

Purchase Order Terms & Conditions

1. **AGREEMENT** – NCTD has contracted with Contractor to provide goods and/or services via a purchase order. The terms in this document, the aforementioned purchase order, Contractor's bid or proposal, and, if applicable, any NCTD solicitation documents, shall be referred to in total as the Agreement. In addition, should the purchase order indicate that NCTD will use federal funds to pay Contractor, the clauses following these General Purchase Order Terms & Conditions, entitled Required Clauses for Federal Funding (Federal Terms) shall also apply and shall supersede any conflicting terms elsewhere in the Agreement. Notwithstanding the foregoing, documents submitted or referenced by Contractor in its bid or proposal that conflict with the terms of the Agreement or the Federal Terms (if applicable), are hereby rejected by NCTD.
2. **INSPECTION AND ACCEPTANCE** - All items are subject to final inspection and acceptance by NCTD at the destination identified in NCTD's purchase order notwithstanding any payment or prior inspection at Contractor's facilities. Final inspection will be made within a reasonable time after receipt of items hereunder.
3. **CHANGES** - By written notice or order, NCTD may, from time to time, order work suspension or make changes in quantities, drawings, designs, specifications, place of delivery or delivery schedules, methods of shipment and packaging, and property and services furnished. If any such change causes an increase or decrease in the price of this Agreement or in the item required for its performance, Contractor or NCTD shall promptly notify the other party thereof and assert its claim for adjustment within thirty (30) days after the change is ordered, and an equitable adjustment shall be made. Nothing in this clause, however, shall excuse Contractor from proceeding immediately with the Agreement as changed.
4. **SALES AND USE TAX** - Unless otherwise specified, Contractor acknowledges that prices stated in the order portion of this Agreement include sales or use tax. NCTD is not exempt from sales and use tax.
5. **DEFAULT AND EXCESS REPROCUREMENT LIABILITY** - NCTD may terminate this Agreement if a federal or state proceeding for the relief of debtors is undertaken by or against Contractor, or if Contractor makes an assignment for the benefit of creditors, or if Contractor fails, after reasonable notice by NCTD to cure a deficiency in performance or lack of progress thereto, and NCTD shall have such additional remedies as may be available whether or not it so terminates this Agreement, including, but not limited to, the payment by Contractor to NCTD of expenses incurred by NCTD in reprocurring elsewhere the same or similar items or services defaulted by Contractor hereunder, provided such Contractor's reprocurement expenses obligation shall be limited to the excess over the price specified herein for such items or services.
6. **INDEMNIFICATION** - Contractor shall indemnify, defend, and save harmless NCTD from and against any loss, damage, claim, or harm for bodily injuries, including death, or damage to property caused by Contractor or its employees, subcontractors, or suppliers in connection with the performance of this Agreement.
7. **ASSIGNMENTS AND SUBCONTRACTORS** - Neither this Agreement nor any interest herein nor claim hereunder may be assigned by Contractor either voluntarily or by operation of law, nor may all or substantially all of this Agreement be further subcontracted by Contractor without the prior written consent of NCTD. No consent shall be deemed to relieve Contractor of its obligations to comply fully with the requirements hereof.
8. **FEDERAL, STATE AND LOCAL LAWS** - Contractor warrants that in the performance of this Agreement it shall comply with all applicable federal, state and local laws and ordinances and all lawful orders, rules and regulations thereunder.
9. **INFRINGEMENT INDEMNITY** - In lieu of any other warranty by NCTD or Contractor against infringement, statutory or otherwise, it is agreed that Contractor shall defend at its expense, any suit against NCTD based on a claim that any item furnished under this Agreement or the normal use or sale thereof infringes any United States Letters Patent or copyright and shall pay cost and damages finally awarded in any such suit, provided that Contractor is notified in writing of the suit and given authority, information, assistance at Contractor's expense for the defense of same. If the use or sale of said item is enjoined as a result of such suit, Contractor, at no expense to NCTD, shall obtain for Contractor the right to use and sell said item, or shall substitute an equivalent item acceptable to NCTD and extend this patent indemnity hereto.
10. **CONTRACTOR'S WARRANTIES** - Contractor warrants all goods and materials to meet the specification or other requirements of this order for a period of one year or for the term of any third party warranties, whichever term is longer. NCTD may return any goods or materials which are defective, unsatisfactory, or of inferior quality or workmanship. Such goods or materials shall, unless used by NCTD, remain the property of Contractor and may be returned at Contractor's risk and expense. Contractor shall reimburse NCTD for all prior payments therefor and/or costs incurred in connection with delivery or return of such goods or materials.
11. **SYSTEM AND DATA SECURITY** - For purposes of the Agreement, NCTD Data means: All information, data, and other content, including Sensitive Information and other information, whether or not made available by NCTD or NCTD's agents, representatives or users, to Contractor or its employees, agents, representatives or subcontractors, and any information, data and content directly derived from the foregoing, including data reflecting user access or use. NCTD Data is at all times exclusively owned by NCTD and shall not be reused, sold, transferred or provided to anyone for any reason without NCTD's permission. CONTRACTOR shall immediately inform NCTD in the event of an improper release of NCTD Data. For purposes of the Agreement, "Sensitive Information" includes, but is not limited to, trade secret information; documents marked as confidential; medical records; personnel records, home addresses and phone numbers of any person, social security numbers, credit card numbers, bank account numbers or any other personally identifiable information protected by California law; and knowledge of selections of contractors or subcontractors in advance of an official announcement by NCTD. Contractor will bear full responsibility for ensuring that any product or service provided does not introduce, via any means, any spyware, adware, ransomware, rootkit, keylogger, virus, trojan, worm, or any other malicious code or mechanism designed to permit unauthorized access to or recording of NCTD Data, or which may restrict any authorized user's access to or use of NCTD Data. Contractor shall not use for financial gain, disclose, or make other improper use of NCTD Data or Sensitive Information that is acquired in connection with the Agreement. All financial, statistical, personal, technical, or other data and information relative to a party's or another entity's operations, which are designated confidential by a party and made available to the other party in order to carry out the Agreement, shall be protected by the receiving party from unauthorized use and disclosure.
12. **STANDARD OF CARE** - Contractor's services shall be performed in accordance with generally-accepted professional practices and principles and in a manner consistent with the level of care and skill ordinarily exercised by members of the profession currently practicing under similar conditions. All services shall be performed to the reasonable satisfaction of NCTD. Errors or omissions identified in the Contractor's services or work product and deemed to be due to Contractor's negligence shall be corrected upon written notification by NCTD, and no additional payment shall be made for said corrections. Corrections of errors or omissions to the CONTRACTOR's work product shall not limit enforcement of any other provision of the Agreement.
13. **PAYMENT TERMS** - Payment will be made Net 30, notwithstanding any provision to the contrary in invoices or other documentation from Contractor. Payments may be withheld or portions thereof may be deducted or set-offs may be made against Contractor if Contractor is not performing work in accordance with the applicable provisions of the Agreement. The time for payment of invoices shall run only from the date of receipt of correct invoices with any certification documents required by NCTD. Contractor must submit its invoice within sixty (60) days of completing the order. Failure to observe this time limitation may constitute a waiver of all claims for payment of the invoice. Invoices shall be prepared and submitted in duplicate to the address shown on the Agreement. Separate invoices are required for each Agreement and shall reference the Agreement number, item number, description of supplies or services, sizes, unit of measure, quantity, unit price, and extended totals.
14. **DISPUTES** - This Agreement shall be interpreted in accordance with the laws of the State of California. In the event Contractor has a dispute with NCTD during the performance of this Agreement, Contractor shall continue to perform, unless NCTD informs Contractor in writing to cease performance. Contractor shall submit a statement of the grounds for the dispute including all pertinent dates, names of persons involved, and supporting documentation to the NCTD Project Manager. The Project Manager and other appropriate NCTD staff will review the documentation in a timely manner and reply to Contractor within twenty (20) days. Upon receipt of an adverse decision by NCTD, Contractor may submit a request

for reconsideration to the NCTD Executive Director. The request for reconsideration must be received within ten (10) days from the postmark date of the NCTD reply. The Executive Director will respond to the request for reconsideration within ten (10) working days. The decision of the Executive Director will be final and in writing. If Contractor is dissatisfied with the results following exhaustion of the above dispute resolution procedures, Contractor shall make a written request to NCTD for mediation. NCTD shall respond to a request for mediation within thirty (30) calendar days. If NCTD agrees mediation is appropriate, a mutually acceptable mediator shall be selected by the parties and the parties will proceed to mediation of the dispute. If any action is brought to interpret or enforce any term of this Agreement, the action shall be brought in a state or federal court situated in the County of San Diego, State of California. In the event of any such litigation between the parties, the prevailing party shall be entitled to recover all reasonable costs incurred, including reasonable attorneys' fees, litigation and collection expenses, witness fees, and court costs as determined by the court.

15. **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 NCTD. 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, maintaining sufficient workers compensation insurance, 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.
16. **INSURANCE** – Except when the procurement involves a one-time purchase of goods with no services, Contractor shall procure and maintain for the duration of this Agreement, the following types and amounts of insurance against claims for injuries to persons, or damages to property, which may arise from or in connection with the performance of the work under the Agreement by Contractor, its agents, representatives, or employees:

Insurance Type	Requirements	Limits
Commercial General Liability (CGL)	Coverage shall conform to ISO Form CG 00 01 covering CGL on an "occurrence" basis. Policy shall include all elements of Coverages A, B and C.	Limits no less than \$1,000,000 - per occurrence for bodily injury, personal injury and property damage. The general aggregate limit shall be twice the required occurrence limit. The policy shall be issued on a policy basis.
Automobile Liability	Coverage shall conform to ISO Form CA 00 01 covering any auto (Code 1).	Limit no less than \$300,000 - per accident for bodily injury and property damage. The policy shall be issued on a combined single limit.
Workers' Compensation and Employer's Liability	Insurance shall cover or insure under the applicable laws relating to workers' compensation insurance, in accordance with the "Workers' Compensation and Insurance Act," Division IV of the Labor Code of the State of California and any Acts amendatory thereof. Not required for sole proprietors or companies with no employees. Verifiable proof of exemption shall be required from CONTRACTOR upon request.	As required by the State of California, with Statutory Limits, and Employer's Liability Insurance with limit of no less than \$1,000,000 per accident; \$1,000,000 policy limit bodily injury by disease; and \$1,000,000 each employee bodily injury by disease.

NCTD shall be named as an additional insured on Contractor's policies. Contractor's policies shall be primary; NCTD shall not be called upon to contribute to any loss. Failure to provide or continue in force any insurance as described in this Insurance section shall be deemed a material breach of the Agreement, which NCTD may deem to constitute cause for immediate termination. NCTD reserves the right to withhold payments to Contractor in the event of material noncompliance with the insurance requirements. The requirements as to the types and limits of insurance coverage to be maintained by Contractor are not intended to and shall not in any manner limit or qualify the liabilities and obligations otherwise assumed by Contractor under the Agreement, including, but not limited to, the provisions concerning indemnification. The specified insurance limits are minimum amounts to be provided, and any insurance maintained by Contractor above such limits shall provide protection to NCTD and all additional insureds to the same extent as other insurance provided by Contractor.

17. **CONFORMITY TO LEGAL REQUIREMENTS** - Contractor shall cause all completed deliverables to conform to all applicable requirements of law: federal, state, and local. Contractor shall be aware of the requirements of the Immigration Reform and Control Act of 1986 and shall comply with those requirements, including, but not limited to, verifying the eligibility for employment of all agents, employees, consultants, and subcontractors that are included in this Agreement. Contractor represents and warrants to NCTD that it has all necessary licenses, permits, qualifications, and approvals, of whatever nature, that are legally required for Contractor to practice its profession. Contractor further represents and warrants to NCTD that it, at its sole cost and expense, shall keep in effect at all times during the term of this Agreement any licenses, permits, and approvals that are required for Contractor to practice its profession and/or perform services under this Agreement.
18. **PRICES** - The price that Contractor charges in carrying out this Agreement shall not be higher than Contractor's most recent quote or charge to NCTD for such materials, supplies, services, and/or installations, unless NCTD expressly agrees otherwise in writing. Notwithstanding the prices set forth in the Agreement, NCTD shall receive the benefit of any general reduction in the price of any item(s) listed herein, which may be made by NCTD at any time prior to the last delivery of goods or services covered by this Agreement.
19. **MATERIAL SAFETY DATA SHEET (MSDS)**: It is mandatory for Contractor to supply an MSDS with the first shipment of any merchandise that contains any hazardous material. Also, at any time the content of an MSDS is revised, Vendor is required to provide the new information relevant to the specific hazardous material to NCTD.
20. **DELAYS** - Contractor will not be held liable for failure or delay in the fulfillment if hindered or prevented by fire, strikes, epidemics, or Acts of God.
21. **TITLE AND RISK OF LOSS** - Unless otherwise provided in this Agreement, Contractor shall have title to and bear the risk of any loss of or damage to the items purchased hereunder until they are delivered in conformity with this Agreement at the F.O.B. point specified in NCTD's purchase order, and upon such delivery title shall pass from Contractor and Contractor's responsibility for loss or damage shall cease, except for loss or damage

resulting from Contractor's negligence. Passing of title upon such delivery shall not constitute acceptance of the item by NCTD.

