

GENERAL TERMS AND CONDITIONS FOR SOLICITATIONS

1. DEFINITIONS

Whenever, in the solicitation or Agreement Documents, the following words are used, the intent and meaning shall be interpreted as follows:

Agreement Documents – the 1) Agreement, 2) all of the contents of the solicitation and associated attachments, addenda, drawings, technical reports, and technical specifications, and 3) the Contractor's bid, in that order of precedence. Said documents shall be considered as part of any agreement made pursuant to this solicitation. Any terms and conditions in Contractor's bid, invoices, or other documents referenced therein shall not be binding on NCTD if they conflict with the Agreement or solicitation.

Bids – offers submitted in response to a solicitation. The term bid, offer and proposal are interchangeable.

Bidder/Bidders - persons, contractors, or corporations submitting a bid to NCTD in response to a solicitation. The term bidder, offeror and proposer are interchangeable.

Chief Executive Officer - the Chief Executive Officer of NCTD or their authorized representative or agent.

Contract Officer - the authorized agent(s) of North County Transit District who is authorized to review and administer the Agreement Documents.

Contractor(s) - the Bidder to whom the Agreement is awarded. The terms Bidder and Contractor are interchangeable when referring to the Bidder that is awarded the Agreement.

Construction General Storm Water Permit - the current State Water Resources Control Board National Pollutant Discharge Elimination System General Permit for Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction and Land Disturbance Activities, as it may be amended or superseded, (currently Order No. 2009-0009-DWQ) issued by the State Water Resources Control Board for the State of California.

Days - calendar days unless otherwise specified.

Disadvantaged Business Enterprise (DBE) – a for-profit small business concern as defined in 49 CFR 26.5.

Grand Total Bid Price - the grand total price of the bid and shall include all direct and indirect labor and material costs, duties, fees, and any other charges applicable to complete the total requirements as specified in the solicitation including all addenda, agreement drawings and technical specifications. Taxes must be included in the bid but will not be included for purposes of determining the lowest bidder.

Hazardous Substances and/or Contaminated Materials - any substance, waste, or material which is determined by any state, federal, or local governmental

authority to be capable of posing a risk of injury to health, safety, and/or the environment, including, but not limited to, all substances, wastes, and materials designated or defined as hazardous, extremely hazardous, or toxic pursuant to Section 311 of the Clean Water Act, 33 USC Sections 1321, et seq., Section 1004 of the Resource and Conservation and Recovery Act, 42 USC Sections 6903, et seq., Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 USC Sections 9601, et seq.; Section 25141 of the Hazardous Waste Control Law, California Health and Safety Code Sections 25117, et seq.; Section 25316 of the Carpenter Presley-Tanner Hazardous Substance Account Act, California Health and Safety Code Section 25316; Section 25501 of the Hazardous Materials Release Response Plans and Inventory Law, California Health and Safety Code Sections 25280-25299, et seq., as may be hereinafter amended.

Linear Underground/Overhead Project (LUP) - include, but are not limited to, any conveyance, pipe, or pipeline for the transportation of any gaseous, liquid (including water and wastewater for domestic municipal services), liquescent, or slurry substance; any cable line or wire for the transmission of electrical energy; any cable line or wire for communications (e.g., telephone, telegraph, radio, or television messages); and associated ancillary facilities. Construction activities associated with LUPs include, but are not limited to, (a) those activities necessary for the installation of underground and overhead linear facilities (e.g., conduits, substructures, pipelines, towers, poles, cables, wires, connectors, switching, regulating and transforming equipment, and associated ancillary facilities); and include, but are not limited to, (b) underground utility mark-out, potholing, concrete and asphalt cutting and removal, trenching, excavation, boring and drilling, access road and pole/tower pad and cable/wire pull station, substation construction, substructure installation, construction of tower footings and/or foundations, pole and tower installations, pipeline installations, welding, concrete and/or pavement repair or replacement, and stockpile/borrow locations.

NCTD or Grantee - North County Transit District or its authorized representative or agent.

NCTD Board of Directors - the Governing Board of NCTD.

NCTD's Project Representative, Engineer, Resident Engineer, Construction Manager, Project Manager - the authorized agent(s) or representative(s) of North County Transit District designated to ensure strict engineering, performance, job site review, and related conformance with the Agreement Documents.



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Notice of Intent to Award (NIA) - the written notice from NCTD to all Bidders identifying the intent to award to the lowest responsive, responsible Bidder following bid opening and opens the period for protest in accordance with the provisions of this solicitation.

Notice to Proceed (NTP) - a written notice from NCTD to a Contractor authorizing the Contractor to commence work and to start the performance period.

Storm Water Pollution Prevention Plan (SWPPP) - a site-specific, written document that, among other things: (1) identifies potential sources of storm water pollution at the construction site; (2) describes storm water control

measures to reduce or eliminate pollutants in storm water discharges from the construction site; and (3) identifies procedures the Contractor will implement to comply with the terms and conditions of, among other things, the Construction General Storm Water Permit and the current NCTD Storm Water Management Plan.

Task Order Authorization - written authorization for Contractor or Subcontractor's off-site staff to perform work under this agreement. Task Order Authorization provides a description of the services to be performed, the scheduled completion date, the hours estimated to perform the work, the hourly rates to be charged and the estimated reimbursable rates.

2. ADDENDA

The effect of all addenda to the solicitation shall be considered in the Bid package and said addenda shall be made a part of the Bid submitted to NCTD. It is the Bidder's sole responsibility to ensure that all addenda have been acknowledged before submitting a bid response. Failure to acknowledge all addenda may render the Bid package nonresponsive and result in its rejection.

3. ASSIGNMENT AND SUBCONTRACTING

Nothing shall prevent the Bidder from employing independent associates and subcontractors as the Bidder may deem appropriate to assist in the performance of the Agreement, however, Contractor shall not assign, sublet, or transfer the Agreement or any rights under or interest in the Agreement without the written consent of NCTD, which may be withheld for any reason.

Certain work may be purchased or contracted from an outside source under a subcontract, and the Bidder shall assume full responsibility for all work and materials. NCTD reserves the right to approve the use of any subcontractor and the Bidder must make a request in writing to use a subcontractor not already named in the Bid or Agreement. Bidder shall provide a copy of any subcontract related to this Agreement within ten calendar days of a request from NCTD. All subcontracts involving the Work shall pass through all applicable provisions in this Agreement, including but not limited to federal provisions and prevailing wage requirements that may be provided herein.

