

STANDARD CONSTRUCTION AGREEMENT

CONTRACT NUMBER

FILE NUMBER(S)

THIS AGREEMENT is entered into this \_\_\_\_\_ day of \_\_\_\_\_ 2015, in the state of California by and between San Diego Metropolitan Transit System ("MTS"), a California public agency, and the following contractor, hereinafter referred to as "Contractor":

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

Form of Business: \_\_\_\_\_  
(Corporation, partnership, sole proprietor, etc.)

Telephone: \_\_\_\_\_

Authorized person to sign contracts: \_\_\_\_\_  
Name Title

**The attached Standard Conditions are part of this Agreement. The Contractor agrees to furnish to the MTS services and materials, as follows:**

**TOTAL AMOUNT OF CONTRACT SHALL NOT EXCEED \$**

SAN DIEGO METROPOLITAN TRANSIT SYSTEM	CONTRACTOR AUTHORIZATION
By: _____ Chief Executive Officer	Firm: _____
Approved as to form:	By: _____ Signature
By: _____ Office of General Counsel	Title: _____

AMOUNT ENCUMBERED BUDGET ITEM FISCAL YEAR

\$ \_\_\_\_\_

By: \_\_\_\_\_ Chief Financial Officer Date

SA-CONSTRUCTION (Rev 02-15)  
DATE

( \_\_\_ total pages, each bearing contract number)

STANDARD CONDITIONS  
CONSTRUCTION

1. INDEPENDENT CONTRACTOR

Contractor hereby declares that it is engaged in an independent business and agrees that in the performance of this Agreement it shall act as an independent contractor and not as an employee of MTS. Contractor has and hereby retains full control of all the employment, compensation, and discharge of all employees of Contractor assisting in its performance hereunder. Contractor shall be fully responsible for all matters relating to payment of its employees, including compliance with Social Security, withholding tax, and all other laws and regulations governing such matters. Contractor shall be responsible for its own acts and those of its agents and employees during the term of this Agreement. MTS shall be responsible for its own acts and those of its agents and employees during the term of this Agreement. Except as otherwise specifically provided, as an independent contractor, Contractor will be solely responsible for determining means and methods for performing the services described in the scope of work. Contractor shall perform the work contemplated with resources available within its own organization.

2. INSURANCE

Contractor will include the contract number on all insurance-related correspondence, i.e., the insurance certificate itself.

All policies required shall be issued by companies who are licensed or approved to do business in the State of California and hold a current policyholder's alphabetic and financial-size category rating of not less than A-VI, in accordance with A.M. Best.

MTS utilizes the services of a third party insurance monitoring company. As a condition of contract award, Contractor shall submit any required insurance policies to the third party monitoring company of MTS' choosing.

A. COVERAGE REQUIRED - ALL CONTRACTS

(1) Liability

- (a) Commercial General Liability At all times during this contract and, with respect to Products and Completed Operations Liability, for 12 months following the acceptance of the work by MTS, Contractor agrees to maintain Commercial General Liability Insurance utilizing Insurance Services Office (ISO) coverage form CG0001, edition date 10/01 or later, or an equivalent form and with insurance companies acceptable to MTS. The coverage shall contain no restricting or exclusionary endorsements with respect to the performing of services described in the scope of work.

All such policies shall name in the endorsement San Diego Metropolitan Transit System (MTS), San Diego Trolley, Inc. (SDTI), San Diego and Arizona Eastern Railway (SD&AE), San Diego and Imperial Valley Railroad (SD&IV), and San Diego Transit Corporation (SDTC), their directors, officers, agents, and employees as additional insureds as their interests may appear.

- (b) Automobile Liability At all times during this contract, Contractor agrees to maintain Automobile Liability Insurance for bodily injury and property damage including coverage for all owned, nonowned, and hired vehicles.
- (c) Workers' Compensation/Employer Liability At all times during this contract, Contractor agrees to maintain Workers' Compensation and Employers' Liability Insurance in compliance with the applicable statutory requirements. Contractor waives any rights of subrogation against MTS, SDTI, SD&AE, SD&IV, and SDTC, and the policy form must permit and accept such waiver.

B. ADDITIONAL COVERAGES REQUIRED (AS INDICATED)

- (1) Owner-Provided Builder's Risk  
PROVIDED

MTS will provide Builder's Risk Insurance on a special form basis, excluding the perils of earthquake and flood, at a limit of not less than the full replacement value of the work and covering the work and all materials and equipment to be incorporated therein, including property in transit elsewhere, and insuring the interests of the Contractor, subcontractors, materialmen, and MTS, SDTI, SD&AE, SD&IV, SDTC, MTS's contractor for design, and MTS's contractor for construction management. However, Contractor is responsible for the portion of any loss that is within the deductible amount of this Builder's Risk Insurance, which is currently at \$50,000 but is subject to change.

- (2) Railroad Protective or Equivalent  
REQUIRED

Any exclusions relating to performance of operations within the vicinity of any railroad, bridge, trestle, track, roadbed, tunnel, underpass, or crossing must be deleted. Option: purchase separate Railroad Protective Liability Policy as required.

- (3) Professional Liability  
REQUIRED

At all times during this contract, and for 12 months following acceptance of work by owner, Contractor agrees to maintain Professional Liability Insurance with respect to services or operations under this agreement.

(4) Pollution Legal Liability  
REQUIRED

At all times during this contract, and for 24 months following, Contractor agrees to maintain Pollution Legal Liability Insurance with respect to services or operations under this Agreement. The extended discovery period must be no less than 24 months.

