessary and reasonable steps to ensure that SBEs have a full and equal opportunity to compete for and perform Work under this Contract, including the measures set forth in the SBE Program as set forth in Appendices 6, 6A, and 6B. Notwithstanding the foregoing, Design-Builder hereby agrees to abide by, and to require each Subcontractor to abide by the policy statements and agreements contained in Appendices 6, 6A, and 6B.

5.6.1.2 Breach

Failure of Design-Builder or a Subcontractor to carry out the requirements set forth in this Section 5.6 shall constitute a breach of Contract and may result in delay in payment, termination of the Contract by Authority or such other remedy as Authority deems appropriate.

5.6.2 Reports and Performance Verification

Design-Builder shall provide reports to Authority quarterly, and otherwise upon request by Authority, regarding the progress of SBE Program participation. If, based on the reports provided by Design-Builder, Authority determines, in its judgment, that Design-Builder is not complying with the SBE Program, then Authority shall so advise Design-Builder in writing and Design-Builder shall have 15 days after receipt of such notice to meet with Authority and agree upon a course of action which will demonstrate to Authority that Design-Builder will comply with the SBE Program. Provision of acceptable evidence of good faith efforts, and agreement on and pursuit of the agreed upon course of action are conditions to Authority's obligation to process invoices.

6.0 PROJECT COMPLETION

6.1 Time of Essence; Notice to Proceed; Interim NTP

Time is of the essence of the Contract. Design-Builder shall begin performance of the Work as directed in the Notice to Proceed. At Authority's option, prior to issuance of the NTP, Authority may issue an Interim NTP directing Design-Builder to perform certain Work described therein according to mutually agreed upon terms and compensation. Design-Builder shall have no right to payment for any Work it performs, unless and until Authority issues a Notice to Proceed or an Interim NTP for such Work.

6.2 Completion Deadlines

6.2.1 Substantial Completion Deadline

Design-Builder shall achieve Substantial Completion on or before the date that is 1300 days after issuance of NTP. Said deadline for Substantial Completion, as it may be extended hereunder, is referred to herein as the "Substantial Completion Deadline."

6.2.2 Deadline for Completion of Punch List Items

Design-Builder shall achieve Punch List Completion within 270 days after Substantial Completion. Said deadline for completion of all Punch List items, as it may be extended hereunder, is referred to herein as the "Punch List Completion Deadline."

6.2.3 Final Acceptance Deadline

Design-Builder shall achieve Final Acceptance within 360 days after Substantial Completion. Said deadline for Final Acceptance, as it may be extended hereunder, is referred to herein as the "Final Acceptance Deadline."

6.2.4 No Time Extensions

Except as otherwise specifically provided in Section 12, Authority shall have no obligation to extend any Completion Deadline, and Design-Builder shall not be relieved of its obligation to achieve the Payment Milestones described in the Payment Milestone Schedule and to achieve Substantial Completion, Punch List Completion and Final Acceptance by the applicable Completion Deadlines, for any reason.

6.3 Liquidated Damages and Lightrail Vehicle Delay Damages

6.3.1 Basis for Liquidated Damages

As the result of late completion of the Project, Authority will suffer financial damages which cannot be quantified as of the date of execution hereof. Therefore, Design-Builder and Authority have agreed to a stipulated amount to be paid by Design-Builder in the event of its failure to achieve Substantial Completion by the Substantial Completion Deadline. The parties intend for the Liquidated Damages set forth herein to constitute liquidated damages as such term is used in Government Code section 53069.85 to the extent said statute may apply, and to constitute stipulated damages to the extent that said statute is not applicable. Design-Builder acknowledges and agrees that the Liquidated Damages are intended to compensate Authority solely for Design-Builder's failure to meet the Substantial Completion Deadline, and shall not excuse Design-Builder from liability from any other breach of the Contract requirements, including any failure of the Work to conform to applicable requirements.

6.3.2 Amount of Liquidated Damages

In the event that Design-Builder fails to achieve Substantial Completion by the Substantial Completion Deadline, Design-Builder agrees to pay Authority Liquidated Damages in the amount of \$50,000 for each day of delay, starting on the Substantial Completion Deadline and ending on the date Substantial Completion is achieved. In no event shall the amount of Liquidated Damages exceed \$15,000,000 under this Section 6.3.2.

6.3.3 Reasonableness of Liquidated Damages

Design-Builder acknowledges and agrees that the foregoing damages have been set based on an evaluation by Authority of damages which it will incur in the event of late completion, including additional administrative costs. Design-Builder and Authority agree that the amount of such damages is impossible to ascertain as of the date of execution hereof and the parties have agreed to such Liquidated Damages in order to fix Design-Builder's costs and to avoid later disputes over which items are properly chargeable to Design-Builder. It is understood and agreed by Design-Builder that any

Liquidated Damages payable in accordance with this Section 6.3 are in the nature of liquidated damages and not a penalty and that such sums are not manifestly unreasonable under the circumstances existing as of the date of execution and delivery of the Contract.

6.3.4 Light Rail Vehicle Delay Damages

Design-Builder shall pay to Authority any amounts charged to Authority by Metro in accordance with Section 4.2 of the Metro Cooperative Agreement (“light rail vehicle delay damages”). For sake of clarity, any such amounts paid to Authority shall not be included within the limit specified in Section 6.3.2, but shall be subject to the limits set forth in Section 4.2 of the Metro Cooperative Agreement.

6.3.5 Payment Terms

Liquidated Damages and light rail vehicle delay damages, to the extent not paid as provided in Section 7, shall be payable by Design-Builder to Authority within ten days after Design-Builder's receipt of an invoice therefor from Authority.

6.3.6 Waiver

Permitting or requiring Design-Builder to continue and finish the Work or any part thereof after a Completion Deadline shall not act as a waiver of Authority's right to receive Liquidated Damages or light rail vehicle delay damages hereunder or any rights or remedies otherwise available to Authority.

6.4 Suspension

6.4.1 Suspensions for Convenience

Authority may, at any time and for any reason, order Design-Builder to suspend all or any part of the Work required under the Contract Documents for the period of time that Authority deems appropriate for the convenience of Authority. Design-Builder shall promptly recommence the Work upon receipt of written notice from Authority directing Design-Builder to resume work. Any such suspension for convenience which results in a delay to the Critical Path shall be considered an Authority-Caused Delay.

Adjustments of the Contract Price, Payment Milestone Schedule and approved Baseline

Schedule or Current Project Schedule, as appropriate, shall be available for any such Authority-Caused Delay, subject to Design-Builder's compliance with the terms and conditions set forth in Section 12.

6.4.2 Suspensions for Cause

Authority has the authority by written order to suspend the Work without prior notice, wholly or in part, for the period of time that Authority deems appropriate, for Design-Builder's failure to:

- (a) Correct conditions unsafe for the Project personnel or general public;
- (b) Perform construction quality control strictly in accordance with the approved Quality Control/Quality Assurance Program, as determined by Authority;
- (c) Perform the Work in accordance with the Contract; or
- (d) Carry out orders of Authority as described in the Contract.

Any such suspension shall not be grounds for additional compensation or an extension of the Contract Time.

6.4.3 Responsibilities of Design-Builder During Suspension Periods

During periods that Work is suspended, Design-Builder shall continue to be responsible for the Work and shall prevent damage or injury to the Project, provide for drainage and erect necessary temporary structures, signs or other facilities required to maintain the Project. During any suspension period, Design-Builder shall maintain in a growing condition all newly established plantings, seedings and soddings furnished under the Contract Documents and shall protect new tree growth and other vegetative growth against injury, replacing all dead plants requiring replacement during the suspension period. Authority shall reimburse Design-Builder for the costs Design-Builder incurs in performing the responsibilities described in this Section 6.4.3 during periods that Work is suspended pursuant to Section 6.4.1 to the extent that such costs are permitted under Section 12.8.

6.5 Delay in Issuance of Notice to Proceed

6.5.1 Delay in Issuance of NTP

Authority anticipates that it will issue NTP concurrently with or shortly after execution and delivery of the Contract. To the extent that Authority's failure to issue the NTP within 60 days after full execution of the Contract results in a delay to the Critical Path, such failure shall constitute an Authority-Caused Delay except to the extent that such failure is caused in whole or in part by Design-Builder.

6.5.2 Amortization of Any Price Increase

Any price increase under this Section 6.5 shall be amortized proportionally over all Payment Milestones. The price increase shall be evidenced by a Change Order accompanied by a revised Payment Milestone Schedule, Baseline Schedule or Current Project Schedule, as appropriate.

7.0 PAYMENT

7.1 Contract Price; Provisional Sum; Total Amount

7.1.1 Contract Price

As full compensation for the Work (excluding interest on deferred payments), Authority will pay to Design-Builder a lump sum of \$_____ [*insert Proposal Price from ITP Form S, Box 1A in execution version*]. Such amount, as it may be adjusted from time to time to account for Change Orders and Provisional Sum Authorizations, is referred to herein as the "Contract Price." The parties have agreed that Authority may defer payment of the Contract Price as described in Section 7.3.4.

7.1.2 Provisional Sums

7.1.2.1 The Project budget includes the following amounts ("Provisional Sums"):

Provisional Sum Item*	Provisional Sum Task Description	Provisional Sum
Utility Work	Contract Secs. 8.4 and 8.5	[\$TBD]
Station Artwork Elements	Performance Specifications Sec. 7.3.9.3	\$1,050,000
Encroachments	Performance Specifications Sec. 3.4.1	\$250,000
Special Events and Related Costs	As set forth in a Provisional Sum Authorization	\$250,000
Spare Parts	General Requirements Sec. 11.5	\$1,000,000
Miscellaneous	As set forth in a Provisional Sum Authorization	\$700,000
Total		\$3,250,000
*See the section and document listed in the Provisional Sum Task Description column for a description of the Provisional Sum Item. The descriptions listed in the Provisional Sum Item column are for reference purposes only.		

7.1.2.2 To the extent available funds remain in an applicable Provisional Sum, other than for Utility Work, Authority may elect, in its sole discretion, to authorize and pay any tasks set forth in Section 7.1.2.1 using a Provisional Sum Authorization; upon such authorization, such tasks shall become part of the Work with a corresponding increase to the Contract Price and decrease to the Provisional Sum. Payment for and performance of Utility Work shall be made as described in Sections 8.4 and 8.5. Payment for and performance of all Provisional Sum items, other than Utility Work, shall be in accordance with this Section 7.1.2. To the extent insufficient funds remain in an applicable Provisional Sum, other than for Utility Work, at Authority's election, payment for and performance of such tasks shall be authorized and become part of the Work by an Authority-Directed Change.

7.1.2.3 To the extent that Design-Builder undertakes performance of any Provisional Sum task without first receiving a Provisional Sum Authorization (or Authority-Directed Change to the extent there are insufficient funds in an applicable Provisional Sum) executed by Authority, Design-Builder shall be deemed to have performed such work voluntarily and shall not be entitled to any compensation in connection therewith. In addition, Design-Builder may be required to remove or otherwise undo any such work, at its sole cost.

7.1.2.4 Except for Utility Work as described in Section 7.1.2.2, Design-Builder shall perform Work set forth in a Provisional Sum Authorization as indicated in the Provisional Sum Authorization. If the Provisional Sum Authorization contemplates payment on a time and materials basis, the applicable provisions of Section 12 shall apply as though it were a Time and Materials Change Order pursuant to Section 12.8, including with regard to time extension, cost eligibility, record keeping and establishing a not-to-exceed amount. If the Provisional Sum Authorization is based on unit prices or a lump sum, the applicable provisions of Section 12 shall apply as though it were a unit priced or lump sum Change Order, and the Work will be paid in accordance with the agreed upon unit prices or lump sum, with no additional mark-up.

7.1.2.5 Except as provided in Section 8.4, at any time, in the event that funds remain in a Provisional Sum, Authority may, in its sole discretion, elect to issue a Change Order to reduce or remove the unused portion of the Provisional Sum.

7.1.3 Total Amount

The “Total Amount” shall mean the sum of the Contract Price and the Provisional Sums. The initial Total Amount is \$_____ [to be conformed in execution version].

7.2 Payment Milestones

7.2.1 Payment Milestone Schedule

7.2.1.1 Design-Builder shall develop and submit the Payment Milestone Schedule to Authority using a form approved by Authority within 30 days after the commencement date stated in NTP for review and written approval. The Payment Milestones shall include the fixed financing transaction costs but shall not include interest costs. Payment Milestones shall be triggered by significant events and/or reflect certain or significant accomplishments towards the completion of the Work that can be readily identified without resorting to extensive measurement of quantities. Payment Milestones shall be associated with all items of Work. Payment Milestones shall be related to schedule Activities both on or off the Critical Path. The Payment Milestone Schedule shall include a minimum of 1,500 and a maximum of 3,000 Payment Milestones.

7.2.1.2 For each Payment Milestone, Design-Builder shall provide:

- a unique Payment Milestone number;
- the schedule Activity number immediately preceding the Payment Milestone;
- a detailed description of the Work to be accomplished;
- for materials, products or components delivered to the Site, a specific description of the materials, products or components, including estimated quantities of each;
- for other Activities, a description of the Activity or event that shall be completed by the Payment Milestone date;

- the month from the commencement date stated in NTP during which the Payment Milestone is scheduled to be achieved; and
- the payment amount, which amount shall in no event be less than \$10,000 nor exceed \$1,000,000, except that such limitations shall not apply to the Payment Milestones set forth in Sections 7.2.1.3 and 7.2.1.4.

7.2.1.3 The Payment Milestone Schedule may include Payment Milestones for mobilization, as set forth in Section 7.4.3. Design-Builder shall describe (by title, type and/or number) the personnel, equipment and/or facilities to be on-site by the Payment Milestone dates for mobilization as well as the invoiced and paid fixed financing transaction costs, invoiced and paid costs associated with establishing required insurance, and costs associated with establishing the Payment Bond and Performance Bond.

7.2.1.4 The following events shall be included as Payment Milestones:

- Completion of the facilities required for commissioning of vehicles as described in Section 4.1 of the Metro Cooperative Agreement;
- Substantial Completion;
- Punch List Completion, in a fixed amount of \$4,000,000; and
- Final Acceptance, in a fixed amount of \$6,000,000.

7.2.2 Revisions to Payment Milestone Schedule

The Payment Milestone Schedule is subject to revision by Design-Builder from time to time to reflect updated information regarding the scope of Provisional Sum Work. The Payment Milestone Schedule must be revised by Design-Builder if:

(a) Authority orders a suspension of the Work or any part thereof under Section 18;

(b) A Completion Deadline or the Contract Price is adjusted by a Change Order under Section 12; or

(c) Authority determines that the Payment Milestone Schedule is not consistent with the Maximum Payment Curve.

7.3 Invoicing and Payment

7.3.1 Delivery of Invoice

(a) Condition Precedent. As a condition precedent to including a Payment Milestone in an invoice, Design-Builder shall have obtained Authority's prior written agreement that the Payment Milestone has been completed.

(b) Pre-submittal Meeting; Draft Invoice. Design-Builder shall deliver a draft invoice to Authority on or about the first business day of each month. Within the first week of each month, and prior to submitting each invoice, Design-Builder shall meet with Authority to discuss the content of the draft invoice to obtain mutual agreement prior to Design-Builder submitting an invoice for payment.

(c) Invoice Requirements. Design-Builder shall submit an invoice each month, but not more often than once per month. Each invoice shall be based on the approved draft invoice. No invoice shall be considered complete unless it (i) describes the status of all completed Payment Milestones, as of the date of the invoice, and includes Authority's prior written agreement that each such Payment Milestone has been completed, (ii) sets forth the related payments which are then due in accordance with the Payment Milestone Schedule, as of the date of the invoice, (iii) shows the maximum payment amount payable (exclusive of interest on any deferred amounts pursuant to Section 7.3.4) based on the Maximum Payment Curve plus any Change Orders and any amounts payable from Provisional Sums and satisfies the requirements set forth in Section 7.4.4, (iv) identifies any prior deferred payments under Section 7.3.4 and any corresponding interest owing, (v) satisfies the requirements set forth in Section 7.3.2, (vi) includes the draft Current Project Schedule under Volume 3- Technical Provisions, Document 1, Section 4.0, (vii) includes the reports required to be provided under Section 5.6.2 (as applicable), (viii) includes, for each full week of the month, each of the weekly T&M Cost Summary Reports required under Section 12.8.6.4, (ix) includes, for each day of the month that is not part of a full week and

therefore not appearing on the T&M Cost Summary Reports submitted with the invoice, the daily reports required under Section 12.8.6.2, (x) includes evidence that Design-Builder has timely paid its Subcontractors as required herein, and (xi) includes acceptable as-built drawings for the Payment Milestones that were included in the most recent previous Approved Invoice.

(d) Authority Review. Within two weeks after Authority's receipt of a given invoice, Authority will review the invoice and all attachments thereto for compliance with all requirements of the Contract Documents, including those set forth in this Section 7.3.1, and will indicate to Design-Builder in writing whether Authority approves the invoice (an "Approved Invoice"). If Authority approves the invoice, Authority shall notify Design-Builder of such approval and the amount approved (the "Approved Invoice Amount"). If Authority does not approve the invoice, Authority shall notify Design-Builder of such non-approval, as well as the reasons for such non-approval. Amounts included on an invoice which are not Approved Invoice Amounts will not accrue interest and will not trigger any payment obligation on the part of Authority. After receiving Authority's non-approval for a given invoice, Design-Builder may submit a revised invoice in a subsequent month in accordance with the requirements set forth herein, including those set forth in Section 7.3.1(b). Failure to timely submit invoices and reports in accordance with the Contract Documents will result in delay in processing Design-Builder's invoices for payment.

7.3.2 Form of Invoice

Each invoice submitted by Design-Builder shall be in form approved by Authority. Each invoice shall be executed by a designated representative of Design-Builder appointed by Design-Builder to have such authority in accordance with Section 20.5.1.

7.3.3 Payment by Authority

(a) The "Payment Due Date" shall mean, with respect to an Approved Invoice, 30 days after receipt by Authority of the Approved Invoice. On or before each Payment Due Date, Authority shall pay Design-Builder the Approved Invoice Amount less any applicable Retainage and less any amounts which Authority is otherwise entitled to

withhold, subject to Authority's obligation and right to defer payment of such amount as set forth in Section 7.3.4. Solely for purposes of determining compliance with Public Contract Code section 20104.50, a deferral under Section 7.3.4(a) or (b) shall be deemed to automatically extend the due date of the progress payment to the deferred due date specified in Section 7.3.4(e).

(b) Authority, in Authority's sole discretion, may include in the payment all or any portion of the outstanding principal and interest on account of any deferred amounts pursuant to Section 7.3.4. If such payment amount exceeds the amount payable under the Payment Schedule exclusive of any Change Orders or amounts payable from the Provisional Sums, Design-Builder's exclusive remedy shall be entitlement to a Change Order for breakage costs in accordance with the following: _____ [*insert methodology to determine breakage costs from ITP Form S, Box 4 in execution version*].

7.3.4 Deferral of Payments

(a) Authority shall defer payment of the Approved Invoice Amount (not including amounts Authority is entitled to withhold or deduct under the Contract other than as provided in this Section 7.3.4) to the extent that such amount (including interest on such amount) (i) is not attributable to Change Orders or payable from the Provisional Sums and (ii) exceeds the applicable cumulative payment amount under the Payment Schedule. Such deferred amount will bear an all-in interest cost at the fixed annual rate of _____% [*insert All-in Fixed Rate calculated as of the time of swap execution based on the methodology set forth in ITP Form S, Boxes 2A, 2B, and 2C in execution version*]. This interest rate shall remain the same from the date of full execution of the Contract until the date on which all deferred amounts pursuant to this Section 7.3.4 are paid to Design-Builder. If Authority defers more than the amount contemplated in this Section 7.3.4(a), Design-Builder shall have the right to suspend Work upon delivery of written notice to Authority that Design-Builder intends to suspend Work and the date of such suspension. Such suspension shall be considered a suspension under Section 6.4.1.

(b) Authority shall have the right to defer payment of the Approved Invoice Amount (not including amounts Authority is entitled to withhold or deduct under the Contract other than as provided in this Section 7.3.4) to the extent that such amount (including interest on such amount) is attributable to Change Orders or payable from the Provisional Sums. Such deferred amount will bear interest at the variable annual rate of _____% [*insert Base Cost of Funds from ITP Form S, Box 3A in execution version*] + a fixed margin of _____% [*insert the Total Spread set forth in ITP Form S, Box 3B in execution version*], subject to a 6.5% cap. If, as of the Payment Due Date for an Approved Invoice, the total amount deferred and then outstanding, plus interest thereon, attributable to Change Orders or payable from the Provisional Sums exceeds \$40,000,000, Design-Builder shall have the right to suspend Work upon delivery of written notice to Authority that Design-Builder intends to suspend Work and the date of such suspension. Such suspension shall be considered a suspension under Section 6.4.1.

(c) Interest owed on deferred amounts under subsections (a) and (b) above will accrue daily, beginning on the Payment Due Date, and will be calculated on the basis of a 360 day year consisting of 12 equal 30 day months. Such interest will compound monthly after it has been added to the Contract Price as described in subsection (d) below for as long as such amounts remain outstanding.

(d) All accrued but unpaid interest then outstanding will be added to the Contract Price monthly.

(e) All deferred amounts pursuant to this Section 7.3.4 (including accrued but unpaid interest thereon) shall be due and payable on or before 11:59 p.m. on June 30, 2022.

(f) Within 10 days following receipt of each Approved Invoice, Authority shall notify Design-Builder whether Authority intends to defer payment with respect to such invoice to the extent that such amount is attributable to Change Orders and whether Authority intends to make payments on account of previously deferred amounts. On or before the Payment Due Date for each Approved Invoice, Authority shall deliver a Schedule of Payments and Deferrals to Design-Builder in the form attached hereto as Appendix 7.

7.4 Deductions, Exclusions and Limitations on Payment

7.4.1 Retainage

Except as provided below, Authority shall withhold funds (the "Retainage") from payment on account of each Approved Invoice Amount, in an amount equal to 5% of such Approved Invoice Amount. At any time after 50% of the Work has been completed, if Authority finds that satisfactory progress is being made, Authority may stop withholding funds from future payments.

7.4.1.1 Authority agrees to release 50% of the Retainage 30 days after achievement of Substantial Completion, subject to reduction as specified below. At such time the amount to be released shall be reduced by any amounts applied (or retained for future application) to the payment of Liquidated Damages or which Authority deems advisable, in its sole discretion, to retain to cover any existing or threatened Disputes, claims, Liens and stop notices relating to the Project, or the cost of any uncompleted or nonconforming Work (including uncompleted Warranty Work) to the extent that Authority believes it is not adequately covered by the remaining Retainage.

7.4.1.2 Upon satisfactory completion of all Work to be performed by a Subcontractor, including provision of appropriate releases, certificates and other evidence of the Subcontractor's compliance with all applicable requirements of the Contract Documents, Design-Builder shall (i) submit an application to Authority for the release of the retention attributed to the Subcontractor's work stating that the Subcontractor has completed all Work required to be performed under its Subcontract, stating the amount withheld by Design-Builder under the Subcontract and providing all backup information and stop notice and Lien releases as may be required by Authority and (ii) return all moneys withheld as retention from the Subcontractor, even if Work to be performed by Design-Builder or other Subcontractors is not completed and has not been accepted, within 30 days following receipt of payment from Authority for the completed Subcontractor Work. Design-Builder shall, by appropriate agreement with each Subcontractor, require each first tier Subcontractor to make payments to sub-subcontractors and Suppliers in a similar manner.

Authority will release retention being withheld for Work performed by Subcontractors, upon receipt of an approved application from Design-Builder as described in this Section 7.4.1.2. Authority's release of such retention shall not relieve Design-Builder of its contractual obligations relating to the Work.

7.4.1.3 Authority agrees to release the remaining Retainage by the later of (a) 60 days after the Final Acceptance Date or (b) 30 days following receipt of an Approved Invoice therefor, subject to reduction as specified below and subject to the following terms and conditions. At such time Authority shall release to Design-Builder all remaining Retainage other than amounts applied (or retained for future application) to the payment of Liquidated Damages or which Authority deems advisable, in its sole discretion, to retain to cover any existing or threatened Disputes, claims, Liens and stop notices relating to the Project, or the cost of any uncompleted or nonconforming Work (including uncompleted Warranty Work). Final payment of such Retainage not applied to Liquidated Damages shall be made upon Design-Builder's showing, to Authority's reasonable satisfaction, that all such matters have been resolved, including delivery to Authority of a certification representing that there are no outstanding claims of Design-Builder or any claims, Liens or stop notices of any Subcontractor, Supplier or laborer with respect to the Work.

7.4.1.4 Design-Builder shall have the right to substitute securities or a letter of credit for the Retainage pursuant to the procedures contained in Public Contract Code Section 22300. No such substitution shall be accepted until such securities or letter of credit have been approved by Authority as qualifying for substitution based on Authority's assessment of creditworthiness and other factors, the value of such securities has been established to Authority's reasonable satisfaction, the parties have entered into an escrow agreement (if the securities are to be held in escrow) in form substantially similar to that contained in Section 22300, and all documentation necessary for assignment of the securities to Authority or to the escrow agent, as appropriate, has been delivered in form reasonably satisfactory to Authority.

7.4.1.5 If Design-Builder has substituted securities for any of the Retainage, then Authority may request that such securities be revalued from time to time, but not more often than monthly. Such revaluation would be made by a Person designated by Authority and approved by Design-Builder. If such revaluation results in a determination that such securities have a market value which is less than the amount of Retainage for which they were substituted, then notwithstanding anything to the contrary contained herein, the amount of the Retainage required under the Contract shall be increased by such difference in market value. Such increased Retainage shall be withheld from the next payment due Design-Builder hereunder.

7.4.2 Deductions

In addition to the deductions provided for under Section 7.4.1, Authority may deduct from each payment the following:

- (a) Any Liquidated Damages which have accrued as of the date of the application for payment;
- (b) If a notice to stop payment is filed with Authority due to Design-Builder's failure to pay for labor or materials used in the Work, money due for such labor or materials, plus the 25% prescribed by law, will be withheld from payment to Design-Builder. In accordance with Section 3196 of the Civil Code, Authority may accept a bond by a corporate surety in lieu of withholding payment;
- (c) Any sums expended by Authority in performing any of Design-Builder's obligations under the Contract which Design-Builder has failed to perform; and
- (d) Any other sums which Authority is entitled to recover from Design-Builder.

The failure by Authority to deduct any of these sums from a payment shall not constitute a waiver of Authority's right to such sums. Notwithstanding anything herein to the contrary, including any Event of Default, no deferred amounts pursuant to Section 7.3.4 shall be subject to withholding, reduction, setoff or counterclaim in respect of any

amounts due and payable, or claimed to be due and payable, to Authority or any person or entity acting by, through or on behalf of Authority or for any other reason.

7.4.3 Mobilization Payments

Design-Builder shall be entitled to mobilization as follows:

(a) A first Mobilization Payment Milestone, in an amount not to exceed 2.5% of the Total Amount, may be invoiced at any time after the commencement date stated in the Notice to Proceed.

(b) A second mobilization amount may be invoiced in six Mobilization Payment Milestones equal to 1/6 of 2% of the Total Amount, no more than one Mobilization Payment Milestone per month, at any time after completion of the first 30 days of construction (not including clearing and grubbing).

7.4.4 Maximum Payment Curve

7.4.4.1 Design-Builder acknowledges and agrees that Authority is in no event obligated to approve invoices for amounts in excess of the Maximum Payment Curve (exclusive of interest) except to the extent set forth in a Change Order or payable from a Provisional Sum. In other words, at no time shall the cumulative total of all Approved Invoice Amounts (exclusive of interest) exceed the cumulative total expenditure permitted by the Maximum Payment Curve (exclusive of interest) plus the cumulative amount of all Change Orders and all amounts payable from Provisional Sums.

7.4.4.2 If any invoice includes amounts which exceed the maximum aggregate allowable under this Section 7.4.4, the Approved Invoice Amount shall not include the excess amount, payment of the excess amount shall be deferred, and no interest shall accrue thereon, until such deferred amounts can be paid without aggregate payments exceeding the Maximum Payment Curve plus the cumulative amount of all Change Orders.

7.4.5 Approval of Baseline Schedule and Payment Milestone Schedule

Authority shall in no event be obligated to approve any invoices after the invoice for the first Mobilization Payment Milestone described in Section 7.4.3(a) until Design-Builder has submitted, and Authority has approved, the Baseline Schedule and Payment Milestone Schedule.

7.5 Final Invoice

As a condition to Final Acceptance, Design-Builder shall have prepared and Authority shall have approved a final invoice as follows:

7.5.1 Design-Builder shall prepare and submit to Authority a proposed final invoice showing the proposed total amount due Design-Builder, including the Final Acceptance Payment Milestone. Design-Builder shall not be entitled to the Final Acceptance Payment Milestone prior to delivery of its final invoice. In addition to meeting all other requirements for invoices hereunder, the final invoice shall list all outstanding Claims, stating the amount at issue associated with each such Claim. The final invoice shall be accompanied by complete and legally effective releases or waivers of Liens and stop notices satisfactory to Authority, from all persons legally eligible to file stop notices in connection with the Work, consent of Surety(ies) to final payment, and such other documentation as Authority may reasonably require. Prior applications and payments shall be subject to correction in the proposed final invoice. Claims filed concurrently with the final invoice must be otherwise timely and meet all requirements under Sections 12 and 16.

