EXHIBIT D of Amendment #1

Mandatory Fiscal and Federal Provisions
for Architectural and Engineering Consultant Contracts
Subject to Caltrans Funding

Caltrans Funded Agreement. This Agreement is for architectural and/or engineering services funded in whole or in part by Caltrans and subject to the following provisions. In the event of any conflict or inconsistency between Exhibit D and this Agreement, Exhibit D will control.

(Note Exhibit 10-R refers to Caltrans exhibit for A&E Boilerplate Agreement Language)

1. Consultant's Reports or Meetings (Exhibit 10-R, Article II)

A. Consultant shall submit progress reports at least once a month. The report should be sufficiently detailed for the City's contract administrator to determine, if Consultant is performing to expectations, or is on schedule; to provide communication of interim findings, and to sufficiently address any difficulties or special problems encountered, so remedies can be developed.

B. Consultant's project manager shall meet with City's contract administrator, as needed, to discuss progress on the Agreement.

2. Performance Period (Exhibit 10-R, Article IV).

A. This Agreement shall go into effect upon approval by City, and Consultant shall commence work after notification to proceed by City's contract administrator. The Agreement shall end as stated in Section 4 of the Agreement , unless extended by amendment to the Agreement.

B. Consultant is advised that any recommendation for Agreement award is not binding on City until the Agreement is fully executed and approved by City.

3. Allowable Costs and Payments (Exhibit 10-R, Article V).

A. The method of payment for this Agreement will be based on actual cost plus a fixed fee. City will reimburse Consultant for actual costs (including labor costs, employee benefits, travel, equipment rental costs, overhead and other direct costs) incurred by Consultant in performance of the work. Consultant will not be reimbursed for actual costs that exceed the estimated wage rates, employee benefits, travel, equipment rental, overhead, and other estimated costs set forth in the approved Consultant's cost proposal, unless additional reimbursement is provided for by amendment to the Agreement. In no event, will Consultant be reimbursed for overhead costs at a rate that exceeds the City approved overhead rate set forth in the cost proposal. In the event that City determines that a change to the work from that specified in the cost proposal and Agreement is required, the Agreement time or actual costs reimbursable by City shall be adjusted by amendment to the Agreement to accommodate the changed work. The maximum

total cost as specified in Paragraph "I" shall not be exceeded, unless authorized by amendment to the Agreement.

B. The indirect cost rate established for this Agreement is extended through the duration of this specific Agreement. Consultant's agreement to the extension of the 1-year applicable period shall not be a condition or qualification to be considered for the work or agreement award.

C. In addition to the allowable incurred costs, City will pay Consultant a fixed fee. The fixed fee is nonadjustable for the term of the Agreement, except in the event of a significant change in the scope of services and such adjustment is made by amendment to the Agreement.

D. Reimbursement for transportation and subsistence costs shall not exceed the rates specified in the approved cost proposal.

E. When milestone cost estimates are included in the approved cost proposal, Consultant shall obtain prior written approval for a revised milestone cost estimate from the contract administrator before exceeding such cost estimate.

F. Progress payments will be made monthly in arrears based on services provided and allowable incurred costs. A pro rata portion of Consultant's fixed fee will be included in the monthly progress payments. If Consultant fails to submit the required deliverable items according to the schedule set forth in the scope of services, City shall have the right to delay payment or terminate this Agreement.

G. No payment will be made prior to approval of any work, nor for any work performed prior to approval of this Agreement.

H. Consultant will be reimbursed promptly according to California Regulations upon receipt by City's contract administrator of itemized invoices in duplicate. Invoices shall be submitted no later than thirty (30) calendar days after the performance of work for which Consultant is billing. Invoices shall detail the work performed on each milestone and each project as applicable. Invoices shall follow the format stipulated for the approved cost proposal and shall reference this Agreement number and project title. Final invoice must contain the final cost and all credits due City including any equipment purchased under the provisions of Section 9 (Article XI), Equipment Purchase and Other Capital Expenditures, of this Exhibit D. The final invoice should be submitted within sixty (60) calendar days after completion of Consultant's work. Invoices shall be mailed to City at the following address:

City Manager
13831 San Pablo Avenue
San Pablo, CA 94806

I. The total amount payable by City including the fixed fee shall not exceed the amount as stated in the latest Amendment, Section 2, Compensation.

J. Salary increases will be reimbursable if the new salary is within the salary range identified in the approved cost proposal and is approved by City's contract administrator.

K. For personnel subject to prevailing wage rates as described in the California Labor Code, all salary increases, which are the direct result of changes in the prevailing wage rates are reimbursable.

4. Termination (Exhibit 10-R, Article VI).

A. This Agreement may be terminated by City provided that City gives not less than thirty (30) calendar days' written notice (delivered by certified mail, return receipt requested) of intent to terminate. Upon termination, City shall be entitled to all work, including but not limited to, reports, investigations, appraisals, inventories, studies, analyses, drawings and data estimates performed to that date, whether completed or not, and in accordance with Section 21 (Article XXVI), Ownership of Data.

B. City may temporarily suspend this Agreement, at no additional cost to City, provided that Consultant is given written notice (delivered by certified mail, return receipt requested) of temporary suspension. If City gives such notice of temporary suspension, Consultant shall immediately suspend its activities under this Agreement. A temporary suspension may be issued concurrent with the notice of termination provided for in subsection A of this section.