4. AVAILABILITY OF FUNDING

NCTD's obligation for payment of any Agreement beyond the current fiscal year is contingent upon the availability of funding from which payment can be made. NCTD shall, at its sole discretion, have the right to terminate or suspend the Agreement or reduce compensation and service levels or scope of work proportionately upon thirty (30) days' written notice to the Contractor in the event that federal, state or other funding for the resulting Agreement ceases or is reduced prior to the ordinary completion date of the term of the resulting contract. In the event of reduction of funding for the contract, NCTD and Contractor shall meet within ten (10) days of written notice to renegotiate the Agreement based upon the modified level of funding. In this case, if no Agreement is reached between NCTD and Contractor within ten (10) days of the first meeting, either party shall have the right to terminate the Agreement within ten (10) days written notice of termination. In the event of termination of the Agreement in accordance with the terms of this section, Contractor shall be entitled to any payment offset to which NCTD may be entitled, for damages or otherwise, under the terms of the Agreement. In the event of termination of the Agreement pursuant to this section, in no event shall Contractor be entitled to any loss of profits on the portion of the Agreement so terminated, or to other compensation, benefits, reimbursements or ancillary services other than as expressly provided herein.

5. 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.

6. BIDDERS INTERESTED IN MORE THAN ONE BID

No Bidder, including a Bidder's principal or agent, may file more than one bid for a solicitation as a prime bidder. However, a person, contractor, or corporation that has submitted a subcontract bid to a Bidder, or one who has quoted prices on materials or services to a Bidder, is not thereby disqualified from submitting a subcontract bid or quoting prices to other Bidders or from being a principal Bidder for the same work.

7. BIDDER SATISFACTION

It is the responsibility of the Bidder to thoroughly examine and be familiar with any material such as drawings and specifications provided. The failure or omission of Bidder to receive or examine any Agreement Documents, addenda, other documents or to visit the site to become acquainted with conditions there existing, shall in no way relieve Bidder from obligations with respect to the bid requirements or to the Agreement. The submission of the bid shall be taken as prima facie evidence of compliance with this section.

8. BUSINESS ETHICS

During the performance of work under this Agreement, Contractor agrees to maintain business ethics standards aimed at avoiding any impropriety or conflict of interest which could be construed to have an adverse impact on the dealings with NCTD.

Contractor shall take reasonable actions to prevent any actions or conditions which could result in a conflict with NCTD's best interests. These obligations shall apply to the activities of Contractor employees, agents, subcontractors, material suppliers (or their representatives), etc. **The Contractor is responsible for implementing and maintaining an internal compliance program to ensure compliance with Agreement requirements and to monitor business ethics and potential conflicts of interest.**

Contractor employees, agents, subcontractors, material suppliers (or their representatives) should not make or provide to be made any employment, gifts, entertainment (liquor, lodging, travel, food, and tickets to public functions (sports events, theater, etc.), payments, loans, free work, substantially discounted work, or other considerations to NCTD representatives, employees or their relatives. Similarly, Contractor employees, agents or Subcontractors (or their relatives) should not receive any commissions, gifts, entertainment, payments, loans, free work, substantially discounted work or any other considerations from representatives of Subcontractors, or material suppliers or any other individuals, organizations, or businesses receiving funds in connection with any work performed under an awarded Agreement.

Contractor agrees to notify the NCTD's Senior Legal Counsel - Regulatory Compliance, within forty-eight (48) hours of any instance where the Contractor becomes aware of a failure to comply with the provisions of this article.

Upon request by NCTD, Contractor agrees to provide a certified Management Representation Letter executed by Contractor representatives in a form agreeable to NCTD stating that they are not aware of any situations violating the business ethics expectations outlined in this Agreement or any similar potential conflict of interest situations.

Contractor shall permit interviews of employees, reviews and audits of accounting or other records by NCTD representative(s) to evaluate compliance with the business ethics standards. Such reviews and audits will encompass all dealings and activities of Contractor employees, agents, representatives, vendors, Subcontractors, and other third parties paid by Contractor in their relations with NCTD's current or former employees or employee relatives.

Contractor agrees to include this clause in all contracts with Subcontractors and payees receiving more than ten thousand dollars (\$10,000) in funds in connection with the work of NCTD.

9. CHANGES TO THE SOLICITATION

NCTD reserves the right to revise or amend any portion of the solicitation up to the deadline for submittal of bids. Any revision and amendment shall be issued through an addendum to this solicitation. If an addendum setting forth material changes, additions or deletions is issued when there is seventy-two (72) hours or less to the deadline for submittal of bids, NCTD will extend the bid submittal deadline date by no less than three (3) business days. Minor changes or clarifications that do not significantly impact the Bidders ability to submit a bid, in NCTD's sole discretion, shall not result in an extension of the bid submittal deadline date.

10. CIVIL RIGHTS

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

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- a. Nondiscrimination - In accordance with State of California regulations California Civil Code § 51 and California Government Code § 11135, the Bidder agrees that no person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, or any other basis protected under federal, state, or local law, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by NCTD. In addition, the Bidder agrees to comply with any other applicable State of California statutes and/or regulations that may be signed into law or promulgated. Terms and conditions relating to compliance with Federal Civil Rights regulations are specified separately in the Federal Requirements Master List.
 - b. Equal Employment Opportunity - In accordance with the California Fair Employment and Housing Act (Government Code §§ 12900 – 12996) and California Labor Code § 1735, the Contractor and its subcontractors shall not discriminate against any employee or applicant for employment because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, sexual orientation, or any other classifications protected by law. The Contractor will take affirmative action to ensure that employees are treated during employment or training without regard to their race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, sexual orientation, or any other classifications protected by law. Such action shall include, but not be limited to: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training or apprenticeship.
2. The Civil Rights requirements flow down to all third-party subcontractors and their subcontracts at every tier.

11. COMMENCEMENT OF WORK

Work may not commence until such time as NCTD issues a Notice to Proceed, a fully executed Task Order or a Purchase Order. Any work performed prior to such action by NCTD shall be at the sole risk and expense of the Bidder who shall be fully liable for any damage or injury sustained by NCTD or third parties resulting therefrom.

For on-call (task order based) contracts:

Any work, proposed and authorized by a Task Order Agreement is on an “as-needed” or “on-call” basis, there is no commitment under the Agreement by NCTD to provide enough additional work to keep Bidder personnel working on a full-time basis. The Not-To-Exceed (NTE) value of the Agreement is only for internal administrative reasons and is not a commitment of the value of work to be assigned.