7.5.2 Authority will review Design-Builder's proposed final invoice, and changes or corrections will be forwarded to Design-Builder for correction. If no changes or corrections are required, Authority will approve the final invoice. The "Final Invoice Payment Date" shall mean the due date for payment of the final Approved Invoice under Section 7.5.3 or Section 7.5.4, as applicable.

7.5.3 Notwithstanding anything to the contrary in Section 7.3.3, if the final Approved Invoice shows no outstanding or pending Claims or Subcontractor claims, Liens or

stop notices, and provided that no Claim or Subcontractor claim, Lien or stop notice is thereafter filed, Authority, in exchange for an executed release meeting the requirements of Section 7.5.5 and otherwise satisfactory in form and content to Authority, will pay the entire sum found due on the approved final invoice, less any amounts deferred in accordance with Section 7.3.4 no later than 30 days after issuance of the Certificate of Final Acceptance.

7.5.4 Notwithstanding anything to the contrary in Section 7.3.3, if the final Approved Invoice lists any outstanding Claims or Subcontractor claims, Liens or stop notices, or if any Claim or Subcontractor claim, Lien or stop notice is thereafter filed, final payment will be made no later than 60 days after issuance of the Certificate of Final Acceptance. Authority, in exchange for an executed release meeting the requirements of Section 7.5.5 and otherwise satisfactory in form and content to Authority, will pay the entire sum found due on the approved Application for Final Payment, less any amounts deferred in accordance with Section 7.3.4. Authority may withhold from payment an amount not to exceed 150% of any Subcontractor claims, Liens or stop notices plus 150% of any amount in dispute between Authority and Design-Builder, pending resolution of such matters.

7.5.5 The executed release from Design-Builder shall be from any and all claims arising from the Work as represented in the Contract Documents, and shall release and waive any claims against Authority and its Board, officers, agents, and employees, excluding only those matters identified in any Claim listed as outstanding in the final invoice. The release shall be accompanied by an affidavit from Design-Builder certifying:

(a) that it has resolved any claims made by Subcontractors and others against Design-Builder or the Project;

(b) that it has no reason to believe that any Person has a valid claim against Design-Builder or the Project which has not been communicated in writing by Design-Builder to Authority as of the date of the certificate; and

- (c) that all guarantees and warranties are in full force and effect.

The release and the affidavit shall survive final payment.

7.6 Payment to Subcontractors

Design-Builder shall pay for all of a Subcontractor's work covered by an Approved Invoice, less any retainage provided for in the Subcontract, within 10 days after the Payment Due Date for the Approved Invoice. Design-Builder shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to sub-subcontractors and Suppliers in a similar manner. Authority shall have no obligation to pay or to see to the payment of money to a Subcontractor, except as may otherwise be required by law.

7.7 No Waiver

It is mutually agreed between the parties to the Contract that no certificate given or approval of invoices made under the Contract, except the final certificate or final invoice approval, shall be conclusive evidence of the performance of the Contract, either wholly or in part, against any claim of Authority, and no payments shall be construed as an acceptance of any defective work or improper materials.

7.8 Disputes

Authority has the right to exclude disputed amounts from the Approved Invoice Amount. Such exclusion shall not alleviate, diminish or modify in any respect Design-Builder's obligation to perform under the Contract Documents, including Design-Builder's obligation to achieve Substantial Completion, Punch List Completion and Final Acceptance in accordance with the Contract Documents, and Design-Builder shall not cease or slow down its performance under the Contract Documents on account of any such amount. Any dispute regarding such payment shall be resolved pursuant to Section 16. Upon resolution of any such dispute Authority shall promptly include the amount owing in the Approved Invoice Amount.

7.9 Offset; Reduction

Authority shall have the right to deduct any amount owed by Design-Builder to Authority hereunder from any amounts owed by Authority to Design-Builder hereunder (excluding any deferred amounts pursuant to Section 7.3.4), including any Retainage which may be payable by Authority to Design-Builder pursuant to Section 7.4.1.

8.0 RISK ALLOCATION

This Section 8 describes how responsibility and liability for certain risks are allocated between the parties.

8.1 Items Included in Price

Design-Builder acknowledges and agrees that, subject only to Design-Builder's rights under Section 12, the Contract Price includes (a) all designs, equipment, materials, labor, insurance and bond premiums, home office, jobsite and other overhead, profit and services relating to Design-Builder's performance of its obligations under the Contract Documents (including all Work, equipment, materials, labor and services provided by Subcontractors and intellectual property rights necessary to perform the Work); (b) performance of each and every portion of the Work; (c) the cost of obtaining all Governmental Approvals other than Environmental Approvals and CPUC Grade Crossing Approvals; (d) all costs of compliance with and maintenance of the Governmental Approvals; (e) the cost of all Remediation Work in connection with any Hazardous Substances disclosed in the Contract Documents, provided that the nature and scope of the Remediation Work is reasonably ascertainable from the information contained in the Contract Documents and provided that changes from the quantities estimated by Design-Builder shall not be grounds for a Change Order; (f) payment of any taxes, duties, permit and other fees and/or royalties imposed with respect to the Work and any equipment, materials, labor or services included therein; (g) all costs related to insurance obtained and maintained by Design-Builder or any Subcontractors; (h) performance of environmental mitigation measures required under the Governmental Approvals and the Contract Documents; and (i) any cost of funds except to the extent compensation is specifically provided for in Section 7.3.4(a).

8.2 Process To Be Followed Upon Discovery of Certain Site Conditions

8.2.1 The procedures set forth in this Section 8.2 shall apply in the event of Design-Builder's discovery of any on-Site material that Design-Builder believes may contain Hazardous Substances other than as indicated in Volume 3- Technical Provisions, Document 8- Phase 2 Environmental Site Assessment Requirements that is required

to be removed to a Class I, Class II or Class III disposal site, any Differing Site A Conditions or any underground Main or Trunkline Utilities requiring Relocation that were not identified with reasonable accuracy in the Utility Information. The term “Differing Site A Conditions” shall mean (a) any subsurface or latent physical conditions at Site A differing from those indicated by the Site Conditions Baseline Report (referred to herein as “type 1” conditions) or (b) unknown physical conditions at Site A of any unusual nature, differing materially from those ordinarily encountered in the area and generally recognized as inherent in work of the character provided for herein (referred to herein as “type 2” conditions). The term shall specifically exclude all such conditions of which Design-Builder had actual or constructive knowledge as of the Proposal Date, and also excludes Utilities, Hazardous Substances and any conditions which constitute or are caused by a Force Majeure event.

8.2.2 During the progress of the Work, if Design-Builder becomes aware of any material or condition described in Section 8.2.1, then Design-Builder shall immediately notify Authority thereof telephonically or in person, to be followed immediately by written notification. Design-Builder shall immediately stop Work in and secure the area pending further instructions. In such event, Authority will view the location by the end of the next full Working Day after receipt of such notification and shall advise Design-Builder at that time whether Work should be resumed or whether further investigation is required.

8.2.3 If directed by Authority, Design-Builder shall promptly conduct such further investigation. Design-Builder shall determine within five Working Days after receipt of such direction whether the material or condition falls within the scope of Section 8.2.1. Design-Builder shall at that time also advise Authority of any action recommended to be taken regarding the situation. If Hazardous Substances are involved, the notice shall describe the type of remediation measures, if any, which Design-Builder proposes to undertake with respect thereto. Authority then will determine whether Design-Builder's findings and proposed actions are acceptable and either approve, or require modification of, Design-Builder's proposed actions.

8.2.4 Authority shall have the right to require Design-Builder to recommence work in the area at any time, even though an investigation may still be ongoing, so long as recommencing work would not violate any Governmental Rules. Design-Builder shall promptly recommence Work in the area upon receipt of notification from Authority to do so. On recommencing Work, Design-Builder shall follow all applicable procedures contained in the Contract Documents and all other legal requirements with respect to such work, consistent with Authority's determination or preliminary determination regarding the nature of the material or condition.

8.2.5 Subject to Section 8.3.10, if during the course of the Work Design-Builder becomes aware of any subsurface or latent physical conditions at Site B different from those indicated or unknown physical conditions at Site B of any unusual nature different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the Contract, Design-Builder shall promptly notify the Program Manager thereof telephonically or in person but shall not be obligated to stop Work.

8.3 Liability for Differing Site Conditions

8.3.1 This Section 8.3 describes how responsibility and liability for certain risks relating to Differing Site A Conditions and Differing Site B Conditions are allocated between the parties.

8.3.2 The determination whether “type 1” Differing Site A Conditions exist shall be made with reference to the Site Conditions Baseline Report. Any other information regarding Site A that may have been included in the RFP or otherwise made available to Design-Builder shall be considered reference information only and may not be relied upon by Design-Builder as an indication of conditions at Site A.

8.3.3 Upon Design-Builder’s fulfillment of all applicable requirements of Sections 8.3, 8.5 and 12, and subject to the limitations contained therein, Authority shall be responsible for, and agrees to issue Change Orders: (a) to compensate Design-Builder for additional costs directly attributable to changes in the Work arising from

Differing Site A Conditions; and (b) to extend the Completion Deadlines as the result of any delay in the Critical Path caused by any such conditions.

8.3.4 If Authority determines that the discovery is of materials or conditions which the Contract Documents indicate are present in the location in question, Design-Builder shall not be entitled to a Change Order.

8.3.5 No claim of Design-Builder under this clause shall be allowed unless Design-Builder has given the notice required in Section 8.2.2. Design-Builder shall provide the notice required by Section 8.2.2 promptly after completion of its site exploration, and the design plans shall be based on the conditions as identified in such exploration.

8.3.6 No claim may be made for “type 2” Differing Site A Conditions if a reasonable site investigation and exploration during the pre-construction phase would have indicated the condition.

8.3.7 Design-Builder shall bear the burden of proving that a Differing Site A Condition exists and that it could not reasonably have designed the Project or worked around the Differing Site A Condition so as to avoid additional cost. Each request for an adjustment based on Differing Site A Conditions shall be accompanied by a statement signed by a qualified professional explaining exactly how the existing conditions differ from those indicated (for type 1) or assumed (for type 2), and stating the efforts undertaken by Design-Builder to find alternative design or construction solutions to eliminate or minimize the problem and the associated costs.

8.3.8 No claim by Design-Builder for an adjustment hereunder shall be allowed if asserted after final payment under the Contract.

8.3.9 The term “Differing Site B Conditions” shall mean (a) any surface condition at Site B which differs materially from the conditions in existence as of the Proposal Date and (b) any subsurface conditions at Site B which differ from those anticipated by Design-Builder, but shall specifically exclude Utility facilities, Hazardous Substances and any such conditions which constitute or are caused by a Force Majeure event.

8.3.10 Design-Builder further acknowledges and agrees that as a result of its agreement to undertake responsibility for Differing Site B Conditions pursuant to this Section 8.3, any and all information regarding such matters included in the Contract Documents and other documents provided to Design-Builder by Authority shall not be considered “indicated” in the Contract as such term is used in Public Contract Code section 7104. Design-Builder specifically waives the benefit of Public Contract Code section 7104 to the extent that it may be inconsistent with the provisions set forth in this Section 8.3.

8.3.11 Prior to filing any request for a Change Order for Differing Site A Conditions, Design-Builder shall inquire whether insurance proceeds may be available to cover any of its costs. If Design-Builder finds that reasonable grounds for filing an insurance claim exist, then Design-Builder shall so notify Authority and shall take appropriate steps to file and pursue the claim in accordance with Section 10.3. Upon receipt of a Change Order request and evidence that the claim has been properly filed, Authority will process the Change Order request.

8.3.12 The foregoing shall not preclude Design-Builder from filing any insurance claim (or requesting Authority to file a claim) and receiving insurance proceeds to pay for any eligible costs incurred by Design-Builder associated with Differing Site B Conditions.

8.4 Utility Relocations

Design-Builder is responsible for performance of the Utility Work and otherwise ensuring that all Utilities affected by the Project are properly dealt with. This Section 8.4 describes how responsibility and liability for certain risks relating to the Utility Work are allocated between the parties. This Section 8.4 also addresses the circumstances under which reductions in the Utility Work will result in a reduction of amounts payable to Design-Builder. Provisions regarding the scope of the responsibilities of Design-Builder relating to Relocations are set forth in Volume 3-Technical Provisions, Document 2- Performance Specifications, Section 4.

The limits of Relocation of existing Utilities extend as far as is necessary to accommodate or permit construction of the Project in accordance with the requirements of the Contract Documents, whether inside or outside the Right of Way.

Notwithstanding any other provision in the Contract Documents, (a) New Utility Work is included in the Contract Price, and (b) the provisions below in this Section 8.4 do not apply to New Utility Work. The scope of the Design-Builder's responsibilities relating to the New Utility Work is addressed in the applicable provisions of Volume 3-Technical Provisions, Document 2- Performance Specifications.

8.4.1 Compensation for Utility Work

8.4.1.1 Compensation

The Contract Price includes compensation for the following:

- (a) Design and construction of sewer and storm drain Relocations (except as otherwise stated in Volume 3- Technical Provisions, Document 2- Performance Specifications, Appendix 2- Utility Responsibilities and Contacts);
- (b) Design and construction of water line Relocations (except as otherwise stated in Volume 3- Technical Provisions, Document 2- Performance Specifications, Appendix 2- Utility Responsibilities and Contacts);
- (c) Design and construction of other utility system Relocations to be designed and constructed by Design-Builder as identified in Volume 3- Technical Provisions, Document 2- Performance Specifications, Appendix 2- Utility Responsibilities and Contacts;
- (d) All payments Design-Builder is required to make to Utility Owners other than amounts payable from the Provisional Sum for Utilities;
- (e) Incidental Utility Work;
- (f) Maintaining reasonable functionality of existing utility services during each Relocation;
- (g) Restoration of facilities following a temporary Relocation (whether to the original location or a nearby location as approved by the Utility Owner);

- (h) Preparation of documentation relating to Utility Easements and other property rights associated with Relocations in accordance with Volume 3- Technical Provisions, Document 2- Performance Specifications, Section 4.4.2.4;
- (i) All indirect costs associated with Relocations (regardless of whether the cost of the Relocation is payable from the Provisional Sum for Utilities); and
- (j) Any costs of performing Utility Work that are not allowable under Section 8.4.1.2.

The Provisional Sum for Utilities will be available to pay the allowable costs of Utility Work determined as described in Section 8.4.1.2. Prior to commencement of any Relocation work to be paid for out of the Provisional Sum for Utilities, Design-Builder must obtain an executed Provisional Sum Authorization from Authority regarding the scope and maximum cost of such work; upon such authorization, such work shall become part of the Work with a corresponding increase to the Contract Price and decrease to the Provisional Sum. If at any time the total allowable costs incurred exceed the Provisional Sum for Utilities, Design-Builder will be entitled to a Change Order increasing the Provisional Sum for Utilities by an amount equal to 50% of the excess allowable costs. If, following achievement of Final Acceptance and resolution of all claims and disputes relating to the Utility Work (including all claims and stop notices of Subcontractors, laborers, Utility Owners and third parties relating to the Utility Work), a positive balance remains in the Provisional Sum for Utility Work, the balance will be deducted from the Provisional Sum and shall be credited to Authority.

8.4.1.2 Allowable Costs

Payment for Utility Work from the Provisional Sum shall be limited to the reasonable and necessary direct costs actually incurred by Design-Builder to pay Utility Owners for reasonable and necessary costs for allowable items of Work. Costs will be considered reasonable and necessary if the Work Order or Time and Materials Daily Record (Form T&M), as applicable, is signed by Design-Builder and approved by Authority prior to payment by Design-Builder to a given Utility Owner. Such Authority approval or

disapproval will be given within five Working Days after Authority has received adequate documentation. Costs shall be determined in accordance with Section 12.8, except that no mark-up shall be applied by Design-Builder. In addition to the foregoing, costs payable from the Provisional Sum for Utilities shall be limited to the following:

- (a) Design and construction of Relocations by Utility Owners; and
- (b) Review, approval, permit, or inspection fees required by Utility Owners.

Notwithstanding the above or any other provision of the Contract, the Provisional Sum for Utilities is not available to pay for any costs that are disallowed from calculation of a Change Order under this Section 8.4.

For purposes of this Section 8.4.1.2, the term “Relocation” excludes Protections in Place.

8.4.1.3 Work Benefiting Multiple Relocations

Where work is performed which benefits more than one Relocation, it shall be allocated among those Relocations and not “double-billed.”

8.4.1.4 Records

Design-Builder shall maintain separate and distinct records to track the cost of designing and constructing all Relocations and shall provide Authority with access to such records.

8.4.2 Change Orders

Design-Builder shall be entitled to receive a Change Order increasing the Contract Price and/or Provisional Sum for Utilities and extending the Contract Time for additional costs and delays associated with the Utility Work only as permitted by this Section 8.4 or for circumstances for which such a Change Order is independently permitted under Section 12. A deductive Change Order for reductions in the Work associated with the Utility Work shall be issued in the circumstances providing for a decrease in the Contract Price and/or Provisional Sum for Utilities described in this Section 8.4 or in circumstances for which a deductive Change Order is independently permitted under

Section 12. All Change Orders pursuant to this Section 8.4 shall be subject to the limitations, restrictions and procedures set forth in Section 12.

8.4.3 Responsibility for Identification and Relocation of Utility Facilities

8.4.3.1 Design-Builder acknowledges that it has the obligation to perform all responsibilities and to undertake all liabilities with respect to identification and Relocation of all Utilities to the extent that Design-Builder is responsible therefor under Volume 3-Technical Provisions, Document 2- Performance Specifications, Section 4 (unless otherwise expressly required by this Section 8.4.3), including Main or Trunkline Utilities which would typically be the responsibility and liability of public agencies subject to the requirements of Government Code section 4215, and that all such responsibilities and liabilities are included either in the Contract Price or the Provisional Sum for Utilities. To the extent that the Government Code might be construed to prohibit Authority from delegating such responsibilities and liabilities to Design-Builder, Design-Builder hereby waives the benefit of such statute. Design-Builder agrees that in the event such waiver is deemed ineffective (thus resulting in a reduction in the scope of the Utility Work), Authority shall be entitled to a credit against the Contract Price or Provisional Sum for Utilities, as applicable, equal to the actual costs incurred by Authority to cause performance of the obligations and satisfaction of the liabilities from which Design-Builder is thereby relieved.

8.4.3.2 Design-Builder acknowledges that prior to the Proposal Date, Design-Builder had ample opportunity to analyze the Utility Information, to contact and make inquiries of Utility Owners, and to perform such additional investigations as it deems appropriate to verify and supplement such information, and that such investigations constituted the basis for establishing its Proposal Price in light of the Provisional Sum amount set forth for Utility Work in Section 7.1.2.

8.4.3.3 If any Main or Trunkline Utilities which are required to be Relocated are not indicated at all in the Utility Information, or are not indicated with reasonable accuracy therein, then (a) for the first 120 days after the date on which NTP is issued, Authority shall take 100% of the risk of any increase in Design-Builder's direct costs for the Utility

Work that is directly attributable to such lacking or inaccurate information, and (b) after the first 120 days after the date on which NTP is issued, the parties shall share equally the risk of any increase in Design-Builder's direct costs for the Utility Work that is directly attributable to such lacking or inaccurate information (i.e. Design-Builder shall be entitled to a Change Order increasing the Contract Price and/or Provisional Sum for Utilities, as applicable, by an amount equal to 50% of the incremental increase in the direct costs of performing the Work arising from the fact that the Utility was not in the location shown and/or was materially different than indicated). Any increase in the Contract Price shall be limited to the costs of the type described in items (a), (b), (c) and (d) of Section 8.4.1.1. Any increase in the Provisional Sum for Utilities shall be limited to costs allowed under Section 8.4.1.2.

Notwithstanding the foregoing, Design-Builder shall be fully liable for, and no Change Order shall be issued with respect to, the circumstances described in the preceding paragraph, if (a) a surface inspection of the area would have shown (i) the existence of a Main or Trunkline Utility with reasonable accuracy, or (ii) the likelihood of the existence of a Main or Trunkline Utility with reasonable accuracy by reason of the existence of above-ground facilities, such as buildings, meters, junction boxes or identifying markers, or (b) the exercise of reasonable care, including the investigations described in Section 8.4.3.2, would have indicated a Main or Trunkline Utility with reasonable accuracy.

8.4.3.4 If any Main or Trunkline Utility identified in the Utility Information is not identified therein with reasonable accuracy, and if as a result of corrected information (a) it is not necessary to Relocate such Utility or (b) there is a reduction in the cost of the Work necessary to Relocate such Utility, then Authority shall be entitled to a Change Order reducing the Contract Price and/or Provisional Sum for Utilities to reflect the full value of any reduction in the Work that is directly attributable to such correction. Such Change Order shall be based on the parties' reasonable estimate of the reduction in the cost of performance of such Work (including mark-ups calculated in accordance with Section 12.7).

8.4.3.5 For purposes of Section 8.2.1 and this Section 8.4.3, a Utility is or is not identified with “reasonable accuracy” based on the definition for such term set forth in Volume 3, Technical Provisions, Document 2- Performance Specifications, Section 4.3.1.3.

8.4.4 Change in Allocation of Work Responsibility

Changes in the Utility allocation of Work responsibility pursuant to Volume 3-Technical Provisions, Document 2- Performance Specifications, Section 4 resulting from the execution of a Utility Agreement shall not be grounds for an increase in the Contract Price or Provisional Sum for Utilities; however, to the extent such changes shift Work responsibility from Utility Owner to Design-Builder, Design-Builder may receive the compensation that would have been otherwise provided to the Utility Owner in the Authority-approved Work Order issued for such Work. Such compensation shall be paid out of the Provisional Sum for Utilities. Such changes shall not be grounds for an extension of the Contract Time, unless such a change impacts the Critical Path, in which case the change might qualify as an Authority-Caused Delay. If Design-Builder believes the change should be considered an Authority-Caused Delay, Design-Builder shall so notify Authority in writing within 15 days after Authority delivers an executed copy of such Utility Agreement to Design-Builder. Notwithstanding any contrary provision of the Contract Documents, Design-Builder’s failure to provide the foregoing notice shall constitute a waiver by Design-Builder of the right to later claim that an Authority-Caused Delay has occurred on account of any matter which should have been covered by such notice. The notification requirements under this Section 8.4.4 shall apply in lieu of the RFC Notice requirements set forth in Section 12.5.

8.4.5 Payments to Utility Owners

8.4.5.1 Design-Builder shall reimburse each Utility Owner for Relocation costs incurred by the Utility Owner (subject to the provisions of the applicable Utility Agreement(s), if any), excluding costs incurred by Utility Owners to acquire Utility Easements.

8.4.5.2 Design-Builder shall also make any other reimbursements to Utility Owners (e.g., for damage to a Utility Owner's facilities caused by Design-Builder's work) required of either Authority or Design-Builder under any Utility Agreement.

8.4.5.3 If Design-Builder fails to make any payment to a Utility Owner required by this Section 8.4.5 within 10 days of receipt of Authority's notice requesting such payment and Design-Builder is not entitled to reimbursement of such payment from the Provisional Sum for Utilities, then Authority may make such payment and deduct the payment amount from any moneys due or to become due to Design-Builder and/or obtain reimbursement from Design-Builder for such cost. If Design-Builder fails to make any payment to a Utility Owner required by this Section 8.4.5 within 10 days of receipt of Authority's notice requesting such payment and Design-Builder is entitled to reimbursement of such payment from the Provisional Sum for Utilities, then Authority may make such payment and deduct the payment amount from the Provisional Sum for Utilities. If insufficient funds remain available in the Provisional Sum for Utilities to pay the amount owing, Authority may deduct the payment amount from any moneys due or to become due to Design-Builder and/or obtain reimbursement from Design-Builder for such cost.

8.4.6 Betterments

8.4.6.1 Increase in Scope

If any Authority-approved changes to the Utility Work are made in accordance with Volume 3-Technical Provisions, Document 2- Performance Specifications, Section 4 which constitute Betterments that were not indicated in the Contract Documents, or which increase the scope of Betterments that were so indicated, then Design-Builder shall be entitled to a Change Order increasing the Contract Price and/or the Provisional Sum for Utilities, with respect to any increase in Design-Builder's allowable costs of performing the Work that is directly attributable to such change(s).

8.4.6.2 Decrease in Scope

If any Authority-approved changes to the Utility Work are made which eliminate or reduce the cost of any Betterments that were indicated in the Contract Documents, thereby reducing the cost of the Work, then Authority shall be entitled to a Change Order reducing the Contract Price and/or the Provisional Sum for Utilities, to reflect the value of any reduction in the allowable costs of the Work that is directly attributable to the reduction or elimination of such Betterment. Such Change Order shall be based on the parties' reasonable estimate of the reduction in allowable costs of performance of such Work.

8.4.7 Change in Relocation Requirements

Inasmuch as Design-Builder is both furnishing the design of and constructing the Project, Design-Builder may have opportunities to reduce the costs of certain portions of the Work, which may increase the costs of certain other portions of the Work. In considering such opportunities, Design-Builder shall at all times consider the impact of Project design changes on Relocations with the overall goal of minimizing the necessity for Relocations to the extent practicable. Accordingly, except for cost increases or decreases resulting from Authority-Directed Changes in Project design affecting Utility Work (which shall be governed solely by the provisions of Section 12), the following rules shall apply with respect to any cost increases or decreases associated with Project design changes which either (a) reduce or eliminate the costs of any Relocation, or (b) result in new Relocations or an increase in costs of existing Relocations:

8.4.7.1 Design-Builder shall not be entitled to an increase in the Contract Price or the Provisional Sum for Utilities for any such additional costs which it incurs, including both additional Relocation costs and the costs of any additional Work on other aspects of the Project undertaken, to facilitate the avoidance or reduction of Relocation costs.

8.4.7.2 Neither the Contract Price nor the Provisional Sum for Utilities shall be increased as the result of: (a) any increase in amounts owed to Utility Owners that is directly attributable to such Project design change or (b) any amounts owed to Utility

Owners for work which is unusable or which must be redone as a result of such Project design change.

8.4.7.3 Design-Builder shall reimburse Authority for any acquisition costs incurred by Authority for additional or expanded Utility Easements required as the result of any such Project design change.

8.4.7.4 Design-Builder shall not be obligated to provide a credit to Authority on account of reductions in the cost of the Work due to any such avoided or reduced Relocations, unless Authority is entitled to such credit pursuant to any other provision of this Section 8.4.

8.4.8 Delays

Design-Builder shall give notice to Authority of any circumstance that may lead to a claim under this Section 8.4.8 within 72 hours of Design-Builder's becoming aware that such circumstance has occurred or is likely to occur. Subject to the limitations and restrictions set forth in Section 12, Design-Builder shall be entitled to an extension of any affected Completion Deadline:

(a) to the extent that any delay in the Critical Path is directly attributable to a circumstance for which Design-Builder is entitled to a Change Order for increased costs pursuant to Section 8.4.3 or 8.4.6.1; and

(b) to the extent that any delay in the Critical Path is directly attributable to a delay by a Utility Owner in completing its assigned work on a Relocation beyond the date scheduled therefor set forth on the approved Baseline Schedule or approved Current Project Schedule, as appropriate, provided that (i) Design-Builder shall have made all reasonable efforts to obtain the timely cooperation of the Utility Owner, and (ii) no extension shall be allowed if the delay for which compensation is sought is concurrent with any other delay, whether or not such other delay is on the Critical Path, other than another Authority-Caused Delay.

8.4.9 Additional Restrictions on Change Orders

In addition to all of the other requirements and limitations contained in this Section 8.4 and in Section 12, the entitlement of either Design-Builder or Authority to any Change Order under this Section 8.4 shall be subject to the following restrictions and limitations:

8.4.9.1 Coordination Costs

In no event will Design-Builder be awarded any increase in the Contract Price or the Provisional Sum for Utilities for any increased costs of coordinating with Utility Owners or for assisting Authority in its coordination with Utility Owners.

8.4.9.2 Avoidance of Relocations.

Design-Builder shall at all times consider the impact of design changes on Relocations of Utilities with the overall goal of minimizing the necessity for Relocations to the extent practicable. Whenever Design-Builder claims entitlement to an adjustment for a Utility Relocation, Design-Builder shall bear the burden of (i) proving that the Utility Relocation could not reasonably have been avoided, and (ii) proving and justifying the amount of any costs and/or delays claimed by Design-Builder, including demonstrating that the timing and nature of the investigations undertaken by Design-Builder were appropriate and that the increased costs and/or time could not have been avoided by more timely and appropriate investigation.

8.4.9.3 No Adjustment for Incidental Utility Work.

Design-Builder shall not be entitled to an adjustment for increased costs of the Work resulting from, or for any extension of time for delays associated with, the performance of Incidental Utility Work by Design-Builder or any Utility Owner.

