

**CITY OF SAN LUIS OBISPO  
CALIFORNIA**

**OPERATIONS AND MAINTENANCE AGREEMENT  
SLO TRANSIT, CITY OF SAN LUIS OBISPO**

This AGREEMENT is made this 16<sup>th</sup> day of JUNE, 2016, by and between the CITY OF SAN LUIS OBISPO a municipal corporation and charter city, hereinafter referred to as "CITY" and FIRST TRANSIT, hereinafter referred to as "CONTRACTOR."

**WITNESSED:**

WHEREAS, on Dec 15<sup>th</sup>, 2015, the City Council authorized the release of a Request for Proposals (RFP) for the operation and maintenance of specified transportation services; and,

WHEREAS, CONTRACTOR submitted a proposal dated March 9, 2016 in response to the said RFP to provide such services in the method and manner and for the costs set forth in the proposal, subsequent clarifications and the "Best and Final Offer" dated May 23, 2016; and,

WHEREAS, CITY has determined that CONTRACTOR has the management and technical personnel, expertise and other useful assets of sufficient quantity and quality to provide CITY's transportation services; and,

WHEREAS, the subject RFP is attached to this agreement as Exhibit B and CONTRACTOR's proposal including the "Best and Final Offer" is attached as Exhibit C and both are by this reference made a part of this agreement;

NOW, THEREFORE, for good and valuable consideration, the parties do agree as follows:

**1. PURPOSE OF AGREEMENT**

CITY hereby contracts with CONTRACTOR to operate and maintain specified transportation services upon the terms and conditions hereinafter set forth.

**2. TERM OF AGREEMENT**

- a. **Term.** Subject to the terms and conditions of this agreement, the term of this agreement shall be from July 1, 2016 through and including June 30, 2020 with three (3) one-year contract extension options as indicated in Section 2.c.
- b. **Month-to-Month Extensions.** Upon completion of the term of this agreement, including any option term described below, CITY may, at its sole discretion, extend the term of this agreement on a month-to-month basis up to a maximum of six (6) months. CITY shall notify CONTRACTOR of such extensions at least thirty (30) days prior to the termination date of this agreement. The compensation rates in effect during the last monthly period of the full term of this agreement or any option terms as applicable shall remain in effect during any such extensions.
- c. **Option Terms.** CITY, at its sole discretion, may extend this agreement for up to three option terms of one year each for a maximum contract term, including the initial term, of four years (through June 30, 2020). If the CITY decides to consider exercising option term years, the price formulas for the extension years shall be negotiated. If the negotiation price formula are not

advantageous to the CITY, the CITY can have the contract go to back to RFP.

### 3. SCOPE OF WORK

CONTRACTOR shall provide the transportation services set forth in Exhibit A entitled "Scope of Work" attached and by this reference made a part of this agreement. Such services shall continue to be provided by CONTRACTOR until the "Scope of Work" is amended pursuant to the terms and conditions of this agreement.

### 4. MAXIMUM OBLIGATION

CITY agrees to pay CONTRACTOR in consideration for its services as described herein.

The maximum cost to be paid by CITY to CONTRACTOR shall not exceed \$2,212,108 in Year One;

\$2,250,930 in Year Two; \$2,330,088 in Year Three; and, \$2,398,270 in Year Four based on the services specified in Exhibit A.

### 5. PRICE FORMULA

CITY agrees to pay CONTRACTOR for performance of the services set forth in this agreement as follows:

- a. Payment of a fixed hourly rate per vehicle service hour of \$30.06 in Year One; \$31.09 in Year Two; \$32.25 in Year Three; \$33.32 in Year Four. A vehicle service hour is defined as on vehicle providing passenger service for one hour during the service hours specified herein. A vehicle service hour shall be deemed to have commenced when a vehicle leaves CITY's Transit Center (located at 990 Palm Street) to provide the services required herein and shall not include any out-of-service vehicle time used for vehicle operator breaks or lunches. A vehicle service hour shall terminate when a vehicle returns to CITY Transit Center prior to any cleaning, servicing or fueling of the vehicle. The hourly rate shall include vehicle operator wages, fringe benefits, indirect labor and all consumable material costs that can be tracked by vehicle service hour such as vehicle maintenance parts and supplies including oil.
- b. Payment of a fixed monthly rate of \$98,047.28 in Year One; \$98,393.04 in Year Two; \$101,773.57 in Year Three; and \$104,429.54 in Year Four to compensate CONTRACTOR for all work to be performed under this agreement as defined in Exhibit A, except that which is included under Paragraph 5(a) and Paragraph 7 of this agreement including, but not limited to: vehicle operator non-service wages; management, controller and maintenance employee wages and said employees fringe benefits and indirect labor costs; bus washing and cleaning supplies; uniforms; report reproduction; office supplies; project telephones; all other related operational costs; and the contract management fee.
- c. Payment of a fixed monthly rate of \$4,754.82 in Year One; \$4,849.37 in Year Two; \$4,945.52 in Year Three; and \$5,044.07 in Year Four for the cost incurred in providing all vehicle and general liability insurance required under this agreement as such insurance is defined in this agreement. This amount shall be in excess of the fixed monthly rate as defined herein. CITY reserves the right, however, to alternatively secure all or part of the specified insurance coverage through other means.
- d. Compensation for those items and services provided by CITY and which are specified in Exhibit A shall not be included in the hourly or monthly rates as defined above. Such items and services include, but are not limited to diesel fuel and gasoline; tires; radios including connection fees and service agreements; city owned vehicles; licenses for radios

and vehicles; routine maintenance of radios; major facility furnishings; telephone system, building security, office copy machine; all major vehicle components which are engines, transmissions, differentials, and design retrofits; and, office, garage and parking facilities.

Additionally, CITY shall provide all marketing, tickets, passes, brochures, and related collateral service materials.

## **6. EXTRA SERVICES**

Special promotional and community services shall be considered extra services and will be provided only with the authorization of CITY and the mutual consent of the CONTRACTOR. Such services shall be defined as those non-permanent service hours operated outside of the services identified in Exhibit A. Extra services shall be considered a change to this agreement as defined herein and shall be in excess of the maximum price defined in Paragraph 4. The costs for extra services will be determined at a rate per vehicle service hours of \$33.27 in Year One; \$33.63 in Year Two; \$34.95 in Year Three; and \$36.03 in Year Four and billed separately from the services specified in Exhibit A.

## **7. GENERAL AND VEHICLES INSURANCE**

- a. Throughout the term of this Agreement, CONTRACTOR shall procure and maintain a comprehensive general liability insurance policy providing no less than TEN MILLION DOLLARS (\$10,000,000) per occurrence with a total policy limit of no less than TEN MILLION DOLLARS (\$10,000,000) combined single limit bodily injury and property damage coverage. Said policy shall include coverage for premises (specifically including dangerous condition of public property as well as coverage for the facility and property provided by CITY for CONTRACTOR's use during the term of this contract), personal injury, and blanket contractual, but shall not include coverage for vehicle liability and/or vehicle physical damage insurance (vehicle liability and vehicle damage insurance shall be provided pursuant to Paragraph (b), below). CONTRACTOR shall name CITY and each of its member jurisdictions or other parties as required by CITY, including their officers, employees and agents, as additional insureds on said policy. CONTRACTOR shall cause such additional insureds to be added to its policy of insurance by way of an endorsement which endorsement shall be a CG 20 10 11/85 or equivalent additional insured endorsement. (The **ADDITIONAL INSURED ENDORSEMENT**) The **ADDITIONAL INSURED ENDORSEMENT** shall not be an omnibus endorsement, but shall specifically and directly name each additional insured. Such **ADDITIONAL INSURED ENDORSEMENT** will explicitly include coverage for the additional insureds for both ongoing and completed operations so long as the liability of an additional insured arises out of the work of the named insured, or so long as an additional insured's liability arises out of the named insured's performance of this Agreement. The **ADDITIONAL INSURED ENDORSEMENT** shall not contain any provisions which limit or restrict coverage for the additional insureds beyond the extent set forth above. Any insurance carrier providing insurance called for in this section shall be from a California admitted carrier and have a minimum rating of A.M. Best Rated A, or better. Any self-insured retention shall be declared by CONTRACTOR and approved in writing by CITY. With respect to any self-insured retention, the coverage provided for CITY, its member jurisdictions, and other parties required by CITY shall be equal and identical to the coverage of the CONTRACTOR. CONTRACTOR shall provide written documentation to CITY that establishes that as to any self-insured retention, the additional insured parties shall have coverage to the same extent as the CONTRACTOR. CONTRACTOR shall provide CITY with the **ADDITIONAL INSURED ENDORSEMENTS** required by this paragraph within thirty (30) days of the Notice of Contract Award and, upon request,

a copy of the entire policy of insurance. Such policy or policies of insurance shall provide that they may not be cancelled without at least 30 days written notice to CITY. CONTRACTOR shall provide CITY a copy of the current policy of insurance and all endorsements, as well as documentation for coverage under any self-insured retention, within ten (10) days of receiving such a request from CITY).