Once the Agreement is executed, the method of task assignment or Task Orders from NCTD will be by issuance of a fully executed Task Order Agreement confirming acceptance of the Bidder’s quote. This is the only method under the Agreement that authorizes work to be proceed. Any work performed in advance of the fully executed Task Order Agreement is at the Bidder’s own risk and may result in late payments or denial of payment request. Oral direction the Project Manager (PM) is not authorization to proceed or perform work. In the event of any such oral direction, the Bidder is to immediately contact the assigned Contract Officer.

Task Orders will be issued under the Agreement and may be funded in whole or in part with federal funding. The DBE participation requirement associated with the Task Orders cannot be precisely determined until the amount of funding and scopes of work for the Task Orders are approved by NCTD. Bidder understands and agrees that a DBE goal may be set at the time proposals are sought for a Task Order, based on the work actually assigned by NCTD. In the event NCTD determines a goal will be set on a Task Order, Bidder shall be required to meet or exceed the established Task Order DBE goal, or make a good faith effort to do so, over the term of the applicable Task Order (inclusive of all amendments, modifications, options, and change orders).

If a Task Order will be federally funded and have a DBE goal, Bidder will be required to provide a DBE Commitment form at the time of proposal. The DBE Commitment form shows the percentage of work that Bidder is offering to commit to DBEs, based on its Price Proposal. If Bidder itself is a DBE, it must still fill out the form and list itself and the portion of the work it will self-perform.

If Bidder does not commit to meet a DBE goal utilizing the DBE Commitment form for a Task Order with a DBE goal, it must complete and submit the DBE Information-Good Faith Efforts (GFE) form with its proposal and demonstrate adequate GFE to meet the DBE goal in order to maintain its eligibility for award. GFE documentation must include the information and supporting documents, as necessary and as set forth in the attachments entitled

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“Guidance for Bidders Completing the GFE and Appendix A to 49 CFR 26” and “DBE Information – Good Faith Efforts” that will be sent out when a Task Order proposal is being requested.

NCTD recommends that even if Bidder has proposed to commit to meet the goal, that it additionally submits the GFE form as a means of protecting its eligibility for award in the event the DBE firm participation proposed was improperly credited by the Bidder due to a DBE firm not being properly certified by the California Uniform Certification Program. CUCP status can be checked here: [Caltrans - Disadvantaged Business Enterprise System \(dbesystem.com\)](http://Caltrans - Disadvantaged Business Enterprise System (dbesystem.com))

12. COMPLIANCE WITH LAW

All items prepared by the Bidder shall conform to all laws, statutes and ordinance, zoning requirements, applicable rules and regulations and the methods and procedures of all local, State and Federal; governmental boards, bureaus, or agencies having jurisdiction over the Contract Document.

13. CONFLICT OF INTEREST

It is important to NCTD to maintain a level competitive playing field for all Bidders. Any verbal or written communications between any potential or actual Bidder, or its representatives and any NCTD Board Member, staff member, committee member, or any consultant, or employee of a consultant, providing NCTD with assistance, advice, or professional services relating to the matters covered by the solicitation or who is involved in any aspect of the bid evaluation process, are strictly prohibited from the date the draft Scope of Work is sent to NCTD’s Procurement and Contract Administration Division for approval through the date of execution of an Agreement or purchase order. The only exceptions to this are: (1) written requests regarding information or clarification made to NCTD’s designated Contract Officer (CO) during the allowable time period under the solicitation; (2) any request for a reference from an NCTD employee that is sent to the designated CO during the procurement process, and (3) any communications at a publicly noticed meeting of the NCTD Board of Directors. Any violation of the requirements set forth in this section shall constitute grounds for immediate and permanent disqualification of the Bidder from participation in this procurement.

Bidders for this solicitation are hereby put on notice that the scope of work may/will include tasks that could create a conflict of interest for the Contractor(s) awarded an Agreement and thus preclude award to it of future work by NCTD. Tasks within this solicitation that could create such a conflict include the provision of environmental services for a future capital project, assistance in developing a scope of work, estimate, or evaluation criteria to be used in a future procurement. In general, NCTD must be able to rely on unbiased advisory services, and work by a Bidder on a past, future, or related project may cause Bidder to have a perceived or actual bias. If a Bidder is unsure of whether its work has or will create a conflict of interest potentially precluding it from working for NCTD, it can send a request for a determination of conflict to NCTD’s Chief Operating Officer prior to the deadline for questions regarding this solicitation.

The scope of work resulting from this solicitation involves procurement advice, project manager responsibilities, third-party invoice reviews, lobbying, legal, or financial advisory services and will require one or more employees of the awarded Contractor(s) to file assuming and leaving office disclosures of economic interests as well as annual economic interest statements with the California Fair Political Practices Commission to ensure prohibited conflicts of interest do not exist. If a selected Bidder’s employees will have any of these types of responsibilities, its affected employees will be required to provide an assuming and leaving office, as well as annual financial disclosure statements as required by state law to confirm that those persons do not have sources of income or gifts that will create a conflict of interest. Such employees are prohibited from receiving gifts (tickets, meals, travel, etc.) or income in excess of \$50 annually from entities with which NCTD may contract in combination with or as a result of the Work.

14. CONSULTING WORK REQUIRING FINAL WRITTEN REPORT

In addition to any deliverables identified in the Scope of Work or elsewhere in the Agreement, if the engagement results in a study or consulting work of any type that requires a final report to be submitted, the Bidder will be required to provide an oral presentation of the contents of the final report to the NCTD management team. Scheduling of such a presentation will be coordinated by the NCTD Project Manager and is to occur within fifteen (15) calendar days from the date of the submittal of the final report within the NCTD General Administration Office located in Oceanside, CA.

15. CONTINUATION OF WORK DURING DISPUTES

The Contractor shall continue the services and adhere to the progress schedule during all disputes or disagreements with NCTD over any work listed in the Scope of work, price, or time dispute. No work shall be delayed or postponed pending resolution of any disputes or disagreements, except as the Contractor and NCTD may otherwise agree in writing.

16. CONTRACT EXTENSION

NCTD, through its Chief Operating Officer, may, in its sole discretion, extend the contract past the stated termination date for a period of up to 180 days in the event that a subsequent contract has not yet been awarded. Additional extensions past the 180 days, as needed, may be approved, as mutually agreed upon by NCTD and the Contractor.

17. CONTRACTOR'S WARRANTIES

Contractor warrants all goods and materials to meet the specification or other requirements of this order. 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.