8.4.9.4 Voluntary Action.

If Design-Builder elects to make payments to Utility Owners or to undertake any other efforts which are not required by the terms of the Contract Documents, Design-Builder shall not be entitled to reimbursement from the Provisional Sum for Utilities or an

adjustment in the Contract Price in connection therewith. Design-Builder shall promptly notify Authority of the terms of any such arrangements.

8.4.10 Assumption of Utility Risks by Design-Builder

Design-Builder agrees that (a) the Contract Price and Provisional Sum for Utilities cover all of the Utility Work described in Volume 3-Technical Provisions, Document 2-Performance Specifications, Section 4, and (b) it is feasible to obtain and/or perform all necessary Relocations within the time deadlines of the Contract Documents. Without limiting the generality of the foregoing, Design-Builder acknowledges and agrees that:

8.4.10.1 Prior to the date of execution hereof, Design-Builder analyzed the risks involved and in calculating the Contract Price and Provisional Sum for Utilities included adjustments deemed appropriate by Design-Builder to account for the potential risks of additional costs and delays relating to the Utility Work.

8.4.10.2 Design-Builder shall not be entitled to any Change Order with respect to any Relocations, including any act or failure to act of any Utility Owner which may result in a delay to Design-Builder's planned schedule or in Design-Builder's incurring costs not included in its budget for the Project, except as specified in this Section 8.4.

8.4.10.3 Design-Builder shall not be entitled to a Change Order for any costs or delays which it may incur attributable to any errors, omissions, inconsistencies or other defects in Relocation designs furnished by Utility Owners which are the basis for any construction Work performed by Design-Builder.

8.4.11 Bonds and Insurance

All Utility Work furnished or performed by Design-Builder shall be covered by the Payment and Performance Bonds described in Section 9. All premiums for including such Utility Work in the Payment and Performance Bonds shall be included in the Contract Price. Any liability insurance required by a Utility Owner for Utility Work furnished by Design-Builder shall be provided by naming such Utility Owner as an additional insured on the insurance provided by Design-Builder pursuant to Section 10.

8.5 City Facility Work

Design-Builder is responsible for performance of the City Facility Work and otherwise ensuring that City Facilities affected by the Project are properly dealt with. This Section 8.5 describes how responsibility and liability for certain risks relating to the City Agreements are allocated between the parties. This Section 8.5 also addresses the circumstances under which reductions in City Facility Work will result in a deductive Change Order.

8.5.1 City Utilities

Except as otherwise expressly provided in this Section 8.5, the Rearrangement of City Utilities is part of the Utility Work and all City Utilities shall be dealt with in the same manner as other Utilities. All City Facility Work that is not Utility Work is included in the Contract Price. Additional provisions regarding the scope of the responsibilities of Design-Builder and Authority relating to the City Facility Work, including the Work with respect to City Utilities, are set forth in Volume 3-Technical Provisions, Document 2-Performance Specifications and Volume 5- Agreements.

8.5.2 Certain Incorporation by Reference - Interpretation

In this Section 8.5, where reference is made by incorporation or otherwise to Section 8.4 provisions: “Utility Agreements” therein shall be deemed to refer to “City Agreements”; “Utility Owner” therein shall be deemed to refer to “City”; “Utility Work” therein shall be deemed to refer to “City Facility Work”; “Utility” therein shall be deemed to refer to “City Facility” (except that any specific references to “City Utilities” means Utilities that are owned or under exclusive control of a City); and “Relocation” therein shall be deemed to refer to “Rearrangement.”

8.5.3 Entitlement to Change Orders

Design-Builder shall be entitled to receive a Change Order increasing the Contract Price and/or the Provisional Sum for Utilities and extending the Contract Time for additional costs and delays associated with the City Agreements only as permitted by this Section 8.5 or Section 8.4 (with respect to City Utilities) or for circumstances for which

such a Change Order is independently permitted under Section 12 (such as for Authority-Directed Changes). A deductive Change Order for reductions in the City Facility Work shall be issued in the circumstances providing for a decrease in the Contract Price or the Provisional Sum for Utilities described in this Section 8.5 or Section 8.4 (with respect to City Utilities) or in circumstances for which a deductive Change Order is independently permitted under Section 12. All Change Orders pursuant to this Section 8.5 shall be subject to the limitations, restrictions and procedures set forth in Section 12.

8.5.4 Betterments

8.5.4.1 Increase in Scope

If any changes to the City Facility Work are those which constitute Betterments that were not indicated in the Contract Documents, or which increase the scope of Betterments that were so indicated, then Design-Builder shall be entitled to a Change Order with respect to any increase in Design-Builder's costs of performing the Work that is directly attributable to such change(s).

8.5.4.2 Decrease in Scope

If any changes to the City Facility Work are made which eliminate or reduce the cost of any Betterments that were indicated in the Contract Documents, thereby reducing the cost of the Work, then Authority shall be entitled to a Change Order reducing the Contract Price to reflect the value of any reduction in the Work that is directly attributable to the reduction or elimination of such Betterment. Such Change Order shall be based on the parties' reasonable estimate of the reduction in the cost of performance of such Work (including mark-ups calculated in accordance with Section 12).

8.5.5 Change in Rearrangement Requirements

The provisions of Section 8.4.7 shall be applicable to City Facilities, except that the reference to Section 8.4 in Section 8.4.7.4 shall be deemed to refer to this Section 8.5 in addition to Section 8.4.

8.5.6 Delays

Design-Builder shall give notice to Authority of any circumstance that may lead to a claim under this Section 8.5.6 within 72 hours of Design-Builder's becoming aware that such circumstance has occurred or is likely to occur. Subject to the limitations and restrictions set forth in Section 12, Design-Builder shall be entitled to an extension of any affected Completion Deadline:

(a) to the extent that any delay in the Critical Path is directly attributable to a circumstance for which Design-Builder is entitled to a Change Order for increased costs pursuant to Section 8.5.4.1;

(b) to the extent that any delay in the Critical Path is directly attributable to a delay by a City in (i) completing its assigned work on a Rearrangement or (ii) otherwise complying with its obligations under the City Agreements, beyond the date scheduled therefor set forth on the approved Baseline Schedule or approved Current Project Schedule, as appropriate, provided that (A) Design-Builder shall have made all reasonable efforts to obtain the timely cooperation of each City, and (B) no extension shall be allowed if the delay for which compensation is sought is concurrent with any other delay, whether or not such other delay is on the Critical Path, other than another Authority-Caused Delay.

8.5.7 Material Change in City Agreement

8.5.7.1 If after the date of execution of the Contract, Authority and City enter into a City Agreement (which term for purposes of this Section 8.5.7 shall include agreements amending existing executed City Agreements) which includes terms differing from the terms of the replaced or revised City Agreement, then the scope of the Work shall automatically be deemed revised to account for all such changed terms immediately upon delivery to Design-Builder of the executed agreement or amendment incorporating such change.

8.5.7.2 Any change in the scope of Design-Builder's Work directly attributable to materially differing terms contained in an executed City Agreement, shall be treated as an Authority-Directed Change, provided that (if Design-Builder believes a Contract Price

increase or a Contract Time extension is warranted) Design-Builder complies with the notification and other requirements set forth below in this Section 8.5.7. In such event the notification requirements of this Section 8.5.7 shall apply in lieu of the RFC Notice requirements set forth in Section 12.5. Any such Authority-Directed Change shall be addressed in accordance with the procedures set forth in Section 12.

8.5.7.3 Design-Builder shall notify Authority in writing of any perceived materially differing terms from the applicable existing executed City Agreement which Design-Builder believes would constitute an Authority-Directed Change warranting an increase in the Contract Price or an extension of the Contract Time within 15 days after Authority delivers a revised City Agreement or an amendment to a City Agreement to Design-Builder. Design-Builder shall thereafter consult with Authority to discuss potential methods for minimizing the impacts thereof.

8.5.7.4 Notwithstanding any contrary provision of the Contract Documents, Design-Builder's failure to provide any of the foregoing notices shall constitute a waiver by Design-Builder of the right to later claim that an Authority-Directed Change has occurred on account of any matter which should have been covered by such notice.

8.5.8 Additional Restrictions on Change Orders

The provisions of Section 8.4.9 and all of its subsections shall be applicable to City Facilities, except that the references therein to Section 8.4 shall be deemed to refer to Section 8.5.

8.5.9 Assumption of City Facility Risks by Design-Builder

The provisions of Section 8.4.10 and all of its subsections shall be applicable to City Facilities, except that the references therein to Volume 3-Technical Provisions, Document 2- Performance Specifications, Section 4 and Contract Section 8.4 shall be deemed to refer to Contract Section 8.5.

8.5.10 Bonds and Insurance

The provisions of Section 8.4.11 shall be applicable to City Facilities and City Facility Work.

8.5.11 Reimbursement of Design-Builder for Salvage Value Paid by City; No Other Reimbursement To Be Passed On

In the event that, at a City's request, Design-Builder recovers and delivers (or holds for a City's account) materials and/or equipment from a City's existing facilities which could otherwise have been sold or reused by Design-Builder, and a City pays to Authority any amount on account of the salvage value of such materials and/or equipment, Authority shall pay such amount to Design-Builder within 30 days after receipt of such funds. Authority shall not be required to pass on any other payments or reimbursements received by Authority from a City.

8.6 Responsibility for Force Majeure Events

In general, the risk of Force Majeure events (as defined below) shall be borne by Authority hereunder, and the risk of other events beyond the control of the parties (except for other events as described in this Section 8) shall be borne by Design-Builder.

8.6.1 Upon Design-Builder's fulfillment of all applicable requirements of Section 12, and subject to the limitations contained therein, Authority shall be responsible for, and agrees to issue Change Orders, (a) to compensate Design-Builder for additional costs directly attributable to changes in the Work arising from Force Majeure events, and (b) to extend the Completion Deadlines as the result of any delay in the Critical Path caused by a Force Majeure event.

8.6.2 The term "Force Majeure" shall mean any of the following events (provided such events are beyond the reasonable control of any Design-Builder-Related Entity and are not due to an act or omission of any Design-Builder-Related Entity) which materially and adversely affects Design-Builder's obligations hereunder and which

event (or the effects of which event) could not have been avoided by due diligence and use of reasonable efforts by any Design-Builder-Related Entity:

- (a) Any earthquake exceeding 3.5 on the Richter scale;
- (b) Any epidemic, blockade, rebellion, war, riot, act of terrorism, or civil commotion;
- (c) The discovery at, near or on the Site of any archaeological, paleontological, biological or cultural resources; provided that the existence of such resources was not disclosed in the Contract Documents;
- (d) The suspension, termination, interruption, denial or failure to obtain, nonrenewal or amendment of any Environmental Approval or CPUC Grade Crossing Approval;
- (e) Any change in a Governmental Rule, or change in the judicial or administrative interpretation of, or adoption of any new Governmental Rule which is materially inconsistent with Governmental Rules in effect on the Proposal Date (subject to the exclusions set forth below);
- (f) Any lawsuit seeking to restrain, enjoin, challenge or delay construction of the Project or the granting or renewal of any Governmental Approval of the Project; and
- (g) Any strike, labor dispute, work slowdown, work stoppage, secondary boycott, walkout or other similar occurrence where each participant in such occurrence is not a Design-Builder-Related Entity.

The term "Force Majeure" shall be limited to the matters listed above and specifically excludes from its definition the following matters which might otherwise be considered force majeure:

- [i] fire or other physical destruction or damage, including lightning, explosion, drought, rain, flood, earthquakes equal to or under 3.5 on the Richter scale, hurricane, storm or action of the elements or other acts of God;

[ii] except as provided in subsection (b) above, explosion or malicious or other acts intended to cause loss or damage or other similar occurrence;

[iii] strike, labor dispute, work slowdown, work stoppage, secondary boycott, walkout or other similar occurrence (unless all participants in such occurrence are not a Design-Builder-Related Entity);

[iv] the suspension, termination, interruption, denial or failure to obtain or nonrenewal of any permit, license, consent, authorization or approval which is necessary for the performance of the Work or the operation or maintenance of the Project, except for any such matter resulting from a lawsuit as described in subsection (f) above;

[v] any change in a Governmental Rule (excluding material changes in Environmental Laws) which was proposed or was otherwise reasonably foreseeable at the Proposal Date; and

[vi] all other matters not caused by Authority or beyond the control of Authority and not listed in subsections (a) through (g) above.

8.6.3 Prior to filing any request for a Change Order based on a Force Majeure event, Design-Builder shall inquire whether insurance proceeds may be available to cover any of its costs. If Design-Builder finds that reasonable grounds for filing an insurance claim exist, then Design-Builder shall so notify Authority and shall take appropriate steps to file and pursue the claim in accordance with Section 10.3. Upon receipt of a Change Order request and evidence that the claim has been properly filed, Authority will process the Change Order request.

8.7 Responsibility for Environmental Compliance

8.7.1 Performance of Mitigation Measures

8.7.1.1 Design-Builder shall be responsible for performance of all environmental mitigation measures (which term shall be deemed to include all requirements of the Environmental Approvals and similar Governmental Approvals, regardless of whether such requirements would be considered to fall within a strict definition of the term) for

the Project. The Contract Price includes compensation for Design-Builder's performance of all such mitigation measures.

8.7.1.2 Design-Builder is required to monitor the progress of performance of environmental mitigation measures and to provide periodic reports to Authority as set forth in the Mitigation Monitoring Program.

8.8 Responsibility for Hazardous Substances

8.8.1 Upon Design-Builder's fulfillment of all applicable requirements of Section 12, and subject to the limitations contained therein, Authority shall be responsible for, and agrees to issue Change Orders, (a) to compensate Design-Builder for additional costs directly attributable to changes in the Work arising from the discovery at, near or on the Site of any Hazardous Substances not identified in Volume 3 - Technical Provisions, Document 10- Phase 2 Environmental Site Assessment Requirements, and (b) to extend the Completion Deadlines as the result of any delay in the Critical Path caused by any such discovery provided such events are beyond the control of Design-Builder and are not due to an act or omission of any Design-Builder-Related Entity, which materially and adversely affects Design-Builder's obligations hereunder and which event (or the effects of which event) could not have been avoided by due diligence and use of reasonable efforts by Design-Builder.

8.8.2 Prior to filing any request for a Change Order relating to any costs which are Authority's responsibility under this Section 8.8, Design-Builder shall inquire whether insurance proceeds may be available to cover any of its costs. If Design-Builder finds that reasonable grounds for filing an insurance claim exist, then Design-Builder shall so notify Authority and shall take appropriate steps to file and pursue the claim in accordance with Section 10.3. Upon receipt of a Change Order request and evidence that the claim has been properly filed, Authority will process the Change Order request.

8.9 Risk of Loss

8.9.1 Maintenance and Repair Liability

8.9.1.1 At all times prior to the Revenue Operations Date, Design-Builder shall maintain, rebuild, repair, restore or replace all Work (including Design Documents, Construction Documents, materials, equipment, supplies and maintenance equipment which are purchased for permanent installation in, or for use during construction of, the Project and regardless of whether Authority has title thereto) that is injured or damaged prior to Authority's acceptance of maintenance liability as provided in this Section 8.9. All such Work shall be at no additional cost to Authority except to the extent that Authority is responsible for such costs as provided in Section 12. Design-Builder shall also have full responsibility for rebuilding, repairing and restoring all other property at the Site whether owned by Design-Builder, Authority or any other Person. Effective as of the Revenue Operations Date, Authority shall be considered to have accepted maintenance liability for all elements of the Project which are 100% complete as of such date. All remaining elements of the Project shall be considered accepted for maintenance purposes as of the Final Acceptance Date.

8.9.1.2 At all times prior to the Revenue Operations Date and until expiration of the time period set forth in Volume 3- Technical Provisions, Document 2- Performance Specifications, Section 7.4, Design-Builder shall maintain in a growing condition all plantings, seedings and soddings furnished under the Contract Documents and shall protect new tree growth and other vegetative growth against injury, replacing all dead plants requiring replacement during said period.

8.9.2 Extension of Maintenance and Repair Obligations

During the period after the Revenue Operations Date until Final Acceptance, Authority may require Design-Builder to continue to have responsibility for maintaining, rebuilding, repairing, restoring and replacing Work accepted by Authority and shall do so pursuant to a Change Order under Section 12.2.

8.10 Matters Not Eligible for Change Orders

Design-Builder acknowledges and agrees that no increase in the Contract Price is available except in circumstances expressly provided for in the Contract, and that such price increases shall be available only as provided in Section 12, and that Design-

Builder shall bear full responsibility for the costs of all other changes. Matters which are Design-Builder's exclusive responsibility include the following:

(a) errors, omissions, inconsistencies or other defects in the Design and Construction Documents (including errors, omissions, inconsistencies or defects traceable to errors, omissions, inconsistencies or defects in the Advanced Conceptual Engineering or Reference Documents), except to the extent Authority fails to act reasonably under Section 2.1.2.2 to approve corrections thereto;

(b) any design changes requested by Authority as part of the process of approving the Design Documents for consistency with the requirements of the Contract Documents, including any design changes relating to Project safety (except to the extent that they arise from a change in Governmental Rules, in which case the costs associated therewith may be payable pursuant to the Force Majeure provisions hereof);

(c) defective or incorrect schedules of Work or changes in the planned sequence of performance of the Work (unless changes in the planned sequence of performance of the Work arise from causes which otherwise give rise to a right to a Change Order);

(d) action or inaction of Subcontractors (unless arising from causes which otherwise give rise to a right to a Change Order);

(e) the action or inaction of (i) adjoining property owners other than Authority's obligations under Section 3.3 or (ii) other contractors (including failure to organize and integrate their work with Design-Builder's Work);

(f) groundwater levels or subsurface moisture content;

(g) untimely delivery of equipment or material, or unavailability or defectiveness or increases in costs of material, equipment or products specified by the Contract Documents other than Authority-Furnished Materials;

(h) delays not on a Critical Path;

(i) delays in issuance of any permit or approval by any entity with jurisdiction over the subject matter of such permit or approval that is required to be obtained by Design-Builder other than as set forth in Section 12.3.1(c);

(j) correction of nonconforming Work and review and acceptance thereof by Authority (including rejected design submittals);

(k) obtaining all Governmental Approvals other than Environmental Approvals and CPUC Grade Crossing Approvals;

(l) all costs covered by insurance proceeds received by or on behalf of Design-Builder;

(m) failure by Design-Builder to comply with Contract requirements (including any failure to provide the notifications to property owners, Utility Owners and others required by the Contract Documents);

(n) weather-related delays (other than Force Majeure events);

(o) delays from any other situations (other than Force Majeure events) which, while not within one of the categories delineated above, were or should have been anticipated because such situations are referred to elsewhere in the Contract or arise out of the nature of the Work; and

(p) all other events beyond Authority's control for which Authority has not agreed to assume liability hereunder.

Design-Builder hereby assumes responsibility for all such matters, and acknowledges and agrees that assumption by Design-Builder of responsibility for such risks, and the consequences and costs resulting therefrom, is reasonable under the circumstances of the Contract and that contingencies included in the Proposal Price in Design-Builder's sole judgment, constitute sufficient consideration for its acceptance and assumption of said risks and responsibilities. DESIGN-BUILDER HEREBY EXPRESSLY WAIVES ALL RIGHTS TO ASSERT ANY AND ALL CLAIMS BASED ON ANY CHANGE IN THE WORK, DELAY OR ACCELERATION (INCLUDING ANY CONSTRUCTIVE CHANGE, DELAY, SUSPENSION OR ACCELERATION) FOR WHICH DESIGN-BUILDER

FAILED TO PROVIDE PROPER AND TIMELY NOTICE OR FAILED TO PROVIDE A TIMELY REQUEST FOR CHANGE ORDER, AND AGREES THAT IT SHALL BE ENTITLED TO NO COMPENSATION OR DAMAGES WHATSOEVER IN CONNECTION WITH THE WORK EXCEPT TO THE EXTENT THAT THE CONTRACT DOCUMENTS EXPRESSLY SPECIFY THAT DESIGN-BUILDER IS ENTITLED TO A CHANGE ORDER OR OTHER COMPENSATION OR DAMAGES.

8.11 Limitation of Design-Builder's Liability

Design-Builder's liability to Authority for damages resulting from breach of the Contract shall be limited to the sum of (a) all those costs reasonably incurred by Authority or any party acting on Authority's behalf in completing or correcting the Work or having the Work completed or corrected by another Person, and (b) an amount equal to \$75,000,000; provided, however, that excluded from the cap will be (i) any type of cost to the extent it is or should have been covered by proceeds of insurance required to be provided by any Design-Builder-Related Entity, (ii) any Liquidated Damages paid pursuant to Section 6.3, and (iii) any type of cost arising from fraud, gross negligence, intentional misconduct or criminal acts of any Design-Builder-Related Entity. For purposes of this Section 8.11, costs as described in Section 16.12 shall be considered costs of completing and correcting the Work. This limitation of liability shall not affect Design-Builder's obligation to provide insurance hereunder.

8.12 Authority-Furnished Materials and Traction Power Substation

Certain materials for the Project will be provided by the Authority including Traction Power Substations (TPSS), at no cost to Design-Builder in Volume 3- Technical Provisions, Document 2- Performance Specifications, Section 1.9 ("Authority-Furnished Materials and Equipment"). All Authority-Furnished Materials will be made available at Authority-designated sites. Design-Builder, at its own expense, shall be responsible for arranging pick up of, inspecting, determining acceptability of, loading and transporting Authority-Furnished Materials, except for TPSS, from the Authority-designated sites, and shall bear the risk of loss during such activities. Design-Builder shall be

responsible for any defects or deficiencies discovered after any Authority-Furnished Materials, other than the TPSS, are removed from the Authority-designated site.

Design-Builder shall off-load, place, and install the TPSS as set forth in Volume 3- Technical Provisions, Document 2- Performance Specifications, Section 10.2. Design-Builder shall have all responsibility and bear all risk of loss for the TPSS during the off-load, placement, and installation process.

9.0 PAYMENT AND PERFORMANCE BONDS

Design-Builder shall provide to Authority and maintain at all times during the term of the Contract security for performance of the Work as described below (or other assurance satisfactory to Authority in its sole discretion). Each bond required hereunder shall be provided by a Surety rated in the top two categories by two nationally recognized rating agencies or receiving an A.M. Best Co. "Best's Rating" of A- or better and Class VII or better, or as otherwise approved by Authority in its sole discretion.

9.1 Performance Bond

Design-Builder has provided Authority with a Performance Bond (the "Performance Bond") guarantying due and punctual performance of all obligations of Design-Builder under the Contract Documents, including all of its obligations to pay Liquidated Damages in accordance with Section 6.3, in the amount of 100% of the Total Amount. A copy of the executed Performance Bond is attached hereto as Appendix 4-1. Notwithstanding any other provision set forth in the Contract Documents, performance by a Surety or Guarantor of any of the obligations of Design-Builder shall not relieve Design-Builder of any of its obligations hereunder.

9.2 Payment Bond

Design-Builder has provided Authority with a Labor and Material Payment Bond (the "Payment Bond") in the amount of 100% of the Total Amount. Design-Builder shall maintain the Payment Bond in full force and effect until (a) Design-Builder has obtained unconditional releases of Liens and stop notices from all Subcontractors who filed preliminary notice of a claim against the bond, or (b) expiration of the statutory period for Subcontractors to file a claim against the bond. A copy of the executed Payment Bond is attached to the Contract as Appendix 4-2.

9.3 Guarantee

_____, which is the parent company of _____,
[To be completed prior to Contract execution] has executed and delivered a guarantee of Design-Builder's obligations under the Contract Documents to Authority concurrently

with the execution of this Contract, a copy of which is attached hereto as Appendix 4-3. Such guarantee assures performance of Design-Builder's obligations hereunder and shall be maintained in full force and effect throughout the duration of this Contract

10.0 INSURANCE

10.1 Contractor Controlled Insurance Program

Design-Builder shall obtain a contractor-controlled insurance program with project-specific limits that shall include the insurance coverages set forth in this Section 10 (collectively, the “CCIP”). Design-Builder shall continuously keep in force the CCIP from and after Contract execution through the expiration of the Warranty period, or such longer or shorter time as may be specifically provided in this Section 10. The insurance provided hereunder shall be available for the benefit of Authority and Design-Builder with respect to covered claims, but shall not be interpreted to relieve Design-Builder of any obligations hereunder. Design-Builder shall require all Subcontractors to be covered by the CCIP on the same terms as Design-Builder itself. The Authority (both in its own capacity and as Trustee), Metro (both in its own capacity and as Settlor), the Railroad Operators, and the Program Manager (and the respective members, directors, officers, employees and agents of the aforementioned entities) will be each a named insured on all policies excepting workers’ compensation and the professional liability policy. The Authority and Program Manager (and the respective members, directors, officers, employees and agents of the aforementioned entities) will also be a named insured on the professional liability policy. All of the policies shall explicitly waive subrogation rights against indemnified parties and shall include “pay on behalf of” coverage for indemnified parties.

All insurance required hereunder shall be procured from insurance or indemnity companies with an A.M. Best and Company rating level of A- or better, Class VII or better, or as otherwise approved by Authority and authorized or approved to do business in the State. All limits of liability set forth below are in U.S. dollars and are specifically reserved for the Project.

10.1.1 Commercial General Liability Insurance

The CCIP shall include CGL coverage for Design-Builder and all Subcontractors of all tiers. The CCIP shall include a policy or policies of commercial general liability insurance for bodily injury, property damage, personal injury and advertising injury (with

the contractual liability exclusion deleted) specifically and exclusively for the Project and Right of Way written on an occurrence form that shall be no less comprehensive and no more restrictive than the coverage provided by Insurance Services Office (ISO) form CG 00 01 07 98. Such insurance shall include, by its terms or appropriate endorsements, coverage for bodily injury, property damage, fire legal liability (not less than the replacement value of the portion of the premises occupied), personal injury, blanket contractual, independent contractors, premises operations, products and completed operations (without limitation as to time), broad form property damage and hazards commonly referred to as "x" (explosion), "c" (collapse) and "u" (underground) exposures, owner's and contractor's protective liability and cross liability or severability of interests. The liability insurance also shall provide coverage of third party Claims arising out of design professionals' or contractors' errors and omissions. The policy or policies shall be endorsed to state that the exclusions for railroads (except where the Site is more than 50 feet from any railroad, including tracks, bridges, trestles, roadbeds, terminals, underpasses or crossings) shall be removed.

The commercial general liability insurance coverage shall have a minimum limit of \$2 million combined single limit of liability for bodily injury, property damage and personal injury per occurrence, \$4 million general annual aggregate and \$4 million products/completed operations aggregate. Design-Builder shall maintain such insurance through the expiration of the Warranty period. Design-Builder shall be the named insured and each of the Indemnified Parties shall be also named insured at policy inception as to any insured loss or liability arising out of or in any way related to the Project or Right of Way, including with respect to liability arising out of the acts or omissions of any Design-Builder-Related Entity, whether occurring on or off of the Site. The required limits can be satisfied by a combination of a primary policy and an excess policy.

10.1.2 Workers' Compensation and Employer's Liability Insurance

The CCIP shall include, for Design-Builder and all Subcontractors of all tiers, workers' compensation statutory limits policy in conformance with the laws of the State, and employer's liability insurance (for bodily injury or disease) with minimum limits of \$1

million per accident for bodily injury by accident, \$1 million per employee for bodily injury by disease, and \$1 million policy limit for bodily injury by disease. Design-Builder shall maintain such insurance through the expiration of the Warranty period. Design-Builder shall be the named insured on these policies. The workers' compensation policy shall contain the following endorsements:

- (a) A voluntary compensation endorsement.
- (b) An alternative employer endorsement.
- (c) An endorsement extending coverage to all states operations on an "if any"

basis.

The required limits can be satisfied by a combination of a primary policy and an excess or umbrella policy.

10.1.3 Automobile Liability Insurance

The CCIP shall include comprehensive automobile liability insurance covering the ownership, maintenance or use of all owned/leased, non-owned and hired vehicles used in the performance of the Work, both on and off the Site, including loading and unloading, with limits of not less than \$1 million, combined single limit for bodily injury and property damage liability. The automobile liability policy or policies shall be endorsed, if necessary to afford coverage, that any exclusions for railroads (except where the Site is more than 50 feet from any railroad, including tracks, bridges, trestles, roadbeds, terminals, underpasses, or crossings) shall be removed.

Design-Builder shall maintain such insurance through Final Acceptance; provided, however, that such coverage shall be maintained for vehicles used in the performance of Warranty and any landscape maintenance Work until the expiration of the Warranty period. Coverage shall be provided on Insurance Services Office form number CA 0001 (Ed. 7/97) or equivalent. Design-Builder shall be the named insured and each of the Indemnified Parties shall be also named insureds at policy inception as to any insured loss or liability arising out of or in any way related to the Project or Right of Way, including with respect to liability arising out of the acts or omissions of any Design-

Builder-Related Entity. The required limits can be satisfied by a combination of a primary policy and an excess policy.