C. Notwithstanding any provisions of this Agreement, Consultant shall not be relieved of liability to City for damages sustained by City by virtue of any breach of this Agreement by Consultant, and City may withhold any payments due to Consultant until such time as the exact amount of damages, if any, due City from Consultant is determined.

D. In the event of termination, Consultant shall be compensated as provided for in the Agreement. Upon termination, City shall be entitled to all work, including but not limited to, reports, investigations, appraisals, inventories, studies, analyses, drawings and data estimates performed to that date, whether completed or not, and in accordance with Section 21 (Article XXVI), Ownership of Data.

5. Cost Principles and Administrative Requirements (Exhibit 10-R, Article VII).

A. Consultant agrees that 48 CFR Part 31, Contract Cost Principles and Procedures, shall be used to determine the allowability of individual terms of cost.

B. Consultant also agrees to comply with federal procedures in accordance with 2 CFR Part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.

C. Any costs for which payment has been made to Consultant that are determined by subsequent audit to be unallowable under 48 CFR Part 31 or 2 CFR Part 200 are subject to repayment by Consultant to City.

D. When a Consultant or subconsultant is a Non-Profit Organization or an Institution of Higher Education, the Cost Principles for Title 2 CFR Part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards shall apply.

6. <u>Retention of Records/Audit</u> (Exhibit 10-R, Article VIII).

For the purpose of determining compliance with Government Code section 8546.7, Consultant, subconsultants, and City shall maintain all books, documents, papers, accounting records, Independent CPA Audited Indirect Cost Rate workpapers, and other evidence pertaining to the performance of the Agreement, including, but not limited to, the costs of administering the Agreement. All parties, including Consultant's Independent CPA, shall make such workpapers and materials available at their respective offices at all reasonable times during the term of the Agreement and for three (3) years from the date of final payment under the Agreement. City, Caltrans Auditor, FHWA, or any duly authorized representative of the Federal Government having jurisdiction under Federal laws or regulations (including the basis of Federal funding in whole or in part) shall have access to any books, records, and documents of Consultant, subconsultants, and Consultant's Independent CPA, that are pertinent to the Agreement) for audits, examinations, workpaper review, excerpts, and transactions, and copies thereof shall be furnished if requested without limitation.

7. <u>Audit Review Procedures</u> (Exhibit 10-R, Article IX).

A. Any dispute concerning a question of fact arising under an interim or post audit of this Agreement that is not disposed of by agreement, shall be reviewed by City's Chief Financial Officer.

B. Not later than 30 calendar days after issuance of the final audit report, Consultant may request a review by City's Chief Financial Officer of unresolved audit issues. The request for review will be submitted in writing.

C. Neither the pendency of a dispute nor its consideration by City will excuse Consultant from full and timely performance, in accordance with the terms of this Agreement.

D. Consultant and subconsultant agreements, including cost proposals and indirect cost rates (ICR), may be subject to audits or reviews such as, but not limited to, an agreement audit, an incurred cost audit, an ICR Audit, or a CPA ICR audit work paper review. If selected for audit or review, the agreement, cost proposal and ICR and related work papers, if applicable, will be reviewed to verify compliance with 48 CFR Part 31 and other related laws and regulations. In the instances of a CPA ICR audit work paper review it is Consultant's responsibility to ensure federal, state, or City officials are allowed full access to the CPA's work papers including making copies as necessary. The agreement, cost proposal, and ICR shall be adjusted by Consultant and approved by City contract administrator to conform to the audit or review recommendations. Consultant agrees that individual terms of costs identified in the audit report shall be incorporated into the agreement by this reference if directed by City at its sole discretion. Refusal by Consultant to incorporate audit or review recommendations, or to ensure that the federal, state, or City officials have access to CPA work papers, will be considered a breach of

Agreement terms and cause for termination of the Agreement and disallowance of prior reimbursed costs.

E. Consultant cost proposal may be subject to a CPA ICR Audit Work Paper Review and/or audit by Caltrans' Audits and Investigation (A&I). Caltrans A&I, at its sole discretion, may review and/or audit and approve the CPA ICR documentation. The cost proposal shall be adjusted by the Consultant and approved by the City contract administrator to conform to the Work Paper Review recommendations included in the management letter or audit recommendations included in the audit report. Refusal by the Consultant to incorporate the Work Paper Review recommendations included in the management letter or audit recommendations included in the audit report will be considered a breach of the Agreement terms and cause for termination of the Agreement and disallowance of prior reimbursed costs.

1. During a Caltrans A&I's review of the ICR audit work papers created by the Consultant's independent CPA, Caltrans A&I will work with the CPA and/or Consultant toward a resolution of issues that arise during the review. Each party agrees to use its best efforts to resolve any audit disputes in a timely manner. If Caltrans A&I identifies significant issues during the review and is unable to issue a cognizant approval letter, City will reimburse the Consultant at an accepted ICR until a FAR (Federal Acquisition Regulation) compliant ICR {e.g. 48 CFR, Part 31; GAGAS (Generally Accepted Auditing Standards); CAS (Cost Accounting Standards), if applicable; in accordance with procedures and guidelines of the American Association of State Highways and Transportation Officials (AASHTO) Audit Guide; and other applicable procedures and guidelines} is received and approved by A&I.