18. COSTS INCURRED

NCTD will not reimburse Bidders for costs incurred in the preparation of a bid, attendance at interviews, or conducting negotiations, at any time, whether before Agreement award, following Agreement award, or when a solicitation is cancelled. In addition, NCTD will not reimburse Contractor for preparation of invoices or administrative reports. These costs shall be included in overhead and shall not be separately billed to NCTD.

19. DETERMINATION OF COMPETENCY

When considering an award determination, in addition to price or other criteria established in the solicitation, NCTD, in its sole discretion, may consider the following:

- (a) The ability, capacity, and skill of the bidder to perform the contract.
- (b) Whether the bidder can perform the contract within the time specified, without delay or interference.
- (c) The character, integrity, reputation, judgment, experience, and efficiency of the bidder.
- (d) The quality of performance of previous contracts.
- (e) The previous and existing compliance by the bidder with laws and ordinances relating to the contract.

20. DISCREPANCIES IN BIDS

Each Bidder shall furnish a price for all bid items as specified in the Line Item section on PlanetBids or indicate "No Bid" if NCTD has specified that partial bids will be allowed. Partial bids shall be deemed nonresponsive unless NCTD has specified that partial bids will be allowed. Failure to furnish clear and legible pricing for all specified bid items may render a bid nonresponsive and may cause its rejection. In the event there are unit price bid items in the Bid Form and the "amount" indicated for a unit price bid item does not equal the product of the unit price and quantity, the unit price shall govern, and the amount will be corrected accordingly. In the event there is more than one bid item in the Bid Form and the Grand Total Bid Price does not agree with the sum of the prices bid on the individual items, the prices bid on the individual items shall govern and the total for the schedule will be corrected accordingly and this may affect the apparent low bidder results.

21. DELAYS

Contractor will not be held liable for failure or delay in the fulfillment if hindered or prevented by fire, strikes or Acts of God.

22. DISADVANTAGED BUSINESS ENTERPRISE (DBE)

Information regarding compliance with Disadvantaged Business Enterprise (DBE) requirements is specified separately in the Federal Requirements Master List.

23. DRAWINGS/SPECIFICATION CHANGES

NCTD reserves the right to revise or amend the specifications up to the time set for opening the bids. Such revisions and amendments, if any, shall be issued by addenda to this solicitation. Copies of such addenda shall be sent to all prospective Bidders. In the event that an addendum setting forth material changes, additions or deletions is issued when there is seventy-two (72) hours or less to the bid opening date, NCTD will extend the bid opening date by no less than three (3) business days. Clarification notices that do not significantly impact the Bidders ability to submit a bid shall not result in an extension of the bid opening date.

24. EQUAL EMPLOYMENT OPPORTUNITY

In connection with the execution of this Agreement and in compliance with State and Federal laws and regulations noted in Section 19 Number 5, the Contractor shall not discriminate against any employee or applicant because of race, color, gender, ancestry, marital status, medical conditions, genetic information, religion, national origin, sex, sexual orientation, gender identity, gender expression, age, or disability or any other class of persons protected by California or federal law. The Contractor shall take affirmative action to ensure applicants are employed, and that employees are treated during their employment without regards to their race, color, ancestry, marital status, medical conditions, genetic information, religion, national origin, sex, sexual orientation, gender identity, gender expression, age, or disability or

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any other basis prohibited by California or federal law. Such actions shall include, but not 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. Contractor shall ensure that this provision is passed through to any subcontractor it uses to provide the goods or services covered by the Agreement.

25. FEDERAL TERMS

If the solicitation is designated as federally funded, wholly or in part, the Contractor shall comply with all terms and conditions prescribed for third party contracts in the grant contract between the United States Department of Transportation and NCTD, as well as the FTA Circular 4220.1G. Contractor shall flow all applicable federal provisions down to subcontractors at every tier as applicable.

All federally mandated terms shall be deemed to control in the event of a conflict with other provisions contained in the solicitation or Agreement. The Contractor shall not perform any act, fail to perform any act, or refuse to comply with any NCTD requests which would cause NCTD to be in violation of applicable FTA terms and conditions.

26. FOB AND SHIPPING COSTS

Unless otherwise agreed to by NCTD in writing, all items shipped shall be Free on Board (FOB) destination, freight prepaid.

27. GOVERNING LAW

The law of California shall govern the resolution of any issue arising in connection with the Agreement Document, including but not limited to, all questions concerning the validity of the Agreement Document; the authorities of the parties to enter herein; and modifications or amendment thereto; and the rights and obligations of the parties hereunder. 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.

Contractor agrees that the venue for any legal proceeding relating to or concerning this agreement is San Diego County, California.

28. GRATUITIES AND CONTINGENT FEES

A. Gratuities.

(a) The right of the Contractor to proceed may be terminated by written notice if, after notice and hearing, the agency head or a designee determines that the Contractor, its agent, or another representative—

(1) Offered or gave a gratuity (e.g., an entertainment or gift) to an officer, official, or employee of the Government; and

(2) Intended, by the gratuity, to obtain a contract or favorable treatment under a contract.

(b) The facts supporting this determination may be reviewed by any court having lawful jurisdiction.

(c) If this contract is terminated under paragraph (a) above, the Government is entitled—

(1) To pursue the same remedies as in a breach of the contract; and

(2) In addition to any other damages provided by law, to exemplary damages of not less than 3 nor more than 10 times the cost incurred by the Contractor in giving gratuities to the person concerned, as determined by the agency head or a designee. (This subparagraph (c)(2) is applicable only if this contract uses money appropriated to the Department of Defense.)

(d) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

B. Covenant Against Contingent Fees.

(a) The Contractor warrants that no person or agency has been employed or retained to solicit or obtain this contract upon an agreement or understanding for a contingent fee, except a bona fide employee or agency. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or to deduct from the contract price or consideration, or otherwise recover, the full amount of the contingent fee.

(b) Bona fide agency, as used in this clause, means an established commercial or selling agency, maintained by a contractor for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds itself out as being able to obtain any Government contract or contracts through improper influence. Bona fide employee, as used in this clause, means a person, employed by a contractor and subject to the contractor's supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds out as being able to obtain any Government contract or contracts through improper influence. Contingent fee, as used in this clause, means any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a Government contract. Improper influence, as used in this clause, means any influence that induces or tends to induce a Government employee or officer to give consideration or to act regarding a Government contract on any basis other than the merits of the matter.