- b. CONTRACTOR shall provide CITY with vehicle liability insurance in the amount of TEN MILLION DOLLARS (\$10,000,000) per occurrence with a total policy limit of TEN MILLION DOLLARS (\$10,000,000) combined single limit for bodily injury and property damage. Coverage will also include collision and comprehensive physical damage with a deductible not to exceed TEN THOUSAND DOLLARS (\$10,000). Any deductible will be the responsibility of CONTRACTOR. CONTRACTOR shall name CITY and each of the member jurisdictions, or other parties as required by CITY, including their officers, employees and agents, as additional insured on said policy and shall furnish CITY with evidence of insurance within 30 days of the notice of contract award. Such policy or policies shall provide that they may not be cancelled without at least thirty (30) days written notice to CITY. CONTRACTOR shall provide CITY a copy of the current policy of insurance and all endorsements within ten (10) days of receiving such a request from CITY.
- c. In case of damage, destruction or loss of any vehicle or equipment provided by CITY under the terms of this agreement, CITY agrees that the liability of CONTRACTOR for said damage or destruction shall be limited to the fair market value of the vehicle or equipment at the time of loss.
- d. During this agreement, CONTRACTOR shall maintain an appropriate Fidelity Bond or other security acceptable to CITY providing protection up to the amount of FIFTY THOUSAND DOLLARS (\$50,000.00) with respect to any one occurrence of theft or other dishonest conduct by CONTRACTOR'S employees, officers or agents of CITY funds, equipment or inventory other than vehicles.

In lieu of a Fidelity Bond, CONTRACTOR may provide CITY with an irrevocable and absolute Letter of Credit in the form set out in Exhibit D attached hereto and incorporated herein.

CITY shall be entitled to draw upon the Letter of Credit to compensate it for all losses it sustains occasioned by the theft or other misconduct of CONTRACTOR's employees, officers or agents. CITY's losses shall include its investigative expenses, including the costs of its experts and attorneys, in addition to the value of the funds, equipment or property in question. At the earliest practicable time, and not later than thirty (30) days after discovery by CITY of the loss, CITY shall give CONTRACTOR written notice of such discovery. CONTRACTOR shall have thirty (30) days to directly reimburse such loss to CITY. With appropriate notice, CONTRACTOR shall be provided a reasonable time to investigate the loss. CONTRACTOR's responsibility to reimburse CITY for the loss shall be to the full extent of such loss and shall not be limited to TWENTY-FIVE THOUSAND DOLLARS. CONTRACTOR reserves the right to dispute the value of the loss. In the event that CONTRACTOR has not reimbursed the loss within said thirty (30) days, CITY may draw against the Letter of Credit to recover its loss and, as stated above, if the Letter of Credit is insufficient to fully compensate CITY, CONTRACTOR shall remain obligated to compensate CITY to the full extent of its loss.

When a loss is alleged to have been caused the theft, fraud or other dishonesty of any one or more of CONTRACTOR's employees, officers, or agents, but CITY is unable to designate the specific person causing such loss, CITY shall have the benefit of the Letter of Credit provided that the evidence submitted reasonably establishes that the loss was in fact due to the fraud or dishonesty of one or more such persons.

Presentation of the Letter of Credit shall be required either electronically or not more than fifty (50) miles from San Luis Obispo, California.

Notice shall be delivered in accordance with Section 25 of this Agreement.

Not less than thirty (30) days after CITY has drawn against the letter of credit, CONTRACTOR shall deposit funds sufficient to restore the letter of credit to the original amount thereof.

In lieu of a Fidelity Bond or Letter of Credit, CONTRACTOR may provide CITY with a cash deposit of FIFTY THOUSAND DOLLARS which shall be held without payment of interest by CITY and CITY shall be entitled to draw upon the deposit in the same manner and for the same purposes as regarding the above described Letter of Credit. Not less than thirty (30) days after CITY has drawn against the cash deposit, CONTRACTOR shall restore the cash deposit to the original amount thereof. The cash deposit shall be held by CITY during the term of the Agreement. Within thirty (30) days of termination or expiration of the Agreement, CITY shall return the cash deposit to CONTRACTOR, less any amount used by CITY pursuant to this Agreement.

- e. Should, at any time, any of the insurance policies required by this Agreement be unsatisfactory to CITY, at its sole discretion, CONTRACTOR shall promptly obtain a new policy, submit the same to CITY. Upon failure of CONTRACTOR to furnish, deliver or maintain any insurance and endorsements as required by this Agreement, at the election of CITY, this Agreement may be immediately terminated as provided herein. Failure of CONTRACTOR to obtain and maintain any required insurance shall not relieve CONTRACTOR of any liability under this Agreement (and CONTRACTOR may be answerable to CITY for damages or any other remedy on account of such breach) nor shall the insurance requirements be construed to conflict with or otherwise limit the obligations of CONTRACTOR concerning indemnification.
- f. All insurance provided by CONTRACTOR shall be primary and any insurance or self-insurance maintained by CITY and its member jurisdictions shall be excess of CONTRACTOR's insurance and shall not contribute to it.
- g. CONTRACTOR's failure to provide the insurance required by this section, or CONTRACTOR's submission of insurance policies, endorsements and other documentation (whether or not such documentation is "accepted" by CITY) shall not waive or satisfy the CONTRACTOR's obligation to provide CITY with the insurance required by this Agreement if it has failed to do so. Should CONTRACTOR fail to provide insurance in the form and amount specified by this Agreement, CONTRACTOR shall be directly liable to CITY to provide it with both a defense and indemnity for any losses which CITY incurs to the extent such losses would have been covered by insurance as is specified in this Agreement. Notwithstanding the above, CONTRACTOR shall not be required to indemnify CITY from loss or liability to the extent such loss or liability arises from the sole negligence or willful misconduct of

CITY, its agents, directors and employees, at such time that such sole negligence or willful misconduct has been finally determined by a court of competent jurisdiction.

- h. It shall be a requirement under this Agreement that any available insurance proceeds broader than or in excess of the specified minimum insurance coverage requirements as set forth above and/or limits shall be available to the additional insured. Furthermore, the requirements for coverage and limits shall be (1) the minimum coverage and limits specified in this Agreement; or (2) the broader coverage and limits of coverage of any insurance policy or proceeds available to the named insured, whichever is greater. The defense and indemnifications of this Agreement are undertaken in addition to, and shall not in any way be limited by, the insurance obligations contained in this Agreement. All deductibles and self-insured retentions (SIR) must be disclosed to CITY for approval and shall not reduce the limits of the liability. Policies containing any SIR provision shall provide, or be endorsed to provide, that the SIR may be satisfied by either the named insured or CITY. CITY reserves the right to obtain a full certified copy of any insurance policy and endorsement coverage under this Agreement. Failure to exercise this right shall not constitute a waiver of the right to exercise it later.