Accepted rates will be as follows:

   a. If the proposed rate is less than one hundred and fifty percent (150%) - the accepted rate reimbursed will be ninety percent (90%) of the proposed rate.

   b. If the proposed rate is between one hundred and fifty percent (150%) and two hundred percent (200%) - the accepted rate will be eighty-five percent (85%) of the proposed rate.

   c. If the proposed rate is greater than two hundred percent (200%) - the accepted rate will be seventy-five percent (75%) of the proposed rate.

2. If Caltrans A&I is unable to issue a cognizant letter per paragraph E.1. above, Caltrans A&I may require Consultant to submit a revised independent CPA-audited ICR and audit report within three (3) months of the effective date of the management letter. Caltrans A&I will then have up to six (6) months to review the Consultant's and/or the independent CPA's revisions.

3. If the Consultant fails to comply with the provisions of this paragraph E, or if Caltrans A&I is still unable to issue a cognizant approval letter after the revised independent CPA-audited ICR is submitted, overhead cost reimbursement will be limited to the accepted ICR that was established upon initial rejection of the ICR and set forth in paragraph E.1. above for all rendered services. In this event, this accepted ICR will become the actual and final ICR for reimbursement purposes under this Agreement.

4. Consultant may submit to City final invoice only when all of the following items have occurred: (1) Caltrans A&I accepts or adjusts the original or revised independent CPA- audited ICR; (2) all work under this Agreement has been completed to the satisfaction of City; and, (3) Caltrans A&I has issued its final ICR review letter. The Consultant MUST SUBMIT ITS FINAL INVOICE TO CITY no later than sixty (60) calendar days after occurrence of the last of these items. The accepted ICR will apply to this Agreement and all other agreements executed between City and the Consultant, either as a prime or subconsultant, with the same fiscal period ICR.

8. <u>Subcontracting</u> (Exhibit 10-R, Article X).

A. Nothing contained in this Agreement or otherwise, shall create any contractual relation between City and any subconsultant(s), and no subagreement shall relieve Consultant of its responsibilities and obligations hereunder. Consultant agrees to be as fully responsible to City for the acts and omissions of its subconsultants and of persons either directly or indirectly employed by any of them as it is for the acts and omissions of persons directly employed by Consultant. Consultant's obligation to pay its subconsultants is an independent obligation from City's obligation to make payments to Consultant.

B. Consultant shall perform the work contemplated with resources available within its own organization and no portion of the work shall be subcontracted without written authorization by City's contract administrator, except that which is expressly identified in the approved cost proposal.

C. Any subagreement entered into as a result of this Agreement shall contain all the provisions stipulated in this entire Agreement to be applicable to subconsultants unless otherwise noted.

D. Consultant shall pay its subconsultants within fifteen (15) calendar days from receipt of each payment made to Consultant by City.

E. Any substitution of subconsultant(s) must be approved in writing by City's contract administrator in advance of assigning work to a substitute subconsultant.

9. <u>Equipment Purchase and Other Capital Expenditures</u> (Exhibit 10-R, Article XI).

A. Prior authorization in writing, by City's contract administrator shall be required before Consultant enters into any unbudgeted purchase order, or subcontract exceeding five thousand dollars ($5,000) for supplies, equipment, or consultant services. Consultant shall provide an evaluation of the necessity or desirability of incurring such costs.

B. For purchase of any item, service or consulting work not covered in Consultant's approved cost proposal and exceeding five thousand dollars ($5,000), with prior authorization from City's contract administrator, three competitive quotations must be submitted with the request, or the absence of bidding must be adequately justified.

C. Any equipment purchased with funds provided under the terms of this Agreement is subject to the following:

1. Consultant shall maintain an inventory of all nonexpendable property. Nonexpendable property is defined as having a useful life of at least two years and an acquisition cost of five thousand dollars ($5,000) or more. If the purchased equipment needs replacement and is sold or traded in, City shall receive a proper refund or credit at the conclusion of the Agreement, or if the Agreement is terminated, Consultant may either keep the equipment and credit City in an amount equal to its fair market value, or sell such equipment at the best price obtainable at a public or private sale, in accordance with established City procedures; and credit City in an amount equal to the sales price. If Consultant elects to keep the equipment, fair market value shall be determined at Consultant's expense, on the basis of a competent independent appraisal of such equipment. Appraisals shall be obtained from an appraiser mutually agreeable to by City and Consultant, if it is determined to sell the equipment, the terms and conditions of such sale must be approved in advance by City.

2. Regulation 2 CFR Part 200 requires a credit to Federal funds when participating equipment with a fair market value greater than five thousand dollars ($5,000) is credited to the project.

10. <u>State Prevailing Wage Rates</u> (Exhibit 10-R, Article XII).

A. No Consultant or subconsultant may be awarded an Agreement containing public work elements unless registered with the Department of Industrial Relations (DIR) pursuant to Labor Code section 1725.5. Registration with DIR must be maintained throughout the entire term of this Agreement, including any subsequent amendments.

