

Reference Numbers:

GBRT Project: 69006

Metropolitan Council: 19I056

City of St. Paul _____: _____

PROJECT: GOLD LINE BUS RAPID TRANSIT PROJECT**AGREEMENT NAME: Master Funding Agreement – St. Paul****PARTIES:**

- **Metropolitan Council**
- **City of St. Paul, Minnesota**

This Master Funding Agreement (“Agreement”) is entered into by and between the Metropolitan Council (“Council”), a public corporation and political subdivision of the State of Minnesota, and the city identified above (“City”), a Minnesota municipal corporation, herein collectively referred to as the “Parties” and individually as a “Party.” This Agreement pertains to the Council’s proposed METRO Gold Line Bus Rapid Transit (“GBRT”) Project (the “Project”).

WHEREAS:

The Council, metropolitan-area cities, public agencies, and transit funders are engaged in activities to develop the Project. The proposed GBRT will directly serve five cities: St. Paul, Maplewood, Landfall, Oakdale, and Woodbury, all within Ramsey and Washington Counties (“Cities and Counties”). The GBRT will connect with the METRO Green Line Light Rail Transit at Union Depot and Central Station, both in St. Paul. As Project Development, Engineering and Construction progress, various agreements with the Cities and Counties will be required.

1. The Council anticipates receiving grants from the Federal Transit Administration (“FTA”) for engineering and construction of the Project under a Full Funding Grant Agreement (“FFGA”) with the FTA.
2. The Council is a party to a Cooperative Funding Agreement for the Project Development phase (“PDP”) with Washington County, Ramsey County, and the Ramsey County Regional Railroad Authority for the Project.
3. The Council has received grants from the Counties Transit Improvement Board (“CTIB”) for Project activity in the PDP of the Project.
4. The Council has entered into a Capital Grant Agreement for Pre-engineering, Engineering, and Right of Way Acquisition (“Grant Agreement”) with the Gold Line Joint Powers Board, a joint powers board established by agreement among Ramsey County, Ramsey County Regional Railroad Authority, Washington County, and Washington County Regional Railroad Authority (“Joint Powers Board”).
5. The City may be involved in certain activities or possibly provide materials in connection with and in support of the Project, and the Council may desire to pass through federal, CTIB, or local funds to the City for costs associated with such Project activities or materials.

6. The City may provide funding for certain FFGA and non-FFGA components which may be designed or constructed as part of, or during, the PDP, Engineering and Construction phases. The details of these future actions will be captured in Subordinate Funding Agreements to this Agreement.
7. This Agreement is entered into between the Parties to provide a mechanism for the transfer of Project funds from the Council to the City for activities undertaken by the City for the Project (Part One), and for the transfer of City funds to the Council for components related to, but not currently part of, the Project (Part Two). In addition, this Agreement establishes general provisions applicable to transfers from either Party to the other (Part Three).

NOW, THEREFORE, the Parties agree as follows:

PART ONE

ARTICLE 1. PURPOSE

The purpose of Part One of this Agreement is to provide:

- a. A method for the transfer of funds from the Council to the City for activities performed or materials supplied by the City in connection with and in support of the Project; and
- b. Contractual provisions that address compliance with federal and state laws and regulations as well as Council procedures including, without limitation, federal requirements for the monitoring of the City's Project activities using federal grant funds.

ARTICLE 2. SUBORDINATE FUNDING AGREEMENTS TRANSFERRING FUNDS FROM COUNCIL TO CITY

2.01 Transfer of Funds from Council to City. The Council will transfer Project funds to the City for the Project activities performed by the City. The transfer of funds from the Council to the City shall be in accordance with Subordinate Funding Agreements executed in accordance with this Article 2, each of which shall state the specific purpose for the funds, the City's responsibility with respect to those funds, and establish who will own any assets constructed or assets remaining upon completion of Project activities. Each such Subordinate Funding Agreement shall constitute a subrecipient or contractor agreement with the Council for the purposes of any federal grant funds transferred to the City. The Council shall bear no responsibility for any costs incurred by the City for the Project that exceed the amounts committed by Subordinate Funding Agreements as such agreements may from time to time be amended.

2.02 Subordinate Funding Agreements. In accordance with Section 2.01, the Parties shall enter into Subordinate Funding Agreements to facilitate the funding by the Council of Project activities to be performed by the City. The Parties anticipate there may be multiple Subordinate Funding Agreements between them in connection with the Project. Each Subordinate Funding Agreement shall be in a form substantially similar to that attached as Exhibit A2 and shall follow and be subject to the terms of Part One and Part Three of this Agreement, unless expressly otherwise agreed to in writing. This Agreement does not create a

specific financial obligation for either Party or require either Party to enter into any specific Subordinate Funding Agreements. No liability shall attach to either Party under this Agreement for refusing to enter into a Subordinate Funding Agreements.

2.03 Implementation of Subordinate Funding Agreements. The Council will only reimburse the City for Project activities that are the subject of a Subordinate Funding Agreement. Prior to entering a contract with any third party (including for the acquisition of property rights) to accomplish the City's reimbursable activities, or prior to authorizing any City employees to proceed with any reimbursable activities, the City shall present a work scope (including a work schedule), staffing plan, and detailed budget for such services or expenditures to the Council for review and approval (the "Scope and Schedule"). This Scope and Schedule will form the basis of the Subordinate Funding Agreement.

2.04 Council Determination of Contractor or Subrecipient Relationship. The Council shall determine whether each Subordinate Funding Agreement is a subrecipient or contractor agreement. The Council shall state its determination in the Subordinate Funding Agreement. For subrecipient agreements, the City will be responsible for compliance with applicable FTA laws, regulations, and deliverables, as well as all Grant Agreement requirements. For contractor agreements, the Council will be responsible for compliance with applicable FTA laws, regulations, and deliverables, as well as all Grant Agreement requirements.

2.05 Modifications of Subordinate Funding Agreements. The following provisions apply to modifications of any Subordinate Funding Agreement:

- a. Re-budgeting within an approved budget is allowable, as long as the budget is within the maximum amount of authorized funding.
- b. Modifications in work scope, if within the approved budget, are authorized when approved in writing by the Project Managers.
- c. Any other modifications to a Subordinate Funding Agreement shall require a written amendment of the Subordinate Funding Agreement executed by the Parties' duly authorized representatives.
- d. Modification requests should be sent to the Project Managers.

2.06 Transfer of Project Funds to the City Under Subordinate Funding Agreements. The Council shall pay the City under Subordinate Funding Agreements as follows:

- a. Unless specifically agreed to by the Parties under a particular Subordinate Funding Agreement, payment to the City for Project costs under each Subordinate Funding Agreement shall be on a reimbursement basis based upon the submittal of invoices satisfactorily evidencing the expenditure of funds by the City for the Project.
- b. Unless specifically agreed to otherwise by the Parties under a particular Subordinate Funding Agreement, the City shall submit separate monthly invoices for each outstanding Subordinate Funding Agreement to the following address:

Attn: Accounts Payable
Gold Line Bus Rapid Transit Project Office
Metro Square Building
121 7th Place East, Suite 102

or to such other address or person as the Council may designate by notice in writing.

- c. Each invoice shall reference the sequential number of the Subordinate Funding Agreement under which the invoice is to be paid.
- d. Each invoice shall include the following if the corresponding Subordinate Funding Agreement was determined by the Council to create a subrecipient relationship:
 - i. Subrecipient Payment Request Form (Form C-22A-GBRT) as shown in Exhibit B,
 - ii. Subrecipient Monthly Progress Report (Form GBRT P1) as shown in Exhibit B, and
 - iii. Itemization of the expenditures for which payment is requested using the Subrecipient Invoice Detail (Form GBRT F1) as shown in Exhibit B, along with supporting documentation.
- e. Each invoice shall include the following if the corresponding Subordinate Funding Agreement was determined by the Council to create a contractor relationship:
 - i. GBRT Payment Request Form (either Engineering-Consultant or Construction)
 - 1) Engineering-Consultant Payment Request Form (Form C22A) as shown in Exhibit B for engineering related expenses, or
 - 2) Construction Payment Request Form (Form C21A) as shown in Exhibit B for construction related expenses,
 - ii. A description of activities undertaken in accordance with the Subordinate Funding Agreement, and
 - iii. An itemized list of the expenditures for which payment is requested, along with supporting documentation.
- f. If a Disadvantaged Business Enterprise (“DBE”) goal applies to the Project activities performed under a Subordinate Funding Agreement, invoices shall include a DBE Reporting Form as shown in Exhibit B, or such other format as may be prescribed by the Council and shall include the information required by Section 4.06 “e.” of this Agreement.
- g. After receipt of an invoice, the Council may request additional information from the City regarding the invoice in order to verify the accuracy and appropriateness of the expenditures for which reimbursement is requested or as required by the FTA for reporting purposes.
- h. Upon receipt of an invoice and supporting documentation, the Council will make prompt payment of undisputed amounts as required by Minnesota Statutes, Section 471.425. Under either 2 C.F.R. § 200.305 or Minnesota Statutes, Section 471.425, the Council may dispute or deny part or all of any invoice payment request if it reasonably believes that the requested payment does not conform to the terms of this Agreement and the applicable Subordinate Funding Agreement. The Parties will promptly meet to review and discuss any disputed or denied payment requests and the dispute resolution process outlined in Section 6.11 of this Agreement will ensue if the Parties cannot agree. If the Council does not pay the invoiced amount within 35 days

of its receipt, the Council shall pay interest on the non-disputed amount at the rate of 1-1/2 percent per month.

- i. No invoice payment shall be made by the Council without prior amendment to the applicable Subordinate Funding Agreement, which would cause distribution of Project funds to exceed, cumulatively through such payment, the maximum amount of authorized funding under the applicable Subordinate Funding Agreement.
- j. Distribution of any funds to the City pursuant to an invoice, or approval of any report, shall not be construed as a Council waiver of any City noncompliance with this Agreement or the applicable Subordinate Funding Agreement.

2.07 Repayment of Unauthorized Use of Project Funds. Upon a finding by the Council that the City has made an unauthorized or undocumented use of Project funds, and upon a demand for repayment issued by the Council and supported by the reason for the finding, if the City agrees, the City shall promptly repay such amounts to the Council. If the City disagrees, the Parties will promptly meet to review and discuss any challenged use of funds already paid and the dispute resolution process outlined in Section 6.11 will ensue if the Parties cannot agree. Neither Party shall be deemed to have waived any rights or remedies available under state law, federal law, common law, or otherwise.

2.08 Prompt Payment to Subcontractors. Consistent with Minnesota Statutes, Section 471.425, subdivision 2, the City must pay each contractor obligation according to the terms of the contract or, if no contract terms apply, within the standard payment period of 35 days of receipt unless the City in good faith disputes the obligation. Each contract of the City must require the prime contractor to pay any subcontractor within ten days of the prime contractor's receipt of payment from the City for undisputed services provided by the subcontractor(s). The City shall not, by reason of said payments, be relieved from responsibility for Project activity done by the subcontractor and shall be responsible for all Project activity under this Agreement or Subordinate Funding Agreement which must be accepted by the Council.

ARTICLE 3. REQUIREMENTS FOR PROJECT FUNDED ACTIVITY

3.01 Allowable Costs; Unspent Funds. The City is authorized to use funds provided by the Council under this Agreement and per the terms of the Subordinate Funding Agreements only for allowable costs directly incurred for the Project. Allowable costs will be determined in accordance with the documents referenced in Section 4.05. Funds provided by the Council in Subordinate Funding Agreements may only be used for costs directly incurred:

- a. within the authorized work scope,
- b. during the project activity period, and
- c. in accordance with the approved budget for the funds.

Any funds provided to the City under this Agreement and applicable Subordinate Funding Agreements which remain unspent after completion of the relevant Project activity shall be promptly repaid to the Council.

3.02 Documentation of Project Costs. All costs charged to the Project by the City must be supported by proper documentation, including properly executed payrolls, time records,

invoices, contracts, receipts for expenses, or vouchers, evidencing in detail the nature and propriety of the charges per the requirements of Section 4.02 of this Agreement.

3.03 Establishment of Capital Assets. If Capital Assets, as defined by the FTA and determined by the Council in a Subordinate Funding Agreement, are procured by or provided to the City under a Subordinate Funding Agreement, invoices shall include an Asset Tracking Log as shown in Exhibit B, or such other format as may be prescribed by the Council.

3.04 Establishment and Maintenance of Project Information. The City agrees to establish and maintain accurate, detailed, complete, and separate books, accounts, financial records, documentation, and inspection and quality assurance reports produced by City staff or contractors, and other evidence relating to the receipt and expenditure of all Project funds. All such Project information shall be established and maintained in accordance with generally accepted government accounting principles and practices and shall be retained intact by the City until the latest of:

- a. complete performance of this Agreement and all Subordinate Funding Agreements;
- b. six years following the term of this Agreement and all Subordinate Funding Agreements;
- c. six years following the close out of the Project by the Council and the FTA; or
- d. if any litigation, claim, or audit is commenced during any such periods, when all such litigation, claims or audits have been resolved.

If the City engages any contractors to perform any part of the Project activities, the City shall include contract provisions requiring the contractor(s) to establish and maintain Project information in accordance with the provisions of this article and to allow audit of such information in the same manner provided with respect to the City in this Section and Section 3.05.

The provisions of this Section 3.04 shall survive termination of this Agreement.

3.05 Reimbursed Costs Audit. The accounts and records of the City relating to the reimbursable costs for the Project shall be audited in the same manner as all other accounts and records of the City are audited. During the time of maintenance of information under Section 3.04, authorized representatives of the Council, and either the Legislative Auditor or State Auditor in accordance with Minnesota Statutes, Section 16C.05, subdivision 5, the United States Secretary of Transportation, the FTA Administrator, and the United States Comptroller General in accordance with 49 U.S.C. Section 5325(g) will have access to all such books, records, documents, accounting practices and procedures, and other information for the purpose of inspection, audit, and copying during normal business hours. Proper facilities for such access and inspection shall be provided by the City.

The provisions of this Section 3.05 shall survive termination of this Agreement.

3.06 Use of Contractors. If the City engages any contractors to perform any activities reimbursable by the Council under Part One of this Agreement, the City agrees that the contract for such services shall include all of the following provisions. These requirements are in addition to other requirements for such contracts set forth in this Agreement.

- a. The contractor must maintain all records and provide all reporting as required by this Agreement.
- b. The contractor must defend, indemnify, and save harmless the Council from all claims, suits, demands, damages, judgments, costs, interest, and expenses arising out of or by reason of the performance of the contracted Project activity, caused in whole or in part by any negligent act or omission of the contractor, including negligent acts or omissions of its employees, subcontractors, or anyone for whose acts any of them may be liable.
- c. The contractor must provide and maintain insurance in amounts and types of coverage appropriate to the contracted Project activity and naming the Council as an additional insured and provide to the City a certificate of insurance evidencing such insurance coverage.
- d. The contractor must be an independent contractor for the purposes of completing the contracted Project activity.
- e. The contractor shall perform and complete the contracted Project activity in full compliance with this Agreement and all applicable laws, statutes, rules, ordinances, and regulations issued by any federal, state, or local political subdivisions having jurisdiction over the contracted Project activity.

3.07 Contract Information. The City shall, in connection with any contract entered into for the Project:

- a. Keep the Council informed as to the progress of such contract;
- b. allow authorized representatives of the Council access to all meetings and documentation related to such contract;
- c. upon request promptly provide the Council with copies of correspondence between the City and the contractor related to such contract; and
- d. in addition to terms specified in this Agreement, contract documents entered into with the contractor will include appropriate insurance, indemnification, and liability provisions as negotiated and accepted by the City and the contractor. The Council expects the contract documents will include the following:
 - i. the contractor's insurance will list the Council as an additional insured under the contractor's policy with a minimum 30 day cancellation period;
 - ii. the contractor will defend and indemnify the Council;
 - iii. the Council will be a beneficiary of the performance and payment bonds;
 - iv. all warranties will extend to the Council; and
 - v. the Council will be a third party beneficiary to the contract with the contractor which will give the Council the authority to enforce the provisions of the contract.

ARTICLE 4. FEDERAL AND GRANT AGREEMENT REQUIREMENTS

4.01 Federal and Grant Agreement Requirements. Monies that may be provided to the City by the Council pursuant to this Agreement may be funded in whole or in part by the FTA and by Joint Powers Board. The requirements in this Article 4 are in addition to and, unless inconsistent and irreconcilable, do not supplant requirements found elsewhere in this Agreement. If any requirement in this article is inconsistent with a provision found elsewhere in this Agreement or any Subordinate Funding Agreement and is irreconcilable with such provision, the requirement in this Article 4 shall prevail.

4.02 Incorporation of Federal Grant and the Grant Agreement. As the Council receives federal grants and Joint Powers Board grants, including a potential Full Funding Grant Agreement for the Project, the Council will provide the City with a copy of each grant. The terms of each grant and any amendments shall be automatically incorporated by reference into this Agreement without further action by the Parties. These grants are collectively referred to in this Agreement as the “Federal and Local Grants.” When performing Project activity or expending funds for Project activities, the City agrees to comply with all applicable terms and conditions of the Federal and Local Grants received by the Council with respect to the Project.

4.03 Incorporation of Specific Federal Requirements. Specifically, and without limitation, the City agrees to comply with the federal requirements set forth in Exhibit C and agrees to require, unless specifically exempted, third party contractors at every tier to comply with the same.

4.04 Federal Certifications and Assurances; Execution and Incorporation. The City agrees to comply with and to certify compliance with the most recent version of the federal *Annual List of Certifications and Assurances for Federal Transit Administration Grants and Cooperative Agreements* if the Council determines the City is a subrecipient under a Subordinate Funding Agreement. The City must certify compliance with the applicable provisions by signing the appropriate certification(s) and returning the signed certification(s) as part of the execution of the applicable Subordinate Funding Agreement. During the term of the applicable Subordinate Funding Agreement, the Council shall provide to the City the annual Federal Certifications and Assurances document, which the City shall execute and return to the Council.

4.05 Compliance with Federal Requirements; Incorporation of Specific Documents by Reference. The City agrees to comply with all federal statutes, rules, FTA Circulars, and Executive Orders which may be applicable to the Federal Grants. In particular, the City agrees to comply with the terms and conditions of the current version of the following documents when performing Project activity or expending funds for Project activities under this Agreement or any Subordinate Funding Agreement:

- a. *FTA Master Agreement*;
- b. *2 C.F.R. Part 200 Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*, as amended;
- c. *FTA Circular 5010.1E, Grant Management Requirements*, as amended;
- d. *FTA Circular 5200.1A Full-Funding Grant Agreements Guidance*, as amended;
- e. *FTA Circular 4220.1F Third Party Contracting Requirements*, as amended;

as such statutes, rules, circulars, and executive orders may hereafter be amended or modified. The listed documents are incorporated by reference into this Agreement. Copies of these documents are available on the FTA website (<https://www.transit.dot.gov/>) or, upon request by the City, from the Council.

4.06 Third Party Contracts. If the City decides to fulfill any of its obligations or duties under a Subordinate Funding Agreement through a third-party contract to be paid for by funds received under this Agreement, the City agrees to the following provisions. These requirements are in addition to other requirements for such contracts set forth in this Agreement.

- a. **Compliance with Federal Procurement Requirements.** The City will comply with all applicable federal law, rules, and guidance relating to such procurement including, without limitation, the provisions of the most current version of the *Third Party Contracting Requirements*, FTA Circular 4220.1F, which document is incorporated by reference into this Agreement.
- b. **Certification of City's Procurement System.** The City certifies that its procurement system complies with the standards described in the previous paragraph.
- c. **Council Approval of Contracts.** The City shall not execute any third-party contract or otherwise enter into a binding agreement until it has first received written approval from the Council. The Council's approval of any such third-party contract is solely for the benefit of the Council and shall not relieve the City of the responsibility to ensure that such contracts are in the proper form and include all state and federal requirements. Additionally, a Subrecipient Contract Initiation Memo, as shown in Exhibit B, is required to be executed prior to any procurement over \$50,000. Requests to enter into agreements should be sent to the Project Manager.
- d. **Inclusion of Provisions in Lower Tier Contracts.** The City agrees to include adequate provisions to ensure compliance with applicable federal requirements in each lower tier subcontract financed in whole or in part with monies from the Project provided under this Agreement including all applicable provisions of this Agreement. Exhibit C provides the provisions to be included in such subcontracts.
- e. **Disadvantaged Business Enterprise (DBE") Requirements.** For all Project activity performed under Part One of this Agreement, the City will comply with the Council's DBE Program. In particular, the City agrees to comply with the requirements of the Council's "Disadvantaged Business Enterprise Pass Through Agreement and Program" document which is attached to and made a part of this Agreement as Exhibit D. For the purpose of Exhibit D, the following provisions apply:
 - i. The Metropolitan Council DBE Liaison Officer, or designated staff, shall act as the City DBE Liaison Officer for the purposes of Project activity under Part One of this funding Agreement.
 - ii. The City agrees to submit to the Council for review, approval, and establishment of the appropriate DBE goal a Subrecipient Contract Initiation Memo, as shown in Exhibit B, for all procurements in excess of \$50,000. Noncompliance with DBE requirements may result in sanctions, including ineligibility for reimbursement pursuant to 2 C.F.R. § 200.305.

- iii. The City will provide reports to the Council reflecting all invoices paid on procurements for which a DBE goal has been established and identifying all DBE activity on such procurements.
 - iv. The City will report DBE activity, on the Disadvantage Business Enterprise Reporting Form, to the Council on other purchase orders and invoices not included above with each Request for Payment.
 - v. DBE eligibility will be based on the most recent DBE Directory from the Minnesota Unified Certification Program (<https://mnucp.metc.state.mn.us/>).
- f. **Federal Procurement Basics.** The City remains responsible for conforming its procurement processes to all applicable federal requirements for funds received from the Council under this Agreement and any Subordinate Funding Agreement.

4.07 Provisions Subject to Change. The City acknowledges that federal requirements in this Article 4 are subject to change and agrees that the most recent of these requirements shall govern this Agreement at any particular time.

4.08 No Federal Obligation. Monies provided under this Agreement may be financed in whole or in part by federal funds. However, payments to the City will be made by the Council. Pursuant to the Federal Transit Administration Master Agreement Section 2(f), the United States is not a party to this Agreement and no reference in this Agreement to the United States, the United States Department of Transportation, the FTA, or any representatives of the federal government makes the United States a party to this Agreement. The City shall include this clause in any contracts or agreements entered into pursuant to this Agreement.

4.09 Special Reporting Requirements. The Council is required to report to the FTA and the Joint Powers Board regarding the Project activities. Accordingly, the City agrees to provide the Council with any additional or follow-up information reasonably requested by the Council, in order to meet the Council's FTA reporting requirements.

PART TWO

ARTICLE 5. SUBORDINATE FUNDING AGREEMENT TRANSFERRING FUNDS FROM CITY TO COUNCIL

5.01 Purpose. The purpose of this Part Two is to provide a method for transferring City funds to the Council for components related to but currently not part of the Project, should any such payment be authorized by the City.

5.02 Transfer of Funds Requires Subordinate Funding Agreement. The City may provide funding for components related to but not part of the Project through the transfer of funds to the Council. Each such transfer of funds to the Council from the City shall be in accordance with one or more duly executed Subordinate Funding Agreements, each of which shall define the amount of funds committed by the City to the Council, specify the purpose for the funds, and establish which Party will own the asset constructed or remaining upon completion of the Project activity. Any surplus moneys provided to the Council by the City pursuant to a Subordinate Funding Agreement shall be returned to the City upon completion of each respective Subordinate Funding Agreement.

5.03 Subordinate Funding Agreements. To facilitate funding by the City in accordance with Section 5.01, the Parties shall enter into Subordinate Funding Agreements. Subordinate Funding Agreements shall be in a form similar to Exhibit A1 and shall follow and be subject to the terms of Parts Two and Three of this Agreement, unless expressly otherwise agreed to in writing. Despite any other provisions of this Agreement, this Agreement does not create a specific financial obligation for either Party or to require either Party to enter into any specific Subordinate Funding Agreements, and no liability shall attach to either Party under this Agreement for refusing to enter into one or more subsequent Subordinate Funding Agreements.

5.04 Implementation of Subordinate Funding Agreements. The City will only reimburse the Council for components related to the Project that are the subject of a Subordinate Funding Agreement. Prior to entering into a contractual obligation with any third party (including for the acquisition of property rights) to accomplish the Council's obligations reimbursable by the City, or prior to authorizing any Council employees to proceed with any reimbursable actions, the Council shall present a work scope (including a work schedule), staffing plan, and detailed budget for such services or expenditures to the City for review and approval.

5.05 Modifications of Subordinate Funding Agreements. The following provisions apply to any modifications in a particular Subordinate Funding Agreement:

- a. Re-budgeting within an approved budget is allowable, as long as the budget is within the maximum amount of authorized funding.
- b. Modifications in work scope, if within the approved budget, are authorized when approved in writing by the City's Assistant City Engineer, or such other person as the City may designate by notice to the Council.
- c. Any other modifications in a particular Subordinate Funding Agreement, including any increase in the maximum amount of authorized funding or changes in the applicable activity period, shall require a formal amendment of the Subordinate Funding Agreement executed by the Parties.

5.06 Transfer of Funds to the Council Under Subordinate Funding Agreements. The City shall pay the Council under Subordinate Funding Agreements as follows:

- a. Unless specifically agreed to otherwise by the Parties under a particular Subordinate Funding Agreement, payment to the Council for costs under each Subordinate Funding Agreement shall be on a reimbursement basis after the submittal of invoices evidencing the expenditure of funds by the Council.
- b. The Council shall submit separate monthly invoices for each outstanding Subordinate Funding Agreement to the following address:

Jeff Bots – Accountant III
1500 City Hall Annex
25 West Fourth Street
Saint Paul, MN 55102

or to such other City address or person as the City may designate in writing.

- c. Unless the Parties otherwise agree, the Council shall submit each invoice to the City in the standard Council format and shall reference the sequential number of the Subordinate Funding Agreement under which the invoice is to be funded.
- d. Each invoice must include:
 - i. A description of activities undertaken in accordance with the Subordinate Funding Agreement;
 - ii. An itemized list of the expenditures for which payment is requested; and
 - iii. Supporting documentation.
- e. The City will be responsible for internal interest charges caused by the City and incurred by the Council in order to fund expenses under each Subordinate Funding Agreement prior to payment from the City. The Council will be responsible for tracking and documenting the internal interest to be invoiced to the City. On an annual basis, the Council will prepare a separate invoice for these charges and submit it to the address listed in Section 5.06(b) of this agreement. The Parties recognize that unless previously authorized in an existing agreement, execution of an additional Subordinate Funding Agreement will be required for payment of this invoice. The City will pay the Council in accordance with the requirements of Section 5.06 of this agreement.
- f. After receipt of an invoice, the City may request additional information from the Council regarding the invoice to verify the accuracy and appropriateness of the expenditures for which reimbursement is requested.
- g. The City shall pay the Council the approved invoice amount within 35 days of its receipt. The City may dispute all of or any part of an invoice if it reasonably believes that the requested payment does not conform to the terms of this Agreement or the applicable Subordinate Funding Agreement. If disputed, the Parties will promptly meet to review and discuss the disputed or denied payment requests and the dispute resolution process outlined in Section 6.11 of this Agreement will ensue if the Parties cannot agree. Unless the City has disputed the payment of an invoice, if the City does not pay the invoiced amount within 35 days of its receipt, the Council shall charge, and the City shall pay interest on the non-disputed amount at the rate of 1-1/2 percent per month. The City shall not withhold the payment of any amount that is not in dispute.
- h. If an invoice payment would cause the distribution of funds to exceed the maximum amount of authorized funding under the applicable Subordinate Funding Agreement, the Parties must amend the applicable Subordinate Funding Agreement prior to making such payment.
- i. The City's payment of any invoices or approval of any reports shall not constitute a waiver of any Council noncompliance with this Agreement or the applicable Subordinate Funding Agreement.

5.07 Repayment of Unauthorized Use of Funds. Upon a finding by the City that the Council has made an unauthorized or undocumented use of City funds, and upon a demand for repayment issued by the City and supported by the reason for the finding, if the Council agrees, the Council shall promptly repay such amounts to the City. If the Council disagrees, the Parties

will promptly meet to review and discuss any challenged use of funds already paid and dispute resolution pursuant to Section 6.11 will ensue if the Parties cannot agree. Neither Party shall be deemed to have waived any rights or remedies available under state law, federal law, common law or otherwise.

5.08 Use of Funds; Allowable Costs. The Council is authorized to use funds provided by the City under this Agreement only for costs directly incurred under a specific Subordinate Funding Agreement. Funds provided by the City under Subordinate Funding Agreements may only be used for costs directly incurred:

- a. Within the authorized work scope;
- b. During the specified activity period; and
- c. In accordance with the approved budget for the funds, all as specified in the relevant Subordinate Funding Agreement.

5.09 Documentation of Costs. All reimbursable costs charged to the City by the Council must be supported by proper documentation, including properly executed payrolls, time records, invoices, contracts, receipts for expenses, or vouchers, evidencing in detail the nature and propriety of the charges.

5.10 Establishment and Maintenance of Information. The Council agrees to establish and maintain accurate, detailed, complete, and separate books, accounts, financial records, documentation, and other evidence relating to the receipt and expenditure of all funds from the City. All such information shall be established and maintained in accordance with generally accepted government accounting principles and practices and shall be retained intact by the Council until the latest of:

- a. Complete performance of this Agreement and all Subordinate Funding Agreements;
- b. Six years following the term of this Agreement and all Subordinate Funding Agreements;
- c. Six years following the close out of the Project by the Council and the FTA; or
- d. If any litigation, claim, or audit is commenced during any such periods, when all such litigation, claims or audits have been resolved.

If the Council engages any contractors to perform any part of the activities reimbursable by the City, the Council agrees that the contract for such services shall include provisions requiring the contractor to establish and maintain information in accordance with the provisions of this Article and to allow audit of such information in the same manner provided with respect to the Council in this Section 5.10.

The provisions of this Section 5.10 shall survive termination of this Agreement.

5.11 Audit. The accounts and records of the Council relating to costs reimbursable by the City shall be audited in the same manner as all other accounts and records of the Council are audited. During the time of maintenance of information under Section 5.10, authorized representatives of the City; the Legislative Auditor and/or State Auditor in accordance with Minnesota Statutes, Section 16C.05, subdivision 5; the United States Secretary of Transportation; the FTA Administrator, and the United States Comptroller General in accordance

with 49 U.S.C. Section 5325(g); will have access to all such books, records, documents, accounting practices and procedures, and other information for the purpose of inspection, audit, and copying during normal business hours. Proper facilities for such access and inspection shall be provided by the Council.

The provisions of this Section 5.11 shall survive termination of this Agreement.

5.12 Use of Contractors. If the Council engages any contractors to perform any activities reimbursable by the City under Part Two of this Agreement, the Council agrees that the contract for such services shall include all of the following provisions. These requirements are in addition to other requirements for such contracts set forth in this Agreement.

- a. The contractor must maintain all records and provide all reporting as required by this Agreement.
- b. The contractor must defend, indemnify, and save harmless the City from all claims, suits, demands, damages, judgments, costs, interest, and expenses arising out of or by reason of the performance of the contracted Project activity, caused in whole or in part by any negligent act or omission of the contractor, including negligent acts or omissions of its employees, subcontractors, or anyone for whose acts any of them may be liable.
- c. The contractor must provide and maintain insurance in amounts and types of coverage appropriate to the contracted Project activity and naming the City as an additional insured and provide to the Council a certificate of insurance evidencing such insurance coverage.
- d. The contractor must be an independent contractor for the purposes of completing the contracted Project activity.
- e. The contractor shall perform and complete the contracted Project activity in full compliance with this Agreement and all applicable laws, statutes, rules, ordinances, and regulations issued by any federal, state, or local political subdivisions having jurisdiction over the contracted Project activity.

