

# REQUEST FOR PROPOSALS

## Casco Bay Island Transit District in Portland, Maine

### Compliance/Financial Audit - RFP #2 - 2023

#### A. PROJECT OVERVIEW.

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Casco Bay Island Transit District (“District”) is seeking proposals for audit services for conducting a review of the District’s Financial Statements for fiscal year ending September 30, 2022 and for conducting Financial and Compliance audits for fiscal years ending September 30, 2023 and September 30, 2024, with an option to extend for an additional two years. The review and the audits are to be performed in accordance with generally accepted accounting principles (GAAP). Casco Bay Island Transit District is located at 56 Commercial Street Portland, Maine. This project is being undertaken with funding from the Federal Transit Administration which is being matched with funding from the District. This project is subject to all applicable federal and state laws, policies, and procedures.

The Consultant will work with District staff and the District’s Finance Committee to perform the duties of the audit. The audit team will report its findings as outlined later in this RFP document to those identified. Proposers must provide a technical proposal and a separate sealed price proposal. No mention of price shall be included in the technical proposal; otherwise, that proposal shall be rejected in its entirety.

**DATE OF RFP POSTING:** May 3, 2023

#### **PROPOSALS ARE TO BE RECEIVED NO LATER THAN:**

Date Due: May 31, 2023

Local Time: 2:00 PM

Anticipated Award: Week of June 12<sup>th</sup>, 2023

#### **COMMUNICATIONS:**

All communication in reference to this RFP shall be in writing and sent to the attention of:

**Name:** Laurie Bowie

**Title:** Director of Finance & HR

**Email:** [laurieb@cascobaylines.com](mailto:laurieb@cascobaylines.com)

*Casco Bay Lines, in accordance with the provisions of Title VI of the Civil Rights Act of 1964 (78 Stat. 252, 42 U.S.C. §§ 2000d to 2000d-4) and the accompanying Regulations, hereby notifies all bidders that it will affirmatively insure that any contract entered into pursuant to this advertisement, disadvantaged business enterprises will be afforded full opportunity to submit bids in response to this invitation and will not be discriminated against on the grounds of race, color, or national origin in consideration for an award.*

## B. CONTRACT TERM, TYPE AND PAYMENT METHOD

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The initial contract term shall be for a period of two years. At the Districts discretion, the contract may be extended as appropriate for an additional two years. The contract type used for this project shall be an adjustable fully burdened hourly rate, and the method of payment shall be monthly.

## C. GENERAL INFORMATION

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1. This RFP does not commit **Casco Bay Island Transit District** to pay any of the costs you incur in submitting your proposal, preparing the proposal, or in procuring or sub-contracting for services or supplies related to the proposal.
2. The Proposer needs to understand and comply with the flow down provisions outlined in each of the applicable FTA clauses as they relate to sub-consultants and service firms that may perform services during the review and audit phases of the work.
3. Requests for Clarification/RFP Amendments. During the proposal preparation period, all requests for clarification or for additional information shall be submitted in writing (by e-mail to [laurieb@cascobaylines.com](mailto:laurieb@cascobaylines.com) : and on the subject line: Clarification to RFP # 2- 2023; no later than 2:00 PM on May 24, 2023. Late requests for clarification will not be accepted. When appropriate, responses to requests, as well as any changes initiated by the District, will be provided to all prospective proposers in writing as amendments to the RFP. It will be the Proposer's responsibility to register with the District via e-mail of intent to submit in order for responses to the Requests for Clarifications and/or RFP amendments to be provided to them.

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## **I. INTRODUCTION**

### **A. General Information**

The Casco Bay Island Transit District (District) is requesting proposals from qualified firms of certified public accountants to review its financial statements for the fiscal year ending September 30, 2022 and to audit its financial statements for the fiscal years ending September 30, 2023, and September 30, 2024, with an option to extend for an additional two years. The review and the audits are to be performed in accordance with generally accepted accounting principles (GAAP). To be considered, a copy of proposal must be received by 2:00 p.m. on May 31, 2023. The District reserves the right to reject any or all proposals submitted. During the evaluation process, the District reserves the right, where it may serve the District's best interest, to request additional information or clarifications from proposals, or to allow corrections of errors or omissions. At the discretion of the District, firms submitting proposals may be requested to make oral presentations as part of the evaluation process. The District reserves the right to retain all proposals submitted regardless of whether that proposal is selected. There is no expressed or implied obligation for the District to reimburse responding firms for any expenses incurred in preparing proposals in response to this request. Submission of a proposal indicates acceptance by the firm of the conditions contained in this request for proposal, unless clearly and specifically noted in the proposal submitted and confirmed in the contract between the District and the firm selected.

The District is currently having a different independent auditor perform a compliance audit for Fiscal Year 2022.

The compliance audit will be conducted in accordance with auditing standards generally accepted in the United States of America; the standards for financial audits contained in Government Auditing Standards, issued by the Comptroller General of the United States; the Single Audit Act Amendments of 1996; and the provisions of Title 2 U.S. Code of Federal Regulations (CFR) Part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance), and will include tests of accounting records, a determination of major program(s) in accordance with the Uniform Guidance, and other procedures considered necessary to express an opinion.

Consistent with best practices, the District seeks to rotate audit firms for future fiscal years, as current auditor has been engaged for several years. To support the new firm in developing understanding of the business, increasing audit quality in FY 2023 and FY 2024., the District has included in the scope of this RFP the review of the FY 2022 audit. It is anticipated that this review will also provide the District with fresh insights into the business, and perspective on existing accounting judgements.

## **II. NATURE OF SERVICES REQUIRED**

### **A. Scope of Work to be Performed**

1. Conduct review of FY 2022 audited financial statements including SEFA & SEDA with particular focus on District policies, procedures, controls, risks, as well as a presentation of performance vs. budget.
2. Conduct financial & compliance audits of FY 2023 & FY 2024 financial statements. The auditor shall also perform a single audit in accordance with Uniform Guidance.
3. The District desires the auditor to express an opinion on the fair presentation of its general-purpose financial statements in conformity with generally accepted accounting principles (GAAP).
4. The auditor shall provide professional advice and guidance on implementation of applicable GASB regulations in effect at the time of issuing the statements and implications of future regulations.
5. Provide the District advice and guidance to convert to an Annual Comprehensive Financial Report (ACFR) in the future.

### **B. Auditing Standards to be Followed**

To meet the requirements of this request for proposal, the audit shall be performed in accordance with generally accepted auditing principles as set forth by the American Institute of Certified Public Accountants and the standards applicable to audits contained in Auditing Standards issued by the Controller General of the United States.

### **C. Responsibilities of the Auditor and Reports to be Issued**

1. Following the completion of the review or audit of the fiscal year's financial statements, the auditor shall issue a report on the fair presentation of the financial statements in conformity with generally accepted accounting principles.
2. The auditor shall communicate in a letter to District Board of Directors any reportable conditions found during the review or audit. A reportable condition shall be defined as a significant deficiency in the design or operation of the internal control structure which could adversely affect the organization's ability to record, process, summarize, and report financial data consistent with the assertions of management in the financial statements.
3. The auditor shall identify and assess the risks of material misstatement of the financial statements, whether due to fraud or error, based on an understanding of the entity and its environment, the applicable financial reporting framework and the entity's system of internal control, design and perform audit procedures responsive to those risks.
4. The auditor shall evaluate the appropriateness of accounting policies used and the reasonableness of significant accounting estimates made by management, as well as evaluate the overall presentation of the financial statements, including the disclosures, and whether the financial statements represent the underlying transactions and events in a manner that achieves fair presentation.

5. The auditor shall conclude, based on the audit evidence obtained, whether there are conditions or events considered in the aggregate, that raise substantial doubt about the District's ability to continue as a going concern for a reasonable period of time.
6. Irregularities and illegal acts. Auditors shall be required to make an immediate written report of all irregularities and illegal acts or indications of illegal acts of which they become aware to the following parties:
  - a. The District's General Manager
  - b. The District's President
  - c. The District's Treasurer
7. Reporting to the Finance Committee. Auditors agree to provide a presentation of findings and answer questions of the District's Finance Committee as well as to inform the District's Finance Committee of the Board of Directors of any and all of the following:
  - a. The auditor's responsibility under generally accepted auditing standards
  - b. Significant accounting policies
  - c. Management judgments and accounting estimates
  - d. Significant audit adjustments
  - e. Other information in documents containing audited financial statements
  - f. Disagreements with management
  - g. Management consultation with other accountants
  - h. Any significant deficiencies or material weaknesses in internal control
  - i. Major issues discussed with management prior to retention
  - j. Difficulties encountered in performing the audit
8. Reporting to the Board of Directors.

Auditors agree to provide a summary presentation to the District's Board of Directors, if requested, all information provided to the Finance Committee, along with standard financial reporting and any additional information requested by the Committee.

### **III. DESCRIPTION OF THE DISTRICT**

#### **A. Contact Persons**

The auditor's principal contact with the District will be Laurie Bowie [laurieb@cascobaylines.com](mailto:laurieb@cascobaylines.com).

If escalation or alternate contact, not otherwise specified herein is required, communication may be directed to the District's Treasurer, Jean Hoffman [JeanH@cascobaylines.com](mailto:JeanH@cascobaylines.com).

#### **B. Background Information**

Casco Bay Island Transit District (CBITD), also known as Casco Bay Lines, operates passenger, vehicle and freight service year-round. Casco Bay Lines ensures that passengers have safe, dependable and reliable transportation, and is considered the "lifeline" for the residents of the islands. Casco Bay Lines' ferries transport more than one million passengers, 35,000 vehicles and over 500,000 pieces of freight annually. Casco Bay Lines also delivers the U.S. mail and

transports island students to and from Portland. A wide range of specialty cruises and charter trips for celebrations, meetings and sightseeing are available as well.

CBITD is a body corporate and politic created under State Enabling Legislation in 1981 to serve residents and visitors of six Casco Bay islands: Peaks Island, Little Diamond Island, Great Diamond Island and Cliff Island (which are within the City of Portland), and the Towns of Long Island and Chebeague Island. The CBITD Board is composed of 12 Directors — 10 elected from the islands, one appointed by the City of Portland, and one appointed by the Commissioner of the Maine Department of Transportation. The District's general operating budget for fiscal year 2021 was approximately \$8 million. More detailed information on the District and its finances can be found on our website at [www.cascobaylines.com](http://www.cascobaylines.com)

### **C. Budgetary Basis of Accounting**

The District prepares annual fiscal year budgets from October 1st to September 30th for the Board's adoption. Capital is included in the District's Master Plan and annually approved through the budget process.

### **D. Availability of Prior Audit Reports and Working Papers**

Interested proposers who wish to review prior years' audit work papers should contact: Laurie Bowie [Laurieb@casobaylines.com](mailto:Laurieb@casobaylines.com). The most recent financial audits and approved budgets are available on the District website at <https://www.cascobaylines.com/about-us/financial-operational-performance/>. The District will use its best efforts to make prior working papers available to proposers to aid their response to this request for proposal.

## **IV. ASSISTANCE TO BE PROVIDED TO THE AUDITOR AND REPORT PREPARATION**

### **A. Finance Department and Clerical Assistance**

The finance department staff and responsible management personnel will be available during the FY 2022 review and FY 2023 & FY 2024 audits to assist the firm by providing information, documentation and explanations. The preparation of confirmations will be the responsibility of the District.

### **B. Statements and Schedules to be Prepared by the Audit Staff**

It is the desire of the District for the Auditors to provide reports and information to the District and the Finance Committee of the Board of Directors by the following dates for FY 2022 review. Understanding that this is a compressed time frame for the work, the Proposal should address whether this is reasonable to do and if not, what the proposer can do for the FY 2022 review and reporting. A reasonable time schedule will be developed for audits of future fiscal years that comply with FTA required submissions.

- Review of Financial Statements (All) September 29, 2023
- Report to Finance Committee October 23, 2023

- Report to Board of Directors November 16, 2023

### **C. Report Preparation**

Report preparation, editing, and printing shall be the responsibility of the auditor.

The auditors will provide a digital copy of the report draft to the Finance Committee/Treasurer and the District Finance Manager for review. During that period, the auditor should be available for any meetings that may be necessary to discuss the review or audit reports. Once all issues for discussion are resolved, the final signed auditor's opinion shall be delivered to the District within five working days. It is anticipated that this process will be completed and the final report delivered by October 23, 2023 for FY 2022, unless agreed to otherwise. A partner of the audit firm who has a clear understanding of the audit and experience in presenting audit reports to boards of directors and public officials, is expected to make a presentation of the findings to the District Finance Committee and the Board of Directors at times consistent with agreed upon schedules.

## **V. PROPOSAL REQUIREMENTS**

### **A. General Requirements**

- 1) Inquiries concerning this request for proposals should be made to Director of Finance & HR Laurie Bowie @ [laurieb@cascobaylines.com](mailto:laurieb@cascobaylines.com).
- 2) Submission of Technical Proposal. An original and/or digital copy of the Technical Proposal must be received by 2:00 PM on May 31, 2023 for a proposal to be considered. The requirements of the technical proposal are described below.
- 3) Submission of Cost Proposal. An original of the Cost Proposal must be received by 2:00 PM on May 31, 2023, under a separate cover in a sealed envelope to be considered. The requirements of the cost proposal are described below.

### **B. Format for Proposal**

The format of the Proposal shall be as follows:

- 1) Transmittal Letter - Include a general introduction, note the RFP subject, and briefly state the proposer's understanding of the audit services to be performed; a positive commitment to perform the service within the time period specified; the name(s) of the person(s) authorized to represent the proposer, title, address, and telephone number.
- 2) Detailed Proposal - The detailed proposal should include a table of contents, and include the required content set out in Section C and D below.

### **C. Contents of Proposal**

The purpose of the Proposal is to demonstrate the commitment, qualifications, and capacity of the firms seeking to undertake an independent audit of the District in conformity with the requirements of this Request for Proposal. The Proposal should demonstrate the qualifications of the firm and of the staff to be assigned to this audit. It should also specify an audit approach

that will meet the Request for Proposal requirements. There should be no mention of cost in the Proposal. All costs should be discussed in the separate Cost Proposal. The Proposal should address all the points outlined in the RFP. While additional data may be presented, the areas detailed below must be included. They represent the criteria against which the proposal will be evaluated.

1) License to Practice in Maine.

An affirmative statement should be included that the firm and all assigned key professional staff are properly licensed to practice in Maine.

2) Independence

The firm should provide an affirmative statement that it is independent of the District as defined by generally accepted auditing principles set forth by the U.S. General Accounting Office's Government Auditing Standards.

3) Insurance

The audit firm shall procure and maintain, for the duration of the agreement, workers' compensation, employer's liability, commercial general liability, and automobile liability insurance against claims for injuries to persons or damages to property which may arise out of or in connection with the performance of the work by the firm, its employees, and its representatives.

4) Firm Qualifications and Experience

The proposer should provide an overview of the firm including information on the number of accountants and staff employed, the size of the firm's governmental audit staff, the location of the office from which the work on this audit is to be performed, the number and job title of the professional staff that would be assigned to the audit. The proposer is also required to submit a copy of the report on its most recent external quality control (peer) review, with a statement whether that quality control review included a review of specific government audits (required by Government Audit Standards (1994)).

- a) The proposer shall also provide information on the results of any federal or state desk reviews or field reviews of its audits during the past three (3) years. In addition, the proposer shall provide information on the circumstances and status of any negative actions taken or pending against the firm during the past three (3) years with state regulatory bodies or professional organizations.