29. INDEMNIFICATION

- a. Indemnity for Professional Liability. Except for the sole negligence or willful misconduct of NCTD, Contractor shall, to the fullest extent permitted by law, hold harmless, protect, defend (with attorneys approved by NCTD) and indemnify NCTD, its Board and each member thereof, its officers, employees, representatives and their successors and assigns (“NCTD” and/or “Indemnified Parties”) from and against all losses, liabilities, claims, suit, damage, expenses, cost, including reasonable attorney's fees and costs, and expert costs and investigation expenses, caused in whole or in part by the negligent, reckless or wrongful acts, errors or omissions of Contractor in the performance of the professional services under this Agreement and those of Contractor's sub-contractors or anyone for whom Contractor is liable regardless of whether or not such claim, loss or liability is caused in part by a party indemnified hereunder. Notwithstanding the foregoing, Contractor's defense obligations shall not exceed its proportionate percentage of fault, except as set forth in Civil Code section 2782.8, as may be amended.
- b. Indemnity for Other than Professional Liability. With respect to operations other than the performance of the professional services under this Agreement, Contractor shall, to the fullest extent permitted by law, hold harmless, protect, defend (with attorneys approved by NCTD) and indemnify the Indemnified Parties, from and against any and all losses, liabilities, claims, suits, damages, expenses and costs including reasonable attorney's fees and costs, and expert costs and investigation expenses (“Claims”), which arise out of or are in any way connected to the performance of Contractor, its officers, employees, representatives, sub-contractors, or agents under this Agreement regardless of whether or not such claim, loss or liability is caused, in part by a party indemnified hereunder. Contractor shall have no obligation, however, to defend or indemnify NCTD if it is determined by a court of competent jurisdiction that such Claim was caused by the sole negligence or willful misconduct of NCTD.
- c. General Indemnity Provisions. This indemnity is in addition to any other rights or remedies which NCTD may have under the law or this Agreement. In the event of any claim or demand made against any party which is entitled to be indemnified hereunder, NCTD may, at its sole discretion, reserve, retain or apply any monies due to Contractor under this Agreement for the purpose of resolving such claims; provided however, that NCTD may release such funds if Contractor provides NCTD with reasonable assurances of protection of NCTD's interest. NCTD shall, in its sole discretion determine whether such assurances are reasonable.
- d. Contractor agrees that its duty to defend the Indemnified Parties arises upon an allegation of liability based upon the performance of services under this Agreement by Contractor, its officers, agents, representatives, employees, sub-contractors, or anyone for whom Contractor is liable and that an adjudication of Contractor's liability is not a condition precedent to Contractor's duty to defend. Contractor shall defend, at Contractor's own cost, expense and risk, with counsel of NCTD's choosing, any and all such aforesaid suits, actions or other legal proceedings of every kind that may be brought or instituted against the Indemnified Parties. To the extent of its liability, the Contractor shall pay and satisfy any judgment, award or decree that may be rendered against the Indemnified Parties, in any such suit, action or other legal proceeding. Contractor shall reimburse the Indemnified Parties for any and all legal expenses and costs incurred by each of them in connection therewith or in enforcing the indemnity herein provided.
- e. Comprehensive Environmental Responses, Compensation, and Liability Act: Contractor acknowledges that the indemnifications contained herein are intended, in part, to operate as indemnifications under Section 9607(e)(1) of the Comprehensive Environmental Responses, Compensation, and Liability Act (42 USC Section 9601, et seq.) as may be hereinafter amended.

30. METHOD OF COMPENSATION

The method of payment shall be as described in the Agreement.

31. MULTIPLE AWARD.

NCTD may make an award to a single vendor or may make an award two or more vendors (primary, secondary, tertiary, or higher), as available, by line item, by group or in its entirety, beginning with lowest, responsive, responsible Bidders (primary), followed by the second lowest, responsive, responsible Bidders (secondary), and continuing with other responsive, responsible Bidders in order of next best cost. If a multiple award is made, NCTD will endeavor to utilize Contractors in order of award. However, the NCTD may utilize other Contractors in the event that: 1) a Contractor is not or is unable to be in compliance with any Agreement or delivery requirement; 2) it is in the best interest of the NCTD to do so regardless of reason.

32. NON-CONFORMANCE TO CONTRACT CONDITIONS.

Items may be tested for compliance with specifications. Items delivered, not conforming to specifications, may be rejected, and returned at the Bidder's expense. These items, as well as items not delivered as per delivery date in Contract and/or purchase order, may be purchased by the NCTD, at its discretion, on the open market. Any increase in cost may be charged against the Bidders. Any violation of these stipulations may also result in the Bidder's name being removed from the NCTD's vendor list.

33. NON-EXCLUSIVITY.

To the extent applicable, it is the intent of the NCTD to purchase the goods or services specifically listed in the solicitation. However, the NCTD reserves the right to purchase any goods or services awarded from any other governmental or cooperative contract, or on the open market.

34. NOTICE OF LABOR DISPUTE

Whenever Contractor has knowledge that any actual or potential labor dispute may delay this Agreement, Contractor shall immediately promptly 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 ensure that any labor disputes involving subcontractors are promptly reported to NCTD. However, any subcontractor need give notice and information only to its next higher tier subcontractor.

35. OPTIONAL CONTRACT USAGE. When the successful Bidders agrees, other units of government or non-profit agencies may participate in purchases pursuant to the award of this contract at the option of the unit of government or non-profit agency.

36. PATENTS & ROYALTIES. Bidder shall indemnify and save harmless NCTD, and its officers, employees, contractors, and/or agents, from liability of any nature or kind, including cost and expenses for, or on account of, any copyrighted, patented, or unpatented invention, process, or article manufactured or used in the performance of the contract, including its use by the NCTD. If the Bidders uses any design, device or materials covered by letters, patent, or copyright, it is mutually understood and agreed, without exception, that the Bid prices shall include all royalties or cost arising from the use of such design, device, or materials in any way involved in the work.

37. PERFORMANCE EVALUATION

In order to establish a written record of the Contractor's performance, NCTD's shall conduct a review and evaluation of Contractor's performance, of which Contractor will receive a copy. This review shall assist NCTD in determining the quality and level of performance required as well as to ensure contract compliance regarding the Contractor's mutually beneficial performance of services.

As such the Contractor will be evaluated on the following: value of services, quality technical performance, fair and reasonable cost performance, timeliness of performance, planning and implementation performance, quality of service, and business relations performance. A Contractor who are found to be deficient in their evaluations may be considered for removal and termination.