22. **NOTICE OF LABOR DISPUTE** - Whenever Contractor has knowledge that any actual or potential labor dispute may delay performance under this Agreement, Contractor shall immediately notify and submit all relevant information to NCTD. Contractor shall insert the substance of this entire clause in any subcontract hereunder as to which a labor dispute may delay this Agreement and any subcontractor shall give notice and information only to its next higher tier subcontractor.
23. **EQUAL EMPLOYMENT OPPORTUNITY** - In connection with the execution of this Agreement, the Contractor shall not discriminate against any employee or applicant because of race, religion, color, gender, marital status disability, national origin, or any other persons on the basis of characteristics prohibited by applicable federal or California law. The Contractor shall take affirmative action to ensure that applicants are employed, and that employees are treated during their employment without regard to any such characteristics. Covered actions shall include, but not be limited to the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rate of pay or other forms of compensation; and selection for training, including apprenticeship.
24. **PROHIBITED INTEREST** - Contractor covenants that no member of, or delegate to, the Congress of the United States shall have any interest, direct or indirect, in the Agreement or the proceeds hereof. Contractor further covenants that, for the term of this Agreement, no director, member, officer, or employee of NCTD during their tenure in office or one (1) year thereafter shall have any interest, direct or indirect, in this Agreement or the proceeds thereof.
25. **TERMINATION**
 - a. **Mutual Termination:** This Agreement may be terminated by mutual Agreement of the Parties. Any other act of termination shall be in accordance with section titled "Termination for Convenience" and "Termination for Default" of this Agreement.
 - b. **Termination for Convenience:** NCTD may terminate the Agreement, in whole or in part, at any time and for any reason by giving written notice to notice to the Contractor and specifying the effective date thereof, at least fifteen (15) days prior to the effective date. If the Agreement is terminated for convenience as provided in this clause, Contractor shall be entitled to receive compensation for any satisfactory work completed up to the receipt by Contractor of notice of termination, less any payments theretofore made and not to exceed the amount payable herein, and for satisfactory work completed between the receipt of notice of termination and the effective date of termination pursuant to a specific request by NCTD for the performance of such work. If the Contractor has any property in its possession belonging to NCTD, the Contractor will account for the same and dispose of or return it in the manner NCTD directs.
 - c. **Termination for Default:** NCTD may terminate this Agreement upon giving of written notice of intention to terminate for cause. Cause shall include: (a) a material violation of any of the covenants, agreements, or stipulations of this Agreement by Contractor, (b) Contractor, through any cause, failing to fulfill in a timely and proper manner its obligations under this Agreement, (c) any act by Contractor exposing NCTD to liability to others for personal injury or property damage, or (d) if Contractor is adjudged bankrupt, Contractor makes a general assignment for the benefit of creditors, or a receiver is appointed on account of Contractor's insolvency. Written notice by NCTD of termination for cause shall contain the reasons for such intention to terminate and shall specify the effective date thereof. Unless prior to the effective date of the termination for cause the condition or violation shall cease, or satisfactory arrangements for the correction thereof be made, this Agreement shall cease and terminate on the effective date specified in the written notice by NCTD.

In the event of such termination, Contractor shall be paid the reasonable value of satisfactory services rendered up to the date of receipt of the notice of termination in accordance with this Agreement, less any payments theretofore made, as determined by NCTD, not to exceed the amount payable herein, and Contractor expressly waives any and all claims for damages or compensation arising under this Agreement in the event of such termination, except as set forth herein.

If it is later determined by NCTD or any other decision maker including a court of competent jurisdiction and/or arbitrator, that the Contractor had an excusable reason for not performing, such as force majeure events that are not a default; NCTD, after setting up a new delivery or performance schedule, may allow the Contractor to continue work, or treat the termination as a termination for convenience, at NCTD's sole option.

Rights of NCTD in the Event of Termination for Default: In the case of a termination of the Agreement for default by the Contractor, the Contractor agrees that NCTD may procure the materials and services to complete the project from other sources at the sole discretion of NCTD and may be deducted from the unpaid balance due the Contractor, or, if applicable, may collect against the Contractor's bond of surety, or may invoice the Contractor for all costs so paid. The prices paid by NCTD to complete the project shall be considered the prevailing market price at the time such purchase is made or such Agreement is entered into. Separate Agreement negotiations may be entered into, at the sole discretion of NCTD, after the Agreement termination concerning the disposition and materials, supplies and equipment acquired by the Contractor for the requirements of the Agreement.

- d. **Remedies and Rights of Contractor:** The Contractor shall not be relieved of any responsibility under the Agreement for work accepted by NCTD before the termination of the Agreement. Furthermore, the termination of the Agreement shall in no way relieve the Contractor from any of its covenants, undertakings, duties and obligations under this Agreement, nor limit the rights and remedies of NCTD hereunder in any manner whatsoever.
 - e. **Work Stopped by Court or Other Public Authority:** If the work should be stopped under an order of any court or other public authority, for a period of three (3) months or more through no act or default of the Contractor or anyone employed by them, or if NCTD has failed to comply with its obligations in any way, or if NCTD should fail to issue any certificate for payment within thirty-five (35) days after it is due, then the Contractor may, upon fifteen (15) days written notice to NCTD, stop work or terminate the Agreement and recover from NCTD payment for all work executed and all losses sustained, and reasonable profit.
 - f. **Opportunity to Cure:** In the case of a termination for breach or default, NCTD will allow the Contractor ten (10) days in which to cure the defect, except that if the nature of the cure requires more than ten (10) days to complete, then the cure period, in the sole and absolute discretion of NCTD, may be extended sufficiently to allow completion of the cure to be diligently pursued by the Contractor. If the Contractor fails to remedy to NCTD's satisfaction the breach or default of any of the terms, covenants, or conditions of the Agreement within ten (10) days or other cure period after receipt by Contractor or written notice from NCTD setting forth the nature of said breach or default, NCTD shall have the right to terminate the Contractor without any further obligation to the Contractor. Any such termination for default shall not in any way operate to preclude NCTD from also pursuing all available remedies against the Contractor and its sureties for said breach or default.
26. **AUDIT AND INSPECTION OF RECORDS** - Contractor shall provide NCTD such access to Contractor's books, records and facilities as may be deemed necessary to examine, audit, and inspect all work data, documents and activities related to the goods or services described herein. Contractor shall maintain such books, records, data, documents and activities related to the goods or services described herein. Contractor shall maintain such books, records, data and documents on a generally accepted accounting basis and shall clearly identify and make such items readily

accessible to such parties during Contractor's performance hereunder and for a period of four (4) years from the date of final payment by NCTD hereunder.

27. **ENTIRE AGREEMENT; NO ORAL MODIFICATIONS** - This Agreement constitutes the entire agreement and understanding between NCTD and Contractor, and supersedes all offers, negotiations and other Agreements concerning the subject matter contained herein. There are no representations or understandings of any kind not set forth in this Agreement. Any amendments to this Agreement must be in writing and executed by both parties hereto. NCTD shall not be bound by any conflicting terms in Contractor's invoices or emails.
28. **LABOR CODE COMPLIANCE** - Contractor and its subcontractors, regardless of tier, shall not be qualified to engage in the performance of any contract for public work, as defined in Labor Code section 1771.1, subdivision (a), unless currently registered with the California Department of Industrial Relations (DIR) and qualified to perform public work pursuant to Section 1725.5 (with limited exceptions from this requirement for bid purposes only under Labor Code section 1771.1(a)). Use of unregistered contractors or subcontractors may result in termination of this Agreement for cause by NCTD. Prevailing wages must be paid to all workers employed on a public works project when the public works project is over \$1,000. Contractor acknowledges that any work that qualifies as a "public work" within the meaning of California Labor Code Section 1720 shall cause Contractor, and its subcontractors at every tier to comply with the provisions of California Labor Code Sections 1775 et seq. Contractor agrees to comply with Labor Code Section 1776 regarding retention and inspection of payroll records and noncompliance penalties, Labor Code Section 1777.5 regarding employment of registered apprentices, and Labor Code Section 1813 regarding forfeiture for violations of the maximum hours per day and per week provisions contained in the same chapter. Contractor and any of its subcontractors working on the public work will be required to input and submit all applicable Certified Payrolls (CPRs) and accompanying documentation to DIR for monitoring and compliance on an ongoing basis while work is being performed. A mistake, inadvertence, or neglect by the Contractor in failing to pay the correct rates of prevailing wage will be remedied solely by the Contractor and will not, under any circumstances, be considered as the basis of a claim against NCTD. Contractor is hereby put on notice that NCTD construction projects are public works projects and Contractor will therefore be required to determine whether the scope of services it provides on particular NCTD projects fall under a classification that would require payment of prevailing wages. The California Labor Code (Sections 1720-1861) includes classifications for pre-construction and post-construction activities. If Contractor will perform services for NCTD that require payment of prevailing wages or intends to perform services that would be covered by California Labor Code, it is required to register with the DIR in order to be compliant with the law. In the event the parties disagree as to whether a particular person is performing work subject to prevailing wage, NCTD will make a decision regarding whether Contractor is in compliance with the law consistent with guidance from the Department of Labor. Contractor may ask DIR for an alternate determination within thirty (30) days of NCTD notification of its decision. In the event that Contractor engages in the performance of a public work under this Agreement as defined by Labor Code Section 1770 et seq., Contractor shall be required to cause such employees who are entitled to prevailing wages, to be paid the required wage amounts pursuant to applicable federal or state law. Pursuant to Labor Code Section 1775, the Contractor and any applicable subcontractor shall forfeit to NCTD or the DIR a penalty of not more than \$200 for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the Director of Industrial Relations for the work or craft in which the worker is employed for any public work done under the Agreement in violation of the requirements of the Labor Code and in particular, Labor Code Sections 1770 to 1780, inclusive. Should Contractor fail to provide CPRs as required by Labor Code section 1776(a) and (h) within ten days following a request from NCTD or its labor compliance Contractor, Contractor shall, as a penalty to NCTD, be subject to a forfeiture of \$100 for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. In addition, if following an investigation by NCTD or its labor compliance Contractor (or as may be directed by the DIR or other relevant enforcing agency) a determination is made that Contractor is not in compliance with applicable Labor Code sections, NCTD may withhold such payments or penalties as appropriate pursuant to Labor Code Sections 1726 and/or 1771.6. This section does not provide an exhaustive list of Labor Code requirements. Other requirements include, but are not limited to, those concerning payment of overtime and benefits, as well as apprenticeship ratios and documentation. Withholding of payment for failure to comply with Agreement provisions, and penalties and forfeitures for failure to comply with applicable Labor Code provisions may be imposed by NCTD against Contractor.
29. **PROMPT PAYMENT (49 CFR 26.29)** - Not later than ten (10) days after receipt of each progress payment from NCTD, the Contractor shall pay to any subcontractor performing under this Agreement, the respective amounts owed to the subcontractor for its work to the extent of each subcontractor's interest therein, unless otherwise agreed to in writing. In addition, for projects that invoice only at the completion of the project, within seven (7) days of the Contractor's receipt of released retention from NCTD upon completion of the project as defined in California Public Contract Code section 7107, the Contractor shall pay each of its subcontractors from whom retention has been withheld, each subcontractor's share of the retention received, in accordance with the provisions of California Public Contract Code section 7107. For projects that issue progress payment invoices, upon incremental acceptance of any portion of the work by NCTD, the Contractor shall pay each of its subcontractors from whom retention has been withheld, each subcontractor's share of the retention received, in accordance with the provisions of California Public Contract Code section 7107. This clause applies to both Disadvantaged Business Enterprise (DBE) and non-DBE subcontractors.