5) Partner, Supervisory and Staff Qualifications and Experience

- a) Identify the principal supervisory and management staff, including audit partners, managers, and other supervisors and specialists, who would be assigned to the audit and provide their background and indication of necessary licensure. Also, provide information on the government auditing experience of each person, including

information on relevant continuing professional education for the past three (3) years and membership in professional organizations relevant to the performance of this audit.

- b) Principal supervisory and management staff, including audit partners, managers, other supervisors and specialists may be changed during the course of the agreement, provided that replacements have substantially the same or better qualifications or experience.

#### 6) Similar Scope of Work with Other Government Entities

For the firm's office that will be assigned responsibility for the audit, list the most significant work performed in the last five years that are similar to the scope of work described in this request for proposal. Please provide a list of not less than three client references for which services similar to those outlined in this RFP are currently or have recently been provided. For each reference listed, provide the name of the organization, approximate gross cost of the contract, dates for which the service(s) are/were provided, type of service(s) being provided and the name, address and telephone number of the responsible person within the reference's organization. The District reserves the right to contact any or all of the listed references regarding the audit services performed by the proposer.

#### 7) Specific Audit Approach

The proposal should set forth a summary, high-level work plan, including an overview of the review and audit methodologies to be followed to perform the services required in this request for proposal.

#### 8) Identification of Anticipated Potential Audit Problems

The proposer should identify and describe any anticipated potential audit problems or special assistance that may be anticipated, and the firm's suggested approach to resolving these problems, and any special assistance that will be requested from the District.

### **D. Cost Proposal**

#### 1. Total Cost Proposal

The Cost Proposal should contain all pricing information relative to performing the audit as described in the request for proposal. This will be used as a point of evaluation and should be a reasonable cost associated with the anticipated work. It should include direct and indirect costs, including out-of-pocket expenses. A final price will be established with the selected proposer after finalizing scope and agreement of work effort. The District will not be responsible for expenses incurred in preparing and submitting the proposal.

#### 2) Rates by Partner, Supervisory and Staff

The cost proposal should include information regarding the estimated number of hours to be dedicated to the District's audit, delineated by staffing level and billing rate, and including all

additional expenses to support the proposed price. Billing rates listed in these schedules will be used if any additional work is requested outside the scope of this proposal.

### 3) Manner of Payment

Progress payments will be made on the basis of work completed during the course of the audit and out-of-pocket expenses incurred in accordance with the firm's proposal. Interim billing shall cover a period of not less than a calendar month. Details of staff hours with billing rates will be required to be included on each invoice. Payment will be made based upon actual costs not to exceed the maximum outlined in the proposal, unless otherwise agreed in writing by the parties. Ten percent (10%) will be withheld pending delivery and approval of the firm's final reports.

## VI. EVALUATION PROCEDURES

### A. Review Committee

Proposals submitted will be reviewed by a selection team chosen by the District, which will make the decision on acceptance. A meeting with the Finance Committee may be requested as part of the evaluation.

### B. Evaluation Criteria

Proposals will be evaluated on the following:

#### 1. Mandatory Elements

- a. The audit firm is independent and licensed to practice in Maine
- b. The firm has no conflict of interest with the District
- c. The firm follows the instructions set forth in the RFP
- d. The firm submits a copy of its last external quality (peer) review report and the firm has a record of quality audit work.

#### 2. Technical Quality

- a. Experience with comparable government audits 20%
- b. Commitment to assign senior and qualified staff 20%
- c. Experience with comparable audits of public transit entities 15%
- d. Interest in performing audit services for the District 20%
- e. Audit approach and communication regarding work plan 15%
- f. Proposed Fees 10%

### C. Selection of Firm

The District's Board of Directors will approve selection of a firm based upon the recommendation of the Selection Committee. It is anticipated that a firm will be selected by June 15, 2023. Following notification of the firm selected, it is expected a contract will be executed between both parties no later than June 30, 2023, provided that all of the required insurances can be obtained.

**D. Right to Reject Proposals**

Submission of a proposal indicates acceptance by the firm of the conditions contained in this request for proposal unless clearly and specifically noted in the proposal submitted and confirmed in the contract between the District and the firm selected. The District reserves the right without prejudice to reject any or all proposals.

**VII. APPENDICES**

1. Appendix A - District's Protest Procedures
2. Appendix B - Standard Contract for Consultation and Professional Services
3. Appendix C – FTA Governing Documents
4. Required Certifications (Must be signed and submitted with proposal)
  - A. FTA Clauses Certification
  - B. Lobbying Certification
  - C. DBE Utilization Form

## **Appendix A**

### **DISTRICT'S PROTEST PROCEDURES**

#### **1 Introduction**

1. These procedures apply to Invitation for Bid (IFB) and Request for Proposals (RFP).
2. The procedures cover pre-award, award and post award phases of procurement.
3. Casco Bay Lines reserves the right to postpone bid opening for its own convenience, to reject any or all bids and to waive any irregularities.
4. Casco Bay Lines will establish a formal record of the dispute resolution process.

#### **2 Pre-Award**

1. Protest of specifications or scope of services must be received by Casco Bay Lines in writing not less than 10 business days before the date of scheduled bid opening. Any protest must be fully supported with technical data, test results, or other pertinent information as evidence that the substitute offered is equal to or better than the specification requirement.
2. Casco Bay Lines replies to protests under paragraph 2.1 above will be postmarked at least 5 business days before the scheduled date of bid opening. Casco Bay Lines will respond specifically to each material issue in its reply.

#### **3 Award**

1. A bidder may protest the proposed award of contract to the General Manager of Casco Bay Lines in writing no later than 5 business days prior to the proposed effective date of contract. Any contract award protest must be fully supported with technical data, test results, or other pertinent information as evidence that the accepted bid or proposal does not meet the specifications or scope of services. The General Manager will attempt to resolve the issues raised by protesters prior to the effective date of contract. The General Manager will issue a final decision in the matter and the procurement process will continue. Bidders may appeal this decision to the Federal Transit Administration (FTA) and no award will be made until FTA has issued a ruling.

#### **4 Post-Award**

1. Post-award protests will only be accepted concerning the alleged failure of the successful bidder to deliver the procured goods and/or services pursuant to the specifications or scope of services.
2. Casco Bay Lines will respond in writing to protesters. If Casco Bay Lines cannot resolve a legitimate issue with the successful bidder, then legal recourse may be pursued. Should the procurement contract with the successful bidder be terminated as a result of legal action, a re-bid of the procurement may occur.

## 5 Appeals to FTA

1. Under the provisions of Circular 4220.1F, FTA will only review protests regarding the alleged failure of Casco Bay Lines to have written protest procedures or an alleged failure to follow those procedures. An appeal to FTA must be in writing and received by the FTA no later than 5 business days following the final decision rendered by Casco Bay Lines or Casco Bay Lines has failed to render a final decision of the protest. Appeals shall be filed with the FTA Region 1 Office Kendall Square, 55 Broadway Suite 920, Cambridge, MA 02142-1093, with a copy to Casco Bay Lines. Appeals must include the name and address of the protester; cite Casco Bay Lines as the grantee, contain the project number, a statement of the grounds for appeal and any supporting documentation; and include a copy of the protest filed with Casco Bay Lines and a copy of Casco Bay Lines decision, if any.
2. Upon notice that an appeal has been submitted to the FTA, Casco Bay Lines will contact the appropriate FTA official to determine if the bid opening should be postponed. If the bid opening is postponed, Casco Bay Lines will notify all prime contractors and subcontractors who have been furnished a copy of the specifications that an appeal has been filed and that bid opening is postponed until FTA has issued a decision. Appropriate addenda will be issued rescheduling bid opening.
3. Any appeal to FTA may be withdrawn at any time.
4. The FTA decision on any appeal will be final, and no further appeals will be considered by FTA or Casco Bay Lines.

## Appendix B

### Standard Contract for Consultation and Professional Services

#### AGREEMENT FOR CONSULTATION AND PROFESSIONAL SERVICES

##### Financial Audit Services

THIS AGREEMENT made this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ by and between the Casco Bay Island Transit District (hereinafter referred to as "District"), and \_\_\_\_\_, whose address is, \_\_\_\_\_ (hereinafter referred to as "Consultant");

##### WITNESSETH:

IN CONSIDERATION of the mutual covenants and conditions herein contained, the parties do hereby agree as follows:

##### General

DISTRICT engages CONSULTANT to furnish the services hereinafter mentioned upon the covenants and conditions of this Agreement, at the compensation herein stipulated, and CONSULTANT accepts said engagement upon said terms.

##### Duties of Consultant; Services to be Performed by Consultant

CONSULTANT shall perform such duties and services as are listed in agreement and is hereby referred to and made a part hereof by reference. Said services shall be completed according to the time schedule contained in the agreement.

##### Services or Materials to be Performed or Furnished by District

DISTRICT shall assist CONSULTANT in connection with this Agreement as necessary in accordance with generally accepted accounting principles (GAAP) and generally accepted auditing standards.

##### Payment by District: Time and Manner of Payment

DISTRICT shall pay CONSULTANT, for all services to be rendered and all materials to be furnished under this Agreement, the amount specifically set forth and, in the manner, specifically set forth on agreement, based on the accepted cost proposal, which will be attached as Exhibit A. CONSULTANT agrees to accept said sum as full compensation for all services due under this Agreement.

Notwithstanding any other language in the Agreement or any exhibits, CONSULTANT agrees that it will perform all tasks for a sum not to exceed; \_\_\_\_\_ (\$\_\_\_\_\_ U.S. Dollars).

This is an Agreement for financial auditing services as outlined in Section D of the RFP document, and CONSULTANT has accurately determined the price of those tasks.

##### Authorization To Perform Services

The CONSULTANT is not authorized to perform any services or incur any costs whatsoever under the terms of this Agreement until receipt of written authorization from the DISTRICT.

**Additional Work**

CONSULTANT shall not be entitled to extra compensation for services or materials not otherwise required under this Agreement.

**Professional Skill**

CONSULTANT represents that it is skilled in the professional calling necessary to perform the work agreed to be done by it under this Agreement. CONSULTANT represents and warrants to DISTRICT that it has all licenses, permits, qualifications that are legally required for CONSULTANT to practice its profession and that CONSULTANT shall, at its sole cost and expense, keep all such licenses, permits, and approvals which are legally required for CONSULTANT to practice its profession in effect. DISTRICT relies upon the skill of CONSULTANT to do and perform its work in a skillful manner, and CONSULTANT agrees to thus perform its work, and the acceptance of its work by DISTRICT shall not operate as a release of CONSULTANT from said Agreement. For purposes of this Agreement, "skillful manner" shall mean the standard of prevailing in the industry in the Portland Maine Area during the term of this Agreement.

**Equal Employment Opportunity**

CONSULTANT shall not discriminate against any employee or applicant for employment because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status or sex of such person as provided in Section 12940 of the Government Code.

**Compliance with Laws**

CONSULTANT shall comply with all federal, state and District laws, statutes, ordinances, rules and regulations and the orders and decrees of any courts or administrative bodies or tribunals in any manner affecting the performance of the Agreement. The laws of the State of Maine shall govern this Agreement.

**Independent Contractor; Not an Agent**

CONSULTANT, at all times during the term of this Agreement is acting as an independent contractor in furnishing the services or materials and performing the work required by this Agreement and is not an agent, servant or employee of DISTRICT. Notwithstanding any other DISTRICT, state or federal policy, rule, regulation, law, or ordinance to the contrary, CONSULTANT and any of its employees, agents, and subcontractors providing services under this Agreement shall not qualify for or become entitled to, and hereby agree to waive any and all claims to, any compensation, benefit, or any incident of employment by DISTRICT.

Except as DISTRICT may specify in writing, CONSULTANT shall have no authority, express or implied, to act on behalf of DISTRICT in any capacity whatsoever as an agent or pursuant to this Agreement to bind DISTRICT to any obligation whatsoever.

**Time**

CONSULTANT shall devote such time to the performance of services pursuant to this Agreement as may be reasonably necessary for satisfactory performance of CONSULTANT'S obligations pursuant to this Agreement.

**Indemnity**

CONSULTANT agrees to indemnify and save harmless and defend with counsel acceptable to DISTRICT, the DISTRICT, its officials, officers, employees, agents, and volunteers from and against any and all losses, liability, suits, actions, costs, expenses, claims, causes of action and damages (including costs of defense) arising out of any personal injury, bodily injury, loss of life, or damage to property, or any violation of any federal, state, or municipal law or ordinance to the extent caused, in whole or in part, by recklessness, the willful misconduct or negligent acts or omissions of CONSULTANT, its officers, employees, agents, consultants, subcontractors or any officer, agent, or employee thereof but excluding liabilities due to the active negligence of the DISTRICT. By execution of this Agreement, CONSULTANT acknowledges and agrees that CONSULTANT has read and understands the provisions hereof and that this paragraph is a material element of consideration. DISTRICT and CONSULTANT agree that this Agreement is consistent with Section 2782.8 of the Civil Code.

**Insurance: Public Liability, Workers' Compensation, Errors and Omissions**

CONSULTANT shall procure and maintain for the duration of the contract insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder by the CONSULTANT, its officers, subcontractors, agents, representatives, or employees. CONSULTANT shall be required to meet all District Insurance Requirements.

**Consultant Professional Team**

CONSULTANT shall provide and maintain the professional team to perform and furnish the materials in connection with this Agreement whose names and capacities are set forth in Exhibit B. In the event that any member of said team shall leave the employ of CONSULTANT or be transferred to another office of CONSULTANT, CONSULTANT shall so advise DISTRICT and replace that member with a new member who is competent to perform the required work and who shall be satisfactory to DISTRICT. Such other agents or employee contractors or subcontractors not listed on Exhibit B as may be required to perform any portion of this Agreement shall be competent and shall be suitably experienced in the function which they perform.

**Notices**

Unless otherwise provided herein, all notices required hereunder shall be given by certified mail, postage prepaid, and addressed to the party at the address indicated in the opening paragraph of this Agreement provided, however, that in lieu thereof, notice may be given by personal delivery to the party at said address.

**Title to Documents**

All original calculations, photographs, maps, drawings, plans, design notes and other material or documents developed or used in connection with the performance of this Agreement shall be the

property of DISTRICT provided, however, that CONSULTANT may provide DISTRICT with legible photo static copies thereof in lieu of the originals upon approval by DISTRICT representative. All such material and documents shall remain confidential and may not be divulged, published or shared by CONSULTANT without the prior written consent of DISTRICT. Any plans and specifications shall bear the name of the CONSULTANT together with his certificate number, if any. If CONSULTANT'S working papers or product includes computer generated statistical material, CONSULTANT shall provide the material including the data base upon which it is based to DISTRICT in a mutually agreed upon computer machine-readable format and media.

### **Assignment**

Neither party shall assign or sublet any portion of this Agreement without the written consent of the other party in writing.

### **Termination**

Without limitation to such rights or remedies as DISTRICT shall otherwise have by law, DISTRICT shall also have the right to terminate this Agreement for any reason upon seven (7) days' written notice to CONSULTANT. This Agreement may also be terminated by either party upon seven (7) days' written notice should the other party fail substantially to perform in accordance with this agreement through no fault of the other or if the project is stopped by conditions beyond the control of the DISTRICT.

In addition to terminating this Agreement if CONSULTANT materially breaches any of the terms of this Agreement, DISTRICT'S remedies shall include, but not be limited to:

- Retain any work product prepared by CONSULTANT pursuant to this Agreement;
- Retain a different consultant to complete the work described in agreement not finished by CONSULTANT; and/or
- This description of DISTRICT's remedies does not otherwise limit DISTRICT's remedies at law or equity.