(5) Contractor Equipment  
REQUIRED

At all times during this contract, Contractor agrees to maintain Contractor's Equipment Insurance on a special form basis covering equipment owned, leased, or used by Contractor. Contractor waives any rights of subrogation against MTS, SDTI, SD&AE, SD&IV, and SDTC, and the policy form must permit and accept such waiver. Contractor hereby releases and holds harmless MTS for any loss or damage to its equipment.

(6) Installation Floater  
REQUIRED

At all times during this contract, Contractor agrees to maintain Installation Floater Insurance on a special form basis covering property owned or provided by Contractor. Contractor waives any rights of subrogation against MTS, SDTI, SD&AE, SD&IV, and SDTC, and the policy form must permit and accept such waiver. Contractor hereby releases and holds harmless these entities for any loss or damage to its property.

(7) Garage Keeper's Legal Liability & Automobile Portion  
REQUIRED

At all times during this contract, Contractor agrees to maintain Garage Keeper's Legal Liability as well Automobile Portion which covers the risk of loss or damage to MTS vehicles while in the care, custody or control of Contractor. Automobile portion shall cover the Contractor in the event of a vehicle accident while they are driving a MTS vehicle, which results in a third party claim of physical damage or bodily injury.

(8) Construction Work Agreements  
REQUIRED

- (a) Contractor agrees to utilize ISO coverage forms CG2010, 10/85 or ISO coverage forms CG2010 and CG2037, or equivalent forms, to comply with the additional Insured requirement stated in section 2.A.(1)(b).
- (b) Contractor agrees to provide a Designated Project Aggregate Limit Endorsement (per project aggregate) utilizing form CG2503 or equivalent Form.

(9) Crime Fidelity Insurance

REQUIRED

At all times during this contract, Contractor agrees to maintain Crime Fidelity Insurance with respect to services or operations under this agreement. The coverage should include the following:

- Employee dishonesty/theft
- Theft, disappearance and destruction on the premises
- Theft, disappearance and destruction while in transit
- Forgery/alteration

(10) Umbrella or Excess Liability (if required to meet liability limits above)

REQUIRED

Contractor agrees that any Umbrella or Excess Liability Policy utilized to provide the required limits of liability shall contain coverage at least as broad as that provided by the General Liability Policy, and be written for a term concurrent with the General Liability Policy.

(11) Primary and Non-Contributory Insurance

REQUIRED

Contractor agrees that all general liability coverages required under this insurance section are PRIMARY and that any insurance of MTS, SDTI, SD&AE, SD&IV, and SDTC shall be excess and noncontributory (endorsement required).

C. MINIMUM POLICY LIMITS REQUIRED

	<u>Limits</u>
Commercial General Liability (Per Occurrence):	<u>\$1,000,000</u>
(General Aggregate)	<u>\$2,000,000</u>
(Completed Operations & Products Aggregate)	<u>\$2,000,000</u>
Automobile Liability: (Combined Single Limit)	<u>\$1,000,000</u>
Worker's Compensation:	<u>Statutory Limits</u>
Employer's Liability per Accident /or Disease:	<u>\$1,000,000</u>

Additional Coverages (as indicated under Section B, Additional Coverages Required):

- |   |                         |
|---|-------------------------|
| <input type="checkbox"/> B (1) Builder's Risk         | <u>Replacement Cost</u> |
| <input type="checkbox"/> B (2) Railroad Protective    | <u>\$</u>               |
| <input type="checkbox"/> B (3) Professional Liability | <u>\$</u>               |
| <input type="checkbox"/> B (4) Pollution Liability    | <u>\$</u>               |
| <input type="checkbox"/> B (5) Contractor Equipment   | <u>Replacement Cost</u> |

<input type="checkbox"/> B (6) Installation Floater	<u>Replacement Cost</u>
<input type="checkbox"/> B (7) Garage Keeper's Legal Liability (Combined Single Limit (CSL) Per Occurrence)	\$ _____
<input type="checkbox"/> B (8) Construction Work Agreements	\$ _____
<input type="checkbox"/> B (9) Crime Fidelity Insurance	\$ _____
<input type="checkbox"/> B (10) Umbrella or Excess Liability (if required to meet liability limits above)	\$ _____

D. POLICY PROVISION REQUIRED

All policies and coverages shall contain a provision for 30 days written notice by the Insurer(s) to MTS Contracts Specialist of any cancellation or material reduction of coverage. A ten-day notice is required for non-payment of premium.

E. EVIDENCE REQUIRED

Within ten working days following receipt of notice that a contract has been awarded, Contractor shall have provided the MTS Contracts Specialist with satisfactory certification by a qualified representative of the Insurer(s) that Contractor's insurance complies with all provisions in this insurance section.

F. SPECIAL PROVISIONS

The foregoing requirements as to the types and limits of insurance coverage to be maintained by Contractor, and any approval of said insurance by MTS, SDTI, SD&AE, SD&IV, and SDTC, or their insurance Contractor(s) are not intended to and shall not in any manner limit or qualify the liabilities and obligations otherwise assumed by Contractor pursuant to this Agreement, including but not limited to the provisions concerning indemnification.

MTS reserves the right to withhold payments to Contractor in the event of material noncompliance with the insurance requirements outlined above.

3. TERMINATION OF AGREEMENT

A. TERMINATION FOR CONVENIENCE

Performance under this Agreement may be terminated by MTS in accordance with this clause in whole or, from time to time, in part, whenever MTS shall elect. Any such termination shall be effected by delivery to Contractor of a Notice of Termination specifying the extent to which performance under this Agreement is terminated, and the date upon which such termination becomes effective. Upon receipt of any such notice, Contractor shall, unless the notice requires otherwise:

- (1) immediately discontinue performance on the date and to the extent specified in the notice;
- (2) place no further orders for materials other than as may be necessarily required for completion of such portion of the Agreement that is not terminated;
- (3) promptly make every reasonable effort to either obtain cancellation on terms satisfactory to MTS of all orders to Contractor's suppliers to the extent they relate to the performance of that portion terminated, or upon MTS's concurrence assign to MTS those orders; and
- (4) assist MTS, upon request, in the maintenance, protection, and disposition of property acquired by MTS under this Agreement.

