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- San Bernardino County Transportation Commission
 - San Bernardino County Transportation Authority
 - San Bernardino County Congestion Management Agency
 - Service Authority for Freeway Emergencies
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Revised Agenda Item and Additional Support Material

Agenda Item No. 6

SANBAG Board Metro Valley Study Session

December 10, 2015

9:00 am

Location:

San Bernardino Associated Governments
Santa Fe Depot – SANBAG Lobby 1st Floor
1170 W. 3rd Street, San Bernardino, California 92410

Discussion Calendar

Project Delivery

6. Financial Advisor Services for the I-10 and I-15 Corridor Projects

Recommendation: That a quorum of the Board of Directors, acting as the San Bernardino County Transportation Authority:

- A. Find it in the best interests of the San Bernardino County Transportation Authority to take final action on this item at this Metro Valley Study Session;
- B. Take final binding action at this Metro Valley Study Session approving Contract 16-1001369, for Financial Advisor Services for the I-10 and I-15 Corridor Projects with Ernst & Young Infrastructure Advisors, LLC for an amount not to exceed \$1,980,000.
- C. Approve a contingency amount of \$198,000 and authorize the Executive Director or designee to release contingency as necessary for the project.

As of the mailing date for this Metro Valley Study Session, the scope and cost proposal had been finalized, but the contract terms had not. Contract terms have now been finalized, and the final contract substantially in the final form is provided with this Revised Agenda Item. The Revised Agenda Item also includes description of the major change to SANBAG's standard contract included in the final contract provisions.

Minute Action

AGENDA ITEM: 6

Date: December 10, 2015

Subject:

Financial Advisor Services for the I-10 and I-15 Corridor Projects

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- C. Approve a contingency amount of \$198,000 and authorize the Executive Director or designee to release contingency as necessary for the project.

Background:

Special Notice:

Board Policy 10007 permits the Board to take final binding actions regarding Measure I Major Projects in the Metro Valley at Metro Valley Study Sessions under the following circumstances:

“The Executive Director, after consultation with the Board President: (a) places an item on the Study Session agenda that clearly states the item is for final action by the Board; (b) provides special notice to the Board regarding the item in question when the agenda is sent to the Board; and (c) all of the following criteria are satisfied: (1) a quorum of the Board is in attendance at the Study Session; (2) at least a quorum of the Board finds it is in the best interests of SANBAG to take final action on the item at the Study Session; and (3) the item is placed on the subsequent regular meeting agenda of the Board as an “information only” item.”

The Executive Director consulted with the Board President before placing this item on the Agenda. Special notice has been provided to the Board regarding the final action sought. The Board may find that final binding action by the Board at this Metro Valley Study Session is necessary for the following reasons:

The prompt approval of the new Financial Advisor contract will result in critical time savings to initiate the Financial Advisor services required for the I-10 and I-15 Corridor Projects, including facilitation of the Letter of Interest (LOI) for the Transportation Infrastructure Finance and Innovation Act (TIFIA) loan, coordination with the Traffic and Revenue (T&R) work currently

Entity: CTA

under way, and development of the financial model that will incorporate the T&R results in early 2016. This expedited approval will help SANBAG achieve its primary objective of accelerating the TIFIA process and better position SANBAG to lock in historically low interest rates, potentially saving a significant amount of public funds for the project.

This is a new contract.

Should Express Lanes be selected as the Preferred Alternative for the I-10 and I-15 Corridor Projects, a TIFIA loan would represent a significant portion of the overall funding plan for both corridors. As discussed at the July 1, 2015 Board meeting, recent discussions with Federal Department of Transportation (DOT) management identified significant benefits related to accelerating the TIFIA process including (1) securing TIFIA fund commitment prior to the change in the Administration and (2) positioning SANBAG to negotiate the loan terms sooner to potentially take advantage of historically low interest rates. Since the TIFIA funds comprise approximately 33 percent of the eligible costs for the I-10 and I-15 Corridor Projects, accelerating the supporting financial activities could provide a significant overall benefit and project cost savings.

Following discussion at the July 1, 2015 meeting, the Board approved acceleration of the TIFIA schedule, which requires acceleration of certain financial activities including the procurement of a Financial Advisor to provide a range of investment grade financial services required in the development of financing alternatives for these projects. If the Express Lanes Alternative is selected during the environmental process, the Financial Advisor will assist in guiding these projects to a successful financial close for each of the corridor projects.

Recommendation B: During the July 2015 meeting, the SANBAG Board authorized the release of a Request for Proposals (RFP) for the Financial Advisor Services for the I-10 and I-15 Corridor Projects. RFP 16-1001369 was released on September 8, 2015, and was sent electronically to approximately thirteen (13) consultants registered on Planet Bids. The solicitation was issued in accordance with current SANBAG policies and procedures for procurement of professional services.

Three (3) proposals were received by the date and time specified in the RFP. A responsiveness review was conducted by the SANBAG Procurement Analyst and found all three (3) proposals to be responsive. The following is a summary of the events that transpired in the evaluation and selection process.