### **Consultant Nondisclosure**

CONSULTANT will not directly or indirectly use (other than for the DISTRICT), publish, or otherwise disclose at any time (except as CONSULTANT'S duties may require), either during or subsequent to the performance of consulting services, any of DISTRICT'S confidential information (whether or not conceived, originated, discovered, or developed in whole or in part by CONSULTANT) as defined below. "Confidential information" means information or material that is not generally available to or used by others or the utility or value of which is not generally known or recognized as standard practice whether or not the underlying details are in the public domain, including without limitation:

- a. Information or material that relates to DISTRICT'S inventions, technological developments, "know how", purchasing, accounting, merchandising or licensing;
- b. Trade secrets;
- c. Software in various stages of development (source code, object code, documentation, diagrams, flow charts), designs, drawings, specifications, models, data and customer information; and
- d. Any information of the type described above that DISTRICT obtained from another party and that the DISTRICT treats as proprietary or designates as confidential, or is obligated to do so by virtue of a third-party agreement, whether or not owned or developed by the DISTRICT.

The obligations of confidentiality imposed herein will not apply to confidential information that:

- a. Is or has been generally available to the public by any means, through no fault of CONSULTANT and without breach of these provisions.
- b. Is or has been lawfully disclosed to CONSULTANT by a third party without an obligation of confidentiality being imposed upon CONSULTANT.
- c. Has been disclosed without restriction by the DISTRICT or by a third-party owner of confidential information.
- d. Was required to be disclosed pursuant to law.

CONSULTANT agrees to deliver to DISTRICT promptly on request, or on the date of termination of CONSULTANT'S services, all documents, software, including any copies, and other materials in CONSULTANT'S possession pertaining to the business of DISTRICT and originating with the DISTRICT that came into CONSULTANT'S possession.

The disclosure of confidential information shall not be construed as granting either a license under any patent, patent application or any right of ownership in said confidential information.

CONSULTANT acknowledges and agrees that in the event of a breach or threatened breach of any provisions of this Agreement, the DISTRICT shall have no adequate remedy at law and shall therefore be entitled to enforce any such provision by temporary or permanent injunctive or mandatory relief obtained in any court without the necessity of proving damages, posting any bond or other security, and without prejudice or diminution of any other rights or remedies which may be available at law or in equity.

**No-Waiver;**

Failure on the part of either party to enforce any provisions of this Agreement shall not be construed as a waiver of the right to compel enforcement of such provisions or any other provision. The singular number shall include the plural, and any gender referenced shall include the masculine, feminine, and neuter gender whenever the context of this Agreement permits.

**Mediation**

Should any dispute arise out of this Agreement, the parties shall meet in mediation and attempt to reach a resolution with the assistance of a mutually acceptable mediator. Neither party shall be permitted to file a legal action without first meeting in mediation and making a good faith attempt to reach a mediated resolution. The costs of the mediator, if any, shall be shared equally by the parties. If a mediated settlement is reached, neither party shall be deemed the prevailing party for purposes of the settlement and each party shall bear its own legal costs.

**Attorney's Fees**

If a party brings any action, including an action for declaratory relief, to enforce or interpret the provisions of this Agreement, the prevailing party is entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. Such fees may be set by the court in the same action or in a separate action brought for that purpose.

**Survival**

All obligations arising prior to the termination of this Agreement and all provisions of this Agreement allocating liability between DISTRICT and CONSULTANT survive the termination of this Agreement.

**Severability**

If a court of competent jurisdiction finds or rules that any provision of this Agreement is invalid, void, or unenforceable, the provisions of this Agreement not so adjudged shall remain in full force and effect. The invalidity in whole or in part of any provision of this Agreement shall not void or affect the validity of any other provision of this Agreement.

**Entire Agreement: Amendment**

This contract supersedes any and all other agreements, whether oral or in writing, between the parties with respect to the subject of this contract. Except as to those documents specifically incorporated by reference into this contract, this contract contains all of the covenants and agreements between the parties with respect to the subject of this contract, and each party acknowledges that no representations, inducements, promises, or agreements have been made by or on behalf of any party except the covenants and agreements embodied in this contract. No agreement, statement, or promise not contained in this contract shall be valid or binding on the parties with respect to the subject of this contract. No modifications hereof shall be effective unless such modification is in writing signed by all parties to this Agreement.

IN WITNESS WHEREOF, the parties have hereunto set their hands the day and year first above written.  
Casco Bay Island Transit District

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Print Name/Title

\_\_\_\_\_  
CONSULTANT/SERVICE NAME

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Print Name/Title

**Attachments:**

Exhibit A: Accepted Cost Proposal

Exhibit B: List of Professional Team Assigned to District

# APPENDIX C

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## **A.1 ACCESS TO RECORDS AND REPORTS**

49 U.S.C. § 5325(g)

2 C.F.R. § 200.333

49 C.F.R. part 633

### **Applicability to Contracts**

The record keeping and access requirements apply to all contracts funded in whole or in part with FTA funds. Under 49 U.S.C. § 5325(g), FTA has the right to examine and inspect all records, documents, and papers, including contracts, related to any FTA project financed with Federal assistance authorized by 49 U.S.C. Chapter 53.

### **Flow Down**

The record keeping and access requirements extend to all third party contractors and their contracts at every tier and sub-recipients and their subcontracts at every tier.

### **Model Clause/Language**

There is no required language for record keeping and access requirements. Recipients can draw on the following language for inclusion in their federally funded procurements.

### **Access to Records and Reports**

- a. Record Retention. The Contractor will retain, and will require its subcontractors of all tiers to retain, complete and readily accessible records related in whole or in part to the contract, including, but not limited to, data, documents, reports, statistics, sub-agreements, leases, subcontracts, arrangements, other third party agreements of any type, and supporting materials related to those records.
- b. Retention Period. The Contractor agrees to comply with the record retention requirements in accordance with 2 C.F.R. § 200.333. The Contractor shall maintain all books, records, accounts and reports required under this Contract for a period of at not less than three (3) years after the date of termination or expiration of this Contract, except in the event of litigation or settlement of claims arising from the performance of this Contract, in which case records shall be maintained until the disposition of all such litigation, appeals, claims or exceptions related thereto.
- c. Access to Records. The Contractor agrees to provide sufficient access to FTA and its contractors to inspect and audit records and information related to performance of this contract as reasonably may be required.
- d. Access to the Sites of Performance. The Contractor agrees to permit FTA and its contractors access to the sites of performance under this contract as reasonably may be required.

## **A.2 BONDING REQUIREMENTS**

2 C.F.R. § 200.325

31 C.F.R. part 223

### **Applicability to Contracts**

Bonds are required for all construction or facility improvement contracts and subcontracts exceeding the simplified acquisition threshold. FTA may accept the bonding policy and requirements of the recipient if FTA has determined that the Federal interest is adequately protected. If such a determination has not been made, the following minimum requirements apply:

- a. A bid guarantee from each bidder equivalent to five percent of the bid price. The “bid guarantee” must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.
- b. A performance bond on the part of the contractor for 100 percent of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.
- c. A payment bond on the part of the contractor for 100 percent of the contract price. A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

### **Flow Down**

These requirements extend to all third party contractors and their contracts at every tier and sub-recipients and their subcontracts at every tier that exceed the simplified acquisition threshold.

### **Model Clauses/Language**

There is no required language for bonding requirements. Recipients can draw on the following language for inclusion in their federally funded procurements.

### **Bond Requirements**

#### **Bid Guarantee**

Bidders shall furnish a bid guaranty in the form of a bid bond, or certified treasurer’s or cashier’s check issued by a responsible bank or trust company, made payable to the RECIPIENT. The amount of such guaranty shall be equal to ~~\$\$\$\$~~ or ~~XX%~~ of the total bid price.

In submitting this bid, it is understood and agreed by bidder that the RECIPIENT reserves the right to reject any and all bids, or part of any bid, and it is agreed that the Bid may not be withdrawn for a period of [90] days subsequent to the opening of bids, without the written consent of RECIPIENT.

It is also understood and agreed that if the undersigned bidder should withdraw any part or all of his bid within [90] days after the bid opening without the written consent of the RECIPIENT, or refuse or be unable to enter into this Contract as provided above, or refuse or be unable to furnish adequate and acceptable Performance and Payment Bonds, or refuse or be unable to furnish adequate and acceptable insurance, as provided above, it shall forfeit its bid guaranty to the extent RECIPIENT'S damages occasioned by such withdrawal, or refusal, or inability to enter into an agreement, or provide adequate security thereof.

It is further understood and agreed that to the extent the defaulting bidder's bid guaranty shall prove inadequate to fully recompense RECIPIENT for the damages occasioned by default, then the undersigned bidder agrees to indemnify RECIPIENT and pay over to RECIPIENT the difference between the bid guarantee and RECIPIENT'S total damages so as to make RECIPIENT whole.

The undersigned understands that any material alteration of any of the above or any of the material contained herein, other than that requested will render the bid unresponsive.

### **Performance Guarantee**

A Performance Guarantee in the amount of 100% of the Contract value is required by the Recipient to ensure faithful performance of the Contract. Either a Performance Bond or an Irrevocable Stand-By Letter of Credit shall be provided by the Contractor and shall remain in full force for the term of the Agreement. The successful Bidder shall certify that it will provide the requisite Performance Guarantee to the RECIPIENT within ten (10) business days from Contract execution. The RECIPIENT requires all Performance Bonds to be provided by a fully qualified surety company acceptable to the RECIPIENT and listed as a company currently authorized under 31 C.F.R. part 22 as possessing a Certificate of Authority as described hereunder. RECIPIENT may require additional performance bond protection when the contract price is increased. The increase in protection shall generally equal 100 percent of the increase in contract price. The RECIPIENT may secure additional protection by directing the Contractor to increase the amount of the existing bond or to obtain an additional bond.

If the Bidder chooses to provide a Letter of Credit as its Performance Guarantee, the Bidder shall furnish with its bid, certification that an Irrevocable Stand-By Letter of Credit will be furnished should the Bidder become the successful Contractor. The Bidder shall also provide a statement from the banking institution certifying that an Irrevocable Stand-By Letter of Credit for the action will be provided if the Contract is awarded to the Bidder. The Irrevocable Stand-By Letter of Credit will only be accepted by the RECIPIENT if:

1. A bank in good standing issues it. The RECIPIENT will not accept a Letter of Credit from an entity other than a bank.
2. It is in writing and signed by the issuing bank.
3. It conspicuously states that it is an irrevocable, non-transferable, "standby" Letter of Credit.
4. The RECIPIENT is identified as the Beneficiary.
5. It is in an amount equal to 100% of the Contract value. This amount must be in U.S. dollars.
6. The effective date of the Letter of Credit is the same as the effective date of the Contract
7. The expiration date of the Letter of Credit coincides with the term of this Agreement.

8. It indicates that it is being issued in order to support the obligation of the Contractor to perform under the Contract. It must specifically reference the Contract between the RECIPIENT and the Contractor the work stipulated herein.

The issuing bank's obligation to pay will arise upon the presentation of the original Letter of Credit and a certificate and draft (similar to the attached forms contained in Sections X and Y) to the issuing bank's representative at a location and time to be determined by the parties. This documentation will indicate that the Contractor is in default under the Contract.

**Payment Bonds**

A Labor and Materials Payment Bond equal to the full value of the contract must be furnished by the contractor to Recipient as security for payment by the Contractor and subcontractors for labor, materials, and rental of equipment. The bond may be issued by a fully qualified surety company acceptable to (Recipient) and listed as a company currently authorized under 31 C.F.R. part 223 as possessing a Certificate of Authority as described thereunder.

**Sample Bond Certifications**

**Performance Guarantee Certification**

The undersigned hereby certifies that the Bidder shall provide a Performance Guarantee in accordance with the Specifications.

Designate below which form of Performance Guarantee shall be provided:

\_\_\_\_\_ Performance Bond

\_\_\_\_\_ Irrevocable Stand-By-Letter of Credit

BIDDER'S NAME: \_\_\_\_\_

AUTHORIZED SIGNATURE: \_\_\_\_\_

TITLE: \_\_\_\_\_

DATE: \_\_\_\_\_

**PERFORMANCE BOND**

KNOW ALL MEN BY THESE PRESENTS: that \_\_\_\_\_ (Insert full name and address and legal title of Contractor) as Principal, hereinafter called Contractor, and \_\_\_\_\_

\_\_\_\_\_ (Insert full name and address or legal title of Surety) as Surety, hereinafter called Surety, are held and firmly bound unto RECIPIENT as Oblige, hereinafter called Authority, in the amount of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) for the payment whereof Contractor and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, Contractor has by written agreement dated \_\_\_\_\_, 20\_\_\_\_, entered into a contract with the RECIPIENT for Contract No. \_\_\_\_\_, which contract is by reference made a part hereof, and is hereinafter referred to as the Contract.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that, if Contractor shall promptly and faithfully perform said Contract, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

The Surety hereby waives notice of any alteration or extension of time made by the RECIPIENT.

Whenever Contractor shall be, and is declared by the RECIPIENT to be in default under the Contract, the RECIPIENT having performed RECIPIENT'S obligations thereunder, the Surety may promptly remedy the default, or shall promptly

1. Complete the Contract in accordance with its terms and conditions, or
2. Obtain a bid or bids for completing the Contract in accordance with its terms and conditions, and upon determination by Surety of the lowest responsible bidder, or, if the RECIPIENT elects, upon determination by the RECIPIENT and the Surety jointly of the lowest responsible bidder, arrange for a contract between such bidder and the Authority, and make available as Work progresses (even though there should be a default or a succession of defaults under the contract or contracts of completion arranged under this paragraph) sufficient funds to pay the cost of completion less the balance of the contract price; but not exceeding, the amount set forth in the first paragraph hereof. The term "balance of the contract price," as used in this paragraph, shall mean the total amount payable by the RECIPIENT to Contractor under the Contract and any amendments thereto, less the amount properly paid by the RECIPIENT to Contractor.

Any suit under this bond must be instituted before the expiration of two (2) years from the date on which final payment under the Contract falls due.

No right of action shall accrue on this bond to or for the use of any person or corporation other than the RECIPIENT or the heirs, executors, administrators or successors of the RECIPIENT.

Signed and sealed this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_.

WITNESS

PRINCIPAL

\_\_\_\_\_

\_\_\_\_\_

(SEAL)

\_\_\_\_\_ (Title)

WITNESS

SURETY

\_\_\_\_\_

\_\_\_\_\_

(SEAL)

\_\_\_\_\_

(Title)

**Attach hereto proof of authority of officers or agents to sign bond.**

**Irrevocable Stand-By Letter Of Credit Certificate**

The undersigned states that he/she is \_\_\_\_\_ of the

(Title)

\_\_\_\_\_ (The "Beneficiary") and hereby

(Name of Beneficiary)

Certifies on behalf of the Beneficiary to \_\_\_\_\_ (the "Bank), with

(Name of Issuing Bank)

Reference to Irrevocable Standby Letter of Credit No. \_\_\_\_\_ Issued by the

Bank (the "Letter of Credit"), that:

1. The undersigned is duly authorized to execute and deliver this certificate on behalf of the Beneficiary.
2. The Beneficiary is making a drawing under the Letter of Credit.
3. An Event of Default has occurred under Contract No. \_\_\_\_\_.
4. The amount of the draft presented with this certificate does not exceed the total maximum amount drawable today under the Letter of Credit as provided therein.

IN WITNESS WHEREOF, this certificate is executed this \_\_\_\_\_ day of \_\_\_\_\_, 20 .