B. Consultant shall comply with all of the applicable provisions of the California Labor Code requiring the payment of prevailing wages. The General Prevailing Wage Rate Determinations applicable to work under this Agreement are available and on file with the Department of Transportation's Regional/District Labor Compliance Officer (http://www.dot.ca.gov/hq/construc/LaborCompliance/documents/District-Region_Map_Construction_7-8-15.pdf). These wage rates are made a specific part of this Agreement by reference pursuant to Labor Code section 1773.2 and will be applicable to work performed at a construction project site. Prevailing wages will be applicable to all inspection work performed at City construction sites, at City facilities and at off-site locations that are set up by the construction contractor or one of its subcontractors solely and specifically to serve City projects. Prevailing wage requirements do not apply to inspection work performed at the facilities of vendors and commercial materials suppliers that provide goods and

services to the general public.

C. General Prevailing Wage Rate Determinations applicable to this project may also be obtained from the Department of Industrial Relations website at http://www.dir.ca.gov**.**

D. Payroll Records

1. Each Consultant and subconsultant shall keep accurate certified payroll records and supporting documents as mandated by Labor Code section 1776 and as defined in 8 CCR section 16000 showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by the Consultant or subconsultant in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

   a. The information contained in the payroll record is true and correct.

   b. The employer has complied with the requirements of Labor Code sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

2. The payroll records enumerated under paragraph (1) above shall be certified as correct by the Consultant under penalty of perjury. The payroll records and all supporting documents shall be made available for inspection and copying by City representative's at all reasonable hours at the principal office of the Consultant. The Consultant shall provide copies of certified payrolls or permit inspection of its records as follows:

   a. A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or the employee's authorized representative on request.

   b. A certified copy of all payroll records enumerated in paragraph (1) above, shall be made available for inspection or furnished upon request to a representative of City, the Division of Labor Standards Enforcement and the Division of Apprenticeship Standards of the Department of Industrial Relations. Certified payrolls submitted to City, the Division of Labor Standards Enforcement and the Division of Apprenticeship Standards shall not be altered or obliterated by the Consultant.

   c. The public shall not be given access to certified payroll records by the Consultant. The Consultant is required to forward any requests for certified payrolls to the City contract administrator by both email and regular mail on the business day following receipt of the request.

3. Each Consultant shall submit a certified copy of the records enumerated in

paragraph (1) above, to the entity that requested the records within ten (10) calendar days after receipt of a written request.

4. Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by City shall be marked or obliterated in such a manner as to prevent disclosure of each individual's name, address, and social security number. The name and address of the Consultant or subconsultant performing the work shall not be marked or obliterated.

5. The Consultant shall inform City of the location of the records enumerated under paragraph (1) above, including the street address, city and county, and shall, within five (5) working days, provide a notice of a change of location and address.

6. The Consultant or subconsultant shall have ten (10) calendar days in which to comply subsequent to receipt of written notice requesting the records enumerated in paragraph (1) above. In the event the Consultant or Subconsultant fails to comply within the ten (10) day period, he or she shall, as a penalty to City, forfeit one hundred dollars ($100) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Such penalties shall be withheld by City from payments then due. Consultant is not subject to a penalty assessment pursuant to this section due to the failure of a subconsultant to comply with this section.

E. When prevailing wage rates apply, the Consultant is responsible for verifying compliance with certified payroll requirements. Invoice payment will not be made until the invoice is approved by the City contract administrator.

F. Penalty

1. The Consultant and any of its subconsultants shall comply with Labor Code sections 1774 and 1775. Pursuant to Labor Code section 1775, Consultant and any subconsultant shall forfeit to City a penalty of not more than two hundred dollars ($200) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the Director of DIR for the work or craft in which the worker is employed for any public work done under the Agreement by the Consultant or by its subconsultant in violation of the requirements of the Labor Code and in particular, Labor Code sections 1770 to 1780, inclusive.

2. The amount of this forfeiture shall be determined by the Labor Commissioner and shall be based on consideration of mistake, inadvertence, or neglect of the Consultant or subconsultant in failing to pay the correct rate of prevailing wages, or the previous record of the Consultant or subconsultant in meeting their respective prevailing wage obligations, or the willful failure by the Consultant or subconsultant to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rates of prevailing wages is not excusable if the Consultant or subconsultant had knowledge of the obligations under the Labor Code. The Consultant is responsible for paying the appropriate rate,

including any escalations that take place during the term of the Agreement.

3. In addition to the penalty and pursuant to Labor Code section 1775, the difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the Consultant or subconsultant.

4. If a worker employed by a subconsultant on a public works project is not paid the general prevailing per diem wages by the subconsultant, the prime Consultant of the project is not liable for the penalties described above unless the prime Consultant had knowledge of that failure of the subconsultant to pay the specified prevailing rate of wages to those workers or unless the prime Consultant fails to comply with all of the following requirements:

   a. The agreement executed between the Consultant and the subconsultant for the performance of work on public works projects shall include a copy of the requirements in Labor Code sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

   b. The Consultant shall monitor the payment of the specified general prevailing rate of per diem wages by the subconsultant to the employees by periodic review of the certified payroll records of the subconsultant.

   c. Upon becoming aware of the subconsultant's failure to pay the specified prevailing rate of wages to the subconsultant's workers, the Consultant shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subconsultant for work performed on the public works project.

   d. Prior to making final payment to the subconsultant for work performed on the public works project, the Consultant shall obtain an affidavit signed under penalty of perjury from the subconsultant that the subconsultant had paid the specified general prevailing rate of per diem wages to the subconsultant's employees on the public works project and any amounts due pursuant to Labor Code section 1813.