The proposals were disseminated to all evaluation committee members. A copy of the Score Sheets and the Declaration of Impartiality and Confidentiality form were also distributed to the committee members. The Evaluation Committee was comprised of the following individuals: three SANBAG staff, a representative of Riverside County Transportation Commission (RCTC), and a representative of Los Angeles County Metropolitan Transportation Authority (LACMTA).

Evaluators concluded their individual review of the proposals and convened to review, discuss and score the proposals. The Evaluation Committee members met on October 27, 2015 and discussed each proposal according to the evaluation criteria, including the proposals' strengths and weaknesses. The SANBAG Procurement Analyst provided information regarding the reference checks of the firms. All reference checks received for all firms resulted in good to

excellent ratings. At the completion of discussions the committee members individually scored the proposals based on the following evaluation criteria: Qualifications, Related Experience and References of the Firm - 25%, Proposed Staffing and Projection Organization - 35%, Work Plan - 30% and Price - 10 %.

The firms were ranked in order of technical merit, and a short-list was developed. Of the three firms submitting proposals, the following two firms were short-listed and invited to interview (in alphabetical order): Ernst & Young Infrastructure Advisors (EY) and Public Financial Management (PFM). Minor variances in the criteria scores were noted and discussed. Full detail of the scores is included in the Contract Audit File.

Interviews were conducted with the short-listed firms. Interviews were 60 minutes in length; which consisted of a 15 minute 'opening statement' by the firms, followed by 40 minutes of questions and answers, and 5 minutes of 'closing statements' by the firms. At the completion of the interviews, the Evaluation Committee separately scored the interviews. The assigned weighting between the technical proposal and interviews is 40% for proposals, and 60% for interviews. The highest ranked firm, Ernst & Young Infrastructure Advisors, was selected for the following reasons: cohesiveness and knowledge demonstrated by key team members; local experience with similar projects; and development of a detailed work plan that accounted for potential risks throughout the project.

As a result of the scoring, the evaluation committee recommends that the contract to perform the scope of work as outlined in the RFP 16-1001369 be awarded to Ernst & Young Infrastructure Advisors. The firm ranked first in overall score, and clearly demonstrated a thorough understanding of the scope of work. Evaluation forms and reference checks are located in the Contract Audit File.

Staff has worked with EY in finalizing a scope of services and negotiating a cost proposal appropriate to the defined scope. An independent cost estimate was prepared to aid in this process. As of the mailing date for this Metro Valley Study Session, the scope and cost proposal had been finalized, but the contract terms had not. Contract terms have now been finalized, and the final contract substantially in the final form is provided with this Revised Agenda Item.

The major change to SANBAG's standard contract pertains to the inclusion of a Limitation of Liability (ARTICLE 49 of the Contract). The limitation, which is capped at \$8 million, applies to damages arising out of Consultant's negligence, but does not apply to damages arising out of Consultant's gross negligence, fraud, willful misconduct, intellectual property infringement, or to personal injury or property damage arising out of Consultant's negligence.

Staff discussed the issue of including a limitation of liability with experts in the financial field. From these discussions staff was informed that:

- **Limitations of liability in financial advisor contracts are frequently requested in financial markets;**
- **Liability caps may typically range from the contract amount to upwards of \$5 million depending upon the terms and conditions of the contract (subject contract is approximately \$2 million);**
- **The risk of lawsuits arising out of such contracts is highly unlikely; and**

- **Legal costs from potential lawsuits are the biggest risks, and is therefore a major factor in setting the limitation.**

Taking in consideration the above, a limitation on liability of \$8 million was negotiated. Given the strong qualifications of the Ernst & Young team, staff believes that it is in SANBAG's best interest to enter into the subject contract.

Initial services to be performed by EY will include review and support for the TIFIA LOI for the I-10 Phase One Project (Los Angeles County Line to I-15), which is scheduled for submission to the TIFIA Joint Program Office (JPO) in early 2016. Concurrently, EY will begin development of the financial model which will incorporate results from the ongoing Investment Grade Traffic and Revenue effort being performed under separate contract. This initial work will be followed by the development of the investment grade Plan of Finance for the I-10 Phase One Project, which is a critical component of the TIFIA creditworthiness evaluation targeted for the 2nd Quarter of 2016. EY will assist the TIFIA application process leading to a submitted TIFIA application by the end of 2016. Following the TIFIA application, EY would provide the financial services needed to achieve financial close for I-10 Phase One in 2018, which includes execution of the TIFIA Credit Agreement and issuance of toll revenue backed bonds.

The scope of services also includes financial support for the TIFIA application process for I-10 Phase Two (I-15 to Ford Street) and I-15 Project One (SR-60 to SR-210) scheduled for 2018, and financial services needed to achieve financial close for both projects scheduled for 2020.

The proposed cost for this work is a not-to-exceed amount of \$1,980,000, and the duration of the contract will run through December 31, 2020. This work will be funded by Measure I Valley Freeway Program, with a portion of the funding pertaining to I-10 from the Los Angeles County Line to I-15 utilizing securities issued by the San Bernardino County Transportation Commission (CTC) purchased by the San Bernardino County Transportation Authority (CTA) per Investment Policy No. 20100 as amended October 14, 2015.