(NAME OF BENEFICIARY)

By: \_\_\_\_\_

Its: \_\_\_\_\_

**Bank Draft**

FOR VALUE RECEIVED

Pay on presentment to \_\_\_\_\_ the sum of \_\_\_\_\_  
(Name of Beneficiary) Dollars (\$)

Charge the Account of \_\_\_\_\_ Irrevocably Standby Letter of  
(Name of Issuing Bank)

Credit No. \_\_\_\_\_ Dated: 20 \_\_\_\_.

To \_\_\_\_\_  
(Name of Issuing Bank)

**NAME OF BENEFICIARY**

By \_\_\_\_\_

Its \_\_\_\_\_

### **A.3 BUS TESTING**

49 U.S.C. § 5318(e)

49 C.F.R. part 665

#### **Applicability to Contracts**

The Bus Testing requirements pertain only to the purchase or lease of any new bus model, or any bus model with a major change in configuration or components to be acquired or leased with funds obligated by FTA. Recipients are responsible for determining whether a vehicle to be acquired requires full or partial testing or has already satisfied the bus testing requirements by achieving a passing test score in accordance with 49 C.F.R. part 665. Recipients must certify compliance with FTA's bus testing requirements in all grant applications for FTA funding for bus procurements.

#### **Flow Down**

There is no flow down requirement for Bus Testing.

#### **Model Clause/Language**

The operator of the bus testing facility is required to provide the resulting test report to the entity that submits the bus for testing. The manufacturer or dealer of a new bus model or a bus produced with a major change in component or configuration is required to provide a copy of the corresponding full bus testing report and any applicable partial testing report(s) to the recipient during the point in the procurement process specified by the recipient, but in all cases before final acceptance of the first bus by the recipient. The complete bus testing reporting requirements are provided in 49 C.F.R. § 665.11. Although no specific certification and bus testing language is required, recipients can draw on the following language for inclusion in their federally funded procurements.

#### **Bus Testing**

The Contractor [Manufacturer] agrees to comply with the Bus Testing requirements under 49 U.S.C. 5318(e) and FTA's implementing regulation at 49 C.F.R. part 665 to ensure that the requisite testing is performed for all new bus models or any bus model with a major change in configuration or components, and that the bus model has achieved a passing score. Upon completion of the testing, the contractor shall obtain a copy of the bus testing reports from the operator of the testing facility and make that report(s) publicly available prior to final acceptance of the first vehicle by the recipient.

#### **A.4 BUY AMERICA REQUIREMENTS**

49 U.S.C. 5323(j)

49 C.F.R. part 661

##### **Applicability to Contracts**

FTA's Buy America law and regulations apply to projects that involve the purchase of more than \$150,000 of iron, steel, manufactured goods, or rolling stock to be delivered to the recipient to be used in an FTA assisted project. FTA cautions that its Buy America regulations are complex. Recipients can obtain detailed information on FTA's Buy America regulation at: <https://www.transit.dot.gov/buyamerica> The Federal Transit Administration's Buy America website.

##### **Flow Down**

The Buy America requirements flow down from FTA recipients and sub-recipients to first tier contractors, who are responsible for ensuring that lower tier contractors and subcontractors are in compliance.

##### **Model Clause/Language**

The Buy America regulation at 49 C.F.R. § 661.13 requires notification of the Buy America requirements in a recipients' bid or request for proposal for FTA funded contracts. Recipients can draw on the following language for inclusion in their federally funded procurements. Note that recipients are responsible for including the correct Buy America certification based on what they are acquiring. Recipients should not include both the rolling stock and steel, iron, or manufactured products certificates in the documents unless acquiring both in the same procurement.

##### **Buy America**

The contractor agrees to comply with 49 U.S.C. 5323(j) and 49 C.F.R. part 661, which provide that Federal funds may not be obligated unless all steel, iron, and manufactured products used in FTA funded projects are produced in the United States, unless a waiver has been granted by FTA or the product is subject to a general waiver. General waivers are listed in 49 C.F.R. § 661.7. Separate requirements for rolling stock are set out at 49 U.S.C. 5323(j)(2)(C) and 49 C.F.R. § 661.11.

The [bidder or offeror] must submit to [Recipient] the appropriate Buy America certification below with its [bid or offer]. Bids or offers that are not accompanied by a completed Buy America certification will be rejected as nonresponsive.

***In accordance with 49 C.F.R. § 661.6, for the procurement of steel, iron or manufactured products, use the certifications below.***

*Certificate of Compliance with Buy America Requirements*

The bidder or offeror hereby certifies that it will comply with the requirements of 49 U.S.C. 5323(j)(1), and the applicable regulations in 49 C.F.R. part 661.

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

Signature: \_\_\_\_\_

Company: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

*Certificate of Non-Compliance with Buy America Requirements*

The bidder or offeror hereby certifies that it cannot comply with the requirements of 49 U.S.C. 5323(j), but it may qualify for an exception to the requirement pursuant to 49 U.S.C. 5323(j)(2), as amended, and the applicable regulations in 49 C.F.R. § 661.7.

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

Signature: \_\_\_\_\_

Company: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

***In accordance with 49 C.F.R. § 661.12, for the procurement of rolling stock (including train control, communication, and traction power equipment) use the following certifications:***

*Certificate of Compliance with Buy America Rolling Stock Requirements*

The bidder or offeror hereby certifies that it will comply with the requirements of 49 U.S.C. 5323(j), and the applicable regulations of 49 C.F.R. § 661.11.

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

Signature: \_\_\_\_\_

Company: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

*Certificate of Non-Compliance with Buy America Rolling Stock Requirements*

The bidder or offeror hereby certifies that it cannot comply with the requirements of 49 U.S.C. 5323(j), but may qualify for an exception to the requirement consistent with 49 U.S.C. 5323(j)(2)(C), and the applicable regulations in 49 C.F.R. § 661.7.

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

Signature: \_\_\_\_\_

Company: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

## **A.5 CARGO PREFERENCE REQUIREMENTS**

46 U.S.C. § 55305

46 C.F.R. part 381

### **Applicability to Contracts**

The Cargo Preference Act of 1954 requirements applies to all contracts involving equipment, materials, or commodities that may be transported by ocean vessels.

### **Flow Down**

The Cargo Preference requirements apply to all contracts involved with the transport of equipment, material, or commodities by ocean vessel.

### **Model Clause/Language**

The Maritime Administration (MARAD) regulations at 46 C.F.R. § 381.7 contain suggested contract clauses. Recipients can draw on the following language for inclusion in their federally funded procurements.

### **Cargo Preference - Use of United States-Flag Vessels**

The contractor agrees:

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

## **A.6 CHARTER SERVICE**

49 U.S.C. 5323(d) and (r)

49 C.F.R. part 604

### **Applicability to Contracts**

The Charter Bus requirements apply to contracts for operating public transportation service.

### **Flow Down Requirements**

The Charter Bus requirements flow down from FTA recipients and sub-recipients to first tier service contractors.

### **Model Clause/Language**

The relevant statutes and regulations do not mandate any specific clause or language. Recipients can draw on the following language for inclusion in their federally funded procurements.

### **Charter Service**

The contractor agrees to comply with 49 U.S.C. 5323(d), 5323(r), and 49 C.F.R. part 604, which provides that recipients and sub-recipients of FTA assistance are prohibited from providing charter service using federally funded equipment or facilities if there is at least one private charter operator willing and able to provide the service, except as permitted under:

1. Federal transit laws, specifically 49 U.S.C. § 5323(d);
2. FTA regulations, "Charter Service," 49 C.F.R. part 604;
3. Any other federal Charter Service regulations; or
4. Federal guidance, except as FTA determines otherwise in writing.

The contractor agrees that if it engages in a pattern of violations of FTA's Charter Service regulations, FTA may require corrective measures or impose remedies on it. These corrective measures and remedies may include:

1. Barring it or any subcontractor operating public transportation under its Award that has provided prohibited charter service from receiving federal assistance from FTA;
2. Withholding an amount of federal assistance as provided by Appendix D to part 604 of FTA's Charter Service regulations; or
3. Any other appropriate remedy that may apply.

The contractor should also include the substance of this clause in each subcontract that may involve operating public transit services.

**A.7 CLEAN AIR ACT AND FEDERAL WATER POLLUTION CONTROL ACT**

42 U.S.C. §§ 7401 – 7671q

33 U.S.C. §§ 1251-1387

2 C.F.R. part 200, Appendix II (G)

**Applicability to Contracts**

The Clean Air and Clean Water Act requirements apply to each contract and subcontract exceeding \$150,000. Each contract and subcontract must contain a provision that requires the recipient to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401–7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251–1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

**Flow Down**

The Clean Air Act and Federal Water Pollution Control Act requirements extend to all third party contractors and their contracts at every tier and sub-recipients and their subcontracts at every tier.

**Model Clause/Language**

Recipients can draw on the following language for inclusion in their federally funded procurements.

The Contractor agrees:

1. It will not use any violating facilities;
2. It will report the use of facilities placed on or likely to be placed on the U.S. EPA “List of Violating Facilities;”
3. It will report violations of use of prohibited facilities to FTA; and
4. It will comply with the inspection and other requirements of the Clean Air Act, as amended, (42 U.S.C. §§ 7401 – 7671q); and the Federal Water Pollution Control Act as amended, (33 U.S.C. §§ 1251-1387).

## **A.8 CIVIL RIGHTS LAWS AND REGULATIONS**

### **Applicability to Contracts**

The following Federal Civil Rights laws and regulations apply to all contracts.

1. **Federal Equal Employment Opportunity (EEO) Requirements.** These include, but are not limited to:
  - a. Nondiscrimination in Federal Public Transportation Programs. 49 U.S.C. § 5332, covering projects, programs, and activities financed under 49 U.S.C. Chapter 53, prohibits discrimination on the basis of race, color, religion, national origin, sex (including sexual orientation and gender identity), disability, or age, and prohibits discrimination in employment or business opportunity.
  - b. Prohibition against Employment Discrimination. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, and Executive Order No. 11246, "Equal Employment Opportunity," September 24, 1965, as amended, prohibit discrimination in employment on the basis of race, color, religion, sex, or national origin.
2. Nondiscrimination on the Basis of Sex. Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. § 1681 et seq. and implementing Federal regulations, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 49 C.F.R. part 25 prohibit discrimination on the basis of sex.
3. Nondiscrimination on the Basis of Age. The "Age Discrimination Act of 1975," as amended, 42 U.S.C. § 6101 et seq., and Department of Health and Human Services implementing regulations, "Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance," 45 C.F.R. part 90, prohibit discrimination by participants in federally assisted programs against individuals on the basis of age. The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq., and Equal Employment Opportunity Commission (EEOC) Implementing regulations, "Age Discrimination in Employment Act," 29 C.F.R. part 1625, also prohibit employment discrimination against individuals age 40 and over on the basis of age.
4. Federal Protections for Individuals with Disabilities. The Americans with Disabilities Act of 1990, as amended (ADA), 42 U.S.C. § 12101 et seq., prohibits discrimination against qualified individuals with disabilities in programs, activities, and services, and imposes specific requirements on public and private entities. Third party contractors must comply with their responsibilities under Titles I, II, III, IV, and V of the ADA in employment, public services, public accommodations, telecommunications, and other provisions, many of which are subject to regulations issued by other Federal agencies.

### **Flow Down**

The Civil Rights requirements flow down to all third party contractors and their contracts at every tier.

### **Model Clause/Language**

Every federally funded contract must include an Equal Opportunity clause. Recipients can draw on the following language for inclusion in their federally funded procurements.

### Civil Rights and Equal Opportunity

The AGENCY is an Equal Opportunity Employer. As such, the AGENCY agrees to comply with all applicable Federal civil rights laws and implementing regulations. Apart from inconsistent requirements imposed by Federal laws or regulations, the AGENCY agrees to comply with the requirements of 49 U.S.C. § 5323(h) (3) by not using any Federal assistance awarded by FTA to support procurements using exclusionary or discriminatory specifications.

Under this Agreement, the Contractor shall at all times comply with the following requirements and shall include these requirements in each subcontract entered into as part thereof.

1. **Nondiscrimination.** In accordance with Federal transit law at 49 U.S.C. § 5332, the Contractor agrees that it will not discriminate against any employee or applicant for employment because of race, color, religion, national origin, sex, disability, or age. In addition, the Contractor agrees to comply with applicable Federal implementing regulations and other implementing requirements FTA may issue.
2. **Race, Color, Religion, National Origin, Sex.** In accordance with Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e et seq., and Federal transit laws at 49 U.S.C. § 5332, the Contractor agrees to comply with all applicable equal employment opportunity requirements of U.S. Department of Labor (U.S. DOL) regulations, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor," 41 C.F.R. chapter 60, and Executive Order No. 11246, "Equal Employment Opportunity in Federal Employment," September 24, 1965, 42 U.S.C. § 2000e note, as amended by any later Executive Order that amends or supersedes it, referenced in 42U.S.C. § 2000e note. The Contractor agrees to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, national origin, or sex (including sexual orientation and gender identity). Such action shall include, but not be limited to, the following: employment, promotion, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.
3. **Age.** In accordance with the Age Discrimination in Employment Act, 29 U.S.C. §§ 621- 634, U.S. Equal Employment Opportunity Commission (U.S. EEOC) regulations, "Age Discrimination in Employment Act," 29 C.F.R. part 1625, the Age Discrimination Act of 1975, as amended, 42 U.S.C. § 6101 et seq., U.S. Health and Human Services regulations, "Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance," 45 C.F.R. part 90, and Federal transit law at 49 U.S.C. § 5332, the Contractor agrees to refrain from discrimination against present and prospective employees for reason of age. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.
4. **Disabilities.** In accordance with section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, the Americans with Disabilities Act of 1990, as amended, 42U.S.C. § 12101 et seq., the Architectural Barriers Act of 1968, as amended, 42 U.S.C. §4151 et seq., and Federal transit law at 49 U.S.C. § 5332, the Contractor agrees that it will not discriminate against individuals on the basis of disability. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.

## **A.9 DISADVANTAGED BUSINESS ENTERPRISE (DBE)**

49 C.F.R. part 26

### **Background and Applicability**

The Disadvantaged Business Enterprise (DBE) program applies to FTA recipients receiving planning, capital and/or operating assistance that will award prime contracts (excluding transit vehicle purchases) exceeding \$250,000 in FTA funds in a Federal fiscal year. All FTA recipients above this threshold must submit a DBE program and overall triennial goal for DBE participation. The overall goal reflects the anticipated amount of DBE participation on DOT-assisted contracts. As part of its DBE program, FTA recipients must require that each transit vehicle manufacturer (TVM), as a condition of being authorized to bid or propose on FTA assisted transit vehicle procurements, certify that it has complied with the requirements of 49 C.F.R. § 26.49. Only those transit vehicle manufacturers listed on FTA's certified list of Transit Vehicle Manufacturers, or that have submitted a goal methodology to FTA that has been approved or has not been disapproved at the time of solicitation, are eligible to bid.

FTA recipients must meet the maximum feasible portion of their overall goal using race-neutral methods. Where appropriate, however, recipients are responsible for establishing DBE contract goals on individual DOT-assisted contracts. FTA recipients may use contract goals only on those DOT-assisted contracts that have subcontracting responsibilities. See 49 C.F.R. § 26.51(e). Furthermore, while FTA recipients are not required to set a contract goal on every DOT-assisted contract, they are responsible for achieving their overall program goals by administering their DBE program in good faith.