5. Pursuant to Labor Code section 1775, City shall notify the Consultant on a public works project within fifteen (15) calendar days of receipt of a complaint that a subconsultant has failed to pay workers the general prevailing rate of per diem wages.

6. If City determines that employees of a subconsultant were not paid the general prevailing rate of per diem wages and if City did not retain sufficient money under the Agreement to pay those employees the balance of wages owed under the general prevailing rate of per diem wages, the Consultant shall withhold an amount of moneys due the subconsultant sufficient to pay those employees the general prevailing rate of per diem wages if requested

by City.

G. Eight (8) hours labor constitutes a legal day's work. The Consultant shall forfeit, as a penalty to the City, twenty-five dollars ($25) for each worker employed in the execution of the Agreement by the Consultant or any of its subconsultants for each calendar day during which such worker is required or permitted to work more than eight (8) hours in any one calendar day and forty (40) hours in any one calendar week in violation of the provisions of the Labor Code, and in particular sections 1810 to 1815 thereof, inclusive, except that work performed by employees in excess of eight (8) hours per day, and forty (40) hours during any one week, shall be permitted upon compensation for all hours worked in excess of eight (8) hours per day and forty (40) hours in any week, at not less than one and one-half (1.5) times the basic rate of pay, as provided in section 1815.

H. Employment of Apprentices

1. Where either the Agreement or the subagreement exceeds thirty thousand dollars ($30,000), the Consultant and any subconsultants under him or her shall comply with all applicable requirements of Labor Code sections 1777.5, 1777.6 and 1777.7 in the employment of apprentices.

2. Consultant and subconsultants are required to comply with all Labor Code requirements regarding the employment of apprentices, including mandatory ratios of journey level to apprentice workers. Prior to commencement of work, Consultant and subconsultants are advised to contact the DIR Division of Apprenticeship Standards website at https://www.dir.ca.gov/das/, for additional information regarding the employment of apprentices and for the specific journey-to-apprentice ratios for the work under the Agreement. The Consultant is responsible for all subconsultants' compliance with these requirements. Penalties are specified in Labor Code section 1777.7.

11. <u>Conflict of Interest</u> (Exhibit 10-R, Article XIII).

A. During the term of this Agreement, Consultant shall disclose any financial, business, or other relationship with City that may have an impact upon the outcome of this Agreement or any ensuing City construction project. Consultant shall also list current clients who may have a financial interest in the outcome of this Agreement or any ensuing City construction project which will follow.

B. Consultant certifies that it has disclosed to City any actual, apparent, or potential conflicts of interest that may exist relative to the services to be provided pursuant to this Agreement. Consultant agrees to advise City of any actual, apparent or potential conflicts of interest that may develop subsequent to the date of execution of this Agreement. Consultant further agrees to complete any statements of economic interest if required by either City ordinance or State law.

C. Consultant hereby certifies that it does not now have, nor shall it acquire any financial or business interest that would conflict with the performance of services under this Agreement.

D. Consultant hereby certifies that Consultant or subconsultant and any firm affiliated with Consultant or subconsultant that bids on any construction contract or on any agreement to provide construction inspection for any construction project resulting from this Agreement has established necessary controls to ensure a conflict of interest does not exist. An affiliated firm is one, which is subject to the control of the same persons through joint ownership or otherwise.

12. <u>Rebates, Kickbacks or Other Unlawful Consideration</u> (Exhibit 10-R, Article XIV).

Consultant warrants that this Agreement was not obtained or secured through rebates, kickbacks or other unlawful consideration, either promised or paid to any City employee. For breach or violation of this warranty, City shall have the right, in its discretion, to terminate the Agreement without liability; to pay only for the value of the work actually performed; or to deduct from the Agreement price or otherwise recover the full amount of such rebate, kickback or other unlawful consideration.

13. <u>Prohibition of Expending Local Agency, State, or Federal Funds for Lobbying</u> (Exhibit 10-R, Article XV).

A. Consultant certifies to the best of his or her knowledge and belief that:

1. No state, federal, or local agency appropriated funds have been paid or will be paid by or on behalf of Consultant to any person for influencing or attempting to influence an officer or employee of any local, state, or federal agency, a Member of the State Legislature or United States Congress, an officer or employee of the Legislature or Congress, or any employee of a Member of the Legislature or Congress, in connection with the awarding or making of this Agreement, or with the extension, continuation, renewal, amendment, or modification of this Agreement.

2. If any funds other than federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress, in connection with this Agreement, Consultant shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying", in accordance with its instructions.

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

C. Consultant also agrees by signing this document that he or she shall require that the language of this certification be included in all lower-tier subagreements, which exceed one hundred thousand dollars ($100,000) and that all such sub recipients shall certify and disclose accordingly.

14. <u>Non-Discrimination Clause and Statement of Compliance</u> (Exhibit 10-R, Article XVI).