The current fiscal year budget provides sufficient budget for this work. The services provided by this new Financial Advisor contract will be coordinated with the development of the Investment Grade Traffic and Revenue forecasts, which is being performed under separate contract. Staff recommends approval of Contract 16-1001369 at a cost not-to-exceed \$1,980,000.

Recommendation C: Due to the length of the contract, the nature of the types of studies to be performed, and the coordination and dependency upon other agencies and consultants, there may be additional items that come up during the course of contract performance which are not currently defined, or require a higher level of effort. For these reasons, it is recommended to provide a contingency amount of \$198,000 and authorize the Executive Director, or their designee to release contingency as required for the project.

Financial Impact:

This item is consistent with the adopted SANBAG Fiscal Year 2015/2016 budget under Task Number 0850. The funding source is Measure I Valley Freeway Funds.

Reviewed By:

This item is not scheduled for review by any other policy committee or technical advisory committee. SANBAG General Counsel and Procurement Manager have reviewed this item and a draft of the contract.

Responsible Staff:

John Meier, Project Manager

Approved
Board of Directors Metro Valley Study Session
Date: December 10, 2015

Witnessed By:

CONTRACT NO. 16-1001369

BY AND BETWEEN

SANBAG

AND

ERNST & YOUNG INFRASTRUCTURE ADVISORS, LLC

FOR

FINANCIAL ADVISOR SERVICES FOR THE I-10 AND I-15 CORRIDOR PROJECTS

This contract (referred to as “Contract”), is made and entered into by and between the San Bernardino County Transportation Authority (“SANBAG”), whose address is: 1170 W. 3rd Street, 2nd Floor, San Bernardino, California 92410-1715; and Ernst & Young Infrastructure Advisors, LLC (“CONSULTANT”) whose address is: 725 South Figueroa Street, Suite 500, Los Angeles, CA 90017. SANBAG and CONSULTANT are each a “Party” and collectively the “Parties”.

RECITALS:

WHEREAS, SANBAG requires certain work services as described in Exhibit “A” of this Contract and;

WHEREAS, CONSULTANT has confirmed that CONSULTANT has the requisite professional qualifications, personnel and experience and is fully capable and qualified to perform the services identified herein; and

WHEREAS, CONSULTANT desires to perform all Work identified herein and to do so for the compensation and in accordance with the terms and conditions set forth herein.

NOW, THEREFORE, the Parties agree as follows:

ARTICLE 1. PROJECT DESCRIPTION/SCOPE OF WORK

1.1 CONSULTANT agrees to perform the work and services set forth in Exhibit A “Scope of Work” (“Work”), in a professional and workmanlike manner in accordance with applicable professional standards, including those established by the American Institute of Certified Public Accountants (“AICPA”), in accordance with the terms and conditions expressed herein and in the sequence, time, and manner defined herein. The word “Work” includes without limitation, the performance, fulfillment and discharge by CONSULTANT of all obligations, duties, tasks, and services imposed upon or assumed by CONSULTANT hereunder; and the Work performed hereunder shall be completed to

the satisfaction of SANBAG, with SANBAG's satisfaction being based on prevailing applicable professional standards as described herein.

- 1.2 The Project Director for this Contract is Garry Cohoe, or such other designee as shall be designated in written notice to CONSULTANT from time to time by the Executive Director of SANBAG or his or her designee. The Project Director shall have authority to act on behalf of SANBAG in administering this Contract, including giving notices (including without limitation, notices of default and/or termination), technical directions and approvals; issuing work direction; demanding performance and accepting work performed, but is not authorized to receive or issue payments or execute amendments to the Contract itself.

ARTICLE 2. CONTRACT TERM

The Contract term shall commence upon issuance of a written Notice To Proceed (NTP) issued by SANBAG, and shall continue in full force and effect through December 31, 2020, until otherwise terminated, or unless extended as hereinafter provided by written amendment. Except that all indemnity and defense obligations hereunder shall survive termination of this Contract. CONSULTANT shall not be compensated for any Work performed or costs incurred prior to issuance of the NTP.

ARTICLE 3. COMPENSATION

- 3.1 Total compensation to CONSULTANT for full and complete performance of the Scope of Work, identified herein and, in compliance with all the terms and conditions of this Contract, shall be on a Time & Materials basis for all obligations incurred in, or application to, CONSULTANT's performance of Work, and for which CONSULTANT shall furnish all personnel, facilities, equipment, materials, supplies, and Work (except as may be explicitly set forth in this Contract as furnished by SANBAG) shall not exceed the amount set forth in section 3.2 below.
- 3.2 The total Contract Not-To-Exceed Amount is One Million, Nine Hundred Eighty Thousand Dollars (\$1,980,000). All Work provided under this Contract is to be performed as set forth in Exhibit A "Scope of Work", and shall be reimbursed pursuant to Exhibit B "Price Form". The hourly labor rates identified in Exhibit B shall remain fixed for the term of this Contract and include CONSULTANT's direct labor costs, indirect costs, and profit. All expenses shall be reimbursed for the amounts identified in Exhibit B. Any travel expenses must be pre-approved by SANBAG and shall be reimbursed for per diem expenses at a rate not to exceed the currently authorized rates for state employees under the State Department of Personnel Administration rules. SANBAG will not reimburse CONSULTANT for any expenses not shown in Exhibit B or agreed to and approved by SANBAG as required under this Contract.