## **8. WORKER'S COMPENSATION**

CONTRACTOR certifies that it is aware of the provisions of the Labor Code of the State of California which require every employer to be insured against liability for Worker's Compensation or to undertake self-insurance in accordance with the provisions of that Code, and it certifies that it will comply with such provisions and furnish CITY with a Certificate of Insurance before commencing the performance of this agreement. Furthermore, CONTRACTOR shall indemnify CITY, its officers and employees, for any claims in law or equity occasioned by failure of CONTRACTOR to comply with this provision or which arise out of any job related injury, including third party claims against CITY by CONTRACTOR'S or subcontractor's employees. The indemnification provisions of this paragraph shall survive the termination of this agreement or any extensions thereof.

## **9. INDEMNIFICATION**

To the fullest extent allowed by law, CONTRACTOR shall indemnify and hold CITY (and CITY's member jurisdictions) and its representative officers, directors, employees and agents free and harmless from and against any and all claims, suits, liens, demands, damages, injuries, liabilities, losses and expenses of any kind, including reasonable fees of attorneys and expert witnesses, to the extent they arise out of or are in any way connected with the performance of this Agreement by CITY, its agents, directors or employees, or by CONTRACTOR, its agents, directors or employees, whether such claims, liens, demands, damages, losses or expenses are based upon a contract or upon a claim for personal injury, death or property damage or upon any other legal or equitable theory whatsoever.

CONTRACTOR agrees, at its own expense and upon written request by CITY, to defend any claim, suit, action or demand brought against CITY on any injury, loss or liability, actual or alleged, covered herein. Notwithstanding this defense obligation, CONTRACTOR shall not be required to indemnify CITY from loss or liability to the extent such loss or liability arises from the sole negligence or willful misconduct of CITY, its agents, directors and employees, at such time that such sole negligence or willful misconduct has been finally determined by a court of competent jurisdiction. CONTRACTOR shall provide CITY with a defense until such determination has been made (i.e. until a court of competent jurisdiction has determined that the loss or liability arises from the sole negligence or willful misconduct of CITY, CONTRACTOR shall provide a defense as to such loss or liability). CONTRACTOR's indemnity obligations survive termination of this Agreement.

## **10. PERFORMANCE BOND**

The faithful performance by CONTRACTOR of each and every term, condition, and provision of this agreement is expressly made a condition precedent for the payment of any sums agreed herein to be paid to CONTRACTOR by CITY. To insure performance, CONTRACTOR shall post with CITY a bond or other acceptable security in the amount of TWENTY-FIVE PERCENT (25%) of the first year contract price. Such bond or security shall be subject to the approval of CITY's Attorney and Finance Director and shall be executed by CONTRACTOR and a surety company licensed to do business as such in the State of California. The condition of the bond shall be that the CONTRACTOR shall fully and faithfully perform all conditions and covenants of this agreement or the face amount of such bond shall be forfeited to CITY. The bond may be a renewable one-year bond, and shall be renewed annually before its expiration date; provided, however, that such bond must remain in full force and effect from and after the date CITY makes any demands for payment on the bond until CITY releases such claim. Provision of such bond or its equivalent is a material covenant of this agreement and CITY shall not approve any security which is not unconditionally payable to CITY upon CITY demand. CITY reserves the right to rescind the requirement for a performance bond at any time.

## **11. INVOICES**

- a. All hourly costs shall be invoiced to CITY monthly following the service month provided. Said invoices shall specify the dates of service and the number of vehicle service hours claimed. Hourly costs shall be directly traceable by dispatcher and/or driver trip sheets and/or employee time cards, copies of which will be submitted to CITY monthly with each invoice.
- b. The monthly fixed rate and insurance rate shall be invoiced monthly following the service month provided. All reports and submissions required under this agreement shall be accurately completed and submitted to CITY prior to payment of said monthly rate invoices.
- c. Any extra services provided under this agreement shall be invoiced separately following the provision of such services. Copies of all appropriate passenger and service logs shall be attached to each extra service invoice prior to payment.

## **12. PAYMENT**

All payments by CITY to CONTRACTOR shall be made in arrears. Payment shall be made by CITY no more than thirty (30) days from receipt of an invoice. Payment of invoices will be made on a monthly basis. If CITY disputes any item on an invoice for a reasonable cause, CITY may deduct that disputed item from the payment, but shall not delay payment for the undisputed portions. The amounts and reasons for such deletions shall be documented to CONTRACTOR within fifteen (15) working days of the receipt of the invoice by CITY. Payments shall be by voucher or check payable to and mailed first-class to:  
[INSERT CONTRACTOR NAME & MAILING ADDRESS]

## **13. OPERATING REVENUES**

All operating revenues collected by CONTRACTOR are the property of CITY. Operating revenues include, but are not limited to, all fares and the proceeds from the sale of tickets and passes. Operating revenues shall be counted and kept separately under appropriate security. Within one working day from collection, unless otherwise agreed upon, CONTRACTOR shall deposit fares at a banking institution as directed by CITY. Reports on the revenues collected and deposited shall be provided to CITY on a timely basis. CITY shall be provided with a written description of CONTRACTOR'S procedures regarding the collection, counting and controlling of fare revenues. These procedures are subject to CITY's audit and approval.

## **14. CONTROL**

- d. All services to be rendered by CONTRACTOR under this agreement shall be subject to the

control of CITY. CONTRACTOR shall advise CITY of matters of importance and make recommendations when appropriate; however, final CITY shall rest with CITY.

- e. CITY shall not interfere with the management of CONTRACTOR'S normal internal business affairs and shall not attempt to directly discipline or terminate CONTRACTOR employees. CITY may advise CONTRACTOR of the performance of any employee having a negative effect on the service being provided.

#### **15. CONTRACT ASSIGNMENT**

This agreement shall not be sold, assigned, transferred, conveyed or encumbered by CONTRACTOR without the prior written consent of CITY which consent may be withheld in CITY's sole and absolute discretion. Any assignment, transfer, conveyance or encumbrance of this agreement without CITY's prior written approval shall be null and void. CONTRACTOR shall not sell or otherwise transfer its interest in this agreement without prior written notification to CITY. Upon receiving such notification from CONTRACTOR, CITY may, at its sole discretion, decide to exercise its right to terminate this agreement. Subject to this provision, the agreement shall be binding upon the heirs, executors, administrators, successors and assigns of the respective parties.

#### **16. DISPUTE RESOLUTION**

- a. Disputes arising in the performance of this agreement shall be decided in writing by the Transit Manager. This decision shall be final and conclusive unless within ten (10) days from the date of receipt of its copy, CONTRACTOR mails or otherwise furnishes a written appeal to the Transit Manager. In connection with any such appeal, CONTRACTOR shall be afforded an opportunity to be heard and to offer evidence in support of its position. The decision of the Transit Manager shall be binding upon the CONTRACTOR and the CONTRACTOR shall abide by the decision.
- b. Unless otherwise directed by CITY, CONTRACTOR shall continue performance under this agreement while matters in dispute are being resolved.
- c. Should either party to this agreement suffer injury or damage to person or property because of any act or omission of the party or of any of his employees, agents or others for whose acts he is legally liable, a claim for damages therefore shall be made in writing to such other party within a reasonable time after the first observance of such injury or damage.
- d. Unless this agreement provides otherwise, all claims, counterclaims, disputes and other matters in question between CITY and CONTRACTOR arising out of or relating to this agreement or its breach will be decided by arbitration if the parties mutually agree, or in a court of competent jurisdiction within the State of California.
- e. The duties and obligations imposed by this agreement and the rights and remedies available thereunder shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law. No action or failure to act by CITY or CONTRACTOR shall constitute a waiver of any right or duty afforded any of them under this agreement, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically agreed in writing.

#### **17. RESOLUTION OF FEDERAL PROCUREMENT ISSUES**

The Federal Procurement Regulations shall be used where applicable to define, resolve, and settle procurement issues. Unless otherwise directed by CITY, CONTRACTOR shall continue performance under this agreement while matters in dispute are being resolved.



## **18. STOP WORK**

CITY may stop work on CITY's transportation system upon forty-eight (48) hours written notice to CONTRACTOR. CITY shall be liable for all relevant costs incurred prior to the stop-work period and for restart, if any. When exercising this provision, CITY shall be obligated for the costs of severance for personnel assigned to CITY's transportation system in accordance with the published policy and procedures of CONTRACTOR, a copy of which shall be provided to CITY upon request. Additionally, the cost associated with operations and facilities close down, shall be the obligation of CITY. CONTRACTOR shall make all reasonable efforts to minimize costs to CITY.