FTA recipients and third party contractors can obtain information about the DBE program at the following website locations:

Federal Transit Administration website Disadvantaged Business Enterprise page click here:

<https://www.transit.dot.gov/dbe>

Department of Transportation website Disadvantaged Business Enterprise Program click here:

<https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise>

### **Flow Down**

The DBE contracting requirements flow down to all third party contractors and their contracts at every tier. It is the recipient's and prime contractor's responsibility to ensure the DBE requirements are applied across the board to all sub-recipients/contractors/subcontractors. Should a subcontractor fail to comply with the DBE regulations, FTA would look to the recipient to make sure it intervenes to monitor compliance. The onus for compliance is on the recipient.

### **Clause Language**

For all DOT-assisted contracts, each FTA recipient must include assurances that third party contractors will comply with the DBE program requirements of 49 C.F.R. part 26, when applicable. The following contract clause is required in all DOT-assisted prime and subcontracts:

The contractor, sub-recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry

out applicable requirements of 49 C.F.R. part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate, which may include, but is not limited to:

- 1) Withholding monthly progress payments;
- 2) Assessing sanctions;
- 3) Liquidated damages; and/or
- 4) Disqualifying the contractor from future bidding as non-responsible. 49 C.F.R. § 26.13(b).

Further, recipients must establish a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from receipt of each payment the recipient makes to the prime contractor. 49 C.F.R. § 26.29(a). Finally, for contracts with defined DBE contract goals, each FTA recipient must include in each prime contract a provision stating that the contractor shall utilize the specific DBEs listed unless the contractor obtains the recipient's written consent; and that, unless the recipient's consent is provided, the contractor shall not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE. 49 C.F.R. § 26.53(f) (1).

As an additional resource, recipients can draw on the following language for inclusion in their federally funded procurements.

#### **Overview**

It is the policy of the AGENCY and the United States Department of Transportation ("DOT") that Disadvantaged Business Enterprises ("DBE's"), as defined herein and in the Federal regulations published at 49 C.F.R. part 26, shall have an equal opportunity to participate in DOT-assisted contracts. It is also the policy of the AGENCY to:

1. Ensure nondiscrimination in the award and administration of DOT-assisted contracts;
2. Create a level playing field on which DBE's can compete fairly for DOT-assisted contracts;
3. Ensure that the DBE program is narrowly tailored in accordance with applicable law;
4. Ensure that only firms that fully meet 49 C.F.R. part 26 eligibility standards are permitted to participate as DBE's;
5. Help remove barriers to the participation of DBEs in DOT assisted contracts;
6. To promote the use of DBEs in all types of federally assisted contracts and procurement activities; and
7. Assist in the development of firms that can compete successfully in the marketplace outside the DBE program.

This Contract is subject to 49 C.F.R. part 26. Therefore, the Contractor must satisfy the requirements for DBE participation as set forth herein. These requirements are in addition to all other equal opportunity employment requirements of this Contract. The AGENCY shall make all determinations with regard to whether or not a Bidder/Offeror is in compliance with the requirements stated herein. In assessing compliance, the AGENCY may consider during its review of the Bidder/Offeror's submission package, the Bidder/Offeror's documented history of non-compliance with DBE requirements on previous contracts with the AGENCY.

### **Contract Assurance**

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

### **DBE Participation**

For the purpose of this Contract, the AGENCY will accept only DBE's who are:

1. Certified, at the time of bid opening or proposal evaluation, by the [certifying agency or the Unified Certification Program (UCP)]; or
2. An out-of-state firm who has been certified by either a local government, state government or Federal government entity authorized to certify DBE status or an agency whose DBE certification process has received FTA approval; or
3. Certified by another agency approved by the AGENCY.

### **DBE Participation Goal**

The DBE participation goal for this Contract is set at **.6%**. This goal represents those elements of work under this Contract performed by qualified Disadvantaged Business Enterprises for amounts totaling not less than \_\_\_\_ % of the total Contract price. Failure to meet the stated goal at the time of proposal submission may render the Bidder/Offeror non-responsive.

### **Proposed Submission**

Each Bidder/Offeror, as part of its submission, shall supply the following information:

1. A completed DBE Utilization Form (see below) that indicates the percentage and dollar value of the total bid/contract amount to be supplied by Disadvantaged Business Enterprises under this Contract.
2. A list of those qualified DBE's with whom the Bidder/Offeror intends to contract for the performance of portions of the work under the Contract, the agreed price to be paid to each DBE for work, the Contract items or parts to be performed by each DBE, a proposed timetable for the performance or delivery of the Contract item, and other information as required by the DBE Participation Schedule (see below). No work shall be included in the Schedule that the Bidder/Offeror has reason to believe the listed DBE will subcontract, at any tier, to other than another DBE. If awarded the Contract, the Bidder/Offeror may not deviate from the DBE Participation Schedule submitted in response to the bid. Any subsequent changes and/or substitutions of DBE firms will require review and written approval by the AGENCY.
3. An original DBE Letter of Intent (see below) from each DBE listed in the DBE Participation Schedule.
4. An original DBE Affidavit (see below) from each DBE stating that there has not been any change in its status since the date of its last certification.

### **Good Faith Efforts**

If the Bidder/Offeror is unable to meet the goal set forth above (DBE Participation Goal), the AGENCY will consider the Bidder/Offeror's documented good faith efforts to meet the goal in determining responsiveness. The types of actions that the AGENCY will consider as part of the Bidder/Offeror's good faith efforts include, but are not limited to, the following:

1. Documented communication with the AGENCY's DBE Coordinator (questions of IFB or RFP requirements, subcontracting opportunities, appropriate certification, will be addressed in a timely fashion);
2. Pre-bid meeting attendance. At the pre-bid meeting, the AGENCY generally informs potential Bidder/Offeror's of DBE subcontracting opportunities;
3. The Bidder/Offeror's own solicitations to obtain DBE involvement in general circulation media, trade association publication, minority-focus media and other reasonable and available means within sufficient time to allow DBEs to respond to the solicitation;
4. Written notification to DBE's encouraging participation in the proposed Contract; and
5. Efforts made to identify specific portions of the work that might be performed by DBE's.

The Bidder/Offeror shall provide the following details, at a minimum, of the specific efforts it made to negotiate in good faith with DBE's for elements of the Contract:

1. The names, addresses, and telephone numbers of DBE's that were contacted;
2. A description of the information provided to targeted DBE's regarding the specifications and bid proposals for portions of the work;
3. Efforts made to assist DBE's contacted in obtaining bonding or insurance required by the Bidder or the Authority.

Further, the documentation of good faith efforts must include copies of each DBE and non-DBE subcontractor quote submitted when a non-DBE subcontractor was selected over a DBE for work on the contract. 49 C.F.R. § 26.53(b) (2) (VI). In determining whether a Bidder has made good faith efforts, the Authority may take into account the performance of other Bidders in meeting the Contract goals. For example, if the apparent successful Bidder failed to meet the goal, but meets or exceeds the average DBE participation obtained by other Bidders, the Authority may view this as evidence of the Bidder having made good faith efforts.

### **Administrative Reconsideration**

Within five (5) business days of being informed by the AGENCY that it is not responsive or responsible because it has not documented sufficient good faith efforts, the Bidder/Offeror may request administrative reconsideration. The Bidder should make this request in writing to the AGENCY's [Contact Name]. The [Contact Name] will forward the Bidder/Offeror's request to a reconsideration official who will not have played any role in the original determination that the Bidder/Offeror did not document sufficient good faith efforts.

As part of this reconsideration, the Bidder/Offeror will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The Bidder/Offeror will have the opportunity to meet in person with the assigned reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. The AGENCY will send the Bidder/Offeror a written decision on its reconsideration,

explaining the basis for finding that the Bidder/Offeror did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the Department of Transportation.

#### **Termination of DBE Subcontractor**

The Contractor shall not terminate the DBE subcontractor(s) listed in the DBE Participation Schedule (see below) without the AGENCY's prior written consent. The AGENCY may provide such written consent only if the Contractor has good cause to terminate the DBE firm. Before transmitting a request to terminate, the Contractor shall give notice in writing to the DBE subcontractor of its intent to terminate and the reason for the request. The Contractor shall give the DBE five days to respond to the notice and advise of the reasons why it objects to the proposed termination. When a DBE subcontractor is terminated or fails to complete its work on the Contract for any reason, the Contractor shall make good faith efforts to find another DBE subcontractor to substitute for the original DBE and immediately notify the AGENCY in writing of its efforts to replace the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the Contract as the DBE that was terminated, to the extent needed to meet the Contract goal established for this procurement. Failure to comply with these requirements will be in accordance with Section 8 below (Sanctions for Violations).

#### **Continued Compliance**

The AGENCY shall monitor the Contractor's DBE compliance during the life of the Contract. In the event this procurement exceeds ninety (90) days, it will be the responsibility of the Contractor to submit quarterly written reports to the AGENCY that summarize the total DBE value for this Contract. These reports shall provide the following details:

- DBE utilization established for the Contract;
- Total value of expenditures with DBE firms for the quarter;
- The value of expenditures with each DBE firm for the quarter by race and gender;
- Total value of expenditures with DBE firms from inception of the Contract; and
- The value of expenditures with each DBE firm from the inception of the Contract by race and gender.

Reports and other correspondence must be submitted to the DBE Coordinator with copies provided to the [Agency Name1] and [Agency Name2]. Reports shall continue to be submitted quarterly until final payment is issued or until DBE participation is completed.

The successful Bidder/Offeror shall permit:

- The AGENCY to have access to necessary records to examine information as the AGENCY deems appropriate for the purpose of investigating and determining compliance with this provision, including, but not limited to, records of expenditures, invoices, and contract between the successful Bidder/Offeror and other DBE parties entered into during the life of the Contract.
- The authorized representative(s) of the AGENCY, the U.S. Department of Transportation, the Comptroller General of the United States, to inspect and audit all data and record of

the Contractor relating to its performance under the Disadvantaged Business Enterprise Participation provision of this Contract.

- All data/record(s) pertaining to DBE shall be maintained as stated in Section [insert reference to record keeping requirements for the Project.]

**Sanctions for Violations**

If at any time the AGENCY has reason to believe that the Contractor is in violation of its obligations under this Agreement or has otherwise failed to comply with terms of this Section, the AGENCY may, in addition to pursuing any other available legal remedy, commence proceedings, which may include but are not limited to, the following:

- Suspension of any payment or part due the Contractor until such time as the issues concerning the Contractor’s compliance are resolved; and
- Termination or cancellation of the Contract, in whole or in part, unless the successful Contractor is able to demonstrate within a reasonable time that it is in compliance with the DBE terms stated herein.

**DBE UTILIZATION FORM**

The undersigned Bidder/Offeror has satisfied the requirements of the solicitation in the following manner (please check the appropriate space):

\_\_\_\_\_ The Bidder/Offer is committed to a minimum of \_\_\_\_\_% DBE utilization on this contract.

\_\_\_\_\_ The Bidder/Offeror (if unable to meet the DBE goal of \_\_\_\_\_ %) is committed to a minimum of \_\_\_\_\_% DBE utilization on this contract and submits documentation demonstrating good faith efforts.

**DBE PARTICIPATION SCHEDULE**

The Bidder/Offeror shall complete the following information for all DBE’s participating in the contract that comprises the DBE Utilization percent stated in the DBE Utilization Form. The Bidder/Offeror shall also furnish the name and telephone number of the appropriate contact person should the Authority have any questions in relation to the information furnished herein.

**DBE IDENTIFICATION AND INFORMATION FORM**

Name and Address	Contact Name and Telephone Number	Participation Percent (Of Total Contract Value)	Description Of Work To Be Performed	Race and Gender of Firm

## **A.10 EMPLOYEE PROTECTIONS**

49 U.S.C. § 5333(a)

40 U.S.C. §§ 3141 – 3148

29 C.F.R. part 5

18 U.S.C. § 874

29 C.F.R. part 3

40 U.S.C. §§3701-3708

29 C.F.R. part 1926

### **Applicability to Contracts**

Certain employee protections apply to all FTA funded contracts with particular emphasis on construction related projects. The recipient will ensure that each third party contractor complies with all federal laws, regulations, and requirements, including:

1. **Prevailing Wage Requirements**
  - a. Federal transit laws, specifically 49 U.S.C. § 5333(a), (FTA’s “Davis-Bacon Related Act”);
  - b. The Davis-Bacon Act, 40 U.S.C. §§ 3141 – 3144, 3146, and 3147; and
  - c. U.S. DOL regulations, “Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (also Labor Standards Provisions Applicable to Non-construction Contracts Subject to the Contract Work Hours and Safety Standards Act),” 29 C.F.R. part 5.
2. **“Anti-Kickback” Prohibitions**
  - a. Section 1 of the Copeland “Anti-Kickback” Act, as amended, 18 U.S.C. § 874;
  - b. Section 2 of the Copeland “Anti-Kickback” Act, as amended, 40 U.S.C. § 3145; and
  - c. U.S. DOL regulations, “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in part by Loans or Grants from the United States,” 29 C.F.R. part 3.
3. **Contract Work Hours and Safety Standards**
  - a. Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. §§ 3701-3708; and supplemented by Department of Labor (DOL) regulations, 29 C.F.R. part 5; and
  - b. U.S. DOL regulations, “Safety and Health Regulations for Construction,” 29 C.F.R. part 1926.

### **Flow Down**

These requirements extend to all third party contractors and their contracts at every tier and sub-recipients and their subcontracts at every tier. The Davis-Bacon Act and the Copeland “Anti-Kickback” Act apply to all prime construction, alteration or repair contracts in excess of \$2,000. The Contract Work Hours and Safety Standards Act apply to all FTA funded contracts in excess of \$100,000 that involve the employment of mechanics or laborers.

### **Model Clause/Language**

The recipient must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. In addition, recipients can draw on the following language for inclusion in their federally funded procurements.

### **Prevailing Wage and Anti-Kickback**

For all prime construction, alteration or repair contracts in excess of \$2,000 awarded by FTA, the Contractor shall comply with the Davis-Bacon Act and the Copeland "Anti-Kickback" Act. Under 49 U.S.C. § 5333(a), prevailing wage protections apply to laborers and mechanics employed on FTA assisted construction, alteration, or repair projects. The Contractor will comply with the Davis-Bacon Act, 40 U.S.C. §§ 3141-3144, and 3146-3148 as supplemented by DOL regulations at 29 C.F.R. part 5, "Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction." In accordance with the statute, the Contractor shall pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, the Contractor agrees to pay wages not less than once a week. The Contractor shall also comply with the Copeland "Anti-Kickback" Act (40 U.S.C. § 3145), as supplemented by DOL regulations at 29 C.F.R. part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in part by Loans or Grants from the United States." The Contractor is prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled.

### **Contract Work Hours and Safety Standards**

For all contracts in excess of \$100,000 that involve the employment of mechanics or laborers, the Contractor shall comply with the Contract Work Hours and Safety Standards Act (40 U.S.C. §§ 3701-3708), as supplemented by the DOL regulations at 29 C.F.R. part 5. Under 40 U.S.C. § 3702 of the Act, the Contractor shall compute the wages of every mechanic and laborer, including watchmen and guards, on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. § 3704 are applicable to construction work and provide that no laborer or mechanic be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchase of supplies or materials or articles ordinarily available on the open market, or to contracts for transportation or transmission of intelligence.

In the event of any violation of the clause set forth herein, the Contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, the Contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of this clause in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by this clause.

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

The Contractor or subcontractor shall insert in any subcontracts the clauses set forth in this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime Contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in this agreement.

#### **Contract Work Hours and Safety Standards for Awards Not Involving Construction**

The Contractor shall comply with all federal laws, regulations, and requirements providing wage and hour protections for non-construction employees, in accordance with 40 U.S.C. § 3702, Contract Work Hours and Safety Standards Act, and other relevant parts of that Act, 40 U.S.C. § 3701 et seq., and U.S. DOL regulations, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (also Labor Standards Provisions Applicable to Non-construction Contracts Subject to the Contract Work Hours and Safety Standards Act)," 29 C.F.R. part 5.