Escalation shall be at a specific rate, as shown on the Bureau of Labor Statistics Employment Cost Index for Total Compensation for private industry workers Table 5 or its successor. The Employment Cost Index will be annually adjusted, apply total benefits for the private industry economic sector, not to be seasonally adjusted, but will include a 12-month percent change. Escalation shall commence as of January 1, 2017, and shall be applied each January 1st thereafter for the term of the Contract.

- 3.3 For personnel subject to prevailing wage rates as described in the California Labor Code, all wage increases that are the direct result of changes in the prevailing wage rates, are reimbursable.
- 3.4 Intentionally Omitted.
- 3.5 Any Work provided by CONSULTANT not specifically covered by the Scope of Work shall not be compensated without prior written authorization from SANBAG. It shall be CONSULTANT's responsibility to recognize and notify SANBAG in writing when services not covered by the Scope of Work have been requested or are required. All changes and/or modifications to the Scope of Work shall be made in accordance with the "CHANGES" Article in this Contract. Any additional services agreed to in accordance with this Contract shall become part of the Work.
- 3.6 All subcontracts in excess of \$25,000 shall contain the above provisions.

ARTICLE 4. INVOICING

- 4.1 Payment to CONSULTANT as provided herein shall be payable in monthly billing period payments, forty-five (45) calendar days after receipt of an acceptable invoice by SANBAG of an invoice prepared in accordance with instructions below. Payment shall not be construed to be an acceptance of Work.
- 4.2 CONSULTANT shall prepare invoices in a form satisfactory to and approved by SANBAG, and it shall be accompanied by documentation supporting each element of measurement and/or cost. Each invoice will be for a monthly billing period and will be marked with SANBAG'S contract number, description and task order number, if applicable. Invoices shall be submitted within thirty (30) calendar days for the period covered by the invoice. Invoices shall include request for payment for Work (including additional services authorized by SANBAG) completed by CONSULTANT during each billing period and shall include back-up information sufficient to establish the validity of the invoice. Any invoice submitted which fails to comply with the terms of this Contract, including the requirements of form and documentation, may be returned to CONSULTANT. Any costs incurred by CONSULTANT in connection with the resubmission of a proper invoice shall be at CONSULTANT's sole expense. The final invoice shall be marked "FINAL" and will be submitted within 60 calendar days after SANBAG has received and approved all Work and deliverables. Invoices shall be submitted to SANBAG as follows:

SANBAG
1170 W. 3rd Street, 2nd Floor
San Bernardino, CA 92410-1715
Contract No. 16-1001369
Attention: Accounts Payable

- 4.3 CONSULTANT shall include a statement and release with each invoice, satisfactory to SANBAG, that CONSULTANT has fully performed the Work invoiced, pursuant to the Contract for the period covered, that all information included with the invoice is true and correct and that all payments to and claims of CONSULTANT and its subconsultants for Work during the period will be satisfied within thirty (30) days of the making of such

payment. SANBAG shall not be obligated to make payments to CONSULTANT until CONSULTANT furnishes such statement and release.

- 4.4 Intentionally Omitted
- 4.5 No payment will be made prior to approval of any Work, nor for any Work performed prior to the NTP, nor for any Work under any amendment to the Contract until SANBAG's Awarding Authority takes action.
- 4.6 CONSULTANT agrees to promptly pay each subconsultant for the satisfactory completion of all Work performed under this Contract, no later than ten (10) calendar days from the receipt of payment from SANBAG. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval by SANBAG. SANBAG reserves the right to request documentation from CONSULTANT showing payment has been made to its subconsultants. SANBAG also reserves the right, at its own sole discretion, to issue joint checks to CONSULTANT and any subconsultant(s), which shall constitute payment to CONSULTANT in compliance with the terms of this Contract. This clause applies to both DBE and non-DBE subconsultants.
- 4.7 Any costs for which payment has been made to CONSULTANT that are determined by subsequent audit to be unallowable under 48 CFR, Ch. 1, subch. E, Part 31 are subject to repayment by CONSULTANT to SANBAG.

ARTICLE 5. TAXES, DUTIES AND FEES

Except to the extent expressly provided elsewhere in this Contract, CONSULTANT shall pay when due, and the compensation set forth herein, shall be inclusive of all: a) local, municipal, State, and federal sales and use taxes; b) excise taxes; c) taxes on personal property owned by CONSULTANT; and d) other governmental fees and taxes or charges of whatever nature applicable to CONSULTANT to enable it to conduct business.

ARTICLE 6. AVAILABILITY OF FUNDS

The award and performance of this Contract is contingent on the availability of funds. If funds are not appropriated and/or allocated and available to SANBAG for the continuance of Work performed by CONSULTANT, Work directly or indirectly involved may be suspended or terminated by SANBAG at the end of the period for which funds are available. When SANBAG becomes aware that any portion of Work, which will or may be affected by a shortage of funds, it will promptly notify CONSULTANT. Nothing herein shall relieve SANBAG from its obligation to compensate CONSULTANT for work already performed pursuant to this Contract. No penalty shall accrue to SANBAG in the event this provision is exercised.