## **19. TERMINATION FOR DEFAULT**

- a. All the terms, conditions, and covenants of this agreement are considered material and in the event CONTRACTOR breaches or defaults in the performance of any such terms, conditions, or covenants which are to be kept, done or performed by it, CITY shall give CONTRACTOR ten days written notice either by certified mail or by personal service, describing such breach or default, and if CONTRACTOR fails, neglects or refuses for a period or more than ten days thereafter to remedy, or cure such breach or default, then CITY without further notice, may terminate this agreement. In the event of termination of this agreement as hereinabove specified, CITY shall have the right to take immediate possession of all equipment and facilities provided by CITY to CONTRACTOR and of the facilities and equipment supplied by CONTRACTOR under the provisions of this agreement. In the event CITY does take possession of CONTRACTOR-supplied facilities and equipment, CONTRACTOR shall be reimbursed by CITY for the actual cost of the temporary use of said facilities and equipment. If it is later determined by CITY that CONTRACTOR had an excusable reason for not performing, such as a strike, fire, or flood, events which are not the fault of or are beyond the control of CONTRACTOR, CITY, after setting up a new delivery of performance schedule, may allow CONTRACTOR to continue work, or treat the termination as a termination for convenience.
- b. Bankruptcy: Either (a) the appointment of a receiver to take full possession of all or substantially all of the assets of CONTRACTOR or (b) a general assignment by CONTRACTOR for the benefit of creditors, or (c) any action taken by or suffered by CONTRACTOR under any insolvency or bankruptcy act shall constitute a breach of the agreement by CONTRACTOR and CITY shall have the option to terminate this agreement. The parties specifically agree that the selection of CONTRACTOR is based on factors that render contractor especially suited to perform this agreement, such that the identity of contractor is central to the obligations in this contract. Accordingly, this contract is similar to a personal services contract and non-assignable under 11 USC 365 (c).

## **20. TERMINATION FOR CONVENIENCE**

The performance of work under this agreement may be terminated by CITY in accordance with this clause in whole, or from time to time in part, whenever the Transit Manager shall determine that such termination is in the best interest of CITY. Any such termination shall be effected by delivery to CONTRACTOR of a notice of termination specifying the extent to which performance of work under the agreement is terminated, and the date upon which such termination becomes effective. After receipt of a notice of termination, and except as otherwise directed by the Transit Manager, CONTRACTOR shall:

- a. Stop work under the agreement on the date and to the extent specified in the notice of termination;
- b. Place no further orders or subcontracts for materials, services, or facilities, except as may be necessary for completion of such portion of the work under the agreement as is not terminated;

- c. Terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the notice of termination; assign to CITY in the manner, at the times, and to the extent directed by the Transit Manager, all of the right, title, and interest of CONTRACTOR under the orders and subcontracts so terminated, in which case CITY shall have the right, in its discretion, to settle or pay and or all claims arising out of the termination of such orders and subcontracts; settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the Transit Manager, to the extent he may require, which approval or ratification shall be final for all the purposes of this clause; transfer title to CITY and deliver in the manner, at the times, and to the extent, if any, directed by Transit Manager the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as part of, or acquired in connection with the performance of, the work. terminated, 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 CITY; use its best efforts to sell, in the manner, at the times, to the extent, and at the price(s) directed or authorized by the Transit Manager, any property of the types referred to above, provided, however, that CONTRACTOR shall not be required to extend credit to any purchaser, and may acquire any such property under the conditions prescribed by and at a price(s) approved by the Transit Manager, and provided further, that the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by CITY to CONTRACTOR under this agreement or shall otherwise be credited to the price or cost of the work covered by this Contract or paid in such other manner as the Transit Manager may direct; complete performance of such part of the work as shall not have been terminated by the notice of termination; and take such action as may be necessary, or as the Transit Manager may direct, for the protection or preservation of the property related to this agreement which is in the possession of CONTRACTOR and in which CITY has or may acquire an interest.
- d. CONTRACTOR shall be paid its costs, including contract close-out costs, and profit on work performed up to the time of termination. CONTRACTOR shall promptly submit its termination claim to CITY to be paid CONTRACTOR.

## **21. REMEDIES ON BREACH (WAIVER OF REMEDIES)**

The duties and obligations imposed by the agreement and the rights and remedies available hereunder shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law. No action or failure to act by CITY or CONTRACTOR shall constitute a waiver of any right or duty afforded any of them under the agreement, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach hereunder, except as may be specifically agreed in writing. In the event that CITY elects to waive its remedies for any breach by CONTRACTOR of any covenant, term or condition of this agreement, such waiver shall not limit CITY's remedies for any succeeding breach of that or of any other term, covenant or condition of this agreement. It is agreed that in the event of failure by CONTRACTOR to perform the services required by this agreement, in addition to all other remedies, penalties and damages provided by law, CITY may provide such services, and deduct the cost of doing so from the amounts due or to become due to the CONTRACTOR. The costs to be deducted shall be the actual costs to CITY to provide such services.

## **22. RIGHTS UPON TERMINATION OR EXPIRATION AND WAIVER OF CLAIMS**

Upon expiration or earlier termination of this agreement, CITY shall have the right to provide the services by means of its own employees or pursuant to contract with other carrier(s) or otherwise. CONTRACTOR agrees to forever waive any claim, of any sort or nature, against CITY based upon CITY's operation, or contracting for the operation, of the service, or any portion of it. CONTRACTOR shall also waive any

right that it otherwise might have to claim entitlement to benefits afforded to private mass transportation companies under Section 3(e) of the Federal Transit Act of 1964 (49 USC Sec. 1602(e)), as it now exists or hereafter may be amended. CONTRACTOR also hereby forever waives any claims of unfair competition that it otherwise might assert, any rights that otherwise might accrue to it under the above- mentioned provisions or under any other similar or comparable provisions of the law. Having entered into this agreement shall not be the sole reason whereby the CONTRACTOR shall be inhibited, penalized, or disqualified from submitting proposals for subsequent transportation, management, and operation programs under the jurisdiction of CITY.

## **23. CHANGES**

CITY, without invalidating this agreement may order additions to or deletions from the work to be performed. Such changes shall be specified to CONTRACTOR in writing. If justified, the "Maximum Obligation" will be adjusted accordingly. New provisions must be mutually agreeable to both CITY and CONTRACTOR. A shift of vehicle service hours between services within the maximum value or an increase or decrease of up to 15% percent change (up or down) within the current span of service would not constitute a change as defined in this agreement, but any such shift or change shall only occur at the direction of CITY.

## **24. MODIFICATION OF AGREEMENT**

This writing constitutes the entire agreement between the parties relative to the subject matter of this agreement and no modification hereof shall be effective unless and until such modification is evidenced by a writing signed by both parties to this agreement. There are no understandings, agreements or conditions with respect to the subject matter of this agreement except those contained in this writing.

## **25. NOTICES**

All notices required to be given with respect to this agreement shall be in writing and mailed first class, postage prepaid to the persons named below or at such addresses as the parties may file with each other for such purpose.

If to CONTRACTOR:	Mr. Nick Promponas, SVP, First Transit, Inc. 7581 S. Willow Drive, Suite 102; Tempe, AZ 85283-5033
Copy To:	Mr. Mike Petrucci, General Counsel, First Transit, Inc. 600 Vine Street, Suite 1400, Cincinnati, OH 45202-2400
If to CITY:	Transit Manager City of San Luis Obispo, SLO TRANSIT 919 Palm Street San Luis Obispo, CA 93401

## **26. PROPRIETARY RIGHTS**

All inventions, improvements, discoveries, proprietary rights, copyrights and patents made by CONTRACTOR under this agreement shall be made available to CITY with no royalties, charges, or other costs, but shall be owned by CONTRACTOR. All manuals prepared by CONTRACTOR for use by CONTRACTOR in other locales shall be made available to CITY at no charge but shall be owned by CONTRACTOR and shall not be disclosed, or released by CITY without prior written consent of CONTRACTOR. Reports and manuals prepared by CONTRACTOR under this agreement for specific use in CITY's system shall become the property of CITY. CONTRACTOR, however, shall have the right to print and issue copies of these reports. CONTRACTOR may make presentations and releases relating to the project. Papers and other formal publications shall be approved by CITY prior to release.