5.13 Contract Information. The Council shall, in connection with any contract entered into for reimbursable Project activity under Part Two of this Agreement:

- a. Keep the City informed as to the progress of such contract;
- b. allow authorized representatives of the City access to all meetings and documentation related to such contract;
- c. upon request, promptly provide the City with copies of correspondence between the Council and the contractor related to any such contract; and
- d. in addition to terms specified in this Agreement, contract documents enter into with the contractor will include appropriate insurance, indemnification, and liability provisions as negotiated and accepted by the Council and the contractor. The City expects the contract documents will include the following:
 - i. the contractor's insurance will list the City as an additional insured under the contractor's policy with a minimum 30 day cancellation period;
 - ii. the contractor will defend and indemnify the City;

- iii. the City will be a beneficiary of the performance and payment bonds;
- iv. all warranties will extend to the City; and
- v. the City will be a third-party beneficiary to the contract with the contractor which will give the City the authority to enforce the provisions of the contract.

PART THREE

ARTICLE 6. GENERAL PROVISIONS

6.01 Purpose. The purpose of this Part Three is to establish the general provisions that apply to this Agreement and each Subordinate Funding Agreement executed by the Parties hereafter.

6.02 Independent Contractors. The Parties agree that any and all persons employed by or on behalf of a Party to perform any Project activity or duties as an agent of a Party under this Agreement shall not be considered employees of the other Party. Any and all claims that may or might arise under the Workers' Compensation Act of Minnesota on behalf of said employees or persons while so engaged, and any and all claims made by any third person as a consequence of any act or omission on the part of said employees or persons while so engaged in any of the Project activity contemplated in this Agreement, shall not be the obligation or responsibility of the other Party. This Agreement is not intended to constitute an interchange of government employees within the meaning of Minnesota Statutes, Section 15.51, *et seq.*

6.03 Entire Agreement. This Agreement constitutes the entire agreement between the Parties and supersedes all oral agreements and negotiations between the Parties relating to the subject matter of this Agreement. As stated herein, this Agreement depends upon one or more Subordinate Funding Agreements for the actual authorization of Project activity or transfer of any reimbursements and the terms of any subsequent Subordinate Funding Agreements shall be considered together with this Agreement.

6.04 Non-Waiver of Immunity and Limits. Nothing in this Agreement shall be construed to waive the immunities or liability limits provided in Minnesota Statutes, Chapter 466, or other applicable state or federal law. The provisions of Minnesota Statutes, Section 471.59, subdivision 1a, specifically apply to this Agreement.

6.05 Amendments. The terms of this Agreement and any Subordinate Funding Agreement may be changed only by mutual agreement of the Parties. Such changes shall be effective only upon the execution of written amendments signed by the Parties' duly authorized representatives.

6.06 Non-Waiver. The failure of either Party at any time to insist upon the strict performance of any or all of the terms, conditions, and covenants in this Agreement or any Subordinate Funding Agreement shall not be deemed a waiver by that Party of any subsequent breach or default in the said terms, conditions, or covenants by the other Party.

6.07 Severability. The provisions of this Agreement shall be deemed severable. If any part of this Agreement is rendered void, invalid or unenforceable, such rendering shall not affect the validity and enforceability of the remainder of this Agreement unless the part or parts

which are void, invalid or otherwise unenforceable shall substantially impair the value of the entire Agreement with respect to either Party.

6.08 Assignment Prohibited. Neither Party shall assign their obligations under this Agreement.

6.09 Time. The Parties agree that all obligations undertaken under this Agreement, and with respect to any subsequent Subordinate Funding Agreements entered into by the Parties, will be diligently performed in a manner consistent with the proper exercise of professional care and with due consideration to Project timelines and constraints.

6.10 Notices. Except as otherwise expressly provided in this Agreement, all requests, notices, demands, authorizations, directions, consents, waivers or other communications required or permitted under this Agreement shall be in writing and shall either be:

- a. Delivered in person;
- b. Deposited postage prepaid in the certified mails of the United States, return receipt requested;
- c. Delivered by a nationally recognized overnight or same-day courier service that obtains receipts; or
- d. Delivered via email attachment.

Such communications shall be directed to the individuals specified below or to such other persons and at such other addresses as either Party may at any time or from time to time designate for itself by notice in accordance with this section. Each such request, notice, demand, authorization, direction, consent, waiver or other document shall be deemed to be delivered to a Party when received at its address set forth or designated as above provided.

For the Council:

Christine Beckwith – Senior Project Manager
Metro Gold Line Bus Rapid Transit Project Office
Metro Square Building
121 7th Place East, Suite 102
St. Paul MN 55101
Phone: 651-602-1994
E-mail address: Christine.Beckwith@metrotransit.org

For the City:

Paul Kurtz, Director of Public Works/City Engineer or successor
800 City Hall Annex
25 West Fourth Street
St. Paul MN 55102
Phone: (651) 266-6203
E-mail address: paul.kurtz@ci.stpaul.mn.us

6.11 Dispute Resolution. A dispute resolution process shall be used for any unresolved issue, dispute or controversy between the Parties before any legal remedies are

exercised. The dispute resolution process contains a three-level dispute resolution ladder that escalates a dispute from the project management level through the executive management level. The City is represented from Level 1 to 3 in the following order: City Engineer, Director of Public Works, and City Manager. The Council is represented from Level 1 to 3 in the following order: Deputy General Manager, General Manager, and Regional Administrator. At each level, representatives of the Parties shall meet and continue to explore resolution until either Party determines, in good faith, that effective resolution is not possible at the current level and notifies the other Party that the process is elevated to the next level. If either or both Parties make such a determination at any point during issue resolution at Level 3, then the dispute resolution process has been exhausted.

6.12 Project Manager. The Council's Project Manager for purposes of administration of this Agreement, and any Subordinate Funding Agreements entered into pursuant to this Agreement, is the person whose title is listed in Section 6.10, or such other person designated in writing by the Council's Regional Administrator. The City's Project Manager for purposes of administration of this Agreement and any Subordinate Funding Agreements entered into pursuant to this Agreement is the person whose title is listed in Section 6.10, or such other person designated in writing by the City. The City's Project Manager shall:

- a. Coordinate the carrying out of the City's obligations under this Agreement;
- b. Coordinate Subordinate Funding Agreement work scope activities with the Council's Project Manager;
- c. Attend meetings called by the Council's Project Manager for Project staff; and
- d. Complete training to be provided by the Council with respect to Council and federal requirements under this Agreement and any Subordinate Funding Agreements entered into pursuant to this Agreement.

Unless specifically and duly authorized by the Parties' respective governing bodies or adopted administrative procedures, the Parties' Project Managers are not authorized to execute amendments to this Agreement or amendments to any Subordinate Funding Agreement.

6.13 Applicable Law and Venue. This Agreement shall be interpreted in accordance with the laws of the State of Minnesota. Venue for all legal proceedings arising out of or relating to this Agreement or any associated Subordinate Funding Agreements, or breach thereof, shall be in the state or federal court with competent jurisdiction in Ramsey County, Minnesota.

6.14 Effective Date and Termination. This Agreement shall be effective on the date when both Parties' duly authorized representatives have signed this Agreement. This Agreement or a Subordinate Funding Agreement shall terminate upon the earliest of:

- a. Completion of construction of the Project and reimbursement of all costs provided for in this Agreement and all Subordinate Funding Agreements;
- b. A determination by the Council that the Project or Project activities funded under a Subordinate Funding Agreement cannot proceed;
- c. A determination by the City that a Subordinate Funding Agreement transferring City funds to the Council cannot proceed, however this Agreement may not be terminated if a Subordinate Funding Agreement is outstanding;

- d. A determination by the Council that sufficient funds do not exist, or are not reasonably projected to exist, in order to complete the Project or a Subordinate Funding Agreement; or
- e. The Council providing 90 days advance written notice to the City that it is terminating this Agreement or any Subordinate Funding Agreement.

The City agrees that Project closeout or termination of this Agreement or any particular Subordinate Funding Agreement does not invalidate continuing obligations imposed on the City by this Agreement or such Subordinate Funding Agreements or any agreements entered into pursuant to this Agreement or a Subordinate Funding Agreement. Project closeout or termination of this Agreement does not alter the Council's authority to disallow costs and recover funds on the basis of a later audit or other review and does not alter the City's obligation to return any funds determined to be due to the Council.

The Council agrees that Project closeout or termination of this Agreement or any particular Subordinate Funding Agreement does not invalidate continuing obligations imposed on the Council by this Agreement or such Subordinate Funding Agreements or any agreements entered into pursuant to this Agreement or a Subordinate Funding Agreement. Project closeout or termination of this Agreement does not alter the City's authority to disallow costs and recover funds on the basis of a later audit or other review and does not alter the Council's obligation to return any funds determined to be due to the City.

6.15 Exhibits. All attached exhibits are incorporated into and made a part of this Agreement.

6.16 Breach by City. If the City materially breaches the terms, covenants, or conditions which this Agreement requires the City to perform, the Council will immediately notify the City of the breach after the Council becomes aware of the breach. The City will then be given a reasonable time period to cure the breach. If the breach is not cured within 90 days, then senior management from the City and the Council will meet in good faith to discuss the breach and the measures necessary to remedy it. If the meeting between senior management from the Council and the City does not result in a cure or a plan to effect a cure that is satisfactory to the Council, then the Council may terminate this Agreement upon 90 days' written notice to the City. If circumstances dictate that the breach must be cured immediately, and the Council is forced to cure the breach, the City will reimburse the Council for the reasonable costs of effecting the remedy. The Council retains the right to collect any damages from the City that occurred as a result of the City's breach.

6.17 Breach by Council. If the Council materially breaches any of the terms, covenants, or conditions which this Agreement requires the Council to perform, the City will immediately notify the Council of the breach after the City becomes aware of the breach. The Council will then be given a reasonable time period to cure the breach. If the breach is not cured within 90 days, then senior management from the City and the Council will meet in good faith to discuss the breach and the measures necessary to remedy it. If the meeting between senior management from the Council and the City does not result in a cure or a plan to effect a cure that is satisfactory to the City, then the City may terminate this Agreement upon 90 days' written notice to the Council. If circumstances dictate that the breach must be cured immediately, and the City is forced to cure the breach, the Council will reimburse the City for the reasonable costs

of effecting the remedy. The City retains the right to collect any damages from the City that occurred as a result of the Council's breach.

6.18 Data Practices. The Parties will comply with the Minnesota Government Data Practices Act, Minnesota Statutes, Chapter 13, as it applies to all data created, collected, received, stored, used, maintained, or disseminated under this Agreement.

6.19 Force Majeure Events. Neither the City nor the Council shall be liable for any failure or delay in performance of its obligations under this Agreement arising out of or caused, directly or indirectly, by any Force Majeure events, including pandemic, public health emergency, fire, floods, explosion, catastrophe, accident, declared war, riot, acts of God, acts of terrorism, insurrection, strike, or applicable laws or orders that prevent performance, to the extent (i) such event is beyond the Party's control, that due diligence and use of reasonable efforts by the Party claiming the Force Majeure event could not have avoided or prevented, (ii) that materially and adversely affects a Party's ability to meet its obligations under this Agreement, and (iii) the Party claiming the Force Majeure event gives prompt written notice of the same to the other Party.

6.20 Counterparts. The parties may sign this Agreement in counterparts, each of which constitutes an original, but all of which together constitute one instrument.

6.21 Electronic Signatures. The parties agree that the electronic signature of a party to this Agreement shall be as valid as an original signature of such party and shall be effective to bind such party to this Agreement. The parties further agree that any document (including this Agreement and any attachments or exhibits to this Agreement) containing, or to which there is affixed, an electronic signature shall be deemed (i) to be "written" or "in writing," (ii) to have been signed and (iii) to constitute a record established and maintained in the ordinary course of business and an original written record when printed from electronic files. For purposes hereof, "electronic signature" also means a manually signed original signature that is then transmitted by any electronic means, including without limitation a faxed version of an original signature or an electronically scanned and transmitted version (e.g., via PDF) of an original signature. Any party's failure to produce the original signature of any electronically transmitted signature shall not affect the enforceability of this Agreement.

**[THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK;
SIGNATURE PAGE TO FOLLOW.]**

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized representatives on the dates indicated below. Furthermore, this Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.

CITY OF ST. PAUL

By: _____
Its: Mayor

Date: _____

By: _____
Its: Director of Public Works/City Engineer

Date: _____

By: _____
City Attorney's Office

Date: _____

By: _____
Office of Financial Services

Date: _____

METROPOLITAN COUNCIL

By: _____

Its: _____

Date: _____

LIST OF EXHIBITS

Exhibit	Description
A1	Form of Subordinate Funding Agreement (City to pay Council)
A2	Form of Subordinate Funding Agreement (Council to pay City)
B	Sample Forms
C	Specific Federal Requirement – “Federal Clauses”
D	Disadvantaged Business Enterprise Pass Through Agreement and Program
E	Capital Grant Agreement between Metropolitan Council and Gold Line Joint Powers Board

EXHIBITS TO THE MASTER FUNDING AGREEMENT

Exhibit A1_SFA example, City Funded Local Work

Exhibit A2_SFA example, Met Council Reimbursement to the City

Exhibit B_Sample Forms

Exhibit C_FTA Clauses

Exhibit D_DBE Pass Through Agreement Program

Exhibit E_DRAFT Capital Grant Agreement between Metropolitan Council and Gold Line Joint Powers Board

Reference Numbers:

GBRT Project: _____ 61402

Metropolitan Council: _____

City of ____: _____

PROJECT: GOLD LINE BUS RAPID TRANSIT PROJECT

MASTER AGREEMENT: Master Funding Agreement # _____ – City of ____ (“MFA”)

PARTIES TO AGREEMENT:

- Metropolitan Council (“Council”)
- City of ____ (“City”)

**SUBORDINATE FUNDING AGREEMENT #____ TO MFA
City of _____ – RE: _____**

This Subordinate Funding Agreement (“SFA”) with the City of _____ is entered by and between the above-named Parties.

WHEREAS:

1. The Parties entered a Gold Line Bus Rapid Transit Project (“Project”) Master Funding Agreement (“MFA”) effective on _____, 2019.
2. The Parties provided in the MFA that certain aspects of funding for the Project would be determined in subsequent SFAs.
3. The Project includes work requested by _____, hereby referred to as “Local Work,” for which the City will fund.
4. The Parties desire to enter this SFA to provide funding for _____ as described in attached Exhibit A, the Scope of Work (collective, this SFA and Exhibits are the “Work”).

NOW, THEREFORE, in reliance on the statements in these recitals, the Parties hereby agree as follows:

1. **Amount of Authorized Funding.** The total for Work (described in Exhibit A) shall be up to but not exceeding the amount of \$_____.
2. **Payment.** The funds shall be payable in accordance with the payment schedule set forth in Exhibit B and as detailed in the MFA.
3. **SFA Budget.** The budget for the Council’s activities described in this SFA is provided in Exhibit B. City funds provided for this SFA may only be used to fund the Council’s costs for activities to be directly incurred within the described Specific Description of Funding Authorization and as detailed in the MFA.
4. **Specific Description of Funding Authorization.** Activities to be performed by the Council’s construction contractor and funded by the City include construction of the Work identified on Exhibit A.

5. **Project Activity Periods.** The project activity period for the purposes of this SFA shall be effective upon execution and shall terminate on the later date of:
- a) the date all costs under this SFA have been paid,
 - b) unless terminated earlier consistent with the terms of the MFA.
6. **Entry onto Easements.** The Parties hereby grant to each other the right to enter onto property and any easements and rights-of-way that the Parties may have obtained for construction of the Work in order to fulfill obligations under this SFA.
7. **Ownership/Maintenance.** Unless otherwise noted on Exhibit A, and after substantial completion of the Work, the Work shall become property of the City and all associated warranties and guarantees provided by the Council's contractor(s) performing work on the Work shall become the property of the City. Upon the City becoming the owner of the Work, the City will be responsible for operation and maintenance of the Work.
8. **Project Management.** Except for the City's responsibilities outlined in Exhibit A, the Council shall perform, direct, and supervise all construction, contract administration, and inspection that the Council deems required or necessary and appropriate to complete the Work. All Work shall be performed by the Council or the Council's contractors, as directed by the Council, in accordance with the Contract Documents, defined in Exhibit A, for the Project. The Council will actively pursue and manage each warranty identified for the duration of the warranty.
9. **Incorporation.** The terms, conditions, and definitions of the MFA are expressly incorporated into this SFA except as modified herein.

CITY OF _____

METROPOLITAN COUNCIL

By: _____

By: _____

Its: _____

Its: _____

Date: _____

Date: _____

By: _____

Its: _____

Date: _____

EXHIBIT A

SCOPE OF WORK (“SOW”) FOR SFA # ____

DRAFT

EXHIBIT B

Description of Work's Budget

Work	Name	Description	Bid Amount
		Bid Total	
		Administration (3%)	
		SFA Total	

Payment Schedule for Work

(timing subject to change)

Payment #	Payable on or before:	Amount
1		25%: \$
2		50%: \$
3		Remaining balance: \$

Reference Numbers:

GBRT Project: _____ 61402

Metropolitan Council: _____

City of ____: _____

PROJECT: **GOLD LINE BUS RAPID TRANSIT PROJECT**

MASTER AGREEMENT: **Master Funding Agreement # _____ – City of ____ (“MFA”)**

PARTIES TO AGREEMENT: ☐ **Metropolitan Council (“Council”)**
☐ **City of ____ (“City”)**

SUBORDINATE FUNDING AGREEMENT #____ TO MFA
City of _____ – RE: _____

This Subordinate Funding Agreement (“SFA”) with the City of _____ is entered by and between the above-named Parties.

WHEREAS:

1. The Parties entered a Gold Line Bus Rapid Transit Project (“Project”) Master Funding Agreement (“MFA”) effective on _____, 2019.
2. The Parties provided in the MFA that certain aspects of funding for the Project would be determined in subsequent SFAs.
3. The Parties desire to enter this SFA to provide funding for _____ as described in attached Exhibit A, the Scope of Work (collective, this SFA and Exhibits are the “Work”).

NOW, THEREFORE, in reliance on the statements in these recitals, the Parties hereby agree as follows:

1. **Amount of Authorized Funding.** The total for Work (described in Exhibit A) shall be up to but not exceeding the amount of \$_____.
2. **Payment.** The funds shall be payable in accordance with the payment schedule set forth in Exhibit B and as detailed in the MFA.
3. **General Purpose of Funds:** The Metropolitan Council will reimburse the City of _____ for the costs to complete _____ (see attached Exhibit A – Scope of Work).
4. **Specific Description of Funding Authorization:** Funds provided under this Subordinate Funding Agreement may only be used for costs directly incurred by the City of _____ within the described Use of Funds: Allowable Costs and as detailed in the Master Funding Agreement.

5. **Project Activity Period.** The Project Activity Period for the purposes of this Subordinate Funding Agreement shall run from _____, 20XX, or until reimbursement of costs associated with the Exhibit B is complete or unless terminated earlier consistent with the terms of the Master Funding Agreement.
6. **Subrecipient Agreement.** This Subordinate Funding Agreement, in conjunction with the Master Funding Agreement, constitutes a subrecipient agreement for the purposes of any federal grant funds passed through to the City of _____ hereby.
7. **Incorporation.** The terms, conditions, and definitions of the MFA are expressly incorporated into this SFA except as modified herein.

CITY OF _____

By: _____

Its: _____

Date: _____

By: _____

Its: _____

Date: _____

METROPOLITAN COUNCIL

By: _____

Its: _____

Date: _____

EXHIBIT A

SCOPE OF WORK (“SOW”) FOR SFA # ____

DRAFT

EXHIBIT B

Description of Work's Budget

Work	Name	Description	Bid Amount
		Bid Total	
		SFA Total	

Asset Tracking Log

SUBRECIPIENT: _____
CONTRACT No.: _____

DATE OF LAST PHYSICAL INVENTORY:

Disposal

[illegible]

DBE Progress/Project Report

1. Project #:		9. Original Contract Amount:	
2. Project Title:		10. Contract Change Orders:	
3. Prime Contractor:		11. Total Contract Amount:	
4. Type of Services:		12. Contract Dollars Expended:	
5. Contract #		13. Contract Dollars Remaining:	
6. Contract Award Date:		14. Amount Paid to Date:	
7. Payment Claim #:		15. Percent Paid to Date:	
8. DBE Progress Report #:			

Utilization Goal: _____%

Reporting Period: From _____ to _____

A) DBE Subcontractor	B) Company DBE is Sub-contracting to	C) Amount of Original DBE Contract	D) Amount DBE Subcontracted to Others *	E) Amount in Change Orders to DBE Contract	F) Total DBE Contract Amount [C) - D) + E)]	G) Amount DBE Paid This Pay Request	H) Amount DBE Paid To Date
16							
17							
18							
19							
20							
21							
22							
23							
24							
DBE Totals:							
* Contract DBE % of Total Current Contracted Amount:							
* Billed DBE % of Total Contract Amount Billed:							
Explanation if DBE Goal Not Being Met or Other Comments:							

Signature:	Date:
Title:	

INSTRUCTIONS:

1. Insert information in all blank spaces. A/E Services contracts **DO NOT** complete Affirmative Action Status/Labor Force Breakdown by Hours.
2. **Amount DBE Subcontracted to Others** (Column D) shall include non-DBE amounts included in Column E.
2. **Contract DBE % of Total Current Contract** = DBE Totals of Column F) / Total Contract Amount (Item 11 above).
3. **Billed DBE % of Total Contract Amount Billed** = DBE Totals of Column H) / Amount Billed To Date (Item 14 above).

Section 1 – Project Information – to be completed by the Subrecipient Project Manager

Subrecipient Project Manager: Phone:			Date:	
Project Title:			MC Project #:	
Proposed Services:			Estimated Cost:	
Period of Performance:	From		To:	
Subcontracting:	Indicate whether or not there is a reasonable opportunity for subcontracting of this procurement		Yes <input type="checkbox"/>	No <input type="checkbox"/>

Subrecipient Project Manager – I have accurately completed the information in Sections 1, 2, and 3 of this SCIM. If this will be a federally funded purchase, I have completed and filed an Independent Cost Estimate.

Signature Date: _____

Council Project Manager Approval

I have reviewed the information in Sections 1, 2, and 3 and approve the initiation of this contract.

Signature Date: _____

Title

Section 2 – Funding – to be completed by the Council Project Manager *Check one box only:*

- ☐ This contract will be FTA-assisted (complete the *Grant Approval* section, below)
- ☐ This contract will be USDOT-assisted by an agency other than FTA (i.e. FAA or FHWA)
- ☐ This contract will be Minnesota PFA-eligible
- ☐ This contract will NOT be assisted with grant funds from any source
- ☐ This contract has special funding:

Subrecipient Project Budget	Project identification within the Subrecipient Accounting system and approved budget				
Met Council Project Budget	Account	Fund	Org	Program	Subclass Project

Comments:

Council Grant Approval – Federal Grant Number: _____ FTA-assisted contracts

_____ Council Grants Manager Signature	_____ Date	_____ Council Finance Officer Signature	_____ Date
---	---------------	--	---------------

Funding Approval – Subrecipient financial officer.

Signature _____ Date _____
Title _____ (To be signed by appropriate authorized Subrecipient staff)

Section 3 – Solicitation and Selection Process – to be completed by Subrecipient Project Manager

1. Type(s) of contractor and subcontractors involved in this contract: (Please list by specialty, skill or industry)

2. Proposed means of publicizing the availability of the contract

☐ State Register

☐ Construction Bulletin

☐ Trade Publication(s): (Please list) _____, _____, _____

☐ Community Organization(s): _____, _____, _____

☐ Other: (Please Explain) _____

3. Proposed process to select contractor

☐ Sole Source

☐ Other: (Please explain)

☐ Sealed bids

☐ Council staff

evaluation committee

Section 4 – Diversity – to be completed by Council Office of Diversity and Equal Opportunity Staff

☐ I wish to review the solicitation documents prepared for this procurement prior to advertisement and distribution

☐ I wish to be involved in the selection process for this procurement

The following diversity business subcontracting goal(s) or preference apply to this contract:

☐ DBE Goal of _____ %

☐ M/WBE Goal of _____ %

☐ TGB Goal of _____ %

☐ MBE Goal of _____ %

☐ SBRA Goal of _____ %

☐ WBE Goal of _____ %

☐ TGB Preference of _____ %

Reviewed by:

Date:

Section 5 – Authorization

By **Subrecipient** in accordance with its organizational structure.

I authorize the initiation of the contracting process for this procurement.

Signature of Authorized Signer

Date: _____

Title of Authorized Signer

Distribution – executed original filed in Subrecipient records; copies provided to:

Council Project Manager ☐

Council Office of Diversity ☐

Council Grants Manager ☐

Council Procurement Manager ☐

BLANKET PO _____

RELEASE PO _____

Payment Request
Metropolitan Council/Metro Transit
Gold Line BRT Project (Form C-22A GBRT)

PAYMENT REQUEST NO. _____ FOR SUBRECIPIENTS

_____ Interim Payment Request

_____ Final Payment Request

PAY TO: _____	DATE: _____
ADDRESS: _____	PERIOD: _____
_____	CONTRACT # _____
_____	INVOICE # _____

PROJECT NAME: _____	SFA # _____
---------------------	-------------

SFA SUMMARY:

SFA Budget Expense Category	SFA Budget Amount	Expenses Incurred this Period	Project-to-Date Expenses	Balance Remaining
Direct Labor	\$ -	\$ -	\$ -	\$ -
Direct Materials (capital)	0.00	0.00	0.00	0.00
Direct Materials (non-capital)	0.00	0.00	0.00	0.00
Direct Costs (mileage, phone)	0.00	0.00	0.00	0.00
Subcontractor	0.00	0.00	0.00	0.00
Subcontractor	0.00	0.00	0.00	0.00
Subcontractor	0.00	0.00	0.00	0.00
Total Expenses	\$ -	\$ -	\$ -	\$ -

AMOUNT OF PAYMENT/FINANCIAL REPORT:

TOTAL EARNED TO DATE	\$ -
LESS AMOUNT PAID OR BILLED PREVIOUSLY	\$ -
AMOUNT DUE THIS PAYMENT	\$ -
AMOUNT INCURRED OR ENCUMBERED BUT NOT BILLED	\$ -
AMOUNT UNENCUMBERED	\$ -

CERTIFICATION BY SUBRECIPIENT

I hereby certify that the above services have been performed and that this claim is just and correct and no part of it has been paid. I certify the expenditures reflected in this invoice are true and correct and have been made for the purpose of and in accordance with applicable terms and conditions of the award. I have examined the expenditures reflected on this invoice and determined that each reflects a reasonable price based on market prices offered by the vendors to the general public.

Appropriate documentation to support these authorized expenditures is on file and available for review. These expenditures are not reimbursable from other sources and have not been previously claimed.

By: _____ Date: _____

(Subrecipient's Authorized Representative)

METROPOLITAN COUNCIL CERTIFICATION

Disbursement Approval is completed electronically through by authorized BPO staff.

NOTE: Blanket PO/Release PO required for all payments

Project/Fund Code Approval

By: _____ Date: _____

(Metro Transit Finance Department)

By: _____ Date: _____

(Council Grants Analyst)

ACCOUNT CHART FIELD

Account	Fund	Dept	Prog	Class	Project	Amount
						\$ -
						\$ -
						\$ -
						\$ -

COMMENTS:

Comments documenting any processing delays are included on the electronic Disbursement Approval form. Note the Council is legally required to make payment within a specified period or pay interest to the vendor. Documentation of all delays is imperative in determining whether or not the interest charge applies.

Subrecipient Invoice Detail	
GOLD LINE BRT Project (Form GBRT F1)	

SUBRECIPIENT: _____

CONTRACT No.: _____

INVOICE No: _____

SFA No.: _____

BILLING PERIOD:

DETAIL DESCRIPTION

DIRECT LABOR

[illegible]

TOTAL DIRECT LABOR: \$ -

*DIRECT COSTS***

Cell Phone	\$ -
Travel Expenses	\$ -
Other (Explain)	\$ -

<i>TOTAL DIRECT LABOR:</i>	\$	-
----------------------------	----	---

SUBCONTRACTOR COSTS***

Sub-Contractor	\$ -
Sub-Contractor	\$ -
Sub-Contractor	\$ -

TOTAL SUB-CONTRACTOR COSTS: \$ -

TOTAL INVOICED \$ -

* Loaded rate/hour must match SFA Exhibit A (budget). Addition or change requests must be made in writing.

* Direct costs must be specifically budgeted for in the SFA and supported by proper documentation, including but not limited to, invoices, receipts, approved travel claim forms, etc.

*** Sub-Contractor invoices must include the same detail and documentation as the subrecipient are required to include.

SUBRECIPEINT MONTHLY PROGRESS REPORT

(Form GBRT P1)

From:	Click here to enter text.	SFA Number:	Click here to enter text.
Contract Number:	Click here to enter text.	Date:	Click here to enter text.
Invoice Number:	Click here to enter text.	Period:	Click here to enter text.

PART A: SCHEDULE

- 1.0 Current scheduled completion date: [Click here to enter text.](#)
- 2.0 Original scheduled completion date: [Click here to enter text.](#)
- 3.0 If current and original dates differ, explain: [Click here to enter text.](#)

PART B: BUDGET STATUS

- 1.0. Original contract value: [Click here to enter text.](#)
- 2.0 Amendment (if applicable): [Click here to enter text.](#)
- 3.0 Total earned to date: [Click here to enter text.](#)
- 4.0 Amount due this payment: [Click here to enter text.](#)
- 5.0 Balance: [Click here to enter text.](#)

PART C: NARRATIVE PROGRESS STATEMENT

- 1.0 *Work Completed This Month:*
[Click here to enter text.](#)
- 2.0 *Work Planned Next Month:*
[Click here to enter text.](#)
- 3.0 *Informational Assistance Requests:*
[Click here to enter text.](#)
- 4.0 *Analysis of significant cost variances this month:*
[Click here to enter text.](#)

PART D: PROCUREMENTS

- 1.0 Procurements Completed This Month:
[Click here to enter text.](#)
- 2.0 Procurements Planned for Next Month:
[Click here to enter text.](#)

SUBMITTER SIGNATURE: _____

SUBMITTER TITLE: _____ DATE: _____

Instructions for Completing Subrecipient MPR

- A. **SCHEDULE:** Provide an explanation of the differences between original and current scheduled completion dates, include reason for change and impacts to contract deliverable(s).
- B. **BUDGET STATUS:** This section provides a summary of the budget from the corresponding monthly Payment Request Form. Amounts must match Payment Request Form.
- C. **NARRATIVE PROGRESS STATEMENT:** For each task identified in the Subordinate Funding Agreement, address the following areas:
- **Work Completed this Month:** Include significant development affecting progress, including issues encountered and other impacts on progress. Include reports completed and underway, as well as a summary of all meetings attended. Attach supplemental sheets as necessary.
 - **Work Planned Next Month:** Include the general outlook for progress, including planned meetings and progress towards deliverables. Include schedule for meetings and deliverables. Attach supplemental sheets as necessary.
 - **Informational Assistance Requests:** Include any needs for special instruction or assistance from the Metropolitan Council or other organizations. Include when assistance is needed, or the date it was provided if completed during the MPR period. Attach supplemental sheets as necessary.
 - **Analysis of significant cost variances:** Please provide analyses of changes in proposed costs that will impact the overall contract value. Clearly state what led to the changes and how it will impact the work going forward. For instance, do you foresee similar changes occurring and their potential costs?
- D. **PROCUREMENTS:** For each task identified in the Subordinate Funding Agreement, address the following areas:
- **Procurements Completed This Month:** Include a listing of items procured; procurement method used, contract type, reason for contractor selection, cost or price, whether the vendor or vendors are DBEs, and for materials or supplies, whether the item will be tracked as an asset. Attach supplemental sheets as necessary.
 - **Procurements Planned for Next Month:** Identify any planned procurements and anticipated cost or price. Attach supplemental sheets as necessary.