If claimed in writing within 30 calendar days after Notice of Termination, MTS will pay to Contractor an equitable adjustment to include (without duplication of any item):

- (1) all amounts due and not previously paid to Contractor for goods completed in accordance with this Agreement prior to such notice;
- (2) a reasonable amount for any goods and materials then in production; provided that no such adjustment be made in favor of Contractor with respect to any goods which are Contractor's standard stock;
- (3) costs of settling and paying supplier's claim arising out of the canceled orders; and
- (4) a reasonable profit for costs incurred in the performance of that portion terminated; provided, however, that if it appears that Contractor would have sustained a loss on the entire Agreement had it been completed, no profit shall be included.

The total sum to be paid to Contractor under this clause shall not exceed the total order price as reduced by the amount of payments otherwise made, and as further reduced by the order price of that portion not terminated, and will not include any consideration for loss of anticipated profits on the terminated portion all claims for which seller agrees to waive.

#### B. TERMINATION FOR DEFAULT

MTS may terminate the whole or any part of Contractor's performance in any one of the following circumstances:

- (1) if Contractor fails to make delivery or fails to perform within the time specified herein or any extension thereof; or
- (2) if Contractor delivers nonconforming goods; or
- (3) if Contractor fails to perform in accordance with the provisions of this Agreement, or so fails to make progress as to endanger performance of this Agreement in accordance with its terms.

In the event of any such failure, MTS will provide Contractor with notice of the nature of the failure and MTS's intention to terminate for default. In the event Contractor does not cure such failure within ten (10) calendar days of such notice, MTS will provide Contractor with written Notice of Termination for Default.

In the event MTS terminates as provided herein, MTS may procure, upon such terms, and in such manner as MTS may deem appropriate, supplies or services similar to those so terminated, and Contractor shall be liable to MTS for any excess costs for such similar supplies or services; and Contractor shall continue the performance of this Agreement to the extent not terminated under the provisions of this clause.

In the event of Contractor's default, Contractor agrees to mitigate damages by cooperating with MTS in transferring information and disposing of goods in process or MTS's materials as MTS may reasonably request. If after Notice of Termination for Default it is determined for any reason that Contractor was not in default under the provisions of this clause, or that the default was excusable under the provisions of this clause, the rights and obligations of the parties shall be the same as if the Notice of Termination had been issued pursuant to the Termination for Convenience clause.

#### 4. INDEMNITY

As between MTS and Contractor, Contractor is deemed to assume responsibility and liability for, and Contractor shall indemnify and hold harmless, MTS, SDTI, SDTC, SD&AE, SD&IV and any and all of its directors, officers, agents or employees from and against any and all claims, loss, damage, charge, or expense, whether direct or indirect, which MTS, SDTI, SDTC, SD&AE, SD&IV or such directors, officers, agents or employees may be put or subjected, by reason of any damage, loss, or injury of any kind or nature whatever to persons or property caused by or resulting from or in connection with any negligent act or action, or any neglect, omission, or failure to act when under a duty to act on the part of Contractor or any of its officers, agents, servants, employees or subcontractors in its or their performance under this Agreement. In addition to any other remedy authorized by law, so much of the money due Contractor under this Agreement as shall be considered necessary by MTS may be retained until disposition has been made of any claim for damages.

#### 5. NONASSIGNMENT

Any attempt by Contractor to assign, subcontract, or transfer all or part of this Agreement shall be void and unenforceable without MTS's prior written consent; which consent shall not be unreasonably withheld. Any such consent shall not relieve Contractor from full and direct responsibility for all services performed prior to the date of assigning, subcontracting, or transferring this Agreement.

#### 6. SUBCONTRACTORS

Any contract in excess of \$25,000, entered into as a result of this contract, shall contain all of the provisions stipulated in this contract to be applicable to subcontractors, including, but not limited to, provisions pertaining to costs, records, and payment methods.



7. NOTICES

All notices or other communications to either party by the other shall be deemed given when made in writing and deposited in the United States Post Office, addressed as follows:

To MTS:

San Diego Metropolitan Transit System  
Attention: Chief Executive Officer  
1255 Imperial Avenue, Suite 1000  
San Diego, CA 92101-7490

To Contractor:

As shown on front face.

8. CONSIDERATION PAID

MTS shall reimburse the Contractor for actual costs (including labor costs, employee benefits, overhead, and other direct costs) incurred by Contractor in performance of the work, in an amount not to exceed \$, exclusive of any fixed fee. Actual costs shall not exceed the estimated wage rates and other costs set forth in Contractor's proposal.

In addition, MTS shall pay the Contractor a fixed fee of \$0.00. Said fixed fee shall not be altered unless there is a significant alteration in scope, complexity, or character of the work to be performed.

Fees and all other charges will be billed monthly as the work progresses, and the net amount shall be due at the time of billing.

Total expenditures made under this contract, including the fixed fee, shall not exceed the sum of \$.

Reimbursement for transportation and subsistence costs shall be in accordance with MTS Board Policy No. 44.

Equipment purchases shall be made in accordance with 49 CFR, Part 18.32.