38. PERFORMANCE WITHIN NCTD PROPERTY

NCTD is committed to maintaining a safe and respectful environment at all its facilities and properties for the benefit of its employees, customers, business partners, and visitors. To support that goal, NCTD requires that the Contractor adhere to reasonable standards of conduct while working on or in NCTD facilities and property. Additionally, use of any NCTD systems, tools, or physical assets must likewise be in accordance with established requirements. Specific areas of compliance include but are not limited to:

- a. NCTD Identification Badges – For safety and security purposes the Contractor must comply with NCTD requirements regarding utilization of Identification Badges while on/in NCTD properties/facilities as requested by NCTD staff.
- b. No Discrimination/Harassment – The Contractor is expected to conduct themselves in a professional, ethical, and respectful manner at all times, and refrain from any conduct or actions which could constitute harassment or discrimination towards employees, customers, business partners, visitors.
- c. Drug/Alcohol – Contractor shall maintain compliance with NCTD's status as a Drug Free work place.
- d. Electronic Systems – Contractor, who are utilizing NCTD electronic systems, including computers, telephones, facsimile machines, etc., shall ensure they are utilized solely for business purposes related to direct fulfillment of contracted services. Additionally, Contractors shall comply with any instructions or requirements of NCTD Information Technology staff related to use of said systems.

Based upon individual contract parameters, solely in NCTD's determination, Contractor may be required to provide additional information to NCTD to ensure compliance with the foregoing items, and/or other reasonable business and operational needs.

39. PROMPT PAYMENT

Unless otherwise specified in the solicitation for federally funded projects, payment shall be made in accordance with, and within the time specified in, Government Code Chapter 4.5, commencing with Section 927.

40. PROTEST PROCEDURES

An actual or prospective Bidder who is aggrieved in connection with the solicitation or award of an agreement may submit a protest. Protests must be submitted in accordance with NCTD's Protest Procedures found at this link: [Protests Procedures and Requests for Reconsideration](#)

41. PUBLIC RECORDS ACT/CONFIDENTIALITY OF BIDS

Access to government records is governed by the laws of the State of California under the California Public Records Act (Gov. Code 7920.000, et seq.) [Act]. Bid price forms submitted to NCTD in response to this solicitation are public records and may, therefore, be disclosed in accordance with the California Public Records Act. Requests for records or debriefing from NCTD related to Bids submitted or evaluations will not be provided by NCTD until after this solicitation is cancelled or an Agreement is fully executed, pursuant to Government Code §7922.000 and Michaelis, Montanari & Johnson v. Superior Court, (2006) 38 Cal. 4th 1065,1077.

Any proprietary information, trade secrets or confidential commercial and financial information that the Bidder believes should be exempted from disclosure shall be specifically identified and marked as such. Blanket-type identification by designating whole pages or sections as containing proprietary information, trade secrets or confidential commercial and financial information will not ensure confidentiality.

The Bidder shall submit proprietary information, trade secrets or confidential commercial and financial information, which Bidder believes should be exempted from disclosure, in a separate volume specifically identified and marked as "Confidential", or "Trade Secret", or "Proprietary", or a similar designation.

NCTD will release Bid cost or price forms in response to a Public Records Act request subject to the requirements of California Government Code §§ 7920.000 et seq., so long as the Bid cost or price form does not contain trade secrets as defined by the Civil Code. Bid price forms submitted to NCTD are public records and may, therefore, be disclosed in accordance with the California Public Records Act.

The Bidder agrees to indemnify and defend NCTD in the event NCTD withholds production of Bidders records that Bidder has marked "Confidential", or "Trade Secret", or "Proprietary", or similar designations, that are responsive to a Public Records Act request pursuant to California Government Code section 7920.000. et seq. or a Freedom of Information Act request. See attached Public Records Act Indemnification Certificate.

42. REJECTION OF BIDS/CANCELLATION OF SOLICITATION

NCTD reserves the right to reject any and all bids and to waive any informalities or irregularities in the bids. If all bids received are rejected, NCTD reserves the right to re-solicit the services by issuing a new solicitation or to cancel the solicitation at any time prior to agreement award and not award an agreement.

43. RELATIONSHIP OF THE PARTIES

Nothing contained herein shall be construed as creating the relationship of employer and employee between NCTD and Contractor or their agents and employees. The Contractor shall perform its services as an independent Contractor and in accordance with its own methods, the Contract Document, applicable laws and regulations. The Contractor shall have exclusive and complete control over its employees and sub-contractor.

44. SALES AND USE TAX

NCTD is not tax exempt. Bidder must break out costs for taxes as a separate line item. NCTD will not include sales or use tax amounts in the total used for determining the lowest bid.

45. SINGLE BID PROCEDURES

In the event a single bid is received, NCTD may conduct a price and/or cost analysis of the bid. The Bidder will cooperate with NCTD to assist in this analysis. The analysis is the process of examining the bid and evaluating the separate cost elements. NCTD may be unable to award an Agreement to a Bidder if there was not competitive bidding and the information provided by the Bidder is not sufficient to establish Bidder's prices are fair and reasonable.

46. SITE INVESTIGATION

At its own expense and prior to submitting its bid, Bidder shall take all necessary actions, as determined by Bidder, to become fully acquainted with the conditions relating to the construction and labor involved in order to fully understand the facilities, difficulties, and restrictions related to the execution of the work under the contract. Bidder acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling and storage of materials; (2) the availability of labor,

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water, electric power, and roads, including prevailing wages and other relevant cost factors; (3) uncertainties of weather, river stages, tides, or similar physical conditions at the site; (4) the conformation and conditions of the ground; (5) the character of equipment and facilities needed preliminary to and during work performance; and (6) all applicable federal, state, and local laws, statutes, ordinances, orders, permits, guidelines, rules, and regulations, including those pertaining to the removal, excavation, hauling, containment, transportation, disposal, recycling, or handling of "Hazardous Substances and/or Contaminated Materials." Bidder also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by NCTD as well as from the drawings and specifications made a part of this contract. **Any failure of the Bidder to take the actions described and acknowledged in this paragraph will not relieve the Bidder from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to NCTD. Bidders are advised that proposed subcontractors should obtain their own sets of plans and specifications from the NCTD's bid management site.**

47. SOCIAL MEDIA

Bidder is prohibited from using any social media to reference any ongoing proposal or solicitation process without NCTD's express written permission. Please see the terms of the Agreement as provided in the Agreement for any additional requirements or obligations.