A. Consultant's signature affixed to the Agreement, and dated, shall constitute a certification under penalty of perjury under the laws of the State of California that Consultant has, unless exempt, complied with the nondiscrimination program requirements of Government Code section 12990 and 2 CCR section 8103.

B. During the performance of this Agreement, Consultant and its subconsultants shall not deny the Agreement's benefits to any person on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status, nor shall they unlawfully discriminate, harass, or allow harassment against any employee or applicant for employment because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status. Consultant and subconsultants shall insure that the evaluation and treatment of their employees and applicants for employment are free from such discrimination and harassment.

C. Consultant and subconsultants shall comply with the provisions of the Fair Employment and Housing Act (Gov. Code section 12990 et seq.), the applicable regulations promulgated thereunder (2 CCR section 11000 et seq.), the provisions of Government Code sections 11135-11139.5, and the regulations or standards adopted by the City to implement such article. The applicable regulations of the Fair Employment and Housing Commission implementing Government Code section 12990 (a-f), set forth in 2 CCR sections 8100-8504, are incorporated into this Agreement by reference and made a part hereof as if set forth in full.

D. Consultant shall permit access by representatives of the Department of Fair Employment and Housing and the City upon reasonable notice at any time during the normal business hours, but in no case less than twenty-four (24) hours' notice, to such of its books, records, accounts, and all other sources of information and its facilities as said Department or City shall require to ascertain compliance with this clause.

E. Consultant and its subconsultant*s* shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other Agreement.

F. The Consultant shall include the nondiscrimination and compliance provisions of this Section in all subcontracts to perform work under this Agreement.

G. The Consultant, with regard to the work performed under this Agreement, shall act in accordance with Title VI of the Civil Rights Act of 1964 (42 U.S.C. section 2000d et seq.). Title VI provides that the recipients of federal assistance will implement and maintain a policy of nondiscrimination in which no person in the United States shall, on the basis of race, color, national origin, religion, sex, age, disability, be excluded from participation in, denied the benefits of or subject to discrimination under any program or activity by the recipients of federal assistance or their assignees and successors in interest.

H. Consultant shall comply with regulations relative to non-discrimination in federally-assisted programs of the U.S. Department of Transportation (49 CFR Part 21-Effectuation of Title VI of the Civil Rights Act of 1964). Specifically, Consultant shall not participate either directly or indirectly in the discrimination prohibited by 49 CFR section 21.5, including employment practices and the selection and retention of subconsultants.

15. <u>Debarment and Suspension Certification</u> (Exhibit 10-R, Article XVII).

A. Consultant's signature affixed to the Agreement shall constitute a certification under penalty of perjury under the laws of the State of California, that the Consultant or any person associated therewith in the capacity of owner, partner, director, officer, or manager:

1. Is not currently under suspension, debarment, voluntary exclusion, or determination of ineligibility by any federal agency;

2. Has not been suspended, debarred, voluntarily excluded, or determined ineligible by any federal agency within the past three (3) years;

3. Does not have a proposed debarment pending; and

4. Has not been indicted, convicted, or had a civil judgment rendered against it by a court of competent jurisdiction in any matter involving fraud or official misconduct within the past three (3) years.

B. Any exceptions to this certification must be disclosed to City. Exceptions will not necessarily result in denial of recommendation for award, but will be considered in determining responsibility. Disclosures must indicate the party to whom the exceptions apply, the initiating agency, and the dates of agency action.

C. Exceptions to the Federal Government Excluded Parties List System maintained by the U.S. General Services Administration are to be determined by FHWA.

16. <u>Disadvantaged Business Enterprises (DBE) Participation</u> (Exhibit 10-R, Article XVIII).

A. This Agreement is subject to 49 CFR Part 26 entitled "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs." Consultants who enter into a federally-funded agreement with City will assist the City in a good faith effort to achieve California's statewide overall DBE goal.

B. The goal for DBE participation for this Agreement is 15%. Participation by DBE Consultant or subconsultants shall be in accordance with information contained in *Exhibit 10-O1: Consultant Proposal DBE Commitment, or in Exhibit 10-O2: Consultant Contract DBE Commitment* attached hereto and incorporated as part of the Agreement. If a DBE subconsultant is unable to perform, Consultant must make a good faith effort to replace him/her with another DBE subconsultant, if the goal is not otherwise met.

C. Consultant can meet the DBE participation goal by either documenting commitments to DBEs to meet the Agreement goal, or by documenting adequate good faith efforts to meet the Agreement goal. An adequate good faith effort means that the Consultant must show that it took all necessary and reasonable steps to achieve a DBE goal that, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to meet the DBE goal. If Consultant has not met the DBE goal, complete and submit Exhibit 15-H: DBE Information – Good Faith Efforts to document efforts to meet the goal. Refer to 49 CFR Part 26 for guidance regarding evaluation of good faith efforts to meet the DBE goal.

D. DBEs and other small businesses, as defined in 49 CFR Part 26 are encouraged to participate in the performance of Agreements financed in whole or in part with federal funds. The City, Consultant, or subconsultant shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Agreement. The Consultant shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the Consultant 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 City 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 Consultant from future bidding as non-responsible.