## **27. FORCE MAJEURE**

CONTRACTOR shall not be held responsible for losses, failure to perform, or excess costs caused by

events beyond the control of CONTRACTOR. Such events may include, but are not restricted to, the following: fire, epidemics, earthquake, flood, or other natural disaster; acts of the government; riots, strikes, war or other civil disorders; or fuel shortages. In every case, CONTRACTOR shall resume performance at the earliest possible date following the cessation of such unforeseen causes or events. CONTRACTOR shall be entitled to no compensation for any service, the performance of which is excused pursuant to this paragraph.

## **28. INFORMATION AND DOCUMENTS**

All information, data, reports, records, maps, survey results as are existing, available, and necessary for carrying out the work under this agreement, shall be furnished to CONTRACTOR without charge by CITY, and CITY shall cooperate in every way possible in the carrying out of the work without undue delay.

## **29. EMERGENCY PROCEDURES**

In the event of a major emergency such as an earthquake, flood, or man-made catastrophe, CONTRACTOR shall make transportation and communication resources available to the degree possible for emergency assistance. If the normal line of direct CITY from CITY is intact, CONTRACTOR shall follow instruction of CITY. If the normal line of direct CITY is broken, and for the period it is broken, CONTRACTOR shall make best use of transportation resources following to the degree possible the direction of an organization such as the San Luis Obispo Office of Emergency Services, the police, Red Cross, or National Guard, which appears to have assumed responsibility within CITY's service area. Emergency uses of transportation may include evacuation, transportation of injured, and movement of people to food and shelter. CONTRACTOR shall be reimbursed in accordance with the normal "Price Formula" and "Payment" or, if the normal method does not cover the types of emergency services involved, then on the basis of fair, equitable and prompt reimbursement of CONTRACTOR'S actual costs. Reimbursement for such major emergency services shall be over and above the "Maximum Obligation" of this contract. Immediately when the emergency condition ceases, CONTRACTOR shall reinstate normal transportation services.

## **30. ACCESS TO RECORDS AND REPORTS (AUDIT AND INSPECTION)**

- a. In accordance with 49 C.F.R. 18.36(i), CONTRACTOR shall permit CITY, the FTA Administrator, the Comptroller General of the United States, the California State Controller, and the Sacramento Area Council of Governments or any of their authorized representatives access to any to books, documents, papers and records of CONTRACTOR which are directly pertinent to this contract for the purposes of making audits, examinations, excerpts and transcriptions. Further, CONTRACTOR agrees to permit any of the foregoing parties to reproduce by any means whatsoever or to copy excerpts and transcriptions as reasonably needed.
- b. CONTRACTOR agrees to maintain all books, records, accounts and reports required under this contract for a period of not less than three years after the date of termination or expiration of this contract, except in the event of litigation or settlement of claims arising from the performance of this contract, in which case CONTRACTOR agrees to maintain same until CITY, the FTA Administrator, the Comptroller General, or any of their duly authorized representatives, have disposed of all such litigation, appeals, claims or exceptions related thereto. Reference 49 CFR 18.39(i)(11).

## **31. TRANSFER OF TITLE TO EQUIPMENT**

All equipment, parts and supplies purchased by CONTRACTOR under this agreement, either as a direct charge expense or within the defined scope of services, shall become the property of CITY upon either the payment of the direct charge invoice or the expiration or termination of this agreement for any reason

unless otherwise specified in writing. The applicable depreciation schedule and residual value, if any, of such items shall be established prior to the execution of this agreement. CONTRACTOR shall maintain a perpetual inventory of all such equipment and supplies purchased under this and any prior agreement, to be submitted for review on or before August 31 of each year. CONTRACTOR shall be responsible for the replacement of any equipment, parts and supplies purchased or provided, either by CITY or CONTRACTOR, under this agreement that is lost or unreasonably destroyed while under the control of CONTRACTOR.

### **32. TRANSPORTATION DATA REPORTING**

CONTRACTOR shall report operating and financial data to CITY in accordance with the California Public Utilities Code, Chapter 4, Section 99243, and California Administrative Code Title 21, Chapter 3, Subchapter 2, as required under California Transportation Development Act, and with Level "R" of the Uniform Financial Accounting and Reporting Elements as required by the National Transit Database System and the Federal Transit Act of 1964 as both are amended from time to time.

### **33. PERMITS AND LICENSES**

At its sole cost and expense, CONTRACTOR shall obtain any and all permits, licenses, certificates, or entitlement to operate as are now or hereafter required by any agency, specifically including, but not limited to, those that may be required by the California Public Utilities Commission, the California Highway Patrol, the Department of Motor Vehicles and local jurisdictions, to enable CONTRACTOR to perform this agreement. Copies of all such entitlements shall be provided to CITY when received by CONTRACTOR. In the event that any aspect of this agreement requires prior approval by the PUC, the CONTRACTOR shall submit necessary application forms. Both parties shall appear as necessary and cooperate in the commission approval process. CITY reserves the right to oppose, support or be neutral on any such request and on the PUC's ruling thereon. CONTRACTOR covenants to obtain all such approvals before commencing operations, and to conform to the PUC ruling thereon, at its sole cost and expense.

### **34. NON-DISCRIMINATION IN EMPLOYMENT AND SERVICE**

- a. In connection with the execution of this agreement, CONTRACTOR shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, age or national origin. CONTRACTOR shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, age, or national origin or ancestry. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or terminations; rates of pay or other forms of compensation; and, selection for training, including apprenticeship. CONTRACTOR must submit a properly executed and current Employer Information Report (EEO-1) upon request of CITY. CONTRACTOR further agrees to insert a similar provision in all subcontracts, except subcontracts for standard commercial supplies or raw materials.
- b. CONTRACTOR shall also comply with the requirements of Title VI of the Civil Rights Act of 1964 (P.L. 88-352) and with all applicable regulations, statutes, laws, etc., promulgated pursuant to the civil rights acts of the state and federal government now in existence or hereafter enacted. Further, CONTRACTOR shall also comply with the provisions of Section 1735 of the California Labor Code.
- c. CONTRACTOR shall not discriminate, nor allow any of its officers, employees, or agents to discriminate against any passenger or patron because of race, color, sex, age, or national origin or ancestry.

- d. CONTRACTOR shall promptly notify CITY of any discrimination complaints. CONTRACTOR shall, at its sole cost and expense, conform to any final orders issued by any State or Federal agency with jurisdiction to correct the CONTRACTOR'S discrimination in employment and/or service and shall fully save harmless and indemnify CITY in this regard.

### 35. LABOR PROVISIONS

In accordance with 40 U.S.C. 329 and 29 CFR Part 5, CONTRACTOR hereby certifies compliance with the following provisions related to the employment of mechanics and laborers under the Contract Work Hours and Safety Standards Act.