REQUIRED CLAUSES FOR FEDERAL FUNDING

PROVISIONS FROM THIS POINT FORWARD APPLY ONLY WHEN NCTD HAS INFORMED CONTRACTOR ON THE PURCHASE ORDER THAT FEDERAL FUNDING WILL BE USED

It is the responsibility of the Contractor to ensure that all clauses applicable to the work are adhered to by the Contractor and its subcontractors when applicable. It is the responsibility of the Contractor to ensure that all clauses applicable to the work of the Agreement are passed through by the Contractor to its subcontractors in their contracts when applicable.

Sec.	Contract Clause	APPLICABILITY TO TYPE OF PROCUREMENT				
		Materials & Supplies	Construction	Professional Services/A&E	Operations/ Management/ Subrecipients	Rolling Stock
1	No Federal Government Obligation to Third Parties by Use of a Disclaimer	All	All	All	All	All
2	Program Fraud and False or Fraudulent Statements and Related Acts	All	All	All	All	All
3	Access to Records	All	All	All	All	All

4	Federal Changes	All	All	All	All	All
5	Civil Rights (EEO, Title VI & ADA)	All	All	All	All	All
6	Incorporation of FTA Terms	All	All	All	All	All
7	Energy Conservation	All	All	All	All	All
8	Termination Provisions	> 10K	> 10K	> 10K	> 10K	> 10K
9	Debarment and Suspension	> 25K	> 25K	> 25K	> 25K	> 25K
10	Buy America	>\$150,000 for steel, iron, manufactured products	>\$150,000	-	-	>\$150,000
11	Provisions for Resolution of Disputes, Breaches and Other Litigation	> 100K	> 100K	> 100K	> 100K	> 100K
12	Lobbying	> 100K (NCTD Requires All)	> 100K (NCTD Requires All)	> 100K (NCTD Requires All)	> 100K (NCTD Requires All)	> 100K (NCTD Requires All)
13	Clean Air	> 100K	> 100K	> 100K	> 100K	> 100K
14	Clean Water	> 100K	> 100K	> 100K	> 100K	> 100K
15	Cargo Preference	All	All	-	-	All
16	Fly America	All	All	All	All	All
17	Davis-Bacon and Copeland Anti-Kickback Acts	-	> \$2000	-	-	-
18	Contract Work Hours and Safety Standards Act	-	>\$100K	-	>\$100K	>\$100K
19	Bonding	-	Construction > 100K (NCTD > \$10K)	-	-	-
20	Seismic Safety	-	New buildings & additions	A&E for New Construction & Additions	-	-
21	Transit Employee Protective Agreements	-	-	-	Transit Operations	-
22	Charter Service Operations	-	-	-	All	-
23	School Bus Operations	-	-	-	All	-
24	Drug and Alcohol Testing	-	-	-	Transit Operations	-
25	Patent and Rights in Data and Copyrights Requirements	-	-	Research Projects Only	-	-
26	Special Department of Labor (DOL) Equal Employment	-	Construction > 10K	-	-	-

	Opportunity(EEO) Clause for Construction Projects					
27	Disadvantaged Business Enterprises (DBEs)	All	All	All	All	All
28	Prompt Payment	All	All	All	All	All
29	Recycled Products	Value > 10K In Fiscal Year	Value > 10K In Fiscal Year	-	Value > 10K In Fiscal Year	-
30	ADA Access	-	All	A&E	All	All
31	Bus Testing	-	-	-	-	All
32	Pre-Award and Post Delivery Audit Requirements	-	-	-	-	All
33	Privacy Act	All	All	All	All	All
34	Transit Vehicle Manufacturer (TVM) Certifications	-	-	-	-	All
35	Metric Requirements	IFBs: All	All	-	-	All
36	Conformance with National ITS Architecture	Contracts and Solicitations for ITS projects only	-	-	-	-
37	Corridor Preservation	-	Right of Way Development	Right of Way Development	-	-
38	Veterans Employment	Capital Projects	Capital Projects	A&E	-	All
39	Notice of Legal Matters	>\$25,000	>\$25,000	>\$25,000	>\$25,000	>\$25,000
40	Federal Tax Liability and Recent Felony Convictions	All	All	All	All	All
41	Promoting Free Speech and Religious Liberty	All	All	All	All	All
42	Safe Operation of Motor Vehicles	All	All	All	All	All

1. NO FEDERAL GOVERNMENT OBLIGATIONS TO THIRD PARTIES BY USE OF A DISCLAIMER

Applicability to Contracts: Applicable to all contracts.

Flow down Requirements: This concept should flow down to all levels to clarify, to all parties to the contract, that the Federal Government does not have contractual liability to third parties, absent specific written consent.

No Obligation by the Federal Government.

(1) NCTD and the Contractor acknowledge and agree that, notwithstanding any concurrence by the Federal Government in or approval of the solicitation or award of the underlying contract, absent the express written consent by the Federal Government, the Federal Government is not a party to this Agreement and shall not be subject to any obligations or liabilities to NCTD, Contractor, or any other party (whether or not a party to that contract) pertaining to any matter resulting from the underlying contract.

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

2. PROGRAM FRAUD AND FALSE OR FRAUDULENT STATEMENTS AND RELATED ACTS

31 U.S.C. 3801 et seq.

49 CFR Part 31

18 U.S.C. 1001

49 U.S.C. 5307

Applicability to Contracts: These requirements are applicable to all contracts.

Flow down Requirements: These requirements flow down to Contractor and its subcontractors who make, present, or submit covered claims and statements.

Program Fraud and False or Fraudulent Statements or Related Acts

(1) The Contractor acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. §§ 3801 et seq. and U.S. DOT regulations, "Program Fraud Civil Remedies," 49 C.F.R. Part 31, apply to its actions pertaining to this Agreement. Upon execution of the underlying Agreement, the Contractor certifies the truthfulness and accuracy of any statement it has made, it makes, it may make, or causes to be made, pertaining to the underlying Agreement or the FTA-assisted project for which this Agreement 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.

(2) 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. § 5307, the Federal Government reserves the right to impose the penalties of 18 U.S.C. § 1001 and 49 U.S.C. § 5307(n)(1) on the Contractor, to the extent the Federal Government deems appropriate.

(3) The Contractor agrees to include the above two (2) clauses in each subcontract financed in whole or in part with Federal assistance provided by FTA. It is further agreed that the clauses shall not be modified, except to identify the subcontractor who will be subject to the provisions.

3. ACCESS TO RECORDS

49 U.S.C. 5325

2 CFR 200

49 CFR 633.17

Applicability to Contracts: Applicable to all contracts equal to or greater than \$100,000.

Flow down Requirements: FTA does not require the inclusion of these requirements in subcontracts.

Access to Records - The following access to records requirements apply to this Agreement:

(1) The Contractor agrees to provide NCTD, the FTA Administrator, the Comptroller General of the United States or any of their authorized representatives access to any books, documents, papers and records of the Contractor that are directly pertinent to this Agreement for the purposes of making audits, examinations, excerpts and transcriptions. Contractor also agrees, pursuant to 49 C.F.R. 633.17 to provide the FTA Administrator or his authorized representatives including any PMO Contractor access to Contractor's records and construction sites pertaining to a major capital project, defined at 49 U.S.C. 5302(a)1, which is receiving federal financial assistance through the programs described at 49 U.S.C. 5307, 5309 or 5311.

(2) Where NCTD or a sub-grantee of NCTD in accordance with 49 U.S.C. 5325(a) enters into a contract for a capital project or improvement (defined at 49 U.S.C. 5302(a) 1) through other than competitive proposal, the Contractor shall make available records related to the Agreement to NCTD, the Secretary of Transportation and the Comptroller General or any authorized officer or employee of any of them for the purposes of conducting an audit and inspection.

(3) The Contractor agrees to permit any of the foregoing parties to reproduce by any means whatsoever or to copy excerpts and transcriptions as reasonably needed.

(4) The Contractor agrees to maintain all books, records, accounts and reports required under this Agreement for a period of not less than three (3) years after the date of termination or expiration of this contract, except in the event of litigation or settlement of claims arising from the performance of this contract, in which case Contractor agrees to maintain same until NCTD, the FTA Administrator, the Comptroller General, or any of their duly authorized representatives, have disposed of all such litigation, appeals, claims or exceptions related thereto. Reference 49 CFR 18.39(i) (11).

(5) FTA does not require the inclusion of these requirements in subcontracts.

(6) Requirements for Access to Records and Reports by Types of Contract

Sources of Authority: 2 CFR 200

4. FEDERAL CHANGES

2 CFR Part 200

Applicability to Contracts: The Federal Changes requirement applies to all contracts.

Flow down Requirements: The Federal Changes requirement flows down appropriately to each applicable changed requirement.

Federal Changes - Contractor shall at all times comply with all applicable FTA regulations, policies, procedures and directives, including without limitation those listed directly or by reference in the Master Agreement between NCTD and FTA, as they may be amended or promulgated from time to time during the term of this Agreement. Contractor's failure to so comply shall constitute a material breach of this Agreement.

5. INCORPORATION OF FEDERAL TRANSIT ADMINISTRATION (FTA) TERMS FTA Circular 4220.1F

Applicability to Contracts: The incorporation of FTA terms applies to all contracts and subcontracts at every tier.

Flow Down Requirements The incorporation of FTA terms has unlimited flow down.

Incorporation of Federal Transit Administration (FTA) Terms - The preceding provisions include, in part, certain Standard Terms and Conditions required by the federal Department of Transportation (DOT), whether or not expressly set forth in the preceding Agreement provisions. All contractual provisions required by DOT, as set forth in the most current FTA Circular 4220 and 2 CFR 200, are hereby incorporated by reference. Anything to the contrary herein notwithstanding, all FTA mandated terms shall be deemed to control in the event of a conflict with other provisions contained in this Agreement. The Contractor shall not perform any act, fail to perform any act, or refuse to comply with any NCTD requests that would cause NCTD to be in violation of the FTA terms and conditions.

6. ENERGY CONSERVATION

42 U.S.C. 6321 et seq. 49 CFR Part 622

Applicability to Contracts: The Energy Conservation requirements are applicable to all contracts.

Flow down Requirements: The Energy Conservation requirements extend to all third party Contractors and their contracts at every tier and, sub-recipients and their sub-Agreements at every tier.

Energy Conservation - The Contractor agrees to comply with mandatory standards and policies relating to energy efficiency that are contained in the State energy conservation plan issued in compliance with the Energy Policy and Conservation Act. The Contractor agrees to perform an energy assessment for any building constructed, reconstructed, or modified with FTA funds required under FTA regulations, "Requirements for Energy Assessments," 49 CFR part 622, subpart C.

7. TERMINATION PROVISIONS

49 CFR Part 18 FTA Circular 4220.1F

See Section above entitled "Termination"

8. DEBARMENT AND SUSPENSION

49 CFR 18 2 CFR 1200 2 CFR 180 Executive Orders 12549 and 12689 31 U.S.C. 6101

Background and Applicability: In addition to the contracts covered under 2 CFR 180.220(b) of the OMB guidance, this part applies to any contract, regardless of tier, that is awarded by a contractor, subcontractor, supplier, Contractor, or its agent or representative in any transaction, if the Agreement is to be funded or provided by the Department of Transportation under a covered non-procurement transaction and the amount of the Agreement is expected to equal or exceed \$25,000. This extends the coverage of the Department of Transportation non-procurement suspension and debarment requirements to all lower tiers of subcontracts under covered non-procurement transactions, as permitted

under the OMB guidance at 2 CFR 180.220(c) (see optional lower-tier coverage in the figure in the appendix to 2 CFR part 180). This government-wide regulation implements Executive Order 12549, *Debarment and Suspension*, Executive Order 12689, *Debarment and Suspension*, and 31 U.S.C. 6101 note (Section 2455, Public Law 103-355, 108 Stat. 3327).

These provisions apply to all NCTD contracts and subcontracts at any level expected to equal or exceed \$25,000 as well as any contract or subcontract (at any level) for federally required auditing services. These are contracts and subcontracts referred to in the regulation as “covered transactions.”

Grantees, contractors, and subcontractors (at any level) that enter into covered transactions are required to verify that the entity (as well as its principals and affiliates) they propose to contract or subcontract with is not excluded or disqualified. They do this by (a) Checking the Excluded Parties List System (EPLS), (b) Collecting a certification from that person, or (c) Adding a clause or condition to the contract or subcontract.