48. STORM WATER

For public works projects, Bidders are cautioned that storm water, surface water, groundwater, and nuisance, or any other waters may be encountered at various times while performing the Work under the Agreement. Federal, state, regional, local and NCTD ordinances, laws, rules and regulations require NCTD and its contractors to appropriately manage waters pursuant to, among other things, the requirements of the NCTD Storm Water Management Plan, the requirements of the Construction General Storm Water Permit, the Federal Clean Water Act, and the California Porter Cologne Water Quality Control Act. By submitting a bid, each Bidder acknowledges that it has investigated the risk arising from such waters and compliance with federal, state, regional, local and NCTD ordinances, laws, rules and regulations, has prepared its bid accordingly, agrees to comply with such federal, state, regional, local and NCTD ordinances, laws, rules and regulations, and assumes any and all risk and liabilities arising therefrom. By submitting a bid, each Bidder agrees to prepare and implement a Storm Water Pollution Prevention Plan (SWPPP) for the Work site based on the appropriate risk level requirements. By submitting a bid, each Bidder warrants that all employees and subcontractors will have sufficient skill and experience to perform the work under the project assigned to them without impacting water quality in violation of applicable laws, rules and regulations, and have received adequate training (including the Qualified SWPPP Practitioner (QSP) and/or Qualified SWPPP Developer (QSD) training referenced above) regarding the requirements of applicable laws, rules and regulations. By submitting a bid, Bidder agrees to implement effective erosion and sediment control measures at all stages of the Work and manage construction waste in a manner that prevents contamination of storm water. Each Bidder must include all costs of compliance in the bid amount.

49. SUBCONTRACTORS/SUBCONTRACTING

In compliance with the Subletting and Subcontracting Fair Practices Act (Chapter 2 [commencing at Section 4100], Division 5, Title 1 of the Government Code of the State of California) and any amendments thereof, each Bidder shall complete all required portions of the List of Subcontractors form. The Bidder shall list only one subcontractor for each such portion of work as is defined by the Bidder in its bid.

If a Bidder fails to specify a subcontractor, they shall be deemed to have agreed that they are fully qualified to perform that portion itself, and that it shall perform that portion themselves.

50. SUSPENSION

NCTD may, without cause, order the Contractor in writing to suspend, or interrupt performance of the Work in whole or in part for such period of time as NCTD may determine. An adjustment may be made for an increase in the cost of performance of the Agreement including profit on the increased cost of performance, if any, caused by any such suspension or interruption. An equitable adjustment may be made of the price or prices specified in the Agreement relating to the portion of the Work not suspended or interrupted by the notice of suspension or interruption. No adjustment shall be made to the extent:

- a. That performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or
- b. An equitable adjustment is made or denied under another provision of this Agreement.

Any suspension or interruption for cause or convenience shall be affected by delivery to the Contractor of a written notice of suspension or interruption specifying the extent to which performance of Work under the Contract is

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suspended or interrupted and the date upon which such suspension or interruption becomes effective. After receipt of the notice of suspension or interruption and except as otherwise directed by NCTD, the Contractor shall:

- a. Stop Work under the Agreement on the date and to the extent specified in the notice of suspension or interruption;
- b. Place no further orders or subcontracts for materials, services or facilities except as necessary to complete the portion of the Work under the Agreement which is not suspended or interrupted;
- c. Place no further equipment at the Project except as necessary to complete the portion of the Work under the Agreement which is not suspended or interrupted;
- d. Terminate all orders or subcontracts to the extent they relate to the performance of Work suspended or interrupted by the notice of suspension or interruption;
- e. Assign to NCTD in the manner, at the times, and to the extent directed NCTD, all the right, title and interest of the Contractor under the orders and subcontracts so suspended or interrupted. NCTD shall have the right, in its discretion, to settle or pay any or all claims arising out of the suspension or interruption of such orders and subcontracts;
- f. Settle all outstanding liabilities and all claims arising out of such suspension or interruption of orders and subcontracts, with the approval or ratification of the Board to the extent the Board may so require. The Board's approval or ratification shall be final for all purposes of this clause;
- g. Transfer title to NCTD, and deliver in the manner, at the times, and to the extent, if directed by NCTD, the fabricated or unfabricated parts, work in process, completed Work, supplies and other materials produced as a part of, or acquired in connection with the performance of, the Work terminated by the notice of suspension, or, and the completed or partially completed plans, drawings, information and other property which, if the Agreement had been completed, would have been required to be furnished to NCTD;
- h. Use its best efforts to sell, in the manner, at the times, and to the extent, and at the price or prices that NCTD direct or authorized, any property of the types previously referred to herein, but the Contractor shall not be required to extend credit to any purchaser and may acquire any such property under the conditions prescribed and at a price or prices approved by NCTD. The proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the NCTD to the Contractor under this Agreement or shall otherwise be credited to the price or cost of the Work covered by this Agreement or paid in such other manner as NCTD may direct;
- i. Complete performance of such part of the Work as shall not have been suspended or interrupted by the notice of suspension or interruption;
- j. Take such action as may be necessary, or as NCTD may direct, for the protection and preservation of the property related to this Agreement which is in the possession of the Contractor and in which NCTD has or may acquire an interest;
- k. The Contractor shall maintain the Work site and provide such ingress and egress for local resident or tenants or the public as may be necessary during the period of suspended work or until the Agreement has been declared terminated; and
- l. Maintain all required insurance as if the Agreement had been satisfactorily performed and accepted by NCTD. After receipt of the notice of suspension, or interruption, the Contractor shall submit to NCTD a certified suspension or interruption claim. Such claim shall be submitted promptly but in no event later than thirty (30) days from the effective date of the notice of suspension or interruption. If the Contractor fails to submit a suspension or interruption claim at any time after such thirty (30) day period, NCTD may determine, on the basis of information available to it, the amount, if any, due to the Contractor. NCTD shall then pay to the Contractor the amount so determined.

After receipt of a certified claim, NCTD and the Contractor may agree upon the whole or any part of the amount or amounts to be paid to the Contractor because of the total or partial suspension or interruption of the Contract. The amount may include a reasonable allowance for profit on Work performed. However, such agreed amount or amounts, exclusive of settlement costs, shall not exceed the total Agreement price as reduced by the amount of payments otherwise made and as further reduced by the Agreement price of Work not suspended, or interrupted and any claims NCTD may have against the Contractor. Nothing in this section, shall be deemed to limit, restrict or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to the Contractor pursuant to this paragraph.