METROPOLITAN COUNCIL/METRO TRANSIT/ Gold Line BRT Project

PAYMENT REQUEST NO. _____ FOR ENGINEERING/CONSULTANT CONTRACTS

_____ Interim Payment Request _____ Final Payment Request

(NOTE: DIVERSITY OFFICE SIGN OFF REQUIRED FOR FINAL PAY REQUESTS ON FEDERALLY FUNDED PROJECTS)

(NOTE: CONTRACTS SIGNOFF REQUIRED FOR FINAL PAY REQUESTS ON CONSTRUCTION CONTRACTS)

PAY TO: _____	DATE: _____
ADDRESS: _____	PERIOD FROM: _____ TO: _____
_____	CONTRACT # _____ WO # _____
_____	INVOICE # _____ DATE _____

PROJECT DESCRIPTION (specific to this consultant):

PROJ #

CONTRACT SUMMARY:

ORIGINAL CONTRACT AMOUNT	\$	-
AMENDMENT #1	\$	-
AMENDMENT #2	\$	-
AMENDMENT #3	\$	-
NET CHANGES(SUBTOTAL)	\$	-
REVISED CONTRACT AMOUNT	\$	-

AMOUNT OF PAYMENT:

TOTAL EARNED TO DATE	\$	-
LESS AMOUNT PAID OR BILLED PREVIOUSLY	\$	-
AMOUNT DUE THIS PAYMENT	\$	-

CERTIFICATION BY CONTRACTOR

I hereby certify that the above services have been performed and that this claim is just and correct and no part of it has been paid

By _____
Contractor's/Consultant's Authorized Representative Date

METROPOLITAN COUNCIL CERTIFICATION

I hereby certify that I have prepared or examined this claim for work performed during the period for which this payment claim has been made and that the Contractor is entitled to payment of the claim Under the terms of the contract

By _____
Project Manager Date

By _____
Supervisor Date

NOTE: Blanket PO/Release PO required for all payments

COMPLETE THIS SIGNATURE SECTION FOR FINAL PAY REQUESTS ONLY

_____ Federal Funding Applies
METROPOLITAN COUNCIL DIVERSITY/EEO CERTIFICATION
(final pay requests for federally-funded projects only)

By _____
Diversity Office Representative Date

METRO TRANSIT CONTRACTS (receipt of Form IC 134 and other close-out documents)

By _____
Contracts Office Representative Date

ACCOUNT CHART FIELD

Account	Fund	Dept	Prog	Class	Project	Amount	PROJECT/FUND CODE APPROVAL: (finance dept use only)
						\$ -	
							By _____ Grants Analyst Date
							ECHO DRAW #

COMMENTS: This section is required to be completed to document any processing delays. Note the Council is legally required to make payment within as specified period or pay interest to the vendor. Documentation of all delays is imperative in determining whether or not the interest charge applies.

METROPOLITAN COUNCIL/METRO TRANSIT/Gold Line BRT Project**PAYMENT REQUEST NO. _____ FOR CONSTRUCTION WORK/SERVICES**

_____ Interim Payment Request

_____ Final Payment Request

(NOTE: DIVERSITY OFFICE SIGN OFF REQUIRED FOR FINAL PAY REQUESTS ON FEDERALLY FUNDED PROJECTS)

(NOTE: CONTRACTS SIGNOFF REQUIRED FOR FINAL PAY REQUESTS ON CONSTRUCTION AND CONTRACTS)

PAY TO: _____	DATE: _____
ADDRESS: _____	PERIOD FROM: _____ TO: _____
_____	CONTRACT # _____ WO # _____
_____	INVOICE # _____ DATE _____

PROJECT DESCRIPTION: _____	PROJ # _____
----------------------------	--------------

CONTRACT SUMMARY:	
ORIGINAL CONTRACT AMOUNT	\$ -
CHANGE ORDERS TO DATE (CO#1 through _____):	\$ -
REVISED CONTRACT AMOUNT	\$ -

RETAINAGE :	
PREVIOUS RETAINAGE	\$ -
THIS PAYMENT RETAINAGE	\$ -
TOTAL RETAINAGE	\$ -

AMOUNT OF PAYMENT:	
TOTAL EARNED TO DATE	\$ -
AMOUNT RETAINED (____%)	\$ -
LESS AMOUNT PAID OR BILLED PREVIOUSLY	\$ -
AMOUNT DUE THIS PAYMENT	\$ -

CERTIFICATION BY CONTRACTOR

I hereby certify that the above services have been performed and that this claim is just and correct and no part of it has been paid

By _____
Contractor's/Consultant's Authorized Representative Date

METROPOLITAN COUNCIL CERTIFICATION

I hereby certify that I have prepared or examined this claim for work performed during the period for which this payment claim has been made and that the Contractor is entitled to payment of the claim Under the terms of the contract

By _____
Council's Authorized Representative/ Project Manager Date

By _____
Project Manager/Supervisor Date

NOTE: Blanket PO/Release PO required for all payments**COMPLETE THIS SIGNATURE SECTION FOR FINAL PAY REQUESTS ONLY**

<input type="checkbox"/> Federal Funding Applies METROPOLITAN COUNCIL DIVERSITY/EEO CERTIFICATION (final pay requests for federally-funded projects only) By _____ Diversity Office Representative Date	METRO TRANSIT CONTRACTS (receipt of Form IC 134 and other close-out documents) By _____ Contracts Office Representative Date
--	--

ACCOUNT CHART FIELD							PROJECT/FUND CODE APPROVAL:	
Account	Fund	Dept	Prog	Class	Project		Amount	(finance dept use only)
								By _____
								Grants Analyst Date
								ECHO DRAW #

COMMENTS: This section is required to be completed to document any processing delays. Note the Council is legally required to make payment within as specified period or pay interest to the vendor. Documentation of all delays is imperative in determining whether or not the interest charge applies.

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RIGHTS IN DATA AND PATENT RIGHTS

ARTICLE FTA-1. DEFINITIONS

This Exhibit C supplements the Master Funding Agreement. Wherever the requirements of this Exhibit C is in conflict with the Master Funding Agreement, that requirement which is most restrictive shall apply. For the purpose of this Exhibit C, "Contractor" refers to the City of XXXX.

- 1.1 **C.F.R.** : The acronym referring to the United States Code of Federal Regulations, which contains regulations applicable to FTA grant recipients and their contractors and subcontractors.
- 1.2 **DOT** : The acronym referring to the United States Department of Transportation. Also represented as USDOT.
- 1.3 **EPA** : The acronym referring to the United States Environmental Protection Agency. Also represented as USEPA.
- 1.4 **FTA** : The acronym referring to the Federal Transit Administration, a public transit regulatory unit of the USDOT, formerly known as the Urban Mass Transit Administration.
- 1.5 **U.S.C.** : The acronym referring to the United States Code.

ARTICLE FTA-2. ACCESS TO RECORDS, ACCESS TO CONSTRUCTION SITE, AND MAINTENANCE OF RECORDS

- 2.1 **Access to Records.** The CONTRACTOR agrees to provide sufficient access to FTA and its contractors to examine, inspect, and audit records and information related to performance of this Contract as reasonably may be required.

In accordance with 49 U.S.C. section 5325(g), CONTRACTOR agrees to provide the Council, the Secretary of Transportation, the FTA Administrator, the Comptroller General of the United States, and any of their authorized representatives access to any books, documents, papers, and records of CONTRACTOR which are directly pertinent to this Contract for the purposes of making audits, examinations, inspections, excerpts, and transcriptions.

CONTRACTOR also agrees, pursuant to 49 C.F.R. section 633.15, to provide the FTA Administrator or the Administrator's authorized representatives, including any project management oversight ("PMO") contractor, access to CONTRACTOR's records and construction sites pertaining to a major capital project, defined at 49 U.S.C. section 5302(a)(1), which is receiving federal financial assistance through the programs described at 49 U.S.C. sections 5307, 5309, or 5311.

- 2.2 **Access to the Sites of Performance.** CONTRACTOR agrees to permit FTA and its contractors access to the sites of performance under this Contract as may reasonably may be required.
- 2.3 **Reproduction of Documents.** The Contractor will retain, and will require its subcontractors at all tiers to retain, complete and readily accessible records related in whole or in part to this Agreement, 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.
- 2.4 **Retention Period.** The CONTRACTOR agrees to comply with the record retention requirements in accordance with 2 C.F.R section 200.333. CONTRACTOR shall maintain all books, records,

accounts, and reports required under this Contract for a period of not less than 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.

The expiration or termination of this Contract does not alter the record retention or access requirements of this Section.

ARTICLE FTA-3. BUY AMERICA

These provisions of this Article FTA-3 apply if the value of this Contract (including the value of any amendments thereto) exceeds \$150,000.

- 3.1 Buy America.** The CONTRACTOR agrees to comply with 49 U.S.C. section 5323(j) and 49 C.F.R. part 661, which provide that Federal funds may not be obligated unless iron, steel, 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. section 661.7.

ARTICLE FTA-4. CARGO PREFERENCE

- 4.1 Cargo Preference—Use of United States-Flag Vessels.** The CONTRACTOR agrees:

- 4.1.1 To use privately owned United States-Flag commercial vessels to ship at least 50% 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;
- 4.1.2 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 Section 4.1.1 above to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590 and to the COUNCIL (through the CONTRACTOR in the case of a lower-tier participating subcontractor's bill of lading); and
- 4.1.3 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.

- 4.2 Fly America Requirements** The CONTRACTOR agrees to comply with 49 U.S.C. 40118 (the "Fly America Act") in accordance with the General Services Administration's regulations at 41 C.F.R. part 301-10, which provide that recipients and subrecipients of Federal funds and their contractors are required to use U.S. Flag Air Carriers for U.S. Government-financed international air travel and transportation of their personal effects or property, to the extent such service is available, unless travel by foreign air carrier is a matter of necessity, as defined by the Fly America Act. The CONTRACTOR shall submit, if a foreign air carrier was used, an appropriate certification or memorandum adequately explaining why service by a U.S. Flag Air Carrier was not available or why it was necessary to use a foreign air carrier and shall, in any event, provide a certificate of compliance with the Fly America requirements. The CONTRACTOR agrees to include the requirements of this section FTA-4.2 in all subcontracts that may involve international air transportation.

ARTICLE FTA-5. EMPLOYEE PROTECTIONS

Certain employee protections apply to all FTA-funded contracts with particular emphasis on construction-related projects. The CONTRACTOR will comply with all federal laws, regulations, and requirements, including:

5.1 Prevailing Wage Requirements

- 5.1.1 Federal transit laws, specifically 49 U.S.C. section 5333(a), ("FTA's Davis-Bacon Related Act");
- 5.1.2 The Davis-Bacon Act, 40 U.S.C. sections 31441-3144, 3146, and 3147; and
- 5.1.3 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.

5.2 Anti-Kickback Prohibitions.

- 5.2.1 Section 1 of the Copeland "Anti-Kickback" Act, as amended, 18 U.S.C. section 874;
- 5.2.2 Section 2 of the Copeland "Anti-Kickback" Act, as amended, 40 U.S.C. section 3145; and
- 5.2.3 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.

5.3 Contract Work Hours and Safety Standards.

- 5.3.1 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
- 5.3.2 U.S. DOL regulations, "Safety and Health Regulations for Construction," 29 C.F.R. part 1926.

5.4 Flow Down. These requirements extend to all third-party contractors and their contracts 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.

5.5 Model Clause/Language. The Contractor 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.

5.6 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. section 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. sections 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. section 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.

5.7 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 any subcontractor under any such contract or any other Federal contract with the CONTRACTOR, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the CONTRACTOR, such sums as may be determined to be necessary to satisfy any liabilities of the CONTRACTOR or any 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 CONTRACTOR shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in this agreement.

ARTICLE FTA-6. DEBARMENT, SUSPENSION, INELIGIBILITY, AND VOLUNTARY EXCLUSION

6.1 The CONTRACTOR agrees to comply with the requirements of 2 C.F.R. part 180, subpart C, as supplemented by 2 C.F.R. part 1200 during the term of this Contract. By signing this Contract, the CONTRACTOR certifies that neither it nor its principals, affiliates, or subcontractors are presently debarred, suspended, proposed for debarment, declared ineligible, voluntarily excluded, or disqualified from participation in this contract by any Federal department or agency. This certification is a material representation of fact upon which the COUNCIL relies in entering this Contract. If it is later determined that the CONTRACTOR knowingly rendered an erroneous certification, in addition to other remedies available to the COUNCIL, the Federal Government may pursue available remedies, including suspension and/or debarment. The CONTRACTOR shall provide to the COUNCIL immediate written notice if at any time the CONTRACTOR learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances. The CONTRACTOR will include a provision requiring such compliance in its lower tier covered transactions.

ARTICLE FTA-7. ENVIRONMENTAL STANDARDS AND PRACTICES

- 7.1 *Clean Water Act.*** For any project of \$150,000 or more, the CONTRACTOR agrees to comply with all applicable standards, orders, or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. sections 1251-1387. The CONTRACTOR agrees to report each violation to the COUNCIL and understands and agrees that the COUNCIL will, in turn, report each violation as required to assure notification to FTA and the appropriate Environmental Protection Agency ("EPA") Regional Office. The CONTRACTOR also agrees to include these requirements in each subcontract exceeding \$150,000 financed in whole or in part with Federal assistance provided by FTA.
- 7.2 *Clean Air Act Compliance.*** For any project of \$150,000 or more, the CONTRACTOR agrees to comply with all applicable standards, orders, or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. sections 7401-7671q. The CONTRACTOR agrees to report each violation to COUNCIL and understands and agrees that COUNCIL will, in turn, report each violation as required to assure notification to FTA and the appropriate EPA Regional Office. The CONTRACTOR also agrees to include these requirements in each subcontract exceeding \$150,000 financed in whole or in part with Federal assistance provided by FTA.
- 7.3 *Energy Conservation.*** 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 federal Energy Policy and Conservation Act.
- 7.4 *Recovered Materials.*** 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 all the requirements of Section 6002 of the Resource Conservation and Recovery Act ("RCRA") as amended (42 U.S.C. section 6962) and U.S. Environmental Protection Agency, "Comprehensive Procurement Guideline for Products Containing Recovered Materials," 40 C.F.R. part 247.

ARTICLE FTA-8. LOBBYING RESTRICTIONS

For any project of \$100,000 or more, the CONTRACTOR is required to make the following certifications. The CONTRACTOR must also require its contractors or subcontractors to make the following certification in any contracts or subcontracts valued at or above \$100,000.

- 8.1 *Certification of Restrictions on Lobbying; Disclosure.*** The CONTRACTOR certifies, to the best of its knowledge and belief, that no Federal appropriated funds have been paid or will be paid by or on behalf of the CONTRACTOR 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.

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 a Federal contract, grant, loan, or cooperative agreement, the CONTRACTOR shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

The CONTRACTOR 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 COUNCIL has relied to enter this Contract. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. section 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.

By its signature on this Contract, the CONTRACTOR certifies or affirms the truthfulness and accuracy of each statement of its certification and disclosure, if any. In addition, CONTRACTOR understands and agrees that the provisions of 31 U.S.C. Section 3801, *et seq.*, apply to this certification and disclosure, if any.

ARTICLE FTA-9. SEISMIC SAFETY

- 9.1 **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 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

ARTICLE FTA-10. NATIONAL INTELLIGENT TRANSPORTATION SYSTEMS ARCHITECTURE AND STANDARDS

- 10.1 **National Intelligent Transportation Systems Architecture and Standards.** To the extent applicable, the CONTRACTOR agrees to conform to the National Intelligent Transportation Systems (ITS) Architecture and Standards as required by section 5206(e) of TEA-21, 23 U.S.C. section 502 note, and to comply with FTA Notice, "FTA National ITS Architecture Policy on Transit Projects" 66 Fed. Reg. 1455 *et seq.*, January 8, 2001, and other Federal requirements that may be issued.

ARTICLE FTA-11. Program Fraud and False or Fraudulent Statements or Related Acts

- 11.1 **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. section 3801 *et seq.*, and USDOT regulations, "*Program Fraud Civil Remedies*," 49 C.F.R. part 31, apply to its actions pertaining to this Contract. Upon execution of this 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 this Contract or the FTA-assisted project for which this 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 Federal Government reserves the right to impose the penalties of 18 U.S.C. section 1001 and 49 U.S.C. section 5323(l) on the CONTRACTOR, to the extent the Federal Government deems appropriate.

The CONTRACTOR agrees to include the above language in each subcontract under this contract,

modified only to identify the subcontractor that will be subject to the provisions.

ARTICLE FTA-12. CIVIL RIGHTS

Under this Contract, the CONTRACTOR shall at all times comply with the following requirements and shall include these requirements in each subcontract entered into as part hereof.

12.1 ***Nondiscrimination.***

12.1.1 ***Nondiscrimination in Employment.*** In accordance with Title VI of the Civil Rights Act, as amended, 42 U.S.C. § 2000d, section 303 of the Age Discrimination Act of 1975, as amended, 42 U.S.C. § 6102, section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, and 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 (including gender identity), age, or disability. In addition, the CONTRACTOR agrees to comply with applicable federal implementing regulations and other implementing requirements FTA may issue.

12.1.2 ***Nondiscrimination in Contracting.*** The CONTRACTOR agrees and assures that it will abide by the following conditions, and that it will include the following assurance in every subagreement and third-party contract it signs: (1) The CONTRACTOR must not discriminate on the basis of race, color, national origin, or sex in the award and performance of any FTA or U.S. DOT-assisted subagreement, third party contract, or third party subcontract, as applicable, and the administration of its DBE program or the requirements of 49 C.F.R. part 26; and (2) the CONTRACTOR must take all necessary and reasonable steps under 49 C.F.R. part 26 to ensure nondiscrimination in the award and administration of U.S. DOT-assisted subagreements, third party contracts, and third party subcontracts, as applicable.

12.2 ***Equal Employment Opportunity.*** The following equal employment opportunity requirements apply to this Contract:

12.2.1 ***Race, Color, Religion, National Origin, Sex.*** In accordance with Title VII of the Civil Rights Act, as amended, 42 U.S.C. section 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. section 2000e note, as further amended by any later Executive Order that amends or supersedes it, referenced in 42 U.S.C. section 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, 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.

12.2.2 ***Age.*** In accordance with the Age Discrimination in Employment Act, 29 U.S.C. sections 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. section 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. section 5332, the CONTRACTOR agrees to refrain from discrimination against present and prospective employees for reason of age. In addition, the CONTRACTOR agrees to comply with any implementing requirements FTA may issue.

12.2.3 **Disabilities.** In accordance with section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. section 794, the Americans with Disabilities Act, as amended, 42 U.S.C. § 12101 *et seq.*, the Architectural Barriers Act of 1968, as amended, 42 U.S.C. section 4151 *et seq.*, and Federal transit law at 49 U.S.C. section 5332, the CONTRACTOR agrees that it will not discriminate against individuals on the basis of disability. In addition, the CONTRACTOR agrees to comply with the requirements of U.S. Equal Employment Opportunity commission, "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 29 C.F.R. part 1630, and any implementing requirements FTA may issue. The Contractor will also ensure that accessible facilities (including vehicles and buildings) and services are made available to individuals with disabilities in accordance with the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. section 12101 *et seq.*, the Architectural Barriers Act of 1968, as amended, 42 U.S.C. section 4151 *et seq.*, and any applicable implementing regulations.

12.3 **Inclusion in Subcontracts.** The CONTRACTOR agrees to include the requirements of this article FTA-12 in each subcontract under this contract, modified only to identify the subcontractor that will be subject to the provisions.

ARTICLE FTA-13. GENERAL PROVISIONS

13.1 **Federal Changes.** The CONTRACTOR shall comply with the required FTA clauses set forth in this contract and with all applicable FTA regulations, policies, procedures and directives including, without limitation, those listed directly or by reference in the agreement between the COUNCIL and FTA. The CONTRACTOR's failure to comply with applicable FTA regulations, policies, procedures, and directives, as they may be amended or promulgated from time to time during the term of this contract, shall constitute a material breach of this contract.

13.2 **No Obligation by the Federal Government.** The COUNCIL and CONTRACTOR acknowledge and agree that, notwithstanding any concurrence by the Federal Government in or approval of the solicitation or award of this 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 COUNCIL, CONTRACTOR, or any other party (whether or not a party to the Contract) pertaining to any matter resulting from this Contract.

The CONTRACTOR agrees to include the preceding clause in each subcontract under this Contract, modified only to identify the subcontractor that will be subject to the provisions.

13.3 **Incorporation of FTA Terms.** Specific provisions in this Contract include, in part, certain Standard Terms and Conditions required by USDOT, whether or not expressly set forth in the contract provisions. All contractual provisions required by USDOT, as set forth in FTA Circular 4220.1F (as revised from time to time) and in Appendix II of 2 C.F.R. part 200 are hereby incorporated by reference. Notwithstanding anything to the contrary in this Contract, all FTA mandated terms shall be deemed to control in the event of a conflict with other provisions contained in this Contract. The CONTRACTOR shall not perform any act, fail to perform any act, or refuse to comply with any COUNCIL requests which would cause the COUNCIL to be in violation of the FTA terms and conditions.

ARTICLE FTA-14. DISADVANTAGED BUSINESS ENTERPRISE (DBE)

14.1 **Nondiscrimination.** Pursuant to 49 CFR part 26, 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 COUNCIL deems appropriate. The CONTRACTOR shall include this requirement in all subcontracts pursuant to this Contract.

14.2 *Prompt Payment.*

- 14.2.1 Section 14.13 of Document 00700 General Conditions, relating to "Prompt Payment to Subcontractors," is deleted and is replaced with this section FTA-14.2.
- 14.2.2 The CONTRACTOR agrees to pay subcontractors within ten (10) calendar days of the CONTRACTOR's receipt of payment from the COUNCIL for undisputed services provided by the subcontractor. The CONTRACTOR agrees to pay subcontractors all undisputed retainage payments within ten (10) calendar days of completion of the work, regardless of whether the CONTRACTOR has received any retainage payment from the COUNCIL. The CONTRACTOR shall not postpone or delay any undisputed payments owed subcontractors without good cause and without prior written consent of the COUNCIL. The CONTRACTOR agrees to include in all subcontracts a provision requiring the use of appropriate alternative dispute resolution mechanisms to resolve payment disputes. The CONTRACTOR will not be reimbursed for work performed by subcontractors unless and until the CONTRACTOR ensures that subcontractors are promptly paid for work they have performed. Failure to comply with the provisions of this Section 14.2 may result in the COUNCIL finding the CONTRACTOR in noncompliance with the DBE provisions of this Contract.
- 14.2.3 The CONTRACTOR shall not, by reason of said payments, be relieved from responsibility for Work done by the subcontractor and shall be responsible for the entire Work under this contract until the same is finally accepted by the COUNCIL.
- 14.2.4 The CONTRACTOR agrees to include in all subcontracts a provision requiring the use of appropriate alternative dispute resolution mechanisms to resolve payment disputes.
- 14.2.5 The CONTRACTOR will not be reimbursed for work performed by subcontractors unless and until the CONTRACTOR ensures that subcontractors are promptly paid for work they have performed. Failure to comply with the provisions of this section FTA-14.2 may result in the COUNCIL finding CONTRACTOR in noncompliance with the DBE provisions of this contract

14.3 *DBE Good Faith Efforts* During the term of this contract, the CONTRACTOR will continue to make good faith efforts to ensure that DBEs have maximum opportunity to successfully perform under the contract, and that the CONTRACTOR meets its DBE commitment as set forth in its bid. These efforts shall include, without limitation, the following:

- 14.3.1 If CONTRACTOR requests substitution of a DBE subcontractor or supplier listed in its **Document 00485 Disadvantaged Business Enterprise Information and Certifications** form, the CONTRACTOR shall exert good faith efforts to replace the DBE firm with another DBE firm subject to approval of the COUNCIL.
- 14.3.2 CONTRACTOR shall not terminate for convenience any DBE subcontractor or supplier listed in its **Document 00485 Disadvantaged Business Enterprise Information and Certifications** form (or an approved substitute DBE firm) and then perform the work itself or with its affiliates without prior written consent of the COUNCIL
- 14.3.3 If a DBE subcontractor or supplier is terminated or fails to complete its work on the contract for

any reason, CONTRACTOR shall make good faith efforts to find another DBE firm to substitute for the original DBE firm.

14.3.4 The dollar amount of amendments or any other contract modifications will be entered into the DBE Contract Monitoring System (CMS).

14.3.5 The CONTRACTOR will identify a "DBE and Workforce Liaison" who will serve as a single point of contact for all CONTRACTOR DBE and Workforce issues.

14.3.6 Failure to comply with the provisions of this section FTA-14.3 may result in the COUNCIL finding CONTRACTOR in noncompliance with the DBE provisions of this contract and the imposition of Administrative Sanctions described in section FTA-14.6.

14.4 *Reporting.*

14.4.1 The CONTRACTOR will submit monthly progress reports to the COUNCIL reflecting its DBE participation through the CMS.

14.4.2 Upon award of a contract a representative from the COUNCIL will assign the DBE and Workforce Liaison a CMS user account and provide a CMS User Manual detailing the following guidelines.

14.4.3 All committed DBE subcontractors to be used on the contract must be entered into the CMS system.

14.4.4 All DBE billing, submitted during the reporting period, must be finalized and entered into CMS prior to submission of CONTRACTOR'S payment application.

14.4.5 Any changes to the DBE subcontractor list or their amounts must be entered into CMS. Changes include; DBE firms removed, DBE firms added, changes to subcontract amounts, and DBE credit adjustments.

14.4.6 All payments made to DBE firms must be finalized and entered into CMS within 10 days of receipt of payment from the COUNCIL.

14.4.7 Failure to submit this report in a timely manner will result in a penalty of \$10 per late day per report and may also result in the imposition of Administrative Sanctions under section FTA-14.6, pursuant to the COUNCIL's DBE policy and USDOT regulations. For the purposes of this section FTA-14.4, timely submittal means receipt in the contract compliance function of the COUNCIL's Office of Diversity and Equal Opportunity by the close of business on the fifteenth (15th) of the following month.

14.5 *Review of Good Faith Efforts*

14.5.1 The COUNCIL's Office of Equal Opportunity will review the CONTRACTOR's DBE progress reports to monitor and determine whether the utilization of DBE firms is consistent with the commitment of CONTRACTOR as stated in its bid.

14.5.2 If it is determined that the CONTRACTOR's DBE utilization under the contract is not consistent with its commitment, the CONTRACTOR will be requested, in writing, to submit evidence of its good faith efforts to meet the commitment. The CONTRACTOR shall be given ten (10) working days to submit this documentation. Failure to respond shall place the CONTRACTOR in non-compliance and subject to imposition of Administrative Sanctions as described in section FTA-14.6.

- 14.5.3 The CONTRACTOR's good faith efforts documentation will then be reviewed for accuracy, sufficiency and internal consistency. COUNCIL staff shall make a determination as to the adequacy of the CONTRACTOR's good faith efforts documentation and so inform the CONTRACTOR. If it is determined that the CONTRACTOR's good faith efforts documentation is acceptable, the CONTRACTOR will be deemed to be in compliance with the DBE program.
- 14.5.4 If it is determined that the CONTRACTOR's good faith efforts documentation is not acceptable, the CONTRACTOR will be notified and be deemed to be in non-compliance with the DBE program.
- 14.5.5 Non-compliance by the CONTRACTOR with the requirements of federal DBE regulations (49 CFR part 26) constitutes a breach of contract and may result in imposition of Administrative Sanctions as described in section FTA-14.6.

14.6 Administrative Sanctions.

- 14.6.1 If the COUNCIL deems the CONTRACTOR to be in non-compliance with the DBE requirements of this Contract, the COUNCIL will inform the CONTRACTOR in writing, by certified mail, that sanctions shall be imposed for failure to meet DBE utilization goals and/or failure to submit documentation of good faith efforts. The notice will state the specific sanction to be imposed.
- 14.6.2 The CONTRACTOR has five (5) working days from the date of the notice to file a written appeal to the COUNCIL's Regional Administrator. Failure to respond within the five (5) day period shall constitute a waiver of appeal. The Regional Administrator or designee, at his or her sole discretion, may schedule a hearing to gather additional facts and evidence and shall issue a final determination on the matter within five (5) working days of receipt of the written appeal. There shall be no right of appeal to the COUNCIL's governing board.
- 14.6.3 Sanctions may include, without limitation: suspension of any payment or part due to the CONTRACTOR for work that was identified to be performed by a DBE at the time of contract award, or of any monies held by the COUNCIL as retained on the contract; denial to the CONTRACTOR (including its principal and key personnel) of the right to participate in future contracts of the COUNCIL for a period of up to three years; and/or termination of the contract for cause.

ARTICLE FTA-15. VETERANS PREFERENCE

The Contractor will give a hiring preference, to the extent practicable, to veterans (as defined in 5 U.S.C Section 2108) who have the requisite skills and abilities to perform the construction work required under this contract. This provision shall not be understood, construed, or enforced in any manner that would require an employer to give preference to any veteran over any equally qualified applicant who is a member of any racial or ethnic minority, female, an individual with disability, or former employee.

ARTICLE FTA-16. EXECUTIVE ORDER/SPECIAL DOL EEO CLAUSES

The following provisions of this Section FTA-16 apply if the value of a subsequent construction contract exceeds \$10,000.

16.1 The CONTRACTOR shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The CONTRACTOR shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color,

religion, sex, or national origin. 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. The CONTRACTOR agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Council setting forth the provisions of this nondiscrimination clause.

16.2 The CONTRACTOR shall, in all solicitations or advertisements for employees placed by or on behalf of the CONTRACTOR state that all qualified applicants shall receive consideration for employment without regard to race, color, religion, sex, or national origin.

16.3 The CONTRACTOR shall send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the COUNCIL, advising the labor union or workers' representative of the CONTRACTOR's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

16.4 The CONTRACTOR shall comply with all provisions of Executive Order No. 11246 of September 24, 1965, and all of the rules, regulations, and relevant orders of the Secretary of Labor.

16.5 The Contractor shall furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and shall permit access to its books, records, and accounts by the COUNCIL and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

16.6 In the event of the CONTRACTOR's noncompliance with the nondiscrimination clauses of this Contract or with any such rules, regulations, or orders, this Contract may be cancelled, terminated, or suspended in whole or in part and the CONTRACTOR may be declared ineligible for further government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

16.7 The CONTRACTOR shall include the provisions of this Section 16 in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions shall be binding upon each subcontractor or vendor. The CONTRACTOR shall take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance. If the CONTRACTOR becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the CONTRACTOR may request the United States to enter into such litigation to protect the interests of the United States.

ARTICLE FTA-17. RIGHTS IN DATA AND PATENT RIGHTS

The following provisions of this Section FTA-17 apply to each contract involving experimental, developmental, or research work:

17.1 The term "subject data" used in this Contract means recorded information, whether or not copyrighted, that is delivered or specified to be delivered under the Contract. The term includes graphic or pictorial delineation in media such as drawings or photographs; text in specifications or related performance or design-type documents; machine forms such as punched cards, magnetic tape, or computer memory printouts; and information retained in computer memory. Examples include, but are not limited to: computer software, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identifications, and related information. The term "subject data" does not include financial reports, cost analyses, and similar information incidental to contract administration.

17.2 The following restrictions apply to all subject data first produced in the performance of the Contract:

- a. 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 the Federal Government, until such time as the Federal Government 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.
- b. In accordance with 49 CFR section 18.34 and 49 CFR section 19.36, 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 in subsections (2)(b)1 and (2)(b)2 of this paragraph below. As used in the previous sentence, "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.
 1. Any subject data developed under that contract, whether or not a copyright has been obtained; and
 2. Any rights of copyright purchased by the CONTRACTOR using federal assistance in whole or in part provided by FTA.
- c. When FTA awards federal assistance for experimental, developmental, or research work, it is FTA's general intention to increase transportation knowledge available to the public, rather than to restrict the benefits resulting from the work to participants in that work. Therefore, unless FTA determines otherwise, the CONTRACTOR performing experimental, developmental, or research work required by the underlying Contract to which this clause is added 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 that 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 the underlying Contract, is not completed for any reason whatsoever, all data developed under that Contract shall become subject data as defined in subsection (a) of this paragraph and shall be delivered as the Federal Government may direct. This subsection (c), however, does not apply to adaptations of automatic data processing equipment or programs for the CONTRACTOR's use whose costs are financed in whole or in part with federal assistance provided by FTA for transportation capital projects.
- d. 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 not 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.
- e. Nothing contained in this paragraph 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.
- f. 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 to which this clause has been added is exempt from the requirements of subsections (b), (c), and (d) of this paragraph, provided that the CONTRACTOR identifies that data in writing at the time of delivery of the Contract work.
- g. Unless FTA determines otherwise, 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 provided by FTA.