10.1.4 Design-Builder's Pollution Liability Insurance

The CCIP shall include contractor's pollution liability (CPL) insurance with a total combined limit of liability of no less than \$25 million per occurrence and \$25 million in the aggregate dedicated to this project. The CPL shall be obtained on an occurrence basis for a policy term inclusive of the entire period of construction. If all or any portion of CPL coverages are available only on a claims-made basis, then a 10-year extended reporting period shall also be purchased. The CPL policy shall include coverage for cleanup costs, third-party bodily injury and property damage resulting from pollution conditions caused by contracting operations. The CPL shall also provide coverage for transportation and off-site disposal of materials. Each of the Indemnified Parties shall also be named insureds.

10.1.5 Environmental Impairment Liability Site Coverage Insurance

The CCIP shall include a policy of Environmental Impairment Liability Site Coverage insurance covering environmental risks, including the clean-up and remediation of unexpected Hazardous Substances from the Project, with a coverage limit of not less than \$25 million on a claims made or reported basis/policy form. The intent of this policy is to cover any and all remediation actions not otherwise contemplated as of the date of the Proposal Date. Therefore, the policy shall include coverage for remediation of known conditions in concentrations not currently known to require remediation as well as unknown conditions. Remediation required as a result of future legal or regulatory changes shall also be covered. The term of the policy shall be no less than a 10-year period from the inception of insurance coverage. If Hazardous Substances are removed from the Site and transported to an off-site disposal site, then the coverage required to be carried under this Section shall be endorsed to include Non-Owned Disposal Site Coverage and Transporter Coverage in a form reasonably acceptable to Authority. Design-Builder is responsible for the full amount of loss, including associated and related deductibles up to the policy limits for unknown site conditions, as well as

known site conditions not currently known to be in need of remediation, which are to be covered by the environmental policy, notwithstanding the Force Majeure provisions in Section 8.6. Each of the Indemnified Parties shall also be named insureds on this policy.

10.1.6 Umbrella or Excess Liability Insurance

The CCIP shall include an umbrella or excess liability insurance policy with limits of not less than \$100 million which will provide bodily injury, personal injury and property damage liability coverage at least as broad as the primary coverages set forth above, including Employer's Liability, Commercial General Liability and Comprehensive Automobile Liability insurance, in excess of the amounts set forth in Sections 10.1.1, 10.1.2 and 10.1.3. Such policy or policies shall include the following terms and conditions: (a) drop down feature requiring the policy to respond in the event that any primary insurance that would otherwise have applied proves to be uncollectable in whole or in part for any reason; (b) pay on behalf of wording as opposed to reimbursement; and (c) concurrency of effective dates with primaries. Indemnified parties shall be named insureds on the Excess Policy.

10.1.7 Professional Liability Insurance

The CCIP shall include project-specific professional liability coverage with limits not less than \$20 million per claim and aggregate. The professional liability coverage shall be provided on a primary basis and shall protect against any negligent act, error or omission arising out of design, engineering, project/construction management, or oversight activities including the work of the Authority and Program Manager (and the respective members, directors, officers, employees and agents of the aforementioned entities) with respect to the Project, including coverage for acts or omissions by any Design-Builder-Related Entity. The policy shall have a retroactive date consistent with the inception of design and/or project/construction management activities, and no later than the date on which the RFP was issued. The policy shall have a ten-year extended reporting period (ERP) from the date of Substantial Completion with respect to events which occurred but were not reported during the term of the policy, if available, but the

total term of the policy (policy term plus ERP) shall be no less than 10 years. The named insureds shall include Authority (and its members, directors, officers, employees and agents), the Program Manager (and its members, directors, officers, employees and agents), and all Design-Build-Related Entities performing professional services for the project, including services provided via a separate contract (if applicable, this information will be provided to Design-Builder), Design-Builder, and any of its Subcontractors of any tier (including design subconsultants). The policy shall not contain any provision or exclusion (including any so-called 'insured versus insured' exclusion or 'cross-liability' exclusion) the effect of which would be to prevent, bar, or otherwise preclude Authority from making a claim which would otherwise be covered by such policy on the grounds that the claim is brought by an insured or additional insured against an insured or additional insured under the policy.

10.1.8 Builder's Risk

The CCIP shall include a policy of builder's risk insurance for the Project as specified below. The insureds shall be Design-Builder, all Subcontractors (excluding those solely responsible for design Work) of any tier, and Authority, as their interests may appear. The Indemnified Parties shall be also named insureds with respect to liability arising out of the acts or omissions of any Design-Builder-Related Entity, whether occurring on or off of the Site. The insurance shall be maintained until the date of Final Acceptance; provided that Design-Builder shall not be required to maintain property insurance for any portion of the Project following transfer of control thereof to Metro, Caltrans or City.

10.1.8.1 Minimum Scope

A blanket builder's risk insurance policy on an "all risk" basis for the Project including: (1) coverage for any ensuing loss from faulty workmanship, nonconforming Work materials, omission or deficiency in design or specifications; (2) coverage against damage or loss caused by earth movement, flood, fire, theft, collapse, explosion, vandalism and malicious mischief, machinery accidents and operational testing; (3) coverage for removal of debris, and insuring the buildings, structures, machinery, equipment, materials, facilities, fixtures and all other properties constituting a part of the

Project; (4) transit coverage with sub-limits sufficient to insure the full replacement value of any key equipment item; and (5) coverage with sub-limits sufficient to insure the full replacement value of any property or equipment stored either on or off the Site. Such insurance shall be on a form acceptable to Authority to ensure adequacy of terms and sublimits.

10.1.8.2 Minimum Coverage

Coverage shall be for the replacement value thereof for "all risks" of direct physical loss or damage, including earth movement and flood coverage, with a minimum limit of liability equal to the greater of (a) \$100 million or (b) the probable maximum loss of the Project and the components thereof, plus "soft cost expense cover" (including attorneys' fees and fees and other costs associated with such damage or loss and with any Governmental Approvals). Coverage shall include the following earthquake insurance with limits not less than \$25 million per occurrence and flood insurance with limits not less than \$25 million per occurrence. The coverage shall be written without risk of liability of Authority for payment and without deduction for depreciation. There shall be no coinsurance penalty provision in any such policy. Deductibles or self-insured retentions shall be no greater than 5% of the total value of each insured unit at the time of loss.

10.1.9 Railroad Protective

The Design Builder shall provide any coverage as may be required by any railroad as a condition of the railroad's consent for entry into railroad facilities or property. Such policy shall be effective during the period any Work is being performed within 50 feet of any railroad right of way. Any requirement for such Railroad Protective insurance may be met by removal of the railroad exclusion from the Commercial General Liability and the Excess Liability policies (CG24 17 or equivalent) provided by the Design-Builder unless procurement of a separate railroad protective policy is mandated by an affected railroad.

10.2 General Insurance Requirements

10.2.1 Premiums, Deductibles and Self-Insured Retentions

Design-Builder shall be responsible for payment of premiums for all insurance required under this Section 10. Indemnified parties have no obligation to pay any premium. Design-Builder further agrees that for each claim, suit or action made against insurance provided hereunder, with respect to all matters for which Design-Builder is responsible hereunder, Design-Builder shall be solely responsible for all deductibles, self-insured retentions and amounts in excess of the coverage provided. Any deductibles or self-insured retentions over \$25,000 must be declared and approved by Authority. At the option of Authority, the insurer shall either reduce or eliminate such deductibles or self-insured retentions with respect to Authority, Metro, Caltrans and the other Indemnified Parties; or Design-Builder shall procure a bond acceptable to Authority guaranteeing payment of losses and related investigations, claims administration and defense expenses. With respect to all matters for which Authority is responsible hereunder, Authority shall remain fully responsible for all deductibles and amounts in excess of the coverage provided.

10.2.2 Verification of Coverage

10.2.2.1 Design-Builder Policies

Concurrently with Design-Builder's execution hereof or on such later date on which coverage is required to be provided hereunder, Design-Builder shall deliver to Authority a certificate of insurance with respect to each policy required to be provided by Design-Builder under this Section 10. The required certificates must be personally and manually signed by the authorized representative of the insurance company shown on the certificate with proof that he/she is an authorized representative thereof and is authorized to bind the named underwriter(s) and their company to the coverage, limits and termination provisions shown thereon. Authority shall have no duty to pay or perform under the Contract until such certificate(s), in compliance with all requirements of this Section 10, have been provided. Upon Authority's request, certified, true and exact copies of each of the insurance policies (including renewal policies) required under this Section 10 shall be provided to Authority.

10.2.2.2 Renewal Policies

Design-Builder shall promptly deliver to Authority a certificate of insurance with respect to each renewal policy, as necessary to demonstrate the maintenance of the required insurance coverages for the terms specified herein. Such certificate shall be delivered to Authority not less than 30 days prior to the expiration date of any policy and bear a notation evidencing payment of the premium therefor. If requested by Authority from time to time, certified duplicate copies of the renewal policy shall also be provided.

10.2.3 Endorsements and Waivers

All insurance policies required to be provided by Design-Builder hereunder shall contain or be endorsed to comply with the following provisions, provided that, for the workers' compensation policy, only the following provisions (e) and (i) shall be applicable:

(a) For claims covered by the insurance specified herein, said insurance coverage shall be primary insurance with respect to the insureds, additional insureds, and their respective members, directors, officers, employees, agents and consultants, and shall specify that coverage continues notwithstanding the fact that Design-Builder has left the Site. Any insurance or self-insurance beyond that specified in the Contract that is maintained by an insured, additional insured, or their members, directors, officers, employees, agents and consultants shall be excess of such insurance and shall not contribute with it.

(b) Any failure on the part of a named insured to comply with reporting provisions or other conditions of the policies, any breach of warranty, any action or inaction of a named insured or others, any foreclosure relating to the Project or any change in ownership of all or any portion of the Project shall not affect coverage provided to the other insureds or additional insureds (and their respective members, directors, officers, employees, agents and consultants).

(c) The insurance shall apply separately to each insured and additional insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability.

(d) Each policy shall be endorsed to state that coverage shall not be suspended, voided, canceled, modified or reduced in coverage or in limits except after 30 days prior written notice by certified mail, return receipt requested, has been given to Authority and Caltrans. Such endorsement shall not include any limitation of liability of the insurer for failure to provide such notice.

(e) All endorsements adding additional insureds to required policies shall be on form CG-20-10 (1985 edition) or an equivalent form providing additional insureds with coverage for "completed operations."

(f) The commercial general liability insurance policy shall be endorsed to state that coverage for Subcontractor employees shall not be excluded.

(g) The automobile liability insurance policy shall be endorsed to include Motor Carrier Act Endorsement-Hazardous materials clean up (MCS-90 and CA 99 48)).

(h) Each policy shall provide coverage on an "occurrence" basis and not a "claims made" basis (with the exception of professional liability and environmental liability policies) and no policy issued on an occurrence basis shall have any sunset clause requiring reporting within a specified period of time.

10.2.4 Waivers of Subrogation

Authority and Design-Builder waive all rights against each other, against each of their agents and employees and against Subcontractors and their respective members, directors, officers, employees, agents and consultants for any claims to the extent covered by insurance obtained pursuant to this Section 10, except such rights as they may have to the proceeds of such insurance. Design-Builder shall require all Subcontractors to provide similar waivers in writing each in favor of all other parties enumerated above. Each policy, including workers' compensation, shall include a waiver of any right of subrogation against all insured and additional insureds (and their respective members, directors, officers, employees, agents and consultants).

10.2.5 Changes in Insurance Requirements

Authority shall notify Design-Builder in writing of any changes in the requirements applicable to insurance required to be provided by Design-Builder. Any additional cost from such change shall be paid by Authority upon demonstrated evidence such as insurance carrier provided invoice or similar acceptable instrument that authenticates such cost. Any reduction in cost shall reduce the Contract Price pursuant to a Change Order.

10.2.6 No Recourse

There shall be no recourse against Authority, Metro or Caltrans for payment of premiums or other amounts with respect to the insurance required to be provided by Design-Builder hereunder, except for deductibles payable by Authority as specified herein.

10.2.7 Support of Indemnifications

The insurance coverage provided hereunder by Design-Builder shall support but is not intended to limit Design-Builder's indemnification obligations under Section 11, nor do the indemnity obligations limit the rights of the insured parties to the coverage afforded by their insured status.

10.3 Prosecution of Claims

Unless otherwise directed by Authority in writing, Design-Builder shall be responsible for reporting and processing all potential claims by Authority or Design-Builder against the insurance required to be provided under this Section 10. Design-Builder agrees to report timely to the insurer(s) any and all matters which may give rise to an insurance claim and to promptly and diligently pursue any and all insurance claims on behalf of Authority, whether for defense or indemnity or both. Authority agrees to promptly notify Design-Builder of Authority's incidents, potential claims, and matters which may give rise to an insurance claim by Authority, to tender its defense or the claim to Design-Builder, and to cooperate with Design-Builder as necessary for Design-Builder to fulfill its duties hereunder.

10.4 Commencement of Work

Design-Builder shall not commence work under the Contract until it has obtained the insurance required under this Section 10, has furnished original certificates of insurance evidencing the required coverage as required under Section 10.2.2 and such insurance has been approved by Authority, nor shall Design-Builder allow any Subcontractor to commence work under its Subcontract until the Subcontractor is covered by the CCIP.

10.5 Design Builder's Failure to Comply

If Design-Builder or any Subcontractor fails to provide and maintain insurance as required herein, then Authority shall have the right but not the obligation, to purchase such insurance or to suspend Design-Builder's right to proceed until proper evidence of insurance is provided. Any amounts paid by Authority shall, at Authority's sole option, be deducted from amounts payable to Design-Builder or reimbursed by Design-Builder upon demand, plus interest thereon from the date of payment by Authority to the reimbursement date, at the lesser of (a) 10% per annum or (b) the maximum rate allowable under applicable Governmental Rules. Nothing herein shall preclude Authority from exercising its rights and remedies under Section 17 as a result of the failure of Design-Builder or any Subcontractor to satisfy the obligations of this Section 10.

If on account of Design-Builder's failure to comply with the provisions of this Section 10, Authority is adjudged to be a co-insurer or otherwise held responsible for all or any portion of a judgment, loss or settlement (through admission or stipulation by Design-Builder or court decision) that would have been covered by insurance but for non-compliance with this Section 10, then any loss or damage it shall sustain by reason thereof shall be borne by Design-Builder, and Design-Builder shall immediately pay the same to Authority, upon receipt of written demand therefor and evidence of such loss or damage.

10.6 Disclaimer

Design-Builder and each Subcontractor shall have the responsibility to make sure that their insurance programs fit their particular needs, and it is their responsibility to arrange

for and secure any insurance coverage which they deem advisable, whether or not specified herein.

Authority makes no representation or warranty that the coverage, limits of liability or other terms specified for the Insurance Policies to be carried pursuant to this Section 10 are adequate to protect Design-Builder against its undertakings under the Contract Documents or its liability to any third party or preclude Authority from taking any actions as are available to it under the Contract or otherwise at law. Authority shall not be limited to the amount of the insurance premium not paid in the proof of any damages it may claim against Design-Builder arising out of or by reason of failure of Design-Builder to provide and keep in force the insurance policies required by and on the terms of this Section 10, but Authority shall instead be entitled to recover the full amount of damages available.

10.7 Coverage to be Provided by Design-Builder During Warranty Period

During the period following the Final Acceptance Date and prior to expiration of the warranty period hereunder, Design-Builder shall maintain in full force and effect all insurance as specified in Section 10, covering all Work performed during such period.

10.8 Other Insurance Requirements

10.8.1 Minimum Safety Compliance Requirements

Design-Builder shall be solely responsible for safety on the worksite, and shall comply in all respects with Design-Builder's Construction Safety and Security Program. Each Subcontractor, before performing any Work, shall agree in writing to, and shall when performing any Work, comply with the requirements of Design-Builder's Construction Safety and Security Program. Any suspension of Work by Authority related to safety concerns, including the failure of any individual to comply with Design-Builder's Construction Safety and Security Program, shall be considered a suspension for cause.

10.8.2 Due Care Required

Nothing contained in this Section shall relieve Design-Builder or any Subcontractors of its obligation to exercise due care in the performance of the Work and to complete the Work in strict compliance with the Contract.

11.0 INDEMNIFICATION

11.1 Indemnifications by Design-Builder

11.1.1 Subject to Section 11.1.3, Design-Builder shall release, indemnify, hold harmless and defend at its own expense Authority (both in its own capacity and as Trustee), Metro (both in its own capacity and as Settlor), the Railroad Operators, and the Program Manager (and the respective members, directors, officers, employees and agents of the aforementioned entities) and their successors and assigns and their shareholders, officers, directors, agents and employees (collectively referred to in this Section 11.1 as the "Indemnified Parties") from and against any and all claims, causes of action, suits, legal or administrative proceedings, costs, damages, losses, liabilities and response costs, including any injury to or death of persons or damage to or loss of property, and including attorneys' and expert witness fees and costs, in each case if asserted by, incurred by, or awarded to any third party, arising out of, relating to, resulting from or founded upon:

(a) The breach or alleged breach of the Contract by any Design-Builder-Related Entity; and/or

(b) The failure or alleged failure by any Design-Builder-Related Entity to comply with any applicable Environmental Laws or Governmental Rules (including Governmental Rules regarding handling, generation, treatment, storage, transportation and disposal of Hazardous Substances) in performing the Work; and/or

(c) Any alleged patent or copyright infringement or other allegedly improper appropriation or use of trade secrets, patents, proprietary information, know-how, copyright rights or inventions in performance of the Work under the Contract, or arising out of any use in connection with the Project of methods, processes, designs, information, or other items furnished or communicated to Authority or another Indemnified Party pursuant to the Contract; provided that this indemnity shall not apply to any infringement resulting from Authority's failure to comply with specific written instructions regarding use provided to Authority by Design-Builder; and/or

(d) The alleged negligent act or omission or willful misconduct of any Design-Builder-Related Entity; and/or

(e) Any and all claims by any governmental or taxing authority claiming taxes based on gross receipts, purchases or sales, the use of any property or income of any Design-Builder-Related Entity with respect to any payment for the Work made to or earned by such Design-Builder-Related Entity under the Contract Documents; and/or

(f) Any and all stop notices and/or Liens filed in connection with the Work, including all expenses and attorneys' fees incurred in discharging any stop notice or Lien, provided that Authority is not in default in payments owing to Design-Builder with respect to such Work; and/or

(g) Any release or threatened release of a Hazardous Substance (i) which was brought onto the Site by any Design-Builder-Related Entity, or (ii) which was negligently removed or handled by any such Persons, regardless of the source, origin or method of deposit of such Hazardous Substance; and/or

(h) The claim or assertion by any contractor of inconvenience, disruption, delay or loss caused by interference by any Design-Builder-Related Entity with or hindering the progress or completion of work being performed by other contractors as described in Volume 3-Technical Provisions, Document 1, Section 1.4, or failure of any Design-Builder-Related Entity to cooperate reasonably with other contractors in accordance therewith; and/or

(i) The failure of Design-Builder to fully comply with any insurance requirements described in Section 10.

11.1.2 Subject to Section 11.1.3, Design-Builder shall release, defend, indemnify and hold harmless the Indemnified Parties from and against any and all claims, damages, losses, liabilities and costs, including attorneys' fees, arising out of, relating to or resulting from errors, omissions, inconsistencies or other defects in the Design Documents furnished by Design-Builder, regardless of whether such errors, omissions, inconsistencies or defects were also included in the Advanced Conceptual

Engineering or other Contract Documents, but excluding any errors, omissions, inconsistencies or other defects which are inherent in prescriptive specifications included in the Contract Documents provided by Authority. Design-Builder agrees that, because the Advanced Conceptual Engineering is subject to review and modification by Design-Builder, such documents shall not be deemed "design furnished" by Authority or any of the other Indemnified Parties, as the term "design furnished" is used in Civil Code Section 2782 and Section 11.1.3.3. Design-Builder hereby waives the benefit (if any) of Civil Code Section 2782 and agrees that this Section 11.1.2 constitutes an agreement governed by Civil Code section 2782.5.

11.1.3 The following restrictions shall apply to the indemnities set forth in Sections 11.1.1 and 11.1.2:

11.1.3.1 With respect to any loss, damage or cost of the type covered by the insurance required to be provided hereunder, Design-Builder's indemnity obligation shall not extend to any loss, damage or expense arising from the sole negligence or willful misconduct of such Indemnified Party or its agents, servants or independent contractors who are directly responsible to such Indemnified Party.

11.1.3.2 With respect to any loss, damage or cost which is not of the type covered by the insurance required to be provided hereunder, Design-Builder's indemnity obligation shall not extend to any loss, damage or cost to the extent that such loss, damage or cost was caused by the gross negligence or willful misconduct of such Indemnified Party or its agents, servants or independent contractors who are directly responsible to such Indemnified Party.

11.1.3.3 Except as permitted by Civil Code sections 2782.1, 2782.2 and 2782.5, such indemnities shall not inure to the benefit of an Indemnified Party so as to impose liability on Design-Builder for the active negligence of Authority, or to relieve Authority of liability for such active negligence.

11.1.3.4 Such indemnities shall not be construed to effect any extension of statutes of limitations otherwise applicable to causes of action for breach of contract held by Authority against Design-Builder.

11.1.3.5 In claims by an employee of Design-Builder, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Section 11.1 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for Design-Builder or a Subcontractor under workers' compensation, disability benefit or other employee benefits laws.

11.1.4 Design-Builder hereby acknowledges and agrees that it is Design-Builder's obligation to cause the Project to be designed and to construct the Project in accordance with the Contract Documents and that the indemnified parties described above are fully entitled to rely on Design-Builder's performance of such obligation. Design-Builder further agrees that any review and/or approval by Authority and/or others hereunder shall not relieve Design-Builder of any of its obligations under the Contract Documents or in any way diminish its liability for performance of such obligations or its obligations to provide indemnities hereunder.

11.2 Indemnification by Authority

11.2.1 It is recognized that certain state and federal statutes provide that individuals and firms may be held liable to third parties for damages and claims related to Hazardous Substances under such doctrines as joint and several liability and/or strict liability. It is not the intention of the parties that Design-Builder be exposed to any such liability arising solely out of (a) properly performed Work involving pre-existing Site contamination, whether known or unknown, or (b) the activities of any Persons other than any Design-Builder-Related Entity. Accordingly, Authority shall, to the extent permitted by applicable law, indemnify, defend and save Design-Builder harmless from, any and all claims, damages, losses, liabilities and costs, including attorneys' fees, arising out of, or in connection with, bodily injury (including death) to persons, damage to property, or environmental removal or response costs arising out

of the presence, release, or threatened release of Hazardous Substances that are identified in Volume 3 - Technical Provisions, Document 10- Phase 2 Environmental Site Assessment Requirements, but specifically excluding those conditions for which Design-Builder has agreed to be responsible as described in Section 11.1.1(g). With respect to any Hazardous Substances not identified in Volume 3 - Technical Provisions, Document 10- Phase 2 Environmental Site Assessment Requirements, Design-Builder shall rely on the Environmental Impairment Liability Site Coverage to cover this risk.

11.2.2 Except for Hazardous Substances for which Design-Builder is responsible as described in Section 11.1.1(g), without contradiction of any assertion by Authority of third party liability, and for purposes of the Contract only, (a) Design-Builder shall not be required to execute any hazardous waste manifests as a “generator”, and (b) Hazardous Substances encountered in the performance of the Work shall be disposed of, if at all, utilizing an EPA Identification Number or other appropriate legal device obtained by, and carried in the name of, Authority or another Person designated by Authority.

11.2.3 In the event Authority terminates the Contract for convenience and Authority elects to accept assignment of any Subcontract under Section 18.2(d), Authority shall indemnify, defend and save Design-Builder harmless from any and all claims, damages, losses, liabilities and costs, including attorneys’ fees, arising out of the breach or alleged breach of the Subcontract by Authority occurring after the effective date of such assignment.

11.3 No Effect on Other Rights

The obligations described in this Section 11 shall not be construed to limit rights and obligations provided by law or equity which would otherwise exist in favor of a party indemnified hereunder.

11.4 CERCLA Agreement

Without limiting their generality, the indemnities set forth in Sections 11.1.1(g) and 11.2 are intended to operate as agreements pursuant to Section 107(e) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. section 9607(e), and Health and Safety Code section 25364, to insure, protect, hold harmless and indemnify the indemnified parties.

12.0 CHANGES IN THE WORK

This Section 12 sets forth the requirements for obtaining all Change Orders under the Contract. Design-Builder waives the right to make any claim for a time extension or for any monetary compensation in addition to the Contract Price and other compensation specified in the Contract Documents, except as permitted in this Section 12.

12.1 Circumstances under which Change Orders May Be Issued

12.1.1 Change Orders

The term “Change Order” shall mean a written amendment to the terms and conditions of the Contract Documents issued in accordance with this Section 12, for the following purposes (or combination thereof):

- (a) to modify the scope of the Work;
- (b) to revise a Completion Deadline;
- (c) to revise the Contract Price or the Provisional Sums; and
- (d) to revise other terms and conditions of the Contract Documents.

A Change Order shall not be effective for any purpose unless executed by Authority, as specified herein. Authority may issue unilateral Change Orders as specified in Section 12.2.

12.1.2 Directive Letters

Authority may at any time issue a Directive Letter to Design-Builder in the event of any desired change in the Work or of any dispute regarding the scope of the Work. The Directive Letter will describe the Work in question and will state the basis for determining compensation, if any. Design-Builder shall proceed immediately with the Work as directed in the letter, pending execution of a formal Change Order (or, if the letter states that the Work is within the original scope of the Work, Design-Builder shall proceed with the Work as directed but shall have the right pursuant to Sections 12.3 and 12.4 to request that Authority issue a Change Order). The fact that a Directive

Letter was issued by Authority does not constitute evidence that an Authority-Directed Change occurred. Such determination shall be based on an analysis of the original requirements of the Contract Documents and the effect of the Directive Letter on those requirements.

12.1.3 Changed or Extra Work Performed Without Change Order or Directive Letter

To the extent that Design-Builder undertakes performance of any changed or extra work without receiving a Directive Letter or Change Order executed by Authority, Design-Builder shall be deemed to have performed such work voluntarily and shall not be entitled to a Change Order in connection therewith. In addition, Design-Builder may be required to remove or otherwise undo any such work, at its sole cost.

12.2 Authority-Directed Changes

12.2.1 Issuance of Potential Change Order

If Authority desires to issue an Authority-Directed Change or to evaluate whether to initiate such a change, then Authority may, at its discretion, issue a Potential Change Order. Within seven days after Design-Builder's receipt of a Potential Change Order, Authority and Design-Builder shall consult to define the proposed scope of the change. Within seven days after the initial consultation, Authority and Design-Builder shall consult concerning the estimated cost and time impacts. Design-Builder shall provide data regarding such matters as requested by Authority.

12.2.2 Authority Determination

Within seven days after the second consultation and provision of any data as described in Section 12.2.1, Authority shall notify Design-Builder whether Authority:

- (a) wishes to issue a Change Order;
- (b) wishes to request Design-Builder to prepare a Change Order form as discussed at the meeting; or
- (c) no longer wishes to issue a Change Order.

Authority may at any time, in its sole discretion, require Design-Builder to provide two alternative Change Order forms, one of which shall provide for a time extension and any additional costs permitted hereunder, and the other of which shall show all Acceleration Costs associated with meeting the original Completion Deadlines, as well as any additional costs permitted hereunder.

12.2.3 Submittal of Change Order Form

If so requested, Design-Builder shall, within 10 days after receipt of the notification described in Section 12.2.2, prepare and submit to Authority for review and approval a Change Order form for the requested change, complying with all applicable requirements of Section 12.5. If the Change Order is approved, any design and engineering costs incurred in preparing plans necessary for developing the Change Order form will be included within the Change Order as reimbursable items, otherwise, a separate Change Order will be issued allowing reimbursement for such costs. All other costs related to Change Orders, including development of the cost estimate, scope and time impact analysis, and any modifications thereto requested by Authority, shall be made at Design-Builder's cost and expense.

12.2.4 Order To Proceed Notwithstanding Disagreement

If Authority and Design-Builder agree that a change in the requirements relating to the Work has occurred but disagree as to whether the change justifies additional compensation or time or disagree as to the amount of any change to be made to the Contract Price, Provisional Sum or a Completion Deadline, Authority may, in its sole discretion, order Design-Builder to proceed with the performance of the Work in question notwithstanding such disagreement, and Design-Builder shall proceed in accordance with such order. Such order may, at Authority's option, be in the form of:

- (a) a unilateral Change Order as provided in Section 12.2.5; or
- (b) a Directive Letter as described in Section 12.1.3.

12.2.5 Unilateral Change Orders

Authority may issue a unilateral Change Order at any time, regardless of whether it has issued a Potential Change Order. Such Change Order shall provide for compensation to be paid in accordance with Section 12.8. If the Change Order results in a reduction in the Work, the Change Order may contain a price deduction deemed appropriate by Authority, and Design-Builder shall have the right to submit the amount of such price deduction to dispute resolution in accordance with Section 16.