After receipt of a certified claim, if the Contractor and NCTD fail to agree on the amounts to be paid to the Contractor, NCTD shall determine, on the basis of the information available to it the amount, if any, due to the Successful Contractor by reason of the suspension or interruption and shall pay the Contractor the amount which shall be determined as follows:

- a. For all work specified in the Agreement which is performed before the effective date of the notice of suspension or interruption, the total of:
 - i. The reasonable cost to the Contractor, without profit, for all Agreement Work performed prior to the notice of suspension or interruption, including the Work done to secure the project for termination. In determining the reasonable cost, NCTD may utilize the schedule of values, Agreement unit prices, Agreement lump sum, the percentage of Work completed and any other method available to it. For purposes of determining reasonable costs, deductions will be made for the cost of materials to be retained by the Contractor, amounts realized by

the sale of materials, and for other appropriate credits against the cost of the Work. When in the opinion of NCTD the cost of an item of Work is unreasonably high, the reasonable cost to be allowed will be the estimated reasonable cost of performing such Work in compliance with the requirements of the plans and specifications and excessive actual cost shall be disallowed.

- ii. Reasonable cost will include a reasonable allowance for project overhead and general administrative overhead not to exceed a total of ten percent (10%) of direct costs of such Work.
- iii. A reasonable allowance for profit on the cost of the Work performed as determined under Subsection (a), of this section, provided the Contractor established to the satisfaction of NCTD that it would have made a profit had the Contract been completed and provided further, that the profit allowed shall in no event exceed five percent (5%) of the cost of the Work completed.
- iv. The reasonable cost to the Contractor of handling material returned to the vendor, delivered to NCTD or otherwise disposed of as directed by NCTD.

In no event shall NCTD be liable for costs incurred by the Contractor or any of its sub-contractors after receipt of a notice of suspension, interruption or termination. Such non-recoverable costs include, but are not limited to, anticipated profits on the Agreement post-suspension, post-interruption or post-termination, employee salaries, administrative expenses, overhead or unabsorbed overhead, the costs of preparing and submitting the SOQ, attorneys' fees or other costs relating to the prosecution of a claim or lawsuit, pre-judgment interest, or any other expense which is not reasonable or authorized as referenced above.

51. TERMINATION

- a. Termination for Convenience: NCTD may terminate the Agreement, in whole or in part, at any time by written notice to the Contractor. The Contractor shall only be paid its justifiable costs, including Agreement closeout costs and profit on work performed up to the time of termination but not for anticipatory profits. If the Contractor has any property in its possession belonging to NCTD, the Contractor will account for the same and dispose of it in the manner NCTD directs. In the event the Contractor believes they have a legitimate claim for termination costs, the Contractor is to submit a termination claim within ten (10) working days from the receipt of NCTD's "Intent to Terminate" letter. Upon the completion of negotiations for any claimed costs, NCTD will issue a Termination for Convenience letter specifying the exact date that performance under the Agreement is to cease.
- b. Termination for Default: If the Contractor fails to perform in any manner its obligations under the Agreement or fails to comply in any other manner with the provisions of the Agreement, NCTD may terminate the Agreement for default. Termination will be effective upon notification of the Contractor by NCTD pursuant to the Agreement. Said notice shall set forth the manner in which the Contractor is in default. On termination for default the Contractor will only be paid the Agreement price for supplies and/or materials delivered and accepted and for work completed in accordance with the Agreement.
- c. If it is later determined by NCTD or any other decision maker including a court of competent jurisdiction and arbitrator, that the Contractor had an excusable reason for not performing, such as a strike, fire, or flood or events which 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.
- d. 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 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.
- e. Separate Agreement negotiations maybe 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.
- f. 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 the Board hereunder in any manner whatsoever.
- g. 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 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.
- h. 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 shall be extended sufficiently to allow completion of the cure if being 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

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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.

52. TIE BID PROCEDURE

In the event of a tie bid situation, and if two or more Bidders remain equally eligible after determination of responsibility and responsiveness, award shall be made to the bidder whose bid was received first as evidenced by the time/date recorded by NCTD. If no time/date was recorded, or if multiple bids were received at the same time by common carrier, the tie shall be settled by a drawing by lot limited to those bidders. In no event shall the work be split. If time permits, the bidders involved shall be given an opportunity to attend the drawing. The drawing shall be witnessed by at least two persons, and the contract file shall contain the names and company addresses of the witnesses and the person supervising the drawing.

53. 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 all materials, equipment, and supplies purchased hereunder until they are delivered in conformity with this Agreement at the FOB point specified herein. Title and risk of loss remain with the Contractor until the goods are delivered to the FOB point and accepted by NCTD, 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 materials, equipment, and supplies by NCTD. Contractor is responsible for ensuring that all subcontractors and suppliers involved in the provision of materials, equipment, and supplies are aware of and comply with the provisions of this clause. Contractor must include similar provisions in all subcontracts and purchase orders.

54. WITHDRAWAL OR MODIFICATION BID

Bidder may withdraw its bid by written notice at any time prior to the deadline for submittal of bids. Bidder may submit a modified bid to replace a previously submitted bid at any time prior to the deadline for submittal of bids. No Bidder may withdraw its bid for a period of one hundred twenty (120) days after the deadline for submittal of bids. Any request to withdrawal or modify a bid after the deadline for bids will not be considered.

Bids shall remain firm and shall not be withdrawn for a period of one hundred twenty (120) days from the bid opening date. Any bidder who withdraws its bid prior to the expiration of this 120-day period shall forfeit its bid bond in its entirety or, in the absence of a bid bond, shall be liable to the North County Transit District (NCTD) for any and all additional costs incurred as a result of such withdrawal. In addition, any such bidder shall be deemed non-responsible and shall be suspended from bidding on NCTD projects for a period of one (1) year from the date of withdrawal.

55. WHISTLEBLOWER HOTLINE

NCTD is an organization with strong values of responsibility and integrity and has developed a number of policies and procedures to provide Bidder with clear direction and guidance to ensure that NCTD's business is carried out with fairness, efficiency, impartiality and integrity. NCTD is committed to an environment where open, honest communication is the expectation, not the exception. If a Bidder or Contractor believes that a violation of law, regulations, Board policies, NCTD's Standard of Conduct Policy or any deviation from established business practices has occurred, NCTD encourages the Bidder or Contractor to report the suspected violation via the anonymous Whistleblower Hotline managed by third-party vendor, Navex Global at www.nctd.ethicspoint.com or by calling 855-877-6048.

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