17.3 Unless the Federal Government later makes a contrary determination in writing, irrespective of the CONTRACTOR's status (i.e., a large business, small business, state government or state instrumentality, local government, nonprofit organization, institution of higher education, individual, etc.), the CONTRACTOR agrees to take the necessary actions to provide, through FTA, those rights in that invention due the Federal Government as described in U.S. Department of Commerce regulations, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," 37 CFR part 401.

17.4 The CONTRACTOR also agrees to include these requirements in each subcontract for experimental, developmental, or research work financed in whole or in part with federal assistance provided by FTA.

17.5 If any invention, improvement, or discovery is conceived or first actually reduced to practice in the course of or under the Contract to which this clause has been added, and that invention, improvement, or discovery is patentable under the laws of the United States of America or any foreign country, the CONTRACTOR agrees to take actions necessary to provide immediate notice and a detailed report to the COUNCIL until FTA is ultimately notified.

END OF DOCUMENT



Exhibit D:
Disadvantage Business Enterprise (DBE)
Pass Through Agreement Program

Disadvantaged Business Enterprise Program

Office of Equal Opportunity
390 Robert St North, St. Paul, MN 55101
Phone: (651) 602-1769 | www.metrocouncil.org

The Metropolitan Council is a certifying member of the MnUCP



**METROPOLITAN COUNCIL
DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM**

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1.0 METROPOLITAN COUNCIL DBE POLICY

1.1 Policy Statement

In accordance with 49 CFR sections 26.3, 26.7, 26.21, and 26.23, the Metropolitan Council hereby affirms its policy to utilize businesses owned and controlled by socially and economically disadvantaged individuals in the procurement of goods and services, and the award of contracts. The Metropolitan Council will, in accordance with authority granted by DOT regulations, other federal, state and local laws and ordinances, act affirmatively to create a "level playing field" for Disadvantaged Business Enterprises (DBEs) to achieve the goal of equal opportunity.

The Metropolitan Council recognizes that creating a "level playing field" for DBEs can only be achieved through the energetic implementation of this plan and the commitment of all Metropolitan Council employees, committees and contractors to the goals of equal opportunity.

This policy statement will be circulated throughout the Metropolitan Council's organization, and to the DBE and non-DBE business communities that perform work on the Metropolitan Council's DOT-assisted contracts. It will be printed and made available through the Metropolitan Council's Regional Data Center and will be mailed free upon request to any individual.

In addition, it is the policy of the Metropolitan Council to not:

1. Exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this program on the basis of race, color, sex, or national origin.
2. In administering the DBE program, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing the accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin.

1.2 Objectives

In accordance with 49 CFR section 26.1, the objectives of the Metropolitan Council's DBE program are:

1. To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Metropolitan Council's financial assistance programs.
2. To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts.
3. To ensure that the Department's DBE program is narrowly tailored in accordance with applicable law.
4. To ensure that only firms that fully meet this program's eligibility standards are permitted to participate as DBEs.
5. To remove barriers to the participation of DBEs in DOT-assisted contracts.

6. To assist the development of firms that can compete successfully in the marketplace outside the DBE program.
7. To utilize the flexibility accorded by Federal financial assistance to establish and provide opportunities for DBEs.

2.0 METROPOLITAN COUNCIL PROGRAM DEFINITIONS

In accordance with 49 CFR section 26.5, the following definitions apply to the Metropolitan Council's DBE program.

AFFILIATION As defined in the Small Business Administration (SBA) regulations, 13 CFR part 121:

1. Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:
 - a. One concerns controls or has the power to control the other;
 - b. A third party or parties controls or has the power to control both; or
 - c. An identity of interest between or among parties exists such that affiliation may be found.
2. In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

AFFIRMATIVE ACTION Specific and positive activities undertaken by the Metropolitan Council and its contractors to eliminate discrimination and its effects, to ensure nondiscriminatory results and practices in the future, and to involve disadvantaged business enterprises fully in contracts and programs funded by the DOT.

ALASKA NATIVE A citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

ALASKA NATIVE CORPORATION Any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, *et seq.*).

APPEAL A formal filing by a business entity who has been denied certification by the Minnesota Unified Certification Program (MnUCP) as a Disadvantaged Business Enterprise (DBE).

APPLICANT One who submits an application, request, or plan to be approved by a departmental official or by a primary recipient as a condition of eligibility for DOT financial assistance; and application means such an **application**, request, or plan.

CHALLENGE A formal filing by a third party to rebut the presumption that a particular business meets the definition of DBE.

COMMERCIALLY USEFUL FUNCTION Work performed by a DBE firm in a particular transaction that in light of industry practices and other relevant considerations, has a necessary and useful role in the transaction, i.e., the firm's role is not a superfluous step added in an attempt to obtain credit toward goals. If, in the Metropolitan Council's judgement, the firm (even though an eligible DBE) does not perform a commercially useful function in the transaction, no credit toward the goal may be awarded.

COMPLIANCE The condition existing when a recipient or contractor has correctly implemented the requirements of the program.

CONTRACT A legally binding relationship or any modification thereof obligating the seller to furnish supplies or services, including construction, and the buyer to pay for them. [For purposes of this part, a lease is a contract].

CONTRACTING OPPORTUNITY Any decision by the Metropolitan Council, Council sub-recipients or its contractors to institute a procurement action to obtain a product or service commercially (as opposed to intergovernmental actions).

CONTRACTOR One who participates, through a contract or subcontract (at any tier), in a DOT-assisted highway, transit, or airport program covered by this part; and includes lessees.

DBE DIRECTORY The MnUCP list of Certified and Denied Firms which is used by the Metropolitan Council, Council sub-recipients and its contractors (at any tier) to identify DBE potential primes, subcontractors and suppliers.

DEPARTMENT OR DOT The U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHA), the Federal Transportation Agency (FTA), and the Federal Aviation Administration (FAA).

DISADVANTAGED BUSINESS ENTERPRISE (DBE) A for-profit small business concern:

- ❑ That is at least 51% owned by one or more individuals who are both socially and economically disadvantaged; or in the case of a corporation, in which at least 51% of the stock is owned by one or more such individuals; and
- ❑ Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.
- ❑ Meets all other eligibility criteria required under 49 CFR Part 26.

DOT-ASSISTED CONTRACT Any contract or modification of a contract between the Metropolitan Council, Council sub-recipient or contractor (at any tier) that is funded for in whole

or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

EQUAL OPPORTUNITY The requirements of non-discrimination in employment with regard to race, religion, creed, color, national origin, ancestry, physical handicap, medical condition, age, marital status, or sex, and in accordance with Government Code, Section 12490.

GOAL The annual percentage of DOT-assisted dollars intended to be awarded to DBEs. The annual overall DBE goal is achieved through a combination of race-neutral and race-conscious measures, including contract-specific goals.

GOOD FAITH EFFORTS Efforts to achieve a DBE goal or other requirement of the program, which by their scope, intensity, and appropriateness to the objective, can be expected to fulfill the program requirement.

IMMEDIATE FAMILY MEMBER Father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law.

INDIAN TRIBE Any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of “tribally-owned concern” in these definitions.

JOINT DEVELOPMENT The planning and implementation of an income producing real estate development which is adjacent to or physically related to an existing or proposed public transportation facility (e.g. transit station, Park and Ride, or bus facility).

JOINT VENTURE An association of a DBE firm and one or more other firms to carry out a single for profit business enterprise, for which the parties contribute their property, capital, efforts, skills, and knowledge, and in which the DBEs responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital, contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

LESSEE A business or person that leases, or is negotiating to lease, property from a recipient or the department on the recipient’s or department’s facility for the purpose of operating a transportation-related activity or for the provision of goods or services to the facility or to the public on the facility.

LEVEL PLAYING FIELD The objective of the DOT and Metropolitan Council DBE program; wherein an environment is created to achieve the level of participation by DBEs that would reasonably be expected in the absence of discrimination.

MANUFACTURER A business that operates, or maintains a factory or establishment that produces on the premises the materials or supplies obtained by the contractor.

MINORITY A person who is a U.S. citizen or lawful permanent resident of the U.S. and who is a:

- a. “Black American”, which includes persons having origins in any of the black racial groups of Africa.
- b. “Hispanic American”, which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race.
- c. “Native American”, which includes persons that are American Indians, Eskimos, Aleuts or Native Hawaiians.
- d. “Asian-Pacific American”, which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Mariana Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, Hong Kong;
- e. “Subcontinent Asian Americans”, which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal, or Sri Lanka;

NATIVE HAWAIIAN Any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

NATIVE HAWAIIAN ORGANIZATION Any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered under the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

NONCOMPLIANCE The condition existing when a recipient or contractor has not correctly implemented the requirements of the program.

OPERATING ADMINISTRATION OR OA Any of the following parts of the DOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The “Administrator” of an operating administration includes his or her designees.

PERSONAL NET WORTH The net value of the assets of an individual remaining after total liabilities are deducted. An individual’s personal net worth does not include the individual’s ownership interest in an applicant or participating DBE firm; or the individual’s equity in his or her primary place of residence. An individual’s personal net worth includes only his or her own share of assets held jointly or as community property with the individual’s spouse.

PRE-BID/PRE-PROPOSAL CONFERENCE A meeting held by the Metropolitan Council, prior to the bid/proposal closing date of a particular project, at which prospective bidders/proposers are advised of Metropolitan Council specification requirements, which include DBE provisions.

PRE-BID/PRE-CONSTRUCTION CONFERENCE A meeting held by the Metropolitan Council prior to solicitation at which the prospective prime contractors are advised of its federal compliance obligations and other technical & administrative requirements.

PREPONDERANCE OF THE EVIDENCE The standard of evidence used in DBE eligibility criteria. Pertains to the total context of factual submissions.

PRIMARY INDUSTRY CLASSIFICATION The four-digit Standard Industrial Classification (SIC) code designation which best describes the primary business of a firm. The SIC code designations are described in the Standard Industry Classification Manual. As the North American Industrial Classification System (NAICS) replaces the SIC system, references to SIC codes and the SIC Manual are deemed to refer to the NAICS manual and applicable codes. The SIC Manual and the NAICS Manual is available through its web site (www.ntis.gov/naics).

PRIMARY RECIPIENT A recipient who receives DOT financial assistance and passes some or all of this assistance on to another recipient.

PRINCIPAL PLACE OF BUSINESS The business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient will determine the principal place of business for DBE program purposes.

PROGRAM Any undertaking by a recipient to use DOT financial assistance, and includes the entire activity any part of which receives DOT financial assistance.

RACE-CONSCIOUS MEASURE OR PROGRAM One that is focused specifically on assisting only DBEs, including women-owned DBEs.

RACE-NEUTRAL MEASURE OR PROGRAM One that is, or can be, used to assist all small businesses. For the purposes of this part, race-neutral includes gender-neutrality.

REBUTTABLE PRESUMPTION A fact related to DBE eligibility criteria that is held to meet the standards of eligibility unless proven otherwise.

RECIPIENT Any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

REGULAR DEALER A firm that owns, operates or maintains a store, warehouse or other establishment in which the materials or supplies required for the performance of the contract are bought, kept in stock, and regularly sold to the public in the usual course of business. To be a regular dealer, the firm must engage in, as its principal business, and in its own name, the purchase and sale of the products in question. A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock, if it owns or operates distribution equipment. Brokers and packagers shall not be regarded as manufacturers or regular dealers within the meaning of this definition.

RELATIVE AVAILABILITY The percentage of available DBE firms in light of local circumstances and the number of total available firms.

SECRETARY The secretary of transportation or his/her designee.

SET-ASIDE A contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

SMALL BUSINESS ADMINISTRATION OR SBA The United States Small Business Administration.

SMALL BUSINESS CONCERN (with respect to firms seeking to participate as DBEs in DOT-assisted contracts) A small business as defined pursuant to Section 3 of the Small Business Act (13 CFR 121), and regulations implementing it, that does not exceed the cap on gross receipts specified in 49 CFR 26.65(6).

SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUALS (for purposes of DOT-assisted projects) Any individual who is a citizen (or lawfully admitted permanent resident) of the United States, and who is:

- a. Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis;
- b. Any individuals in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
 - i. Black Americans
 - ii. Hispanic Americans
 - iii. Native Americans
 - iv. Asian-Pacific Americans
 - v. Subcontinent Asian Americans
- b. Women (regardless of race, ethnicity or origin); or
- c. Individuals found to be socially and economically disadvantaged by the U.S. SBA pursuant to Section 8(a) of the Small Business Act.

The Metropolitan Council will make a rebuttable presumption that individuals in the above groups are socially and economically disadvantaged. The Metropolitan Council may, on a case-by-case basis, determine or accept the determination by another DOT recipient, individuals who are socially and economically disadvantaged in accordance with 49 CFR 26, Appendix E.

TRANSIT VEHICLE MANUFACTURER A manufacturer of vehicles used by FTA recipients for the primary program purpose of public mass transportation (e.g. buses, railcars, vans). The term does not apply to firms that rehabilitate old vehicles or to manufacturers of locomotives or ferryboats. The term refers to distributors of or dealers in transit vehicles with respect to requirements of 49 CFR part 23.67 of the regulations.

TRIBALLY-OWNED CONCERN Any concern that at least 51% owned by an Indian tribe as defined in these definitions.

U.S. DOT REGULATIONS (49 CFR part 23 and part 26) Federal rules and regulations published in the Federal Register dated March 31, 1980; amended April 27, 1981; July 21, 1983; October 21, 1987; and March 4, 1999; by the Department of Transportation, Office of the Secretary; entitled "Participation by [Minority Business Enterprise] in Department of Transportation Programs" and codified at Title 49, Code of Federal Regulations, Part 23.

DBE LIAISON OFFICER The official designated by the head of the department element to have overall responsibility for promotion of DBE participation.

3.0 RESPONSIBILITY FOR DBE PROGRAM IMPLEMENTATION

1. The Chair of the Metropolitan Council has overall responsibility for the DBE program, and performs the role of providing policy leadership regarding the involvement of DBEs in the activities of the Metropolitan Council.
2. The Regional Administrator has responsibility for establishing and maintaining a program to promote the Metropolitan Council's DBE program. This responsibility will be carried out in conjunction with the DBE Liaison Officer.
3. In accordance with 49 CFR section 26.25, the Metropolitan Council has designated its Manager, Office of Diversity and Equal Opportunity as its DBE Liaison Officer, responsible for implementing all aspects of the DBE program. The DBE Liaison Officer shall have direct and independent access to, and direct communication with, the Regional Administrator concerning DBE program matters.
4. Department directors, division directors and managers of operating elements have responsibility for effectively carrying out this policy within their particular departments. The manager of each program shall work in cooperation with the DBE Liaison Officer for the promotion of DBEs in his or her department. Each department director will include DBE contracting efforts as a factor in regular contract review activities.

3.1 Duties of DBE Liaison Officer

The responsibilities of the DBE Liaison Officer include:

1. Providing information and recommendations to the Regional Administrator of the Metropolitan Council regarding its obligations for compliance with current applicable federal and state law, regulations and local ordinances.
2. Provide information and recommendations directly to the General Manager. This includes:
 - a. Analyzing and revising the DBE Program policies and procedures as necessary.
 - b. Surveying the DBE community for development of goal-setting data and conducting outreach in order to increase business opportunities to DBEs.
 - c. Analyzing Metropolitan Council contract opportunities available of DBEs, and developing annual DBE goals.

- d. Establishing contract-specific goals.
 - e. Conducting periodic training of Metropolitan Council managers on DBE responsibilities.
- 3. Maintaining and updating the Metropolitan Council's DBE directory as provided for in Section 4.2 of this program.
- 4. Implementing DBE outreach activities as described in Section 5.3 of this program.
- 5. Monitoring contractor/grantee compliance with DBE commitments, maintaining accurate records, demonstrating DBE efforts and accomplishments, and determining compliance. This includes:
 - a. Issuing periodic reports to the Metropolitan Council's Contracts & Procurement/Purchasing Unit concerning DBE compliance or non-compliance of contractors and staff with the requirements of this program.
 - b. Attending meetings of the Metropolitan Council at which time these matters are considered; and responding to queries from Metropolitan Council members.
 - c. Compiling DBE statistical and narrative reports for the DOT, the Metropolitan Council, and other public agencies.
 - d. Analyzing and recommending revisions to the DBE policies and procedures for granting and denying DBE certification; monitoring contractors' compliance with DBE requirements; and recommending sanctions for violation of these requirements.
 - e. Reviewing contractor's good faith efforts to meet the DBE goal committed to in the bid or proposal throughout the performance of the contract.
 - f. Reviewing and recommending to the Council's Authorized Representative (CAR) and Project Manager the approval or disapproval of a prime contractor's request to substitute a DBE.
 - g. Reviewing contractor's violation of DBE utilization requirements; recommending any appropriate administrative sanctions to be imposed in accordance with 49 CFR part 26; and coordinating imposition of administrative sanctions with the Metropolitan Council's General Counsel, Contracts & Procurement/Purchasing Unit, and CAR.
- 6. Coordinating development and implementation of policies and procedures for DBE participation on joint development projects with the Metropolitan Council's Community Development Department and participating in the proposal evaluation process.
- 7. Participating on Proposal/Bid Evaluation Teams (PETs).

8. Evaluating bids and proposals for compliance with DBE requirements, including bidder's good faith efforts.
9. Monitoring contractor's compliance with DBE utilization goals.
10. Coordinating dispute resolution through process established in partnering workshops with contract representatives, vendors and others regarding DBE program.
11. Ensuring the placement of legal and public notices of the Metropolitan Council's annual DBE goals pursuant to Section 5.1 of this program.

3.2 Responsibilities of Support Personnel

Metropolitan Council personnel from other Departments share the responsibility for ensuring the effective implementation of the DBE program. They shall give their full cooperation and active support to the DBE Liaison and his/her designee(s) in this effort. The performance of all personnel in support of the DBE Program will be evaluated by their superiors as part of their annual performance appraisal. The following are the support personnel.

- ❑ Legal-General Counsel
- ❑ Director of Finance/Controller
- ❑ Director of Internal Audit
- ❑ Grants Manager
- ❑ Contract & Procurement Unit
- ❑ Purchasing Unit
- ❑ Council Authorized Representative
- ❑ Metropolitan Council Project Managers

3.2.1 Legal-General Counsel

The responsibilities of the Legal-General Counsel in support of the DBE Program include:

1. Addressing legal matters relating to DBE program implementation.
2. Rendering legal opinions regarding the interpretation of DBE bid specifications and contract provisions.
3. Advising the DBE Liaison Officer and the Contract & Procurement/Purchasing Unit regarding matters dealing with imposition of administrative sanctions against contractors who violate DBE provisions.
4. Representing the Metropolitan Council in all litigation matters involving DBE issues.
5. Providing the DBE Liaison Officer with legal opinions relevant to DBE certification.

3.2.2 Director of Finance/Controller

The responsibilities of the Director of Finance/Controller in support of the DBE Program include:

1. Ensuring the submittal of data to the DBE Liaison Officer to assist in the establishment of contract-specific goals.
2. Conferring with the DBE Liaison Officer to maximize investment of Metropolitan Council funds with DBE financial institutions, and periodically report the progress to the Metropolitan Council.
3. Assisting the DBE Liaison Officer in compiling data to develop the federal funding base for calculation of the annual DBE goals pursuant to Section 5.1 of this program.
4. Ensuring maximum participation by DBE financial advisors, investment bankers, and bond counsel through the sale of Revenue Anticipation Notes, Equipment Trust Certificates, and other investment instruments.

3.2.3 Director of Internal Audit

The responsibilities of Director of Internal Audit in support of the DBE Program include:

1. Providing audit or investigation assistance to the Manager, Office of Diversity and Equal Opportunity in particularly complex or difficult cases involving potential fraud or false statements on the part of certified DBEs in order to obtain certification.
2. Providing audit or investigation assistance to the Manager, Office of Diversity and Equal Opportunity in particularly complex or difficult cases involving potential fraud or false statements on the part of Metropolitan Council contractors and subcontractors in carrying out their DBE contract obligations.

3.2.4 Grants Manager

The responsibilities of the Grants Manager in support of the DBE Program include:

1. Ensuring the submittal of data to the DBE Liaison Officer to assist in the establishment of contract-specific goals.
2. Ensuring that DBE Liaison Officer is notified when DOT programs or funding levels are revised.

3.2.5 Contract & Procurement Unit

The responsibilities of the Contract & Procurement Unit in support of the DBE Program include:

1. Ensuring the timely forward of data to the DBE Liaison Officer to assist in the establishment of contract-specific goals, and the monitoring of contractors' DBE obligations.
2. Maintaining the Bidders List of prime and subcontractors in accordance with 49 CFR section 26.11 and Section 9.1 of this program.

3. Ensuring that the Contract Initiation Memo (CIM) from the requesting department has been properly routed to the DBE Liaison Officer for determination of contract-specific DBE goals.
4. Providing the DBE Liaison Officer with draft scopes of work for Invitations to Bid (IFBs), Requests for Proposals (RFPs), and Requests for Invitations for Qualifications (RFIQs) to enable goal-setting, outreach and, where applicable, development of appropriate DBE language.
5. Providing the DBE Liaison Officer with copies of all final IFBs, RFPs, RFIQs, purchase orders (POs), mailing lists and advanced notices.
6. Incorporating DBE goals and appropriate DBE and contract compliance language into IFBs, RFPs, and RFIQs.
7. Informing the DBE Liaison Officer of any changes to IFBs, RFPs, RFIQs and POs prior to solicitation.
8. Sending IFBs, RFPs, RFIQs and POs to DBEs referred by the DBE Liaison Officer.
9. Placing IFB, RFP, RFIQ, and PO notices in minority-focused newspapers.
10. Notifying the DBE Liaison Officer of scheduled pre-bid, pre-proposal and pre-construction conferences.
11. Maintaining a computerized vendor listing by commodity codes, race, ethnicity and gender data to assist Procurement and DBE staff in identifying potential DBE vendors/contractors.
12. Ensuring that the DBE Liaison Officer's designee serves on all formal Proposal/Bid Evaluation Teams.
13. Forwarding copies of bids/proposals to the DBE Liaison Officer for evaluation of compliance with DBE requirements.
14. Incorporating analysis prepared by the DBE Liaison Officer concerning bidders' and proposers' conformance with DBE requirements into Metropolitan Council executive summaries (business items) for all contracts or procurements with DBE goals.
15. Maintaining computerized data on purchase orders and contracts to enable compilation of quarterly DOT and other DBE progress reports.
16. Allocating appropriate resources (budget and staff) to participate with Office of Diversity and Equal Opportunity and Equal Opportunity representatives at trade fairs targeted for DBEs.
17. Ensuring that all department staff:
 - a. Receive adequate orientation on DBE policies and procedures.

- b. Refer all potentially eligible vendors to apply for DBE certification.
 - c. Utilize the Metropolitan Council's DBE Directory to seek potential vendors.
 - d. Solicit quotes from at least one DBE (in commodities or services where DBEs are identified) for informal procurements.
18. Incorporating applicable DBE provisions into all contracts.
 19. Ensuring that RFPs, RFIQs, and IFBs do not contain requirements that may unnecessarily restrict or eliminate DBEs from competing.
 20. Facilitating release to DBEs of public documents that provide non-proprietary information on prior winning bids and proposals.
 21. Notifying DBE Liaison Officer when the project scope, funding or other changes affecting the attainment of a DBE goal, is made.

3.2.6 Purchasing Units

The responsibilities of the Purchasing Unit in support of the DBE Program include:

1. Ensuring the timely submittal of data to the DBE Liaison Officer to assist in the establishment of contract-specific goals, and the monitoring of contractors' DBE obligations.
2. Maintaining Bidders List of prime and subcontractors in accordance with 49 CFR section 26.11 and Section 9.1 of this program.
3. Ensuring that the Contract Initiation Memo (CIM) from the requesting department has been properly routed to the DBE Liaison Officer for determination of contract-specific DBE goals.
4. Providing the DBE Liaison Officer with draft scopes of work for Invitations to Bid (IFBs), Requests for Proposals (RFPs), and Requests for Invitations for Qualifications (RFIQs) to enable goal-setting, outreach and, where applicable, development of appropriate DBE language.
5. Providing the DBE Liaison Officer with copies of all final IFBs, RFPs, RFIQs, purchase orders (POs), mailing lists and advanced notices.
6. Incorporating DBE goals and appropriate DBE and contract compliance language into IFBs, RFPs, and RFIQs.
7. Informing the DBE Liaison Officer of any changes to IFBs, RFPs, RFIQs and POs prior to solicitation.
8. Sending IFBs, RFPs, RFIQs and POs to DBEs referred by the DBE Liaison Officer.
9. Placing IFB, RFP, RFIQ, and PO notices in minority-focused newspapers.

10. Notifying the DBE Liaison Officer of scheduled pre-bid, pre-proposal and pre-construction conferences.
11. Maintaining a computerized vendor listing by commodity codes, race, ethnicity and gender data to assist Procurement and DBE staff in identifying potential DBE vendors/contractors.
12. Ensuring that the DBE Liaison Officer's designee serves on all formal Proposal/Bid Evaluation Teams.
13. Forwarding copies of bids/proposals to the DBE Liaison Officer for evaluation of compliance with DBE requirements.
14. Incorporating analysis prepared by the DBE Liaison Officer concerning bidders' and proposers' conformance with DBE requirements into Metropolitan Council executive summaries (business items) for all contracts or procurements with DBE goals.
15. Maintaining computerized data on purchase orders and contracts to enable compilation of quarterly DOT and other DBE progress reports.
16. Allocating appropriate resources (budget and staff) to participate with Office of Diversity and Equal Opportunity representatives at trade fairs targeted for DBEs.
17. Ensuring that all department staff:
 - a. Receive adequate orientation on DBE policies and procedures.
 - b. Refer all potentially eligible vendors to apply for DBE certification.
 - c. Utilize the Metropolitan Council's DBE Directory to seek potential vendors.
 - d. Solicit quotes from at least one DBE (in commodities or services where DBEs are identified) for informal procurements.
18. Incorporating applicable DBE provisions into all contracts.
19. Ensuring that RFPs, RFIQs, and IFBs do not contain unnecessary requirements that could unduly restrict or eliminate DBEs from competing.
20. Facilitating release to DBEs of public documents that provide non-proprietary information on prior winning bids and proposals.

3.2.7 Council's Authorized Representative (CAR)

The responsibilities of Council's Authorized Representative (CAR) in support of the DBE Program include:

1. Becoming familiar with the Metropolitan Council's DBE policies and procedures, including but not limited to, attending orientation sessions conducted by the Office of Diversity and Equal Opportunity and Equal and Contract & Documents Purchasing Unit staff concerning contract procurement and administration, and DBE policies and procedures.
2. For contracts with DBE goals, ensuring that:
 - a. DBEs maintain current DBE certification by verifying their status with the contract compliance function of the Office of Diversity and Equal Opportunity.
 - b. DBEs are utilized in accordance with the terms of the contract.
 - c. Potential DBE utilization problems are immediately referred to the DBE Liaison Officer.
 - d. The prime contractor continues to outreach to DBEs for additional business opportunities that result during the performance of the contract.
 - e. Referring all requests for DBE substitution to the DBE Liaison Officer and conferring with him or her in granting or denying the request.

3.2.8 Metropolitan Council Project Managers

The responsibilities of Project Managers in support of the DBE Program include:

1. Ensuring the timely submittal of data to the DBE Liaison Officer to assist in the establishment of contract-specific goals, and the monitoring of contractors' DBE obligations.
2. Becoming familiar with the Metropolitan Council's DBE policies and procedures, including but not limited to, attending orientation sessions conducted by the Office of Diversity and Equal Opportunity and Contract & Procurement/Purchasing Unit staff concerning contract procurement and administration, and DBE policies and procedures.
3. Providing the Contracts Documents Unit with a completed Contract Initiation Memo, and providing the Purchasing Unit with a completed Purchase Requisition, as required.
4. Utilizing the DBE directory to search for potential DBE vendors.
5. Providing maximum opportunity to DBEs by initiating informal competitive procurement procedures for DBEs to compete for contracts within their respective areas that do not require solicitation of formal, public bids or proposals.
6. Referring all potentially eligible firms to apply for DBE certification.
7. For contracts with DBE goals, ensuring that:

- a. DBEs maintain current DBE certification by verifying their status with the contract compliance function of the Office of Diversity and Equal Opportunity.
 - b. DBEs are utilized in accordance with the terms of the contract.
 - c. Potential DBE utilization problems are immediately referred to the DBE Liaison Officer.
 - d. The prime contractor continues to outreach to DBEs for additional business opportunities that result during the performance of the contract.
 - e. Referring all requests for DBE substitution to the DBE Liaison Officer and conferring with him or her in granting or denying the request.
- 8. Packaging individual contracts in a manner to maximize the ability of DBEs to compete favorably and ensuring that RFPs, RFIs, and IFBs do not contain unnecessary requirements that could unduly restrict or eliminate DBEs from competing.
 - 9. Informing the DBE Liaison Officer of the scheduled pre-construction conference.
 - 10. Informing the DBE Liaison Officer of any potential problems concerning DBE utilization during contract administration.

3.2.9 Chief Information Officer

The responsibilities of the Director of Information System Management in support of the DBE Program are:

- 1. Ensuring the development of long and short range information management strategies to meet DBE recordkeeping and reporting requirements.
- 2. Designing and developing technical systems and processes to support vendor utilization tracking and agency progress towards attainment of its DBE goal.

3.3 Reconsideration Official

In accordance with the reconsideration process pursuant to 49 CFR section 26.53, and described in Section 5.5 of this program, the Metropolitan Council will, when appropriate, appoint a person to serve as its reconsideration official. The reconsideration official will be:

- a. Familiar with the Metropolitan Council's DBE program and its requirements; and
- b. Not have any involvement in any decisions that a bidder's good faith efforts were inadequate for which they are serving as reconsideration official.

4.0 ADMINISTRATIVE REQUIREMENTS

4.1 Financial Institutions

The Metropolitan Council has thoroughly investigated the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in its community.

The Metropolitan Council has identified one minority owned bank in the state of Minnesota. Two branches of the bank are located adjacent to the region served by the Metropolitan Council. The Metropolitan Council will encourage prime contractors to use the services of these institutions by communicating their existence prior to contract award. These institutions are:

Woodlands National Bank
PO Box 190
Hinkley, Minnesota 55037

Woodlands National Bank
PO Box 187
Sturgeon Lake, MN 55783

The surveys offered by these institutions include checking and savings accounts, certificates of deposits, individual retirement accounts and loans.

In accordance with 49 CFR section 26.27, the Metropolitan Council will continue to investigate the full extent of services offered by, and making reasonable efforts to use, financial institutions owned and controlled by socially and economically disadvantaged individuals in our community as they are identified.

4.2 DBE Directory

1. In accordance with 49 CFR section 26.31, the Metropolitan Council will maintain a current directory of DBE firms certified to do work with the Metropolitan Council. The directory will include the following minimum information for each firm:
 - a. Name.
 - b. Address.
 - c. Phone number/fax number/e-mail.
 - d. Types of work certified to perform.
 - e. SIC, ethnicity & certification dates
2. Only those firms certified as DBEs in accordance with the procedures specified in Section VII of this program will be included in the DBE directory. The DBE directory will be made available to the public electronically, on the Internet, and in print format. Electronic formats will be updated as appropriate; and the entire directory will be updated at least annually.
3. The DBE Directory shall serve as a source list to help in identifying DBEs with capabilities relative to contracting solicitations. The directory will be available to bidders and proposers during normal business hours to assist in their efforts to meet DBE

requirements. The directory will be categorized by type of firm to facilitate identifying businesses with capabilities relative to a particular specification.