12.3 Time Extensions for Excusable Delays

The Completion Deadlines may only be changed by a Change Order. Any claim by Design-Builder for an extension of a Completion Deadline shall be subject to Design-Builder's fulfillment of all applicable requirements of this Section 12, and subject to the limitations contained herein.

12.3.1 Design-Builder Right to Request Time Extension

Design-Builder may submit a Request for Change Order to extend a Completion Deadline only for the following excusable delays ("Excusable Delays") changing the duration of a Critical Path:

- (a) Authority-Caused Delays;
- (b) Delays directly attributable to Differing Site A Conditions, Force Majeure events and Hazardous Substances, as specified in Section 8, to the extent provided therein; and
- (c) Certain delays relating to Utility Work or City Facility Work, as specified in Section 8, to the extent provided therein;
- (d) Failure of a City, Metro or Caltrans to provide responses for matters for which a response is required within the time period specified in the CDRL, or if not specified in the CDRL, within the time period specified in the Master Cooperative Agreements set forth in Volume 5-Agreements.

Design-Builder shall be required to demonstrate to Authority's satisfaction that the change in the Work or other event or situation which is the subject of the Request for Change Order seeking a change in a Completion Deadline has caused or will result in an identifiable and measurable disruption of the Work which has impacted a Critical Path Activity.

12.3.2 Limitation on Time Extensions

Any extension of a Completion Deadline allowed hereunder shall exclude any delay to the extent that it:

- (a) did not impact the Critical Path;
- (b) was due to the negligent acts or omissions, fault, recklessness, willful misconduct, breach of contract, or violation of law of any Design-Builder Related Entity; and
- (c) could reasonably have been prevented or avoided by Design-Builder, including by resequencing, reallocating or redeploying its forces to other portions of the Work .

12.3.3 Multiple Delays

If more than one Excusable Delay occurs, Design-Builder will be entitled to a single extension of the Completion Deadlines for the cumulative change to the Critical Path.

12.3.4 Sole Remedy

The adjustment to the Completion Deadlines allowed for Excusable Delays constitutes Design-Builder's sole and exclusive remedy for such delays, except for the compensation allowed for certain types of delays as provided in Section 12.4.1(b).

12.3.5 No Change Order for Non-Excusable Delay

Design-Builder shall not be entitled to an extension of a Completion Deadline for any delays which are not Excusable Delays.

12.4 Increase in Contract Price or Provisional Sum for Utilities

The Contract Price and Provisional Sum for Utilities may only be changed by a Change Order. Any claim by Design-Builder for an increase in the Contract Price or Provisional Sum for Utilities shall be subject to Design-Builder's fulfillment of all applicable requirements of this Section 12, and subject to the limitations contained herein.

12.4.1 Design-Builder Right to Request Price Increase

Design-Builder may submit a Request for Change Order to increase the Contract Price only for the following:

- (a) additional costs of performance of the Work directly attributable to Authority-Directed Changes;
- (b) delay and disruption damages and Acceleration Costs as specified in Section 12.4.3;
- (c) additional costs as specified in Section 8, to the extent provided therein;
- (d) reimbursement of certain costs during an Authority suspension for convenience as described in Section 6.4.3;
- (e) additional costs directly attributable to uncovering, removing, and restoring Work, to the extent provided in Volume 3-Technical Provisions, Document 1, Section 9.1; and
- (f) additional costs resulting from Authority's payment in excess of the amount payable under the Payment Schedule exclusive of any Change Orders or amounts payable from the Provisional Sums as specified in Section 7.3.3, to the extent provided in Section 7.3.3.

Design-Builder may submit a Request for Change Order to increase the Provisional Sum for Utilities only for additional costs as specified in Section 8, to the extent provided therein.

12.4.2 Limitation on Contract Price Increases

Any increase in the Contract Price or Provisional Sum for Utilities allowed hereunder shall exclude:

- (a) costs caused by the breach of contract or fault or negligence, or act or failure to act of any Design-Builder Related Entity;
- (b) costs which could reasonably have been avoided by Design-Builder, including by resequencing, reallocating or redeploying its forces to other portions of the Work or to other activities unrelated to the Work (in which event additional costs that would reasonably have been incurred in connection with such reallocation or redeployment would be allowable); and
- (c) costs for any rejected Work which failed to meet the requirements of the Contract Documents and any necessary remedial Work.

12.4.3 Compensable Delays

12.4.3.1 Delay and Disruption Damages

Delay and disruption damages are allowed only for Authority-Caused Delays and for any Change Orders issued by Authority as an alternative to allowing an extension of a Completion Deadline as contemplated by Sections 12.2.2 and 12.5.3. Acceleration Costs shall be compensable hereunder only with respect to Change Orders issued by Authority as an alternative to allowing an extension of a Completion Deadline as contemplated by Sections 12.2.2 and 12.5.3. Eligible costs include costs of performance of additional Work required as a result of the delay determined in accordance with Section 12.8, disruption in the Design-Builder's plan for performance of the Work directly attributable to the delay and overhead applied at a rate not to exceed \$20,000 per day.

12.4.3.2 Limitations

Before Design-Builder may obtain any delay or disruption damages, including Acceleration Costs, Design-Builder must demonstrate to Authority's satisfaction that:

- (a) its schedule which defines the affected Critical Path in fact set forth a reasonable method for completion of the Work;
- (b) the change in the Work or other event or situation which is the subject of the requested Change Order has caused or will result in an identifiable and measurable disruption of the Work which impacted the Critical Path Activity;
- (c) the delay or damage was not due to any breach of contract or fault or negligence, or act or failure to act of any Design-Builder Related Entity, and could not reasonably have been prevented or avoided by Design-Builder, including by resequencing, reallocating or redeploying its forces to other portions of the Work or other activities unrelated to the Work (in which event additional costs that would reasonably have been incurred in connection with such reallocation or redeployment would be allowable);
- (d) the delay for which compensation is sought is not concurrent with any other delay, whether or not such other delay is on the Critical Path, other than another Authority-Caused Delay; and
- (e) Design-Builder has suffered or will suffer actual costs due to such delay eligible for payment hereunder, and has documented such costs in a manner satisfactory to Authority.

Costs of rearranging Design-Builder's work plan to accommodate changes in the Work not associated with a Critical Path delay shall not be compensable hereunder.

12.5 Conditions Precedent

Except as otherwise provided in Sections 8.4 and 8.5, the requirements set forth in this Section 12.5 constitute conditions precedent to Design-Builder's entitlement to request and receive a Change Order.

12.5.1 Delivery of RFC Notice

Design-Builder shall deliver to Authority written notice (an “RFC Notice”) stating that an event or situation has occurred within the scope of Section 12.3 and/or 12.4 and shall state which subsection thereof is applicable.

Each RFC Notice shall be delivered as promptly as possible after the occurrence of such event or situation. If any RFC Notice is delivered later than 10 days after Design-Builder first discovered (or should have discovered in the exercise of reasonable prudence) the occurrence which is described therein, Design-Builder shall be deemed to have waived its right to a Change Order. Furthermore, if any RFC Notice concerns any condition or material described in Section 8.2, Design-Builder shall be deemed to have waived the right to collect any and all costs incurred in connection therewith to the extent that Authority is not afforded the opportunity to inspect such material or condition before it is disturbed.

12.5.2 Contents of RFC Notice

The RFC Notice shall: (a) state in detail the facts underlying the potential Change Order, the reasons why Design-Builder believes additional compensation or time will or may be due and the date of occurrence; (b) state in detail the basis that the work is not required by the Contract Documents, if applicable; (c) identify particular elements of performance for which additional compensation may be sought under this Section 12; (d) identify any potential Critical Path impacts; and (e) provide an estimate of the time within which a response to the notice is required to minimize cost, delay, or disruption of performance.

Any adjustments made to the Contract Documents shall not include increased costs or time extensions for delay resulting from Design-Builder’s failure to provide requested additional information under this Section 12.5.

12.5.3 Delivery of Requests for Change Orders

Design-Builder shall deliver a detailed Request for Change Order to Authority within 30 days after delivery of the RFC Notice indicating the relief being sought with particularity

and detailed written support. If Design-Builder requests a time extension, then Authority, in its sole discretion, may require Design-Builder to provide two alternative Change Order requests, one of which shall provide for a time extension and any additional costs permitted hereunder, and the other of which shall show all Acceleration Costs associated with meeting the original Completion Deadlines, as well as any additional costs permitted hereunder. If any such Request for Change Order meeting the requirements of Section 12.5.4 is not received within 30 days as indicated in this Section 12.5.3, Design-Builder shall be deemed to have waived its right to a Change Order.

12.5.4 Requests for Change Orders; Incomplete Requests for Change Orders

Each Request for Change Order provided by Design-Builder shall meet all requirements set forth in Section 12.6; provided that if any such requirements cannot be met due to the nature of the occurrence, Design-Builder shall provide an incomplete Request for Change Order which shall:

- (a) comply with all requirements capable of being met;
- (b) include a list of requirements which are not fulfilled together with an explanation reasonably satisfactory to Authority stating why such requirements cannot be met and a date by which all requirements will be fulfilled;
- (c) provide such information regarding projected impact on the Critical Path as is requested by Authority; and
- (d) in all events include sufficient detail to ascertain the basis for the Request for Change Order and for any price increase associated therewith, to the extent such amount is then ascertainable.

Design-Builder shall furnish, when requested by Authority, such further information and details as may be required to determine the facts or contentions involved. Design-Builder agrees that it shall give Authority access to any and all of Design-Builder's books, records and other materials relating to the Work, and shall cause its Subcontractors to do the same, so that Authority can investigate the basis for such

Request for Change Order. Design-Builder shall provide Authority with a monthly update to all outstanding incomplete Requests for Change Orders, describing the status of all previously unfulfilled requirements and stating any changes in projections previously delivered to Authority, time expenditures to date and time anticipated for completion of the Activities for which the time extension is claimed.

12.5.5 Importance of Timely Delivery

Design-Builder acknowledges and agrees that, due to the limited availability of funds and timing constraints for the Project, timely delivery of notification of such events and situations, RFC Notices and Requests for Change Orders and updates thereto are of vital importance to Authority. Authority is relying on Design-Builder to evaluate, promptly upon the occurrence of any event or situation, whether the event or situation will affect schedule or costs and, if so, whether Design-Builder believes a time extension and/or price increase is required hereunder. If an event or situation occurs which may affect the Contract Price or a Completion Deadline, Authority will evaluate the situation and determine whether it wishes to make any changes to the definition of the Project so as to bring it within Authority's funding and time restraints.

12.5.6 Subcontractor Claims

Prior to submission by Design-Builder of any Request for Change Order to Authority which is based in whole or in part on a request by a Subcontractor to Design-Builder for a price increase or time extension under its Subcontract, Design-Builder shall have reviewed all claims by the Subcontractor which constitute the basis for the Request for Change Order and determined in good faith that each such claim is justified hereunder and that Design-Builder is justified in requesting an increase in the Contract Price and/or change in Completion Deadlines in the amounts specified in the Request for Change Order. Each Request for Change Order involving Subcontractor Work, and each update to an incomplete Request for Change Order involving such Work, shall include a summary of Design-Builder's analysis of all components of the Subcontractor claims and a sworn certification in form acceptable to Authority signed by Design-Builder's Project Manager stating that Design-Builder has investigated the basis for the

Subcontractor's claims and has determined that all such claims are justified as to entitlement and amount of money and/or time requested, has reviewed and verified the adequacy of all back-up documentation and has no reason to believe and does not believe that the factual basis for the Subcontractor's claim is falsely represented. Any Request for Change Order involving a Subcontractor claim shall be considered incomplete if it is not accompanied by such analysis and certification.

12.5.7 Burden of Proof

The Design-Builder shall have the burden of proving that it is entitled to a Change Order hereunder.

12.6 Contents of Change Orders

12.6.1 Form of Change Order

Each Change Order form and Request for Change Order shall be prepared in form acceptable to Authority and shall meet all applicable requirements of this Section 12. Design-Builder shall prepare a scope of work, cost estimate, time impact analysis and other information as required by this Section 12.6.1 for each Change Order form and Request for Change Order.

12.6.1.1 Scope of Work

The scope of work shall describe in detail satisfactory to Authority all activities associated with the Change Order, including a description of additions, deletions and modifications to the existing requirements of the Contract Documents.

12.6.1.2 Cost Estimate

The cost estimate shall set out the estimated costs in such a way that a fair evaluation can be made. It shall include a breakdown for labor, materials, equipment, overhead (which includes all indirect costs) and profit, unless Authority agrees otherwise. If the work is to be performed by Subcontractors and if the work is sufficiently defined to obtain Subcontractor quotes, Design-Builder shall obtain quotes (with breakdowns showing cost of labor, materials, equipment, overhead and profit) on the

Subcontractor's stationery and shall include such quotes as back-up for Design-Builder's estimate. No mark-up shall be allowed in excess of the amounts allowed under Section 12.8. Design-Builder shall identify all conditions with respect to prices or other aspects of the cost estimate, such as pricing contingent on firm orders being made by a certain date or the occurrence or non-occurrence of an event.

12.6.1.3 Time Impact Analysis

If Design-Builder claims that such event, situation or change affects the Critical Path, it shall provide a time impact analysis, as described in Volume 3, Document 1, Section 4.8.3, indicating all activities represented or affected by the change, with Activity numbers, durations, predecessor and successor Activities, resources and cost, and with a narrative report, in form satisfactory to Authority, which compares to the schedule in effect prior to the start of the delay.

12.6.1.4 Other Supporting Documentation

Design-Builder shall provide such other supporting documentation as may be required by Authority.

12.6.2 Justification

All Requests for Change Orders shall include a narrative justification therefor, detailing all causes of the proposed change, making specific reference to the applicable provisions of this Section 12 which permit a Change Order to be issued, and describing the data and documents which establish the necessity and amount of such proposed change.

12.6.3 Design-Builder Representation

Each Change Order (other than Change Orders issued unilaterally by Authority) shall contain a sworn certification in form acceptable to Authority by Design-Builder that the amount of time and/or compensation requested includes all known and anticipated impacts or amounts, direct, indirect and consequential, which may be incurred as a result of the event or matter giving rise to such proposed change and that Design-

Builder has no reason to believe and does not believe that the factual basis for the Change Order is falsely represented.

12.7 Pricing of Change Orders

Except as otherwise provided herein, Authority and Design-Builder (on its own behalf and on behalf of its Subcontractors) shall endeavor to negotiate, in good faith, a reasonable cost for each Change Order. Subject to the foregoing exceptions, in general the price of a Change Order shall be negotiated in accordance with this Section 12.7 or shall be based on time and materials records pursuant to Section 12.8.

12.7.1 Contents

A negotiated Change Order shall specify, as applicable, scheduling requirements, time extensions and all costs of any nature arising out of the Work covered by the Change Order. Notwithstanding the foregoing, the parties may mutually agree to use a multiple-step process involving issuance of a Change Order which includes an estimated construction cost and which provides for a revised Change Order to be issued after a certain design level has been reached, thus allowing a refinement and further definition of the estimated construction cost.

12.7.2 Unit Price Change Orders

Authority and Design-Builder may agree to negotiate unit prices for changed Work. Measurement of unit-priced quantities will be as specified in the Change Order. Unit prices shall be deemed to include all costs for labor, material, equipment, overhead and profit, and shall not be subject to change regardless of any change in the estimated quantities. Unit-priced Change Orders shall initially include an estimated increase in the Contract Price based on estimated quantities. Upon final determination of the quantities, Authority will issue a modified Change Order setting forth the final adjustment to the Contract Price.

12.7.3 Added Work

When the Change Order adds Work to Design-Builder's scope, the dollar value of the Change Order shall be negotiated based on estimated costs of labor, material and

equipment, or shall be based on actual costs in accordance with Section 12.8. For negotiated Change Orders, mark-ups for profit and overhead shall be as provided in Section 12.8.

12.7.4 Deleted Work

When the Change Order deletes Work from Design-Builder's scope (including deletion of any Work contained in the Contract Documents that is found to be unnecessary), the amount of the reduction in the Contract Price shall be based upon a current estimate including a bill of material, a breakdown of labor, material, and equipment costs and overhead and profit associated with the deleted work. The current estimated amount of risk associated with such Work shall be a factor in determining the mark-up for the deduction. When a deduction is involved, documented cancellation and restocking charges may be included in costs and subtracted from the price deduction.

12.7.5 Work Both Added and Deleted

When the Change Order includes both added and deleted Work, Design-Builder shall prepare a statement of the cost of labor, material and equipment for both added and deleted work.

- (a) If the change results in a net increase in cost, the change shall be treated as Work added and the provisions of Section 12.7.3 shall be used to determine mark-ups for overhead and profit. Mark-ups for overhead and profit will be allowed only for the net increase in cost in order to establish the amount to be added to the Contract Price.
- (b) If the change results in a net decrease in cost, the change shall be treated as Work deleted and the provisions of Section 12.7.4 shall be used on the net decrease in cost in order to establish the price to be deducted from the Contract Price.
- (c) If the change results in a net change of zero, there will be no change in the Contract Price.

12.8 Time and Materials Change Orders

Authority may at its discretion issue a Time and Materials Change Order whenever Authority determines that a Time and Materials Change Order is advisable. The Time and Materials Change Order shall instruct Design-Builder to perform the Work, indicating expressly the intention to treat the items as changes in the Work, and setting forth the kind, character and limits of the Work as far as they can be ascertained, the terms under which changes to the Contract Price will be determined and the estimated total change in the Contract Price anticipated thereunder. Upon final determination of the allowable costs, Authority shall issue a modified Change Order setting forth the final adjustment to the Contract Price. The following costs and mark-ups (and no others) shall be used for calculating the change in the Contract Price. No direct compensation will be allowed for other miscellaneous costs for which no specific allowance is provided in this Section 12.8.

12.8.1 Labor Costs

The cost of labor shall be calculated based on straight time for all hours worked, unless Design-Builder obtains Authority's prior approval for overtime.

12.8.1.1 Construction Labor Costs

Costs of construction labor shall be determined based on the prevailing wage scale for each craft or type of Work, plus payroll taxes and fringe benefits, as applicable. Payroll taxes shall be calculated on base wage only and not on fringe benefits. Fringe benefits shall be applied only to the straight-time component of cost and shall not apply to the premium-time component unless otherwise required by the California Labor Code.

Construction labor costs shall not include costs for management personnel above foreman, office personnel, timekeepers, and maintenance mechanics unless authorized by Authority prior to the start of the Time and Materials Change Order Work. The foreman must be in direct charge of the specific operations and must be at the Site in order to be included in this compensation. The wages of any foreman who is employed partly on Time and Materials Charge Order Work and partly on other work will be

prorated between the two classes of work according to the number of workers employed on each class of work as shown by the payrolls. When the wages of the foreman are prorated, the only time allowed on Time and Materials Change Order Work will be when the foreman is at the Site.

12.8.1.2 Non-Construction Labor Costs

The cost of labor for non-construction-related Work, whether provided by Design-Builder or a Subcontractor, will equal the actual unburdened wages (i.e., the base wage paid to the employee exclusive of any fringe benefits).

12.8.1.3 Subsistence & Travel Allowance

Reimbursements or subsistence and travel allowances paid to workers (whether performing construction or non-construction services) will be allowed only if specifically permitted by the Time and Materials Change Order, and shall be prorated according to the number of hours worked on each class of work.

12.8.2 Material Costs

Material costs shall be the cost of all materials to be used in the performance of construction Work including normal wastage allowance as per industry standards, subject to the requirements set forth in this Section 12.8.2. The material prices shall be supported by valid quotes and invoices from the suppliers. The cost shall include applicable sales taxes, freight and delivery charges and any allowable discounts (exclusive of machinery rentals). Authority reserves the right to approve materials and sources of supply of materials to be furnished by Design-Builder or Subcontractors, and shall have the right to furnish such materials as it deems advisable. The price allowed for materials shall be adjusted as follows:

12.8.2.1 Affiliated Source of Supply

If the materials are obtained from a supply or source owned in whole or in part by Design-Builder, a Subcontractor, or an Affiliate the cost of such materials shall not exceed the lesser of the lowest price charged by Design-Builder, such Subcontractor, or

Affiliate (as applicable) for similar materials furnished to other jobs or the current wholesale price for such materials delivered to the Site.

12.8.2.2 Excessive Cost

If the cost of such materials is, in the opinion of Authority, excessive, then the cost of such materials shall be deemed to be the lowest current wholesale price at which such materials were available, in the quantities needed and delivered to the Site.

12.8.2.3 Evidence of Cost

If Design-Builder or any Subcontractor (as applicable) does not furnish satisfactory evidence of the cost of such materials from the actual supplier thereof within 60 days after the date of delivery of the material, Authority reserves the right to establish the cost of such materials at the lowest current wholesale prices at which such materials were available, in the quantities needed and delivered to the Site.

12.8.3 Equipment

12.8.3.1 Equipment Rental Rates

Design-Builder will be paid for the use of equipment owned or rented by Design-Builder or any Subcontractor for actual use in construction of the Project at the rental rates established in the most recently issued Cost Reference Guide for Construction Equipment (published by EquipmentWatch) which is in effect at the time of commencement of the changed Work.

12.8.3.2 Exclusions

The rates paid as above provided shall be deemed to include compensation for the cost of machinery, special equipment, fuel, oil, lubricants, supplies, small tools, necessary attachments, repairs and maintenance of all kinds, depreciation, storage, insurance and all incidentals. Individual pieces of equipment or tools not listed in said Cost Reference Guide and having an individual replacement value of \$200 or less, whether or not consumed by use, shall be considered to be small tools. Equipment rental rates not provided by said Cost Reference Guide must be approved by Authority before the start of any Time and Materials Change Order Work.

12.8.3.3 Equipment Operators

Equipment operators will be paid for as stipulated in Section 12.8.1.

12.8.3.4 Condition of Equipment

All equipment shall be in good working condition and suitable for the purpose for which the equipment is to be used. If Design-Builder uses equipment of a higher rental value than that suitable for the Work, payment will be made for the equipment and (if applicable) for the operator of the equipment at the rate applicable to the suitable equipment.

12.8.3.5 Classification of Equipment

Unless otherwise specified, manufacturer's ratings and manufacturer-approved modifications shall be used to classify equipment for the determination of applicable rental rates. Equipment which has no direct power unit shall be powered by a unit of at least the minimum rating recommended by the manufacturer of that equipment.

12.8.3.6 Computation of Time

The time to be paid for use of equipment on the Site shall be the time the equipment is in operation on the Time and Materials Change Order Work being performed. The time shall include the reasonable time required to move the equipment to the location of the Time and Materials Change Order Work and return it to the original location or to another location requiring no more time than that required to return it to its original location when the equipment is moved under its own power. When the equipment is moved by means other than its own power, the actual operating time during periods of loading and unloading will be paid at the rental rates, and the actual transportation costs will be added to the sum of the rental costs. No payment for moving or loading and transporting will be made if the equipment is also used at the Site other than for Time and Materials Change Order Work. Time will be computed in half and full hours. In computing the time for use of equipment, less than 30 minutes shall be considered one-half hour.

12.8.4 Permit Fees

Design-Builder will be reimbursed for the cost of any additional permit fees payable as the result of the change in the Work. Back-up documentation supporting each cost item for this category shall be provided by Design-Builder and approved by Authority prior to any payment authorization being granted.

12.8.5 Mark-Ups

The mark-ups (for overhead and profit) and surcharges Authority will pay to Design-Builder on such direct costs for performance of such changed Work are:

- A. For construction labor costs (as set forth in Section 12.8.1.1): 20%;
- B. For non-construction labor costs (as set forth in Section 12.8.1.2): 140%;
- C. For material costs (as set forth in Section 12.8.2): 15%;
- D. For equipment use costs (as set forth in Section 12.8.3): 15%; and
- E. For permit fees (as set forth in Section 12.8.4): 0%.

The mark-ups and labor surcharges under this Section 12.8 are subject to the following:

12.8.5.1 Items Included in Mark-Ups

Unless otherwise indicated in this Section 12.8, the mark-ups and labor surcharges under this Section 12.8 are full and complete compensation for all overhead and other indirect costs of the added or changed Work, as well as for profit thereon. Costs that the Contract specifies are included in mark-ups and surcharges shall not be charged directly. Design-Builder's mark-up percentages and labor surcharges under this Section 12.8 shall be considered to include, among other costs, salary and expenses of executive officers, incidental engineering (such as time spent by engineers on preparation, review, planning, coordination, and/or any other administration relating to construction documents, reports/logs, inspections scheduling, Requests for Information, Requests for Change Orders, schedule/cost estimates, and Claims), supervising officers or supervising employees, clerical or stenographic employees, charges for

minor equipment, such as small tools (as defined in Section 12.8.3.2), consumables (items which are consumed in the performance of the Work which are not a part of the finished product), and other miscellaneous supplies and services, quality assurance and quality control, all bond and insurance premiums, incidental job burdens, bonuses not otherwise covered, field, jobsite and general home office expenses of all types (including timekeepers, bookkeepers and other general office help), supervisory expenses of all types (excluding only direct supervision of force account work) and all other overhead, general condition and indirect costs and expenses.

12.8.5.2 Payment of Mark-Ups

The foregoing mark-ups and labor surcharges will be paid to Design-Builder only for Work it performs; in the case of Work that is subcontracted, the mark-up for Subcontract administration will be allowed to Design-Builder as described in Section 12.8.5.6 and all other mark-ups and labor surcharges will be allowed to the Subcontractor who actually performs the Work.

12.8.5.3 Construction Labor Costs

The mark-up allowed on costs of construction labor shall be full compensation for all indirect labor force costs and all other payments made to, or on behalf of, the worker, as well as for overhead and profit.

12.8.5.4 Non-Construction Labor Costs

The surcharge allowed on non-construction labor costs shall constitute full compensation for all state and federal payroll, unemployment and other taxes, insurance and bond premiums, fringe benefits (including health insurance, retirement plans, vacation, sick leave and bonuses) and all other payments made to, or on behalf of, the worker, as well as overhead and profit.

12.8.5.5 Materials and Equipment

No mark-up will be paid to Design-Builder for any materials or equipment furnished by Authority.

12.8.5.6 Subcontracted Work

Authority will pay Design-Builder one, and only one, mark-up on Subcontracted Work equal to 5% of the Subcontractor's direct costs, provided that Design-Builder may allocate all or any part of such mark-up among intervening Subcontractors. This mark-up shall fully compensate Design-Builder (and all Subcontractors) for administration, general superintendence, overhead, profit and expenses not otherwise recoverable with respect to subcontracted Work. This mark-up shall not apply to (a) Subcontracts with Affiliates or (b) Subcontracts with suppliers.

12.8.5.7 Credit Items

Where Design-Builder's or any Subcontractor's portion of a change involves credit items, or the proposed change is a net deductive change, Design-Builder shall include all Design-Builder's and Subcontractor's overhead and profits in computing the value of the credit.

12.8.6 Time and Materials Records

12.8.6.1 Collection and Maintenance of Data

Design-Builder shall maintain its records in such a manner as to provide a clear distinction between (a) the direct cost of Work for which it is entitled (or for which it believes it is entitled) to an increase in the Contract Price and (b) the costs of other operations. Design-Builder shall contemporaneously collect, record in writing, segregate and preserve (y) all data necessary to determine the costs described in this Section 12.8 with respect to all Work which is the subject of a Change Order or a Request for Change Order, specifically including costs associated with design Work as well as Utility Relocations, but specifically excluding all negotiated Change Orders, and (z) all data necessary to show the actual impact (if any) of the change on the Critical Path with respect to all Work which is the subject of a Change Order or a Request for Change Order, if the impact on the Baseline Schedule or Current Project Schedule (as applicable) is in dispute. Such data shall be provided to the Disputes Board, Authority, and its authorized representatives as directed by Authority, on forms approved by

Authority. The cost of furnishing such reports is included in Design-Builder's predetermined overhead and profit mark-ups.

12.8.6.2 Daily Reports

Design-Builder shall furnish daily to Authority, on forms approved by Authority, reports of Time and Materials Change Order Work. The cost of furnishing such reports shall be included in Design-Builder's overhead and fee percentages. The reports shall include:

- (a) name, classification, date, daily hours, total hours (including both construction and non-construction personnel) and foreman;
- (b) designation, dates, daily hours, and total hours for each unit of machinery and equipment; and
- (c) quantities of materials.

12.8.6.3 Materials

If materials used on the Time and Materials Change Order Work are not specifically purchased for the Work but are taken from stock of a Design-Builder-Related Entity, Design-Builder shall furnish an affidavit of the Design-Builder-Related Entity certifying that such materials were taken from its stock, that the quantity claimed was actually used, and that the price and transportation costs claimed represent its actual costs.

12.8.6.4 Reports As Basis for Payment

The Time and Materials Change Order reports described in Section 12.8.6.2 shall be signed by Design-Builder. Authority shall revise such reports when and as appropriate and add its signature thereto. When a given report is signed by Authority, such report (or revised report, as applicable) will become the basis of payment, but shall not preclude subsequent adjustment based on a later audit (provided that no adjustments shall be made to deferred amounts pursuant to Section 7.3.4). To the extent Design-Builder disagrees with Authority revisions, Design-Builder may submit the issue to dispute resolution in accordance with Section 16.