E. A DBE firm may be terminated only with prior written approval from City and only for the reasons specified in 49 CFR section 26.53(f). Prior to requesting City consent for the termination, Consultant must meet the procedural requirements specified in 49 CFR section 26.53(f). If a DBE subconsultant is unable to perform, Consultant must make a good faith effort to replace him/her with another DBE subconsultant, if the goal is not otherwise met.

F. Consultant shall not be entitled to any payment for such work or material unless it is performed or supplied by the listed DBE or by other forces (including those of Consultant) pursuant to prior written authorization of the City's contract administrator.

G. A DBE is only eligible to be counted toward the Agreement goal if it performs a commercially useful function (CUF) on the Agreement. CUF must be evaluated on an agreement by agreement basis. A DBE performs a CUF when it is responsible for execution of the work of the Agreement and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a CUF, the DBE must also be responsible, with respect to materials and supplies used on the Agreement, for negotiating price, determining quality and quantity, ordering the material and installing (where applicable), and paying for the material itself. To determine whether a DBE is performing a CUF, evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the Agreement is commensurate with the work it is actually performing, and other relevant factors.

H. A DBE does not perform a CUF if its role is limited to that of an extra participant in a transaction, Agreement, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, examine similar transactions, particularly those in which DBEs do not participate.

I. If a DBE does not perform or exercise responsibility for at least thirty percent (30%) of the total cost of its agreement with its own work force, or the DBE subcontracts a greater portion of the work of the agreement than would be expected on the basis of normal industry practice for the type of work involved, it will be presumed that it is not performing a CUF.

J. Consultant shall maintain records of materials purchased or supplied from all subcontracts entered into with certified DBEs. The records shall show the name and business address of each DBE or vendor and the total dollar amount actually paid each DBE or vendor, regardless of tier. The records shall show the date of payment and the total dollar figure paid to all firms. DBE prime Consultant's shall also show the date of work performed by their own forces along with the corresponding dollar value of the work.

K. Upon completion of the Agreement, a summary of these records shall be prepared and submitted on the form entitled, *Exhibit 17-F: Final Report-Utilization of Disadvantaged Business Enterprise (DBE) First-Tier Subconsultants*, certified correct by Consultant or Consultant's authorized representative and shall be furnished to the contract administrator with the final invoice. Failure to provide the summary of DBE payments with the final invoice will result in twenty-five percent (25%) of the dollar value of the invoice being withheld from payment until the form is submitted. The amount will be returned to Consultant when a satisfactory "Final Report-Utilization of Disadvantaged Business Enterprises (DBE), First-Tier Subconsultants" is submitted to the contract administrator.

L. If a DBE subconsultant is decertified during the term of the Agreement, the decertified subconsultant shall notify Consultant in writing with the date of decertification. If a subconsultant becomes a certified DBE during the term of the Agreement, the subconsultant shall notify Consultant in writing with the date of certification. Any changes should be reported to City's contract administrator within thirty (30) calendar days.

M. Any subcontract entered into as a result of this Agreement shall contain all of the provisions of this Section.

17. <u>Funding Requirements</u> (Exhibit 10-R, Article XX).

A. It is mutually understood between the parties that this Agreement may have been written before ascertaining the availability of funds or appropriation of funds, for the mutual benefit of both parties, in order to avoid program and fiscal delays that would occur if the Agreement were executed after that determination was made.

B. This Agreement is valid and enforceable only, if sufficient funds are made available to City for the purpose of this Agreement. In addition, this Agreement is subject to

any additional restrictions, limitations, conditions, or any statute enacted by the Congress, State Legislature, or City governing board that may affect the provisions, terms, or funding of this Agreement in any manner.

C. It is mutually agreed that if sufficient funds are not appropriated, this Agreement may be amended to reflect any reduction in funds.

D. City has the option to terminate the Agreement pursuant to Section 4 (Article VI), Termination, or by mutual agreement to amend the Agreement to reflect any reduction of funds.

18. <u>Contingent Fee</u> (Exhibit 10-R, Article XXII).

Consultant warrants, by execution of this Agreement that no person or selling agency has been employed, or retained, to solicit or secure this Agreement upon an agreement or understanding, for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees, or bona fide established commercial or selling agencies maintained by Consultant for the purpose of securing business. For breach or violation of this warranty, City has the right to annul this Agreement without liability; to pay only for the value of the work actually performed; or, in its discretion, to deduct from the Agreement price or consideration, or otherwise recover the full amount of such commission, percentage, brokerage, or contingent fee.

19. <u>Disputes</u> (Exhibit 10-R, Article XXIII).

A. Prior to either Party commencing any legal action under this Agreement, the Parties agree to try in good faith to settle any dispute amicably between them. If a dispute has not been settled after forty-five (45) days of good-faith negotiations and as may be otherwise provided herein, then either party may commence legal action against the other.

B. Not later than thirty (30) calendar days after completion of all deliverables necessary to complete the plans, specifications and estimate, Consultant may request review by the City Council of unresolved claims or disputes, other than an audit. The request for review will be submitted in writing.

20. <u>Safety</u> (Exhibit 10-R, Article XXV).

A. Consultant shall comply with Occupational Safety and Health Administration (OSHA) regulations applicable to Consultant regarding necessary safety equipment or procedures. Consultant shall comply with safety instructions issued by City Safety Officer and other City representatives. Consultant personnel shall wear hard hats and safety vests at all times while working on the construction project site.