- a. **Overtime Requirements.** No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any work week in which he or she is employed on such work to work in excess of eight hours in any calendar day or in excess of forty hours in such work week unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of eight hours in any calendar day or in excess of forty hours in such work week.
- b. **Violation; Liability for Unpaid Wages; Liquidated Damages.** In the event of any violation of the clause set forth in subparagraph (b)(1) of 29 CFR Section 5.5, contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen or guards, employed in violation of the clause set forth in subparagraph (b)(1) of 29 CFR Section 5.5 in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of eight hours or in excess of the standard work week of forty hours without payment of the overtime wages required by the clause set forth in subparagraph (b)(1) of 29 CFR Section 5.5.
- c. **Withholding for Unpaid Wages and Liquidated Damages.** CITY shall upon its own action or upon written request of authorized representative of the Department of Labor withhold or cause to be withheld, from any monies payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in subparagraph (b)(2) of 29 CFR Section 5.5.
- d. **Non-Construction Grants.** Contractor or subcontractor shall maintain payrolls and basic payroll records during the course of the work and shall preserve them for a period of three years from the completion of the contract for all laborers and mechanics, including guards and watchmen, of each such employee, social security number, correct classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. Further, the recipient shall require the contracting Officer to insert in any such contract a clause providing that the records to be maintained under this paragraph shall be made available by contractor or subcontractor for inspection, copying, or transcription by authorized representatives of Department of Transportation ("DOT") and the Department of Labor and the Contractor or subcontractor will permit such representatives to interview employees during working hours on the job.
- e. **Subcontracts.** Contractor or subcontractor shall insert in any subcontracts the clauses set forth in subparagraph (a) through (e) of this paragraph and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for

compliance by any subcontractor or lower tier subcontractor with the clauses set forth in subparagraphs (a) through (e) of this paragraph.

- f. CONTRACTOR and any subcontractor shall comply with 40 U.S.C. 3701.

### **36. TRANSIT EMPLOYEE PROTECTIVE AGREEMENTS**

- a. **General Transit Employee Protective Requirements** – To the extent that the Federal Transit Administration (FTA) determines that transit operations are involved, CONTRACTOR agrees to carry out the transit operations work on the underlying contract in compliance with terms and conditions determined by the U.S. Secretary of Labor to be fair and equitable to protect the interests of employees employed under this contract and to meet the employee protective requirements of 49 U.S.C. A 5333(b), and U.S. DOL guidelines at 29 C.F.R.-Part 215, and any amendments thereto. These terms and conditions are identified in the letter of certification from the U.S. DOL to FTA applicable to the FTA Recipient's project from which Federal assistance is provided to support work on the underlying contract. CONTRACTOR agrees to carry out that work in compliance with the conditions stated in that U.S. DOL letter. The requirements of this subsection (1), however, do not apply to any contract financed with Federal assistance provided by FTA either for projects for elderly individuals and individuals with disabilities authorized by 49 U.S.C. § 5310(a)(2), or for projects for nonurbanized areas authorized by 49 U.S.C. § 5311. Alternative provisions for these projects are set forth in subsections (b) and (c) of this clause.
- b. **Transit Employee Protective Requirements for Projects Authorized by 49 U.S.C. § 5310(a)(2) for Elderly Individuals and Individuals with Disabilities** – If the contract involves transit operations financed in whole or in part with Federal assistance authorized by 49 U.S.C. § 5310(a)(2), and if the U.S. Secretary of Transportation has determined or determines in the future that the employee protective requirements of 49 U.S.C. § 5333(b) are necessary or appropriate for the state and the public body subrecipient for which work is performed on the underlying contract, CONTRACTOR agrees to carry out the Project in compliance with the terms and conditions determined by the U.S. Secretary of Labor to meet the requirements of 49 U.S.C. § 5333(b), U.S. DOL guidelines at 29 C.F.R. Part 215, and any amendments thereto. These terms and conditions are identified in the U.S. DOL's letter of certification to FTA, the date of which is set forth Grant Amendment or Cooperative Agreement with the state. CONTRACTOR agrees to perform transit operations in connection with the underlying contract in compliance with the conditions stated in that U.S. DOL letter.
- c. **Transit Employee Protective Requirements for Projects Authorized by 49 U.S.C. § 5311 in Nonurbanized Areas** – If the contract involves transit operations financed in whole or in part with Federal assistance authorized by 49 U.S.C. § 5311, CONTRACTOR agrees to comply with the terms and conditions of the Special Warranty for the Nonurbanized Area Program agreed to by the U.S. Secretaries of Transportation and Labor, dated May 31, 1979, and the procedures implemented by U.S. DOL or any revision thereto.
- d. CONTRACTOR also agrees to include any applicable requirements in each subcontract involving transit operations financed in whole or part with Federal assistance provided by FTA.

### **37. ACCESS REQUIREMENTS FOR PERSONS WITH DISABILITIES**

CONTRACTOR agrees to comply with all applicable requirements of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 *et seq.*, Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; 49 U.S.C. § 5301(d); and all regulations promulgated to implement the ADA and Section 504 of the Rehabilitation Act of 1973, as amended, as may be applicable to CONTRACTOR.

### 38. CIVIL RIGHTS

During the performance of this contract, CONTRACTOR, for itself, its assignees and successors in interest, agrees as follows:

- a. **Nondiscrimination.** In accordance with Title VI of the Civil Rights Act, as amended, 42 U.S.C. § 2000d, section 303 of the Age Discrimination Act of 1975, as amended, 42 U.S.C. § 6102, section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, and Federal transit law at 49 U.S.C. § 5332, CONTRACTOR agrees that it will not discriminate against any employee or applicant for employment because of race, color, creed, national origin, sex age, or disability. In addition, CONTRACTOR agrees to comply with applicable Federal implementing regulations and other implementing requirements FTA may issue.
- b. **Equal Employment Opportunity.** The following equal employment opportunity requirements apply to the underlying contract:
- c. **Race, Color, Creed, National Origin, Sex** – In accordance with Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e, and Federal transit laws at 49 U.S.C. § 5332, CONTRACTOR agrees to comply with all applicable equal employment opportunity requirements of U.S. Department of Labor (U.S. DOL) regulations, “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor,” 41 C.F.R. Parts 60 et seq., (which implement Executive Order No. 11246, “Equal Employment Opportunity,” as amended by Executive Order No. 11375, “Amending Executive Order 11246 Relating to Equal Employment Opportunity,” 42 U.S.C. § 2000e note), and with any applicable Federal statutes, executive orders, regulations, and Federal policies that may in the future affect construction activities undertaken in the course of the Project. CONTRACTOR agrees to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, creed, national origin, sex, or age. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. In addition, CONTRACTOR agrees to comply with any implementing requirements FTA may issue.
- d. **Age** – In accordance with section 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 623 and Federal transit law at 49 U.S.C. § 5332, CONTRACTOR agrees to refrain from discrimination against present and prospective employees for reason of age. In addition, CONTRACTOR agrees to comply with any implementing requirements FTA may issue.
- e. **Disabilities** – In accordance with section 102 of the Americans with Disabilities Act, as amended, 42 U.S.C. § 12112, CONTRACTOR agrees that it will comply with the requirements of the U.S. Equal Employment Opportunity Commission, “Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act,” 29 C.F.R. Part 1630, pertaining to employment of persons with disabilities. In addition, CONTRACTOR agrees to comply with any implementing requirements FTA may issue.
- f. **Subcontracts.** CONTRACTOR agrees to include these requirements in each subcontract financed in whole or in part with Federal assistance provided by FTA, modified only if necessary to identify the affected parties.
- g. **Employer Information Report.** CONTRACTOR must submit a properly executed and current Employer Information Report (EEO-1) upon request of CITY



### **39. DISADVANTAGED BUSINESS ENTERPRISE**

- e. It is the policy of the U.S. Department of Transportation that Disadvantaged Business Enterprises (DBE) as defined in 49 CFR Part 26, shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with federal funds under this agreement. Consequently, the DBE requirements of 49 CFR Part 26 applies to this agreement.
- f. CONTRACTOR agrees to ensure that Disadvantaged Business Enterprises (DBE) as defined in 49 CFR Part 26 have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with federal funds provided under this agreement. In this regard, CONTRACTOR and subcontractors shall take all necessary and reasonable steps in accordance with 49 CFR Part 26 to ensure that Disadvantaged Business Enterprises have the maximum opportunity to compete for and perform contracts. CONTRACTOR and its subcontractors shall not discriminate on the basis of race, creed, national origin, age or sex in the award and performance of federal-assisted contracts.
- g. CONTRACTOR shall cooperate fully with CITY in meeting any of CITY's commitments and goals with regard to the maximum utilization of disadvantaged business enterprises. CONTRACTOR shall keep records of DBE participation in all activities carried out pursuant to this agreement, and shall report to CITY all such participation and efforts made to encourage DBE participation as required by CITY. See Appendix H – DBE Goal for the current established goal.
- h. CONTRACTOR shall incorporate the provisions of this paragraph in all applicable subcontracts.