The Contractor shall maintain payrolls and basic payroll records during the course of the work and shall preserve them for a period of three (3) years from the completion of the contract for all laborers and mechanics, including guards and watchmen, working on the contract. Such records shall contain the name and address of each such employee, social security number, correct classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid.

Such records maintained under this paragraph shall be made available by the Contractor for inspection, copying, or transcription by authorized representatives of the FTA and the Department of Labor, and the Contractor will permit such representatives to interview employees during working hours on the job. The contractor shall require the inclusion of the language of this clause within subcontracts of all tiers.

## **A.11 ENERGY CONSERVATION**

42 U.S.C. 6321 et seq.

49 C.F.R. part 622, subpart C

### **Applicability to Contracts**

The Energy Policy and Conservation requirements are applicable to all contracts. The Recipient agrees to, and assures that its sub-recipients, if any, will comply with the mandatory energy standards and policies of its state energy conservation plans under the Energy Policy and Conservation Act, as amended, 42 U.S.C. § 6201 et seq., and perform an energy assessment for any building constructed, reconstructed, or modified with federal assistance as required under FTA regulations, "Requirements for Energy Assessments," 49 C.F.R. part 622, subpart C.

### **Flow Down**

These requirements extend to all third party contractors and their contracts at every tier and sub-recipients and their subcontracts at every tier.

### **Model Clause/Language**

No specific clause is recommended in the regulations because the Energy Conservation requirements are so dependent on the state energy conservation plan. Recipients can draw on the following language for inclusion in their federally funded procurements.

### **Energy Conservation**

The contractor agrees to comply with mandatory standards and policies relating to energy efficiency, which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act.

## **A.12 FLY AMERICA**

49 U.S.C. § 40118

41 C.F.R. part 301-10

48 C.F.R. part 47.4

### **Applicability to Contracts**

The Fly America requirements apply to the transportation of persons or property, by air, between a place in the U.S. and a place outside the U.S., or between places outside the U.S., when the FTA will participate in the costs of such air transportation. Transportation on a foreign air carrier is permissible when provided by a foreign air carrier under a code share agreement when the ticket identifies the U.S. air carrier's designator code and flight number. Transportation by a foreign air carrier is also permissible if there is a bilateral or multilateral air transportation agreement to which the U.S. Government and a foreign government are parties and which the U.S. DOT has determined meets the requirements of the Fly America Act.

### **Flow Down Requirements**

The Fly America requirements flow down from FTA recipients and sub-recipients to first tier contractors who are responsible for ensuring that lower tier contractors and subcontractors are in compliance.

### **Model Clause/Language**

The relevant statutes and regulations do not require any specific clause or language that recipients use in their third party contracts. A sample clause is provided for Federal contracts at 48 C.F.R. 52.247-63. Recipients can draw on the following language for inclusion in their federally funded procurements.

FTA proposes the following language, modified from the Federal clause.

### **Fly America Requirements**

- a. *Definitions.* As used in this clause—
  - “International air transportation” means transportation by air between a place in the United States and a place outside the United States or between two places both of which are outside the United States.
  - “United States” means the 50 States, the District of Columbia, and outlying areas.
  - “U.S.-flag air carrier” means an air carrier holding a certificate under 49 U.S.C. Chapter 411.
- b. When Federal funds are used to fund travel, Section 5 of the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 40118) (Fly America Act) requires contractors, recipients, and others use U.S.-flag air carriers for U.S. Government-financed international air transportation of personnel (and their personal

effects) or property, to the extent that service by those carriers is available. It requires the Comptroller General of the United States, in the absence of satisfactory proof of the necessity for foreign-flag air transportation, to disallow expenditures from funds, appropriated or otherwise established for the account of the United States, for international air transportation secured aboard a foreign-flag air carrier if a U.S.-flag air carrier is available to provide such services.

- c. If available, the Contractor, in performing work under this contract, shall use U.S.-flag carriers for international air transportation of personnel (and their personal effects) or property.
- d. In the event that the Contractor selects a carrier other than a U.S.-flag air carrier for international air transportation, the Contractor shall include a statement on vouchers involving such transportation essentially as follows:

**Statement of Unavailability of U.S.-Flag Air Carriers**

International air transportation of persons (and their personal effects) or property by U.S.-flag air carrier was not available or it was necessary to use foreign-flag air carrier service for the following reasons. See FAR § 47.403. [State reasons]:

(End of statement)

- e. The Contractor shall include the substance of this clause, including this paragraph (e), in each subcontract or purchase under this contract that may involve international air transportation.

(End of Clause)

## **A.13 GOVERNMENT-WIDE DEBARMENT AND SUSPENSION**

2 C.F.R. part 180

2 C.F.R part 1200

2 C.F.R. § 200.213

2 C.F.R. part 200 Appendix II (I) Executive Order 12549

Executive Order 12689

### **Background and Applicability**

A contract award (of any tier) in an amount expected to equal or exceed \$25,000 or a contract award at any tier for a federally required audit (irrespective of the contract amount) must not be made to parties listed on the government-wide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 C.F.R. part 180. The Excluded Parties List System in SAM contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.

Recipients, contractors, and subcontractors (at any level) that enter into covered transactions are required to verify that the entity (as well as its principals and affiliates) with which they propose to contract or subcontract is not excluded or disqualified. This is done by: (a) checking the SAM exclusions; (b) collecting a certification from that person; or (c) adding a clause or condition to the contract or subcontract.

### **Flow Down**

Recipients, contractors, and subcontractors who enter into covered transactions with a participant at the next lower level, must require that participant to: (a) comply with subpart C of 2 C.F.R. part 180, as supplemented by 2 C.F.R. part 1200; and (b) pass the requirement to comply with subpart C of 2 C.F.R. part 180 to each person with whom the participant enters into a covered transaction at the next lower tier.

### **Model Clause/Language**

There is no required language for the Debarment and Suspension clause. Recipients can draw on the following language for inclusion in their federally funded procurements.

### **Debarment, Suspension, Ineligibility and Voluntary Exclusion**

The Contractor shall comply and facilitate compliance with U.S. DOT regulations, "Non-procurement Suspension and Debarment," 2 C.F.R. part 1200, which adopts and supplements the U.S. Office of Management and Budget (U.S. OMB) "Guidelines to Agencies on Government wide Debarment and Suspension (Non-procurement)," 2 C.F.R. part 180. These provisions apply to each contract at any tier of \$25,000 or more, and to each contract at any tier for a federally required audit (irrespective of the contract amount), and to each contract at any tier that must be approved by an FTA

official irrespective of the contract amount. As such, the Contractor shall verify that its principals, affiliates, and subcontractors are eligible to participate in this federally funded contract and are not presently declared by any Federal department or agency to be:

- a) Debarred from participation in any federally assisted Award;
- b) Suspended from participation in any federally assisted Award;
- c) Proposed for debarment from participation in any federally assisted Award;
- d) Declared ineligible to participate in any federally assisted Award;
- e) Voluntarily excluded from participation in any federally assisted Award; or
- f) Disqualified from participation in any federally assisted Award.

By signing and submitting its bid or proposal, the bidder or proposer certifies as follows:

The certification in this clause is a material representation of fact relied upon by the AGENCY. If it is later determined by the AGENCY that the bidder or proposer knowingly rendered an erroneous certification, in addition to remedies available to the AGENCY, the Federal Government may pursue available remedies, including but not limited to suspension and/or debarment. The bidder or proposer agrees to comply with the requirements of 2 C.F.R. part 180, subpart C, as supplemented by 2 C.F.R. part 1200, while this offer is valid and throughout the period of any contract that may arise from this offer. The bidder or proposer further agrees to include a provision requiring such compliance in its lower tier covered transactions.

**A.14 LOBBYING RESTRICTIONS**

31 U.S.C. § 1352

2 C.F.R. § 200.450

2 C.F.R. part 200 appendix II (J) 49 C.F.R. part 20

**Applicability to Contracts**

The lobbying requirements apply to all contracts and subcontracts of \$100,000 or more at any tier under a Federal grant. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this agreement, the payor must complete and submit the Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

**Flow Down**

The lobbying requirements mandate the maximum flow down pursuant to Byrd Anti-Lobbying Amendment, 31 U.S.C. § 1352(b)(5).

**Model Clause/Language**

49 C.F.R. part 20, Appendices A and B provide specific language for inclusion in FTA funded third party contracts as follows:

**Lobbying Restrictions**

The undersigned certifies, to the best of his or her knowledge and belief, that:

1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned

shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

3. The undersigned shall require that the language of this certification be included in the award documents for all sub-awards at all tiers (including subcontracts, sub-grants, and contracts under grants, loans, and cooperative agreements) and that all sub-recipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

\_\_\_\_\_ Signature of Contractor's Authorized Official

\_\_\_\_\_ Name and Title of Contractor's Authorized Official

\_\_\_\_\_ Date

## **A.15 NO GOVERNMENT OBLIGATION TO THIRD PARTIES**

### **Applicability to Contracts**

The No Obligation clause applies to all third party contracts that are federally funded.

### **Flow Down**

The No Obligation clause extends to all third party contractors and their contracts at every tier and sub-recipients and their subcontracts at every tier.

### **Model Clause/Language**

There is no required language for the No Obligations clause. Recipients can draw on the following language for inclusion in their federally funded procurements.

#### **No Federal Government Obligation to Third Parties.**

The Recipient and Contractor acknowledge and agree that, notwithstanding any concurrence by the Federal Government in or approval of the solicitation or award of the underlying Contract, absent the express written consent by the Federal Government, the Federal Government is not a party to this Contract and shall not be subject to any obligations or liabilities to the Recipient, Contractor or any other party (whether or not a party to that contract) pertaining to any matter resulting from the underlying Contract. The Contractor agrees to include the above clause in each subcontract financed in whole or in part with Federal assistance provided by the FTA. It is further agreed that the clause shall not be modified, except to identify the subcontractor who will be subject to its provisions.

## **A.16 PATENT RIGHTS AND RIGHTS IN DATA**

2 C.F.R. part 200, Appendix II (F) 37 C.F.R. part 401

### **Applicability to Contracts**

If the recipient or sub-recipient wishes to enter into a contract (or subcontract) with a small business firm or nonprofit organization for the performance of experimental, developmental, or research work under the FTA award, the recipient or sub-recipient must comply with the requirements of 37 C.F.R. part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,” and any implementing regulations issued by the awarding agency. Except in the case of an “other agreement” in which the Federal Government has agreed to take more limited rights, the Federal Government is entitled to a non-exclusive, royalty free license to use the resulting invention, or patent the invention for Federal Government purposes. The FTA has the right to:

1. Obtain, reproduce, publish, or otherwise use the data produced under a Federal award; and
2. Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

### **Flow Down**

The Patent Rights and Rights in Data requirements flow down to all third party contractors and their contracts at every tier that meet the definition of a research-type project under 37 U.S.C. § 401.2.

### **Model Clause/Language**

Recipients can draw on language provided in 37 C.F.R. § 401.3 for appropriate Patent Rights and Data Rights Clauses for use in their federally funded research, development, demonstration, or special studies projects. Recipients should consult legal counsel for guidance in developing an appropriate Intellectual Property Agreement. At a minimum, recipients can include the following language in their standard boilerplates.

### **Intellectual Property Rights**

This Project is funded through a Federal award with FTA for experimental, developmental, or research work purposes. As such, certain Patent Rights and Data Rights apply to all subject data first produced in the performance of this Contract. The Contractor shall grant the AGENCY intellectual property access and licenses deemed necessary for the work performed under this Agreement and in accordance with the requirements of 37 C.F.R. part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,” and any implementing regulations issued by FTA or U.S. DOT. The terms of an intellectual property agreement and software license rights will be finalized prior to execution of this Agreement and shall, at a minimum, include the following restrictions: Except for its own internal use, the Contractor may not publish or reproduce subject data in whole or in part, or in any manner or form, nor may the Contractor authorize others to do so, without the written consent of FTA, until such time as FTA may have either released or approved the release of such data to the public. This restriction on publication, however, does not apply to any contract with an academic institution. For purposes of this agreement, the term “subject data” means recorded information whether or not copyrighted, and that

is delivered or specified to be delivered as required by the Contract. Examples of “subject data” include, but are not limited to computer software, standards, specifications, engineering drawings and associated lists, process sheets, manuals, technical reports, catalog item identifications, and related information, but do not include financial reports, cost analyses, or other similar information used for performance or administration of the Contract.

1. The Federal Government reserves a royalty-free, non-exclusive and irrevocable license to reproduce, publish, or otherwise use, and to authorize others to use for “Federal Government Purposes,” any subject data or copyright described below. For “Federal Government Purposes,” means use only for the direct purposes of the Federal Government. Without the copyright owner’s consent, the Federal Government may not extend its Federal license to any other party.
  - a. Any subject data developed under the Contract, whether or not a copyright has been obtained; and
  - b. Any rights of copyright purchased by the Contractor using Federal assistance in whole or in part by the FTA.
2. Unless FTA determines otherwise, the Contractor performing experimental, developmental, or research work required as part of this Contract agrees to permit FTA to make available to the public, either FTA’s license in the copyright to any subject data developed in the course of the Contract, or a copy of the subject data first produced under the Contract for which a copyright has not been obtained. If the experimental, developmental, or research work, which is the subject of this Contract, is not completed for any reason whatsoever, all data developed under the Contract shall become subject data as defined herein and shall be delivered as the Federal Government may direct.
3. Unless prohibited by state law, upon request by the Federal Government, the Contractor agrees to indemnify, save, and hold harmless the Federal Government, its officers, agents, and employees acting within the scope of their official duties against any liability, including costs and expenses, resulting from any willful or intentional violation by the Contractor of proprietary rights, copyrights, or right of privacy, arising out of the publication, translation, reproduction, delivery, use, or disposition of any data furnished under that contract. The Contractor shall be required to indemnify the Federal Government for any such liability arising out of the wrongful act of any employee, official, or agents of the Federal Government.
4. Nothing contained in this clause on rights in data shall imply a license to the Federal Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Federal Government under any patent.
5. Data developed by the Contractor and financed entirely without using Federal assistance provided by the Federal Government that has been incorporated into work required by the underlying Contract is exempt from the requirements herein, provided that the Contractor identifies those data in writing at the time of delivery of the Contract work.
6. The Contractor agrees to include these requirements in each subcontract for experimental, developmental, or research work financed in whole or in part with Federal assistance.

## **A.17 PRE-AWARD AND POST-DELIVERY AUDITS OF ROLLING STOCK PURCHASES**

49 U.S.C. 5323(m)

49 C.F.R. part 663

### **Applicability to Contracts**

Recipients purchasing revenue service rolling stock with FTA funds must comply with the pre-award and post-delivery audit requirements set forth in 49 U.S.C. 5323(m) and supplemented by 49 C.F.R. part 663. For more information about pre-award and post-delivery audit requirements, please go to FTA's Buy America page on its website: <https://www.transit.dot.gov/buyamerica> .

### **Flow Down**

There is no flow down requirement for Pre-Award and Post-Delivery Audits of Rolling Stock.

### **Model Clause/Language**

Part 663 of Title 49, Code of Federal Regulations, does not contain specific language to be included in third party contracts but does contain requirements applicable to sub-recipients and third party contractors. Recipients are advised to use the model certificates and language contained in the audit handbook. Additionally, recipients can draw on the following language for inclusion in their federally funded procurements.