Design-Builder shall submit weekly a T&M Cost Summary Report which shall be in a form approved by Authority and shall include:

- (a) a summary of the information described in Section 12.8.6.2 for a given week;
- (b) the rates and extension for each worker including both construction and non-construction personnel and foreman;
- (c) the rental rate and extension for each unit of machinery and equipment;
- (d) the prices and extensions for materials;
- (e) transportation costs of materials, machinery, and equipment;
- (f) invoices for materials used and transportation charges; and
- (g) the total costs to date for the Time and Materials Change Order Work.

Design-Builder's (and each Subcontractor's) cost records pertaining to Work paid for on a time and materials basis shall be open, during all regular business hours, to inspection or audit by representatives of Authority during the life of the Agreement and for a period of not less than seven years after Final Acceptance, and Design-Builder (and each Subcontractor) shall retain such records for that period. If an audit is to be commenced more than 60 days after Final Acceptance, Design-Builder will be given a 20 day notice of the time when such audit is to begin.

12.8.7 Compliance with the Federal Acquisition Regulation

Reimbursable expenses shall be limited to and comply with the FAR. Expenses excluded by the FAR shall not be reimbursed. If the FTA asserts that any claimed reimbursable expenses are not reimbursable under FAR, Authority will allow Design-Builder the opportunity to respond to the FTA and defend the allowability of the expenses.

12.8.8 Not-to-Exceed Amount

Each Time and Materials Change Order shall include a not-to-exceed amount. Design-Builder shall notify Authority when it has reached 80% of the not-to-exceed amount. Such notice shall include either a forecast that Design-Builder will complete the Work set forth in the Change Order within the original Not-to-Exceed amount and in accordance with the original schedule, or a forecast as to the final cost and schedule to complete such Work

12.9 Waiver

Design-Builder hereby expressly waives all rights to assert any and all claims based on any change in the work, delay or acceleration (including any change, delay, suspension or acceleration which, but for the express terms of the Contract Documents, could be inferred or implied at law) for which Design-Builder failed to provide proper and timely notice or failed to provide a timely request for Change Order, and agrees that Design-Builder shall be entitled to no compensation or damages whatsoever in connection with the work except to the extent that the Contract Documents expressly specify that Design-Builder is entitled to a Change Order or other compensation or damages.

12.10 Disputes

If Authority refuses to issue a Change Order based on Design-Builder's request, Design-Builder shall nevertheless perform all work as specified in an appropriate Directive Letter, with the right to submit the issue of entitlement to a Change Order to dispute resolution in accordance with Section 16. Design-Builder shall maintain and deliver to Authority, upon request, contemporaneous records, meeting the requirements of Section 12.8.6, for all work performed which Design-Builder believes constitutes extra work (including non-construction work), until all Disputes regarding entitlement or cost of such work are resolved.

If Authority and Design-Builder agree that a request to increase the Contract Price and/or extend any Completion Deadline by Design-Builder has merit, but are unable to agree as to the amount of such price increase and/or time extension, Authority agrees

to mark up the Change Order request or Change Order form, as applicable, provided by Design-Builder to reduce the amount of the price increase and/or time extension as deemed appropriate by Authority. In such event, Authority will execute and deliver the marked-up Change Order to Design-Builder within a reasonable period after receipt of a request by Design-Builder to do so, and thereafter will make payment and/or grant a time extension based on such marked-up Change Order.

Except as otherwise specified in the Change Order, execution of a Change Order by both parties shall be deemed accord and satisfaction of all claims by Design-Builder of any nature arising from or relating to the Work covered by the Change Order. Design-Builder's Claim and any award by the dispute resolver shall be limited to the incremental costs incurred by Design-Builder with respect to the disputed matter (crediting Authority for any corresponding reduction in Design-Builder's other costs) and shall in no event exceed the amounts allowed by Section 12.8 with respect thereto.

12.11 No Release or Waiver

12.11.1 Extension of Time for Performance

No extension of time granted hereunder shall release Design-Builder's Surety or any Guarantor from its obligations. Authority shall not be deemed to have waived any rights under the Contract Documents (including its right to abrogate the Agreement for abandonment or for failure to complete within the time specified, or to impose and deduct damages as may be provided herein) as the result of any grant of an extension of time beyond the date fixed for the completion of any part of the Work, any acceptance of performance of any part of the Work after a Completion Deadline, or the making of any payments to Design-Builder after such date.

12.11.2 No Change Order Based on Course of Conduct or Order by Unauthorized Person

No course of conduct or dealings between the parties nor express or implied acceptance of alterations or additions to the Work, and no claim that Authority has been unjustly enriched shall be the basis for any claim, request for additional compensation or extension of a Completion Deadline. Further, Design-Builder shall undertake, at its

risk, work included in any request, order or other authorization issued by a person in excess of that person's authority as provided herein, or included in any oral request. Design-Builder shall be deemed to have performed such work as a volunteer and at its sole cost. In addition, Authority may require Design-Builder to remove or otherwise undo any such work, at Design-Builder's sole cost.

13.0 AUTHORITY ACCEPTANCE

13.1 Passage of Title

Design-Builder warrants that it owns, or will own, and has, or will have, good and marketable title to all materials, equipment, tools, and supplies furnished, or to be furnished, by it and its Subcontractors that become part of the Project or are purchased for Authority for the operation, maintenance or repair thereof, free and clear of all Liens. Title to all of such materials, equipment, tools, and supplies which shall have been delivered to the Site shall pass to Authority, free and clear of all Liens, upon the sooner of (a) incorporation into the Project, or (b) the date of payment by Authority to Design-Builder for invoiced amounts pertaining thereto. Notwithstanding any such passage of title, Design-Builder shall retain sole care, custody and control of such materials, equipment, tools, and supplies and shall exercise due care with respect thereto, as part of the Work until the Final Acceptance Date or until Design-Builder is removed from the Project.

13.2 Substantial Completion

13.2.1 Design-Builder shall deliver an Application for Substantial Completion to Authority when all of the following have occurred:

- (a) Design-Builder has completed all Work (except for Punch List items, final cleanup and other items included in the requirements for Final Acceptance);
- (b) Design-Builder has ensured that all Work has been performed in accordance with the requirements of the Contract Documents;
- (c) Design-Builder has ensured that the Project may be used without damage to the Project or any other property on or off the Site, and without injury to any Person;
- (d) Design-Builder has complied with all Verification and Acceptance requirements, in accordance with Volume 3-Technical Provisions, Document 1- General Requirements, Section 9, including the submittal and Authority acceptance of all test reports;

(e) Design-BUILDER has successfully completed the Training Program set forth in Volume 3-Technical Provisions, Document 1- General Requirements, Section 11.4;

(f) Authority shall have received and accepted all System and Facility Safety Certifications as described in Volume 3-Technical Provisions, Document 2- Performance Specifications, Section 12;

(g) Design-BUILDER shall have provided Authority with a copy of its "Certificate of Occupancy" obtained from the Metro Fire, Life, Safety, and Security Committee; and

(h) Any special tools purchased by Design-BUILDER as provided in the Contract Documents shall have been delivered to Authority and all replacement spare parts shall have been purchased and delivered to Authority free and clear of Liens.

13.2.2 Upon receipt of Design-BUILDER's Application for Substantial Completion, Authority shall conduct such inspections, surveys and/or testing as Authority deems desirable. If such inspections, surveys and/or tests disclose that any Work does not meet the requirements of the Contract Documents, Authority will promptly advise Design-BUILDER as to any errors, omissions, deviations, defects or deficiencies in the Work necessary to be corrected as a condition to Substantial Completion and as to any errors, omissions, deviations, defects or deficiencies which may be corrected as Punch List items. Upon correction of the errors, omissions, deviations, defects or deficiencies identified as a prerequisite to Substantial Completion, Design-BUILDER shall provide written notification to Authority and Authority shall conduct another round of inspections, surveys and/or tests. This procedure shall be repeated until Authority finds that all prerequisites to Substantial Completion have been met.

13.2.3 Substantial Completion of the Project shall be deemed to have occurred when:

(a) Authority determines that all errors, omissions, deviations, defects and deficiencies identified as prerequisites to Substantial Completion have been corrected; and

(b) Authority and Design-Builder have agreed upon a Punch List for the Project other than punch list items that may be added in accordance with the Metro Cooperative Agreement.

13.2.4 Authority will issue a Certificate of Substantial Completion to Design-Builder at such time as Authority determines that Substantial Completion has occurred.

13.3 Punch List Completion

The term "Punch List Completion" shall mean all Punch List items (including items added pursuant to the Metro Cooperative Agreement) shall have been completed to the reasonable satisfaction of Authority.

13.4 Final Acceptance

13.4.1 On or before the Final Acceptance Deadline, Design-Builder shall perform all Work, if any, which was waived for purposes of Substantial Completion and shall satisfy all of its other obligations under the Contract Documents, including ensuring that the Project has been completed and all components have been properly inspected and tested. Final Acceptance of the Project shall be deemed to have occurred when all of the following have occurred:

(a) All requirements for Substantial Completion and Punch List Completion have been fully satisfied;

(b) Demonstration that the Contract requirements for passenger operation have been met during System Performance Demonstration, including the requirement for System Service Availability and submittal by Design-Builder and acceptance by Authority of the System Performance Demonstration Report, in accordance with Volume 3-Technical Provisions, Document 2- Performance Specifications, Section 13.2.4;

(c) Design-Builder shall have delivered to Authority a certification representing that there are no outstanding claims of Design-Builder or claims, Liens or stop notices of any Subcontractor or laborer with respect to the Work, other than any previously submitted unresolved claims of Design-Builder and any claims, Liens or stop

notices of a Subcontractor or laborer being contested by Design-Builder (in which event the certification shall include a list of all such matters with such detail as is requested by Authority and, with respect to all Subcontractor and laborer claims, Liens and stop notices, shall include a representation by Design-Builder that it is diligently and in good faith contesting such matters by appropriate legal proceedings which shall operate to prevent the enforcement or collection of the same). For purposes of such certificate, the term "claim" shall include all matters or facts which may give rise to a claim;

(d) Authority shall have received and accepted all Design Documents, Record Documents and as-built schedule as described in Volume 3-Technical Provisions, Document 1, right-of-way record maps, surveys, test data and other deliverables required under the Contract Documents;

(e) All of Design-Builder's obligations under the Contract Documents (other than obligations which by their nature are required to be performed after Final Acceptance) shall have been satisfied in full or waived in writing by Authority, including all of Design-Builder's obligations required for "Turnback" as such term is defined in Section 5.1 of the Metro Cooperative Agreement; and

(f) Design-Builder shall have delivered to Authority a Notice of Completion for the Project in recordable form and meeting all statutory requirements.

13.4.2 Authority will issue a Certificate of Final Acceptance to Design-Builder at such time as Authority determines that Final Acceptance has occurred.

13.4.3 Final Acceptance will not prevent Authority from correcting any measurement, estimate or certificate made before or after completion of the Work, nor shall it prevent Authority from recovering from Design-Builder, its Surety(ies), or other provider of performance security or any combination of the foregoing, overpayment or other costs sustained for failure of Design-Builder to fulfill the obligations under the Contract Documents. The occurrence of the Final Acceptance Date shall not relieve Design-Builder from any of its continuing obligations hereunder.

13.4.4 Provided that all conditions to Final Acceptance of the Project have occurred, Design-Builder shall have the right to replace the Performance Bond with a replacement performance bond in an amount and in form satisfactory to Authority in its sole discretion (provided that such replacement bond shall not be required to exceed 10% of the Total Amount) or with such other security as is approved by Authority in its sole discretion, guaranteeing due and punctual performance of all obligations of Design-Builder under the Contract Documents which survive Final Acceptance.

13.5 Assignment of Causes of Action

Design-Builder's attention is directed to the following requirements in Public Contract Code 7103.5:

(b) In entering into a public works contract or a subcontract to supply goods, services, or materials pursuant to a public works contract, the contractor or subcontractor offers and agrees to assign to the awarding body all rights, title, and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Sec. 15) or under the Cartwright Act (Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code), arising from purchases of goods, services, or materials pursuant to the public works contract or the subcontract. This assignment shall be made and become effective at the time the awarding body tenders final payment to the contractor, without further acknowledgment by the parties.

14.0 WARRANTIES

14.1 Warranties

14.1.1 Warranty

Design-Builder warrants that (a) all design Work furnished pursuant to the Contract Documents shall conform to all professional engineering principles generally accepted as standards of the industry in the State of California, (b) the Project shall be free of defects, including design defects, errors and omissions other than design defects inherent in prescriptive specifications included in the Contract Documents provided by Authority, (c) the Project shall be fit for use for the intended function, (d) materials and equipment furnished under the Contract Documents, except for Authority-Furnished Materials, shall be of good quality and new and (e) the Work shall meet all of the requirements of the Contract Documents.

14.1.2 Warranty Term

The Warranties shall commence at Substantial Completion and shall remain in effect until the later of (a) two years after Substantial Completion or (b) the Final Acceptance Date. The term of the Warranties is subject to extension pursuant to Section 14.2. The foregoing shall not, however, be deemed to entitle Authority to require Design-Builder to correct any patent deficiencies beyond the limitations period stated in Code of Civil Procedure Section 337.1. If Authority determines that any of the Work has not met the standards set forth in Section 14.1 at any time within the Warranty period, then Authority shall provide written notice to Design-Builder describing such Work and requesting that such non-conforming Work be corrected. Design-Builder shall correct such Work as specified below. Authority and Design-Builder shall conduct a walkthrough of the Site at the end of each year during the Warranty period and shall produce a punch list of those items requiring Warranty Work.

14.1.3 Remedy

Within seven days of receipt by Design-Builder of notice from Authority specifying the Work which has not met the standards set forth in Section 14.1 Design-Builder and Authority shall mutually agree when and how Design-Builder shall remedy such

violation; provided, however, that in case of an emergency requiring immediate curative action, Design-Builder shall implement such action as it deems necessary and shall notify Authority immediately of the urgency of a decision. Design-Builder and Authority shall agree on such remedy immediately upon notice by or to Authority of such emergency. If Design-Builder does not use its best efforts to proceed to effectuate such remedy within the agreed time, or should Design-Builder and Authority fail to reach such an agreement within a seven-day period (or immediately, in the case of emergency conditions), Authority, after notice to Design-Builder, shall have the right to perform or have performed by third parties the necessary remedy, and the costs thereof shall be borne by Design-Builder.

14.1.4 Permits and Costs

Design-Builder shall be responsible for obtaining and complying with all permits required in connection with the performance of any Warranty Work. Further, Design-Builder shall coordinate with the contractors for the Iconic Freeway Structure Project and Parking Facility Project in the performance of any Warranty Work. Design-Builder shall bear all costs of Warranty Work, including additional testing and inspections, and shall reimburse Authority or pay Authority's expenses made necessary thereby within 10 days after Design-Builder's receipt of invoices therefor.

14.2 Applicability of Warranties to Re-Done Work

The Warranties shall apply to all Work re-done or replaced pursuant to the terms of the Contract. In the event any Work is re-done or replaced, the Warranty for such Work shall extend to the later of one year after acceptance of the re-done or replaced Work by Authority in accordance with the Contract Documents or the expiration of the Warranty term, provided that the Warranty for re-done or replaced Work shall not extend beyond one year after the expiration of the original Warranty term.

14.3 Subcontractor Warranties

14.3.1 Warranty Requirements

Without in any way derogating Design-Builder's own representations and warranties and other obligations with respect to all of the Work, Design-Builder shall obtain from all Subcontractors and cause to be extended to Authority appropriate representations, warranties, guarantees and obligations with respect to design, materials, workmanship, equipment, tools and supplies furnished by such Subcontractors. All representations, warranties, guarantees and obligations of Subcontractors (a) shall be written so as to survive all Authority and Design-Builder inspections, tests and approvals, and (b) shall run directly to and be enforceable by Design-Builder and/or Authority and their respective successors and assigns. Design-Builder hereby assigns to Authority all of Design-Builder's rights and interest in all extended warranties for periods exceeding the applicable warranty period which are received by Design-Builder from any of its Subcontractors.

14.3.2 Enforcement

Upon receipt from Authority of notice of a failure of any of the Work to satisfy any Subcontractor warranty, representation, guarantee or obligation, Design-Builder shall be responsible for enforcing or performing any such representation, warranty, guaranty or obligation, in addition to Design-Builder's other obligations hereunder. Authority's rights under this Section 14.3.2 shall commence at the time such representation, warranty, guaranty or obligation is furnished and shall continue until the expiration of Design-Builder's relevant warranty (including extensions for redone Work). Until such expiration, the cost of any equipment, material, labor (including re-engineering) or shipping shall be for the account of Design-Builder if such cost is covered by such a warranty and Design-Builder shall be required to replace or repair defective equipment, material or workmanship furnished by Subcontractors.

14.4 No Limitation of Liability

The foregoing Warranties and Subcontractor warranties are in addition to all rights and remedies available under the Contract Documents or applicable law, and shall not limit

Design-Builder's liability or responsibility imposed by the Contract Documents or applicable law with respect to the Work, including liability for design defects, latent construction defects, strict liability, negligence or fraud.

14.5 Warranty Beneficiaries

In addition to benefiting Authority and its successors and assigns, the Warranties and Subcontractor warranties provided under this Section 14 (including Warranties for re-done Work) shall inure to the benefit of, and shall be directly enforceable by Settlor and Trustee in accordance with Appendix 11, and by Metro, Caltrans, and/or City, to the extent required under the Master Cooperative Agreements set forth in Volume 5-Agreements.

14.6 Damages for Breach of Warranty

Design-Builder shall be liable for actual damages resulting from any breach of an express or implied warranty or any defect in the Work.

14.7 Disputes

Any disagreement between Authority and Design-Builder relating to this Section 14 shall be subject to the dispute resolution provisions contained in Section 16, provided that Design-Builder shall proceed as directed by Authority pending resolution of the dispute.

15.0 VALUE ENGINEERING

Design-Builder is encouraged to submit Value Engineering Change Proposals (“VECPs”) for the purpose of enabling Design-Builder and Authority to take advantage of potential cost savings from changes in the Contract requirements but which do not adversely impact essential characteristics of the Project. Design-Builder is encouraged to submit VECPs whenever it identifies potential savings or improvement. Authority may also request Design-Builder to develop and submit a specific VECP. Design-Builder has the right to refuse to consider such Authority-requested VECP.

15.1 Description of VECPs

A VECP is a proposal developed and documented by Design-Builder which:

- A. Would modify or require a change in any of the requirements of or constraints set forth in the Contract Documents in order to be implemented; and
- B. Reduces the Contract Price without impairing essential functions or characteristics of the Work, including the meeting of requirements contained in all Governmental Approvals, and provided that it is not based solely upon a change in quantities.

15.2 Information to be Provided

At a minimum, the following information shall be submitted by Design-Builder with each VECP:

- (a) Description of the existing Contract requirements which are involved in the proposed change;
- (b) Description of the proposed change;
- (c) Discussion of differences between existing requirements and the proposed change, together with advantages and disadvantages of each changed item;

- (d) Itemization of the Contract requirements which must be changed if the VECP is approved (e.g., drawing numbers and specifications);
- (e) Justification for changes in function or characteristics of each item, and effect of the change on the performance of the end item, as well as on the meeting of requirements contained in the Contract Documents;
- (f) Date or time by which a Change Order adopting the VECP must be issued in order to obtain the maximum cost reduction, noting any effect on any schedules including the Current Project Schedule and Payment Milestone Schedule;
- (g) Cost estimate for existing Contract requirements compared to Design-Builder's cost estimate of the proposed changes; and
- (h) Costs of development and implementation by Design-Builder.

15.3 Review by Authority

Design-Builder shall submit VECPs directly to Authority. Authority will process VECPs expeditiously, but shall not be liable for any delay in acting upon any VECP. Design-Builder may withdraw all or part of any VECP at any time prior to approval by Authority, but, in the event of such withdrawal, shall be liable for costs incurred by Authority in reviewing the withdrawn portion of the VECP. In all other circumstances each party shall bear its own costs in connection with the study, preparation and review of VECPs.

15.4 Approval of VECPs

Authority may approve, in its sole discretion, in whole or in part, by Change Order, any VECP submitted. Designs for approved VECPs shall be prepared by Design-Builder for incorporation into the Design Documents. Until a Change Order is issued on a VECP, Design-Builder shall remain obligated to perform in accordance with the Design Documents and other Contract Documents. The decision of Authority as to rejection or approval of any VECP shall be at the sole discretion of Authority and shall be final and not subject to any formal dispute resolution.

15.5 Contract Price Adjustment

If Authority accepts a VECP submitted by Design-Builder, the Contract Price shall be adjusted in accordance with the following:

- (a) The term “estimated net savings” as used herein shall mean (i) the difference between the cost of performing the Work according to the Contract Documents and the actual cost to perform it according to the proposed change, less (ii) any additional costs incurred by Authority resulting from the VECP, other than the costs of Authority review in accordance with Section 15.3. Design-Builder’s profit shall not be considered part of the cost.
- (b) Except as specified herein, Design-Builder is not entitled to share in either collateral or future contract savings. The term “collateral savings” means those measurable net reductions in Authority’s costs resulting from the VECP, including maintenance costs and cost of Authority-Furnished Materials. The term “future contract savings” shall mean reductions in the cost of performance of future construction contracts for essentially the same item resulting from a VECP submitted by Design-Builder.
- (c) The Contract Price shall be reduced by an amount equal to 50% of estimated net savings, provided that Design-Builder’s profit shall not be reduced by application of the VECP.
- (d) In a case where Design-Builder proposes that an adjustment be made to the planned acquisition of real property or to the area which has been environmentally cleared for the Project in order to result in an overall cost savings to the Project (such as a proposal that additional real property be purchased in order to save on the cost of structures, or a proposal which would enable a reduction in the real property required to be obtained by Authority hereunder by incurring additional construction costs): the VECP shall compare (a) the incremental reduction in costs (such as for not designing and building a wall), and (b) the costs involved in adjusting the

real property limits or environmental clearances (which shall be based on Design-Builder's additional costs, such as for providing real property acquisition support services (including profit) plus Authority's additional costs, including costs of personnel as well as out-of-pocket costs such as the price of the additional real property), or shall compare (c) the incremental reduction in costs (if any) for not acquiring the unnecessary real property, and (d) the additional construction costs to be incurred. The estimated net savings shall be shared 50-50 between Authority and Design-Builder. In the event Design-Builder wishes to propose such a VECP, Design-Builder shall provide a separate notification to Authority describing the proposed impact concurrently with delivery of the VECP to Authority.

- (e) Design-Builder's share of any VECP cost savings shall be payable at such time as payments would have been made for the Work which is the subject of the VECP had the VECP not been implemented.

16.0 PARTNERING; DISPUTE RESOLUTION

Section 16.1 sets forth a framework for voluntary partnering between the parties in connection with the Project. It is the intent of the parties that before resorting to the dispute resolution provisions contained in Sections 16.2 through 16.12, the parties shall engage in informal efforts to resolve all disputes arising out of the Work. The provisions of Sections 16.2 through 16.12 shall apply to all disputes, claims and other controversies arising out of the Work, except as expressly provided to the contrary in the Contract Documents.

16.1 PARTNERING

16.1.1 Intent

The parties are committed to a partnering process among Authority, Design-Builder and its Subcontractors. The partnering process is intended to draw on the strengths of each organization to help identify and achieve reciprocal goals, including achieving completion of the Work on time, within budget and in accordance with its intended purpose. A primary consideration of partnering is the prompt and equitable resolution of issues affecting the conduct of the Work under the Contract and the rights and responsibilities of the respective parties.

16.1.2 Participation and Responsibilities

This partnering will be bilateral and participation will be voluntary but is strongly encouraged by Authority. Any cost associated with this partnering will be agreed to by both parties and will be shared equally, except that Design-Builder and Authority will each be responsible for the salaries, travel and subsistence costs of its own attendees.

16.1.3 Workshops

Within 30 days of the Notice to Proceed Design-Builder and Authority will mutually select a third-party facilitator to conduct the team building workshop for Design-Builder and Authority personnel. The initial workshop should be held within 60 days of the Notice to Proceed. The workshop is expected to last approximately one day and will be held in close proximity to Authority's offices. Key staff of Design-Builder and

Subcontractors whose Subcontract price is valued at or greater than ½ of 1% of the Total Amount as well as Authority's key staff responsible for the management and administration of the Contract should attend the workshop. During the initial workshop, a program for the continuation and maintenance of the partnering initiative will be developed for use through the duration of the Project.

Follow-up workshops may be held periodically throughout the duration of the Contract as agreed by Design-Builder and Authority. The partnering sessions will focus on how to work together to smoothly process payments, change orders, requests for information, delay requests, substitutions and other typical interactions and interfaces between Design-Builder, Authority and consultants. The sessions are meant to establish channels of communication to maximize productivity of everyone working on the Project and minimize conflict.

16.1.4 Rights of Parties

Either party may withdraw from partnering upon written notice to the other. However, no claim or dispute settled or change approved through partnering shall be revived. The establishment of a partnering charter will not change the legal relationship of the parties to the Contract nor relieve either party from any of the terms of the Contract.

16.2 Introduction

A disputes review board (the "Disputes Board") will be established to assist in the resolution of disputes, claims and other controversies arising out of the Work. This Section 16 describes the purpose, procedure, function and key features of the Disputes Board. The form of the Disputes Board Agreement which will formalize the creation of the Disputes Board is attached hereto as Appendix 9.

16.2.1 Function of Disputes Board

The Disputes Board will assist in and facilitate the timely and equitable resolution of disputes between Authority and Design-Builder, in an effort to avoid construction delay and litigation. It is not intended for Authority or Design-Builder to default on the normal responsibility to amicably and fairly settle their differences by indiscriminately assigning

them to the Disputes Board. It is intended that the Disputes Board encourage Authority and Design-Builder to resolve potential disputes without resorting to this appeal procedure.

16.2.2 Appeal to Disputes Board; Conditions Precedent to Litigation

Either Authority or Design-Builder may appeal a dispute to the Disputes Board. Design-Builder shall have no right to submit a claim or other dispute to the Disputes Board unless the issue has been reduced to writing by the Chief Executive Officer of Authority or its representative. Design-Builder's refusal to allow Authority to exercise its audit rights under the Contract Documents shall also preclude Design-Builder from submitting a claim or other dispute to the Disputes Board (other than a dispute regarding the scope of the audit). Submission of claims and disputes to the Disputes Board shall be a condition precedent to Design-Builder's ability, where the amount in controversy is greater than \$1,000,000, to file a complaint in court to obtain resolution of the claim or dispute.

16.3 Continuance of Work During Dispute

At all times during the course of the dispute resolution process, Design-Builder shall continue with the Work as directed, in a diligent manner and without delay, or shall conform to Authority's decision or order, and shall be governed by all applicable provisions of the Contract Documents. Records of the Work shall be kept in sufficient detail to enable payment in accordance with applicable provisions in the Contract Documents, if this should become necessary.

16.4 Membership

The Disputes Board will consist of one member selected by Authority, one member selected by Design-Builder, and a third member selected by the first two members and approved by both Authority and Design-Builder and who meets the qualifications for an arbitrator under Public Contract Code sections 10240 *et seq.* and implementing regulations. It is further agreed that any third member will act as chairman for all Disputes Board activities.

16.4.1 Experience of Members

It is desirable that all Disputes Board members be experienced with light rail design and construction, as well as in resolution of disputes involving interpretation of design-build contracts. The goal in selecting the third member is to complement the dispute resolution experience of the first two and to provide leadership for the Disputes Board's activities.

16.4.2 Avoidance of Appearance of Conflict

It is imperative that Disputes Board members show no partiality to either Design-Builder or Authority, or have any conflict of interest.

16.4.2.1 No member shall be an Affiliate or otherwise have a financial interest in the Contract or in the outcome of any dispute decided hereunder, except for the right to receive payment for serving on the Disputes Board.

16.4.2.2 No member shall have ever been previously employed (or have their employer employed) by Authority, Metro, Design-Builder or any Affiliate, within two years prior to the Proposal Date, except for fee-based consulting services on other projects which are disclosed to all parties, or otherwise have had financial ties to, any party to the Contract during such period.

16.4.2.3 No member shall have had substantial prior involvement in the Project or relationship with any party, Metro, or any Affiliate of a nature which could compromise their ability to impartially resolve disputes.

16.4.2.4 No member shall accept employment with Authority, Metro, Design-Builder or any Affiliate during the term hereof and for so long thereafter as any obligations remain outstanding under the Contract Documents, except as a member of other disputes boards.

16.4.2.5 No member shall discuss employment with Design-Builder, any Affiliate, Authority, Metro, or any consultants working on the Project during the term hereof and

for so long thereafter as any obligations remain outstanding under the Contract Documents.