4.3 OVERCONCENTRATION OF DBEs.

- a. If Metropolitan Council determines that DBE firms are so over-concentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, Metropolitan Council will devise appropriate measures to address this over-concentration.
- b. Metropolitan Council governing board may, either alone or in concert with other recipients, institute additional measures which by way of example may include the use of incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designated to assist DBEs in performing work outside of the specific field in which Metropolitan Council has determined that non-DBEs are unduly burdened. Metropolitan Council may also consider varying its use of contract goals, to the extent consistent with § 26.51, to ensure that non-DBEs are not unfairly prevented from competing for subcontracts.
- c. Metropolitan Council will obtain the approval of the DOT's administering agency for Metropolitan Council's determination of over-concentration and the measures Metropolitan Council devises to address it. Once approved, the measures become part of the Plan.

5.0 DETERMINING, MEETING AND COUNTING OVERALL ANNUAL DBE GOALS FOR FEDERALLY-ASSISTED CONTRACTS

5.1 Goal-Setting Methodology

Pursuant to 49 CFR section 26.45, the Metropolitan Council will establish an annual overall DBE goal through a two-step process consisting of (a) establishing a base figure; and (b) adjusting the base figure. (See Appendix A2)

1. The following departments will assist the DBE Liaison Officer in the development of the annual goal by providing budget, financial, procurement, and other relevant information which will be used to develop the federal funding base against which the annual DBE goals are calculated:
 - a. Offices of the Director of Finance and the Controller.
 - b. Grants Manager.
 - c. Offices of the Contract & Procurement/Purchasing Unit.
 - d. All departments that intend to purchase goods and services during the reporting period.

2. Data sources used to develop the annual overall DBE goal may include, but not be limited to, the following:
 - a. The Metropolitan Council's fiscal year budget.
 - b. Grant-funded capital lists, specific Capital Projects, Financial Plan and Schedule.
 - c. Past results of contracting agencies such as the Metropolitan Council with similar contracting opportunities, and the reasons for the level of such results.
 - d. Demographics and business activity of the geographical area in which the Metropolitan Council will solicit bids or proposals.

FTA assistance used in transit vehicle procurements will not be included in the base amount from which the annual overall goal is calculated.

3. The Metropolitan Council will conduct public participation in setting the overall goal. This participation will include the following:
 - a. Consultation with women, minority and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and the Metropolitan Council's efforts to establish a level playing field for the participation of DBEs.
 - b. A published notice announcing the Metropolitan Council's proposed overall goal, informing the public that the proposed goal, and its rationale are available for inspection during normal business hours at the Metropolitan Council's principal office for 30 days following the date of the notice, and informing the public that the Metropolitan Council and the DOT will accept comments on the goals for 45 days from the date of the notice. The notice will include the addresses to which comments may be sent, and will be published in general circulation media and available minority-focused media and trade association publications.

5.1.1 Establishing the DBE Base Figure

1. The Base Figure will reflect the "relative availability" of DBEs based on demonstrable evidence of ready, willing and able DBEs relative to all ready, willing and able firms available to participate in DOT-assisted contracts. The Metropolitan Council will establish the Base Figure through the use of one of the following five options:
 - a. DBE directories and Census Data.
 - b. Bidders Lists.
 - c. Data from Disparity Studies.
 - d. Goals of other recipients.

- e. As calculated through alternative means, subject to review and approval by the Operating Administration.

5.1.2 Adjusting the DBE Base Figure

1. In order to consider additional evidence to narrowly tailor the DBE program, the Metropolitan Council will conduct a survey of available data to determine what evidence is available to use in adjusting the Base Figure that demonstrates the capacity of available firms to work on DOT-assisted projects for the Metropolitan Council.
2. The annual overall DBE goal will provide for participation by all certified DBEs and not be subdivided into group-specific goals.
3. The overall goal will include a calculation of the percentage of the goal that will be made through race-neutral measures and through contract-specific goals.

5.1.3 Reporting Goals

1. Pursuant to 49 CFR section 26.45, the Metropolitan Council's annual overall DBE goal will be submitted to the FTA for approval 60 days prior to. The overall goal submission will include the following:
 - a. A description of the methodology used to establish the goal, including the Base Figure and the evidence by which it was calculated.
 - b. A description of the adjustments made to the Base Figure and the evidence relied on for the adjustments, including a summary of the relevant available evidence in the Metropolitan Council's jurisdiction. Where applicable, this will include an explanation of why the Metropolitan Council did not use that evidence in adjusting the Base Figure.
 - c. A projection of the relative portions of the overall goal that the Metropolitan Council expects to meet through race-neutral and race-conscious means.
2. The annual goals will be submitted to the Metropolitan Council for approval and will become part of all DOT financial assistance agreements.
3. Concurrent with DBE goal submittal, the Metropolitan Council will publish a notice in majority and minority-focused newspapers announcing the goals, and providing the public an opportunity to review the annual goals and submit comments to the Metropolitan Council and/or the DOT.

5.2 Transit Vehicle Manufacturers (TVMs) Participation and Certification

In accordance with 49 CFR section 26.45, the Metropolitan Council requires that each transit vehicle manufacturer (TVM) certify, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements that it has complied with the requirements of this section. FTA assistance used in transit vehicle procurements will not be included in the base amount from which the annual overall goal is calculated.

5.3 Race-Neutral Measures

In accordance with 49 CFR section 26.51, the Metropolitan Council will use the following guidelines for the utilization of race-neutral measures to attain the annual overall DBE goal, and contract-specific goals. Race-neutral measures to attain the overall DBE goal, as allowed by state and local law, may include, but not be limited to, the following:

1. Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate the participation of DBEs and other small businesses. For example:
 - a. Unbundling large projects to make them more accessible to small businesses.
 - b. Requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own work forces.
 - c. Ensuring that contract solicitations do not contain unnecessarily restrictive requirements.
 - d. Waiving or allowing incremental bonding.
 - e. Providing assistance to overcome limitations such as the inability to obtain bonding or financing.
 - f. Providing services to help DBEs, and other small businesses, to obtain bonding and financing; and the administration of a surety bond guarantee and working capital loan program for DBE prime contractors and subcontractors.
2. Providing technical assistance and other services, including but not limited to:
 - a. Assisting potentially eligible firms in applying to the contract compliance function of the Office of Diversity and Equal Opportunity for DBE certification.
 - b. Referring DBEs to appropriate minority business development centers for more in-depth "hands on" technical and financial assistance (i.e. preparing bids, proposals, business plans, financial statements, and accessing working capital and bonding).
 - c. Assisting in preparation of bid submissions to assure bids are technically correct.
 - d. Explaining terms, conditions and specifications of bidding documents and procurement regulations that may apply.
 - e. Providing instructions on job performance requirements to those DBEs contacted to submit proposals.
3. Carrying out information and communications programs on contracting procedures and specific contract opportunities, including but not limited to:

- a. Ensuring the inclusion of DBEs and other small businesses on the Metropolitan Council's mailing lists for bidders.
 - b. Ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors.
 - c. Providing for the provision of information in languages other than English, where appropriate.
 - d. Publishing and distributing a comprehensive guide which contains information about the Metropolitan Council's DBE procurement policies and procedures, name and telephone numbers of key contact persons, and a listing of all Metropolitan Council types of goods and services they may purchase.
 - e. Linking interested DBEs with appropriate buyers, contract administrators and project managers to inquire about short and long-range needs of the Metropolitan Council for procurement of goods and services within their areas of specialization.
 - f. Ensuring adequate lead-time in advertisements to allow DBE firms sufficient opportunity to develop bid packages.
 - g. opportunities in written form by direct mail to those DBE firms that are certified with the Metropolitan Council and organizations that work in support of DBE firms.
4. Conducting outreach to DBEs to inform them of upcoming contract opportunities through the following methods:
- a. Trade fairs
 - b. Newsletters
 - c. Seminars
 - d. One-on-one
 - e. Minority and women business associations
 - f. Business development centers
 - g. Vendor relations programs
 - h. Advertisements in minority and majority publications
5. Ensuring distribution of the Metropolitan Council's DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors.

5.3.1 Supportive Services

- 1. Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses. This may include but not be limited to facilitating the debriefing of unsuccessful DBE proposer by his/her proposal evaluation team to discuss strengths and weaknesses of his/her proposal.
- 2. Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle

increasingly significant projects, and achieve eventual self-sufficiency. This may include but not be limited to encouraging consortiums and co-ventures of businesses owned and controlled by DBEs.

3. Establishing a program to assist new, start-up firms, and particularly in fields in which DBE participation has historically been low.
4. Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

5.4 Contract Goals

In order to achieve the percentage of the annual overall DBE goal not attainable by race-neutral means, the Metropolitan Council will set contract-specific goals as follows:

1. The DBE Liaison Officer will receive from the requesting department a Contract Initiation Memo (CIM) for each purchase requisition over \$25,000.
2. The DBE Liaison Officer will consult with the requester, CAR, project manager and Contracts & Procurement/Purchasing Unit, to determine the level and type of subcontracting opportunities for goal setting.
3. The DBE Liaison Officer will conduct an in-depth analysis of the DBE availability within the identified contract.
4. The DBE Liaison Officer will recommend the contract-specific goal to the Contract & Procurement/Purchasing Units, and the requestor, for incorporation into the appropriate solicitation documents.

5.5 Good Faith Efforts

In accordance with 49 CFR section 26.53 and Appendix A thereto, the following guidelines will apply to good faith efforts.

1. For all contracts where goals are set, regardless of contract size, prime contractors will be required to propose the participation of specific DBEs to either (a) meet the goal; or (b) demonstrate good faith efforts to meet the goal in their bid or proposal.
2. Bidders must submit with their bids/proposals, written confirmation of their commitment to use DBEs subcontractor(s), whose participation it submits to meet a contract-specific goal; and identify in their Bid (on the List of Proposed DBEs) all DBEs proposed to participate in the contract, regardless of their percent of participation. The List of Proposed DBEs will include:
 - a. A description of how DBE firms will participate in this contract. The DBE goal may be satisfied by a commitment to DBE participation in the contract as a prime contractor, joint venture partner, subcontractor, trucker, or supplier.
 - b. The name and address of each DBE prime contractor, joint venture partner, subcontractor, trucker or supplier that the bidder intends to credit toward the DBE

goal. The complete legal business name as used for DBE certification shall be identified on the form.

- c. A description of the work to be performed or materials to be supplied by each DBE.
 - d. The estimated dollar value of each DBEs participation in the contract.
 - e. The estimated percent of the total bid for each DBE. The percentage allocated for each DBE must be in accordance with the provisions for performing a commercially useful function, as required by 49 CFR section 26.55, and described in Section 5.6 of this program.
3. All bidders must submit in their bid/proposal written confirmation from the DBE(s) participating in the contract as provided in the prime contractor's commitment.
 4. If the List of Proposed DBEs does not demonstrate meeting the contract-specific goal, bidders must complete and submit a Good Faith Efforts Summary form (Exhibit B) with the bid/proposal.
 5. The DBE Liaison Officer will determine whether a contractor made sufficient good faith efforts to meet the goal in accordance with the guidelines set forth in 49 CFR section 26.53, and Appendix A thereto. The bidder must show that they took all necessary and reasonable steps to achieve a DBE goal or other requirement of 49 CFR Part 26 which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful. Compliance will be determined on a case-by-case basis, based on a review of documentation of the following types of activities:
 - a. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.
 - b. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.
 - c. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.
 - d. Negotiating in good faith with interested DBEs. The bidder has the responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers so as to facilitate DBE participation. Evidence of such

negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.

- e. A bidder using good business judgement would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.
 - f. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.
 - g. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.
 - h. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials or related assistance or services.
 - i. Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, state and Federal offices of minority/women business assistance; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.
 - j. The performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional reasonable efforts; the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.
6. Any of the following conditions will constitute failure to meet the goal:
- a. The total percentage participation by DBE firms reflected on the List of Proposed DBEs is less than the DBE goal set forth in the procurement.
 - b. Firms on the List of Proposed DBEs whose participation are being credited toward meeting the DBE goal, but are not certified by the Metropolitan Council as DBEs as of the execution of the contract.

7. If the Metropolitan Council determines that the apparent successful bidder has failed to meet the Good Faith Efforts requirements of this program, it will, before contract award, provide the bidder an opportunity for administrative reconsideration. The bidder will have the opportunity to:
 - a. Provide a written documentation or argument concerning the issue of whether the bidder met the goal or made adequate good faith efforts to do so.
 - b. Meet in person with the Metropolitan Council or its reconsideration official (as required in Section 3.3 of this program) to discuss the issue of whether the bidder met the goal or made adequate good faith efforts to do so.
8. The Metropolitan Council will send the bidder a written decision on its reconsideration, explaining the basis of whether it met the goal or made adequate good faith efforts to do so.
9. In accordance with 49 CFR section 26.53, the result of the Metropolitan Council's reconsideration process is not subject to administrative appeal to the Department of Transportation.
10. In "design-build" or "turnkey" contracting situations where the Metropolitan Council lets a master contract to a contractor, who in turn lets subsequent subcontracts for the work of the project, the Metropolitan Council will set a goal for the project. The master contractor then must establish contract-specific goals, as appropriate, for all subcontracts it lets. The Metropolitan Council will monitor the master contractor's activities to ensure that they are consistent with the requirements of the program.
11. The Metropolitan Council requires that prime contractors not terminate for convenience a DBE subcontractor listed on the List of Proposed DBEs (or an approved substitute DBE) and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without prior written consent of the Metropolitan Council's DBE Liaison Officer.
12. If a DBE subcontractor is terminated or fails to complete its work on a contract for any reason, the prime contractor must make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts must 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-specific goal.
13. These good faith efforts requirements also apply to DBE bidders/proposers for prime contracts. The work proposed to be performed with its own work force as well as work committed to DBE subcontractors and suppliers will count toward the contract-specific goal.

5.6 Counting DBE Participation

In accordance with 49 CFR section 26.55, the Metropolitan Council will utilize the following guidelines in determining the percentage of DBE participation that will be counted toward the overall DBE goal:

1. If a firm is not currently certified as a DBE in accordance with the standards of subpart D of the regulations at the time of the execution of the contract, the firm's participation toward any DBE goals will not be counted, except as provided in 49 CFR section 26.87(I).
2. The dollar value of work performed under a contract with a firm after it has ceased to be certified will not be counted toward the overall goal.
3. The participation of a DBE subcontractor toward the prime contractor's DBE achievements or the overall goal will not be counted until the amount being counted toward the goal has been paid to the DBE.
4. When a DBE participates in a contract, the value of the work actually performed will be counted as follows:
 - a. The entire amount of that portion of a construction contract (or other contract not covered by paragraph 49 CFR part 26.55 that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies, and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).
 - b. The entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE goals, provided that the Metropolitan Council determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
 - c. When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontract work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm will not count toward DBE goals.
5. When a DBE performs as a participant in a joint venture, the Metropolitan Council will count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.
6. The Metropolitan Council will count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract:
 - a. A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect

to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, the Metropolitan Council will evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

- b. A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which the funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, you must examine similar transactions, particularly those in which DBEs do not participate.
 - c. If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, you must presume that it is not performing a commercially useful function.
 - d. When a DBE is presumed not to be performing a commercially useful function as provided in this program, the DBE may present evidence to rebut this presumption. You may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.
 - e. The Metropolitan Council's decisions on matters of whether a DBE performs a commercially useful functions are subject to review by the concerned operating administration, but is not subject to an administrative appeal to DOT.
7. The Metropolitan Council will use the following factors in determining whether a DBE trucking company is performing a commercially useful function:
- a. The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
 - b. The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on its contract.
 - c. The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
 - d. The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.

- e. The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by the DBE.
 - f. For purposes of this section, a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for the use of the leased truck. Leased trucks must display the name and identification number of the DBE.
8. The Metropolitan Council will count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:
 - a. The Metropolitan Council will count 100% of the cost of the materials or supplies toward DBE goals if the materials or supplies are obtained from a DBE manufacturer. For purposes of this paragraph, a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described in the specifications.
 - b. The Metropolitan council will count 60% of the cost of the materials or supplies toward DBE goals if the materials or supplies are purchased from a DBE regular dealer. For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold to or leased to the public in the usual course of business.
 9. To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.
 10. A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone or asphalt without owning, operating, or maintaining a place of business as provided in 49 CFR section 26.55(e)(2)(ii) if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease and not on an ad hoc or contract-by-contract basis.
 11. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of 49 CFR section 26.55(e)(2).
 12. With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, the Metropolitan Council will count the entire amount

of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided that the Metropolitan Council has determined the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. The Metropolitan Council will not count any portion of the cost of the materials and supplies themselves toward DBE goals, however.

5.7 Quotas, Set-Asides and Penalties

1. Pursuant to 49 CFR section 26.43, the Metropolitan Council will utilize the following guidelines for use of quotas and set-asides:
 - a. The Metropolitan Council will not use quotas for DBEs on DOT-assisted contracts subject to the regulations of 49 CFR Part 26.
 - b. The Metropolitan Council has the discretion to use set-aside contracts only in limited and extreme circumstances, when no other method could be reasonably expected to redress egregious instances of discrimination.
2. In accordance with 49 CFR section 26.47, the Metropolitan Council will not be penalized or be held in non-compliance with the regulations because DBE participation falls short of its overall goal, unless the Metropolitan Council has failed to administer its program in good faith.
3. If the Metropolitan Council does not have an approved DBE program or overall goal, or if it fails to implement its program in good faith, it will be considered to be in non-compliance with the regulations.

6.0 REQUIRED CONTRACT PROVISIONS

6.1 Assurances

1. In accordance with 49 CFR section 26.13, each financial assistance agreement that the Metropolitan Council signs with a DOT operating administration (or a primary recipient) must include the following assurance:

The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements of 49 CFR Part 26. The recipient shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required under 49 CFR Part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*).

2. In accordance with 49 CFR section 26.13, each contract the Metropolitan Council signs with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following 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 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy, as the recipient deems appropriate.

6.2 Prompt Payment

In accordance with 49 CFR section 26.29, the Metropolitan Council has established:

1. A contract clause requiring prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 5 days from receipt of each payment that the Metropolitan Council makes to the prime contractor. This clause requires the return of retainage payments from the prime contractor to the subcontractor within 10 days after the contractor receives payment from the Metropolitan Council. This clause also provides for:
 - a. Appropriate penalties for failure to comply, in accordance with terms and conditions set by the Metropolitan Council.
 - b. That any delay or postponement of payment among the parties may take place only for good cause, with the Metropolitan Council's prior written approval.
2. The Metropolitan Council has also established as part of its DBE program, the following additional mechanisms to ensure prompt payment:
 - a. A contract clause that requires prime contractors to include in their subcontracts language providing that prime contractors and subcontractors will use appropriate alternative dispute resolution mechanisms to resolve payment disputes as referred to in Section 3.1 of this program.
 - b. A contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.
3. The Metropolitan Council may, consistent with the regulations and applicable state and local law, implement other mechanisms at its discretion, to ensure that DBEs and other contractors are fully and promptly paid.

6.3 Legal and Contract Remedies

1. In accordance with 49 CFR section 26.37, the Metropolitan Council will implement appropriate mechanisms to ensure compliance by all participants with program

requirements, including that DBE commitments are actually performed by DBEs. This monitoring includes the review of monthly Summary of Subcontract Awards and Paid Report (Exhibit C), and a provision that DBE participation is counted toward overall or contract goals only when payments are actually made to DBEs. The Metropolitan Council will apply all legal and contract remedies available under Federal, state, and local law as described in Section 6.3.1 of this program.

2. The contract compliance function of the Office of Diversity and Equal Opportunity and Equal Opportunity will implement the monitoring aspect of the DBE program.
3. Non-compliance by the contractor with the requirements of the DBE regulations constitute a breach of contract and may result in termination of the contract, liquidated damages or other appropriate remedy as set forth in Section 6.3.1 of this program.
4. Prior to execution of all contracts containing DBE goals the prime contractor will be directed to the contract specification for the Metropolitan Council's specific DBE reporting and record keeping requirements, as described in Section 6.4 of this program.

6.3.1 Administrative Sanctions

1. All contractors deemed to be in non-compliance will be informed in writing, by certified mail, by the **[Contracts & Procurement Unit/Procurement Unit]** that sanctions shall be imposed for failure to meet DBE utilization goals and/or submit documentation of good faith efforts. The Contractor will be given five (5) working days from the date of the notice to file a written appeal to the Regional Administrator. Failure to respond within the five-(5) day period shall constitute a waiver of appeal. The notice will state the specific sanction to be imposed.
2. The Regional Administrator or designee, at his or her sole discretion, may schedule a hearing to gather additional facts and evidence and shall issue a final determination on the matter within five (5) working days of receipt of the written appeal. There shall be no right of appeal to the Metropolitan Council.
3. Sanctions may include, but not be limited to:
 - a. Liquidated damages;
 - b. Suspension of payment to the contractor of any monies held by Metropolitan Council as retained on the contract;
 - c. The denial to the contractor (including its principal and key personnel) of the right to participate in future contracts of the Metropolitan Council for a period of up to three years; and
 - d. Contract termination.
 - e. The DBE Liaison Officer will recommend which sanction to apply.

6.4 Contractor Reporting Requirements

1. During the term of the contract, the contractor will continue to make good faith efforts to ensure that DBEs have maximum opportunity to successfully perform in the contract, and that the contractor meets its DBE goal. These efforts shall include but not be limited to the following:
 - a. Negotiating in good faith to attempt to finalize a subcontract agreement with DBEs committed to prior to contract award;
 - b. Continuing to provide assistance to DBE subcontractors or suppliers in obtaining bonding, lines of credit, etc., if required by the contract;
 - c. Notifying a DBE in writing of any potential problem and attempting to resolve the problem prior to formally requesting Metro Metropolitan Council approval to substitute the DBE;
 - d. As with all subcontractors, timely payment of all monies due and owing to DBE subcontractors and suppliers;
 - e. Timely submittal of complete and accurate DBE monthly reports in accordance with paragraph 3 below; and
 - f. Informing the Metropolitan Council's contract compliance function within the Office of Diversity and Equal Opportunity and Equal Opportunity in a timely manner of any problems anticipated in attaining the DBE participation goal committed to in the bid.
2. If a contractor requests a substitution of DBE subcontractors or suppliers, the contractor must exert good faith efforts to replace a DBE subcontractor with another DBE subcontractor subject to the approval of Metropolitan Council.
3. The contractor will submit monthly progress reports to the Metropolitan Council, in conformance with the currently approved schedule, reflecting its DBE participation. A Summary Subcontracts Award and Paid Report (Exhibit C) shall be submitted to comply with this reporting requirement. Failure to submit this report in a timely manner will result in the imposition of administrative sanctions pursuant to Metropolitan Council's DBE policy and DOT regulations.
4. Staff will review the contractor's monthly progress reports to monitor and determine whether the utilization of DBE firms is consistent with the commitment of the contractor as stated in its bid or proposal.
5. If it is determined that the contractor's DBE utilization during performance of the contract is not consistent with the commitment thereto, the contractor will be requested, in writing, to submit evidence of its good faith efforts to meet the goal. The contractor shall be given ten (10) working days to submit this documentation. Failure to respond shall place the

contractor in non-compliance, subject to sanctions as provided in the section on Administrative Sanctions below.

6. The contractor's good faith efforts documentation will then be reviewed for accuracy, sufficiency and internal consistency. Staff shall make a determination as to the adequacy of the contractor's good faith efforts documentation and so inform the contractor. If it is determined that the contractor's good faith efforts documentation is acceptable, the contractor will be deemed to be in compliance with the DBE utilization goals. If it is determined that the contractor's good faith efforts documentation is not acceptable, the contractor will be notified and be deemed to be in non-compliance with the DBE utilization goals.
7. The dollar amount of Change Orders or any other contract modifications that increase or decrease the work area in which DBEs participation has been committed to in the bid, will be commensurately added to or subtracted from the total contract base figure used to compute actual dollars paid to DBEs. Revised total contract dollar values shall be reflected in the monthly progress report submitted to Metropolitan Council and referenced above.
8. Failure to carry out these requirements constitutes a breach of contract and, and after notification to the U.S. Department of Transportation, may result in termination of the contract by Metropolitan Council or imposition of other appropriate sanctions. This notice is given pursuant to 49 CFR section 23.43(c). For purposes of this section, timely submittal means received in the contract compliance function of the Office of Diversity and Equal Opportunity and Equal Opportunity by the close of business on the fifteenth (15th) of the following month.

7.0 CERTIFICATION STANDARDS (SUBPART D)

7.1 Burdens of Proof

In accordance with 49 CFR section 26.61, the Metropolitan Council will apply the following standards to determine DBE eligibility:

1. The firm seeking certification has the burden of demonstrating to the Metropolitan Council, by a preponderance of the evidence, that it meets the requirements of 49 CFR Part 26, Subpart D (sections 26.61-26.73) concerning group membership or individual disadvantage, business size, ownership, and control.
2. The Metropolitan Council will rebuttably presume that members of the designated groups identified in 49 CFR section 26.67(a) are socially and economically disadvantaged. This means that they do not have the burden of proving to the Metropolitan Council that they are socially and economically disadvantaged. However, applicants have the obligation to provide the Metropolitan Council information concerning their economic disadvantage.
3. Individuals who are not presumed to be socially and economically disadvantaged, and individuals whose presumption of disadvantage has been rebutted, have the burden of proving to the Metropolitan Council, by a preponderance of evidence, that they are socially and economically disadvantaged in accordance with Appendix B of 49 CFR Part 26.

4. The Metropolitan Council will determine whether individuals and firms have met their burden of demonstrating group membership, business size, individual disadvantage, ownership, and control by considering all the facts in the record, viewed as a whole.

7.2 Group Membership Determinations

In accordance with 49 CFR section 26.63, the Metropolitan Council will utilize the following guidelines to determine group membership status for purposes of DBE eligibility.

1. If there is reason to question whether an individual is a member of a group that is presumed to be socially and economically disadvantaged, the Metropolitan Council will require the individual to demonstrate, by a preponderance of evidence, that he or she is a member of the group.
2. In making such a determination, the Metropolitan Council will consider whether the person has held him or herself out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community. The Metropolitan Council may require the applicant to produce appropriate documentation of group membership.
3. If the Metropolitan Council determines that an individual claiming to be a member of a group presumed to be disadvantaged is not a member of a designated disadvantaged group, the individual must demonstrate social and economic disadvantage on an individual basis in accordance with the guidelines of Section 7.3.4 of this program.
4. The Metropolitan Council's decisions concerning membership in a designated group are subject to the certification appeals procedure of 49 CFR part 26.89, and as described in Section 8.6 of this program.

7.3 Social and Economic Disadvantage; Statement of Net Worth

In accordance with 49 CFR section 26.67, the Metropolitan Council will utilize the following guidelines to determine social and economic disadvantage for purposes of DBE eligibility.

7.3.1 Presumption of disadvantage

1. The Metropolitan Council will rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. The Metropolitan Council will require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.
2. The Metropolitan Council requires each individual applying to participate as a DBE whose ownership and control are relied upon for DBE certification to submit a signed, notarized statement of personal net worth, with appropriate supporting documentation.

3. In determining net worth, the Metropolitan Council will exclude an individual's ownership interest in the applicant firm and the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). Furthermore, contingent liability will not reduce an individual's net worth for these purposes. The personal net worth of an individual claiming to be an Alaska Native will include assets and income from other than an Alaska Native Corporation and exclude any of the following which the individual receives from any Alaska Native Corporation:
 - a. Cash (including cash dividends on stock received from an ANC) to the extent that it does not, in the aggregate, exceed \$2,000 per individual per annum;
 - b. Stock (including stock issued or distributed by an ANC as a dividend or distribution on stock);
 - c. A partnership interest;
 - d. Land or an interest in land (including land or an interest in land received from an ANC as a dividend or distribution on stock); and
 - e. An interest in a settlement trust.

7.3.2 Rebuttal of presumption of disadvantage

1. If the statement of personal net worth that an individual submits under paragraph III-C above shows that the individual's personal net worth exceeds \$750,000, the individual's presumption of economic disadvantage is rebutted. The Metropolitan Council is not required to have a proceeding in order to rebut the presumption of economic disadvantage in such cases.
2. If the Metropolitan Council has a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged, the Metropolitan Council may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. Such proceedings will follow the procedures of 49 CFR part 26.87, as described in Section 8.5 of this program.
3. In such proceedings, the Metropolitan Council has the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. The Metropolitan Council may, at its discretion, require the individual to produce information relevant to the determination of his or her disadvantage.
4. When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this program unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds \$750,000, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage.

7.3.3 SBA 8(a) and SDB Firms

1. If a firm applying for certification has a current, valid certification from or is recognized by the SBA under the 8(a) or small and disadvantaged business (SDB) program (except an SDB certification based on the firm's self-certification as an SDB), the Metropolitan Council may accept the firm's 8(a) or SDB certification in lieu of conducting its own certification proceeding. The Metropolitan Council may, at its discretion, accept the certification of another DOT recipient for this purpose.

7.3.4 Individual determinations of social and economic disadvantage

1. Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. The Metropolitan Council will make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a review, the applicant firm has the burden of demonstrating to the Metropolitan Council, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds \$750,000 shall not be deemed to be economically disadvantaged. In making these determinations, the Metropolitan Council will use the guidelines found in Appendix E of 49 CFR part 26; and the Metropolitan Council will require that applicants provide sufficient information to permit determinations under the guidelines referenced herein.

7.4 Business Size Determinations

In accordance with 49 CFR section 26.65, the Metropolitan Council will utilize the following guidelines to determine business size for purposes of DBE eligibility.

1. An eligible DBE (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. The Metropolitan Council will apply current SBA business size standards found in 13 CFR Part 121 appropriate to the type(s) of work the firm seeks to perform on DOT-assisted contracts.
2. Even if the firm meets these requirements, a firm will not be certified as an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA standards, in excess of \$16.6 million.

7.5 Ownership Determinations

In accordance with 49 CFR section 26.69, the Metropolitan Council will utilize the following guidelines to determine social and economic disadvantage for purposes of DBE eligibility:

1. Eligible DBE firms must be at least 51% owned by socially and economically disadvantaged individuals, as follows:
 - a. In a corporation, eligible individuals must own at least 51% of each class of voting stock outstanding and 51% of the aggregate of all stock outstanding.

- b. In a partnership, 51% of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement.
 - c. In a limited liability company, at least 51% of each class of member interest must be owned by socially and economically disadvantaged individuals.
- 2. The firm's ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. To be eligible, the disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.
- 3. All securities that constitute ownership of a firm must be held directly by disadvantaged persons. Except as provided in this paragraph, no securities or assets held in trust, or by any guardian for a minor, are considered as held by disadvantaged persons in determining ownership of a firm. However, securities or assets held in trust are regarded as held by a disadvantaged individual for purposes of ownership of a firm, if:
 - a. The beneficial owner of securities or assets held in trust is a disadvantaged individual, and the trustee is the same or another such individual; or
 - b. The beneficial owner of a trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policy-making, and daily operational activities of the firm. Assets held in a revocable living trust may be counted only in the situation where the disadvantaged individual is the sole grantor, beneficiary, and trustee.
- 4. The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other institutions that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.
- 5. The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership; the owner's expertise must be:
 - a. In a specialized field;
 - b. Of outstanding quality;
 - c. In area's critical to the firm's operations;
 - d. Indispensable to the firm's potential success;
 - e. Specific to the type of work the firm performs; and
 - f. Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.

