

**COMPENSATION & PAYMENT PROVISIONS (CONSTRUCTION)**

**FIRM FIXED PRICE (FFP)**

**Note:**

Articles flagged with an asterisk (\*) are Flow-down requirements as defined in Article SUBCONTRACTORS AND SUPPLIERS in Contract Document GENERAL CONDITIONS.

**CP-1 BASIS OF COMPENSATION**

Contractor will be paid the Contract Price in accordance with the following Articles, the Payment Schedule Quantities and Prices (**Attachment 2 herein or Exhibit TBD in the Form of Contract**), and all other applicable terms and conditions of the Contract.

**CP-2 PROGRESS PAYMENTS**

- A. Definition: A Progress Payment is a payment of a portion of the Contract Price for partial completion of the Work based upon the PAYMENT SCHEDULE. A Progress Payment shall not include those portions of the Contract Price withheld pursuant to the Article entitled RETENTION AND ESCROW ACCOUNTS herein, nor any other amount properly withheld or deducted under other provisions of this Contract.
- B. Payment Schedule: Within thirty (30) days after the date of the Notice to Proceed (NTP), but in any event prior to the first Application for Progress Payment (hereinafter referred to as "Application"), the Contractor shall submit a detailed PAYMENT SCHEDULE to the Metro, including a SCHEDULE OF VALUES based upon the SCHEDULE OF QUANTITIES AND PRICES attached hereto and a Schedule based upon the milestones in the Critical Path Schedule (or such other Schedule as is required under the Contract). Progress Payments shall be based upon the approved PAYMENT SCHEDULE. Each item of the PAYMENT SCHEDULE shall include its proportionate share of overhead, profit, and all other expenses involved. The quantities and values shall be extended to show the total amount for each item. The PAYMENT SCHEDULE must be approved by the Metro prior to any Progress Payment being made. The Metro reserves the right to modify or reject and require re-submission of any Payment Schedule which the Contracting Officer determines to be "front-end loaded," "materially unbalanced" or which otherwise does not represent an accurate representation of the manner in which the Contractor will incur cost. The determination of the Contracting Officer is final.
- C. General Invoicing Instructions: Contractor's Invoice shall include, at a minimum:
  - 1. Clear reference to the Metro Contract Number, as well as the Metro Project, to which the Invoice applies.
  - 2. Contractor's Invoice Number, Invoice Date, as well as the contract payment number the invoice represents; for example, Contractor's submittal of its first invoice is payment number 1, its second invoice submittal is payment number 2, and so on. Any Contractor re-

submittal/revision to a submitted invoice shall have a letter suffix (a, b, c, etc.) added to the payment number, signifying the invoice revision; for example, Contractor's first re-submittal of its first invoice shall be designated as payment number "1a".

3. Clear reference to the PAYMENT SCHEDULE Item(s) being invoiced, and the appropriate milestone description of activities and/or work related to the billing.
4. The itemized and total amount being invoiced (in U.S. dollars), less the amount of all contractual retention and deductions applicable for the invoiced amount (in U.S. dollars), and the resulting total net payment due.
5. The Time Period during which the Work was performed and for which the invoice is submitted.
6. Clear reference to Contractor's Taxpayer ID Number.

In no event shall Contractor's Invoice include any commercial terms in conflict with, or in addition to, the provisions already provided and agreed upon in the Contract. Any such non-contractual commercial terms included in Contractor's Invoice shall be null and void, superceded by the terms of Contract, and may subject the Invoice to being rejected by the Metro.

D. Application for Progress Payment:

Contractor's Application shall contain:

1. Contractor's ORIGINAL invoice, and two (2) COPIES;
2. A description of the Work completed;
3. Conditional and unconditional waivers executed by the Subcontractors as described in the Article entitled PAYMENT TO SUBCONTRACTORS herein;
4. Release of Stop Notice from Subcontractors;
5. Any other documentation the Metro requires to process the Progress Payment;
6. A Certification as set forth in Attachment 1, and;
7. Signature of Metro's Authorized Representative acknowledging that the Work described in the Application has been done in accordance with the Contract.