### **Pre-Award and Post-Delivery Audit Requirements**

The Contractor agrees to comply with 49 U.S.C. § 5323(m) and FTA's implementing regulation at 49 C.F.R. part 663. The Contractor shall comply with the Buy America certification(s) submitted with its proposal/bid. The Contractor agrees to participate and cooperate in any pre-award and post-delivery audits performed pursuant to 49 C.F.R. part 663 and related FTA guidance.

## **A.18 PROGRAM FRAUD AND FALSE OR FRAUDULENT STATEMENTS AND RELATED ACTS**

49 U.S.C. § 5323(l) (1)

31 U.S.C. §§ 3801-3812

18 U.S.C. § 1001

49 C.F.R. part 31

### **Applicability to Contracts**

The Program Fraud clause applies to all third party contracts that are federally funded.

### **Flow Down**

The Program Fraud clause extends to all third party contractors and their contracts at every tier and sub-recipients and their subcontracts at every tier. These requirements flow down to contractors and subcontractors who make, present, or submit covered claims and statements.

### **Model Clause/Language**

There is no required language for the Program Fraud clause. Recipients can draw on the following language for inclusion in their federally funded procurements.

#### **Program Fraud and False or Fraudulent Statements or Related Acts**

The Contractor acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. § 3801 et seq. and U.S. DOT regulations, "Program Fraud Civil Remedies," 49 C.F.R. part 31, apply to its actions pertaining to this Project. Upon execution of the underlying contract, the Contractor certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, it may make, or causes to be made, pertaining to the underlying contract or the FTA assisted project for which this contract work is being performed. In addition to other penalties that may be applicable, the Contractor further acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification, the Federal Government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986 on the Contractor to the extent the Federal Government deems appropriate.

The Contractor also acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification to the Federal Government under a contract connected with a project that is financed in whole or in part with Federal assistance originally awarded by FTA under the authority of 49 U.S.C. chapter 53, the Government reserves the right to impose the penalties of 18 U.S.C. § 1001 and 49 U.S.C. § 5323(l) on the Contractor, to the extent the Federal Government deems appropriate.

The Contractor agrees to include the above two clauses in each subcontract financed in whole or in part with Federal assistance provided by FTA. It is further agreed that the clauses shall not be modified, except to identify the subcontractor who will be subject to the provisions.

## **A.19 PUBLIC TRANSPORTATION EMPLOYEE PROTECTIVE ARRANGEMENTS**

49 U.S.C. § 5333(b) (“13(c)”)

29 C.F.R. part 215

### **Applicability to Contracts**

The Public Transportation Employee Protective Arrangements apply to each contract for transit operations performed by employees of a Contractor recognized by FTA to be a transit operator.

### **Flow Down**

The employee protective arrangements clause flows down to all third party contractors and their contracts at every tier.

### **Model Clause/Language**

There is no required language for the Public Transportation Employee Protective Arrangements clause. Recipients can draw on the following language for inclusion in their federally funded procurements.

### **Public Transportation Employee Protective Arrangements**

The Contractor agrees to comply with the following employee protective arrangements of 49 U.S.C. § 5333(b):

1. **U.S. DOL Certification.** Under this Contract or any Amendments thereto that involve public transportation operations that are supported with federal assistance, a certification issued by U.S. DOL is a condition of the Contract.
2. **Special Warranty.** When the Contract involves public transportation operations and is supported with federal assistance appropriated or made available for 49 U.S.C. § 5311, U.S. DOL will provide a Special Warranty for its Award, including its Award of federal assistance under the Tribal Transit Program. The U.S. DOL Special Warranty is a condition of the Contract.
3. **Special Arrangements.** The conditions of 49 U.S.C. § 5333(b) do not apply to Contractors providing public transportation operations pursuant to 49 U.S.C. § 5310. FTA reserves the right to make case-by-case determinations of the applicability of 49 U.S.C. § 5333(b) for all transfers of funding authorized under title 23, United States Code (flex funds), and make other exceptions as it deems appropriate, and, in those instances, any special arrangements required by FTA will be incorporated herein as required.

## **A.20 RECYCLED PRODUCTS**

42 U.S.C. § 6962

40 C.F.R. part 247

2 C.F.R. part § 200.322

### **Applicability to Contracts**

The Resource Conservation and Recovery Act, as amended, (42 U.S.C. § 6962 et seq.), requires States and local governmental authorities to provide a competitive preference to products and services that conserve natural resources, protect the environment, and are energy efficient. Recipients are required to procure only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 C.F.R. part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000.

### **Flow Down**

These requirements extend to all third party contractors and their contracts at every tier and sub-recipients and their subcontracts at every tier where the value of an EPA designated item exceeds \$10,000.

### **Model Clause/Language**

There is no required language for preference for recycled products. Recipients can draw on the following language for inclusion in their federally funded procurements.

### **Recovered Materials**

The Contractor agrees to provide a preference for those products and services that conserve natural resources, protect the environment, and are energy efficient by complying with and facilitating compliance with Section 6002 of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. § 6962, and U.S. Environmental Protection Agency (U.S. EPA), "Comprehensive Procurement Guideline for Products Containing Recovered Materials," 40 C.F.R. part 247.

## **A.21 SAFE OPERATION OF MOTOR VEHICLES**

23 U.S.C. part 402

Executive Order No. 13043 Executive Order No. 13513

U.S. DOT Order No. 3902.10

### **Applicability to Contracts**

The Safe Operation of Motor Vehicles requirements apply to all federally funded third party contracts. In compliance with Federal Executive Order No. 13043, "Increasing Seat Belt Use in the United States," April 16, 1997, 23 U.S.C. Section 402 note, FTA encourages each third party contractor to adopt and promote on-the-job seat belt use policies and programs for its employees and other personnel that operate company owned, rented, or personally operated vehicles, and to include this provision in each third party subcontract involving the project. Additionally, recipients are required by FTA to include a Distracted Driving clause that addresses distracted driving, including text messaging in each of its third party agreements supported with Federal assistance.

### **Flow Down Requirements**

The Safe Operation of Motor Vehicles requirements flow down to all third party contractors at every tier.

### **Model Clause/Language**

There is no required language for the Safe Operation of Motor Vehicles clause. Recipients can draw on the following language for inclusion in their federally funded procurements.

## **Safe Operation of Motor Vehicles**

### **Seat Belt Use**

The Contractor is encouraged to adopt and promote on-the-job seat belt use policies and programs for its employees and other personnel that operate company-owned vehicles, company-rented vehicles, or personally operated vehicles. The terms "company-owned" and "company-leased" refer to vehicles owned or leased either by the Contractor or AGENCY.

### **Distracted Driving**

The Contractor agrees to adopt and enforce workplace safety policies to decrease crashes caused by distracted drivers, including policies to ban text messaging while using an electronic device supplied by an employer, and driving a vehicle the driver owns or rents, a vehicle Contractor owns, leases, or rents, or a privately-owned vehicle when on official business in connection with the work performed under this agreement.

## **A.22 SCHOOL BUS OPERATIONS**

49 U.S.C. 5323(f)

49 C.F.R. part 605

### **Applicability to Contracts**

The School Bus requirements apply to contracts for operating public transportation service.

### **Flow Down Requirements**

The School Bus requirements flow down from FTA recipients and sub-recipients to first tier service contractors.

### **Model Clause/Language**

The relevant statutes and regulations do not mandate any specific clause or language. Recipients can draw on the following language for inclusion in their federally funded procurements.

### **School Bus Operations**

The contractor agrees to comply with 49 U.S.C. 5323(f), and 49 C.F.R. part 604, and not engage in school bus operations using federally funded equipment or facilities in competition with private operators of school buses, except as permitted under:

1. Federal transit laws, specifically 49 U.S.C. § 5323(f);
2. FTA regulations, "School Bus Operations," 49 C.F.R. part 605;
3. Any other Federal School Bus regulations; or
4. Federal guidance, except as FTA determines otherwise in writing. If Contractor violates this School Bus Agreement, FTA may:
  - a. Bar the Contractor from receiving Federal assistance for public transportation; or
  - b. Require the contractor to take such remedial measures as FTA considers appropriate.

When operating exclusive school bus service under an allowable exemption, the contractor may not use federally funded equipment, vehicles, or facilities.

The Contractor should include the substance of this clause in each subcontract or purchase under this contract that may operate public transportation services.

## **A.23 SEISMIC SAFETY**

42 U.S.C. 7701 et seq.

49 C.F.R. part 41

Executive Order (E.O.) 12699

### **Applicability to Contracts**

The Seismic Safety requirements apply only to contracts for the construction of new buildings or additions to existing buildings.

### **Flow Down**

The Seismic Safety requirements flow down from FTA recipients and sub-recipients to first tier contractors to assure compliance with the applicable building standards for Seismic Safety, including the work performed by all subcontractors.

### **Model Clauses/Language**

The regulations do not provide suggested language for third party contract clauses. Recipients can draw on the following language for inclusion in their federally funded procurements.

### **Seismic Safety**

The contractor agrees that any new building or addition to an existing building will be designed and constructed in accordance with the standards for Seismic Safety required in Department of Transportation (DOT) Seismic Safety Regulations 49 C.F.R. part 41 and will certify to compliance to the extent required by the regulation. The contractor also agrees to ensure that all work performed under this contract, including work performed by a subcontractor, is in compliance with the standards required by the Seismic Safety regulations and the certification of compliance issued on the project.

## **A.24 SUBSTANCE ABUSE REQUIREMENTS**

49 U.S.C. § 5331

49 C.F.R. part 655

49 C.F.R. part 40

### **Applicability to Contracts**

Third party contractors who perform safety-sensitive functions must comply with FTA's substance abuse management program under 49 C.F.R. part 655, "Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations." Under 49 C.F.R. § 655.4, Safety-sensitive function means any of the following duties, when performed by employees of recipients, sub-recipients, operators, or contractors:

1. Operating a revenue service vehicle, including when not in revenue service;
2. Operating a nonrevenue service vehicle, when required to be operated by a holder of a Commercial Driver's License;
3. Controlling dispatch or movement of a revenue service vehicle;
4. Maintaining (including repairs, overhaul and rebuilding) a revenue service vehicle or equipment used in revenue service. This section does not apply to the following: an employer who receives funding under 49 U.S.C. § 5307 or § 5309, is in an area less than 200,000 in population, and contracts out such services; or an employer who receives funding under 49 U.S.C. § 5311 and contracts out such services;
5. Carrying a firearm for security purposes.
6. Additionally, third party contractors providing testing services involving the performance of safety sensitive activities must also comply with 49 C.F.R. part 40, "Procedures for Transportation Workplace Drug and Alcohol Testing Programs."

### **Flow Down Requirements**

The Substance Abuse requirements flow down to all third party contractors at every tier who perform a safety-sensitive function for the recipient or sub-recipient.

### **Model Clause/Language**

FTA's drug and alcohol rules, 49 C.F.R. part 655, are unique among the regulations issued by FTA. First, they require recipients to ensure that any entity performing a safety-sensitive function on the recipient's behalf (usually sub-recipients and/or contractors) implement a complex drug and alcohol testing program that complies with part 655. Second, the rules condition the receipt of certain kinds of FTA funding on the recipient's compliance with the rules; thus, the recipient is not in compliance with the rules unless every entity that performs a safety-sensitive function on the recipient's behalf is in compliance with the rules. Third, the rules do not specify how a recipient ensures that its sub-recipients and/or contractors comply with them.

How a recipient does so depends on several factors, including whether the contractor is covered independently by the drug and alcohol rules of another Department of Transportation operating

administration, the nature of the relationship that the recipient has with the contractor, and the financial resources available to the recipient to oversee the contractor's drug and alcohol testing program. In short, there are a variety of ways a recipient can ensure that its sub-recipients and contractors comply with the rules.

FTA has developed three model contract provisions for recipients to use "as is" or to modify to fit their particular situations.

### **Explanation of Model Contract Clauses**

#### **Option 1**

The recipient ensures the contractor's compliance with the rules by requiring the contractor to participate in a drug and alcohol program administered by the recipient. The advantages of doing this are obvious: the recipient maintains total control over its compliance with 49 C.F.R. part 655. The disadvantage is that the recipient, which may not directly employ any safety-sensitive employees, has to implement a complex testing program. Therefore, this may be a practical option for only those recipients that have a testing program for their employees, and can add the contractor's safety-sensitive employees to that program.

#### **Option 2**

The recipient relies on the contractor to implement a drug and alcohol testing program that complies with 49 C.F.R. part 655, but retains the ability to monitor the contractor's testing program; thus, the recipient has less control over its compliance with the drug and alcohol testing rules than it does under Option 1. The advantage of this approach is that it places the responsibility for complying with the rules on the entity that is actually performing the safety-sensitive function. Moreover, it reserves to the recipient the power to ensure that the contractor complies with the program. The disadvantage of Option 2 is that, without adequate monitoring of the contractor's program, the recipient may find itself out of compliance with the rules.

#### **Option 3**

The recipient specifies some or all of the specific features of a contractor's drug and alcohol compliance program. Thus, it requires the recipient to decide what it wants to do and how it wants to do it. The advantage of this option is that the recipient has more control over the contractor's drug and alcohol testing program, yet it is not actually administering the testing program. The disadvantage is that the recipient has to specify and understand clearly what it wants to do and why.

### **SUBSTANCE ABUSE TESTING**

#### **Option 1**

The Contractor agrees to participate in AGENCY's drug and alcohol program established in compliance with 49 C.F.R. part 655.

### **SUBSTANCE ABUSE TESTING**

### **Option 2**

The Contractor agrees to establish and implement a drug and alcohol testing program that complies with 49 C.F.R. parts 655, produce any documentation necessary to establish its compliance with part 655, and permit any authorized representative of the United States Department of Transportation or its operating administrations, the State Oversight Agency of [name of State], or AGENCY, to inspect the facilities and records associated with the implementation of the drug and alcohol testing program as required under 49 C.F.R. part 655 and review the testing process. The Contractor agrees further to certify annually its compliance with parts 655 before [insert date] and to submit the Management Information System (MIS) reports before [insert date before March 15] to [insert title and address of person responsible for receiving information]. To certify compliance, the Contractor shall use the "Substance Abuse Certifications" in the "Annual List of Certifications and Assurances for Federal Transit Administration Grants and Cooperative Agreements," which is published annually in the Federal Register.

### **SUBSTANCE ABUSE TESTING**

### **Option 3**

The Contractor agrees to establish and implement a drug and alcohol testing program that complies with 49 C.F.R. part 655, produce any documentation necessary to establish its compliance with part 655, and permit any authorized representative of the United States Department of Transportation or its operating administrations, the State Oversight Agency of [name of State], or AGENCY, to inspect the facilities and records associated with the implementation of the drug and alcohol testing program as required under 49 C.F.R. part 655 and review the testing process. The Contractor agrees further to certify annually its compliance with parts 655 before [insert date] and to submit the Management Information System (MIS) reports before [insert date before March 15] to [insert title and address of person responsible for receiving information]. To certify compliance the Contractor shall use the "Substance Abuse Certifications" in the "Annual List of Certifications and Assurances for Federal Transit Administration Grants and Cooperative Agreements," which is published annually in the Federal Register. The Contractor agrees further to [Select a, b, or c] (a) submit before [insert date or upon request] a copy of the Policy Statement developed to implement its drug and alcohol testing program; OR (b) adopt [insert title of the Policy Statement the recipient wishes the contractor to use] as its policy statement as required under 49 C.F.R. part 655; OR (c) submit for review and approval before [insert date or upon request] a copy of its Policy Statement developed to implement its drug and alcohol testing program. In addition, the Contractor agrees to: [to be determined by the recipient, but may address areas such as: the selection of the certified laboratory, substance abuse professional, or Medical Review Officer, or the use of a consortium].