16.4.3 Submission of Disclosure Statements

Before their appointments are final, the first two prospective members shall submit complete disclosure statements for the approval of both Authority and Design-Builder. Each statement shall include a resume of experience, together with a declaration describing all past, present and anticipated or planned future relationships to the Project and with all parties involved in the Contract, including disclosure of past or current professional or close personal relationships with Design-Builder, any Affiliate, Authority or its consultants working on the Project, or with any key member of any such Person. The third Disputes Board member shall supply such a statement to the first two Disputes Board members and to Authority and Design-Builder prior to approval of his or her appointment.

16.4.4 Selection Process

Authority and Design-Builder shall each select and negotiate a working agreement with their respective member within six weeks after award of the Contract. Immediately after approval of their respective members, Authority and Design-Builder will notify their respective members to begin selection of the third member. The first two members shall ensure that the third member meets all of the criteria listed above. The third member shall be selected within four weeks after the first two members are notified to proceed with the selection. In the event of an impasse in selection of the third member, that member shall be selected by mutual agreement of Authority and Design-Builder. In so doing, they may, but are not required to, consider the nominees offered by the first two members. If Authority and Design-Builder cannot agree in the selection of the third member, then each party may submit a list of up to five candidates to a court of competent jurisdiction for judicial resolution of the selection of the third member.

16.4.5 Execution of Agreement

Authority, Design-Builder, and all three members of the Disputes Board shall execute the Disputes Board Agreement within four weeks after the selection of the third member.

16.4.6 Reconstitution of the Disputes Board

Authority and Design-Builder shall each have the right, one time only, to require appointment of a new disputes review board to resolve future Disputes, which right may be exercised at any time by delivery of notice to such effect to the other party and to the Disputes Board. In such event a new Disputes Board Agreement, in the same form as Appendix 9 attached hereto, shall be executed establishing a new board, and except as otherwise mutually agreed by Authority and Design-Builder, the work to be performed by the Disputes Board shall be limited to Disputes submitted to the Disputes Board before delivery of the notice requiring appointment of a new Disputes Board.

16.5 Operation

The Disputes Board shall formulate its own rules of operation in accordance with the Disputes Board Agreement.

16.5.1 Progress Reports

In order to keep abreast of design and construction development and progress, the members will be provided regular written progress reports and other relevant data from Authority and Design-Builder. Design-Builder or Authority may provide supplemental progress reports if it chooses, after consultation with the other party. Such supplemental progress report(s) shall be limited to material pertaining to disputes that have already been presented to the Disputes Board. Neither Authority nor Design-Builder shall submit supplemental progress reports pertaining to issues that have not been previously presented to the Disputes Board. Authority and Design-Builder shall provide a copy of any supplemental progress report to the other party.

16.5.2 Regular Meetings

The Disputes Board shall visit the Project and meet with representatives of Authority and Design-Builder at regular intervals and at times of critical events. The frequency of these visits shall be as agreed among Authority, Design-Builder and the Disputes Board, depending on the progress of the Work. The regular meetings shall be held at the Site. Each meeting shall consist of an informal round table discussion followed by a field inspection of the Project. The round table discussion shall be attended by selected personnel from Authority and Design-Builder. The agenda shall generally include the following:

- (a) Meeting convened by the chairman of the Disputes Board;
- (b) Opening remarks by Authority's representative and Design-Builder's representative;
- (c) A description by Design-Builder's representative of Work accomplished since the last meeting, current status of the Work schedule, schedule for future Work, potential disputes, claims and other controversies, proposed solutions for these problems;
- (d) Discussion by Authority's representative of the Work schedule as Authority views it, potential disputes, claims and other controversies, status of past disputes, claims and other controversies; and
- (e) Set tentative date for next meeting.

If it is considered necessary by the parties, Authority will prepare minutes of regular meetings and circulate them for comments, revisions, and/or approval of all concerned.

The field inspection shall cover all active segments of the work. The Disputes Board shall be accompanied by representatives of both Authority and Design-Builder.

16.5.3 No Ex Parte Communications

The parties are expressly prohibited from seeking any Disputes Board member's advice or consultation or discussing any aspect of an existing or potential dispute, claim or other controversy, unless duly authorized representatives of both parties agree otherwise, in writing.

16.6 Procedures and Schedule for Dispute Resolution

16.6.1 Impartiality of Disputes Board

The Disputes Board shall fairly and impartially consider disputes referred to it, and shall provide written recommendations to Authority and Design-Builder, to assist in the resolution of disputes submitted to the Disputes Board in accordance herewith.

16.6.2 Time Periods

Disputes shall be considered as quickly as possible, taking into consideration the particular circumstances and the time required to prepare detailed documentation. Steps may be omitted as agreed by both parties, and the time periods stated below may be shortened in order to hasten resolution. Authority may submit a claim or dispute to the Disputes Board at any time. Before Design-Builder shall have the right to submit a claim or dispute to the Disputes Board, it must first comply with the following procedures.

16.6.2.1 If Design-Builder objects to any written decision, action or order of Authority, Design-Builder may file a written protest with Authority, stating clearly, and in detail, the basis for the objection, within ten days after the date on which Design-Builder first becomes aware of the decision, action or order. In the event any such protest is not filed within this time period, Design-Builder shall be deemed to have waived the right to collect any and all costs incurred prior to the date of delivery of the protest, and shall be deemed to have waived the right to seek an extension of the Completion Deadline with respect to any delay in the Critical Path which occurred prior to the date of the protest. This waiver shall occur whether or not there is any showing of prejudice to Authority resulting from the delay in filing the protest.

16.6.2.2 Authority will consider the written protest and make its decision (the "Authority Decision") on the basis of the pertinent provisions of the Contract, together with the facts and circumstances involved in the dispute. The decision will be furnished in writing to Design-Builder, within two weeks after receipt of Design-Builder's written protest, provided that if no written decision is issued, Authority shall be deemed to have denied Design-Builder's written protest and an Authority Decision to that effect shall be deemed received by Design-Builder at the end of such two-week period. This decision shall be final and conclusive on the subject, unless a written appeal to Authority is filed by Design-Builder within 30 days of receiving an Authority Decision.

16.6.2.3 If a written appeal is submitted to Authority, both parties shall pursue the matter further to attempt to settle the dispute. If Authority fails to issue a new decision within two weeks after the date on which the appeal is submitted, the existing Authority Decision shall be final and conclusive at the end of such two-week period. If Authority issues a new decision within such two-week period, such decision shall be the Authority Decision and shall be final and conclusive on the date it is issued.

16.6.2.4 If the Authority Decision does not resolve the dispute, then either party may submit the claim or dispute to the Disputes Board, or, if the Disputes Board does not then exist, directly to the courts. The claim or dispute shall be submitted to the Disputes Board by written notice of appeal, delivered to the Disputes Board and simultaneously served upon the other party. The notice of appeal (or complaint if the Disputes Board does not exist) shall be filed and served within 30 days following the date on which the Authority Decision becomes final, and shall state clearly and in full detail the specific issues of the dispute to be considered. If no notice of appeal or complaint is filed within 30 days following the date upon which the Authority Decision is final, the Authority Decision shall be final, conclusive and binding upon the parties.

16.6.2.5 When a dispute is appealed to the Disputes Board, the Disputes Board, with input from Design-Builder and Authority, shall first decide when to conduct the hearing. If the matter is not urgent, it may be heard at the next regular Disputes Board meeting. For an urgent matter, the Disputes Board shall meet at its earliest convenience.

16.6.2.6 Once a notice of appeal is filed with the Disputes Board, discovery shall be permitted to the full extent provided by Code of Civil Procedure sections 1283.05(a) through (d); provided that the parties may agree to shorten the discovery period for individual disputes. During the hearing, Design-Builder and Authority shall each have ample opportunity to be heard and to offer evidence. Detailed procedures are set forth in Section 16.6.4. The Disputes Board's recommendations for resolution of the dispute shall be given in writing, to both Authority and Design-Builder, within two weeks of completion of the hearings. In exceptionally difficult cases, this time may be extended by mutual agreement of all parties.

16.6.2.7 If requested by either party, the Disputes Board shall meet with Authority and Design-Builder to provide additional clarification of its recommendation.

16.6.2.8 Within two weeks after receiving the Disputes Board's recommendations, or such other time specified by the Disputes Board, both Authority and Design-Builder shall respond to the other and to the Disputes Board in writing, signifying either acceptance or rejection of the Disputes Board's recommendations. The failure of either party to respond within the specified period shall be deemed an acceptance of the Disputes Board's recommendations. If with the aid of the Disputes Board's recommendations, Authority and Design-Builder are able to resolve their dispute, Authority will promptly process any required Contract changes.

16.6.2.9 Except as limited in Section 16.6.2.11, should a party reject the Disputes Board's recommendations and give notice of such rejection pursuant to Section 16.6.2.8, it shall have the following options:

(a) Within two weeks after receiving the recommendations, the party may appeal the recommendations back to the Disputes Board by submitting an appeal. If such an appeal is made, then the six-month period described in Section 16.6.2.9(c) shall not begin to run until 30 days after the Disputes Board's ruling regarding the appeal. The Disputes Board's recommendations regarding a particular dispute may be appealed back to the Disputes Board only once.

(b) If the amount in controversy is less than or equal to \$1,000,000, and either party appeals the recommendations back to the Disputes Board, then the Disputes Board's decision on the appeal shall be final and binding on the parties. If the amount in controversy is less than or equal to \$1,000,000 and neither party appeals the recommendations back to the Disputes Board, then the Disputes Board's initial recommendations shall be final and binding on the parties.

(c) If the amount in controversy is greater than \$1,000,000, and whether or not it has filed an appeal back to the Disputes Board, then within six-months following issuance of the Disputes Board recommendations, the party may submit the dispute to judicial resolution by filing a complaint in a court of competent jurisdiction. If the amount in controversy is greater than \$1,000,000 and the dispute has not been submitted to judicial resolution by the filing of a complaint in a court of competent jurisdiction within the required six-month period, then the recommendations made by the Disputes Board shall be final and binding on the parties.

(d) The parties may resort to other methods of settlement, should they mutually agree to do so.

16.6.2.10 The parties hereby agree that, except to the extent that any provision of California Government Code Sections 900 et seq. requires presentation of a claim on a date prior to the deadline for submitting a claim to the Disputes Board under Section 16.6.2.4, all statutes of limitation shall be tolled from the date of submission of a dispute to the Disputes Board to the date of the final recommendation.

16.6.2.11 Notwithstanding anything to the contrary in this Section 16.6.2, as permitted by Public Contract Code section 20104(a)(2), each dispute where the amount in controversy is equal to or less than \$375,000, shall be heard and determined by an arbitrator or arbitrators selected pursuant to Public Contract Code sections 10240 et seq. (the "State Arbitration Act"), and in accordance with the procedures set forth in California Code of Regulations, Title 1, Chapter 4, sections 1300 et seq. (the "Regulations"). Authority and Design-Builder agree to select the Disputes Board to act as arbitrators under the State Arbitration Act for all such disputes, as permitted by

Public Contract Code section 10240.3 and Section 1321(a) of the Regulations; provided that the parties may, in lieu of appointing the entire Disputes Board, agree to appoint the third member of the Disputes Board as such arbitrator. The parties intend to comply with the State Arbitration Act, and agree that the State Arbitration Act and Regulations shall be applicable with respect to Disputes up to \$375,000, except as otherwise provided herein. Accordingly, for disputes up to \$375,000, the decision of the Disputes Board (or third member) will be made in accordance with and will be binding pursuant to the Regulations and the State Arbitration Act.

16.6.3 Disputes Board Recommendations Not Admissible

Although both Authority and Design-Builder should place great weight on the Disputes Board's recommendations, no such recommendation shall be admissible as evidence in any litigation concerning the same dispute, any subsequent litigation or other dispute resolution proceeding, except in cases involving the failure of a party to implement a binding decision under Section 16.6.2. Findings of fact by the Disputes Board shall not be collateral estoppel in any other proceeding involving the same issue, but final Disputes Board decisions which are binding pursuant to Section 16.6.2 hereunder shall be res judicata.

16.6.4 Hearings

16.6.4.1 Normally the hearing will be conducted at the Site. However, any location that would be more convenient and still provide all required facilities and access to necessary documentation is satisfactory. Private sessions of the Disputes Board may be held at any convenient location.

16.6.4.2 The third member of the Disputes Board will act as chairman of the hearing, or he or she may appoint one of the other members to be chairman. Normally each member keeps their own notes, and a formal transcript is not prepared. In special cases, when requested by either party, the Disputes Board may allow preparation of a transcript by a court reporter. Audio or video recordings should not be permitted.

16.6.4.3 Authority and Design-Builder shall have representatives at all hearings. Design-Builder will first discuss the dispute, followed by Authority. Each party will then be allowed successive rebuttals until all aspects are fully covered. The Disputes Board members may ask questions, request clarification, or ask for additional data. In large or complex cases, additional hearings may be necessary in order to consider and fully understand all the evidence presented by both parties. Both Authority and Design-Builder shall be provided full and adequate opportunity to present all of their evidence, documentation and testimony regarding all issues before the Disputes Board. The Disputes Board shall not be bound by the rules of evidence, except for those pertaining to privilege. During the hearings, no Disputes Board member shall express any opinion concerning the merit of any facet of the case.

16.6.5 Recommendations of Disputes Board

After the hearings are concluded, the Disputes Board shall meet to formulate its recommendations. All Disputes Board deliberations shall be conducted in private, with all individual views kept strictly confidential. The Disputes Board's recommendations, together with an explanation of its reasonings, shall be submitted as a written report to both parties. The recommendations shall be based on the pertinent provisions of the Contract, applicable Governmental Rules, and the facts and circumstances involved in the dispute. The Disputes Board shall make every effort to reach a unanimous recommendation. If this proves impossible, the dissenting member may prepare a minority report.

16.6.6 Matters Ineligible for Disputes Review Board Procedures

The dispute resolution procedures set forth in this Section 16.6 shall not apply to the following (collectively, "Ineligible Matters"):

- (a) Any matters that the Contract Documents expressly state are final, binding or not subject to dispute resolution;
- (b) Any matters relating to the scope or applicability of indemnities provided under the Contract Documents;

- (c) Any claim for injunctive relief;
- (d) Any claim against an insurance company, including any Subcontractor dispute that is covered by insurance;
- (e) Any claim arising solely in tort;
- (f) Any claim between Design-Builder or Authority and a third party in which the third party is a necessary or appropriate party to such dispute, including any related claims between the Parties arising therefrom;
- (g) Any claim for, or dispute based on, remedies expressly created by statute;
and
- (h) Any dispute that is actionable only against a Surety.

16.7 Compensation

Fees and expenses of all three members of the Disputes Board shall be shared equally by Authority and Design-Builder and shall be eligible in accordance with Authority's "Business and Travel Policy" on file in Authority's offices. Authority will prepare and mail minutes and progress reports, will provide administrative services, such as conference facilities and secretarial services, and will have the right to require Design-Builder to pay for half of the cost of these services. If the Disputes Board desires special services, such as legal consultation, accounting, data research, and the like, both parties must agree, and the costs will be shared by them as mutually agreed. Design-Builder shall pay the invoices of all Disputes Board members after approval by both parties. Design-Builder will then invoice Authority for 50% of the amount of such invoices.

16.8 Cooperation

The parties shall diligently cooperate with one another and the Disputes Board, and shall perform such acts as may be necessary to obtain a prompt and expeditious resolution of the dispute.

16.9 Provisional Remedies

No party shall be precluded from initiating a proceeding in a court of competent jurisdiction for the purpose of obtaining any emergency or provisional remedy which may be necessary, and which is not otherwise available under this Section 16, to protect its rights, including temporary and preliminary injunctive relief, attachment, claim and delivery, receivership and any extraordinary writ.

16.10 Continuing Performance

Failure by Authority to pay any amount in dispute shall not alleviate, diminish or modify in any respect Design-Builder's obligation to perform under the Contract Documents, including Design-Builder's obligation to achieve Final Acceptance of the Project in accordance with the Contract Documents, and Design-Builder shall not cease or slow down its performance under the Contract Documents on account of any such amount in dispute. Upon resolution of any such dispute each party shall promptly pay to the other any amount owing.

16.11 Participation in Other Proceedings

Design-Builder agrees that, at Authority's request, third parties which are involved in the design or construction of any part of the Project may be joined as parties in dispute resolution proceedings under Section 16. Also, if requested by Authority, Design-Builder will allow itself to be joined as a participant in, and be bound by, any arbitration or other proceeding that involves Authority and any other participant in the design or construction of any part of or related to the Project. If Design-Builder participates in any proceeding before the disputes board established under the contracts for Iconic Freeway Structure Project or the Parking Facilities Project, it shall have the rights held by "Such Other Design-Builders" under Section 6.1 of the Disputes Board Agreement for such contract. This provision is for the benefit of Authority and not for the benefit of any other party.

16.12 Attorneys' Fees

The prevailing party in any proceeding (including appeals) shall be entitled to recover from the losing party reasonable costs and court costs, including reasonable attorneys' fees, expert witness fees and the reasonable cost of the arbitrator or other dispute resolver, as determined by the person(s) resolving the dispute.

17.0 DEFAULT

17.1 Default of Design-Builder

17.1.1 Design-Builder shall be in default under the Contract upon the occurrence of any one or more of the following events or conditions:

- (a) Design-Builder fails promptly to begin the Work under the Contract Documents; or
- (b) Design-Builder fails to perform the Work in accordance with the Contract Documents, including conforming to applicable standards set forth therein in constructing the Project, or refuses to remove and replace rejected materials or unacceptable Work; or
- (c) Design-Builder discontinues the prosecution of the Work (exclusive of work stoppage (i) due to termination by Authority, or (ii) due to and during the continuance of a Force Majeure event or suspension by Authority); or
- (d) Design-Builder fails to resume performance of Work which has been suspended or stopped, within a reasonable time after receipt of notice from Authority to do so or (if applicable) after cessation of the event preventing performance; or
- (e) Design-Builder shall have become insolvent, or generally does not pay its debts as they become due, or admits in writing its inability to pay its debts or makes an assignment for the benefit of creditors; or
- (f) Insolvency, receivership, reorganization or bankruptcy proceedings shall have been commenced by or against Design-Builder; or
- (g) Any representation or warranty made by Design-Builder or any Guarantor in the Contract Documents or any certificate, schedule, instrument or other document delivered by Design-Builder pursuant to the Contract Documents shall have been false or materially misleading when made; or

(h) Design-Builder breaches any agreement, representation or warranty contained in the Contract Documents; or

(i) Design-Builder shall have assigned or transferred the Contract Documents or any right or interest herein, except as expressly permitted under Section 20.4; or

(j) Design-Builder fails to discharge or obtain a stay of any final judgment(s) or order for the payment of money against it in excess of \$100,000 in the aggregate arising out of the prosecution of the Work (provided that for purposes hereof posting of a bond in the amount of 125% of such judgment or order shall be deemed an effective stay); or

(k) Design-Builder shall have failed, absent a valid dispute, to make payment when due for labor, equipment or materials in accordance with its agreements with Subcontractors and applicable law, or failed reasonably to comply with the instructions of Authority consistent with the Contract Documents; or

(l) Any Guarantor revokes or attempts to revoke its obligations under its guarantee or otherwise takes the position that such instrument is no longer in full force and effect or is unenforceable; or

(m) Design-Builder violates any Governmental Rules in performance of the Work; or

(n) Design-Builder fails to provide and maintain the Performance and Payment Bonds and insurance as required hereunder.

17.1.2 Design-Builder and its Surety under the Performance Bond shall be entitled to 15 days notice and opportunity to cure any breach described in Section 17.1.1(a) through (d) and (h) through (l). Design-Builder and its Surety under the Performance Bond shall be entitled to three days' notice and opportunity to cure any breach described in Section 17.1.1(n). Design-Builder and its Surety under the Performance Bond shall have no right to notice or opportunity to cure with respect to any breach described in Section 17.1.1(e), (f), (g) or (m). If Design-Builder is unable to cure the

applicable default within the time period specified, but in Authority's reasonable determination (i) Design-Builder has diligently and continuously undertaken efforts to cure such default, and (ii) such failure to cure is beyond the control of Design-Builder, Authority may extend the cure period in accordance with its discretion.

17.2 Remedies

17.2.1 If any breach described in Section 17.1.1 is not subject to cure or is not cured within the period (if any) specified in Section 17.1.2, Authority may declare that an "Event of Default" has occurred and notify Design-Builder to discontinue the Work. The declaration of an Event of Default shall be in writing and given to Design-Builder and Surety. In addition to all other rights and remedies provided by law or equity and such rights and remedies as are otherwise available under the Contract and the Performance Bond, Authority may appropriate any or all materials and equipment on the Site as may be suitable and acceptable and may direct the Surety to complete the Contract or may enter into an agreement for the completion of the Contract according to the terms and provisions hereof with another contractor or the Surety, or use such other methods as may be required for the completion of the Contract, including completion of the Work by Authority.

17.2.2 If an Event of Default shall have occurred, Design-Builder and Surety shall be liable to Authority (in addition to any other damages under the Contract Documents other than those costs intended to be covered by Liquidated Damages payable hereunder) for all costs reasonably incurred by Authority or any party acting on Authority's behalf in completing the Work or having the Work completed by another Person. Upon occurrence of an Event of Default, Authority shall be entitled to withhold all or any portion of further payments to Design-Builder until the Final Acceptance Date or the date on which Authority otherwise accepts the Project as complete or determines that it will not proceed with completion, at which time Authority will determine whether Design-Builder is entitled to further payments. Promptly following the Final Acceptance Date or the date on which Authority otherwise accepts the Project as complete or determines that it will not proceed with completion, the total cost of all completed Work shall be determined, and Authority shall notify Design-

Builder and its Surety in writing of the amount, if any, that Design-Builder and its Surety shall pay Authority or Authority shall pay Design-Builder or its Surety with respect thereto. All costs and charges incurred by Authority, including attorneys' fees and costs, together with the cost of completing the Work under the Contract Documents, will be deducted from any moneys due or which may become due Design-Builder or its Surety. If such expense exceeds the sum which would have been payable under the Contract, then Design-Builder and its Surety shall be liable and shall pay to Authority the amount of such excess. If the Surety fails to pay such amount immediately upon Authority's demand, then Authority shall be entitled to collect interest from the Surety on the amounts Authority is required to pay in excess of the remaining balance of the Contract Price, from the date of Authority payment until the date the total amount is paid. The interest rate which the Surety shall pay shall be 2% in excess of the reference rate charged by Bank of America from time to time for prime commercial loans of 90-day maturities.

17.2.3 It is recognized that if Design-Builder or any joint venture member of Design-Builder is adjudged a bankrupt or makes a general assignment for the benefit of creditors, or if a receiver is appointed for the benefit of its creditors, or if a receiver is appointed on account of such insolvency, Design-Builder's performance of the Work might be impaired or frustrated. Accordingly, it is agreed that upon the occurrence of any such event, Authority shall be entitled to request of Design-Builder, or its successor in interest, adequate assurance of future performance in accordance with the terms and conditions hereof. Failure to comply with such request within five days of delivery of the request shall entitle Authority to terminate the Contract and to enforce its rights set forth above. Pending receipt of adequate assurance of performance and actual performance in accordance therewith, Authority shall be entitled to proceed with the Work with its own forces or with other contractors on a time and material or other appropriate basis, the cost of which will be backcharged against the Contract Price.

17.2.4 In lieu of the provisions of this Section 17.2 for terminating Design-Builder and completing the Work for proper cause, Authority may compensate Design-Builder for

the parts already done according to the provisions of the Contract Documents and may treat the parts remaining undone as if they had never been included or contemplated by the Contract. No claim under this provision will be allowed Design-Builder for prospective profits on Work uncompleted by Design-Builder.

17.3 Suspension Relating to Payment Deferrals Exceeding the Maximum Deferral

Design-Builder shall have the right to stop Work in the event that payment deferrals by Authority exceed the Maximum Deferral following notice as specified in Section 7.3.4(c) (which work stoppage shall be considered a suspension under Section 6.4.1).

18.0 TERMINATION FOR CONVENIENCE

Authority may terminate the Contract and the performance of the Work by Design-Builder in whole or, from time to time, in part, if Authority determines, in its sole discretion, that a termination is in Authority's best interest.

18.1 Notice of Termination

Authority shall notify Design-Builder of its decision to terminate by delivering to Design-Builder a written Notice of Termination or Notice of Partial Termination specifying the extent of termination and its effective date. Termination (or partial termination) of the Contract shall not relieve the Surety or Guarantor of its obligation for any just claims arising out of the Work performed.

18.2 Design-Builder's Responsibilities after Receipt of Notice of Termination

After receipt of a Notice of Termination, and except as directed by Authority, Design-Builder shall immediately proceed as follows, regardless of any delay in determining or adjusting any amounts due under this Section 18:

- (a) Stop Work as specified in the notice;
- (b) Place no further Subcontracts or orders for materials, services or facilities relating to the Work terminated, except as necessary for mitigation of damages;
- (c) Unless instructed otherwise by Authority, terminate all Subcontracts to the extent they relate to the Work terminated;
- (d) Assign to Authority in the manner, at the times, and to the extent directed by Authority, all of the right, title, and interest of Design-Builder under the Subcontracts so terminated, in which case Authority will have the right, in its sole discretion, to accept performance, settle or pay any or all claims arising out of the termination of each such Subcontract;

(e) Settle outstanding liabilities and claims arising out of such termination of Subcontracts, with, to the extent required by Authority, the approval or ratification of Authority, which approval or ratification shall be final;

(f) Transfer title to and deliver to Authority, as directed by Authority, (i) the Work in process, completed Work, supplies and other material produced or acquired for the Work terminated, and (ii) the Design Documents, Construction Documents and all other completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, records, samples, information and other property which would have been required to be furnished to Authority if the Work had been completed;

(g) Complete performance in accordance with the Contract Documents of all Work not terminated;

(h) Take all action which may be necessary, or Authority may direct, for the protection and preservation of the property related to the Contract Documents which is in the possession of Design-Builder and in which Authority has or may acquire an interest; and

(i) As authorized by Authority, use its best efforts to sell at reasonable prices any property of the types referred to in Section 18.2(f); provided, however, Design-Builder (i) is not required to extend credit to any purchaser, and (ii) may acquire such property under the conditions prescribed and at prices approved by Authority. Design-Builder shall apply the proceeds of any such sale or disposition to reduce any amounts owed by Authority under the Contract Documents, or if no amount is owing, Design-Builder shall apply such proceeds as directed by Authority.

18.3 Inventory

Design-Builder shall submit to Authority a list of termination inventory not previously disposed of and excluding items authorized for disposition by Authority, upon receipt of a request therefor from Authority. Within 45 days of Authority's receipt of the list,

Design-Builder shall deliver such inventory to Authority and Authority shall accept title to such inventory as appropriate.

18.4 Settlement Proposal

After termination, Design-Builder shall submit a final termination settlement proposal to Authority in the form and with the certification prescribed by Authority. Design-Builder shall submit the proposal promptly, but no later than 60 days from the effective date of termination unless Authority has agreed in writing to allow such an extension. However, if Authority determines the facts justify it, Authority may review a termination settlement proposal which is provided late. Design-Builder's settlement proposal shall constitute the basis for negotiation of a settlement. If Design-Builder fails to submit the proposal within the time allowed, Authority may determine, on the basis of information available to Authority, the amount, if any, due Design-Builder because of the termination and shall pay Design-Builder the amount so determined.

18.5 Agreement as to Amount of Termination Settlement

Any negotiated settlement under Section 18.4 may include an allowance for profit solely on Work which has been completed as of the effective date of termination. The negotiated settlement shall not include compensation for risks assumed by Design-Builder hereunder or for contingencies included in the Proposal Price except to the extent of Design-Builder's actual expenses relating to such risks and contingencies. Such agreed amount or amounts, exclusive of any extra costs caused solely by the termination, shall not exceed the total Contract Price as reduced by the amount of payments otherwise made and as further reduced by the cost of the Work not terminated, as determined by the costs allocated to such Work in the Payment Milestones. Upon determination of the settlement amount the Contract will be amended accordingly, and Design-Builder will be paid the agreed amount as described in this Section 18.5. Nothing in Section 18.6, prescribing the amount to be paid to Design-Builder by Authority in the event Design-Builder and Authority fail to agree upon the whole amount to be paid to Design-Builder by reason of the termination of Work

pursuant to this Section 18, shall be deemed to limit, restrict or otherwise determine or affect the amount or amounts which may be agreed upon pursuant to this Section 18.5.