B. Pursuant to the authority contained in Vehicle Code section 591, City has determined that such areas are within the limits of the project and are open to public traffic. Consultant shall comply with all of the requirements set forth in Divisions 11, 12, 13, 14, and 15 of the Vehicle Code. Consultant shall take all reasonably necessary precautions for safe operation of its vehicles and the protection of the traveling public from injury and damage from such vehicles.

21. <u>Ownership of Data</u> (Exhibit 10-R, Article XXVI).

A. It is mutually agreed that all materials prepared by Consultant under this Agreement shall become the property of City, and Consultant shall have no property right therein whatsoever. Immediately upon termination, City shall be entitled to, and Consultant shall deliver to City, reports, investigations, appraisals, inventories, studies, analyses, drawings and data estimates performed to that date, whether completed or not, and other such materials as may have been prepared or accumulated to date by Consultant in performing this Agreement which is not Consultant's privileged information, as defined by law, or Consultant's personnel information, along with all other property belonging exclusively to City which is in Consultant's possession. Publication of the information derived from work performed or data obtained in connection with services rendered under this Agreement must be approved in writing by City.

B. Additionally, it is agreed that the Parties intend this to be an Agreement for services and each considers the products and results of the services to be rendered by Consultant hereunder to be work made for hire. Consultant acknowledges and agrees that the work (and all rights therein, including, without limitation, copyright) belongs to and shall be the sole and exclusive property of City without restriction or limitation upon its use or dissemination by City.

C. Nothing herein shall constitute or be construed to be any representation by Consultant that the work product is suitable in any way for any other project except the one detailed in this Agreement. Any reuse by City for another project or project location shall be at City's sole risk.

D. Applicable patent rights provisions regarding rights to inventions shall be included in the contracts as appropriate (48 CFR 27 Subpart 27.3 - Patent Rights under Government Contracts for federal-aid contracts).

E. City may permit copyrighting reports or other agreement products. If copyrights are permitted, the Agreement shall provide that the FHWA shall have the royalty-free nonexclusive and irrevocable right to reproduce, publish, or otherwise use, and to authorize others to use, the work for government purposes.

22. <u>Claims Filed by City's Construction Contractor</u> (Exhibit 10-R, Article XXVII).

A. If claims are filed by City's construction contractor relating to work performed by Consultant's personnel, and additional information or assistance from Consultant's personnel is required in order to evaluate or defend against such claims; Consultant agrees to make its personnel available for consultation with City's construction contract administration and legal staff and for testimony, if necessary, at depositions and at trial or arbitration proceedings.

B. Consultant's personnel that City considers essential to assist in defending against construction contractor claims will be made available on reasonable notice from City. Consultation or testimony will be reimbursed at the same rates, including travel costs that are being paid for Consultant's personnel services under this

Agreement.

C. Services of Consultant's personnel in connection with City's construction contractor claims will be performed pursuant to a written amendment to this Agreement, if necessary, extending the termination date of this Agreement in order to resolve the construction claims.

23. <u>Confidentiality of Data</u> (Exhibit 10-R, Article XXVIII).

A. All financial, statistical, personal, technical, or other data and information relative to City's operations, which are designated confidential by City and made available to Consultant in order to carry out this Agreement, shall be protected by Consultant from unauthorized use and disclosure.

B. Permission to disclose information on one occasion, or public hearing held by City relating to the Agreement, shall not authorize Consultant to further disclose such information, or disseminate the same on any other occasion.

C. Consultant shall not comment publicly to the press or any other media regarding the Agreement or City's actions on the same, except to City's staff, Consultant's own personnel involved in the performance of this Agreement, at public hearings, or in response to questions from a Legislative committee.

D. Consultant shall not issue any news release or public relations item of any nature, whatsoever, regarding work performed or to be performed under this Agreement without prior review of the contents thereof by City, and receipt of City's written permission.

E. All information related to the construction estimate is confidential, and shall not be disclosed by Consultant to any entity, other than City, Caltrans, and/or FHWA. All of the materials prepared or assembled by Consultant pursuant to performance of this Contract are confidential and Consultant agrees that they shall not be made available to any individual or organization without the prior written approval of City or except by court order. If Consultant or any of its officers, employees, or subcontractors does voluntarily provide information in violation of this Agreement, City has the right to reimbursement and indemnity from Consultant for any damages caused by Consultant releasing the information, including, but not limited to, City's attorney's fees and disbursements, including without limitation experts' fees and disbursements.

24. <u>National Labor Relations Board Certification</u> (Exhibit 10-R, Article XXIX).

In accordance with Public Contract Code §10296, Consultant hereby states under penalty of perjury that no more than one final unappealable finding of contempt of court by a federal court has been issued against Consultant within the immediately preceding two-year period, because of Consultant's failure to comply with an order of a federal court that orders Consultant to comply with an order of the National Labor Relations Board.

25. <u>Evaluation of Consultant</u> (Exhibit 10-R, Article XXX).

Consultant's performance will be evaluated by City. A copy of the evaluation will be sent to Consultant for comments. The evaluation together with the comments shall be retained as part of the Agreement record.