ARTICLE 7. PERMITS AND LICENSES

CONSULTANT shall, without additional compensation, keep current all governmental permits, certificates and licenses (including professional licenses) necessary for CONSULTANT to perform Work identified herein.

ARTICLE 8. DOCUMENTATION AND RIGHT TO AUDIT

- 8.1 CONSULTANT shall maintain all records related to this Contract in an organized way in the original format, electronic and hard copy, conducive to professional review and audit, for a period of three (3) years from the date of final payment by SANBAG, or until the conclusion of all litigation, appeals or claims related to this Contract, whichever is longer. Subject to CONSULTANT's confidentiality obligations and applicable professional standards, CONSULTANT shall provide SANBAG, the California State Auditor, the U.S. Department of Transportation (DOT), including but not limited to the Federal Transit Administration or Federal Highway Administration, and the Comptroller General of the United States, or other authorized representatives of SANBAG, access to CONSULTANTs records which are directly related to performance of Work under this Contract for the purpose of inspection, auditing or copying during the entirety of the records maintenance period above. CONSULTANT further agrees to maintain separate records for costs of Work performed by amendment. CONSULTANT shall allow SANBAG, and its representatives or agents to reproduce any materials as reasonably necessary in connection with such audit or inspection, subject to CONSULTANT's confidentiality obligations and applicable professional standards.
- 8.2 The cost proposal and/or invoices for this Contract are subject to audit by SANBAG and/or any state or federal agency funding this Project at any time. After CONSULTANT receives any audit recommendations, the cost proposal shall be adjusted by CONSULTANT and approved by SANBAG's Director of Project Delivery to conform to the audit recommendations, provided that such audit recommendations are reasonable and properly documented. Refusal by CONSULTANT to incorporate the audit or post award recommendations will be considered a breach of the Contract and cause for termination of the Contract. Any dispute concerning the audit findings of this Contract shall be reviewed by SANBAG's Chief Financial Officer. CONSULTANT may request a review by submitting the request in writing to SANBAG within thirty (30) calendar days after issuance of the audit report
- 8.3 Subcontracts in excess of \$25,000 shall contain this provision.

ARTICLE 9. RESPONSIBILITY OF CONSULTANT

- 9.1 CONSULTANT shall be responsible for the professional quality, technical accuracy, and assurance of compliance with all applicable federal, State and local laws and regulations and other Work furnished by CONSULTANT under the Contract. The Contract includes reference to the appropriate standards for Work performance stipulated in the Contract.
- 9.2 In addition to any other requirements of this Contract or duties and obligations imposed on CONSULTANT by law, CONSULTANT shall, as part of its Work, employ quality control procedures in accordance with applicable professional standards that identify potential risks and uncertainties related to scope, schedule, cost, quality and safety of the Project and the Work performed by CONSULTANT within the areas of CONSULTANT's expertise. At any time during performance of the Scope of Work, should CONSULTANT observe, encounter, or identify any unusual circumstances or uncertainties, which could pose material risk to SANBAG or the Project, CONSULTANT shall promptly document such matters and notify SANBAG in writing. Notifications under this paragraph shall be specific, clear and timely, and in a form which

will assist SANBAG to understand and evaluate the magnitude and effect of the risk and/or uncertainties involved.

ARTICLE 10. REPORTING AND DELIVERABLES

All reports and deliverables shall be submitted in accordance with Exhibit A "Scope of Work". At a minimum, CONSULTANT shall submit monthly progress reports with their monthly invoices. The report shall be sufficiently detailed for SANBAG to determine if CONSULTANT is performing to expectations, or is on schedule; to provide communication of interim findings, and to sufficiently address any difficulties or problems encountered, so remedies can be developed.

ARTICLE 11. TECHNICAL DIRECTION

11.1 Performance of Work under this Contract shall be subject to the technical direction of SANBAG's Director of Project Delivery. The term "Technical Direction" is defined to include, without limitation:

11.1.1 Directions to CONSULTANT, which redirect the Contract effort, shift work emphasis between work areas or tasks, require pursuit of certain lines of inquiry, fill in details or otherwise serve to accomplish the Scope of Work.

11.1.2 Provision of written information to CONSULTANT, which assists in the interpretation of reports, or technical portions of the Scope of Work described herein.

11.1.3 Review and, where required by the Contract, approval of technical reports, and technical information to be delivered by CONSULTANT to SANBAG under the Contract.

11.1.4 SANBAG may modify this Contract for certain administrative modifications without issuing a written amendment. Administrative modifications are limited to: substitutions of personnel identified in the Contract, including Key Personnel and subconsultants; modifications to classifications, hourly rates and names of personnel in Exhibit B; and modifications of the address of the CONSULTANT. All such modifications will be documented in writing between the Parties.