9. EQUAL EMPLOYMENT OPPORTUNITY PROGRAM

MTS's Equal Employment Opportunity Program for Contractors, MTS Policy No. 25, is part of this Agreement (a copy can be obtained from MTS's Clerk of the Board). A Certificate of Compliance and a Workforce Report form signed by the Contractor is a condition for the award of this contract.

Each Contractor who provides MTS labor, equipment, materials and services of \$50,000 or more per year with fifty (50) or more employees shall have, maintain, and submit an Equal Employment Opportunity (EEO) Plan to the Director of Human Resources and Labor Relations for MTS each year of the contract, and a Workforce Utilization Report on or before January 1 and July 1 for each year of the contract.

10. COST PRINCIPLES

The Contractor agrees that the Contract Cost Principles and Procedures, 48 CFR, Federal Acquisition Regulations System, Chapter 1, Part 31, shall be used to determine the allowability of individual items of cost.

The Contractor also agrees to comply with federal procedures in accordance with 49 CFR, Part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to state and local governments.

Any costs for which payment has been made to the Contractor that are determined by subsequent audit to be unallowable under 48 CFR, Federal Acquisition Regulations System, Chapter 1, Part 31, or 49 CFR, Part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to state and local governments, are subject to repayment by the Contractor to MTS.

11. APPROVAL OF CONTRACTS OVER \$100,000

The Chief Executive Officer approves contracts up to \$100,000; contracts over \$100,000 must be approved by the MTS Board of Directors.

12. NOTICE OF POTENTIAL CLAIM FOR OUT-OF-SCOPE WORK

The Contractor shall not be entitled to additional compensation for out-of-scope work unless he has given MTS a written notice of potential claim for any such work. The written notice of potential claim shall set forth the reasons for which the Contractor believes additional compensation will or may be due, the nature of the out-of-scope work involved and, insofar as possible, the amount of the potential claim. The notice must be given to MTS prior to the time Contractor shall have performed the work, if based on an act or failure to act by MTS, or in all other cases within 15 days after the happening of the event, thing, occurrence, or other cause, giving rise to the potential claim.

It is the intention of this section that any claim for out-of-scope work be brought to the attention of MTS at the earliest possible time in order that matters related to any such work can be settled in a prompt manner. The Contractor hereby agrees that he shall have no right to additional compensation for any claim for out-of-scope work for which no written notice of potential claim as herein required was filed.

13. LITIGATION EXPENSES

Should litigation be necessary to enforce any term or provision of this Agreement, or to collect any portion of the amount payable under this Agreement, then all litigation and collection expenses, witness fees, court costs, and attorney's fees shall be paid to the prevailing party.

14. **DISADVANTAGED BUSINESS ENTERPRISE (DBE) PARTICIPATION (*applies to federally funded contracts only*)**

This project is subject to Title 49, Code of Federal Regulations part 26 (49 C.F.R. 26), entitled "Participation by Disadvantaged Business Enterprises (DBEs) in Department of Transportation Financial Assistance Programs." MTS' DBE program has an aspirational goal of 4.1% participation by certified DBE's over the Fiscal years 2013 to 2015 time period.

In order to help MTS achieve its federally mandated overall DBE goal, MTS encourages the participation of DBEs as defined in 49 C.F.R. 26 in the performance of contracts financed, in whole or in part, with federal funds. Contractor is also encouraged to use services offered by financial institutions owned and controlled by DBEs. The Contractor shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of subcontracts.

In order to ascertain whether its overall DBE goal is being achieved, MTS is tracking DBE participation on all federal-aid contracts. Therefore, all successful proposers are required to report the DBE status of all participants after award of any contract. If only a portion of any contract will be performed by a certified DBE, then the portion of work performed and associated contract price shall also be reported. If the proposed prime contractor is not a certified DBE, MTS encourages the proposer to outreach to DBEs for subcontracting opportunities on this project. There is no specific DBE goal for this project; participation of DBEs is not a condition of execution of this Agreement.

Contractor shall be fully informed in respect to the requirements of the DBE regulations. The DBE regulations in their entirety are incorporated herein by this reference (see 49 USC 26; 49 CFR 26). Contractor's attention is directed to the following matters:

- A. A DBE must be a small business concern as defined pursuant to Section 3 of U.S. Small Business Act and relevant regulations promulgated pursuant thereto.
- B. A DBE may participate as a prime contractor, subcontractor, joint-venture partner with a prime or subcontractor, vendor of materials or supplies, or as a trucking company.
- C. A DBE joint-venture partner must be responsible for specific contract items of work or clearly defined portions thereof. Responsibility means actually performing, managing, and supervising the work with its own forces. The DBE joint venture partner must share in the capital contribution, control, management, risks, and profits of the joint venture commensurate with its ownership interest.
- D. A DBE must perform a commercially useful function; i.e., must be responsible for the execution of a distinct element of the work and must carry out its responsibility by actually performing, managing, and supervising the work.
- E. DBEs must be certified by the California Unified Certification Program (CUCP). Listings of DBEs certified by the CUCP are available from the following sources:
  1. Caltrans' "Civil Rights" Web site at: <http://www.dot.ca.gov/hq/bep>.
  2. Caltrans' DBE Directory This Directory may be obtained from the Department of Transportation, Material Operations Branch, Publication Distribution Unit, 1900 Royal Oaks Drive, Sacramento, California 95815, Telephone: (916) 445-3520.