6. The individual whose expertise is relied upon must have a significant financial investment in the firm.
7. For purposes of determining ownership, all interests in a business or other assets obtained by the individual in the following manners will be considered as held by a socially and economically disadvantaged individual:
 - a. As the result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with this section; or
 - b. Through inheritance, or otherwise because of the death of the former owner.
8. For purposes of determining ownership, the Metropolitan Council does not count all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is:
 - a. Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;
 - b. Involved in the same or a similar line of business; or
 - c. Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.
9. To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to the Metropolitan Council, by clear and convincing evidence, that:
 - a. The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
 - b. The disadvantaged individual actually controls the management, policy and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.
10. The Metropolitan Council will apply the following rules in situations in which marital assets form a basis for ownership of a firm:
 - a. When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. You do not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.

- b. A copy of a document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.
11. The Metropolitan Council may consider the following factors in determining the ownership of a firm. However, the Metropolitan Council will not regard a contribution of capital as failing to be real or substantial, or find a firm ineligible, solely because –
- a. A socially and economically disadvantaged individual acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration, other than the types set forth in paragraph 7 above.
 - b. There is a provision for the co-signature of a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents; or
 - c. Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. In this case, the Metropolitan Council will give close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual.

7.6 Control Determinations

In accordance with 49 CFR part 26.71, the Metropolitan Council will utilize the following guidelines to determine control for purposes of DBE eligibility:

- 1. Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms. In considering the independence of the potential DBE, the Metropolitan Council will:
 - a. Scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.
 - b. Consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm.
 - c. Examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.
 - d. Consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.

2. A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents as provided for in 49 CFR section 26.69(j)(2).
3. The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.
 - a. A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).
 - b. In a corporation, disadvantaged owners must control the board of directors.
 - c. In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.
4. Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operations of the firm.
5. The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the Metropolitan Council can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.
6. The eligible owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The eligible owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. However, the eligible owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions about the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping

functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

7. If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and/or control a potential DBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, the Metropolitan Council will not deny certification solely on the ground that the person lacks the license or credential. However, the Metropolitan Council may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.
8. The Metropolitan Council will consider differences in the remuneration between the eligible owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practices concerning reinvestment of income, and any other explanations for the differences proffered by the firm. The Metropolitan Council may determine that a firm is controlled by its eligible owner although that owner's remuneration is lower than that of some other participants in the firm.

In a case where a non-eligible individual formerly controlled the firm, and an eligible individual now controls it, the Metropolitan Council may consider a difference between the remuneration of the former and current person who controls the firm as a factor in determining who controls the firm, particularly when the non-eligible individual remains involved with the firm and continues to receive greater compensation than the eligible individual.

9. In order to be viewed as controlling a firm, an eligible owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time that it is operating.
10. An eligible individual may control a firm even though one or more of the individual's immediate family members (who themselves are not eligible individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this section, the Metropolitan Council will make a judgement about the control the eligible owner exercises vis-a-vis other persons involved in the business as you do in other situations, without regard to whether or not the other persons are immediate family members.

If the Metropolitan Council cannot determine that the eligible owners- as distinct from the family as a whole- control the firm, then the eligible owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

11. Where a firm was formerly owned and/or controlled by a non-eligible individual (whether or not an immediate family member), ownership and/or control were transferred to an eligible individual, and the non-eligible individual remains involved with the firm in any capacity, the eligible individual now owning the firm must demonstrate, by clear and convincing evidence, that:
 - a. The transfer of ownership and/or control to the eligible individual was made for reasons other than obtaining certification as a DBE; and
 - b. The eligible individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-eligible individual who formerly owned and/or controlled the firm.
12. In determining whether a firm is controlled by its eligible owners, the Metropolitan Council may consider whether the firm owns equipment necessary to perform its work. However, the Metropolitan Council will not determine that a firm is not controlled by eligible owners solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.
13. The Metropolitan Council will grant certification to a firm only for specific types of work in which the eligible owners have the ability to control the firm. To become certified in an additional type of work, the firm must demonstrate to the Metropolitan Council that its eligible owners are able to control the firm with respect to that type of work. The Metropolitan Council will not, in this situation, require that the firm be re-certified or submit a new application for certification, but must verify the eligible owner's control of the firm in the additional type of work.
14. A business operating under a franchise or license agreement may be certified as a DBE if it meets the standards in 49 CFR Part 26, Subpart D and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliations exists, the Metropolitan Council will generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.
15. In order for a partnership to be controlled by eligible individuals, any non-eligible partners must not have the power, without the specific written concurrence of the eligible partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.
16. The eligible individuals controlling a firm may use an employee leasing company. The use of such a company does not preclude the eligible individuals from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and

otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

7.7 Other Considerations

In accordance with 49 CFR section 26.73, the Metropolitan Council will utilize the following additional guidelines to determine DBE eligibility:

1. Consideration of whether a firm performs a commercially useful function or is a regular dealer pertains solely to counting toward DBE goals the participation of firms that have already been certified as DBEs. Except as provided in this section, the Metropolitan Council will not consider commercially useful function issues in making decisions about whether to certify a firm as a DBE.
2. The Metropolitan Council may consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating involvement in attempts to evade or subvert the intent or requirements of the DBE program.
3. The Metropolitan Council will evaluate the eligibility of a firm on the basis of present circumstances. The Metropolitan Council will not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by eligible individuals at some time in the past, if the firm currently meets the ownership and control standards of this part. Nor will the Metropolitan Council refuse to certify a firm solely on the basis that it is a newly formed firm.
4. DBE firms and firms seeking DBE certification must cooperate fully with requests by the Metropolitan Council and DOT for information relevant to the certification process. Failure or refusal to provide such information is grounds for a denial or removal of certification.
5. Only firms organized for profit may be eligible DBEs. Not-for-profit organizations, even though controlled by eligible individuals, are not eligible to be certified as DBEs.
6. An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided in this paragraph, a firm that is not owned by such individuals, but instead is owned by another firm- even a DBE firm- cannot be an eligible DBE.
 - a. If eligible individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, the Metropolitan Council may certify the subsidiary if it otherwise meets all requirements of this subpart. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.
 - b. The Metropolitan Council may certify such a subsidiary only if there is cumulatively 51% ownership of the subsidiary by eligible individuals.

7. Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by eligible individuals.
8. A firm that is owned by an Indian tribe, Alaska Native Corporation, or Native Hawaiian organization as an entity, rather than by Indians, Alaska Natives, or Native Hawaiians, as individuals, may be eligible for certification. Such a firm must meet the size standards of Section 26.65; and such a firm must be controlled by eligible individuals, as provided in Section 26.71.

8.0 CERTIFICATION PROCEDURES (SUBPART E)

8.1 Unified Certification Program

In accordance with 49 CFR section 26.81, the Metropolitan Council will participate with other DOT recipients in Minnesota in a Unified Certification Program (UCP) as follows.

1. The Metropolitan Council and other recipients in Minnesota will sign an agreement establishing the UCP for Minnesota and submit the agreement to the Secretary for approval no later than March 4, 2002. The Secretary may, on the basis of extenuating circumstances shown by the recipients in Minnesota, extend this deadline for no more than one additional year.
2. The UCP agreement must provide for the establishment of a UCP that meets all the requirements of 49 CFR section 26.81, and as summarized in this section. The agreement must specify the following:
 - a. That the UCP will follow all certification procedures and standards of this part, on the same basis as recipients;
 - b. That the UCP shall cooperate fully with oversight, review, and monitoring activities of DOT and its operating administrations;
 - c. That the UCP shall implement DOT directives and guidance concerning certification matters; and
 - d. Commit UCP participants to ensuring that the UCP has sufficient resources and expertise to carry out the requirements of this part. The agreement shall include an implementation schedule ensuring that the UCP is fully operational no later than 18 months following the approval of the agreement by the Secretary.
3. Subject to approval by the Secretary, the UCP in each state may take any form acceptable to the recipients in that state.
4. The Secretary shall review the UCP and approve it, disapprove it, or remand it to the recipients in the state for revisions. A complete agreement that is not disapproved or remanded within 180 days of its receipt by the Secretary will be deemed to be accepted.

5. If the Metropolitan Council and other Minnesota recipients fail to meet the deadlines set forth in this section, they will have the opportunity to make an explanation to the Secretary why a deadline could not be met and why meeting the deadline was beyond the control of the Minnesota recipients. If the Minnesota recipients fail to make such an explanation, or the explanation does not justify the failure to meet the deadline, the Secretary shall direct them to complete the required action by a date certain. If the Metropolitan Council and the other Minnesota recipients fail to carry out this direction in a timely manner, they will be collectively in noncompliance with this part.
6. The UCP shall make all certification decisions on behalf of all DOT recipients in Minnesota with respect to participation in the DOT DBE Program. Specifically:
 - a. Certification decisions by the UCP shall be binding on all DOT recipients within the state.
 - b. The UCP shall provide “one-stop shopping” to applicants for certification, such that an applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state.
 - c. All obligations of recipients with respect to certification and nondiscrimination must be carried out by UCPs, and recipients may use only UCPs that comply with the certification and nondiscrimination requirements of this part.
7. All certifications by UCPs shall be pre-certifications; i.e., certifications that have been made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE.
8. The Minnesota UCP will not be required to process an application for certification from a firm having its principal place of business outside the state if the firm is not certified by the UCP in the state in which it maintains its principal place of business. The “home state” UCP shall share its information and documents concerning the firm with other UCPs that are considering the firm’s application.
9. Subject to DOT approval as provided in 49 CFR section 26.81, the recipients in two or more states may form a regional UCP. UCPs may also enter into written reciprocity agreements with other UCPs. Such an agreement shall outline the specific responsibilities of each participant. A UCP may accept the certification of any other UCP or DOT recipient.
10. Pending the establishment of UCPs meeting the requirements of this section, you may enter into agreements with other recipients, on a regional or inter-jurisdictional basis, to perform certification functions required by 49 CFR section 26.81. The Minnesota UCP may also grant reciprocity to other recipient’s certification decisions.
11. The Minnesota UCP will maintain a unified DBE directory containing, for all firms certified by the UCP (including those from other states certified under the provisions of this section), the information required by 49 CFR part 26.31. The UCP will make the directory available to the public electronically, on the internet, as well as in print; and will update the electronic version of the directory by including additions, deletions, and other changes routinely.

12. Except as otherwise specified in this section, all provisions of this 49 CFR Part 26, Subpart E and subpart D of this part pertaining to recipients also applies to UCPs.

8.2 Initial Certification Procedures

In order to ensure that only firms certified as eligible DBEs under 49 CFR Part 26, Subpart D participate as DBEs in its program, the Metropolitan Council will determine the eligibility of firms as DBEs consistent with the standards of 49 CFR Part 26, Subpart D. When a UCP is formed, the UCP must meet all the requirements of 49 CFR Part 26, Subpart D and Subpart E that recipients are required to meet.

The Metropolitan Council will take all the following steps in determining whether a DBE firm meets the standards of 49 CFR Part 26, Subpart D as follows.

1. Require potential DBEs to complete and submit an appropriate application form. The Metropolitan Council will make sure that the applicant attests to the accuracy and truthfulness of the information on the application form. This shall be done either in the form of an affidavit sworn to by the applicant who is authorized by state law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States. Subject to the approval of the concerned operating administration as part of the its DBE program, the Metropolitan Council may impose a reasonable application fee for certification. Fee waivers shall be made in appropriate cases.
2. The Metropolitan Council will review all information on the form prior to making a decision about the eligibility of the firm. This review will include the following:
 - a. Perform an on-site visit to the offices of the firm. The Metropolitan Council must interview the principal officers of the firm and review their resumes and/or work histories; and must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area. The Metropolitan Council may rely upon the site visit report of any other recipient with respect to a firm applying for certification.
 - b. If the firm is a corporation, analyze the ownership of stock in the firm.
 - c. Analyze the bonding and financial capacity of the firm.
 - d. Determine the work history of the firm, including contracts it has received and work it has completed.
 - e. Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any.
 - f. Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE program.

3. When another DOT recipient has certified a firm, the Metropolitan Council has the discretion to take any of the following actions:
 - a. Certify the firm in reliance on the certification decision of the other recipient;
 - b. Make an independent certification decision based on documentation provided by the other recipient, augmented by any additional information the Metropolitan Council requires the applicant to provide; or
 - c. Require the applicant to go through the Metropolitan Council's application process without regard to the action of the other recipient.
4. When another recipient, in connection with its consideration of the eligibility of a firm, makes a written request for certification information that the Metropolitan Council has obtained about that firm (e.g., including application materials or the report of a site visit, if you have made one to the firm), the Metropolitan Council will promptly make the information available to the other recipient.
5. The Metropolitan Council must safeguard from disclosure to unauthorized persons information gathered as part of the certification process that may reasonably be regarded as proprietary or other confidential business information, consistent with applicable Federal, state, and local law.
6. Once the Metropolitan Council has certified a DBE, it shall remain certified for a period of at least three years unless and until its certification has been removed through the procedures of 49 CFR section 26.87. The Metropolitan Council may not require DBEs to reapply for certification as a condition of continuing to participate in this program during this three-year period, unless the factual basis on which the certification was made changes.
7. DBEs must inform the Metropolitan Council or UCP in writing of any change in the circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of 49 CFR Part 26, Subpart D or any material change in the information provided in the Metropolitan Council's application form.
 - a. Changes in management responsibility among members of a limited liability company are covered by this requirement.
 - b. DBEs must attach supporting documentation describing in detail the nature of such changes.
 - c. The notice must take the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or of an unsworn declaration executed under penalty of perjury of the laws of the United States. The DBE must provide the written notification within 30 days of the occurrence of such change. If the DBE fails to make timely notification of such a change, they will be deemed to have failed to cooperate under Section 26.109(c).

8. DBEs must provide to the Metropolitan Council every year on the anniversary date of its certification, an affidavit sworn to by the firm's owners before a person who is authorized by state law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about which the DBE has notified the Metropolitan Council such as those described in this section. The affidavit shall specifically affirm that the DBE firm continues to meet SBA business size criteria and the overall gross receipts cap of 49 CFR Part 26, Subpart D, documenting this affirmation with supporting documentation of the firm's size and gross receipts. If a DBE fails to provide this affidavit in a timely manner, they will be deemed to have failed to cooperate under 49 CFR section 26.109(c).
9. The Metropolitan Council will make decisions on applications for certification within 90 days of receiving from the applicant firm all information required under this part. This time period may be extended once, for no more than 60 days, upon written notice to the firm, explaining fully and specifically reasons for the extension. Failure by the Metropolitan Council to make a decision by this deadline will be deemed a constructive denial of the application, on the basis of which the applicant firm may appeal to DOT under 49 CFR section 26.89.

8.3 Recertification Procedures

Firms that are certified as DBEs by the Metropolitan Council may renew their certification by applying for recertification and demonstrating their continued eligibility.

1. Not less than 3 months prior to expiration of the initial certification date, the Metropolitan Council will send a letter to the DBE firm notifying it of its responsibility to submit an application for recertification.
2. The Metropolitan Council may, at its discretion, require any and all documentation required of an initial certification in order to recertify a firm as a DBE.
3. All other procedures for recertification shall be the same as those for initial certification.

8.4 Denials and Re-Application Procedures

1. When the Metropolitan Council denies a request by a firm not currently certified with the Metropolitan Council to be certified as a DBE, the Metropolitan Council will provide the firm a written explanation of the reason for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based will be made available to the applicant, on request.
2. When the Metropolitan Council denies a firm DBE certification, it may reapply after one year. The time period for reapplication begins to run on the date the explanation required by paragraph 1 above is received by the firm.

3. When the Metropolitan Council makes an administratively final denial of certification concerning a firm, the firm may appeal the denial to the Department under 49 CFR section 26.89.

8.5 Decertifications

8.5.1 Ineligibility complaints

1. Any person may file with the Metropolitan Council a written complaint alleging that a currently certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. The Metropolitan Council is not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified. Confidentiality of complainant's identities must be protected as provided in 49 CFR section 26.109(b).
2. The Metropolitan Council will review its records concerning the firm, any material provided by the firm, and the complainant, and other available information. The Metropolitan Council may request additional information from the firm or conduct any other investigation that it deems necessary.
3. If the Metropolitan Council determines, based on this review, that there is reasonable cause to believe that the firm is ineligible, the Metropolitan Council will provide written notice to the firm that it proposes to find the firm ineligible, setting forth the reasons for the proposed determination. If the Metropolitan Council determines that such reasonable cause does not exist, it will notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issues of reasonable cause must specifically reference the evidence in the record on which each reason is based.

8.5.2 Recipient-initiated proceedings

1. If, based on notification by the firm of a change in its circumstances or other information that comes the attention of the Metropolitan Council, it determines that there is reasonable cause to believe that a currently certified firm is ineligible, the Metropolitan Council will provide written notice to the firm that it proposes to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.

8.5.3 DOT directive to initiate proceeding

1. If the concerned operating administration determines that information in the Metropolitan Council's certification records, or other information available to the concerned operating administration, provides reasonable cause to believe that a firm that the Metropolitan Council certified does not meet the eligibility criteria of this part, the concerned operating administration may direct the Metropolitan Council to initiate a proceeding to remove the firm's certification.

2. The concerned operating administration will provide the Metropolitan Council and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.
3. The Metropolitan Council will immediately commence and prosecute a proceeding to remove eligibility as provided in this section.

8.5.4 Hearing

1. When the Metropolitan Council notifies a firm that there is reasonable cause to remove its eligibility, as provided in this section, the Metropolitan Council will give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.
2. In such proceeding, the Metropolitan Council shall bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.
3. The Metropolitan Council will maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to DOT under 49 CFR part 26.89, the Metropolitan Council will provide a transcript of the hearing to DOT and, on request, to the firm. The Metropolitan Council will retain the original record of the hearing; and may charge the firm only for the cost of copying the record.
4. The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, the Metropolitan Council will bear the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as it would during a hearing.

8.5.5 Separation of functions

1. The Metropolitan Council will ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.
2. The decision-maker must be an individual who is knowledgeable about the certification requirements of the Metropolitan Council's DBE program and of the requirements of 49 CFR Part 26.

8.5.6 Grounds for decision

1. The Metropolitan Council will not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the recipient at the time of certification of the firm. The Metropolitan Council may base such a decision only on one or more of the following:

2. Changes in the firm's circumstances since the certification of the firm by the Metropolitan Council that renders the firm unable to meet the eligibility standards of this part.
 - a. Information or evidence not available to the Metropolitan Council at the time the firm was certified.
 - b. Information that was concealed or misrepresented by the firm in previous certification actions by the Metropolitan Council.
 - c. A change in the certification standards or requirements of the Department since the Metropolitan Council certified the firm.
 - d. A documented finding that the Metropolitan Council's determination to certify the firm was factually erroneous.

8.5.7 Notice of decision

1. Following its decision, the Metropolitan Council will provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice will inform the firm of the consequences of the Metropolitan Council's decision and of the availability of an appeal to the Department of Transportation under 49 CFR part 26.89. The Metropolitan Council will send copies of the notice to the complainant or the concerned operating administration that had directed the Metropolitan Council to initiate the proceeding.

8.5.8 Status of firm during proceeding

1. A firm remains an eligible DBE during the time that the Metropolitan Council's proceeding to remove its eligibility is pending.
2. The firm does not become ineligible until the issuance of the notice provided for in this section.

8.5.9 Effects of removal of eligibility

When it removes a firm's eligibility, the Metropolitan Council will take the following action:

1. When a prime contractor has made a commitment to using the ineligible firm, or the Metropolitan Council has made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before you issue the decertification notice provided for in this section, the ineligible firm does not count toward the contract goal or overall goal. The Metropolitan Council will direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate that it has made a good faith effort to do so, in accordance Section V.
2. If a prime contractor has executed a subcontract with the firm before the Metropolitan Council has notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where the Metropolitan Council has let a prime

contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after the Metropolitan Council issued the notice of its ineligibility shall not count toward the Metropolitan Council's overall goal, but may count toward the contract goal.

8.5.10 Exception

1. If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, the Metropolitan Council may continue to count its participation on that contract toward overall and contract goals.

8.5.11 Availability of Appeal

1. When the Metropolitan Council finalizes an administrative removal of a firm's eligibility under this section, the firm may appeal the removal to the Department under 49 CFR section 26.89.

8.6 Certification Appeals

1. Firms denied certification or whose eligibility is removed by a recipient, may make an administrative appeal to the Department.
 - a. A complainant in an ineligibility complaint to the Metropolitan Council (including the concerned operating administration in the circumstances provided in 49 CFR section 26.87(c), may appeal to the Department if the Metropolitan Council does not find reasonable cause to propose removing the firm's eligibility or, following a removal of eligibility proceeding, determines that the firm is eligible.
 - b. Appeals should be sent to: Department of Transportation, Office of Civil Rights, 400 7th Street, SW, Room 2401, Washington, D.C. 20590.
2. Pending the Department's decision in the matter, the Metropolitan Council's decision remains in effect. The Department does not stay the effect of the Metropolitan Council's decision while it is considering an appeal.
3. If a firm wants to file an appeal, it must send a letter to the Department within 90 days of the date of the Metropolitan Council's final decision, including information and arguments concerning why the Metropolitan Council's decision should be reversed. The Department may accept an appeal filed later than 90 days after the date of the decision if the Department determines that there was good cause for the late filing of the appeal.
 - a. An appellant who is a firm that has been denied certification, whose certification has been removed, whose owner is determined not to be a member of a designated disadvantaged group, or concerning whose owner the presumption of disadvantage has been rebutted, must include in its letter the name and address of any other recipient which currently certifies the firm or removed the firm's eligibility within one year prior to the date of the appeal, or before which an application for certification or a removal of eligibility is pending.

Failure to provide this information may be deemed a failure to cooperate under 49 CFR section 26.109(c).

- b. An appellant other than one described above, the Department will request, and the firm whose certification has been questioned shall promptly provide, the information called for in the paragraph above. Failure to provide this information may be deemed a failure to cooperate under 49 CFR section 26.109(c).
4. When it receives an appeal, the Department will request a copy of the Metropolitan Council's complete administrative record in the matter. The Metropolitan Council will provide the administrative record, including a hearing transcript, within 20 days of the Department's request. The Department may extend this time period on the basis of the Metropolitan Council's showing of good cause. To facilitate the Department's review of a recipient's decision, such administrative records must be well organized, indexed, and paginated. Records that do not comport with these requirements are not acceptable and will be returned to the Metropolitan Council be corrected immediately. If an appeal is brought concerning one recipient's certification decision concerning a firm, and that recipient relied on the decision and/or administrative record of another recipient, this requirement applies to both recipients involved.
5. The Department will make its decision based solely on the entire administrative record. The department will not make a *de novo* review of the matter, nor conduct a hearing. The Department may supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General: Federal, state, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party.
6. When the Metropolitan Council provides supplementary information to the Department, it will also make this information available to the firm and any third-party complainant involved, consistent with Federal or applicable state laws concerning freedom of information and privacy. The Department makes available, on request by the firm and any third-party complainant involved, any supplementary information it receives from any source.
 - a. The Department affirms the Metropolitan Council's decision unless it determines, based on the entire administrative record, that its decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.
 - b. If the Department determines, after reviewing the entire administrative record, that the Metropolitan Council's decision was unsupported by substantial evidence or procedural provisions of this part concerning certification, the Department will reverse the Metropolitan Council's decision and directs it to certify the firm or remove its eligibility, as appropriate. The Metropolitan Council is required to take the action directed by the Department's decision immediately upon receiving written notice of it.
 - c. The Department will not be required to reverse the Metropolitan Council's decision if the Department determines that a procedural error did not result in

fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case.

- d. If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Department may remand the record to the Metropolitan Council with instructions seeking clarification or augmentation of the record before making a finding. The Department may also remand a case to the Metropolitan Council for further proceedings consistent with Department instructions concerning the proper application of provisions of this part.
 - e. The Department does not uphold the Metropolitan Council's decision based on grounds not specified in your decision.
 - f. The Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed.
 - g. The Department provides written notice of its decision to the Metropolitan Council, the firm, and the complainant in an ineligibility complaint. A copy of the notice is also sent to any other recipient whose administrative record or decision has been involved in the proceeding. The notice includes the reasons for the Department's decision, including specific references to the evidence in the record that supports each reason for the decision.
 - h. The Department's policy is to make its decision within 180 days of receiving the complete administrative record. If the Department does not make its decision within this period, the Department provides written notice to concerned parties, including a statement of the reason for the delay and a date by which the appeal decision will be made.
7. All decisions under this section are administratively final, and are not subject to petitions for reconsideration.
 8. If the Metropolitan Council's action is subject to an appeal under Section 26.89 is taken, the decision is binding. It is not binding on other recipients.
 9. If it is subject to a DOT determination under 49 CFR section 26.89, the Metropolitan Council must take the following action:
 - a. If the Department determines that the Metropolitan Council erroneously certified a firm, it must remove the firm's eligibility on receipt of that determination, without further proceedings on the Metropolitan Council's part. Effective on the date of the Metropolitan Council's receipt of the Department's determination, the consequences of a removal of eligibility set forth in 49 CFR section 26.87(l) take effect.
 - b. If the Department determines that the Metropolitan Council erroneously failed to find reasonable cause to remove the firm's eligibility, it must expeditiously commence a proceeding to determine whether the firm's eligibility should be removed, as provided in 49 CFR section 26.87.

- c. If the Department determines that the Metropolitan Council erroneously declined to certify or removed the eligibility of the firm, it must certify the firm, effective on the date of your receipt of the written notice of Department's determination.
 - d. If the Department determines that the Metropolitan Council erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, it must take appropriate corrective action as determined by the Department.
 - e. If the Department affirms the Metropolitan Council's determination, no further action is necessary.
10. Where DOT has upheld the Metropolitan Council's denial of certification to or removal of eligibility from a firm or directed the removal of a firm's eligibility, other recipients with whom the firm is certified may commence a proceeding to remove the firm's eligibility under 49 CFR section 26.87. Such recipients must not remove the firm's eligibility absent such a proceeding. Where DOT has reversed your denial of certification to or removal of eligibility of a firm, other recipients must take the DOT action into account in any certification action involving the firm. However, other recipients are not required to certify the firm based on the DOT decision.

9.0 RECORD KEEPING, MONITORING AND ENFORCEMENT

9.1 Bidders List

- 1. Pursuant to 49 CFR section 26.11(c), the Metropolitan Council will create and maintain a bidder's list, consisting of firms bidding on prime contracts and bidding or quoting subcontracts on DOT-assisted projects. The Bidders List will include the following minimum information for each firm:
 - a. Firm name;
 - b. Firm address;
 - c. Firm's status as a DBE or non-DBE;
 - d. The age of the firm; and
 - e. The annual gross receipts of the firm.

9.2 Monitoring Payments to DBEs

- 1. In accordance with the requirements of Section 6.3 of this program, the Metropolitan Council will require all prime contractors to submit on a monthly basis, evidence of actual payments to each DBE listed on the contract.
- 2. This evidence shall take the form of the Summary Subcontracts Award and Paid Report.

3. The Metropolitan Council will review and monitor the amount actually paid to each DBE and non-DBE in accordance with the requirements of Section 6.3 of this program.

9.3 Reporting to DOT

1. The Metropolitan Council will continue to provide data on its DBE program to the Department as directed by the DOT Operating Administration. The Metropolitan Council shall submit a quarterly report by the last day in January, April, July and October describing the activities undertaken toward progress achieved in meeting the goal of greater DBE participation in its procurement and financial assistance programs during the preceding federal quarter. These reports shall discuss at least the following:
2. Data on the level of DBE participation in contracting and subcontracting activities of the Metropolitan Council and recipients of financial assistance both in terms of number of DBE contracts awarded and the identities of DBEs and the dollar value of work being so contracted.
3. A statistical breakdown and methods of awards to DBEs, for example, open competition, small business set-aside, competitive DBE set-asides, and subcontracts.
4. Data reported by prime contractors under subcontracting as required by federal procurement regulations.
5. A description of any participation or attendance in seminars, conferences, or workshops on DBEs by the Metropolitan Council.
6. A brief description of any problems encountered in the general area of DBEs, or specific contracts or projects.
7. Specific efforts to identify and award contracts to DBEs.
8. A summary of the extent to which percentages have been met.
9. All reports and records will be categorized separately by type of work (by Primary Industry Classification code) for all DBE and other firms. Reports will be made available to the public and DBE reports will be submitted to the Metropolitan Council's board.

9.4 Availability of Records

In responding to requests for information concerning any aspect of the DBE program, the Department complies with provisions of the Federal Freedom of Information and Privacy Acts (5 U.S.C. 552 and 552a). The Department may make available to the public any information concerning the DBE program where not prohibited by Federal law.

The Metropolitan Council will safeguard against disclosure to unauthorized persons information that may reasonably be considered as confidential business information, consistent with Federal, State, and local law.

9.5 Confidentiality of information

The identity of complainants will be kept confidential, at their election. If such confidentiality hinders an investigation, proceeding, or hearing, or will result in a denial of appropriate administrative due process to other parties, the complainant will be advised for the purpose of waiving the privilege. Complainants are advised that, in some cases, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing. FAA follows procedures of 14 CFR Part 16 with respect to confidentiality of information in complaints.

9.6 Cooperation of DBEs

All participants in the DBE program are required to cooperate fully and promptly with DOT and Metropolitan Council compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so will be grounds for appropriate action against the party involved.

9.8 Intimidation and Retaliation Prohibited

The Metropolitan Council, its contractors, and other program participants must not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by this part or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under the program. Violation of this prohibition will be deemed as noncompliance.

DRAFT 11/06/2019 - Will be replaced with final executed agreement upon signature

GOLD LINE JOINT POWERS BOARD
CAPITAL GRANT AGREEMENT
FOR PRE-ENGINEERING, ENGINEERING AND RIGHT-OF-WAY ACQUISITION

for the
METRO GOLD LINE BUS RAPID TRANSIT PROJECT
WITH
THE METROPOLITAN COUNCIL

DRAFT: OCTOBER 2019

**GOLD LINE JOINT POWERS BOARD - CAPITAL GRANT AGREEMENT FOR PRE-ENGINEERING,
ENGINEERING AND RIGHT-OF-WAY ACQUISITION
FOR THE GOLD LINE PROJECT WITH THE METROPOLITAN COUNCIL**

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**GOLD LINE JOINT POWERS BOARD - CAPITAL GRANT AGREEMENT FOR PRE-ENGINEERING,
ENGINEERING AND RIGHT-OF-WAY ACQUISITION
FOR THE GOLD LINE PROJECT WITH THE METROPOLITAN COUNCIL**

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GOLD LINE JOINT POWERS BOARD
CAPITAL GRANT AGREEMENT FOR PRE-ENGINEERING, ENGINEERING AND
RIGHT-OF-WAY ACQUISITION

FOR THE
GOLD LINE PROJECT
WITH THE METROPOLITAN COUNCIL

THIS AGREEMENT is entered into between GOLD LINE JOINT POWERS BOARD, a joint powers board established pursuant to Minnesota Statutes Sections 471.59 and 398A.04, as GRANTOR, and the Metropolitan Council, a political subdivision of the State of Minnesota, as GRANTEE, effective as of JANUARY 1, 2020.

RECITALS

1. Pursuant to Minnesota Statutes section 297A.993, Ramsey County and Washington County enacted a sales and use tax and an excise tax on motor vehicles for the purpose of funding operating and capital costs of transit and transportation projects and improvements and adopted a Sales and Use Transportation Tax Implementation Plan, designating the projects eligible to receive such funding, including the METRO Gold Line ("Transitway Project.")
2. Ramsey County Regional Railroad Authority (RCRRA) and Washington County Regional Railroad Authority (WCRRA) have the authority pursuant to Minn. Stat. Chapter 398A to levy property taxes and appropriate such funds to state and local government for the purpose of developing bus rapid transit projects.
3. On [REDACTED], 2019, Ramsey County, RCRRA, Washington County and WCRRA entered into a Joint Powers Agreement establishing the Gold Line Joint Powers Board, for the specific purpose of providing funding and financial oversight of the development of the Gold Line Project through the engineering and construction phases of work.
4. Grantee, as the primary agency responsible for operating the public transit system for the Minneapolis-Saint Paul metropolitan region, has proposed a Transitway Project, defined in Article I and Exhibit A, and has requested that the Gold Line Joint Powers Board provide funding for pre-engineering, engineering and right-of-way acquisition for the period of January 1, 2020, through December 31, 2021, in an amount not to exceed \$75,000,000.00._____.