11.2 Technical Direction must be within the Scope of Work under this Contract. SANBAG does not have the authority to, and may not, issue any Technical Direction which:

11.2.1 Increases or decreases the Scope of Work;

11.2.2 Directs CONSULTANT to perform Work outside the original intent of the Scope of Work;

11.2.3 Constitutes a change as defined in the "CHANGES" Article of the Contract;

11.2.4 In any manner, causes an increase or decrease in the Contract price as identified in the "COMPENSATION" Article or the time required for Contract performance;

11.2.5 Changes any of the expressed terms, conditions or specifications of the Contract; unless identified herein;

11.2.6 Interferes with CONSULTANT's right to perform the terms and conditions of the Contract unless identified herein; or

11.2.7 Approves any demand or claims for additional payment.

11.3 Failure of CONSULTANT and SANBAG to agree that the Technical Direction is within the scope of the Contract, or a failure to agree upon the Contract action to be taken with respect thereto shall be subject to the provisions of "DISPUTES" Article herein.

11.4 All Technical Direction shall be issued in writing by SANBAG.

11.5 CONSULTANT shall proceed promptly with the performance of Technical Direction issued by SANBAG, in the manner prescribed by this Article and within their authority under the provisions of this Article. If, in the opinion of CONSULTANT, any instruction or direction by SANBAG, falls within one of the categories defined in sections 11.2.1 through 11.2.7 above, CONSULTANT shall not proceed but shall notify SANBAG in writing within five (5) working days after receipt of any such instruction or direction and shall request SANBAG to modify the Contract accordingly. Upon receiving the notification from CONSULTANT, SANBAG shall:

11.5.1 Advise CONSULTANT in writing within thirty (30) calendar days after receipt of CONSULTANT's letter that the Technical Direction is or is not within the scope of this Contract.

11.5.2 Advise CONSULTANT within a reasonable time whether SANBAG will or will not issue a written amendment.

ARTICLE 12. CHANGES

12.1 The Work shall be subject to changes by additions, deletions, or revisions made by SANBAG. CONSULTANT will be advised of any such changes by written notification from SANBAG describing the change, and shall have a reasonable opportunity to agree. This notification will not be binding on SANBAG until SANBAG's Awarding Authority has approved an amendment to this Contract.

12.2 Promptly after such written notification of change is given to CONSULTANT by SANBAG, the Parties will attempt to negotiate a mutually agreeable adjustment to compensation or time of performance, and amend the Contract accordingly.

ARTICLE 13. EQUAL EMPLOYMENT OPPORTUNITY

During the term of this Contract, CONSULTANT shall not willfully discriminate against any employee or applicant for employment because of race, religion, color, national origin, ancestry, physical handicap, medical condition, gender, marital status, sexual orientation, age, political affiliation or disability. CONSULTANT agrees to comply with the provisions of Executive Orders 11246, 11375, 11625, 12138, 12432, 12250, Title VII of the Civil Rights Act of 1964, the California Fair Employment and Housing Act and other applicable Federal, State and County laws and regulations and policies relating to equal employment and contracting opportunities, including laws and regulations hereafter enacted.

ARTICLE 14. CONFLICT OF INTEREST

CONSULTANT agrees that it presently has no interest financial or otherwise and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of Work required under this Contract or be contrary to the interests of SANBAG as to the Project. CONSULTANT further agrees that in the performance of this Contract, no person having any such interest shall be employed. CONSULTANT is obligated to fully disclose to SANBAG, in writing, of any conflict of interest issues as soon as they are known to CONSULTANT.

ARTICLE 15. KEY PERSONNEL

The personnel specified below are considered to be essential to the Work being performed under this Contract. Prior to diverting any of the specified individuals to other projects, or reallocation of any tasks or hours of Work that are the responsibility of key personnel to other personnel, CONSULTANT shall notify SANBAG in writing in advance and shall submit justifications (including proposed substitutions, resumes and payroll information to support any changes to the labor rates) in sufficient detail to permit evaluation of the impact on the Project. Diversion or reallocation of key personnel shall not be made without prior written consent of SANBAG's Director of Project Delivery. CONSULTANT shall not substitute any key personnel without the prior written consent of SANBAG. In the event that the Parties cannot agree as to the substitution of key personnel, SANBAG may terminate this Contract.

Key Personnel are:

Name	Job Classification/Function
Tom Rousakis	Ernst & Young Senior Managing Director
Tuyen Mai	Ernst & Young Senior Vice President
Scott Ladner	Ernst & Young Vice President
Dan Wiles	Fieldman Principal
Jim Bemis	Montague DeRose & Associates Principal
Doug Montague	Montague DeRose & Associates Principal

ARTICLE 16. REPRESENTATIONS

All Work supplied by CONSULTANT under this Contract shall be supplied by personnel who are qualified, careful, skilled, experienced and competent in their respective trades or professions. CONSULTANT agrees that they are supplying professional services, findings, and/or recommendations in the performance of this Contract and agrees with SANBAG that the same shall conform to professional standards that are generally accepted in the profession in the State of California.

ARTICLE 17. PROPRIETARY RIGHTS/CONFIDENTIALITY

- 17.1 If, as a part of this Contract, CONSULTANT is required to produce Reports as defined in Article 24.1, then CONSULTANT, if requested by SANBAG, shall deliver to SANBAG the original of all such Reports which shall become the sole property of SANBAG.
- 17.2 All materials, documents, data or information obtained from SANBAG's data files or any SANBAG-owned medium furnished to CONSULTANT in the performance of this Contract will at all times remain the property of SANBAG. Such data or information may

not be used or copied for direct or indirect use outside of this Project by CONSULTANT without the express written consent of SANBAG.