18.6 No Agreement as to Amount of Claim

In the event of failure of Design-Builder and Authority to agree upon the whole amount to be paid to Design-Builder by reason of the termination of Work pursuant to this Section 18, the amount payable (exclusive of interest charges which shall be paid based on Design-Builder's actual cost) shall be determined in accordance with the following:

18.6.1 Authority will pay Design-Builder the sum of the following amounts for Work performed prior to the effective date of the termination, as such amounts are determined by Authority, and without duplication of any items or of any amounts agreed upon in accordance with Section 18.4:

(a) Design-Builder's actual reasonable out-of-pocket cost (including costs of construction equipment only to the extent allowed by Section 12) for all Work performed, including reasonable overhead and interest and loan fees on amounts expended by Design-Builder, and accounting for any refunds payable to Design-Builder with respect to insurance premiums, deposits, cancellations or similar items, as established to Authority's satisfaction;

(b) A sum, as profit on subsection (a) above, determined by Authority to be fair and reasonable; provided, however, if it appears Design-Builder would have sustained a loss on the entire Contract had it been completed, no profit shall be included or allowed under this Section 18.6.1(b) and an appropriate adjustment shall be made by reducing the amount of the settlement to reflect the indicated rate of loss;

(c) The cost of settling and paying claims arising out of the termination of Work under Subcontracts as provided in Section 18.2(e), exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the Subcontractor prior to the effective date of the termination, which amounts shall be included in the cost on account of which payment is made under subsection (a) above;

(d) The reasonable out-of-pocket cost (including reasonable overhead) of the preservation and protection of property incurred pursuant to Section 18.2(h) and any other reasonable out-of-pocket cost (including overhead) incidental to termination of Work under the Contract, including expense incidental to the determination of the amount due to Design-Builder as the result of the termination of Work under the Contract; and

(e) To the extent not included in clauses (a) through (d) above, and without double counting, all deferred amounts pursuant to Section 7.3.4 outstanding as of the termination date, including accrued unpaid interest on such amounts, plus any commercially reasonable prepayment premiums or penalties, make-whole payments or other prepayment amounts that Design-Builder must pay under any Loan Document as a result of the payment of all or any portion of the principal amount of Project debt prior to its scheduled payment date, subject to Design-Builder and the Lenders mitigating all such costs to the extent reasonably possible.

18.6.2 The total amount to be paid to Design-Builder, exclusive of costs described herein in Sections 18.6.1(c), (d) and (e) may not exceed the total Contract Price less the amount of payments previously made. Furthermore, in the event any refund is payable with respect to insurance premiums, deposits or similar items which were previously passed through to Authority by Design-Builder, such refund shall be paid directly to Authority or otherwise credited to Authority. Design-Builder acknowledges and agrees that it shall not be entitled to any compensation in excess of the value of the Work performed (determined as provided in Section 18.6.1) plus any extra costs caused solely by the termination, and items such as lost or anticipated profits, unabsorbed overhead and opportunity costs shall not be recoverable by it upon termination of the Contract. Upon determination of the amount of the termination payment, the Contract shall be amended to reflect the agreed termination payment, and Design-Builder shall be paid the agreed amount. Except for normal spoilage, and except to the extent Authority will have otherwise expressly assumed the risk of loss, there will be excluded from the amounts payable to Design-Builder under Section 18.6.1 or this Section 18.6.2 the fair value, as determined by Authority, of

property which is destroyed, lost, stolen, or damaged so as to become undeliverable to Authority, or to a buyer pursuant to Section 18.2(i).

18.6.3 If any termination hereunder is partial, the Contract Price for the remainder of the Work shall be adjusted as appropriate to account for the change in the overall scope of the Project. The amount of any such adjustment as may be agreed upon shall be set forth in a Change Order to the Contract.

18.7 Reduction in Amount of Claim

The amount otherwise due Design-Builder under this Section 18 shall be reduced by (a) the amount of any claim which Authority may have against Design-Builder in connection with the Contract and (b) the agreed price for, or the proceeds of sale, of materials, supplies or other things acquired by Design-Builder or sold, pursuant to the provisions of this Section 18 and not otherwise recovered by or credited to Authority. In the event Authority determines an offset hereunder was wrongfully made, Authority will make the payment owing within 30 days thereafter.

18.8 Payment

Pending a final agreement or determination as to the amount to which Design-Builder is entitled under this Section 18 for a termination or partial termination for convenience, Authority may, from time to time, under such terms and conditions as it may prescribe and in its sole discretion, make partial payments on account against amounts owed by it to Design-Builder in connection with the terminated portion of the Contract, whenever in the opinion of Authority the aggregate of such payments shall be less than or equal to the amount to which Design-Builder will be entitled under this Section 18. If the total of such payments is in excess of the amount finally agreed or determined to be due under this Section 18, such excess shall be payable by Design-Builder to Authority within 30 days after demand. Any amounts owing from Authority to Design-Builder under this Section 18 shall be paid within a reasonable period of time after a final agreement or determination is made as to the amount owing.

18.9 Inclusion in Subcontracts

Design-Builder shall insert in all Subcontracts a requirement that the Subcontractor shall stop Work on the date and to the extent specified in a Notice of Termination from Authority and shall require Subcontractors to insert the same provision in each Subcontract at all tiers. Immediately upon Design-Builder's receipt of any Notice of Termination issued by Authority, Design-Builder shall communicate such notice to all affected Subcontractors.

18.10 Limitation on Amounts Payable to Subcontractors

For the purposes of Sections 18.5 and 18.6, upon termination under Section 18.2(c) of Work under any Subcontract which would have entitled the Subcontractor to gross proceeds of \$100,000 or more had it not been terminated, Design-Builder will not be entitled to reimbursement for that portion of the termination settlement with any such Subcontractor which constitutes anticipatory or unearned profit on Work not performed, or which constitute consequential damages on account of the termination or partial termination.

18.11 No Consequential Damages or Unearned Profits to Design-Builder

Under no circumstances is Design-Builder entitled to anticipatory or unearned profits or consequential or other damages as a result of a termination or partial termination under this Section 18. The payment to Design-Builder determined in accordance with this Section 18 constitutes Design-Builder's sole and exclusive remedy for a termination under this Section 18.

18.12 No Waiver

Anything contained in the Contract to the contrary notwithstanding, a termination under this Section 18 shall not waive any right or claim to damages which Authority may have and Authority may pursue any cause of action which it may have at law or in equity or under the Contract.

18.13 Dispute Resolution

The failure of the parties to agree on amounts due under this Section 18 shall be a dispute to be resolved in accordance with Section 16.

18.14 Allowability of Costs

All costs claimed by Design-Builder under this Section 18 shall, at a minimum, be allowable, allocable and reasonable in accordance with the cost principles and procedures of Part 31 of the Federal Acquisition Regulations. Authority's determination regarding the allowability, allocability and reasonableness of such costs shall be final and conclusive.

18.15 Suspension of Work; Delay in Issuance of NTP

Subject to Section 3.5.3, in the event of any suspension of the Work by Authority under Section 6.4.1 for more than 180 consecutive days (including a suspension under Section 7.3.4) or a failure by Authority to issue the NTP within 180 days after full execution of the Contract (unless such failure is caused in whole or in part by Design-Builder), Design-Builder shall have the right to consider the Contract to have been terminated for convenience under this Section 18. Design-Builder shall notify Authority of such election by delivering to Authority a written notice of termination due to such suspension or failure to issue the NTP specifying its effective date. Upon delivery by Design-Builder to Authority of a notice of termination under this Section 18.15, the provisions of this Section 18 shall apply.

19.0 DOCUMENTS AND RECORDS

19.1 Escrowed Proposal Documents

Design-Builder has delivered to Authority one copy of all documentary information used in preparation of the Proposal Price (the "EPDs"), which are being held in a locked fireproof cabinet supplied by Design-Builder and located in Authority's offices or in another location designated by Authority, with the key held only by Design-Builder. Concurrently with submission of quotations or revisions to quotations provided in connection with formally proposed amendments to the Contract and concurrently with approval of each Change Order, if appropriate, one copy of all documentary information used in preparation of the quotation or Change Order shall be added to the cabinet to be held with the other EPDs. The EPDs will be held in such cabinet or otherwise maintained subject to Section 19.1.1 until all of the following have occurred:

- (a) expiration of Design-Builder's Warranties or termination of the Work, as applicable;
- (b) all disputes regarding the Contract have been settled; and
- (c) final payment on the Contract has been made by Authority and accepted by Design-Builder.

19.1.1 Availability for Review

The EPDs shall be available during business hours for joint review by Design-Builder and Authority and its successors and assigns, in connection with approval of the Payment Milestone Schedule, negotiations of Change Orders, in the resolution of disputes and as described in Section 19.1.6. Authority shall be entitled to review all or any part of the EPDs in order to satisfy itself regarding the applicability of the individual documents to the matter at issue. Authority shall be entitled to make and retain copies of such documents as it deems appropriate in connection with any such matters, provided that Authority has executed and delivered to Design-Builder a confidentiality agreement specifying that all proprietary information contained in such documents will be kept confidential, that copies of such documents will not be distributed to any third parties other than Authority's attorneys and experts, the Disputes Board and other dispute resolvers hereunder, and that all copies of such documents (other than those delivered to dispute resolvers) will be either destroyed or returned to the depository (or to Design-Builder if the EPDs have been returned to it) upon final resolution of the

negotiations or disputes. The foregoing shall in no way be deemed a limitation on Authority's discovery rights with respect to such documents.

19.1.2 Proprietary Information

The EPDs are, and shall always remain, the property of Design-Builder and shall be considered to be in Design-Builder's possession, subject to Authority's right to review the EPDs as provided in this Section 19. Authority acknowledges that Design-Builder may consider that the EPDs constitute trade secrets or proprietary information. This acknowledgment is based upon Authority's understanding that the information contained in the EPDs is not known outside Design-Builder's business, is known only to a limited extent and by a limited number of employees of Design-Builder, is safeguarded while in Design-Builder's possession, and may be valuable to Design-Builder's construction strategies, assumptions and intended means, methods and techniques of construction. Authority further acknowledges that Design-Builder expended money in developing the information included in the EPDs and further acknowledges that it would be difficult for a competitor to replicate the information contained therein. Authority acknowledges that the EPDs and the information contained therein are being made accessible to Authority only because it is an express prerequisite to award of the Contract.

19.1.3 Representation

Design-Builder represents and warrants that the EPDs constitute all of the information used in the preparation of its Proposal Price and agrees that no other Proposal preparation information will be considered in resolving disputes or claims. Design-Builder agrees that the EPDs are not part of the Contract and that nothing in the EPDs shall change or modify the Contract.

19.1.4 Contents of EPDs

The EPDs provided with the Proposal shall, inter alia, clearly detail how each price included in the Proposal has been determined and shall be adequate to enable a complete understanding and interpretation of how Design-Builder arrived at the Proposal Price. The EPDs provided in connection with quotations and Change Orders shall, inter alia, clearly detail how the total price and individual components of that price

were determined. In this regard, crews, equipment, quantities and rates of production shall be detailed. Estimates of costs shall be further divided into Design-Builder's usual cost categories such as direct labor, repair labor, equipment ownership and operation, expendable materials, permanent materials and subcontract costs as appropriate. Plant and equipment and indirect costs shall also be detailed in Design-Builder's usual format. Design-Builder's allocation of plant and equipment, indirect costs, contingencies, mark-up and other items to each direct cost item shall be clearly identified. The EPDs shall include all assumptions, detailed quantity takeoffs, rates of production and progress calculations, quotes from Subcontractors and suppliers, memoranda, narratives and all other information used by Design-Builder to arrive at the Proposal Price or amendment or Change Order.

19.1.5 Form of EPDs

Except as otherwise provided in the RFP, Design-Builder shall submit the EPDs in such format as is used by Design-Builder. It is not intended that Design-Builder perform any significant extra work in the preparation of these documents. However, Design-Builder represents and warrants that the EPDs provided with the Proposal were personally examined prior to delivery by an authorized officer of Design-Builder and that they meet the requirements of Section 19.1.4, that the EPDs provided in connection with quotations and Change Orders will be personally examined prior to delivery by an authorized officer of Design-Builder, and that they will meet the requirements of Section 19.1.4.

19.1.6 Review by Authority

Authority may at any time conduct a review of the EPDs to determine whether they are complete. In the event Authority determines that any data is missing, Design-Builder shall provide such data within three Working Days of the request, and at that time it will be date stamped, labeled to identify it as supplementary EPDs information, and added to the EPDs. Design-Builder shall have no right to add documents to the EPDs except upon Authority's request.

At Authority's option, which may be exercised at any time, the EPDs associated with any Change Order or Contract amendment shall be reviewed, organized and indexed in the following manner: Representatives of the Authority and the Proposer shall organize the EPDs, labeling each page so that it is obvious that the page is a part of the EPDs and so as to enable a person reviewing the page out of context to determine where it can be found within the EPDs, and shall compile an index listing each document included in the EPDs and briefly describing the document and its location in the EPDs. The Authority shall have a right to retain a copy of the index. If, following the initial organization, the Authority determines that the EPDs are incomplete, the Authority may require the Proposer to supply data to make the EPDs complete.

19.2 Subcontractor Pricing Documents

Design-Builder shall require each Subcontractor whose Subcontract price equals or exceeds \$5,000,000 to submit to Design-Builder a copy of all documentary information used in determining its Subcontract price, immediately prior to executing the Subcontract or change orders or amendments thereto, to be held in the same manner as the EPDs and which shall be accessible by Design-Builder and its successors and assigns (including Authority), the Disputes Board and other dispute resolvers, on terms substantially similar to those contained herein. Each such Subcontract shall include a representation and warranty from the Subcontractor stating that its EPDs constitute all the documentary information used in establishing its Subcontract price. Each Subcontract with a Subcontractor whose Subcontract price is less than \$5,000,000 shall require the Subcontractor to preserve all documentary information used in establishing its Subcontract price and to provide such documentation to Design-Builder and/or Authority in connection with any claim made by such Subcontractor.

19.3 Maintenance of, Access to and Audit of Records

Design-Builder shall maintain at its Project Manager's office a complete set of all books and records prepared or employed by Design-Builder in its management, scheduling, cost accounting and otherwise with respect to the Project. Design-Builder shall grant to Authority or other parties designated by Authority, such audit rights and allow Authority

such access to and the right to copy such books and records as Authority may request in connection with the issuance of Change Orders, the resolution of disputes and such other matters as Authority reasonably deem necessary for purposes of verifying compliance with the Contract and applicable law.

19.3.1 Where the payment method for any Work is on a time and materials basis, such examination and audit rights shall include all books, records, documents and other evidence and accounting principles and practices sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of such Work. If an audit indicates Design-Builder has been overcredited under a previous progress report or payment, that overcredit will be credited against current progress reports or payments.

19.3.2 For cost and pricing data submitted in connection with pricing Change Orders, unless such pricing is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the public, or prices set by law or regulation, Authority and its representatives have the right to examine all books, records, documents and other data of Design-Builder related to the negotiation of or performance of Work under such Change Orders for the purpose of evaluating the accuracy, completeness and currency of the cost or pricing data submitted. The right of examination shall extend to all documents deemed necessary by such Persons to permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.

19.3.3 Design-Builder's cost proposal, the subcontractors' cost proposals, all proposal rates and allowability of all items included in the cost proposals will be audited by Caltrans Audits and Investigations following execution and final approval of the contract.

19.4 Retention of Records

Design-Builder shall maintain all records and documents relating to the Contract (including copies of all original documents delivered to Authority) for five years after the Final Acceptance Date or termination date, as applicable, and shall notify Authority where such records and documents are kept. Notwithstanding the foregoing, all records

which relate to Claims being processed or actions brought under the dispute resolution provisions hereof shall be retained and made available until such actions and Claims have been finally resolved. Records to be retained include all books and other evidence bearing on Design-Builder's costs under the Contract Documents. Design-Builder shall make these records and documents available for audit and inspection to Authority, at Design-Builder's office, at all reasonable times, without charge, and shall allow such Persons to make copies of such documents (at no expense to Design-Builder). If approved by Authority, photographs, microphotographs or other authentic reproductions may be maintained instead of original records and documents.

19.5 Public Records Act

19.5.1 Design-Builder acknowledges and agrees that all records, documents, drawings, plans, specifications and other materials in Authority's possession, including materials submitted by Design-Builder, are subject to the provisions of the California Public Records Act (Government Code sections 6250 et seq.). Design-Builder shall be solely responsible for all determinations made by it under such Act, and for clearly and prominently marking each and every page or sheet of materials with "Trade Secret" or "Confidential" as it determines to be appropriate. Design-Builder is advised to contact legal counsel concerning such Act and its application to Design-Builder.

19.5.2 If any of the materials submitted by Design-Builder to Authority are clearly and prominently labeled "Trade Secret" or "Confidential" by Design-Builder, Authority will endeavor to advise Design-Builder of any request for the disclosure of such materials prior to making any such disclosure. Under no circumstances, however, will Authority be responsible or liable to Design-Builder or any other Person for the disclosure of any such labeled materials, whether the disclosure is required by law, by court order or occurs through inadvertence, mistake or negligence on the part of Authority, except for any disclosure of trade secrets or proprietary information in violation of the confidentiality agreement described in Section 19.1.1.

19.5.3 In the event of litigation concerning the disclosure of any material submitted by Design-Builder to Authority, Authority's sole involvement will be as a stakeholder

retaining the material until otherwise ordered by a court, and Design-Builder shall be fully responsible for otherwise prosecuting or defending any action concerning the materials at its sole cost and risk.

20.0 MISCELLANEOUS

20.1 Amendments

The Contract may be amended only by a written instrument duly executed by the parties or their respective successors or assigns.

20.2 Waiver

Either party's waiver of any breach or failure to enforce any of the terms, covenants, conditions or other provisions of the Contract Documents at any time shall not in any way limit or waive that party's right thereafter to enforce or compel strict compliance with every term, covenant, condition or other provision, any course of dealing or custom of the trade notwithstanding. Furthermore, if the parties make and implement any interpretation of the Contract Documents without documenting such interpretation by an instrument in writing signed by both parties, such interpretation and implementation thereof will not be binding in the event of any future disputes.

20.3 Independent Contractor

Design-Builder is an independent contractor, and nothing contained in the Contract Documents shall be construed as constituting any relationship with Authority other than that of Project owner and independent contractor. In no event shall the relationship between Authority and Design-Builder be construed as creating any relationship whatsoever between Authority and Design-Builder's employees. Neither Design-Builder nor any of its employees is or shall be deemed to be an employee of Authority. Except as otherwise specified in the Contract Documents, Design-Builder has sole authority and responsibility to employ, discharge and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Subcontractors and for all other Persons that Design-Builder or any Subcontractor hires to perform or assist in performing the Work.

20.4 Successors and Assigns

The Contract Documents shall be binding upon and inure to the benefit of Authority and Design-Builder and their permitted successors, assigns and legal representatives.

20.4.1 Authority may assign all or part of its right, title and interest in and to the Contract, including rights with respect to the Payment and Performance Bonds and Guaranty, to any Person with the prior written approval of Design-Builder. Design-Builder approves any such assignment to Metro.

20.4.2 Design-Builder may assign its rights to receive payment under the Contract Documents. Design-Builder may not delegate any of its duties hereunder, except to Subcontractors as expressly otherwise permitted in the Contract Documents. Design-Builder's assignment or delegation of any of its Work under the Contract Documents shall be ineffective to relieve Design-Builder of its responsibility for the Work assigned or delegated, unless Authority, in its sole discretion, has approved such relief from responsibility. Any assignment of money shall be subject to all set-offs, withholdings, and deductions provided for in the Contract (provided that no deferred amounts pursuant to Section 7.3.4 shall be subject to set-off, withholding, or deduction). All money withheld, whether assigned or not, shall be subject to being used by Authority for completion of the Work, should Design-Builder be in default.

20.5 Designation of Representatives; Cooperation with Representatives

20.5.1 Authority and Design-Builder shall each designate an individual or individuals who shall be authorized to make decisions and bind the parties on matters relating to the Contract Documents. Appendix 10 provides the initial designations. Such designations may be changed by a subsequent writing delivered to the other party in accordance with Section 20.12. The parties may also designate technical representatives who shall be authorized to investigate and report on matters relating to the construction of the Project and negotiate on behalf of each of the parties but who do not have authority to bind Authority or Design-Builder.

20.5.2 Design-Builder shall cooperate with Authority and all representatives of Authority designated as described above.

20.6 Gratuities and Conflicts of Interest

20.6.1 Design-Builder shall not permit any member, officer, or employee of Authority to have any financial interest in the Contract prohibited by Sections 1090, et seq., and 87100, et seq., of the Government Code. In addition, Design-Builder or its employees shall not enter into any contract involving services or property with a person or business prohibited from transacting such business with Authority, pursuant to Sections 1090, et seq., and 87100, et seq., of the Government Code. Unless an explicit statement to the contrary accompanies Design-Builder's Proposal, Design-Builder affirms that no Authority member, officer, or employee of Authority has any interest (whether contractual, non-contractual, financial, or otherwise) in this transaction or in the business of Design-Builder. If any such interest becomes known to Design-Builder at any time, Design-Builder shall submit a full and complete written disclosure of such information to Authority, even if such interest would not be considered a conflict under Sections 1090, et seq., and 87100, et seq., of the Government Code.

20.6.2 Neither Design-Builder nor any of its employees, agents and representatives shall offer or give to an officer, official or employee of Authority gifts, entertainment, payments, loans or gratuities. Authority may, by written notice to Design-Builder, terminate the right of Design-Builder to proceed under the Contract if it is found that gratuities (in the form of gifts, entertainment, or otherwise) were offered or given by Design-Builder, or any agent of Design-Builder, to any Board member, officer, agent and/or employee of Authority.

20.6.3 Employment by Design-Builder of personnel on the payroll of Authority is not permitted in the performance of the Contract, even though such employment may be outside Authority employee's regular working hours or on Saturdays, Sundays, holidays or vacation time; further, employment by Design-Builder of personnel who have been on Authority's payroll within one year prior to the date of Contract award, where such employment is caused by and/or dependent upon Design-Builder securing the Contract or a related contract with Authority, is also prohibited.

20.6.4 The rights and remedies of Authority specified in this Section 20.6 are not exclusive and are in addition to any other rights and remedies allowed by law.

20.7 Survival

The dispute resolution provisions contained in Section 16, and all other provisions which by their inherent character should survive termination of the Contract and/or Final Acceptance, shall survive the termination of the Contract and the date on which Final Acceptance occurs.

20.8 Limitation on Third Party Beneficiaries

It is not intended by any of the provisions of the Contract Documents to create any third party beneficiary hereunder, other than Trustee and Metro (both in its own capacity and as the Settlor) and the Collateral Agent with respect to Lenders' rights regarding any deferred amounts pursuant to Section 7.3.4, or to authorize anyone not a party hereto to maintain a suit for personal injury or property damage pursuant to the terms or provisions hereof. The duties, obligations and responsibilities of the parties to the Contract Documents with respect to such third parties shall remain as imposed by law. The Contract Documents shall not be construed to create a contractual relationship of any kind between Authority and a Subcontractor or any other Person except Design-Builder.

20.9 Personal Liability of Authority Employees

Authority's authorized representatives are acting solely as agents and representatives of Authority when carrying out the provisions of or exercising the power or authority granted to them under the Contract. They shall not be liable either personally or as employees of Authority for actions in their ordinary course of employment. No agent, consultant, board member, officer or authorized employee of Authority shall be personally responsible for any liability arising under the Contract.

20.10 No Estoppel

Authority shall not, nor shall any officer thereof, be precluded or estopped by any return or certificate made or given by any Authority representative or other officer, agent, or

employee of Authority under any provisions of the Contract from at any time (either before or after the final completion and acceptance of the Work and payment therefor) pursuant to any such return or certificate showing the true and correct amount and character of the work done, and materials furnished by Design-Builder or any person under the Contract or from showing at any time that any such return or certificate is untrue and incorrect, or improperly made in any particular, or that the work and materials, or any part thereof, do not in fact conform to the Contract Documents; and Authority shall not be precluded or estopped, notwithstanding any such return or certificate and payment in accordance therewith, from demanding and recovering from Design-Builder such damages as it may sustain by reason of Design-Builder's failure to comply with the Contract Documents.

20.11 Governing Law and Venue

The Contract Documents shall be governed by and construed in accordance with the law of the State of California. The venue of any proceeding for the litigation and/or resolution of any dispute under the Contract Documents shall be the County of Los Angeles, California.

20.12 Notices and Communications

20.12.1 Notices under the Contract Documents shall be in writing and (a) delivered personally, or (b) sent by certified mail, return receipt requested, or (c) sent by a recognized overnight mail or courier service, with delivery receipt requested, or (d) sent by telefacsimile communication or other electronic communication (such as email or cooperative computer software) approved by Authority followed by a hard copy and with receipt confirmed by telephone or by email, to the following addresses (or to such other address as may from time to time be specified in writing by such Person):

All correspondence from Authority to Design-Builder shall be sent to the Project Manager or as otherwise directed by the Project Manager. The address for such communications shall be:

[execution version to include name and address]

In addition, copies of all notices to proceed and suspension, termination and default notices shall be delivered to the following persons:

[execution version to include name and address]

All communications to Authority shall be marked with Authority's contract identification number and shall be delivered as directed by Authority's Chief Executive Officer.

20.12.2 Notices shall be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U. S. Postal Service, private carrier or other Person making the delivery. Notwithstanding the foregoing, notices sent by telefacsimile or other electronic communication (such as email or cooperative computer software) approved by Authority after 4:00 p.m. Pacific Standard or Daylight Time (as applicable) and all other notices received after 5:00 p.m. shall be deemed received on the first business day following delivery (that is, in order for a fax to be deemed received on the same day, at least the first page of the fax must have been received before 4:00 p.m.). Any technical or other communications pertaining to the Work shall be conducted by the Project Manager and technical representatives designated by Authority. Any technical problem or any failure of any kind preventing Design-Builder from delivering notice in accordance with the Contract shall be the sole responsibility of the Design-Builder. Design-Builder's representatives shall be available at all reasonable times for consultation. Except as otherwise provided in Section 20.5.1, each party's representative shall be authorized to act on behalf of such party in matters concerning the Work.

20.12.3 Design-Builder shall copy Authority on all written correspondence pertaining to the Contract between Design-Builder and any Person other than Design-Builder's Subcontractors, consultants and attorneys.

20.13 Further Assurances

Design-Builder shall promptly execute and deliver to Authority all such instruments and other documents and assurances as are reasonably requested by Authority to further evidence the obligations of Design-Builder hereunder, including assurances regarding assignments of Subcontracts contained herein.

20.14 Severability

If any clause, provision, section or part of the Contract is ruled invalid by a court of competent jurisdiction, then the parties shall: (a) promptly meet and negotiate a substitute for such clause, provision, section or part, which shall, to the greatest extent legally permissible, effect the original intent of the parties, including an equitable adjustment to the Contract Price to account for any change in the Work resulting from such invalidated portion; and (b) if necessary or desirable, apply to the court which declared such invalidity for a judicial construction of the invalidated portion to guide the negotiations. The invalidity or unenforceability of any such clause, provision, section or part shall not affect the validity or enforceability of the balance of the Contract, which shall be construed and enforced as if the Contract did not contain such invalid or unenforceable clause, provision, section or part.

20.15 Headings

The captions of the sections of the Contract are for convenience only and shall not be deemed part of the Contract or considered in construing the Contract.

20.16 Metro Provisions

Design-Builder shall comply with the requirements set forth in Appendix 11 hereto. Design-Builder shall include a provision in each Subcontract requiring the Subcontractor to comply with the requirements of Appendix 11 hereto on the same terms as does Design-Builder and shall require that the Subcontractor insert the same provision in each Subcontract at all tiers.

Design-Builder shall cooperate with Metro as set forth in, and perform the Work in accordance with, the Metro Cooperative Agreement.

20.17 Entire Agreement

The Contract Documents contain the entire understanding of the parties with respect to the subject matter hereof and supersede all prior agreements, understandings, statements, representations and negotiations between the parties with respect to its subject matter.

20.18 Patents and Copyrights

Design-Builder warrants that the materials, equipment, devices, or processes used on or incorporated into the Work shall be delivered free of any rightful claim of any third party for infringement of any patent or copyright. Design-Builder shall defend or may settle, at its expense, any suit or proceeding against Authority or its representatives based on claimed infringement that would result in a breach of this warranty. Design-Builder shall pay all damages and costs awarded therein due to such breach, unless a suit is brought concerning a product or material specified for use by Authority.

Design-Builder shall bear all costs arising from the use of patented materials, equipment, devices, or processes used on or incorporated into the Work. In case material, equipment, devices, or processes are held to constitute an infringement and their use is enjoined, Design-Builder, at its expense, shall:

- (a) secure for Authority the right to continue using said materials, equipment, devices, or processes by suspension of the injunction or by procuring a license or licenses;
- (b) replace such materials, equipment, devices, or processes with non-infringing materials, equipment, devices, or processes; or
- (c) modify them so they become noninfringing or remove the enjoined materials, equipment, devices, or processes and refund the sum paid therefor without prejudice to any other rights of Authority.

IN WITNESS WHEREOF, the Contract has been executed as of the last date set forth next to the signatures of the parties, below.

Date: _____, 2011

PASADENA METRO BLUE LINE
CONSTRUCTION AUTHORITY, AKA METRO
GOLD LINE FOOTHILL EXTENSION
CONSTRUCTION AUTHORITY

By: _____
Name:
Title:

APPROVED AS TO FORM:

Nossaman LLP
Special Counsel

By: _____

Date: _____, 2011

[*DESIGN-BUILDER*]

By: _____
Name:
Title:

[*Member*]

By: _____
Name:
Title:

[*Member*]

By: _____
Name:
Title:

License No: _____