NOW THEREFORE, IN CONSIDERATION of the Grant described and other provisions in this Agreement, the Parties to this Agreement agree as follows.

ARTICLE I - DEFINITIONS

Section 1.01 Defined Terms. As used in this Agreement, the following terms shall have the meanings set out respectively after each such term (such meanings to be equally

**GOLD LINE JOINT POWERS BOARD - CAPITAL GRANT AGREEMENT FOR PRE-
ENGINEERING, ENGINEERING AND RIGHT-OF-WAY ACQUISITION
FOR THE GOLD LINE PROJECT WITH THE METROPOLITAN COUNCIL**

applicable to both the singular and plural forms of the terms defined), unless the context hereof specifically indicates otherwise:

“Agreement” means this Gold Line Joint Powers Board Capital Grant Agreement for the METRO Gold Line Bus Rapid Transit Project.

“Bonds” means bonds, notes, or other obligations issued by the individual members of the Gold Line Joint Powers Board for the purpose of funding grants pursuant to Minnesota Statutes Sections 297A.993, 398A.06 - .07, 471.59 and Chapter 475.

“Declaration” means a declaration, in form and substance acceptable to Grantor, substantially as contained in attached Exhibit C, indicating that the Grantee’s interest in Real Property will be subject to certain restrictions imposed by this Agreement.

“Disbursement(s)” means payments to Grantee as part of the Grant in accordance with Article III of this Agreement and Exhibit D, as it may be amended from time to time.

“Effective Date” shall be January 1, 2020, notwithstanding the date of signatures.

“Fair Market Value” means the price which Real Property should bring in a competitive and open market under all conditions for a fair sale, with a willing buyer and willing seller, each acting prudently, knowledgeably, and in their own best interests, and neither under undue stimulus, and as determined by an appraisal of the unencumbered fee simple interest in the property. Fair Market Value shall be determined within 120 days before the date of Sale of Real Property.

“FTA” means the Federal Transit Administration.

“Full Funding Grant Agreement” or “FFGA” means the agreement used to provide federal financial assistance for Capital Investment Grants Program projects under Title 49 United States Code section 5309, *et seq.*

Funding Commitment Resolutions shall mean Washington County Resolution #_____, Ramsey County Resolution #_____, and Ramsey County Regional Railroad Authority Resolution #_____, attached as Exhibit G and incorporated herein.

“Grant” means the money provided by Grantor to the Grantee pursuant to this Agreement.

“Grant Activity Period” means each twelve-month period funded pursuant to the Grantor’s annual budget process or as may be extended pursuant to Section 2.03. The initial Grant Activity period shall be January 1, 2020 through December 31, 2020.

“Grant Project” means the use for which the Grant is made, as described in Exhibit B, attached hereto, and made a part of this Agreement. The Grant Project may have a lesser scope than the Transitway Project.

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“Grantee” means Metropolitan Council (the Council) and its successors and assigns.

“Grantee’s Contract Administrator” means the Gold Line Project Manager, or such other person, as may be designated from time to time by Grantee to administer this Agreement for Grantee.

“Grantee’s Designee” means the Gold Line Project Manager, or such other person designated from time to time by Grantee to act on its behalf under this Agreement for Grantee, noticed in accordance with Section 8.07.

“Grantee’s Payment Commitments” shall have the meaning set forth in Section 2.09.

“Grantor” means Gold Line Joint Powers Board.

“Grantor’s Contract Administrator” means [AGENCY, TITLE], or such other person, as may be designated from time to time by Grantor to administer this Agreement for Grantor.

“Grantor’s Designee” means Washington County Administrator, or such other person designated from time to time by Grantor to act on its behalf, noticed in accordance with Section 8.07.

“Grantor’s Project Shares” means the proportions of total funds paid for the Transitway Project by Grantor pursuant to its joint powers agreement, under this Agreement and any other grant funds provided by Grantor under this or other agreements. Grantor’s Project Share does not include grant funds paid from sales taxes collected pursuant to Minn. Stat. § 297A.992, but should include any remaining funds contributed by each county or regional railroad authority from Project Development. Grantor’s Project Shares shall be calculated separately for Ramsey County, Ramsey County Regional Railroad Authority, Washington County, and Washington County Regional Railroad Authority in accordance with its joint powers agreement.

“Grantor’s Proportionate Share” shall be Grantor’s Project Share multiplied by the Net Proceeds of the sale of Real Property.

“Joint Development” means activities consistent with this definition from FTA Guidance, Circular 7050.1A, dated December 29, 2016, or as that term may subsequently be defined by the FTA: A public transportation project that integrally relates to, and often co-locates with commercial, residential, mixed-use, or other non-transit development. For purposes of this Agreement, Joint Development shall not include public development that integrally relates to and is co-located with the Project.

“Joint Powers Board Parties” means Ramsey County, Ramsey County Regional Railroad Authority, Washington County and Washington County Regional Railroad Authority.

“Local Match” means the funds required to be provided from non-federal funding sources for the Transitway Project, and identified as the “Local Share” in the FFGA, consistent

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with the FTA Full-Funding Grant Agreements Guidance, Circular 5200.1A, dated December 5, 2002, or as may be amended from time to time.

“Maximum Grant Amount” has the meaning provided in Section 2.01 of this Agreement.

“Net Proceeds” are defined as the sale price of Real Property less reasonable sale costs.

“Party or Parties” means Grantor or Grantee, individually or together, as the context of the Agreement requires.

“Pre-Award Authority” means authorization from the FTA allowing Grantee to incur certain Transitway Project costs before FFGA approval and retain their eligibility for subsequent reimbursement after FFGA approval, as set forth in FTA Capital Investment Grants Program Guidance, Circular 9300.1B, dated November 1, 2008, or as subsequently supplemented or modified.

“RCRRA” mean the Ramsey County Regional Railroad Authority.

“Real Property” means a fee simple, leasehold, or any other interest in real property, or any improvements made to real property to the extent said improvements are constructed and used for the Transitway Project.

“Restricted Property” means the Real Property upon which Grantee is required to place a Declaration in accordance with the terms of this Agreement.

“Replacement Property” means such interest in real property and improvements acquired as a substitute for the Real Property, and any applicable improvements, in accordance with Article IV of this Agreement.

“Sale of Real Property” means the transfer of any interest in Real Property for valuable consideration.

“Transitway Project” means that certain proposed transitway project commonly referred to as the METRO Gold Line Bus Rapid Transit Project, a 10-mile bus rapid transitway line that will serve Saint Paul, Maplewood, Landfall, Oakdale, and Woodbury, but does not include operation and maintenance of the transit system, or ongoing capital maintenance costs, as further described in Exhibit A, attached hereto and incorporated herein.

“Use Contract” means any lease, sublease, management contract, or joint venture, naming rights, advertising, licensing or sponsorship agreement or other contract or instrument relating to all or any portion of the Real Property and any improvements attached thereto and personal property contained therein.

“WCRRA” means the Washington County Regional Railroad Authority.

ARTICLE II - GRANT

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Section 2.01 Grant of Monies. Grantor agrees to grant the amount of \$ [REDACTED] ("Maximum Grant Amount") to Grantee for the Grant Project. Of this amount, Grantor agrees to provide [REDACTED] for the initial Grant Activity period of January 1, 2020 through December 31, 2020. Grant funds provided in subsequent years will be established as a part of Grantor's annual budget process set forth in and incorporated through amendment to this Agreement. In no event shall the sum of the annual grant amounts exceed the Maximum Grant Amount.

The Maximum Grant Amount includes grant funds for expenditures pursuant to federal Pre-Award Authority and expenditures for non-FFGA eligible activities if specifically authorized pursuant to Section 2.06 of this Agreement.

In no event will Grantor's obligation under this Agreement exceed the Maximum Grant Amount as a result of cost overruns or otherwise. Grantee acknowledges that all or a portion of the Grant made hereunder may be financed with the proceeds of Bonds (see Article V of this Agreement for additional terms of compliance).

Section 2.02 Term of Grant Agreement. The term of this Agreement shall commence on January 1, 2020, and shall terminate on December 31, 2021, unless earlier terminated as provided herein.

Section 2.03 Use of Grant Proceeds. Grantee agrees to perform and complete in a satisfactory manner the Grant Project, all as set forth in Exhibit B, which is incorporated herein by reference and made a part hereof. The Grantee shall use the proceeds of the Grant only for the purposes and consistent with the amounts stated in Exhibit B. The Grantee shall not use the proceeds of the Grant for operating assistance for transitways, any other working capital expenses, or for any other purpose not identified in Exhibit B. Grantee shall comply with all contractual and other requirements necessary to maximize federal, state and any other matching funds identified by Grantee for the Grant Project and the Transitway Project, as identified in Section 2.12. Grantee shall expend Grant funds in a manner that complies with all FTA requirements, so that Grant funds qualify as a Local Match in a future FFGA, except as approved by the Grantor pursuant to Section 2.06.

In prior consultation with Grantor's Designee, Grantee may reallocate funds among the FTA's standardized cost categories referenced in the Grant Project budget as reflected in Exhibit B. But any such reallocation shall be consistent with FTA guidelines, Grantor's prior approval for expenditures pursuant to Pre-Award Authority, Grantor's contingency management requirements, and other conditions identified in the Joint Powers Agreement and in the Funding Commitment Resolutions.

Section 2.04 Extension of Grant Activity Period. Upon written request of Grantee, the initial Grant Activity Period of January 1, 2020 through December 31, 2020 may be extended in writing by the Grantor's Designee. At the end of the Grant Activity Period, including any extension, Grantor's obligation to continue to fund the Grant shall terminate, except as may be provided in Section 2.09.

Section 2.05 Completion of Transitway Project. Grantee shall use best efforts to: (a) complete the Transitway Project; and (b) secure all funding sources needed for completion of the Transitway Project. But Grantee's exercise of best efforts does not

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relieve the Grantee of any of its obligations under this Agreement, including but not limited to Section 2.12.

Section 2.06 Requirements for the Transitway Project. The Grantee agrees to comply with the following requirements:

- A. Grantor will not make any final governmental decisions for engineering or construction activities, including disbursement of grant funds for those activities, until any necessary state and federal environmental review has been completed and a Record of Decision (ROD), Finding of No Significant Impact (FONSI), or a Categorical Exclusion (CE) has been published in the Federal Register.
- B. Except as provided in Section 2.06C below, grant funds may only be used for Capital Investment Grants Program federally-eligible activities. For purposes of this Agreement, eligible activities shall not include Joint Development activities. In the event that the FTA determines any project expenditure is not eligible to qualify as part of the Local Match for the Transitway Project pursuant to a FFGA, Grantee shall reimburse Grantor for actual costs paid for all ineligible expenditures. If Grantor reasonably questions whether an expenditure is federally-eligible, Grantee shall provide any information requested by Grantor to demonstrate eligibility. Grantor retains the right to withhold in its sole judgement disbursements for that activity until such time as Grantor determines Grantee has satisfactorily demonstrated eligibility.
- C. Grantor may, in its sole discretion, agree that grant funds may be used for activities that do not qualify as federally eligible under the following conditions:
 - 1. Grantor provides prior written approval of the proposed expenditure, if feasible, pursuant to resolution. A request for prior approval must include a detailed accounting of the expenditure, the justification for using grant funds, an explanation of why the proposed expenditure is necessary to advance the Transitway Project, and a detailed description of the impact on Project budget, Grantor's Project Shares and the Local Match.
 - 2. If prior written approval is not feasible, Grantee may request Grantor to authorize the expenditure after the activity has been performed. Such request must include a detailed accounting of the expenditure, the justification for using grant funds, an explanation of why prior approval was not obtained, and an explanation of why the expenditure was necessary to advance the Transitway Project.
 - 3. In no event will the Grantor approve the use of grant funds for non-federally eligible activities if such expenditure or activity would result in non-compliance with Article V.
 - 4. Grantee must provide a separate accounting of all expenditures made pursuant to this Section 2.06C, as well as an analysis of the impact on the Local Match for the Transitway Project and future federal funding.
- D. Grantee shall provide to Grantor all information necessary for Grantor to provide fiscal oversight of the use of Grant funds, including the following:
 - 1. Monthly budget reports identifying all activities for which funds have been expended;
 - 2. Monthly report on anticipated risk to scope and schedule;

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3. Upon request, copies of invoices and supporting documentation submitted by the Project contractors;
 4. Upon request, the most current information generated by the Project contractors, including copies of progress reports;
 5. Upon request, documentation identifying sources and uses of the Parties funding share and quarterly actual expenditures as compared to budget; and
 6. Any other requests for information as needed by the Grantor.
- E. Prior to the submittal of the FFGA application to the FTA, Grantee shall jointly develop a schedule with Grantor for the review of all related documentation, and shall provide such documentation to Grantor in accordance with the agreed upon schedule.
- F. In all cases, the Grantee agrees to include the Grantor in Project decision-making activities under this Agreement as delineated in this article, Section 6.01 and Exhibit F. Representatives from the Grantor will participate in the Project, including, but not limited to all Project committee meetings and coordination meetings with the cities and interest groups as described in Exhibit D. Grantee staff will coordinate with Grantor's designated contact for the Project with respect to all requests for County Board actions relating to the Project.
- G. Appropriate staff designated by Grantor's Designee will be notified and invited to participate in all meetings with the FTA, if feasible.
- H. Reports relating to scope, schedule, and budget shall be shared with Grantor prior to submission to FTA and shall include the following:
1. the Project Management Plan and any updates;
 2. the Financial Plan and any updates;
 3. the Risk and Contingency Management Plan and any updates;
 4. each new full revision to the integrated master project schedule;
 5. the draft FFGA and all attachments; and
 6. any other report or information relating to project scope, schedule, and budget as requested by Grantor or Grantor's Designee.
 7. Spot reports prepared by the FTA's project management oversight consultant if received by the Gold Line Project Office shall be shared with the Grantor.

Section 2.07 Grantee Representations and Warranties. With respect to the Grant Project and the Grant Activity Period, Grantee represents and warrants to Grantor as follows:

- A. It has legal authority to enter into, execute, and deliver this Agreement, and it has taken all actions necessary to its execution and delivery of this Agreement and has the legal authority to perform the Grant Project.
- B. This Agreement is a legal, valid and binding obligation of Grantee, enforceable against Grantee in accordance with its terms.

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- C. To the best of Grantee's knowledge after due search and inquiry, Grantee has made no material false statement or misstatement of fact in connection with its receipt of the Grant, and all of the information it previously submitted to Grantor relating to the Grant or the disbursement of any of the Grant is true and correct.
- D. To the best of Grantee's knowledge after due search and inquiry, it is not in violation of any provisions of the laws of the State of Minnesota; no actions, suits, or proceedings are pending, before any judicial body or governmental authority, against or affecting it relating to the Transitway Project or Grant Project (except as disclosed in Exhibit E); and it is not in default with respect to any order, writ, injunction, decree, or demand of any court or any governmental authority that would impair its ability to enter into this Agreement or to perform any of the acts required of it in this Agreement.
- E. Neither the execution and delivery of this Agreement, nor compliance with any of the terms, conditions, requirements, or provisions contained herein, is prevented by, is a breach of, or will result in a breach of, any term, condition, or provision of any agreement or document to which it is now a party or by which it is bound.
- F. The Council will be the federal grantee for purposes of obtaining the federal funds for the Transitway Project. The Grantee acknowledges that as the federal grantee for the Transitway Project, the Grantee is required to ensure project compliance with federal law, regulations, and requirements. The Parties agree to cooperate with each other in carrying out the obligations set forth in this paragraph.

Section 2.08 Grantee Covenants. With respect to the Grant Project and the Grant Activity Period, Grantee covenants with Grantor as follows:

- A. It will comply with all of the terms, conditions, provisions, covenants, requirements, and warranties contained in this Agreement.
- B. It will make no material false statement or misstatement of fact in connection with its receipt of the Grant, and all of the information it submits to Grantor relating to the Grant or the disbursement of any of the Grant will be true and correct.
- C. It will use the Grant solely for expenditures to perform and complete the Grant Project or to pay for the completion of the Grant Project.
- D. The Grant Project will be performed and completed in full compliance with all applicable laws, statutes, rules, ordinances, and regulations issued by any federal, state, or local political subdivisions having jurisdiction over the Grant Project.
- E. It has complied or will comply with the matching funds requirement contained in Section 2.12.
- F. It will use best efforts: 1) to complete the Grant Project; and 2) secure funding sources needed for such completion, provided that Grantee's exercise of best efforts does not relieve Grantee of any of its obligations under this Agreement, including but not limited to the obligation to secure such funding or any required matching funds.

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- G. It will furnish such satisfactory evidence regarding the representations and warranties described herein as may be reasonably required and requested in writing by Grantor.

Section 2.09 Termination or Modification for Lack of Funds. The Grant under this Agreement is subject to the availability and provision of funding from proceeds of taxes authorized by Minn. Stat. § 297A.993 and § 398A.04, subd. 8 or by Bonds secured by such taxes. If at any time:

- (i) these tax revenues available to Grantor are projected to be less than necessary to meet Grantor's financial commitments;
- (ii) Ramsey and Washington Counties fail to pass an approving resolution authorizing the issuance and sale of the Bonds;
- (iii) the Ramsey and Washington Counties are unable to obtain an unqualified approving opinion of its nationally-recognized bond counsel as to: the validity of the Bonds, or exemption from federal gross income tax of interest on the Bonds if the Bonds are intended to be issued as tax-exempt;
- (iv) Ramsey and Washington Counties do not receive a bid for the purchase of the Bonds; or
- (v) no bid received by Ramsey and Washington Counties for the purchase of the Bonds results in a net interest cost on such Bonds that is acceptable to Ramsey and Washington Counties; then Ramsey and Washington Counties:
 - shall as soon as practicable notify Grantee in writing of such situation; and
 - may unilaterally amend the payment schedule called for under this Agreement, reduce the Maximum Grant Amount, or cancel this Agreement.

Prior to any amendment, reduction, or cancellation as provided for in this paragraph, Grantor shall meet with Grantee to discuss potential changes in the scope of the Grant Project and/or disbursement schedule that would allow the Grant Project to go forward in a modified form or to wind down the Grant Project.

Upon receipt of Grantor's notice of an amendment of the payment schedule, reduction of the Maximum Grant Amount, or cancellation of the Agreement, Grantee shall take all actions necessary to discontinue further commitments of funds to the extent they relate to this Agreement or the portions of this Agreement for which funding has become unavailable.

Grantee shall immediately notify Grantor of any change in circumstances indicating that Grantee will not receive anticipated funding sources identified in Section 2.12, if any. In such event, Grantor may cancel the Grant and this Agreement, unless Grantee provides satisfactory evidence to Grantor that it will receive substitute funding for completion of the Grant Project.

Notwithstanding any amendment, reduction, or cancellation under this section because of lack of Grantor funds, Grantor shall allow Grantee to use any disbursed Grant funds for Grantor's Project Share of any amounts that were actually expended by Grantee for the Grant Project prior to receipt of Grantor's notice as provided for in the above paragraph, and any of the following:

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- Salary and expenses incurred by Grantee's personnel or public agency staff assigned to the Grant Project, as of the time of the notice, and allowable under FTA guidelines for the Grant Project; and
- Amounts owed to Grantee's consultants, contractors, subcontractors, suppliers, and others for completed and acceptable work that has either not been invoiced to Grantee or actually paid by the Grantee as of the time of the notice.
- Amounts owed to Grantee's lessor of the Gold Line Project Office.

Amounts identified above in this paragraph are hereinafter referred to as "Grantee's Payment Commitments"; provided, however, that all such Grantee's Payment Commitments shall be costs that are properly capitalized under general accounting principles if funded from Bond proceeds.

Notwithstanding any provisions in this Agreement, Grantor shall not be assessed nor pay any costs incurred to litigate, arbitrate, resolve or settle any penalties, claims, costs, losses, or damages demanded due to termination of any contracts with consultants, contractors, subcontractors, suppliers, and others (including, without limitation, attorney's fees; all fees and charges incurred for experts, including engineers, architects and other professionals, in preparation for settlement or trial, or for testimony; and all court or arbitration or other dispute resolution costs).

Section 2.10 Grant Not a Loan. The Grant is not intended to be a loan.

Section 2.11 Reimbursement of Grantor. Within 60 days of the receipt of written demand, Grantee shall reimburse Grantor for the following:

1. Any amounts paid by Grantor for which Grantee's books, records and other documents are not sufficient to substantiate that those amounts were used by Grantee to perform the Grant Project.
2. Any amount paid by Grantor for Transitway Project costs that either duplicate costs covered by other specific grants or agreements, or costs determined by Grantor to be non-eligible under the provisions of this Agreement.
3. Any amount identified as a financial audit exception.
4. Any amount in excess of the Maximum Grant Amount to be returned to Grantor pursuant to Section 2.01 of this Agreement.
5. Any amount to be refunded to Grantor pursuant to Section 2.13 of this Agreement.
6. Any interest earnings generated by funds Grantor provides to the Transitway Project.
7. Any amounts determined by the FTA to be ineligible to constitute part of the Local Match that have not been approved by the Grantor pursuant to Section 2.06.C. above.

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Section 2.12 Matching Funds. Grantee shall obtain and supply the following matching funds for the completion of the Grant Project: None (\$0)

Any matching funds intended to meet the above requirements must either be in the form of (i) cash monies, (ii) legally binding commitments for money, or (iii) equivalent funds or contributions, including equity, that have been or will be used to complete or pay for the Grant Project.

Section 2.13 Reconciliation and Final Report.

- A. Within six (6) months after the commencement of revenue service or termination of the Transitway Project, Grantee shall provide a preliminary written financial report of all expenditures made for the Transitway Project, the amounts and sources of all funds received from any source for the Transitway Project (including interest earnings thereon), the amount of disbursed but unexpended funds remaining for the Transitway Project, and a preliminary estimate of refund owed to Grantor, measured by Grantor's Project Shares.
- B. Within 30 days after providing the preliminary financial report pursuant to Section 2.13.A, Grantee shall refund to Grantor 50% of the estimated refund amount identified in the preliminary report. Grantee shall also pay to Grantor the current balance of interest earnings generated on funds Grantor has provided to the Transitway Project from time to time and upon request of the Grantor.
- C. Prior to FTA closure of the FFGA, Grantee shall certify and provide a final written report of all expenditures made for the Transitway Project, the amounts and sources of all funds received for the Transitway Project (including interest earnings on Transitway Project funds), the amount of unexpended funds remaining for the Transitway Project, and Grantor's Project Shares. Calculation of these amounts is subject to verification by Grantor and/or independent audit. This verification process shall not be deemed to supersede the dispute resolution process in Section 8.16.
- D. If Grantor's contribution to the Transitway Project exceeds the percentage of eligible costs specified in Grantor's funding commitment resolutions to the Transitway Project, Grantee shall promptly return to Grantor the excess contribution, less any refund amount previously paid to Grantor under Section 2.13B, unless otherwise agreed to by Grantor.
- F. The written reports required in this Section shall be made in the format and at a level of detail requested by Grantor, after consultation with Grantee.

ARTICLE III - DISBURSEMENT OF GRANT PROCEEDS

Section 3.01 Disbursements. Grantor agrees, on the terms and subject to the conditions set forth herein and in Exhibit D, attached hereto and incorporated herein, to make timely Disbursements from the Grant to Grantee from time to time in an aggregate total amount less than or equal to the Maximum Grant Amount.

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In consultation with Grantee, Exhibit D may be revised by Grantor or Grantor's Contract Designee in accordance with this Agreement. Grantor's Contract Administrator will review the disbursement schedules in Exhibit D at least quarterly. If Grantor's Contract Administrator finds that forecasted expenditures are likely to be significantly less than the approved disbursement schedule, Grantor or Grantor's Designee may reduce the Maximum Grant Amount accordingly. In no event, however, will Grantor's Designee increase the Maximum Grant Amount.

Section 3.02 Disbursement Requests. In order to receive a Disbursement of a portion of the Grant, Grantee shall submit to Grantor's Contract Administrator a disbursement request in accordance with the Exhibit D and duly executed on behalf of Grantee or Grantee's Designee ("Disbursement Request"). Disbursement Request amounts shall be for sums no greater than the monthly amounts identified in Exhibit D, and made for no sooner than the anticipated schedule of disbursements set forth in Exhibit D.

At the time of submission of each Disbursement Request Grantee shall submit to Grantor such supporting evidence as may be requested by Grantor to substantiate all expenditures that are to be paid using funds to be provided pursuant to the relevant Disbursement Request. Grantor's Designee, in consultation with Grantor's Contract Administrator, may withhold or reduce the amount of the Disbursement if (i) Grantee's cash balance exceeds the amount to be disbursed in any given month and project activities expenditures are estimated to be within the amount of the available cash balance or (ii) Grantee fails to provide evidence reasonably necessary and sufficient to support the disbursement request, as determined by Grantor's Contract Administrator.

If Grantee has complied with all requirements of this Agreement and Grantor, acting through Grantor's Contract Administrator, approves the relevant Disbursement Request, then Grantor shall authorize the requested Disbursement to Grantee.

Section 3.03 Condition Precedent to Any Disbursement. The obligation of Grantor to make any Disbursement hereunder shall be subject to the following conditions precedent:

- A. Prior to the first disbursement under this Agreement Grantor shall have received evidence, in form and substance acceptable to Grantor, that (i) Grantee has legal authority to and has taken all actions necessary to enter into this Agreement, (ii) this Agreement is binding on and enforceable against Grantee, and (iii) Grantee has fulfilled such other terms as set forth in Section 2.12, if any, and Exhibit D.
- B. If Grantee becomes aware of any material change in circumstances which would render the information in Paragraph A above incorrect, Grantee shall notify Grantor of such change in circumstances within ten (10) days of becoming aware of such change in circumstances or prior to the next Disbursement Request, whichever is earlier.
- C. For all disbursements:
 - 1. Grantor shall have received a Disbursement Request for such disbursement specifying the amount of funds being requested, which

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amount when added to all prior requests for disbursements shall not exceed the Maximum Grant Amount set forth in Section 2.01.

2. No Event of Default under this Agreement or event which would constitute an Event of Default but for the requirement that notice be given or that a period of grace or time elapse shall have occurred and be continuing.
3. Grantee has supplied to Grantor all other items that Grantor may reasonably require.

Section 3.04 Grantor's Prior Approval for Use of Grant Funds for Pre-Award Authority Expenditures. Unless Grantor has provided prior approval, prior to execution of the FFGA, Grant funds will not be disbursed and may not be expended for the following purposes allowable under Pre-Award Authority: utility relocation, real property acquisition and associated relocations, vehicle purchases, demolition, and procurement of long lead items. Grantor will only authorize Grant funds to be expended on such activities if Grantee can demonstrate to Grantor's satisfaction that the activity has a critical path schedule or cost impact.

Grantor's approval for the use of funds for Pre-Award Authority expenditures will be in the form of a resolution that identifies a specific funding share amount and purpose, as well as a maximum, not-to-exceed dollar amount. Grantor's resolution may also identify any special conditions.

Section 3.05 Process For Requesting Pre-Award Authority.

Requests for prior approval, as required under Section 3.04, to expend Grant funds pursuant to Pre-Award Authority must be submitted in writing to Grantor's Contract Administrator. Written requests should include sufficient information and justification to allow Grantor to consider the request, including but not limited to the following information:

- A. Identification of the maximum dollar amount of Grant funds to be expended, as well as Grantor's percentage funding share of the requested expenditures;
- B. Description of the specific activities to be covered by the Pre-Award including scope, schedule, and budget;
- C. Justification for advancing the identified activities, including a detailed assessment of the consequences to the project scope, schedule (including critical path impacts), and budget should the Pre-Award Authority authorization not be approved by Grantor. The justification should also include a detailed assessment of the benefits to the Transitway Project should the Pre-Award Authority authorization be approved;
- D. A detailed description of the risks of proceeding or not proceeding with the proposed activities prior to execution of the FFGA, and a proposed risk mitigation plan;
- E. Status of procurement progress for the activities covered by the authorization;
- F. Demonstration that Grantee is ready to expend funds on requested activities within the identified timeline, including completion of necessary contract procurement, right-of-way acquisition, third party agreements, and resolution of any other technical readiness issue; and

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- G. Demonstration that the FTA has concurred with the requested Pre-Award Authority activity, if applicable; and
- H. Any additional information required by Grantor as needed to support its consideration of the request.

ARTICLE IV - ACQUISITION OF REAL PROPERTY

Section 4.01 Applicability. The provisions contained in this Article IV do not apply to permits, temporary easements, licenses, or other agreements for use of land on which Grantee will not be constructing or placing permanent improvements.

Section 4.02 Fee Simple Acquisition. Whenever practicable, Grantee shall acquire a non-defeasible fee simple interest in Real Property. This section shall not be interpreted to mean that Grantee must acquire fee title to the Real Property.

Section 4.03 Execution and Delivery of Declaration. Upon acquisition of Real Property, Grantee shall promptly execute a Declaration, record it in the appropriate office, and deliver it to Grantor with all of the recording information displayed thereon.

Section 4.04 Grantee Covenants, Representations, and Warranties. With respect to Grantee's acquisition of Real Property, Grantee covenants with Grantor as follows:

- A. Grantee will take no action that would revoke or impair Grantee's authority or ability to enter into, record, or deliver the Declaration. Grantee represents and warrants that, as of the date of this Agreement, Grantee has legal authority to enter into, execute, record, and deliver the Declaration.
- B. Grantee will take all actions necessary to the execution, recording, and delivery of the Declaration.
- C. After the Declaration has been executed, the Declaration will be a legal, valid, and binding obligation of Grantee, its successors and assigns, enforceable against Grantee, its successors and assigns, in accordance with its terms.
- D. Grantee's acquisition of an interest in the Real Property will be performed in full and complete compliance with all applicable laws, statutes, rules, ordinances, and regulations issued by any federal, state, or local political subdivisions having jurisdiction over the Real Property.
- E. Grantee will obtain all applicable licenses, permits, and bonds required for its acquisition of an interest in the Real Property.
- F. Grantee's use of the Real Property will fully comply with all applicable laws, statutes, rules, ordinances, and regulations issued by any federal, state, or local political subdivisions having jurisdiction over the use of the Real Property.
- G. Grantee will obtain all applicable licenses, permits, and bonds required for its use of the Real Property and improvements.

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- H. In its acquisition of an interest in Real Property, Grantee will comply with all of the terms contained in this Agreement and the Declaration.
- I. Grantee will fully enforce the terms and conditions of any Use Contract or management agreement it enters into for operation of the Real Property.
- J. Grantee will not allow any lien or encumbrance that is prior or superior to the Declaration to be created or imposed upon the Real Property, whether such lien or encumbrance is voluntary or involuntary and including but not limited to a mechanic's lien or a mortgage lien, without the prior written consent of Grantor.
- K. Grantee will take no action that would be in violation of any laws of the State of Minnesota that would (i) prohibit it from entering into, recording, and delivering the Declaration, or (ii) affect its ability to acquire an interest in the Real Property or use the Real Property for the Transitway Project. Grantee represents and warrants that, as of the date of this Agreement, Grantee is not in violation of such laws that would prohibit or prevent it from performing such acts.
- L. Grantee will immediately notify Grantor of any actions, suits, or proceedings pending or threatened, to Grantee's knowledge, before or by any judicial body or governmental authority, against, or affecting it that would (i) prohibit it from entering into, recording, and delivering the Declaration, or (ii) affect its ability to acquire an interest in the Real Property or use the Real Property for the Transitway Project. Grantee represents and warrants that, as of the date of this Agreement, it has no knowledge of any such action, suit, or proceeding.
- M. Grantee will take no action that would cause Grantee to be in default with respect to any order, writ, injunction, decree, or demand of any court or any governmental authority which would prohibit it from (i) executing, recording, and delivering the Declaration, or (ii) acquiring an interest in the Real Property or operating the Real Property for the Transitway Project. Grantee represents and warrants that, as of the date of this Agreement, it is not in default under any such order, writ, injunction, decree, or demand of any court or any governmental authority.
- N. Grantee will not enter into any agreement or document that would prevent or impair (i) Grantee's execution, recording, or delivery of the Declaration, or (ii) Grantee's ability to acquire an interest in and, if applicable, improve the Real Property or use the Real Property for the Transitway Project. Grantee represents and warrants that, as of the date of this Agreement, such acts will not be prevented by, be a breach of, or result in a breach of, any term, condition, or provision of any agreement or document to which it is a party or by which it is bound.
- O. Grantee will take no action that would violate any applicable zoning or use statute, ordinance, building code, rule or regulation, or any covenant or agreement of record. Grantee represents and warrant that, as of the date of this Agreement, Grantee's acquisition of an interest in Real Property or use of Real Property for the Transitway Project will not cause such a violation.