- 17.3 Except as reasonably necessary for the performance of the Work, CONSULTANT agrees that it, its employees, agents and subconsultants will hold in confidence and not divulge to third parties without prior written consent of SANBAG, any information obtained by CONSULTANT from or through SANBAG unless (a) the information was known to CONSULTANT prior to obtaining same from SANBAG pursuant to a prior contract; or (b) the information was at the time of disclosure to CONSULTANT, or thereafter becomes, part of the public domain, but not as a result of the fault or an unauthorized disclosure of CONSULTANT or its employees, agents, or subconsultants, (c) the information was obtained by CONSULTANT from a third party who did not receive the same, directly or indirectly, from SANBAG and who had, to CONSULTANT's knowledge and belief, the right to disclose the same, or (d) required to be disclosed in accordance with applicable law, regulation or professional standards.
- 17.4 CONSULTANT shall not use SANBAG's name or photographs in any professional publication, magazine, trade paper, newspaper, seminar or other medium without first receiving the express written consent of SANBAG.
- 17.5 All press releases, or press inquiries relating to the Project or this Contract, including graphic display information to be published in newspapers, magazines, and other publications, are to be made only by SANBAG unless otherwise agreed to in writing by both Parties.

ARTICLE 18. TERMINATION

- 18.1 Termination for Convenience. SANBAG shall have the right at any time, with or without cause, to terminate further performance of Work by giving thirty (30) calendar days written notice to CONSULTANT specifying the date of termination. On the date of such termination stated in said notice, CONSULTANT shall promptly discontinue performance of Work and shall preserve Work in progress and completed Work, pending SANBAG's instruction, and shall turn over such Work in accordance with SANBAG's instructions.
- 18.1.1 CONSULTANT shall deliver to SANBAG, all Reports prepared by CONSULTANT or its subconsultants or furnished to CONSULTANT by SANBAG. Upon such delivery, CONSULTANT may then invoice SANBAG for payment in accordance with the terms herein.
- 18.1.2 If CONSULTANT has fully and completely performed all obligations under this Contract up to the date of termination, CONSULTANT shall be entitled to receive from SANBAG as complete and full settlement for such termination a pro rata share of the Contract cost based upon the percentage of all contracted Work satisfactorily executed to the date of termination.
- 18.1.3 CONSULTANT shall be entitled to receive the actual costs incurred by CONSULTANT to return CONSULTANT's tools and equipment, if any, to it or its suppliers' premises, or to turn over Work in progress in accordance with SANBAG's instructions plus the actual cost necessarily incurred in effecting the termination.

18.2 Termination for Cause. In the event CONSULTANT shall file a petition in bankruptcy court, or shall make a general assignment for the benefit of its creditors, or if a petition in bankruptcy court shall be filed against CONSULTANT or a receiver shall be appointed on account of its insolvency, or if CONSULTANT shall default in the performance of any express obligation to be performed by it under this Contract and shall fail to immediately correct (or if immediate correction is not possible, shall fail to commence and diligently continue action to correct) such default within ten (10) calendar days following written notice, SANBAG may, without prejudice to any other rights or remedies SANBAG may have, and in compliance with applicable Bankruptcy Laws; (a) hold in abeyance further payments to CONSULTANT; (b) stop any Work of CONSULTANT or its subconsultants related to such failure until such failure is remedied; and/or (c) terminate this Contract by written notice to CONSULTANT specifying the date of termination. In the event of such termination by SANBAG, SANBAG may take possession of the deliverables and finished Work by whatever method SANBAG may deem expedient. A waiver by SANBAG of one default of CONSULTANT shall not be considered to be a waiver of any subsequent default of CONSULTANT, of the same or any other provision, nor be deemed to waive, amend, or modify any term of this Contract.

18.2.1 CONSULTANT shall deliver to SANBAG all finished and unfinished deliverables under this Contract prepared by CONSULTANT or its subconsultants or furnished to CONSULTANT by SANBAG within ten (10) working days of said notice.

18.3 All claims for compensation or reimbursement of costs under any of the foregoing provisions shall be supported by documentation submitted to SANBAG, satisfactory in form and content to SANBAG and verified by SANBAG. In no event shall CONSULTANT be entitled to any payment for prospective profits or any damages because of such termination.

18.4 In the event of termination in accordance with 18.1 or 18.2, to the extent that SANBAG retains or requires the delivery of any unfinished Work, incomplete deliverables or any draft reports, SANBAG shall not rely on any such unfinished Work, incomplete deliverable or any draft report.

18.5 CONSULTANT may terminate this Contract, or any particular services, immediately upon written notice to SANBAG if CONSULTANT reasonably determines that it can no longer perform the Work in accordance with applicable law or professional obligations. In such event, the CONSULTANT's written notice of termination shall include a reasonable explanation of the applicable law or professional standards that impair CONSULTANT'S ability to perform Work, and CONSULTANT shall reasonably cooperate with SANBAG in the transition of Work to another vendor.