Grantees, contractors, and subcontractors who enter into covered transactions also must require the entities they contract with to comply 2 CFR 180 and include this requirement in their own subsequent covered transactions (i.e., the requirement flows down to subcontracts at all levels).

Flow down Requirements: These requirements flow down to contractors and subcontractors at all levels.

Suspension and Debarment: This Agreement is a covered transaction for purposes of 49 CFR Part 18. As such, the Contractor is required to verify that none of its principals or subcontractors are excluded or disqualified as defined under Executive Orders Nos. 12549 and 12689.

The Contractor is required to comply with 2 CFR 1200 and must include the requirement to comply with 2 CFR 1200, Subpart C in any lower tier covered transaction it enters into.

By signing and submitting its bid or proposal, Contractor certifies as follows:

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

9. BUY AMERICA

49 U.S.C. 5323(j)
49 U.S.C. 5323(h)
49 CFR Part 661

Applicability to Contracts: The Buy America requirements apply to the following types of contracts: Construction Contracts and Acquisition of Goods or Rolling Stock (valued at more than \$100,000).

Flow down Requirements: The Buy America requirements flow down from NCTD to first tier contractors, who are responsible for ensuring that lower tier contractors and subcontractors are in compliance.

Buy America - The Contractor agrees to comply with the Infrastructure Investment and Jobs Act of 2021, Public Law No. 117-58, November 15, 2021, and other authorizing legislation that may be enacted, 49 U.S.C. 5323(j) as amended by MAP-21, 49 U.S.C. 5323(h), 49 CFR Part 661, and FAST Act (Pub. L. 114-94), which provide that Federal funds may not be obligated unless steel, iron, and manufactured products used in FTA-funded projects are produced in the United States, unless a waiver has been granted by FTA or the product is subject to a general waiver. General waivers are listed in 49 CFR 661.7 and was amended by Section 3011 of the FAST Act (Pub. L. 114-94). Separate requirements for rolling stock are set out at 5323(j)(2)(C) and 49 CFR 661.11. Rolling stock not subject to a general waiver must be manufactured in the United States and have a sixty percent (60%) domestic content for FY16 & FY17; sixty-five percent (65%) domestic content for FY18 & FY19; and seventy percent (70%) domestic content for FY20 & beyond.

General waivers for small purchases do not apply to Contractor’s equipment purchases when Contractor’s Agreement value exceeds \$150,000 in value. Contractor must submit to NCTD the appropriate Buy America certification with all bids on FTA-funded contracts, except those subject to a general waiver. Bids or offers that are not accompanied by a completed Buy America certification must be rejected as non-responsive. This requirement does not apply to lower tier subcontractors.

10. PROVISIONS FOR RESOLUTION OF DISPUTES, BREACHES, OR OTHER LITIGATION
49 CFR Part 18
FTA Circular 4220.1F

Applicability to Contracts: All contracts in excess of \$100,000 shall contain provisions or conditions that will allow for administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. This may include provisions for bonding, penalties for late or inadequate performance, retained earnings, liquidated damages or other appropriate measures.

Flow Down Requirements: The Breaches and Dispute Resolutions requirements flow down to all tiers.

Disputes - Disputes arising in the performance of this Agreement that are not resolved by Agreement of the parties shall be decided in writing by the authorized representative of NCTD. This decision shall be final and conclusive unless within ten (10) days from the date of receipt of its copy, the Contractor mails or otherwise furnishes a written appeal to the NCTD. In connection with any such appeal, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its position. The decision of NCTD shall be binding upon the Contractor and the Contractor shall abide by the decision.

Performance During Dispute - Unless otherwise directed by NCTD, Contractor shall continue performance under this Agreement while matters in dispute are being resolved.

Claims for Damages - Should either party to the Agreement suffer injury or damage to person or property because of any act or omission of the party or of any of his employees, agents or others for whose acts they are legally liable, a claim for damages therefore shall be made in writing to such other party within a reasonable time after the first observance of such injury or damage.

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

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

11. LOBBYING

31 U.S.C. 1352
49 CFR Part 19
49 CFR Part 20

Applicability to Contracts: The Lobbying requirements apply to Construction/Architectural and Engineering/Acquisition of Rolling Stock/Professional Service Contract/Operational Service Contract/Turnkey contracts.

Flow Down Requirements The Lobbying requirements mandate the maximum flow down, pursuant to Byrd Anti-Lobbying Amendment, 31 U.S.C. § 1352(b)(5) and 49 C.F.R. Part 19, Appendix A, Section 7.

Byrd Anti-Lobbying Amendment, 31 U.S.C. 1352, as amended by the Lobbying Disclosure Act of 1995, P.L. 104-65 [to be codified at 2 U.S.C. § 1601, et seq.] - Contractors who apply or bid for an award of \$100,000 or more shall file the certification required by 49 CFR part 20, "New Restrictions on Lobbying." Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of a Federal agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier certifies to the tier above that it will not and has not taken any action involving the Project or the Underlying Agreement for the Project, including any award, extension, or modification. Each tier shall also disclose the name of any registrant under the Lobbying Disclosure Act of 1995 who has made lobbying contacts on its behalf with non-Federal funds with respect to that Federal contract, grant or award covered by 31 U.S.C. 1352. Such disclosures are forwarded from tier to tier up to NCTD.

12. CLEAN AIR

**42 U.S.C. 7401 – 7601(q)
40 CFR 15.61
49 CFR Part 18**

Applicability to Contracts: The Clean Air requirements apply to all contracts exceeding \$100,000, including indefinite quantities where the amount is expected to exceed \$100,000 in any year.

Flow down Requirements: The Clean Air requirements flow down to all subcontracts that exceed \$100,000.

Clean Air - (1) 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. §§ 7401 – 7601(q) et seq . The Contractor agrees to report each violation to NCTD and understands and agrees that NCTD, in turn, report each violation as required to assure notification to FTA and the appropriate EPA Regional Office.

(2) The Contractor also agrees to include these requirements in each subcontract exceeding \$100,000 financed in whole or in part with Federal assistance provided by FTA.

13. CLEAN WATER

33 U.S.C. 1251 - 1377

Applicability to Contracts: The Clean Water requirements apply to each contract and subcontract that exceeds \$100,000.

Flow down Requirements: The Clean Water Act requirements flow down to NCTD third party contractors and their contracts at every tier, and sub-recipients and their sub-Agreements at every tier.

Clean Water - (a) The Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Water Act, as amended, 33 U.S.C. 1251 – 1377 et seq.

(b) The Contractor agrees to report each violation to NCTD and understands and agrees that NCTD will, in turn, report each violation as required to assure notification to FTA and the appropriate EPA Regional Office in compliance with the notice of violating facility provisions in section 508 of the Clean Water Act, as amended, 33 U.S.C. 1368.

(c) The Contractor agrees to protect underground sources of drinking water in compliance with the Safe Drinking Water Act of 1974, as amended, 42 U.S.C. 300f – 300j-6.

(d) The Contractor also agrees to include these requirements in each subcontract exceeding \$100,000 financed in whole or in part with Federal assistance provided by FTA.

14. CARGO PREFERENCE

46 U.S.C. 55305

Applicability to Contracts: The Cargo Preference requirements apply to all contracts involving equipment, materials, or commodities that may be transported by ocean vessels.

Flow down Requirements: The Cargo Preference requirements apply to all subcontracts when the subcontract may be involved with the transport of equipment, material, or commodities by ocean vessel.

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

Cargoes Procured, Furnished, or Financed by the United States Government - (a) Definition.- In this section, the term "privately-owned commercial vessel of the United States" does not include a vessel that, after September 21, 1961, was built or rebuilt outside the United States or documented under the laws of a foreign country, until the vessel has been documented under the laws of the United States for at least three (3) years.

(b) **Minimum Tonnage.**-When the United States Government procures, contracts for, or otherwise obtains for its own account, or furnishes to or for the account of a foreign country, organization, or persons without provision for reimbursement, any equipment, materials, or commodities, or provides financing in any way with Federal funds for the account of any persons unless otherwise exempted, within or without the United States, or advances funds or credits, or guarantees the convertibility of foreign currencies in connection with the furnishing or obtaining of the equipment, materials, or commodities, the appropriate agencies shall take steps necessary and practicable to ensure that at least fifty percent (50%) of the gross tonnage of the equipment, materials, or commodities (computed separately for dry bulk carriers, dry cargo liners, and tankers) that may be transported on ocean vessels is transported on privately-owned commercial vessels of the United States, to the extent those vessels are available at fair and reasonable rates for commercial vessels of the United States, in a manner that will ensure a fair and reasonable participation of commercial vessels of the United States in those cargoes by geographic areas.

(c) **Waivers.**-The President, the Secretary of Defense, or Congress (by concurrent resolution or otherwise) may waive this section temporarily by-

(1) Declaring the existence of an emergency justifying a waiver; and

(2) Notifying the appropriate agencies of the waiver.

(d) **Programs of Other Agencies**

(1) Each department or agency that has responsibility for a program under this section shall administer that program with respect to this section under regulations and guidance issued by the Secretary of Transportation. The Secretary, after consulting with the department or agency or organization or person involved, shall have the sole responsibility for determining if a program is subject to the requirements of this section.

(2) **The Secretary-**

(A) shall conduct an annual review of the administration of programs determined pursuant to paragraph (1) as subject to the requirements of this section;

(B) may direct agencies to require the transportation on United States-flagged vessels of cargo shipments not otherwise subject to this section in equivalent amounts to cargo determined to have been shipped on foreign carriers in violation of this section;

(C) may impose on any person that violates this section, or a regulation prescribed under this section, a civil penalty of not more than \$25,000 for each violation willfully and knowingly committed, with each day of a continuing violation following the date of shipment to be a separate violation; and

(D) may take other measures as appropriate under the Federal Acquisition Regulations issued pursuant to section 25(c)(1) 1 of the Office of Federal Procurement Policy Act (41 U.S.C. 421(c)(1) 2 or contract with respect to each violation.

(e) **Security of Government-Impelled Cargo.-**

(1) In order to ensure the safety of vessels and crewmembers transporting equipment, materials, or commodities under this section, the Secretary of Transportation shall direct each department or agency (except the Department of Defense), when responsible for the carriage of such equipment, materials, or commodities, to provide armed personnel aboard vessels of the United States carrying such equipment, materials, or commodities if the vessels are transiting high-risk waters.

(2) The Secretary of Transportation shall direct each department or agency responsible to provide armed personnel under paragraph (1) to reimburse, subject to the availability of appropriations, the owners or operators of applicable vessels for the cost of providing armed personnel.

(3) In this subsection, the term "high-risk waters" means waters so designated by the Commandant of the Coast Guard in the Port Security Advisory in effect on the date on which an applicable voyage begins.

(Pub. L. 109-304, §8(c), Oct. 6, 2006, 120 Stat. 1642; Pub. L. 110-417, div. C, title XXXV, §3511(a), (b), Oct. 14, 2008, 122 Stat. 4769; Pub. L. 112-213, title V, §503, Dec. 20, 2012, 126 Stat. 1575.)

15. FLY AMERICA

49 U.S.C. §40118

41 CFR Part 301-10.131 - 301-10.143

Applicability to Contracts: The Fly America requirements apply to the transportation of persons or property, by air, between a place in the U.S. and a place outside the U.S., or between places outside the U.S., when the FTA will participate in the costs of such air transportation. Transportation on a foreign air carrier is permissible when provided by a foreign air carrier under a code share Agreement when the ticket identifies the U.S. air carrier's designator code and flight

number. Transportation by a foreign air carrier is also permissible if there is a bilateral or multilateral air transportation agreement to which the U.S. Government and a foreign government are parties and that the Federal DOT has determined meets the requirements of the Fly America Act.

Flow down Requirements: The Fly America requirements flow down from NCTD to first tier Contractors, who are responsible for ensuring that lower tier contractors and subcontractors are in compliance.

Fly America - 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 CFR Part 301-10.131 - 301-10.143, which provide that recipients and sub-recipients 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 in all subcontracts that may involve international air transportation.