## **A.25 TERMINATION**

2 C.F.R. § 200.339

2 C.F.R. part 200, Appendix II (B)

### **Applicability to Contracts**

All contracts in excess of \$10,000 must address termination for cause and for convenience, including the manner by which it will be effected and the basis for settlement.

### **Flow Down**

For all contracts in excess of \$10,000, the Termination clause extends to all third party contractors and their contracts at every tier and sub-recipients and their subcontracts at every tier.

### **Model Clause/Language**

There is no required language for the Terminations clause. Recipients can draw on the following language for inclusion in their federally funded procurements.

#### **Termination for Convenience (General Provision)**

The AGENCY may terminate this contract, in whole or in part, at any time by written notice to the Contractor when it is in the AGENCY's best interest. The Contractor shall be paid its costs, including contract close-out costs, and profit on work performed up to the time of termination. The Contractor shall promptly submit its termination claim to AGENCY to be paid the Contractor. If the Contractor has any property in its possession belonging to AGENCY, the Contractor will account for the same, and dispose of it in the manner AGENCY directs.

#### **Termination for Default [Breach or Cause] (General Provision)**

If the Contractor does not deliver supplies in accordance with the contract delivery schedule, or if the contract is for services, the Contractor fails to perform in the manner called for in the contract, or if the Contractor fails to comply with any other provisions of the contract, the AGENCY may terminate this contract for default. Termination shall be effected by serving a Notice of Termination on the Contractor setting forth the manner in which the Contractor is in default. The Contractor will be paid only the contract price for supplies delivered and accepted, or services performed in accordance with the manner of performance set forth in the contract.

If it is later determined by the AGENCY that the Contractor had an excusable reason for not performing, such as a strike, fire, or flood, events which are not the fault of or are beyond the control of

the Contractor, the AGENCY, after setting up a new delivery of performance schedule, may allow the Contractor to continue work, or treat the termination as a Termination for Convenience.

#### **Opportunity to Cure (General Provision)**

The AGENCY, in its sole discretion may, in the case of a termination for breach or default, allow the Contractor [an appropriately short period of time] in which to cure the defect. In such case, the Notice of Termination will state the time period in which cure is permitted and other appropriate conditions

If Contractor fails to remedy to AGENCY's satisfaction the breach or default of any of the terms, covenants, or conditions of this Contract within [10 days] after receipt by Contractor of written notice from AGENCY setting forth the nature of said breach or default, AGENCY shall have the right to terminate the contract without any further obligation to Contractor. Any such termination for default shall not in any way operate to preclude AGENCY from also pursuing all available remedies against Contractor and its sureties for said breach or default.

#### **Waiver of Remedies for any Breach**

In the event that AGENCY elects to waive its remedies for any breach by Contractor of any covenant, term or condition of this contract, such waiver by AGENCY shall not limit AGENCY's remedies for any succeeding breach of that or of any other covenant, term, or condition of this contract.

#### **Termination for Convenience (Professional or Transit Service Contracts)**

The AGENCY, by written notice, may terminate this contract, in whole or in part, when it is in the AGENCY's interest. If this contract is terminated, the AGENCY shall be liable only for payment under the payment provisions of this contract for services rendered before the effective date of termination.

#### **Termination for Default (Supplies and Service)**

If the Contractor fails to deliver supplies or to perform the services within the time specified in this contract or any extension, or if the Contractor fails to comply with any other provisions of this contract, the AGENCY may terminate this contract for default. The AGENCY shall terminate by delivering to the Contractor a Notice of Termination specifying the nature of the default. The Contractor will only be paid the contract price for supplies delivered and accepted, or services performed in accordance with the manner or performance set forth in this contract.

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

#### **Termination for Default (Transportation Services)**

If the Contractor fails to pick up the commodities or to perform the services, including delivery services, within the time specified in this contract or any extension, or if the Contractor fails to comply with any other provisions of this contract, the AGENCY may terminate this contract for default. The AGENCY shall terminate by delivering to the Contractor a Notice of Termination specifying the nature of

default. The Contractor will only be paid the contract price for services performed in accordance with the manner of performance set forth in this contract.

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

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

#### **Termination for Default (Construction)**

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

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

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

If, after termination of the Contractor's right to proceed, it is determined that the Contractor was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of AGENCY.

#### **Termination for Convenience or Default (Architect and Engineering)**

The AGENCY may terminate this contract in whole or in part, for the AGENCY's convenience or because of the failure of the Contractor to fulfill the contract obligations. The AGENCY shall terminate by

delivering to the Contractor a Notice of Termination specifying the nature, extent, and effective date of the termination. Upon receipt of the notice, the Contractor shall (1) immediately discontinue all services affected (unless the notice directs otherwise), and (2) deliver to the AGENCY 's Contracting Officer all data, drawings, specifications, reports, estimates, summaries, and other information and materials accumulated in performing this contract, whether completed or in process. AGENCY has a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, all such data, drawings, specifications, reports, estimates, summaries, and other information and materials.

If the termination is for the convenience of the AGENCY, the AGENCY's Contracting Officer shall make an equitable adjustment in the contract price but shall allow no anticipated profit on unperformed services.

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

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

#### **Termination for Convenience or Default (Cost-Type Contracts)**

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

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

If, after serving a Notice of Termination for Default, the AGENCY determines that the Contractor has an excusable reason for not performing, the AGENCY, after setting up a new work schedule, may allow the Contractor to continue work, or treat the termination as a Termination for Convenience.

## **A.26 VIOLATION AND BREACH OF CONTRACT**

2 C.F.R. § 200.326

2 C.F.R. part 200, Appendix II (A)

### **Applicability to Contracts**

All contracts in excess of the Simplified Acquisition Threshold (currently set at \$150,000) shall contain administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.

### **Flow Down**

The Violations and Breach of Contracts clause flow down to all third party contractors and their contracts at every tier.

### **Model Clauses/Language**

FTA does not prescribe the form or content of such provisions. The provisions developed will depend on the circumstances and the type of contract. Recipients should consult legal counsel in developing appropriate clauses. The following clauses are examples of provisions from various FTA third party contracts. Recipients can draw on these examples for inclusion in their federally funded procurements.

### **Rights and Remedies of the AGENCY**

The AGENCY shall have the following rights in the event that the AGENCY deems the Contractor guilty of a breach of any term under the Contract.

1. The right to take over and complete the work or any part thereof as agency for and at the expense of the Contractor, either directly or through other contractors;
2. The right to cancel this Contract as to any or all of the work yet to be performed;
3. The right to specific performance, an injunction or any other appropriate equitable remedy; and
4. The right to money damages.

For purposes of this Contract, breach shall include [AGENCY to define].

### **Rights and Remedies of Contractor**

Inasmuch as the Contractor can be adequately compensated by money damages for any breach of this Contract, which may be committed by the AGENCY, the Contractor expressly agrees that no default, act or omission of the AGENCY shall constitute a material breach of this Contract, entitling Contractor to cancel or rescind the Contract (unless the AGENCY directs Contractor to do so) or to suspend or abandon performance.

### **Remedies**

Substantial failure of the Contractor to complete the Project in accordance with the terms of this Agreement will be a default of this Agreement. In the event of a default, the AGENCY will have all

remedies in law and equity, including the right to specific performance, without further assistance, and the rights to termination or suspension as provided herein. The Contractor recognizes that in the event of a breach of this Agreement by the Contractor before the AGENCY takes action contemplated herein, the AGENCY will provide the Contractor with sixty (60) days written notice that the AGENCY considers that such a breach has occurred and will provide the Contractor a reasonable period of time to respond and to take necessary corrective action.

### **Disputes**

- **Example 1:** Disputes arising in the performance of this Contract that are not resolved by agreement of the parties shall be decided in writing by the authorized representative of AGENCY's [title of employee]. This decision shall be final and conclusive unless within [10] days from the date of receipt of its copy, the Contractor mails or otherwise furnishes a written appeal to the [title of employee]. In connection with any such appeal, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its position. The decision of the [title of employee] shall be binding upon the Contractor and the Contractor shall abide by the decision.
- **Example 2:** The AGENCY and the Contractor intend to resolve all disputes under this Agreement to the best of their abilities in an informal manner. To accomplish this end, the parties will use an Alternative Dispute Resolution process to resolve disputes in a manner designed to avoid litigation. In general, the parties contemplate that the Alternative Dispute Resolution process will include, at a minimum, an attempt to resolve disputes through communications between their staffs, and, if resolution is not reached at that level, a procedure for review and action on such disputes by appropriate management level officials within the AGENCY and the Contractor's organization.

In the event that a resolution of the dispute is not mutually agreed upon, the parties can agree to mediate the dispute or proceed with litigation. Notwithstanding any provision of this section, or any other provision of this Contract, it is expressly agreed and understood that any court proceeding arising out of a dispute under the Contract shall be heard by a Court de novo and the court shall not be limited in such proceeding to the issue of whether the Authority acted in an arbitrary, capricious or grossly erroneous manner.

Pending final settlement of any dispute, the parties shall proceed diligently with the performance of the Contract, and in accordance with the AGENCY's direction or decisions made thereof.

### **Performance during Dispute**

Unless otherwise directed by AGENCY, Contractor shall continue performance under this Contract while matters in dispute are being resolved.

### **Claims for Damages**

Should either party to the Contract suffer injury or damage to person or property because of any act or omission of the party or of any of its employees, agents or others for whose acts it is legally liable, a claim for damages therefor shall be made in writing to such other party within a reasonable time after the first observance of such injury or damage.

### **Remedies**

Unless this Contract provides otherwise, all claims, counterclaims, disputes and other matters in question between the AGENCY and the Contractor arising out of or relating to this agreement or its breach will be decided by arbitration if the parties mutually agree, or in a court of competent jurisdiction within the State in which the AGENCY is located.

### **Rights and Remedies**

The duties and obligations imposed by the Contract documents and the rights and remedies available thereunder shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law. No action or failure to act by the AGENCY or Contractor shall constitute a waiver of any right or duty afforded any of them under the Contract, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically agreed in writing.

**CASCO BAY LINES**  
**FTA REQUIRED PROCUREMENT PROVISIONS/CLAUSES**  
**(Submit Signed Sheet with Proposal)**

The following FTA required procurement provisions and clauses will apply to this project. This form must be submitted with the Contract as documentation that you have read and agreed to the attached FTA provisions and clauses.

- A.1 ACCESS TO RECORDS AND REPORTS
- A.2 BONDING REQUIREMENTS **(Not applicable to project)**
- A.3 BUS TESTING **(Not applicable to project)**
- A.4 BUY AMERICA REQUIREMENTS **(Not applicable to project)**
- A.5 CARGO PREFERENCE REQUIREMENTS **(Not applicable to project)**
- A.6 CHARTER SERVICE **(Not applicable to project)**
- A.7 CLEAN AIR ACT AND FEDERAL WATER POLLUTION CONTROL ACT
- A.8 CIVIL RIGHTS LAWS AND REGULATIONS
- A.9 DISADVANTAGED BUSINESS ENTERPRISE (DBE)
- A.10 EMPLOYEE PROTECTIONS
- A.11 ENERGY CONSERVATION
- A.12 FLY AMERICA **(Not applicable to project)**
- A.13 GOVERNMENT-WIDE DEBARMENT AND SUSPENSION
- A.14 LOBBYING RESTRICTIONS
- A.15 NO GOVERNMENT OBLIGATION TO THIRD PARTIES
- A.16 PATENT RIGHTS AND RIGHTS IN DATA **(Not applicable to project)**
- A.17 PRE-AWARD AND POST-DELIVERY AUDITS OF ROLLING STOCK PURCHASES **(Not applicable to project)**
- A.18 PROGRAM FRAUD AND FALSE OR FRAUDULENT STATEMENTS AND RELATED ACTS
- A.19 PUBLIC TRANSPORTATION EMPLOYEE PROTECTIVE ARRANGEMENTS **(Not applicable to project)**
- A.20 RECYCLED PRODUCTS
- A.21 SAFE OPERATION OF MOTOR VEHICLES
- A.22 SCHOOL BUS OPERATIONS **(Not applicable to project)**
- A.23 SEISMIC SAFETY **(Not applicable to project)**
- A.24 SUBSTANCE ABUSE REQUIREMENTS **(Not applicable to project)**
- A.25 TERMINATION
- A.26 VIOLATION AND BREACH OF CONTRACT **(Not applicable to project)**

Please sign and date below certifying that you have read and agreed to the attached FTA provisions. This form must be submitted with proposal.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_  
(Authorized Representative)

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

Company: \_\_\_\_\_

**This form must be submitted with Proposal**

**CASCO BAY LINES**  
**FTA REQUIRED PROCUREMENT PROVISIONS - Lobbying**  
**(Submit Signed Sheet with Proposal)**

The undersigned [Contractor] certifies, to the best of his or her knowledge and belief, that:

1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for making lobbying contacts to an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form--LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions [as amended by "Government wide Guidance for New Restrictions on Lobbying," 61 Fed. Reg. 1413 (1/19/96). Note: Language in paragraph (2) herein has been modified in accordance with Section 10 of the Lobbying Disclosure Act of 1995 (P.L. 104-65, to be codified at 2 U.S.C. 1601, *et seq.*)]
3. The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31, U.S.C. § 1352 (as amended by the Lobbying Disclosure Act of 1995). Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

[Note: Pursuant to 31 U.S.C. § 1352(c)(1)-(2)(A), any person who makes a prohibited expenditure or fails to file or amend a required certification or disclosure form shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such expenditure or failure.]

The Contractor, \_\_\_\_\_, certifies or affirms the truthfulness and accuracy of each statement of its certification and disclosure, if any. In addition, the Contractor understands and agrees that the provisions of 31 U.S.C. A 3801, *et seq.*, apply to this certification and disclosure, if any.

\_\_\_\_\_ Signature of Contractor's Authorized Official

\_\_\_\_\_ Name and Title of Contractor's Authorized Official

\_\_\_\_\_ Date

- Original Contract
- Modification

**CASCO BAY LINES CONSULTANT'S DBE/SUBCONSULTANT  
PROPOSED UTILIZATION FORM**

**Must be provided by the Consultant as an attachment to Technical Proposals for New Contracts**

Consultant Firm: \_\_\_\_\_ DBE: Yes  No   
 Contact Person: \_\_\_\_\_ Tele: \_\_\_\_\_ Fax: \_\_\_\_\_  
 E-mail: \_\_\_\_\_  
 Contract/Modification Amount: \_\_\_\_\_ Date of Execution: \_\_\_\_\_  
(For CBL Use Only)  
 Federal Project # \_\_\_\_\_ Project Location: \_\_\_\_\_  
**TOTAL ANTICIPATED DBE \_\_\_\_\_% PARTICIPATION FOR THIS CONTRACT**

W B E	D B E	Non DBE	Firm Name	Description of Work	Anticipated \$ Value
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			
<b>Subconsultant Total</b>					
<b>DBE Total &gt;</b>					

*\*Note: this information is used to track and report anticipated dbe participation in all federally funded CBL contracts. The anticipated DBE amount is voluntary and will not become a part of the contractual terms.*

(CASCO BAY LINES INTERNAL USE ONLY)

Form received: \_\_\_/\_\_\_/\_\_\_ Verified by: \_\_\_\_\_  
Civil Rights Office Representative

FHWA  FTA

For a complete list of certified firms and company designation (WBE/DBE) go to  
<http://www.maine.gov/mdot/civilrights/dbe/>