### **40. DRUG AND ALCOHOL TESTING**

CONTRACTOR agrees to establish and implement a drug and alcohol testing program that complies with 49 CFR Part 655, produce any documentation necessary to establish its compliance with Part 655, and permit any authorized representative of the United States Department of Transportation or its operating administrations, the State Oversight Agency of California, or CITY, to inspect the facilities and records associated with the implementation of the drug and alcohol testing program as required under 49 CFR Part 655 and review the testing process. CONTRACTOR agrees further to certify annually its compliance with Part 655 and to submit the Management Information System (MIS) reports by March 1 of each year to CITY. To certify compliance, CONTRACTOR shall use the "Substance Abuse Certifications" in the "Annual List of Certifications and Assurances for Federal Transit Administration Grants and Cooperative Agreements," which is published annually in the Federal Register.

### **41. CHARTER SERVICE OPERATIONS**

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

### **42. SCHOOL BUS OPERATIONS**

CONTRACTOR agrees that neither it nor any subcontractor performing work in connection with this agreement will engage in school bus operations for the transportation of students or school personnel exclusively in competition with private school bus operators, except as permitted by 49 U.S.C. § 5323(f) and FTA regulations, "School Bus Operations," 49 C.F.R. Part 605, and any amendments thereto that may be issued. Any applicable school bus agreement required by these regulations is incorporated by reference and made part of this agreement.

#### 43. MISCELLANEOUS PROVISIONS

- a. **Energy Conservation.** CONTRACTOR agrees to comply with the mandatory standards and policies relating to energy efficiency which are contained in the State energy conservation plan issued in compliance with the Energy Policy and Conservation Act.
- b. **Interest of Members of or Delegates to Congress.** In accordance with 18 USC, Section 431, no member of, or delegate to, the Congress of the United States shall be admitted to any share or part of this agreement or to any benefit arising therefrom.
- c. **Conflict of Interest.** No employee, officer, director or agent of CITY shall participate in the selection, award or administration of this agreement if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when the employee, officer or agent, or any member of his immediate family, or an organization which employs, or is about to employ same, has a financial or other interest in the firm selected for award. No employee, officer, or agent of CITY shall have any interest, direct or indirect, in this contract or the proceeds thereof during his tenure or for one year thereafter.
- d. **Clean Water Act.** CONTRACTOR agrees to comply with all applicable standards, orders or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251 et seq. CONTRACTOR agrees to report each violation to CITY and understands and agrees that CITY will, in turn, report each violation as required to assure notification to FTA and the appropriate EPA Regional Office. CONTRACTOR also agrees to include these requirements in each subcontract exceeding \$100,000 financed in whole or in part with Federal assistance provided by FTA.
- e. **Clean Air Act.** CONTRACTOR agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. § 7401 et seq. CONTRACTOR agrees to report each violation to CITY and understands and agrees that CITY will, in turn, report each violation as required to assure notification to FTA and the appropriate EPA Regional Office. CONTRACTOR also agrees to include this requirement in each subcontract exceeding \$100,000 financed in whole or in part with Federal assistance provided by FTA.
- f. **Debarred Bidders.** This agreement is a covered transaction for purposes of 49 CFR Part 29. As such, CONTRACTOR has verified by signed certification that none of its principals, as defined at 49 CRR 29.995, or affiliates, as defined by 49 CFR 29.905, are excluded or disqualified at 49 CFR 29.940 and 29.945. CONTRACTOR is required to comply with 49 CFR 29, Subpart C and must include the requirement to comply with 49CFR 29, Subpart C in any lower tier covered transaction it enters into.
- g. **Conflict of Transportation Interests.** The CONTRACTOR shall not divert any revenues, passengers, or other business from CITY's project to any taxi or other transportation operation of CONTRACTOR without the written approval of CITY.
- h. **Conflicting Use.** The CONTRACTOR shall not use any vehicle, equipment, personnel or other facilities which are dedicated to CITY for performing services under this agreement for any use whatsoever other than provided for in this agreement without the prior approval of CITY.
- i. **Fair Employment and Housing Act.** CONTRACTOR shall comply with the requirements of the California Fair Employment and Housing Act,

- j. **Working Conditions.** It shall be a condition of this agreement, and shall be made a condition of each subcontract entered into pursuant to this agreement, that the CONTRACTOR or the subcontractor shall not require any laborer or mechanic employed in connection with the performance of this agreement to work under working conditions which are unsanitary, hazardous or dangerous to his health or safety, as determined under the California Occupational Safety and Health Act of 1973 (Chapter 993, Statutes of 1973).
- k. **Federal Changes.** CONTRACTOR shall at all times comply with all applicable FTA regulations, policies, procedures and directives, including without limitation those listed directly or by reference in the Master Agreement between CITY and FTA, as they may be amended or promulgated from time to time during the term of this contract. CONTRACTOR'S failure to so comply shall constitute a material breach of this contract.
- l. **No Obligation By The Federal Government.**
  - 1. CITY and CONTRACTOR acknowledge and agree that, notwithstanding any concurrence by the Federal Government in or approval of the solicitation or award of the underlying contract, absent the express written consent by the Federal Government, the Federal Government is not a party to this contract and shall not be subject to any obligations or liabilities to CITY, CONTRACTOR, or any other party (whether or not a party to that contract) pertaining to any matter resulting from the underlying contract.
  - 2. CONTRACTOR agrees to include the above clause in each subcontract financed in whole in part with Federal assistance provided by FTA. It is further agreed that the clause shall not be modified, except to identify the subcontractor who will be subject to its provisions.
- m. **Fly America Requirements.** CONTRACTOR agrees to comply with 49 U.S.C. 40118 (the "Fly America" Act) in accordance with the General Services Administration's regulations at 41 CFR Part 301-10, which provide that recipients and subrecipients of Federal funds and their contractors are required to use U.S. Flag air carriers for U.S. Government-financed international air travel and transportation of their personal effects or property, to the extent such service is available, unless travel by foreign air carrier is a matter of necessity, as defined by the Fly America Act. The Contractor shall submit, if a foreign air carrier was used, an appropriate certification or memorandum adequately explaining why service by a U.S. flag air carrier was not available or why it was necessary to use a foreign air carrier and shall, in any event, provide a certificate of compliance with the Fly America requirements. The Contractor agrees to include the requirements of this section in all subcontracts that may involve international air transportation.
- n. **Recycled Products.** CONTRACTOR agrees to comply with all of the requirements of Section 6002 of the Resource Conservation and Recovery Act (RCRA), as amended (42 U.S.C. 6962), including but not limited to the regulatory provisions of 40 CFR Part 247, and Executive Order 12873, as they apply to the procurement of the items designated in Subpart B of 40 CFR Part 247. CONTRACTOR agrees to include these requirements in every subcontract.
- o. **Taxes/Licenses.** CONTRACTOR shall be responsible for paying any and all Federal, State, and Local taxes. CONTRACTOR shall also be responsible for securing and paying for any and all business licenses and taxes that may be required for the operation of services within the scope of this agreement.

- p. **Failure to Act.** No action or failure to act by either party shall be a waiver of a right or duty afforded under this agreement, nor shall such action or failure to act constitute a breach of this agreement, except as specifically agreed to in writing.
- q. **Conflict of Interests.** CONTRACTOR shall not divert any revenues, passengers, or other business from CITY to any taxi or other transportation operation.
- r. **Waiver and Non-Waiver.** A waiver by one party of a right to a remedy for breach of this contract by the other party shall not be deemed to waive the right to a remedy for a subsequent breach by the other party. Both parties, having had the opportunity to consult an attorney regarding the provisions of this agreement, agree to waive the principle of contract interpretation that an ambiguity will be construed against the party that drafted the ambiguous provision.
- s. **Time is of the Essence.** Time is of the essence in this agreement. CONTRACTOR'S failure to deliver goods/services on time shall be a material breach of this contract. If CONTRACTOR fails to deliver goods/services on time, CITY, at its discretion, may procure those goods/services from another source. If the price paid by CITY for goods/services procured from another source under this paragraph is higher than the price under this agreement, CONTRACTOR shall pay CITY the difference between those prices. CITY may deduct that difference from any amount CITY owes CONTRACTOR.
- t. **Intelligent Transportation System (ITS).** For all ITS property and services, the Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the National ITS Architecture and Standards to the extent required by 23 U.S.C. Section 517(d) and 23 CFR part 655 and 940.