16. DAVIS-BACON AND COPELAND ANTI-KICKBACK ACTS

49 U.S.C. 5333

40 U.S.C. 3141 – 3144

40 U.S.C. 3146 – 3147

18 U.S.C. 874

40 U.S.C. 3145

Applicability to Contracts: The Davis-Bacon and Copeland Acts are codified at 40 USC 3141, *et seq.* and 18 USC 874. The Acts apply to grantee construction contracts and subcontracts that "at least partly are financed by a loan or grant from the Federal Government." 40 USC 3145(a), 29 CFR 5.2(h), 49 CFR 18.36(i) (5). The Acts apply to any construction contract over \$2,000. 40 USC 3142(a), 29 CFR 5.5(a). 'Construction,' for purposes of the Acts, includes "actual construction, alteration and/or repair, including painting and decorating." 29 CFR 5.5(a). The requirements of both Acts are incorporated into a single clause (see 29 FR 3.11) enumerated at 29 CFR 5.5(a) and reproduced below.

Flow down Requirements: Applies to third party contractors and subcontractors

(1) **Minimum wages** - (i) All laborers and mechanics employed or working upon the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor that is attached hereto and made a part hereof, regardless of any contractual relationship that may be alleged to exist between the Contractor and such laborers and mechanics.

Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (1)(iv) of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than Monthly) under plans, funds, or programs that cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in 29 CFR Part 5.5(a)(4). Laborers or mechanics performing work in more than one (1) classification may be compensated at the rate specified for each classification for the time actually worked therein: Provided, that the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classifications and wage rates conformed under paragraph (1)(ii) of this section) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the Contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

(ii)(A) The Contracting Officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and that is to be employed under the Agreement shall be classified in conformance with the wage determination. The Contracting Officer shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:

(1) Except with respect to helpers as defined as 29 CFR 5.2(n) (4), the work to be performed by the classification requested is not performed by a classification in the wage determination; and

(2) The classification is utilized in the area by the construction industry; and

(3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination; and

(4) With respect to helpers as defined in 29 CFR 5.2(n) (4), such a classification prevails in the area in which the work is performed.

(B) If the Contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the Contracting Officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the Contracting Officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within thirty (30) days of receipt and shall advise the Contracting Officer or will notify the Contracting Officer within the thirty (30) day period that additional time is necessary.

(C) In the event the Contractor, the laborers or mechanics to be employed in the classification or their representatives, and the Contracting Officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the Contracting Officer shall refer the questions, including the views of all interested parties and the recommendation of the Contracting Officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within thirty (30) days of receipt and shall advise the Contracting Officer or will notify the Contracting Officer within the thirty (30) day period that additional time is necessary.

(D) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs (a)(1)(ii) (B) or (C) of this section, shall be paid to all workers performing work in the classification under this Agreement from the first day on which work is performed in the classification.

(iii) Whenever the minimum wage rate prescribed in the Agreement for a class of laborers or mechanics includes a fringe benefit that is not expressed as an hourly rate, the Contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(iv) If the Contractor does not make payments to a trustee or other third person, the Contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, Provided, That the Secretary of Labor has found, upon the written request of the Contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the Contractor to set aside in a separate account, assets for the meeting of obligations under the plan or program.

(v)(A) The Contracting Officer shall require that any class of laborers or mechanics that is not listed in the wage determination and that is to be employed under the Agreement shall be classified in conformance with the wage determination. The Contracting Officer shall approve an additional classification and wage rate and fringe benefits therefor only when the following criteria have been met:

(1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and

(2) The classification is utilized in the area by the construction industry; and

(3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(B) If the Contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the Contracting Officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the Contracting Officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within thirty (30) days of receipt and so advise the Contracting Officer or will notify the Contracting Officer within the thirty (30) day period that additional time is necessary.

(C) In the event the Contractor, the laborers or mechanics to be employed in the classification or their representatives, and the Contracting Officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the Contracting Officer shall refer the questions, including the views of all interested parties and the recommendation of the Contracting Officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination with thirty (30) days of receipt and shall advise the Contracting Officer or will notify the Contracting Officer within the thirty (30) day period that additional time is necessary.

(D) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs (a)(1)(v) (B) or (C) of this section, shall be paid to all workers performing work in the classification under this Agreement from the first day on which work is performed in the classification.

(2) **Withholding** - NCTD 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 the Contractor under this Agreement or any other Federal contract with the same prime Contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime Contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the Contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), all or part of the wages required by the Agreement, NCTD may, after written notice to the Contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(3) **Payrolls and basic records** - (i) Payrolls and basic records relating thereto shall be maintained by the Contractor during the course of the work and preserved for a period of three (3) years thereafter for all laborers and mechanics working at the site of the work (or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project). Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the Contractor shall maintain records that show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records that show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

(ii)(A) The Contractor shall submit weekly for each week in which any Agreement work is performed a copy of all payrolls to NCTD. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under section 5.5(a)(3)(i) of Regulations, 29 CFR part 5. This information may be submitted in any form desired. Optional Form WH-347 is available for this purpose and may be purchased from the Superintendent of Documents (Federal Stock Number 029-005-00014-1), U.S. Government Printing Office, Washington, DC 20402. The prime Contractor is responsible for the submission of copies of payrolls by all subcontractors.

(B) Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the Contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:

(1) That the payroll for the payroll period contains the information required to be maintained under section 5.5(a)(3)(i) of Regulations, 29 CFR Part 5 and that such information is correct and complete;

(2) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations, 29 CFR Part 3;

(3) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the Agreement.

(C) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph (a)(3)(ii)(B) of this section.

(D) The falsification of any of the above certifications may subject the Contractor or subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.

(iii) The Contractor or subcontractor shall make the records required under paragraph (a)(3)(i) of this section available for inspection, copying, or transcription by authorized representatives of the Federal Transit Administration or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the Contractor

or subcontractor fails to submit the required records or to make them available, the Federal agency may, after written notice to the Contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

(4) **Apprentices and trainees** - (i) Apprentices - Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or if a person is employed in his or her first ninety (90) days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the Contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the Contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator of the Wage and Hour Division of the U.S. Department of Labor determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Bureau of Apprenticeship and Training, or a State Apprenticeship Agency recognized by the Bureau, withdraws approval of an apprenticeship program, the Contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(ii) Trainees - Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program that has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination that provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the Contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(iii) Equal employment opportunity - The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended and 29 CFR part 30.

(5) **Compliance with Copeland Act requirements** - The Contractor shall comply with the requirements of 29 CFR part 3, which are incorporated by reference in this Agreement.

(6) **Subcontracts** - The Contractor or subcontractor shall insert in any subcontracts the clauses contained in 29 CFR 5.5(a)(1) through (10) and such other clauses as the Federal Transit Administration may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime Contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.

- (7) **Agreement termination: debarment** - A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the Agreement, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.
- (8) **Compliance with Davis-Bacon and Related Act requirements** - All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR parts 1, 3, and 5 are herein incorporated by reference in this Agreement.
- (9) **Disputes concerning labor standards** - Disputes arising out of the labor standards provisions of this Agreement shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the Contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.
- (10) **Certification of eligibility** - (i) By entering into this Agreement, the Contractor certifies that neither it (nor he or she) nor any person or contractor who has an interest in the Contractor's Agreement is a person or Contractor ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).
- (ii) No part of this Agreement shall be subcontracted to any person or Contractor ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).
- (iii) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.
- (b) **Contract Work Hours and Safety Standards Act.** The Contractor shall comply with the clauses set forth in paragraphs (b)(1), (2), (3), and (4) of this section in full in any contract in an amount in excess of \$100,000 and subject to the overtime provisions of the Contract Work Hours and Safety Standards Act. These clauses shall be inserted in addition to the clauses required by §5.5(a) or §4.6 of part 4 of this title. As used in this paragraph, the terms laborers and mechanics include watchmen and guards.
- (1) **Overtime requirements.** No contractor or subcontractor contracting for any part of the Agreement work that may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which they are employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half (1.5) times the basic rate of pay for all hours worked in excess of forty (40) hours in such workweek.
- (2) **Violation; liability for unpaid wages; liquidated damages.** In the event of any violation of the clause set forth in paragraph (b)(1) of this section the Contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such 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 the clause set forth in paragraph (b)(1) of this section, 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 the clause set forth in paragraph (b)(1) of this section.
- (3) **Withholding for unpaid wages and liquidated damages.** The (write in the name of the Federal agency or the loan or grant recipient) shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the Contractor or subcontractor under any such contract or any other Federal contract with the same prime Contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime Contractor, such sums as may be determined to be necessary to satisfy any liabilities of such Contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (b)(2) of this section.
- (4) **Subcontracts.** The Contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraph (b)(1) through (4) of this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime Contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (b)(1) through (4) of this section.
- (c) In addition to the clauses contained in paragraph (b), in any contract subject only to the Contract Work Hours and Safety Standards Act and not to any of the other statutes cited in §5.1, the Contractor and any subcontractor shall maintain payrolls and basic payroll records during the course of the work and shall preserve them for a period of three years from the completion of the Agreement for all laborers and mechanics, including guards and watchmen, working on the contract. Such records shall contain the name and address of each such employee, social security number, correct classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. Further, records shall be maintained under this paragraph by Contractor and its subcontractors and shall be made available by the Contractor or subcontractor for inspection, copying, or transcription by authorized representatives of the (write the name of agency) and the Department of Labor, and the Contractor or subcontractor will permit such representatives to interview employees during working hours on the job.

(The information collection, recordkeeping, and reporting requirements contained in the following paragraphs of this section were approved by the Office of Management and Budget:

OMB Control Number
(a)(1)(ii)(B) 1215-0140
(a)(1)(ii)(C) 1215-0140
(a)(1)(iv) 1215-0140
(a)(3)(i) 1215-0140,
1215-0017
(a)(3)(ii)(A) 1215-0149
(c) 1215-0140,
1215-0017

[48 FR 19540, Apr. 29, 1983, as amended at 51 FR 12265, Apr. 9, 1986; 55 FR 50150, Dec. 4, 1990; 57 FR 28776, June 26, 1992; 58 FR 58955, Nov. 5, 1993; 61 FR 40716, Aug. 5, 1996; 65 FR 69693, Nov. 20, 2000; 73 FR 77511, Dec. 19, 2008]

Effective Date Note: At 58 FR 58955, Nov. 5, 1993, §5.5 was amended by suspending paragraph (a)(1)(ii) indefinitely.

17. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT
29 CFR Part 5
40 U.S.C. 3701 et seq.
40 U.S.C. 3702

Applicability to Contracts: The Contract Work Hours and Safety Standards Act is codified at 40 USC 3701, *et seq.* The Act applies to grantee contracts and subcontracts “financed at least in part by loans or grants from ... the [Federal] Government.” 40 USC 3701(b) (1) (B) (iii) and (b) (2), 29 CFR 5.2(h), 49 CFR 18.36(i) (6).

The Act applies to construction contracts and, in very limited circumstances, non-construction projects that employ “laborers or mechanics on a public work” with a value greater than \$100,000. These non-construction applications do not generally apply to transit procurements because transit procurements (to include rail cars and buses) are deemed “commercial items.” 40 USC 3707, 41 USC 403 (12)

Flow down Requirements: Applies to third party contractors and subcontractors.

(1) **Overtime requirements** - No contractor or subcontractor contracting for any part of the Agreement work that may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which they are employed on such work to work in excess of forty (40) hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half (1.5) times the basic rate of pay for all hours worked in excess of forty (40) hours in such workweek.

(2) **Violation; liability for unpaid wages; liquidated damages** - In the event of any violation of the clause set forth in paragraph (1) of this section the Contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such Contractor and subcontractor shall be liable to the United States 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 the clause set forth in paragraph (1) of this section, 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 (40) hours without payment of the overtime wages required by the clause set forth in paragraph (1) of this section.

(3) **Withholding for unpaid wages and liquidated damages** - NCTD shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the Contractor or subcontractor under any such contract or any other Federal contract with the same prime Contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime Contractor, such sums as may be determined to be necessary to satisfy any liabilities of such Contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (2) of this section.

(4) **Subcontracts** - The Contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraphs (1) through (4) of this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime Contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (1) through (4) of this section.

18. BONDING

Bonds shall be required from Contractor if the Work involves construction or facility improvement contracts exceeding \$100,000. If this Agreement covers such Work, applicable language is included elsewhere in the Agreement.

19. SEISMIC SAFETY

**42 U.S.C. 7701 et seq.
49 CFR Part 41**

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

Flow down Requirements: The Seismic Safety requirements flow down from NCTD to first tier contractors to assure compliance, with the applicable building standards for Seismic Safety, including the work performed by all subcontractors.