- F. When reporting DBE participation, the Contractor may count the cost of materials or supplies purchased from DBEs as follows:
1. If the materials or supplies are obtained from a DBE manufacturer, 100 percent of the cost of the materials or supplies. A DBE 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 by the specifications.
  2. If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies. A DBE 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 or leased to the public in the usual course of business. To be a DBE 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. A person may be a DBE 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 this paragraph 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 agreement and not on an ad hoc or contract-by-contract basis. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not DBE regular dealers within the meaning of this paragraph.
  3. If the DBE is neither a manufacturer nor a regular dealer, count only 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, provided the fees are reasonable and not excessive as compared with fees charged for similar services.
  4. Materials or supplies purchased from a DBE, which is neither a manufacturer nor a regular dealer, will be limited to 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 the job site, provided the fees are reasonable and not excessive as compared with fees charged for similar services.
- G. When reporting DBE participation, the Contractor may count the participation of DBE trucking companies as follows:
1. The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract.
  2. The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
  3. 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.

4. 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.
5. 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 a DBE.
6. For the purposes of paragraph 14(G), 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 use of the leased truck. Leased trucks must display the name and identification number of the DBE.
7. Prior to the fifteenth of each month, the Contractor shall submit documentation to MTS showing the amount paid to DBE trucking companies. The Contractor shall also obtain and submit documentation to MTS showing the amount paid by DBE trucking companies to all firms, including owner-operators, for the leasing of trucks. If the DBE leases trucks from a non-DBE, the Contractor may count only the fee or commission the DBE receives as a result of the lease arrangement. The Contractor shall also submit to MTS documentation showing the truck number, name of owner, California Highway Patrol CA number, and if applicable, the DBE certification number of the truck owner for all trucks used during that month

If a DBE subcontractor is decertified during the life of the project, the decertified subcontractor shall notify the Contractor in writing with the date of decertification.

If a subcontractor becomes a certified DBE during the life of the project, the subcontractor shall notify the Contractor in writing with the date of certification. The Contractor shall furnish the written documentation to the Engineer.

15. PROMPT PAYMENT **[Choose either the first, OR second, OR third paragraph, then delete this line.]**

The agency shall hold retainage from the prime contractor and shall make prompt and regular incremental acceptances of portions as determined by the agency of the contract work and pay retainage to the prime contractor based on these acceptances. The prime contractor or subcontractor shall return all monies withheld in retention from a subcontractor within 30 days after receiving payment for work satisfactorily completed and accepted, including incremental acceptances of portions of the contract work by the agency. Federal regulation (49 CRF 26.29) requires that any delay or postponement of payment over 30 days may take place only for good cause and with the agency's prior written approval. Any violation of this provision shall subject the violating prime contractor or subcontractor to the penalties, sanctions, and other remedies specified in Section 7108.5 of the California Business and Professions Code. These requirements shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise available to the prime contractor or subcontractor in the event of a dispute

involving late payment or nonpayment by the prime contractor deficient subcontract performance, or noncompliance by a subcontractor. This provision applies to both DBE and non-DBE prime contractors and subcontractors.

**OR this**

A prime contractor or subcontractor shall pay any subcontractor no later than ten days from the receipt of each progress payment in accordance with the provision in Section 7108.5 of the California Business and Professions Code concerning prompt payment to subcontractors. The ten days is applicable unless a longer period is agreed to in writing. Any delay or postponement of payment over 30 days may take place only for good cause and with the agency's prior written approval. Any violation of Section 7108.5 shall subject the violating contractor or subcontractor to the penalties, sanctions, and other remedies of that Section. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise, available to the contractor or subcontractor in the event of a dispute involving late payment, or nonpayment by the contractor, deficient subcontractor performance, noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

**OR this**

**(Use this provision for engineering, surveying, environmental, architectural, landscaping, or construction project management services when state or federal highway funds are being used per Mara Elliott, May 2001.)**

No retainage will be held by the agency from progress payments due to the prime contractor. Any retainage kept by the prime contractor or by a subcontractor must be paid in full to the earning subcontractor in 30 days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment may take place only for good cause and with MTS's prior written approval. Any violation of these provisions shall subject the violating contractor or subcontractor to the penalties, sanctions, and remedies specific in Section 7108.5 of the California Business and Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise, available to the prime contractor, or subcontractor in the event of a dispute involving late payment, or nonpayment by the contractor, or deficient subcontractor's performance, or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

16. RECORDS RETENTION

The Contractor shall maintain all books, documents, papers, accounting records, and other evidence pertaining to the performance of the contract including, but not limited to, the costs of administering the contract. The Contractor shall make such materials available at its respective office at all reasonable times during the Agreement and for three years from the date of final payment under the contract. MTS, the state, the State Auditor, or any duly authorized representative of the federal government shall have access to any books, records, and documents of the Contractor that are pertinent to the contract for audit examination, excerpts, and transactions, and copies thereof shall be furnished if requested.

17. COVENANT AGAINST CONTINGENT FEES

Contractor warrants that it has not employed or retained any company or person, other than a bona fide employee working for Contractor, to solicit or secure this Agreement, and that s/he has not agreed to pay any company or person, other than a bona fide employee, any fee, commission, percentage, brokerage fee, gift, or any other consideration, contingent from or resulting from the award or formation of this Agreement. For breach or violation of this warranty, MTS shall have the right to annul this Agreement without liability, or at its discretion to deduct from the Agreement price or consideration, or otherwise recover the full amount of such fee, percentage, brokerage fee, gift, or contingent fee.

18. OWNERSHIP OF DOCUMENTS

Tracings, plans, specifications, and maps prepared or obtained under the terms of this Agreement shall be delivered to and become the property of MTS. Basic survey notes and sketches, charts, computations, and other data prepared or obtained under this Agreement shall be made available, upon request, to MTS without restriction or limitation on its use.

19. TIME

The Contractor acknowledges that timely performance is an important element of this Agreement. Accordingly, the Contractor shall put forth its best professional effort to complete its services in accordance with the agreed-upon schedule.