E. Terms of Payment:

1. Shall submit the Application to the Metro as set forth in Article INVOICES in the FORM OF CONTRACT, based upon the PAYMENT SCHEDULE, no later than the 25<sup>th</sup> day of each month.
2. The Metro will make Progress Payments within thirty (30) days after it's receipt of an undisputed and properly submitted Application. If the Metro fails to make any approved Progress Payment within such time, it shall pay interest to the Contractor equivalent to the legal rate set forth in subdivision (a) of §685.010 of the California Code of Civil Procedure. Upon receipt of an Application, the Metro shall:
  - a. Review the Application to determine if it is complete and meets Contractual requirements.
  - b. Return any Application that is not complete or does not meet Contractual requirements as soon as practicable, but not later than seven (7) days after receipt by the Metro. The Metro shall set forth in writing the reason(s) why the Application does not meet Contractual requirements.
3. The number of days available to the Metro to make a Progress Payment without incurring interest shall be reduced by the number of days by which it exceeds the seven (7) day return requirement set forth above.
4. No Progress Payments shall be made for Work not performed in accordance with the Contract.
5. Except for Final Payment, an Application shall not be submitted unless the value of the Work is greater than five thousand dollars (\$5,000).

F. Payment for Goods Not Incorporated into the Work:

The Metro, at its discretion, may authorize payment for Goods not yet incorporated into the Work, subject to the following conditions:

1. Goods shall be delivered to the Worksite or delivered to the Contractor and promptly placed in appropriate storage within Los Angeles County or other location, as approved by the Metro.
2. Prior to inclusion of such Goods in any Application, the Contractor shall submit certified invoices for such Goods to the Metro. The Metro may allow only such portion of the amount represented by these invoices that, in its opinion, does not exceed the reasonable cost of such Goods.
3. If Goods are stored outside Los Angeles County, the Contractor shall pay all personal and property taxes that are levied against the Metro by any state or subdivision thereof on account of such storage of said Goods.

4. The Metro will permit the Contractor to contest, at its own expense, the validity of any such tax levied against the Metro in appropriate legal proceedings.
  5. In the event of any judgment or decree by the court against the Contractor and/or the Metro, the Contractor shall pay it together with any penalty and any other costs relating thereto. All such Goods so accepted shall become the property of the Metro.
  6. Payments made for Goods included in an Application that are subsequently lost, damaged, or unsatisfactory shall be deducted from succeeding Applications.
- G. Title to portions of the Work for which Progress Payments or other payments are made shall pass to the Metro as set forth in the General Conditions.”

### **CP-3 RETENTION AND ESCROW ACCOUNTS\***

#### **A. Retention:**

The Metro shall retain from each Progress Payment ten percent (10%) of the Progress Payment as part security for the fulfillment of the Contract by the Contractor. However, after fifty percent (50%) of the Work has been completed, if in the sole discretion of the Metro progress on the Work is satisfactory, Metro will not make further deductions on the remaining Progress Payments, except that the amount of the retention withheld shall not at any time thereafter be less than five percent (5%) of the Contract Price, as amended, or as adjusted by Change Orders. However, if the Metro determines that the Work or progress of the Work is unsatisfactory, Metro may reinstate, continue or increase retentions in amounts necessary to increase the total retention to an amount not to exceed ten percent (10%) of the Contract Price.

#### **B. Substitution of Securities:**

To ensure performance under the Contract, the Contractor may, at its sole expense, substitute securities equivalent to the retention withheld by the Metro. Such securities shall be deposited with an escrow agent approved by the Metro, who shall then pay such retention to the Contractor. Upon satisfactory completion of the Contract, the securities shall be returned to the Contractor. The Contractor shall be the beneficial owner of any security substituted for monies withheld and shall receive any accrued interest thereon. Securities eligible for investment shall include those listed in Government Code §16430, bank or savings and loan certificates of deposit, interest bearing demand deposit accounts, standby letters of credit, or any other security mutually agreed to by the Contractor and the Metro. No such substitution shall be accepted until the Escrow Agreement, securities, and any other documents related to the substitution are reviewed and accepted in writing by the Metro.

#### **C. Payment of Escrow Agent:**

In lieu of substitution of securities as provided above, the Contractor may request and the Metro shall make payment of retention earned directly to the escrow agent at the expense of the Contractor. At the expense of the Contractor, the Contractor may direct the investment of the payments into securities consistent with Government Code §16430 and the Contractor shall receive the interest earned on the investments upon the same terms provided for in this Article for securities deposited by the Contractor. Upon satisfactory completion of the Contract, the Contractor shall receive from the escrow agent all securities, interest and payments received by the escrow agent from the Metro, pursuant to the terms of this Article. The Contractor shall pay to each Subcontractor, not later than twenty (20) days after receipt of the payment, the respective amount of interest earned, net of costs attributed to retention withheld from each Subcontractor, on the amount of retention withheld to ensure the performance of the Subcontractor. The escrow agreement used by the escrow agent pursuant to this Article shall be substantially similar to the form set forth in §22300 of the California Public Contract Code.

D. Release of Retention:

Upon Final Acceptance of the Contract, the Contractor shall submit an invoice for release of retention in accordance with the terms of the Contract.