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 CFR 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 Agreement 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. The Contractor will facilitate and follow Executive Order No. 12699, "Seismic Safety of Federal and Federally-Assisted or Regulated New Building Construction," 42 U.S.C. 7704 note, except as the Federal Government determines otherwise in writing.

20. TRANSIT EMPLOYEE PROTECTIVE AGREEMENTS

**49 U.S.C. § 5310, § 5311, and § 5333
29 CFR Part 215**

Applicability to Contracts: The Transit Employee Protective Provisions apply to each contract for transit operations performed by employees of a Contractor recognized by FTA to be a transit operator. (Because transit operations involve many activities apart from directly driving or operating transit vehicles, FTA determines which activities constitute transit "operations" for purposes of this clause.)

Flow down Requirements: These provisions are applicable to all contracts and subcontracts at every tier.

(a) **General Transit Employee Protective Requirements** - To the extent that FTA determines that transit operations are involved, the Contractor agrees to carry out the transit operations work on the underlying Agreement in compliance with terms and conditions determined by the U.S. Secretary of Labor to be fair and equitable to protect the interests of employees employed under this Agreement and to meet the employee protective requirements of 49 U.S.C. A 5333(b), and U.S. DOL guidelines at 29 C.F.R. Part 215, and any amendments thereto. These terms and conditions are identified in the letter of certification from the U.S. DOL to FTA applicable to NCTD's project from which Federal assistance is provided to support work on the underlying contract. The Contractor agrees to carry out that work in compliance with the conditions stated in that U.S. DOL letter. The requirements of this subsection (a), however, do not apply to any contract financed with Federal assistance provided by FTA either for projects for elderly individuals and individuals with disabilities authorized by 49 U.S.C. § 5310(a)(2), or for projects for non-urbanized areas authorized by 49 U.S.C. § 5311. Alternate provisions for those projects are set forth in subsections (b) and (c) of this section.

(b) **Transit Employee Protective Requirements for Projects Authorized by 49 U.S.C. § 5310(a)(2) for Elderly Individuals and Individuals with Disabilities** - If the Agreement involves transit operations financed in whole or in part with Federal assistance authorized by 49 U.S.C. § 5310(a)(2), and if the U.S. Secretary of Transportation has determined or determines in the future that the employee protective requirements of 49 U.S.C. § 5333(b) are necessary or appropriate for the state and the public body sub-recipient for which work is performed on the underlying contract, the Contractor agrees to carry out the Work in compliance with the terms and conditions determined by the U.S. Secretary of Labor to meet the requirements of 49 U.S.C. § 5333(b), U.S. DOL guidelines at 29 C.F.R. Part 215, and any amendments thereto. These terms and conditions are identified in the U.S. DOL's letter of certification to FTA, the date of which is set forth Grant Agreement or Cooperative Agreement with the state. The Contractor agrees to perform transit operations in connection with the underlying Agreement in compliance with the conditions stated in that U.S. DOL letter.

(c) **Transit Employee Protective Requirements for Projects Authorized by 49 U.S.C. § 5311 in Non-urbanized Areas** - If the Agreement involves transit operations financed in whole or in part with Federal assistance authorized by 49 U.S.C. § 5311, the Contractor agrees to comply with the terms and conditions of the Special Warranty for the Non-urbanized Area Program agreed to by the U.S. Secretaries of Transportation and Labor, dated May 31, 1979, and the procedures implemented by U.S. DOL or any revision thereto.

(2) The Contractor also agrees to include the any applicable requirements in each subcontract involving transit operations financed in whole or in part with Federal assistance provided by FTA.

21. CHARTER SERVICE OPERATIONS

**49 U.S.C. 5323(d)
49 CFR Part 604**

Applicability to Contracts: The Charter Bus requirements apply to the following type of contract: Operational Service Contracts.

Flow down Requirements: The Charter Bus requirements flow down from NCTD to first tier service contractors.

Charter Service Operations - The Contractor agrees to comply with 49 U.S.C. 5323(d) and 49 CFR Part 604, which provides that recipients and sub-recipients of FTA assistance are prohibited from providing charter service using federally funded equipment or facilities if there is at least one private charter operator willing and able to provide the service, except under one of the exceptions at 49 CFR 604.9. Any charter service provided under one of the exceptions must be "incidental," i.e., it must not interfere with or detract from the provision of mass transportation.

22. SCHOOL BUS OPERATIONS

**49 U.S.C. 5323(F)
49 CFR Part 605**

Applicability to Contracts: The School Bus requirements apply to the following type of contract: Operational Service Contracts.

Flow down Requirements: The School Bus requirements flow down from NCTD to first tier service contractors.

School Bus Operations - Pursuant to 49 U.S.C. 5323(f) and 49 CFR Part 605, recipients and sub-recipients of FTA assistance may not engage in school bus operations exclusively for the transportation of students and school personnel in competition with private school bus operators unless qualified under specified exemptions. When operating exclusive school bus service under an allowable exemption, recipients and sub-recipients may not use federally funded equipment, vehicles, or facilities.

23. DRUG AND ALCOHOL TESTING

**49 U.S.C. §5331
49 CFR Part 655
49 CFR Part 382**

Applicability to Contracts: The Drug and Alcohol testing provisions apply to Operational Service Contracts.

Flow down Requirements: Anyone who performs a safety-sensitive function for the recipient or sub-recipient is required to comply with 49 CFR 655 as amended by MAP-21, with certain exceptions for contracts involving maintenance services. Maintenance contractors for non-urbanized area formula program grantees are not subject to the rules. Also, the rules do not apply to maintenance subcontractors.

Drug and Alcohol Testing: The Contractor agrees to establish and implement a drug and alcohol testing program that complies with 49 CFR Part 655, produce any documentation necessary to establish its compliance with Part 655, and permit any authorized representative of the United States Department of Transportation or its operating administrations, the State Oversight Agency of California, or NCTD, to inspect the facilities and records associated with the implementation of the drug and alcohol testing program as required under 49 CFR Part 655 and review the testing process. The Contractor agrees further to certify annually its compliance with Part 655 before June 30 and to submit the Management Information System (MIS) reports before January 15 to NCTD. To certify compliance the Contractor shall use the "Substance Abuse Certifications" in the "Annual List of Certifications and Assurances for Federal Transit Administration Grants and Cooperative Agreements," which is published annually in the Federal Register.

24. PATENT AND RIGHTS IN DATA AND COPYRIGHTS REQUIREMENTS

**37 CFR Part 401
49 CFR Parts 18 and 19**

Applicability to Contracts: Patent and rights in data requirements for federally assisted projects ONLY apply to research projects in which FTA finances the purpose of the grant is to finance the development of a product or information. These patent and data rights requirements do not apply to capital projects or operating projects, even though a small portion of the sales price may cover the cost of product development or writing the user's manual.

Flow down Requirements: The Patent and Rights in Data requirements apply to all contractors and their contracts at every tier.

CONTRACTS INVOLVING EXPERIMENTAL, DEVELOPMENTAL, OR RESEARCH WORK.

A. Rights in Data - The following requirements apply to each contract involving experimental, developmental or research work:

(1) The term "subject data" used in this clause 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.

(2) The following restrictions apply to all subject data first produced in the performance of the Agreement to which this has been added:

(a) Except for its own internal use, NCTD or Contractor may not publish or reproduce subject data in whole or in part, or in any manner or form, nor may NCTD or 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 C.F.R. § 18.34 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," any subject data or copyright described in subsections (2)(b)1 and (2)(b)2 of this clause 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 NCTD or 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, NCTD and the Contractor performing experimental, developmental, or research work required by the underlying Agreement to which this Attachment 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 Agreement 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 Agreement shall become subject data as defined in subsection (a) of this clause 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 NCTD or 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, NCTD and the Contractor agree 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 NCTD or 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. Neither NCTD nor the Contractor shall be required to indemnify the Federal Government for any such liability arising out of the wrongful act of any employee, official, or agents of the Federal Government.

(e) Nothing contained in this clause on rights in data shall imply a license to the Federal Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Federal Government under any patent.

(f) Data developed by NCTD or Contractor and financed entirely without using Federal assistance provided by the Federal Government that has been incorporated into work required by the underlying Agreement to which this Attachment has been added is exempt from the requirements of subsections (b), (c), and (d) of this clause, provided that NCTD or Contractor identifies that data in writing at the time of delivery of the Agreement 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.

(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.), NCTD and the Contractor agree 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 Contractors under Government Grants, Contracts and Cooperative Agreements," 37 C.F.R. Part 401.

(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.

B. Patent Rights - The following requirements apply to each contract involving experimental, developmental, or research work:

(1) General - If any invention, improvement, or discovery is conceived or first actually reduced to practice in the course of or under the Agreement to which this section has been added, and that invention, improvement, or discovery is patentable under the laws of the United States of America or any foreign country, NCTD and Contractor agree to take actions necessary to provide immediate notice and a detailed report to the party at a higher tier until FTA is ultimately notified.

(2) Unless the Federal Government later makes a contrary determination in writing, irrespective of the Contractor's status (a large business, small business, state government or state instrumentality, local government, nonprofit organization, institution of higher education, individual), NCTD and the Contractor agree 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 Contractors Under Government Grants, Contracts and Cooperative Agreements," 37 C.F.R. Part 401.

(3) The Contractor also agrees to include the requirements of this clause in each subcontract for experimental, developmental, or research work financed in whole or in part with Federal assistance provided by FTA.

25. SPECIAL DOL EQUAL EMPLOYMENT OPORTUNITY CLAUSE FOR CONSTRUCTION PROJECTS
41 CFR Part 60

See section entitled Civil Rights and Disadvantaged Business Enterprise Requirements"

26. DISADVANTAGED BUSINESS ENTERPRISES (DBE)
49 CFR Part 26

Section 1101(b) of MAP-21 (23 U.S.C. § 101 note)

See section entitled Civil Rights and Disadvantaged Business Enterprise Requirements".

27. PROMPT PAYMENT

49 CFR 26.29

Not later than ten (10) days after receipt of each progress payment from NCTD, the Contractor shall pay to any subcontractor performing any Work, the respective amounts allowed to the Contractor for work performed by the subcontractor, to the extent of each subcontractor's interest therein, unless otherwise agreed to in writing. In addition, for projects that invoice only at the completion of the project, within seven (7) days of the Contractor receipt of released retention from NCTD upon completion of the project as defined in California Public Contract Code section 7107 the Contractor shall pay each of its subcontractors from whom retention has been withheld, each subcontractor's share of the retention received, in accordance with the provisions of California Public Contract Code section 7107. For projects that issue progress payment invoices, upon incremental acceptance of any portion of the work by NCTD, the Contractor shall pay each of its subcontractors from whom retention has been withheld, each subcontractor's share of the retention received, in accordance with the provisions of California Public Contract Code section 7107. This clause applies to both Disadvantaged Business Enterprise (DBE) and non-DBE subcontractors.

28. RECYCLED PRODUCTS

42 U.S.C. 6962
40 CFR Part 247

Executive Order 12873

Applicability to Contracts: The Recycled Products requirements apply to all contracts for items designated by the EPA, when the Contractor procures \$10,000 or more of one (1) of these items during the fiscal year, or has procured \$10,000 or more of such items in the previous fiscal year, using Federal funds.

Flow down Requirements: These requirements flow down to all contractor and subcontractor tiers.

Recovered Materials - The Contractor agrees to comply with all the requirements of Section 6002 of the Resource Conservation and Recovery Act (RCRA), as amended (42 U.S.C. 6962), including but not limited to the regulatory provisions of 40 CFR Part 247, and Executive Order 12873, as they apply to the procurement of the items designated in

Subpart B of 40 CFR Part 247. The Contractor agrees to comply with the U.S. Environmental Protection Agency (US EPA), "Comprehensive Procurement Guideline for Products Containing Recovered Materials," 40 CFR part 247.

29. ADA ACCESS

49 U.S.C. § 5301, 29 U.S.C. § 794, 42 U.S.C. § 12101

Applicability to Contracts: The Contractor shall comply with 49 USC 5301(d), stating Federal policy that the elderly and persons with disabilities have the same rights as other persons to use mass transportation services and facilities and that special efforts shall be made in planning and designing those services and facilities to implement that policy. Contractor shall also comply with all applicable requirements of Sections 504 of the Rehabilitation Act (1973), as amended, 29 USC 794, which prohibits discrimination on the basis of handicaps, and the Americans with Disabilities Act of 1990 (ADA), as amended, 42 USC 12101 et seq., which requires that accessible facilities and services be made available to persons with disabilities, including any subsequent amendments thereto. Contractor shall also comply with all applicable requirements of Sections 508 of the Rehabilitation Act (1973), which requires public-facing software to meet various accessibility requirements for persons with disabilities.