20. ENTIRE AGREEMENT

This Agreement is the entire agreement of the parties and no attempted modification shall be binding unless in writing and signed by the MTS Board and Contractor. All questions pertaining to the validity and interpretation of this Agreement shall be determined in accordance with the laws of California applicable to contracts made to be performed within the state.

21. NON DISCRIMINATION BY CONTRACTOR

The Contractor 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 MTS deems appropriate.

22. DISPUTES, CLAIMS, AND RESOLUTION

MTS and the Contractor agree that every effort shall be made to resolve any dispute arising under this agreement informally through their designated representatives. If the informal efforts are unsuccessful, then either party may request mediation by submitting a written request signed by an officer with the authority to bind the Contractor or MTS. Within five (5) business days of the request of any party, the parties shall mutually agree on the person or

alternative dispute resolution agency to conduct the mediation. If the parties are unable to agree on the person or alternative dispute resolution agency to conduct the mediation, the initiating party may arrange for the office of the American Arbitration Association in downtown San Diego, California, to perform the mediation. The initiating party shall then schedule the mediation so that it is conducted within fifteen (15) business days of the mediator's appointment. The costs of the mediation and fees of the mediator, if any, shall be borne by the requesting party. Any dispute not resolved through the mediation may proceed to litigation in a court of competent jurisdiction in the County of San Diego, State of California, unless the parties agree in writing to submit the dispute to binding arbitration.

Should the Contractor suffer any injury or damage to person or property because of any alleged act or omission of MTS, or if any of Contractor's employees, agents, or others for whose acts the Contractor is legally liable suffers any injury or damages to person or property because of any alleged act or omission of MTS, a written claim for damages shall be filed with the MTS Office of General Counsel in accordance with the provisions of California Government Code section 800 et seq.

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

#### 23. DUTY TO CLARIFY OBVIOUS AMBIGUITY

The Contractor is required to seek clarification of any obvious ambiguity contained in the contract documents. Failure to do so will result in an interpretation of the ambiguous provision favorable to MTS should a dispute later arise concerning that provision.

#### 24. PREVAILING WAGE

##### A. PUBLIC WORK

Work performed by Contractor and Subcontractor in accordance with this Contract may be a public work under California Labor Code, 1720, et seq. All public work projects are subject to compliance monitoring and enforcement by the Department of Industrial Relations (DIR).

The following requirements listed in this section apply to any bid proposal submitted on or after March 1, 2015 and any contract for public work entered into on or after April 1, 2015:

A contractor or subcontractor shall not be qualified to bid on, be listed in a bid proposal subject to the requirements of Public Contract Code, 4104, or engage in the performance of any contract for public work unless currently registered and qualified by the DIR to perform a public work project pursuant to Labor Code, 1725.5. (Labor Code, 1771.1 subd. (a)).



MTS will not accept a bid or enter into any contract or subcontract without proof of the Contractor and Subcontractor's current registration to perform public work pursuant to Labor Code, 1725.5. (Labor Code, 1771.1 subd. (b)). If a contract is entered into with an unregistered contractor or subcontractor, the contract shall be subject to cancellation, but shall not be voided solely for failure to comply with Labor Code, 1725.5 or 1771.1.

If an unregistered contractor submits a bid that is authorized by Business and Professions Code, 7029.1 or by Public Contract Code, 10164 or 20103.5, it will not be violation of Labor Code, 1771.1 so long as the contractor is registered at the time the contract is awarded.

If by inadvertent error an unregistered subcontractor is listed in a bid proposal, it shall not be grounds for filing a bid protest or grounds for considering the bid nonresponsive, provided that any of the following apply: 1) subcontractor is registered at bid opening; 2) within 24 hours after the bid opening, the subcontractor is registered and has paid the penalty registration fee; or 3) the subcontractor is replaced by another registered subcontractor pursuant to Public Contract Code, 4107.

To register with the DIR, use the following link: <http://www.dir.ca.gov/Public-Works/PublicWorks.html>.

## B. PREVAILING WAGE

### (1) Payment of Prevailing Wage

If work performed under this Contract is a public work, state prevailing wages may be applicable. When applicable, the Contractor shall pay its employees the general prevailing rate of wages as determined by the Director of the DIR for all public works projects (See Labor Code, 1771, 1774).

It is the sole responsibility of Contractor to ensure that all workers who perform work pursuant to this Contract are paid the correct rate of prevailing wages. This includes ensuring compliance with the requirements relating to the employment and payment of prevailing wage to apprentices, in accordance with Labor Code, 1777.5. Noncompliance with state prevailing wage regulations may be subject to penalties, as prescribed in Labor Code, 1775, 1776, 1813 and 1815.

If Contractor will receive federal funds, this Contract may also be subject to the payment of prevailing wages pursuant to the Davis-Bacon Act, 40 U.S.C. 3141 et seq., and other federal laws. When working on a federally funded project, Contractor shall ensure that all workers entitled to the payment of prevailing wages receive the higher of the applicable State or federal prevailing wage.

MTS has obtained from the Director of the DIR general prevailing wage determinations for the locality in which work is being performed. These determinations are on file and available at MTS' offices located at 1255 Imperial Avenue, Suite 1000, San Diego, California 92101, and are available from the DIR on the internet at <http://www.dir.ca.gov/DLSR/PWD/>. Federal prevailing wage rates are available from the U.S. Department of Labor on the internet at [www.access.gpo.gov](http://www.access.gpo.gov).

(2) Certified Payroll

If work performed under this Contract is a public work, each Contractor and Subcontractor shall comply with Labor Code, 1776 regarding maintaining accurate payroll records. This includes certifying the payroll records and making the certified payroll records available for inspection or furnishing upon request.