E. Additional Deductibles:

In addition to the Retentions described above, the Metro may deduct from each Progress Payment any or all of the following:

1. Liquidated Damages that have occurred as of the date of the Application for Progress Payment;
2. Deductions from previous Progress Payments already paid, due to Metro's discovery of deficiencies in the Work or non-compliance with the Specifications or any other requirement of the Contract;
3. Sums expended by the Metro in performing any of the Contractor's obligations under the Contract that the Contractor has failed to perform, and;
4. Other sums that the Metro is entitled to recover from the Contractor under the terms of the Contract, including without limitation insurance deductibles and assessments.

The failure of the Metro to deduct any of the above-identified sums from a Progress Payment shall not constitute a waiver of the Metro's right to such sums or to deduct them from a later Progress Payment.

**CP-4 STOP NOTICE\***

In addition to other amounts properly withheld under this Article or under other provisions of the Contract, the Metro shall retain from Progress Payments otherwise due the Contractor an amount equal to one hundred twenty-five percent (125%) of the amount claimed under any Stop Notice under Civil Code §3179 et. seq. or other lien filed against the Contractor for labor, materials, supplies, equipment, and any other thing of value claimed to have been furnished to and/or incorporated into the Work; or for any other alleged contribution thereto. In addition to the foregoing and in accordance with Civil Code §3186 the Metro may also satisfy its duty to withhold funds for Stop Notices by refusing to release funds held in escrow pursuant to Public Contract Code §22300. However, the Metro may release such funds upon receipt of a Release of Stop Notice executed by a Stop Notice Claimant, a Stop Notice Bond, an order of a court of competent jurisdiction, or other evidence satisfactory to the Metro that the Contractor has resolved such claim by settlement.

**CP-5 PAYMENT TO SUBCONTRACTORS\***

**A. Requirements**

The Contractor shall pay all Subcontractors for and on account of Work performed by such Subcontractors, not later than ten (10) days after receipt of each Progress Payment as required by the California Business and Professions Code §7108.5. Such payments to Subcontractors shall be based on the measurements and estimates made pursuant to Article PROGRESS PAYMENTS provided herein.

Pursuant to 49 Code of Federal Regulations (CFR) Part 26, the Contractor shall pay each Subcontractor under this Contract for satisfactory performance of its Contract no later than ten (10) days after receipt of each Progress Payment received from the Metro. The Contractor shall pay to each Subcontractor all amounts it has retained from payments under the Subcontract within ten (10) days after the Subcontractor's work is satisfactorily completed. Any delay of payment beyond the ten (10) day time limit shall be only for good cause, and only upon the prior written approval of the Metro.

**B. Waiver and Release Forms**

As a condition to Metro's release of any Progress Payment, Contractor shall furnish the Metro with:

1. A duly executed Conditional Waiver and Release Form from each Subcontractor listed in the current Application, and;
2. A duly executed Unconditional Waiver and Release Form from each Subcontractor listed in the preceding Application.

The Unconditional Waiver(s) must state the amount that the Subcontractor has been paid with respect to the Progress Payment most recently made to the Contractor. The required waiver and release forms shall be those set forth in California Civil Code §3262, clarified to confirm that they are not intended to release claims beyond the amount of the Progress Payment made and do not cover unprocessed or unresolved claims. In the event the Contractor fails to supply any of the foregoing waiver and release forms, the Metro may retain the amount attributable to any such Subcontractor until the appropriate form is received.

C. Failure to Comply

If the Metro determines that the Contractor has failed to comply with this Article, the Metro may give written notice to the Contractor and the Contractor's Surety that if the default is not remedied within a specified period of time -- at least five (5) days -- the Contract may be terminated for cause in accordance with Article TERMINATION FOR DEFAULT in Contract Document GENERAL CONDITIONS.

**CP-6 PAYMENT OF TAXES**

Unless otherwise specifically provided in this Contract, the Contract Price includes compensation for all taxes the Contractor is required to pay by Laws in effect on the date the Contractor's bid was opened. The Contractor shall pay all federal, state, and local taxes, and duties applicable to and assessable against any Work, including but not limited to retail sales and use, transportation, export, import, business, and special taxes. The Contractor shall ascertain and pay the taxes when due. The Contractor will maintain auditable records, subject to Metro reviews, confirming that tax payments are current at all times.