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Section 4.05 Sale or Conveyance of Interest in Real Property. Grantee may not sell or convey any interest in Real Property, including but not limited to the fee title interest, easement rights, air rights, or any other interest in the Real Property, for purposes other than for use for the Transitway Project, unless all of the following conditions have been met:

- A. Grantee determines, by official action, that the interest in the Real Property is surplus and it is no longer usable or needed for the Transitway Project;
- B. Grantor declines the opportunity to acquire the interest in the Real Property, subject to the terms set forth in Section 4.13;
- C. Grantee provides Grantor with written notice of the proposed sale or conveyance at least sixty (60) days prior to the date of such sale or conveyance;
- D. The proposed sale or conveyance of the Real Property is made as authorized by law, including the applicable right-of-first refusal requirements of Minnesota Statutes § 117.226, and FTA property disposition guidelines and regulations;
- E. The sale or conveyance is for Fair Market Value unless Grantor gives its prior written approval for a sale for less than Fair Market Value, or unless some other value is required by law. Grantor's approval shall not be unreasonably withheld. A sale for at least 95% of the appraised value shall be deemed Fair Market Value; and
- F. Grantor's Designee determines that the sale will have no adverse effect on the tax-exempt or tax-favored status of the Bonds.

This section does not apply to any sale or conveyance by Grantee of Real Property (i) to Grantor under Section 4.13 or (ii) to the State of Minnesota or any of its agencies, or any political subdivision of the State of Minnesota, when such sale or conveyance is required by Federal or State statute, or as part of the Transitway Project, provided, however, that following such sale or conveyance, the Real Property shall remain subject to the Declaration and transferee shall be subject to the terms of this Agreement.

This section does not apply to Use Contracts.

Section 4.06 Disposition Alternatives and Proceeds of a Sale of Real Property. If Grantee has received proceeds from sale or conveyance of an interest in Real Property, other than a Use Contract, Grantee must elect one of the following disposition alternatives:

- A. Sell and Reimburse Grantor. Grantee pays to Grantor Grantor's Proportionate Share, provided, however, that in no event shall Grantor receive from Grantee under this paragraph a total amount of funds for all properties sold by Grantee that exceeds the lesser of the aggregate amount of the Disbursements or the Maximum Grant Amount.
- B. Sale and Offset. Grantee applies the Net Proceeds to the cost of Replacement Property for the Transitway Project. The acquisition and purchase price of such

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Replacement Property must be approved by Grantor. Such Replacement Property shall be subject to the provisions of this Agreement. If the purchase price of the Replacement Property is less than the sale price of the Real Property, excess funds shall be distributed in accordance with Section 4.06A. The terms of this Article IV shall apply to the Replacement Property, and Grantee shall timely file a Declaration on the Replacement Property.

- C. Sell and Use Proceeds for other Eligible Transitway Projects. If applicable, Grantee applies the Net Proceeds to one or more other capital or operating transitway projects eligible for funding under Grantor's Sales and Use Transportation Tax Implementation Plan, as directed by Grantor, subject to federal requirements with respect to the use of federal grant monies and Bond proceeds. When possible, consistent with federal and state law, the Grantor's Proportionate Share shall be deemed to be a Local Match from Grantor for such an eligible transitway project.
- D. Property Donated by Grantor. Notwithstanding any other provisions in this Section, if the interest in property that was sold was donated by Grantor to the Transitway Project and the value of the property interest was not counted toward Grantee's Local Match for the Transitway Project, all Net Proceeds shall be paid to Grantor.

Section 4.07 Release of Grantor's Interest in Real Property, Grantor or Grantor's Designee may release its interest in Real Property if Grantor or Grantor's Designee finds Grantee to be in compliance with the conditions of Section 4.05, Grantee has notified Grantor of the disposition alternative selected in conformance with Section 4.06, and Grantee applies any funds received from the disposition of the Real Property consistent with Section 4.06 on or before the date of such release of Grantor's interest in such Real Property.

Section 4.08 Insurance. Grantee shall maintain or cause to be maintained commercially reasonable property insurance, providing "all-risk" coverage on the Real Property and improvements constructed using Grant proceeds, whether or not constructed on the Real Property, in an amount equal to replacement cost of the value thereof, and shall name Grantor as loss payee thereunder. If damages covered by such required insurance occur to the Real Property or improvements, then Grantee shall, at its sole option and discretion, either: (i) use the insurance proceeds or cause the insurance proceeds to be used to fully or partially repair such damage and to provide or cause to be provided whatever additional funds may be needed to fully or partially repair such damage, or (ii) sell its interest in the Real Property, if such exists, in accordance with the provisions contained in Sections 4.05 and 4.06. If Grantee elects to only partially repair such damage, but collects insurance proceeds for the remaining damaged property that has not been repaired, then the portion of the insurance proceeds related to the damage that was not repaired shall be applied in accordance with the provisions contained in Section 4.06 as if Grantee's interest in the Real Property had been sold, and such amounts shall be credited against the amounts due under Section 4.06 upon the ultimate sale of Grantee's interest in the Real Property. If Grantee elects to sell its interest in the Real Property then such sale must occur within a reasonable time period from the date the damage occurred and the cumulative sum of the insurance proceeds plus the proceeds of such sale must be applied in accordance with the provisions

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contained in Section 4.06, with the insurance proceeds being so applied within a reasonable time period from the date they are received by Grantee.

As loss payee under the insurance required, Grantor will assign or pay over to Grantee all insurance proceeds it receives so that Grantee can comply with the requirements that this Section 4.07 imposes upon Grantee as to the use of such insurance proceeds.

At the written request of Grantor, Grantee shall promptly furnish to Grantor all written notices and all paid premium receipts received by Grantee regarding such required insurance, or certificates of insurance evidencing the existence of the required insurance.

Section 4.09 Condemnation. If all or any portion of the Real Property is condemned to an extent that Grantee can no longer use the Real Property for the Transitway Project, then Grantee shall, at its sole option and discretion, either: (i) use the condemnation proceeds or cause the condemnation proceeds to be used, to acquire an interest in Replacement Property needed for Grantee to continue to comply with the provisions contained in this Agreement and to provide or cause to be provided whatever additional funds may be needed for such purposes, or (ii) sell the remaining portion of its interest in the Real Property in accordance with the provisions contained in Sections 4.05 and 4.06. Any condemnation proceeds that are not used to acquire an interest in Replacement Property or to restore, if applicable, the Real Property shall be applied in accordance with the provisions contained in Section 4.06 as if Grantee's interest in the Real Property had been sold, and such amounts shall be credited against the amounts due under Section 4.06 upon the ultimate sale of Grantee's interest in the Real Property. If Grantee elects to sell its interest in the portion of the Real Property that remains after the condemnation, then such sale must occur within a reasonable time period from the date the condemnation occurred and the cumulative sum of the condemnation proceeds plus the proceeds of such sale must be applied in accordance with the provisions contained in Section 4.06, with the condemnation proceeds being so applied within a reasonable time period from the date they are received by Grantee.

As recipient of any condemnation awards or proceeds referred to herein, Grantor agrees to and will disclaim, assign, or pay over to Grantee all of such condemnation awards or proceeds it receives so that Grantee can comply with the requirements that this Section 4.09 imposes upon Grantee as to the use of such condemnation awards or proceeds.

Section 4.10 Use, Maintenance, Repair And Alterations.

- A. Grantee shall not, without the prior written consent of Grantor, permit or suffer the use of any of the Real Property for any purpose other than for the Transitway Project.
- B. Grantee shall comply with the following requirements or cause the requirements to be complied with:
 - (i) shall keep the Real Property in good condition and repair, subject to reasonable and ordinary wear and tear;

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- (ii) shall not during the useful life of the asset, without written consent of Grantor, remove or demolish any of the improvements, if applicable, except as provided in (ix) below regarding any fixtures or personal property;
- (iii) shall not do any act or thing which would unduly impair or depreciate the value of the Real Property;
- (iv) shall not abandon the Real Property;
- (v) shall complete promptly and in good and workmanlike manner any building or other improvement that may be constructed on the Real Property and pay when due all claims for labor performed and materials furnished therefore;
- (vi) shall promptly restore in like manner or demolish any portion of the improvements that may be damaged or destroyed thereon in accordance with Section 4.08;
- (vii) shall comply with all applicable laws, ordinances, regulations, requirements, covenants, conditions, and restrictions now or hereafter affecting the Real Property or any part thereof, or requiring any alterations or improvements thereto;
- (viii) shall not commit or permit any waste or deterioration of the Real Property;
- (ix) shall not remove any fixtures or personal property from the Real Property that were paid for as part of the Transitway Project, unless the property or fixtures are removed to serve another Grantor-funded capital or operating transitway project and the removal either a) does not materially reduce the operating utility of the Transitway Project from which the property or fixtures are removed, or b) the property or fixtures are immediately replaced with like property of at least equal utility; and
- (x) shall not commit, suffer, or permit any act to be done in or upon the Real Property in violation of any applicable law, ordinance, or regulation. Grantee shall require that any person it permits or suffers to use the Real Property complies with these requirements, and any failure by such person to comply with these requirements shall be deemed to be a failure of Grantee.

- C. Prior to commencement of revenue service, Grantee shall consult with Grantor's Contract Administrator in regard to any maintenance, repairs, or alterations required under this Section.

Section 4.11 Inspection of Real Property. Upon reasonable request by Grantor Grantee shall allow, and will require any entity with whom it enters into a Use Contract for any portion of the Real Property to allow, Grantor to inspect the Real Property subject to applicable right of entry requirements.

Section 4.12 Receipt of Monies Under Use Contract. If Grantee receives any monies under a Use Contract for the Real Property that is subject to the terms of this Article IV, the portion of such monies in excess of the amounts Grantee needs to pay operating expenses of the Real Property under the terms of such Use Contract shall be accounted for by Grantee as operations revenues for the transitway developed by or for the Transitway Project, except as may be agreed to in writing by the Parties.

Section 4.13 Grantor's Right to Acquire Surplus Property. If Grantee determines, by official action, that any interest in Real Property is surplus and no longer usable or needed for the Transitway Project, it shall comply with the applicable right-of-first refusal requirements of Minnesota Statutes § 117.226 and then, before otherwise disposing of

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the Real Property, offer the Real Property, at no cost, to Grantor or as designated by the Grantor pursuant to the Joint Powers Agreement Establishing the Gold Line Joint Powers Board. If Grantor accepts the Real Property, it must satisfy and discharge any interests that other funders of the Transitway Project may have in the Real Property and assume any other obligations associated with the Real Property.

**ARTICLE V - COMPLIANCE WITH TAX EXEMPT OR TAX-FAVORED BOND
REQUIREMENTS**

Section 5.01 Compliance with Tax Covenants and Representations. Grantee hereby acknowledges that some or all of the Disbursements will be funded with the proceeds of tax-exempt or tax-favored Bonds. Grantee agrees to comply with the provisions of all applicable state and federal laws, rules, and regulations pertaining to the use of such bond proceeds. Grantee will not use such bond proceeds in any way that would cause the Bonds to be classified as arbitrage bonds under the Internal Revenue Code. Grantee will not take any action that would adversely affect the tax-exempt or tax-favored status of the Bonds or omit to take any action necessary to maintain such tax-exempt or tax-favored status of the Bonds. Grantee agrees to assist Grantor in complying with applicable federal tax laws, rules, and regulations by timely informing Grantor of possible compliance issues and by cooperating to help ensure compliance.

Grantee shall provide advance notice of any intent to enter into any Use Contract for all or portions of the Transitway Project and shall obtain Grantor's consent prior to entering into any such Use Contract.

If it is determined by Grantor's bond counsel that (i) any action by or omission of one or more of the Parties or (ii) any term of this Agreement is noncompliant or creates a significant risk of noncompliance with applicable state and federal laws, rules, or regulations pertaining to the use of such Bond proceeds, the Parties shall negotiate in good faith to agree on alternatives to avoid such noncompliance or risk of noncompliance, including if necessary, the amendment of any term of this Agreement.

Section 5.02 Noncompliance. Without limiting the foregoing, in the event that any action or omission of the Grantee results in the loss of tax-exemption on Bonds originally issued as tax-exempt, the Grantee shall pay, or reimburse the Grantor for: (i) any increase in fees or interest rates arising under the applicable Bond documents as a result of such loss of tax-exempt status; (ii) any fees, penalties, or other charges imposed by the Internal Revenue Service ("IRS"), the Minnesota Department of Revenue, or any applicable authority; and (iii) any costs, including attorney or advisory fees, incurred by the Grantor in connection thereto. Such payment or reimbursement by the Grantee shall also be required in the event that the Grantor enters into a Voluntary Closing Agreement with the IRS or similar arrangement.

ARTICLE VI - ADDITIONAL REQUIREMENTS

Section 6.01 Project Decision Making. Recognizing the partnership between Grantor and Grantee, key decisions on significant aspects of the Transitway Project will be brought to a policy maker working group for mutual agreement. Grantee and Grantor will

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timely share information such that staff and policy makers can implement this cooperative approach.

Grantee shall include county staff in leadership positions in committees advising the Grantee, as set forth in Exhibit_____.

Excess funds resulting from low bids shall be deposited in the unallocated contingency. These funds and all other Transitway Project funds must be managed pursuant to the change control and financial oversight processes established by the Grantor. Such oversight shall include, but not be limited to, review and approval of the project costs and budget at the 30%, 60%, and 90% levels of design, as well as the project costs and budget submitted to the FTA as a component of the application for a Full Funding Grant Agreement.

Section 6.02 Cash Flow. Grantee shall provide cash flow financing of the federal funding share. Grantor shall only be responsible for cash flow financing of the local funding share.

Section 6.03 Eligible and Ineligible Transitway Project and Operating Costs.

- A. **Costs for loss claim liability or other accident-related exposure.** The following are not Transitway Project costs or operating costs to be paid by Grantor: any loss claim liability or other accident-related exposure beyond the payment of insurance premiums and self-insured retention or deductible. Grantor may provide input on Grantee's bus rapid transit insurance-related decision making.

To the fullest extent permitted by law, Grantee shall defend, indemnify, and save harmless Grantor and Grantor's elected officials, officers, agents, and employees from any loss claim liability or other accident-related exposure beyond the payment of insurance premiums and self-insured retention or deductible, including negligent acts or omissions of Grantor or Grantor's elected officials, officers, agents, or employees, arising out of the construction or operation of the Transitway Project. Grantee's obligation herein is not a Transitway Project cost nor an Operating Cost to be paid by Grantor.

Section 6.04 Project Shutdown Obligations

- A. **Project Shutdown Prior To Revenue Service.** If the Transitway Project is cancelled or otherwise discontinued prior to revenue service, the following are Transitway Project costs that may be paid from grant funds, but must be actual and verifiable costs incurred by Grantee for activities authorized in this Agreement:

1. contractual encumbrances, buyouts, and other liabilities pursuant to contracts with Grantee; Grantee must not enter into or extend any contracts agreeing to buyout, restoration obligations, penalties, or other shutdown liabilities in excess of actual and verifiable expenses without the consent of Grantor or Grantor's Designee;

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2. project costs related to the acquisition of Real Property for the Transitway Project including direct purchase, condemnation, and relocation obligations;
3. reasonable expenses of project office shutdown, consistent with Grantee's employment policy (Grantor must be directly involved in decision making);
4. restoration of bike trails, sidewalks and any other obligations as required by law or contract to restore the construction site.

In the event that shutdown costs not covered by this Agreement are identified by Grantee, the Parties agree to meet and discuss in good faith responsibility for the payment of such expenses. Grantee shall make good faith efforts to mitigate expenses under this section.

- B. **Project Shutdown Post-FFGA.** As the federal grantee, Grantee shall be responsible for fulfilling all obligations under the FFGA without recourse to Grantor, unless agreed to in a separate agreement.
- C. **Shutdown Scenario: Due To "But For" Regulatory Changes.** If bus rapid transit service on the METRO Gold Line is shut down due to regulatory changes, Grantee shall be responsible for all costs associated with resuming service, without recourse to Grantor, such as capital or other costs to upgrade for regulatory compliance.

Section 6.05 Funding Commitment Resolutions. Those terms and conditions specified in the Funding Commitment Resolutions, attached hereto, are incorporated herein. Grantee's failure to comply strictly with the Funding Commitment Resolutions, as incorporated herein, shall be an Event of Default under this Agreement. Waiver of any non-compliance shall not excuse future non-compliance with the same or other provisions.

ARTICLE VII - EVENTS OF DEFAULT AND REMEDIES

Section 7.01 Event(s) of Default. The following shall, unless waived in writing by Grantor, constitute an Event of Default under this Agreement:

- A. If any representation, covenant, or warranty made by Grantee herein, in any other document furnished pursuant to this Agreement, or in order to induce Grantor to disburse any of the Grant, is untrue or incorrect in any material respect or materially misleading as of the time such representation, covenant, or warranty was made.
- B. If Grantee fails to fully comply with any material provision, term, condition, covenant, or warranty contained in this Agreement.
- C. If Grantee fails to comply strictly with the Funding Commitment Resolutions.

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Waiver by Grantor of any non-compliance shall not excuse future non-compliance with the same or other provisions.

Section 7.02 Notice of Event of Default and Opportunity to Cure.

- A. Grantee Notice. If Grantee has obtained knowledge of the occurrence of an Event of Default, or an event that with the giving of notice or lapse of time or both would constitute an Event of Default, Grantee will furnish to Grantor as soon as possible, but not later than seven (7) calendar days after obtaining such knowledge, a statement setting forth details of each Event of Default, or event that with the giving of notice or lapse of time or both would constitute an Event of Default, and the action that Grantee proposes to take with respect thereto.
- B. Grantor Notice. If Grantor determines that an Event of Default has occurred, it will provide Grantee written notice of such Event of Default. Upon receipt of such notice, Grantee shall have thirty (30) days in which to cure such Event of Default, or such longer period of time to which Grantor agrees as may be reasonably necessary so long as Grantee is using its best efforts to cure and is making reasonable progress in curing such Events of Default (the "Cure Period"). In no event shall the Cure Period for any Event of Default exceed six (6) months. Within ten (10) days after receipt of notice of an Event of Default, Grantee shall propose in writing the actions that Grantee proposes to take and the schedule required to cure the Event of Default.

Section 7.03 Remedies. Upon Grantee's failure to cure an Event of Default within the Cure Period, Grantor may enforce any or all of the following remedies, as applicable:

- A. Grantor may refrain from disbursing the Grant, except for Grantee's Payment Commitments; provided, however, Grantor may make such a disbursement after the occurrence of an Event of Default without thereby waiving its rights and remedies hereunder.
- B. If the Grant is funded in whole or in part directly from proceeds of taxes authorized by Minn. Stat. §297A.993, or 398A.04, subd. 8, Grantor may demand that any portion of the Grant funded directly by said taxes that have been already disbursed to Grantee be returned to Grantor, and upon such demand Grantee shall return such portion, except for Grantee's Payment Commitments, to Grantor.
- C. If the Grant is funded in whole or in part from Bond proceeds and the Event of Default frustrates the public purpose for which the Grant was awarded, Grantor may demand that any portion of the Grant funded from Bond proceeds and already disbursed to Grantee be returned to Grantor, and upon such demand Grantee shall return such portion, except for Grantee's Payment Commitments, to Grantor.
- D. Grantor may terminate this Agreement and its obligation to provide funds under this Agreement for cause by providing thirty (30) days' written notice to Grantee.

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Grantor may enforce any additional remedies it may have in law or equity. The rights and remedies herein specified are cumulative and not exclusive of any rights or remedies that Grantor would otherwise possess.

Prior to Grantor demanding return of any portion of the Grant already disbursed to Grantee, or terminating this Agreement, Grantor shall meet with Grantee to discuss wind down of the Grant Project. Notwithstanding any provisions in this Agreement, Grantor shall not be assessed nor pay any costs incurred to litigate, arbitrate, resolve, or settle any penalties, claims, costs, losses, or damages demanded due to termination of any contracts with consultants, contractors, subcontractors, suppliers, and others (including, without limitation, attorneys' fees; all fees and charges incurred for experts, including engineers, architects, and other professionals, in preparation for settlement or trial, or for testimony; and all court or arbitration or other dispute resolution costs).

ARTICLE VIII - MISCELLANEOUS

Section 8.01 Records Keeping and Reporting. Grantee shall maintain or cause to be maintained books, records, documents, and other evidence pertaining to the costs or expenses associated with the completion of the Transitway Project and, if accomplished, the acquisition of an interest in and, if applicable, the improvement of Real Property and, in addition and if applicable, the acquisition, improvement, renovation, rehabilitation, or new construction of any facilities for the Transitway Project, and the contemplated use of the Real Property and, if applicable, such facilities, and compliance with the requirements contained in this Agreement. Grantee shall upon request allow or cause the entity which is maintaining such items to allow Grantor, auditors for Grantor, the Legislative Auditor for the State of Minnesota, or the State Auditor for the State of Minnesota, to inspect, audit, copy, or abstract all of its books, records, papers, or other documents relevant to the Grant. Grantee shall use or cause the entity that is maintaining such books and records to use generally accepted accounting principles in the maintenance of such books and records, and shall retain or cause to be retained all of such books, records, documents, and other evidence for a period of six (6) years from the date of close-out of the Transitway Project pursuant to Section 2.13.

Section 8.02 Data Practices. Grantee agrees, with respect to any data that it possesses regarding the Grant, the Transitway Project, and, if accomplished, the acquisition of an interest in and, if applicable, the improvement of the Real Property and, in addition and if applicable, the acquisition, improvement, renovation, rehabilitation, or new construction of any facilities, or contemplated use of the Real Property and, if applicable, any facilities, to comply with all of the provisions and restrictions contained in the Minnesota Government Data Practices Act contained in Chapter 13 of the Minnesota Statutes, as such may be amended, modified, or replaced from time to time.

Section 8.03 Non-Discrimination. Grantee agrees to not engage in discriminatory employment practices in the completion of the Transitway Project and, if accomplished, the acquisition of an interest in Real Property, and it shall, with respect to such activities, fully comply with all of the provisions contained in Minn. Stat. Ch. 363A and Minn. Stat. § 181.59, as such may subsequently be amended, modified, or replaced from time to time.

Section 8.04 Liability. Except as specifically provided herein, each Party agrees that it will be responsible for its own acts and omissions, as well as the acts and omissions of

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its officers, employees, contractors, and volunteers, and the results thereof, to the extent authorized by law and shall not be responsible for the acts and omissions of the other Party, its officers, employees, contractors, and volunteers, and the results thereof. The Parties expressly agree that they do not waive any limitations of liability or immunities or defenses available to them by statute or common law, in connection with activities undertaken pursuant to this Agreement.

Section 8.05 Relationship of the Parties. Nothing contained in this Agreement is intended or should be construed in any manner to create or establish the relationship of co-partners or a joint venture between Grantee and Grantor, nor shall Grantee be considered or deemed to be an agent, representative, or employee of Grantor in the performance of this Agreement, the completion of the Grant Project, the Transitway Project, or, the acquisition of an interest in, improvement of, or use of Real Property. All personnel of Grantee or other persons while engaging in the performance of this Agreement, the completion of the Grant Project and the Transitway Project, or the acquisition of an interest in, the improvement of, or use of Real Property shall not have any contractual relationship with Grantor and shall not be considered employees of Grantor. In addition, all claims that may arise on behalf of said personnel or other persons while so engaged, out of employment or alleged employment including, but not limited to, claims under the Workers' Compensation Act of the State of Minnesota, claims of discrimination against Grantee or its officers, agents, contractors, or employees shall in no way be the responsibility of Grantor. Such personnel or other persons shall not require nor be entitled to any compensation, rights, or benefits of any kind whatsoever from Grantor, including, but not limited to, tenure rights, medical and hospital care, sick and vacation leave, disability benefits, severance pay, or retirement benefits.

Section 8.06 Contract Administration. Grantee's Contract Administrator shall manage this Agreement on behalf of Grantee and serve as liaison between Grantee and Grantor. Grantor's Contract Administrator shall manage this Agreement on behalf of Grantor and serve as liaison between Grantor and Grantee.

Section 8.07 Notices. In addition to any notice required under applicable law to be given in another manner, any notices required hereunder must be in writing, and shall be sufficient if personally served or sent by registered or certified mail (return receipt requested), to the business address of the Party to whom it is directed. Such business address shall be that address specified below or such different address as may hereafter be specified, by either Party by written notice to the other:

To Grantee at:

Metropolitan Council Regional Administrator
Metropolitan Council
390 Robert Street North
Saint Paul, MN 55101

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METRO Gold Line BRT Project Manager
121 7th PI E Ste 102
Saint Paul, MN 55101

To Grantor at:

County Manager, Ramsey County
County Manager's Office
15 W Kellogg Blvd
Saint Paul, MN 55102

County Administrator, Washington County
14949 62nd St N
PO Box 6
Stillwater, MN 55082

Section 8.08 Binding Effect and Assignment or Modification. This Agreement shall be binding upon and inure to the benefit of Grantee and Grantor, and their respective successors and assigns; provided, however, that Grantee may not assign any of its rights or obligations under this Agreement without the prior written consent of Grantor. Unless provided herein, no change or modification of the terms or provisions of this Agreement shall be binding on either Grantee or Grantor unless such change or modification is: (1) in writing; (2) approved by their respective governing boards, provided, however, that a governing board may, by resolution, delegate such authority; and (3) legally executed.

Section 8.09 Waiver. Neither the failure of Grantee or Grantor in any one or more instances to insist upon the complete and total observance or performance of any term or provision hereof, nor the failure of Grantee or Grantor to exercise any right, privilege, or remedy conferred hereunder or afforded by law shall be construed as waiving any breach of such term or provision, or the right to exercise such right, privilege, or remedy thereafter. In addition, no delay on the part of either Grantee or Grantor in exercising any right or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right or remedy preclude other or further exercise thereof or the exercise of any other right or remedy.

Section 8.10 Choice of Law and Venue. All matters relating to the validity, construction, performance, or enforcement of this Agreement shall be determined in accordance with the laws of the State of Minnesota. All legal actions initiated with respect to or arising from any provision contained in this Agreement shall be initiated, filed, and venued in the State of Minnesota District Court located in either County of Ramsey or Washington, State of Minnesota.

Section 8.11 Severability. If any provision of this Agreement is finally judged by any court to be invalid, then the remaining provisions shall remain in full force and effect, and they shall be interpreted, performed, and enforced as if the invalid provision did not appear herein.

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Section 8.12 Counterparts. This Agreement may be executed in any number of counterparts, each of which when so executed and delivered shall be an original, but such counterparts shall together constitute one and the same instrument.

Section 8.13 Supplemental Reports. Grantee shall promptly provide additional information and make supplemental reports to Grantor as may be reasonably requested by Grantor.

Section 8.14 Survival of Obligations. All obligations of Grantee hereunder, including but not limited to those stated in Articles IV and V, not fully performed as of the date of completion of the Grant Project or expiration or earlier termination of this Agreement shall survive such completion of the Grant Project or termination of this Agreement, and Grantee, its successors and assigns shall be fully bound by such obligations, unless waived by Grantor.

Section 8.15 Acknowledgment of Grantor Funding for the Transitway Project. Grantee shall acknowledge Ramsey County and Washington County as funding partners in all promotional, branding, and educational materials related to the Transitway Project.

Section 8.16 Alternative Dispute Resolution. In the event of a dispute between the Parties arising under this Agreement, the Parties agree to attempt to resolve their dispute by following the process described below:

- A. A Party (the "Initiating Party") may initiate this dispute resolution process by providing the other Party (the "Responding Party") with a written notice describing the perceived conflict, the Initiating Party's position, and underlying reasons therefore.
- B. The Responding Party shall, within ten (10) working days of receipt of such notice, provide the Initiating Party with a written response describing its view of the perceived conflict, the Responding Party's position, and underlying reasons therefor.
- C. The Parties shall meet within fourteen (14) working days from the date the Initiating Party receives the Responding Party's response to resolve the dispute. If the Parties are unable to resolve the dispute, the Parties shall meet with a neutral facilitator to be agreed upon by the Parties within ten (10) working days from the date of the meeting. Costs of such facilitator shall be shared equally by the Parties.
- D. At the first meeting the neutral facilitator will assist the Parties in identifying the appropriate parties and participants in the dispute resolution process and their concerns, and will establish a meeting agenda for any subsequent meetings. The Parties shall cooperatively develop a process for resolving the problem, which could involve additional negotiations, mediation, or arbitration.
- E. In developing the process, the Parties will be guided by the following principles:
 - 1) The Parties will attempt in good faith to reach a negotiated settlement.
 - 2) The Parties will be fairly represented.

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- 3) The Parties will use legal proceedings as a last resort.

In the event the Parties are unable to resolve the dispute, each Party shall retain all rights, remedies, and defenses it had prior to entering the process, except that each Party shall be responsible for its own attorneys' fees and costs.

Section 8.17 Compliance with Laws. Grantee shall perform and complete the Grant Project in full compliance with all applicable laws, statutes, rules, ordinances, and regulations issued by any federal, state, or local political subdivisions having jurisdiction over the Grant Project.

Section 8.18 Use of Contractors.

- A. Grantee may enter into agreements with contractors or other entities to perform Grant Project activities. However, Grantee retains responsibility for performance of the Grant Project. The use of such agreements or contracts does not relieve Grantee from any of its obligations under this Agreement.
- B. If Grantee engages any contractors to perform any part of the Grant Project activities, the contract for such services shall include the following provisions, and Grantee shall require any contractors to include these following provisions in any subcontract: (Note: these requirements are in addition to other requirements for such contracts set forth in this Agreement.)
1. The contractor must maintain all records and provide all reporting as required by this Agreement.
 2. The contractor must defend, indemnify, and save harmless Grantor from all claims, suits, demands, damages, judgments, costs, interest, and expenses arising out of or by reason of the performance of the contracted work, caused in whole or in part by any negligent act or omission of the contractor, including negligent acts or omissions of its employees, subcontractors, or anyone for whose acts any of them may be liable.
 3. The contractor must provide and maintain insurance in amounts and types of coverage appropriate to the contracted work and naming Grantor as an additional insured, and provide to Grantee prior to commencement of the contracted work a certificate of insurance evidencing such insurance coverage.
 4. The contractor must be an independent contractor for the purposes of completing the contracted work.
 5. The contractor must acknowledge that the contract between Grantee and the contractor does not create any contractual relationship between Grantor and the contractor.
 6. The contractor shall perform and complete the Grant Project in full compliance with this Agreement and all applicable laws, statutes, rules,

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ordinances, and regulations issued by any federal, state, or local political subdivisions having jurisdiction over the Grant Project.

IN TESTIMONY HEREOF, Grantee and Grantor have executed this Grant Agreement on the day and date indicated immediately below their respective signatures.

**GRANTEE
METROPOLITAN COUNCIL**

By: _____
Regional Administrator

Date: _____

**GRANTOR
GOLD LINE JOINT POWERS BOARD**

By: _____
Chair

Date: _____