(3) Job Site Notice

For all public work contracts awarded on or after January 1, 2015, the prime contractor shall post a notice at each job site stating prevailing wage rates will be enforced in accordance with 8 CCR 16451 subd. (d). In addition, the prime contractor shall post a notice at each job site of the applicable DIR prevailing wage rates in accordance with Labor Code, 1773.2.

25. ROYALTIES AND PATENT FEES

The Contractor shall pay all royalties and patent fees, and shall defend all suits and claims for infringements of any patent rights, and shall hold MTS harmless from loss on account thereof. If however, the Contractor has information that the procedures or articles specified are an infringement of a patent, the Contractor shall be responsible for any loss unless said information is promptly given to MTS by Contractor.

26. PATENT RIGHTS

A. General.

If any invention, improvement, or discovery of MTS, or any of its third party contractors, is conceived or first actually reduced to practice in the course of, or under this Project, and that invention, improvement, or discovery is patentable under the laws of the United States of America or any foreign country, MTS is required to notify FTA immediately and provide a detailed report.

B. Federal Rights.

Unless the Federal Government later makes a contrary determination in writing, the rights and responsibilities of MTS, third party contractor, subrecipient and the Federal Government pertaining to that invention, improvement, or discovery will

be determined in accordance with applicable federal laws, regulations, including any waiver thereof. Unless the Federal Government later makes a contrary determination in writing, MTS, irrespective of its status or the status of any subrecipient or any third party contractor at any tier (i.e., a large business, small business, state government or state instrumentality, local government, nonprofit organization, institution of higher education, individual, etc.), MTS shall transmit to FTA those rights due the Federal Government in any invention resulting from that third party contract described in U.S. Department of Commerce regulations, "Rights to Inventions Made by Nonprofit Organizations and Small Business firms Under Government Grants, Contracts, and cooperative Agreements," 37 C.F.R. Part 401.

## 27. RIGHTS IN DATA AND COPYRIGHTS

### A. Definition.

The term "subject data" used in this section means recorded information, whether or not copyrighted, that is delivered or specified to be delivered under the Grant Agreement or Cooperative Agreement. 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 Project administration.

### B. Federal Restrictions. The following restrictions apply to all subject data first produced in the performance of the Grant Agreement or Cooperative Agreement:

1. Except for its own internal use, Contractor may not publish or reproduce subject data in whole or in part, or in any manner or form, nor may 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.
2. This restriction on publication, however does not apply to an Agreement with an institution of higher learning.

### C. Federal Rights in Data and Copyrights. In accordance with 49 C.F.R. § 19.34 and 49 C.F.R. § 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 the "subject data" described in the following subsection 1 and 2. As used in the previous sentence, "for Federal Government purposes," means use only for the direct purposes of the Federal Government. Without the copyright's owner's consent, the Federal Government may not extend its federal license to other parties.

1. Any subject data developed in the Grant Agreement or Cooperative Agreement, or under a third party contract or subagreement financed by the Grant Agreement or Cooperative Agreement, whether or not a copyright has been obtained; and

2. Any rights of copyright to which MTS, a subrecipient or third party contractor purchases ownership with federal assistance.
- D. Special Federal Rights for Planning, Research, and Development Projects. When FTA provides financial assistance for a planning, research, development or a Demonstration Project, it is FTA's general intention to increase transportation knowledge, rather than limit the benefits of the Project to participants in the Project. Therefore, unless FTA determines otherwise, the Recipient of FTA financial assistance to support a planning, research, development, or a Demonstration Project agrees that in addition to the rights in data and copyrights of Subsection C of this Section, FTA may make available to any FTA recipient, subrecipient, third party contractor, or third party subcontractor, either FTA's license in the copyright to the subject data derived under the Grant Agreement or Cooperative Agreement, or a copy of the subject data first produced under the Grant Agreement or Cooperative Agreement. If the Project, which is the subject of the Grant Agreement or Cooperative Agreement, is not completed for any reason whatsoever, all data developed under that Project shall become subject data as defined in Subsection A of this Section and shall be delivered as the Federal Government may direct. This Subsection D of this Section, however, does not apply to adaptations of automatic data processing equipment or programs for MTS' use whose costs are financed with Federal transportation funds for capital projects.
- E. Hold Harmless. Unless prohibited by state law, upon request by the Federal Government, Contractor agrees to indemnify, save, and hold harmless MTS, the Federal Government and 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 this project, the Grant Agreement or Cooperative Agreement. Contractor shall not be required to indemnify the Federal Government for any such liability arising out of the wrongful acts of employees or agents of Federal Government.
- F. Restrictions on Access to Patent Rights. Nothing contained in this section 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.
- G. Application to Materials Incorporated into Project. The requirements of Subsections B, C and D of this Section, do not apply to material furnished by Contractor, and incorporated into the work carried out under this project, the Grant Agreement or Cooperative Agreement, provided that Contractor identifies the incorporated material at the time of delivery of the work.