**CP-7 FINAL PAYMENT**

A. After Final Acceptance of the Work, a Final Payment will be made as follows:

1. Prior to Final Acceptance, the Contractor shall prepare and submit an Application for Final Payment to the Metro, including:
  - a. The proposed total amount due the Contractor, segregated by items on the Payment Schedule, Amendments, Change Orders, and other bases for payment;
  - b. Deductions for prior Progress Payments;
  - c. Amounts retained;
  - d. An Unconditional Waiver and Release for each Subcontractor;
  - e. List of Claims the Contractor intends to file at that time or a statement that no Claims will be filed, and;



- f. List of pending unsettled claims, stating claimed amounts.
2. The Application for Final Payment shall include complete and legally effective releases or waivers of liens and stop notices satisfactory to the Metro, arising out of or filed in connection with the Work. Prior Progress Payments shall be subject to correction in Metro's review of the Application for Final Payment. Claims filed with the Application for Final Payment must be otherwise timely under the Contract and applicable Law.
3. Within a reasonable time, the Metro will review the Contractor's Application for Final Payment. Any recommended changes or corrections will then be forwarded to the Contractor. Within ten (10) days after receipt of recommended changes from the Metro, the Contractor will make the changes, or list Claims that will be filed as a result of the changes, and shall submit the revised Application for Final Payment. Upon Acceptance by the Metro, the revised Application for Final Payment will become the approved Application for Final Payment.
4. If no Claims have been filed with the initial or any revised Application for Final Payment, and no claims remain unsettled within thirty (30) days after Final Acceptance of the Work by the Metro, and agreements are reached on all issues regarding the Application for Final Payment, the Metro, in exchange for an executed release, satisfactory in form and substance to the Metro, will pay the entire sum found due on the approved Application for Final Payment, including the amount, if any, allowed on settled Claims.
5. The release from the Contractor shall be from any and all Claims arising under the Contract, except for Claims that with the concurrence of Metro are specifically reserved, and shall release and waive all unreserved claims against the Metro and its officers, directors, employees and Authorized Representatives. The release shall be accompanied by a certification by the Contractor that:
  - a. It has resolved all Subcontractor, Supplier and other Claims that are related to the settled Claims included in the Final Payment;
  - b. It has no reason to believe that any party has a valid Claim against the Contractor or the Metro which has not been communicated in writing by the Contractor to the Metro as of the date of the Certificate;
  - c. All warranties are in full force and effect, and;
  - d. The releases and the warranties shall survive final payment.
6. If any Claims remain open, the Metro may make Final Payment subject to resolution of those Claims. The Metro may withhold from the Final Payment an amount not to exceed one hundred fifty percent (150%) of the sum of the amounts of the open Claims, and one hundred twenty-five

percent (125%) of the amounts of open Stop Notices referred to in Article entitled STOP NOTICES herein.

**CP-8 DISCOVERY OF DEFICIENCIES BEFORE AND AFTER FINAL PAYMENT**

- A. Notwithstanding the Metro's acceptance of the Application for Final Payment and irrespective of whether it is before or after Final Payment has been made, the Metro shall not be precluded from subsequently showing that:
1. The true and correct amount payable for the Work is different from that previously accepted;
  2. The previously-accepted Work did not in fact conform to the Contract requirements, or;
  3. A previous payment or portion thereof for Work was improperly made.

The Metro also shall not be estopped from demanding and recovering damages from the Contractor, as appropriate, under any of the foregoing circumstances as permitted under the Contract or applicable Law.

**TBD (IFB/RFP No.)**

**TBD (Solicitation Title)**

**ATTACHMENT 1 CERTIFICATION FOR REQUEST FOR PAYMENT**

I hereby certify under penalty of perjury as follows:

That the claim for payment is in all respects true, correct; that the services mentioned herein were actually rendered and/or supplies delivered to the Metro in accordance with the contract.

I understand that it is a violation of both the federal and California False Claims Acts to knowingly present or cause to be presented to the Metro a false claim for payment or approval. A claim includes a demand or request for money. It is also a violation of the False Claims Acts to knowingly make use of a false record or statement to get a false claim paid. The term "knowingly" includes either actual knowledge of the information, deliberate ignorance of the truth or falsity of the information, or reckless disregard for the truth or falsity of the information. Proof of specific intent to defraud is not necessary under the False Claims Acts.

I understand that the penalties under the Federal False Claims Act and State of California False Claims Act are non-exclusive, and are in addition to any other remedies which the Metro may have either under contract or law.

I hereby further certify, to the best of my knowledge and belief, that:

- (1) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;
- (2) Payments to subcontractors and suppliers have been made from previous payments received under the contract, and timely payments will be made from the proceeds of the payment covered by this certification;
- (3) This request for progress payments does not include any amounts which the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract; and
- (4) This certification is not to be construed as final acceptance of a subcontractor's performance.

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Title)

\_\_\_\_\_  
(Date)

**END OF COMPENSATION & PAYMENT PROVISIONS**

## ATTACHMENT 2 – PAYMENT SCHEDULE & PRICES

To be inserted at the time of contract award