#### 44. LOBBYING

CONTRACTOR shall comply with 31 U.S.C. 1352, which provides in part that no appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement. CONTRACTORS who apply or bid for an award of \$100,000 or more shall file the certification required by 49 CFR Part 20, "New Restrictions on Lobbying." Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose the name of any registrant under the Lobbying Disclosure Act of 1995 who has made lobbying contacts on its behalf with non-Federal funds with respect to that Federal contract, grant or award covered by 31 U.S.C. 1352. Such disclosures are forwarded from tier to tier up to the recipient."

#### 45. COMPLIANCE WITH FEDERAL, STATE, AND LOCAL LAWS

CONTRACTOR warrants and covenants that it shall fully and completely comply with all applicable Federal, State, and Local laws and ordinances, and all lawful orders, rules and regulations issued by any CITY with jurisdiction in all aspects of its performance of this

agreement. CONTRACTOR shall hold CITY harmless from any claims or charges by reason of the CONTRACTOR's or any subcontractor's failure to comply with the applicable laws or any regulations adopted pursuant thereto and shall reimburse CITY for any fines, damages or expenses of any kind incurred by it by reason of said failure. This paragraph shall survive the termination of this agreement or any extensions thereof.

#### **46. PROGRAM FRAUD AND FALSE OR FRAUDULENT STATEMENTS OR RELATED ACTS**

- a. CONTRACTOR acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. §§ 3801 et seq. and U.S. DOT regulations, "Program Fraud Civil Remedies", 49 C.F.R. Part 31, apply to its actions pertaining to this agreement. Upon execution of the underlying contract, CONTRACTOR certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, it may make, or causes to be made, pertaining to the underlying contract or the FTA assisted project for which this contract work is being performed. In addition to other penalties that may be applicable, CONTRACTOR further acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification, the Federal Government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986 on CONTRACTOR to the extent the Federal Government deems appropriate.
- b. CONTRACTOR also acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification to the Federal Government under a contract connected with a project that is financed in whole or in part with Federal assistance originally awarded by FTA under CITY of 49 U.S.C. § 5307, the Government reserves the right to impose the penalties of 18 U.S.C. § 1001 and 49 U.S.C. § 5307(n)(1) on CONTRACTOR, to the extent the Federal Government deems appropriate.
- c. CONTRACTOR agrees to include the above two clauses in each subcontract financed in whole or in part with Federal assistance provided by FTA. It is further agreed that the clauses shall not be modified, except to identify the subcontractor who will be subject to the provisions.

#### **47. INCORPORATION OF FEDERAL TRANSIT ADMINISTRATION (FTA) TERMS**

The preceding provisions include, in part, certain Standard Terms and Conditions required by DOT, whether or not expressly set forth in the preceding contract provisions. All contractual provisions required by DOT, as set forth in FTA Circular 4220.1E are hereby incorporated by reference. Anything to the contrary herein notwithstanding, all FTA mandated terms shall be deemed to control in the event of a conflict with other provisions contained in this Agreement. CONTRACTOR shall not perform any act, fail to perform any act, or refuse to comply with any CITY requests, which would cause CITY to be in violation of the FTA terms and conditions.

#### **48. PRIVACY ACT**

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

include these requirements in each subcontract to administer any system of records on behalf of the Federal Government financed in whole or in part with Federal assistance provided by FTA.

#### **49. INDEPENDENT CONTRACTOR**

- a. Neither of the parties hereunder shall be deemed to be the agent, employee, partner, or joint venture of the other. CONTRACTOR is and should be an independent contractor performing services under this agreement for the consideration herein set forth.
- b. CONTRACTOR'S employees shall at all times be and remain the sole employees of CONTRACTOR, and CONTRACTOR shall be solely responsible for payment of all employees' wages and benefits. CONTRACTOR, without any cost or expenses to CITY, shall faithfully comply with the requirements of all applicable State and Federal enactments with respect to employer's liability, worker's compensation, unemployment insurance and other forms of Social Security, and also with respect to withholding of income tax at its source from wages of said employee and shall indemnify and hold harmless CITY from and against any and all liability, damages, claims, costs and expenses of whatever nature arising from alleged violation of such enactments or from any claims of subrogation provided for in such enactment or otherwise.
- c. This agreement does not constitute a contract of employment between CITY and CONTRACTOR or any agents, officers or employees of CONTRACTOR. After the expiration or termination of this agreement, CONTRACTOR'S successor shall be permitted to hire any CONTRACTOR employees previously employed on this program. At that time, in hiring a CONTRACTOR employee or a former CONTRACTOR employee, CITY shall ensure and require that such employment process fairly treat former CONTRACTOR employees as members of the general public with no discrimination, no waiver of job advertising, no consideration of employee's seniority with CONTRACTOR and no other privilege different from that accorded to members of the general public.

#### **50. TRANSITION TO FUTURE OPERATOR**

Up to and for a minimum of thirty (30) days following the effective date of termination or expiration of this agreement, CONTRACTOR shall provide to either CITY or any future operator selected by CITY, CONTRACTOR'S full cooperation in the transition to the successor operator. This shall include, at a minimum, consultation regarding labor and management issues (including a delineation of wages and benefits by employee category), access to non-confidential personnel files and maintenance records. CONTRACTOR shall provide its best professional effort to assure a smooth transition from CONTRACTOR'S services to those provided by the new operator and shall cooperate fully with CITY and the new operator to this end.

#### **51. SEVERABILITY**

If any provision of this agreement is held invalid or unconstitutional by any court of competent jurisdiction, such decision shall have no effect on the validity of the remaining provisions of this agreement and such remaining provisions shall continue to remain in full force and effect.

#### **52. PRECEDENCE OF CONTRACT DOCUMENTS**

The total agreement between the parties consists of the documents specified in this paragraph. In the event of a conflict or ambiguity arising between said documents, or any term or condition therein, the document having precedence shall be determined as follows:

- a. Any supplemental agreements executed after the date of this agreement.
- b. This agreement and attachments thereto, including Exhibit A (Scope of Work).

- c. Exhibits B (RFP) and C (CONTRACTOR'S proposal including any "Best & Final Offer") to this agreement.


### 53. ADDITIONAL TERMS

In the case of dispute the prevailing party in any action between the parties to this agreement, brought to enforce the terms of this agreement, may recover from the other party its reasonable costs and attorneys' fees in connection with such an action.

The validity in whole or in part of any provision of this agreement shall not affect the validity of other provisions. CITY's failure to insist in any one or more instances upon the performance of any term or terms of this agreement shall not be construed as a waiver or relinquishment of CITY's right to such performance or to future performance of such a term or terms, and CONTRACTOR'S obligations in respect thereto shall continue in full force and effect. Time shall be of the essence. Changes hereto shall not be binding upon CITY except when specifically confirmed in writing by CITY.

**IN WITNESS WHEREOF**, the parties hereto have caused this agreement to be executed by and through their respective officers thereunto duly authorized on the date written below their signatures.

ATTEST:

  
\_\_\_\_\_  
City Clerk

CITY OF SAN LUIS OBISPO

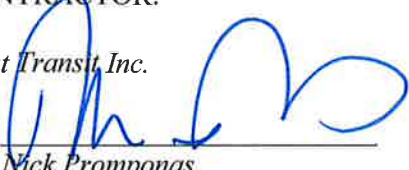
By:   
\_\_\_\_\_  
Mayor

APPROVED AS TO FORM:

  
\_\_\_\_\_  
J. Christine Dietrick  
City Attorney

CONTRACTOR:

*First Transit Inc.*

By:   
\_\_\_\_\_  
*Nick Promponas*  
Its: Senior Vice President