## 28. ACCESS REQUIREMENTS FOR PERSONS WITH DISABILITIES

The Contractor shall comply with all applicable requirements of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 et seq.; section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; 49 U.S.C. § 5301(d); and the

following federal regulations including any amendments thereto:

- A. U.S. DOT regulations, "Transportation Services for Individuals with Disabilities (ADA)," 49 C.F.R. Part 37;
- B. U.S. DOT regulations, "Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance," 49 C.F.R. Part 27;
- C. U.S. DOT regulations, "Americans with Disabilities (ADA) Accessibility Specifications for Transportation Vehicles," 49 C.F.R. Part 38;
- D. U.S. DOJ regulations, "Nondiscrimination on the Basis of Disability in State and Local Government Services," 28 C.F.R. Part 35;
- E. U.S. DOJ regulations, "Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities," 28 C.F.R. Part 36;
- F. U.S. GSA regulations, "Accommodations for the Physically Handicapped," 41 C.F.R. Subpart 101-19;
- G. U.S. Equal Employment Opportunity Commission, "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 29 C.F.R. Part 1630;
- H. U.S. Federal Communications Commission regulations, "Telecommunications Relay Services and Related Customer Premises Equipment for the Hearing and Speech Disabled," 47 C.F.R. Part 64, Subpart F;
- I. FTA Regulations, "Transportation for Elderly and Handicapped Persons," 49 C.F.R. Part 609; and
- J. Any implementing requirements FTA may issue.

29. METRIC SYSTEM

As required by U.S. DOT or FTA, Contractor agrees to use the metric system of measurement in its Project activities, in accordance with the Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act, 15 U.S.C. §§ 205a *et seq.*; Executive Order No. 12770, "Metric Usage in Federal Government Programs," 15 U.S.C. §§ 205a note; and any U.S. DOT or FTA regulations, guidelines, and policies. To the extent practicable and feasible, Contractor agrees to accept products and services with dimensions expressed in the metric system of measurement.

30. SUBSTANCE ABUSE

Pursuant to the rules and regulations of the Department of Transportation, Contractor will be required to comply with all applicable drug and alcohol testing requirements, including the amendments to 49 C.F.R. parts 655.

As a condition of this Contract, the following are the Contractor's Drug and Alcohol Testing Obligations:

- A. Contractors Certification: Contractor certifies that it will comply with all applicable drug and alcohol testing requirements provided by law, including, but not limited to, the drug and alcohol testing requirements set forth in the Department of Transportation's regulations.
- B. Indemnification of MTS: Contractor agrees to indemnify, defend and hold harmless MTS, SDTI and SDTC, and their directors, employees and agents from and against any loss, damage, expense and liability that MTS, SDTI or SDTC, may incur as a result of Contractor's failure to comply with any applicable drug and alcohol testing obligations.
- C. Survival of MTS' Indemnification Rights: The rights and obligations contained in "B" (Indemnification of MTS) will survive any termination or expiration of this Agreement.
- D. Failure to comply with Drug and Alcohol Testing Obligations May Result in Termination of Contract: If, at any time during the period of this Agreement, Contractor fails to comply with any applicable drug and alcohol testing requirements, MTS will consider such failure a material breach of this Agreement, and MTS may terminate this Agreement immediately.

31. IDENTIFICATION OF PERSONNEL/SECURITY

MTS shall provide Contractor personnel who enter upon MTS property with "Contractor Identification Badges." All personnel shall display these badges prominently upon their persons while on MTS properties. MTS will allow only properly certified personnel of the Contractor on its properties. MTS shall have the right to require the Contractor to conduct background checks on its employees and to remove from MTS properties an employee MTS considers incompetent, careless, or who constitutes a security risk or safety hazard. The Contractor's personnel must have appropriate documentation, as determined by the Contract Administrator, to gain access to MTS properties. The Contract Administrator will advise the Contractor in writing of necessary documentation and identification required to gain access to MTS properties based upon the Federal Department of Homeland Security threat level in effect from time-to-time, and subject to any additional security requirements mandated by the Federal Department of Homeland Security, the Federal Transit Administration, or any other federal or state agency.

32. NONWAIVER

Failure of MTS to insist upon strict performance of any of the terms and conditions hereof, or failure or delay to exercise any rights or remedies provided herein, or by law, or to properly notify Contractor in the event of breach, or the acceptance of payment for any goods hereunder, or review of design, shall not release Contractor from any of the warranties or obligations of this agreement, and shall not be deemed a waiver of any right of MTS to insist regardless when shipped, received, or accepted or as to any prior or subsequent default hereunder, nor shall any revision of this agreement by MTS

operate as a waiver of any of the terms hereof. A requirement that a Contractor's document be submitted for or subject to "authorization to proceed," "approval," "acceptance," "review," "comment," or combinations of such words or words of like import shall mean, unless the context clearly indicates otherwise, that Contractor shall, before implementing the information in the document, submit the document, obtain resolution of any comments, and obtain written authorization from MTS to proceed, and shall mean that a complete check will be performed. Authorization to proceed shall not constitute acceptance or approval of design details, calculations, analyses, test methods, or materials developed or selected by Contractor and shall not relieve Contractor from full compliance with contractual obligations.

TYPIST ID  
SA-CONSTRUCTION (Rev 2-15)  
DATE

Attachment: Certificate of Compliance

**CERTIFICATE OF COMPLIANCE  
WITH MTS EQUAL OPPORTUNITY PROGRAMS AND DBE CONTRACTOR INFORMATION FORM**

I hereby certify that, in performing under contract(s) or purchase order(s) awarded by the San Diego Metropolitan Transit System (MTS), I will comply with the provisions of MTS Equal Employment Opportunity Program, and rules and regulations adopted pursuant thereto, Title VI of the Civil Rights Act of 1964, the California Fair Employment Practices Act, and any other applicable federal and state laws and regulations relating to equal employment opportunity, including laws and regulations hereinafter enacted.

DBE subcontractor participants are listed below, the successful bidder must execute and return this form even if no DBE participation will be reported:

Company Name and Address	Description of Work	Dollar Amount

If 100% of item is not to be performed or furnished by DBE, describe exact portion of item to be performed or furnished by DBE. I agree to make a good faith effort to meet the goals of this plan as part of my contractual obligations to MTS.

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

Firm: \_\_\_\_\_

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

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