30. BUS TESTING

49 U.S.C. 5318(e)

49 U.S.C. 5323(c)

49 CFR Part 665

Applicability to Contracts: The Bus Testing requirements pertain only to the acquisition of Rolling Stock/Turnkey.

Flow down Requirements: The Bus Testing requirements should not flow down, except to the turnkey Contractor as stated in the most current FTA Master Agreement.

Bus Testing - The Contractor [Manufacturer] agrees to comply with 49 U.S.C. 5323(c) and FTA's implementing regulation at 49 CFR Part 665 and shall perform the following:

- a) A manufacturer of a new bus model or a bus produced with a major change in components or configuration shall provide a copy of the final test report to the recipient at a point in the procurement process specified by the recipient, which will be prior to the recipient's final acceptance of the first vehicle.
- b) A manufacturer who releases a report under paragraph 1 above shall provide notice to the operator of the testing facility that the report is available to the public.
- c) If the manufacturer represents that the vehicle was previously tested, the vehicle being sold should have the identical configuration and major components as the vehicle in the test report, which must be provided to the recipient prior to recipient's final acceptance of the first vehicle. If the configuration or components are not identical, the manufacturer shall provide a description of the change and the manufacturer's basis for concluding that it is not a major change requiring additional testing.
- d) If the manufacturer represents that the vehicle is "grandfathered" (has been used in mass transit service in the United States before October 1, 1988, and is currently being produced without a major change in configuration or components), the manufacturer shall provide the name and address of the recipient of such a vehicle and the details of that vehicle's configuration and major components.

31. PRE-AWARD AND POST-DELIVERY AUDITS REQUIREMENTS

49 U.S.C. 5323

49 C.F.R. 661.12

49 CFR Part 663

Applicability to Contracts: These requirements apply only to the acquisition of Rolling Stock/Turnkey.

Flow down Requirements: These requirements should not flow down, except to the turnkey contractor as stated in Master Agreement

Buy America certification is mandated under FTA regulation, "Pre-Award and Post-Delivery Audits of Rolling Stock Purchases," 49 C.F.R. 663.13.

A Buy America certification under this part shall be issued in addition to any certification that may be required by part 661 of this title. Nothing in this part precludes FTA from conducting a Buy America investigation under part 661 of this title "**Pre-Award and Post-Delivery Audit Requirements**" - The Contractor agrees to comply with "Buy America Requirements--Surface Transportation Assistance Act of 1982, as amended," 49 C.F.R. 661.12, but has been modified to include FTA's Buy America requirements codified at 49 U.S.C. A 5323(j).

Pre-Award and Post-Delivery Audit Requirements - The Contractor agrees to comply with 49 U.S.C. § 5323(l) and FTA's implementing regulation at 49 C.F.R. Part 663 and to submit the following certifications:

(1) Buy America Requirements: The Contractor shall complete and submit a declaration certifying either compliance or noncompliance with Buy America. If the Firm certifies compliance with Buy America, it shall submit documentation that lists 1) component and subcomponent parts of the rolling stock to be purchased identified by manufacturer of the parts, their country of origin and costs; 2) The location of the final assembly point for the rolling stock, including a description of the activities that will take place at the final assembly point and the cost of final assembly.

(2) Solicitation Specification Requirements: The Contractor shall submit evidence that it will be capable of meeting the bid specifications.

(3) Federal Motor Vehicle Safety Standards (FMVSS): The Contractor shall submit a) manufacturer's FMVSS self-certification sticker information that the vehicle complies with relevant FMVSS or b) manufacturer's certified statement that the contracted buses will not be subject to FMVSS regulations.

32. PRIVACY ACT

5 U.S.C. 552

Applicability to Contracts: When NCTD maintains files on drug and alcohol enforcement activities for FTA, and those files are organized so that information could be retrieved by personal identifier, the Privacy Act requirements apply to all contracts.

Flow down Requirements: The Federal Privacy Act requirements flow down to each third party contractor and their contracts at every tier.

Contracts Involving Federal Privacy Act Requirements: The following requirements apply to the Contractor and its employees that administer any system of records on behalf of the Federal Government under any contract:

(1) The Contractor agrees to comply with, and assures the compliance of its employees with, the information restrictions and other applicable requirements of the Privacy Act of 1974, 5 U.S.C. § 552a. Among other things, the Contractor agrees to obtain the express consent of the Federal Government before the Contractor or its employees operate a system of records on behalf of the Federal Government. The Contractor understands that the requirements of the Privacy Act, including the civil and criminal penalties for violation of that Act, apply to those individuals involved, and that failure to comply with the terms of the Privacy Act may result in termination of the underlying contract.

33. TRANSIT VEHICLE MANUFACTURER (TVM) CERTIFICATIONS

49 CFR Part 26

49 CFR §26.49 Contractor must submit to NCTD a certification from each transit vehicle manufacturer that desires to bid or propose upon a DOT-assisted transit vehicle procurement that it has complied with the requirements of 49 CFR §26.49. NCTD may, however, with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of complying through the overall goal-setting procedures.

34. METRIC REQUIREMENTS

15 U.S.C. §§205

2007-Pub. L. 110-69

As required by U.S. DOT or FTA, NCTD agrees to use the metric system of measurement in its activities, pursuant to 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 other U.S. DOT or FTA regulations, guidelines, and policies. To the extent practicable and feasible, the NCTD agrees to accept products and services with dimensions expressed in the metric system of measurement.

35. NATIONAL INTELLIGENT TRANSPORTATION SYSTEMS (ITS) ARCHITECTURE AND STANDARDS

23 U.S.C. Section 517(d)

23 U.S.C. §502

Intelligent transportation system (ITS) property and services must comply with the National ITS Architecture and Standards to the extent required by 23 U.S.C. Section 517(d) and FTA Notice, "FTA National ITS Architecture Policy on Transit Projects," 66 FR 1455 *et seq.*, January 8, 2001, and later published policies or implementing directives FTA may issue. Consequently, third party contracts involving ITS are likely to require provisions to ensure compliance with Federal requirements.

36. CORRIDOR PRESERVATION

49 U.S.C. 5323(q)

NCTD has agreed not to develop right-of way acquired under 49 U.S.C. § 5323(q), as amended by MAP-21, in anticipation of a project until all required environmental reviews for that project have been completed. Contractor shall assist NCTD in complying with this agreement if applicable based on the Work.

37. VETERANS EMPLOYMENT

49 U.S.C. 5325 (k)

Veterans Employment. As provided by 49 U.S.C. § 5325(k):

- a. To the extent practicable, Contractor agrees that it:
 1. Will give a hiring preference to veterans (as defined in 5 U.S.C. § 2108), who have the skills and abilities required to perform construction work required under a third party contract in connection with a capital project supported with funds made available or appropriated for 49 U.S.C. chapter 53, and
 2. Will not require an employer to give a preference to any veteran over any equally qualified applicant who is a member of any racial or ethnic minority, female, an individual with a disability, or a former employee, and
- b. Contractor also assures that its subcontractor will:
 1. Will give a hiring preference to veterans (as defined in 5 U.S.C. § 2108), who have the skills and abilities required to perform construction work required under a third party contract in connection with a capital project supported with funds made available or appropriated for 49 U.S.C. chapter 53, to the extent practicable, and
 2. Will not require an employer to give a preference to any veteran over any equally qualified applicant who is a member of any racial or ethnic minority, female, an individual with a disability, or a former employee.

38. NOTICE OF LEGAL MATTERS

2 C.F.R. §§ 180.220(b)-(c)

Applicability to Contracts: The Notice of Legal Matters requirements apply to all contracts covered under 2 C.F.R. §180.220 and 1200.220 and the amount of the Agreement is expected to equal or exceed \$25,000.

Flow down Requirements: The Notice of Legal Matters requirements flow down to each third party contractor and their contracts at every tier as permitted under OMB guidance at 2 C.F.R. 180.220(c).

If a current or prospective legal matter that may affect the Federal Government emerges, the Contractor agrees to promptly notify the FTA Chief Counsel and FTA Regional Counsel for the Region in which the Recipient is located. The Contractor must include a similar notification requirement in its subAgreements at every tier, for any Agreement that is a “covered transaction” according to 2 C.F.R. §§ 180.220 and 1200.220.

(1) The types of legal matters that require notification include, but are not limited to, a major dispute, breach, default, litigation, or naming the Federal Government as a party to litigation or a legal disagreement in any forum for any reason.

(2) Matters that may affect the Federal Government include, but are not limited to, the Federal Government’s interests in a federal grant award, any related, federally-funded contract and amendments thereto, or the Federal Government’s administration or enforcement of federal laws, regulations, and requirements.

(3) Additional Notice to U.S. DOT Inspector General. NCTD must promptly notify the U.S. DOT Inspector General in addition to the FTA Chief Counsel or Regional Counsel for the Region in which the Recipient is located, if it has knowledge of potential fraud, waste, or abuse occurring on a project receiving assistance from FTA. The notification provision applies if a person has or may have submitted a false claim under the False Claims Act, 31 U.S.C. § 3729, et seq., or has or may have committed a criminal or civil violation of law pertaining to such matters as fraud, conflict of interest, bid rigging, misappropriation or embezzlement, bribery, gratuity, or similar misconduct involving federal assistance. This responsibility occurs whether the project is subject to this Agreement or another Agreement between the NCTD and FTA, or an Agreement involving a principal, officer, employee, agent, or Third Party Participant of NCTD. It also applies to subcontractors at any tier. Knowledge, as used in this paragraph, includes, but is not limited to, knowledge of a criminal or civil investigation by a Federal, state, or local law enforcement or other investigative agency, a criminal indictment or civil complaint, or probable cause that could support a criminal indictment, or any other credible information in the possession of the NCTD. In this paragraph, “promptly” means to refer information without delay and without change. This notification provision applies to all divisions of NCTD, including divisions tasked with law enforcement or investigatory functions.

39. FEDERAL TAX LIABILITY AND RECENT FELONY CONVICTIONS

Applicability to Contracts: Applicable to all contracts.

Flow down Requirements: The Federal Tax Liability and Recent Felony Convictions prohibition extends to all third party contractors and their contracts at every tier and, sub-recipients and their sub-agreements at every tier.

(1) Transactions Prohibited.

(i) Contractor certifies that it: that

(A) Does not have any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability; and

(B) Was not convicted of the felony criminal violation under any Federal law within the preceding 24 months.

40. PROMOTING FREE SPEECH AND RELIGIOUS LIBERTY

Applicability to Contracts: Applicable to all contracts.

Flow down Requirements: These requirements have unlimited flow down.

Promoting Free Speech and Religious Liberty. The Contractor agrees to ensure that Federal funding is expended in full accordance with the U.S. Constitution, Federal Law, and statutory and public policy requirements: including, but not limited to, those protecting free speech, religious liberty, public welfare, the environment, and prohibiting discrimination.

41. SAFE OPERATION OF MOTOR VEHICLES

23 U.S.C. § 402

U.S. DOT Order 3902.10

Applicability to Contracts: Applicable to all contracts.

Flow down Requirements: The Safe Operations of Motor Vehicles extends to all third party contractors and their contracts at every tier and, sub-recipients and their sub-Agreements at every tier.

Seat Belt Use.

The Contractor agrees to adopt and promote on-the-job seat belt use policies and programs for its employees and other personnel that operate company-owned vehicles, company-rented vehicles, or personally operated vehicles;

Distracted Driving, Including Text Messaging While Driving.

(i) Safety. The Contractor agrees to adopt and enforce workplace safety policies to decrease crashes caused by distracted drivers, including policies to ban text messaging while using an electronic device supplied by an employer, and driving a vehicle the driver owns or rents, a vehicle Contractor owns, leases, or rents, or a privately-owned vehicle when on official business in connection with the Work, or when performing any work for or on behalf of NCTD;

(ii) Contractor Size. The Contractor agrees to conduct workplace safety initiatives in a manner commensurate with its size, such as establishing new rules and programs to prohibit text messaging while driving, re-evaluating the existing programs to prohibit text messaging while driving, and providing education, awareness, and other outreach to employees about the safety risks associated with texting while driving.

CIVIL RIGHTS AND DISADVANTAGED BUSINESS ENTERPRISE REQUIREMENTS

A. CIVIL RIGHTS

a. The Contractor will be required to comply with these applicable civil rights, nondiscrimination, and equal employment opportunity laws and regulations:

- i. 49 CFR Part 21, 49 CFR Part 25, 49 CFR Part 26, 49 CFR Part 27, 49 CFR Part 37, 49 CFR Part 38, 49 CFR Part 39, 20 U.S.C. §§ 1681 – 1683 and 1685 – 1687, 21 U.S.C. § 1101, 29 U.S.C. § 794, et seq., 42 U.S.C. § 290dd – 290dd-2, 42 U.S.C. § 2000d, 42 U.S.C. § 3601, 42 U.S.C. § 4541, 42 U.S.C. § 6101 – 6107, 42 U.S.C. § 12101, et seq., 42 U.S.C § 12132, 49 U.S.C § 5307 (c)(1)(D)(ii), 49 U.S.C § 5332, California Civil Code § 51, California Government Code § 11135
- ii. 29 CFR Part 1630, 41 CFR Part 60, 29 U.S.C. § 623, 42 U.S.C. § 2000e, 42 U.S.C. § 12112, California Government Code § 12900 - 12996
- iii. 49 U.S.C. § 5325 (k).
- iv. Fixing America's Surface Transportation (FAST) Act, Public Law No: 114-94, as may be amended.

b. The Civil Rights requirements flow down to all subcontractors and their subcontracts at every tier.

c. The following requirements apply to an Agreement awarded as a result of this solicitation:

- i. Nondiscrimination - In accordance with U.S. Department of Transportation (DOT), Federal, and State of California regulations 49 CFR Part 21, 49 CFR Part 25, 49 CFR Part 27, 49 CFR Part 37, 49 CFR Part 38, 49 CFR Part 39,

the Rehabilitation Act of 1973, as amended, 20 U.S.C. §§ 1681 – 1683 and 1685 – 1687, 21 U.S.C. § 1101, 29 U.S.C. § 794, Title VI of the Civil Rights Act, as amended, 42 U.S.C. § 290dd – 290dd-2, 42 U.S.C. § 2000d, section 303 of the Age Discrimination Act of 1975, as amended, 42 U.S.C. § 3601, 42 U.S.C. § 4541, 42 U.S.C. § 6102, 42 U.S.C. § 6101 – 6107, section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, 42 U.S.C. § 12132, Federal transit law 49 U.S.C § 5307 (c)(1)(D)(ii), Federal transit law 49 U.S.C. § 5332, FTA Circular 4702.1, “Title VI Requirements and Guidelines for Federal Transit Administration Recipients.”, DOT Order to Address Environmental Justice in Minority Populations and Low-Income Populations, Executive Order No. 13166 and DOT Policy Guidance Concerning Recipients’ Responsibilities to Limited English Proficiency (70 FR 74087, Dec. 14, 2005), the Unruh Civil Rights Act, California Civil Code § 51, and California Government Code § 11135, the Contractor agrees that it will comply with the identified Federal and State of California laws and regulations, pertaining to NCTD programs and activities, to ensure that no person will be denied the benefits of, or otherwise be subjected to, discrimination (particularly in the level and quality of transportation services and transportation-related benefits) on the bases of race, color, religion, national origin, ancestry, sex, sexual orientation, gender identity, gender expression, age, marital status, genetic information, medical condition, or disability. In addition, the Contractor agrees to comply with applicable Federal implementing regulations, other implementing requirements that DOT or FTA may issue, and any other applicable Federal and State of California statutes and/or regulations that may be signed into law or promulgated.

ii. Equal Employment Opportunity - The following equal employment opportunity requirements apply to a Agreement awarded as a result of this solicitation:

1. Race, Color, Ancestry, Marital Status, Medical Condition, Genetic Information, Religion, National Origin, Sex, Sexual Orientation, Gender Identity, Gender Expression - In accordance with Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e, 49 U.S.C. § 5332, FTA Circular 4704.1, “Equal Employment Program Guidelines for Grant Recipients”, and , the Contractor agrees to comply with all applicable equal employment opportunity requirements of U.S. Department of Labor (U.S. DOL) regulations, including "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor," 41 C.F.R. Parts 60, et seq., (which implement Executive Order No. 11246, "Equal Employment Opportunity," as amended by Executive Order No. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," 42 U.S.C. § 2000e note), Fair Employment and Housing Act, California Government Code Sections 12900 - 12996 and with any applicable Federal statutes, executive orders, regulations, and Federal policies that may in the future affect Proposer agrees to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, ancestry, religion, marital status, medical condition, genetic information, national origin, sex, sexual orientation, gender identity, gender expression, or age. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. In addition, the Contractor agrees to comply with any implementing requirements that DOT or FTA may issue, and any other applicable Federal statutes that may be signed into law or Federal regulations that may be promulgated.
2. Sex – The Contractor agrees to comply with all applicable requirements of Title IX of the Education Amendments of 1975, as amended, 20 U.S.C. § 1681, and 49 CFR part 25. In addition, the Contractor agrees to comply with any implementing requirements that DOT or FTA may issue.
3. Age - The Contractor agrees to comply with all applicable requirements of the Age Discrimination Act of 1975, as amended, 42 U.S.C. § 6101, 45 CFR part 90, the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, and Equal Employment Opportunity Commission (EEOC) implementing regulations 29 CFR part 1625. In addition, the Contractor agrees to comply with any implementing requirements that DOT or FTA may issue.
4. Disabilities - The Contractor agrees to comply with Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, Section 508 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794(d), 36 CFR part 1194, the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101, 49 CFR parts 27, 37, 38, and 39, and FTA Circular 4710.1, “Americans with Disabilities Act: Guidance”. In addition, the Contractor agrees to comply with any implementing requirements that DOT or FTA may issue.

- d. The Contractor agrees to include these requirements in each subcontract financed in whole or in part with Federal assistance provided by FTA, modified only if necessary to identify the affected parties.

B. DISADVANTAGED BUSINESS ENTERPRISE (DBE)

- a. NCTD encourages DBE participation in this solicitation. In order to qualify as a DBE, a Contractor, or a Contractor's subcontractor, must be certified as a DBE under 49 CFR Part 26. As a recipient of Federal funds, NCTD must comply, and ensure that its contractor(s) comply with 49 CFR Part 26 and Section 1101(b) of the Fixing America's Surface Transportation Act (FAST Act).
- b. DBE Requirements/DBE Obligation:
- i. The Agreement to be awarded may be funded in part by the U.S. Department of Transportation (DOT) FTA. As a condition of financial assistance Agreements between NCTD and the U.S. DOT, NCTD has established a DBE Program and overall triennial DBE goal in accordance with Title 49 CFR, Part 26.
 - ii. The Agreement to be awarded may be funded in part by the U.S. DOT FTA. As a condition of financial assistance Agreements between NCTD and the U.S. DOT, NCTD has established a DBE Program and overall triennial DBE goal in accordance with Title 49 CFR, Part 26.
 - iii. Pursuant to Race-Neutral DBE policy directive issued by the U.S. DOT in response to the Ninth Circuit U.S. Court of Appeals decision in *Western States Paving v. Washington State Department of Transportation and the FTA's Guidance* (Docket No. FTA-2006-24063; dated March 23, 2006), NCTD will strictly utilize race-neutral measures to meet its overall DBE goals and objectives. Contractors are encouraged to afford small businesses, including DBEs, an equitable opportunity to compete for and perform on a Agreement resulting from this solicitation.
 - iv. The Contractor, and any of its subcontractors, are to ensure that DBE as defined in 49 CFR Part 26 have equal opportunities to participate in the performance of NCTD contracts. In this regard, the Contractor shall take all necessary and reasonable steps in accordance with 49 CFR Part 26 to ensure that DBEs have the equal opportunities to compete for and are awarded contracts. The Contractor 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 this U.S. DOT-assisted contract. Each subcontract the Contractor signs with a subcontractor must include the assurance in this paragraph (see 49 CFR 26.13(b)).
 - v. 1101(b) of the FAST Act extends the Federal statutory requirement that FTA make available at least 10 percent (10%) of its funding under that Act for contracts with small business concerns owned and controlled by socially and economically disadvantaged people. NCTD and sub-recipients (Contractor and its subcontractors) of FTA-funding assists FTA in meeting this national goal. To receive FTA assistance, NCTD and sub-recipients (Contractor and its subcontractors) of FTA-funding must comply with applicable requirements of DOT regulations 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs".
- c. DBE Financial Institutions
- i. The Contractor is to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to use these institutions, and to encourage subcontractors to make use of these institutions also.
 - ii. A list of Minority Owned Banks is on the Federal Reserve website at <http://federalreserve.gov/releases/mob/current/default.htm>. The Federal Reserve website is updated periodically.
 - iii. The Contractor is encouraged to use the services offered by banks in the community that are owned and controlled by minorities or women when feasible and beneficial.
- d. DBE Reporting and Certification
- i. Contractor shall utilize the PlanetBids "My Contracts" portal to report monthly subcontractor payment reports during the reporting month. Contractor shall ensure that its subcontractors are added into the PlanetBids "MyContracts" portal once the Agreement has been awarded. Contractor shall submit a monthly subcontractor payment report on the PlanetBids "MyContracts" portal by the 20th of each month following the end of the reporting month and should reflect all payments made to subcontractor(s) through the last day of the previous month, even if the subcontractor(s) did not perform any work. Contractor shall ensure that its subcontractor(s) use the PlanetBids "MyContracts" portal to verify the payment amounts the Contractor submitted by the 25th of each month following the end of the reporting month. In order for the Contractor to submit a properly executed monthly subcontractor payments report, the Contractor must verify that their subcontractors' DBE certification is current at the time of payment. Certified Contractors can be found at the following State of California website: http://www.dot.ca.gov/hq/bep/find_certified.htm Failure to submit a proper substantiation of payment via PlanetBids will result in delayed payment. Failure to submit these reports in a timely manner may result in a penalty of \$10 per day for each payment not reported upon.

- e. DBE Contract Assurance (49 CFR 26.13)
 - i. NCTD does not discriminate on the basis of race, color, national origin, or sex in the award and performance of any U.S. DOT assisted contract or in the administration of its DBE Program or the requirements of 49 CFR Part 26. NCTD takes all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of U.S. DOT assisted contracts. NCTD's DBE Program as required by 49 CFR Part 26 and as approved by U.S. DOT will be incorporated by reference into the Agreement resulting from this solicitation.
 - ii. The Contractor 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 Agreement, which may result in the termination of this Agreement or such other remedy as the recipient deems appropriate, which may include, but is not limited to:
 - 1. Withholding monthly progress payments;
 - 2. Assessing sanctions;
 - 3. Liquidated damages; and/or
 - 4. Disqualifying the Contractor from future bidding/proposing as non-responsible.
- f. DBE Prompt Payment (49 CFR 26.29)
 - i. Failure to comply with these provisions or delay in payment without prior written approval from NCTD will constitute noncompliance, which will result in appropriate administrative sanctions, including, but not limited to a penalty of 2% of the amount due per month for every month that payment is not made.
- g. Termination and/or Substitution of DBE Subcontractors (49 CFR 26.53)
 - i. Termination and/or substitution of a DBE subcontractor must be done in accordance with NCTD's DBE Program and 49 CFR 26.53. Pursuant to 49 CFR 26.53(f)(1)(i) a prime contractor shall not substitute or terminate a DBE subcontractor listed in the original bid without NCTD's prior written consent. NCTD will evaluate all requests in strict accordance with NCTD's DBE Program, and all applicable laws rules and regulations including 49 CFR 26.53(f)(1)(i) the Subletting and Subcontracting Fair practices Act (Chapter 2 [commencing at Section 4100], Division 5, Title 1 of the Public Contract Code of the State of California). Substitution or termination includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE contractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm.
- h. Civil Rights Policy Statements
 - i. NCTD's DBE Policy Statement for its FTA approved DBE program is located at the following website: <https://gonctd.com/about-nctd/accountability/>
 - ii. NCTD's Discrimination Complaint Procedures Policy Statement for its Title VI/Unruh program is located at the following website: <https://gonctd.com/accessibility/civil-rights/>
 - iii. NCTD's EEO Policy Statement for its EEO program is located at the following website: <https://gonctd.com/careers-nctd-north-county-transit-district/>