ARTICLE 19. STOP WORK ORDER

Upon failure of CONSULTANT or its subconsultants to comply with any of the requirements of this Contract, SANBAG shall have the right to stop any or all Work affected by such failure until such failure is remedied or to terminate this Contract in accordance with section "Termination For Cause" above.

ARTICLE 20. CLAIMS

SANBAG or CONSULTANT shall not be bound to any adjustments in the Contract amount or schedule unless expressly agreed to in writing. SANBAG shall not be liable to CONSULTANT for any claim for unpaid fees asserted by CONSULTANT after final payment has been made under this Contract.

ARTICLE 21. INSURANCE

21.1 Without in any way affecting the indemnity provisions of this Contract, CONSULTANT shall, at the CONSULTANT's sole expense, and prior to the commencement of any Work, procure and maintain in full force, insurance with carriers and with terms and conditions acceptable to SANBAG through the entire term of this Contract. Except as specifically permitted below, the policies shall be written by a carrier authorized to do business in the State of California with a recent A.M. Best rating of A-VII or better, and shall be written with at least the following limits of liability:

21.1.1 Professional Liability. CONSULTANT, at its own cost and expense, must maintain for the period covered by this Contract, Professional Liability Insurance in an amount not less than \$1,000,000, per claim and \$3,000,000 in the aggregate for all claims. Professional Liability shall be made on a claims made basis. If such policy contains a retroactive date for coverage of prior acts, this date will be prior to the date the CONSULTANT begins to perform Work under this Contract. CONSULTANT shall secure and maintain this insurance and "tail" coverage throughout the term of this Contract and for a minimum of three (3) years after Contract completion.

21.1.2 Workers' Compensation . Workers' Compensation insurance shall be provided in an amount and form to meet all applicable requirements of the Labor Code of the State of California, including Employers Liability with \$1,000,000 per occurrence covering all persons providing labor or services on behalf of CONSULTANT and all risks to such persons under this Contract. Where coverage is provided through the California State Compensation Insurance Fund, the requirement for a minimum A.M. Best rating does not apply.

21.1.3 Employer's Liability. Employer's Liability insurance shall include coverage in the amount of \$1,000,000 for Bodily injury per accident, a policy limit of \$1,000,000 Bodily Injury by Disease and \$1,000,000 Bodily Injury by Disease for each employee.

21.1.4 Commercial General Liability. Commercial General Liability insurance shall include coverage for Premises and Operations, Contractual Liability, Personal Injury Liability, Products/Completed Operations Liability, Personal Injury Liability, Broad-Form Property Damage and Independent Contractors Liability, in an amount of not less than \$1,000,000 per occurrence, combined single limit, and \$2,000,000 in the aggregate written on an occurrence form. Also included shall be \$1,000,000 in the aggregate for Personal/Advertising, \$100,000 for Damages to Rented Premises, and \$10,000 for Medical Expenses. For products and completed operations a \$2,000,000 aggregate shall be provided. Commercial General Liability insurance is to be primary and non-contributory with any insurance

carried or administered by SANBAG for claims related to CONSULTANT's negligence.

21.1.5 Automobile Liability. To include owned, non-owned and hired automobiles, in an amount of not less than \$1,000,000 combined single limit.

21.1.6 Pollution Liability. – Intentionally Omitted

21.2 Proof of Coverage. Cancellation Prior to issuance of the NTP or prior to commencing any Work, as SANBAG specifies, CONSULTANT shall furnish SANBAG with a certificate(s) of insurance, executed by a duly authorized representative of each insurer, showing compliance with all insurance requirements set forth in this Article. The certificate(s) of insurance are to include the Contract number and name of the Director of Project Delivery on the face of the certificate(s) and shall be submitted directly to SANBAG's Procurement Analyst. SANBAG reserves the right to terminate the Contract in accordance with Article 18.2.

21.3 Additional Insured. All policies, except for Workers' Compensation and Professional Liability policies, shall contain endorsements naming San Bernardino Associated Governments and all of its associated entities and capacities, including the San Bernardino County Transportation Authority, San Bernardino County Transportation Commission, San Bernardino Congestion Management Agency, San Bernardino County Service Authority for Freeway Emergencies and their officers, members, employees, consultants and volunteers ("SANBAG's Entities") as additional insured parties with respect to liabilities arising out to the performance of Work hereunder. This requirement may be satisfied by a blanket additional insured endorsement. The additional insured endorsements shall not limit the scope of coverage for SANBAG to vicarious liability but shall allow coverage for SANBAG to the full extent provided by the policy.

21.4 Waiver of Subrogation Rights. CONSULTANT shall require the carriers of Commercial General Liability and Automobile Liability and Worker's Compensation to waive all rights of subrogation against SANBAG, its officers, employees, and volunteers for claims related to CONTRACTOR's negligence. Such insurance coverage provided shall not prohibit CONSULTANT or CONSULTANT's employees or agents from waiving the right of subrogation prior to a loss or claim. CONSULTANT hereby waives all rights of subrogation against SANBAG for claims related to CONTRACTOR's negligence.

21.5 Subconsultant Insurance. All coverage for subconsultants shall be subject to all of the insurance requirements stated in this Article. CONSULTANT shall include all subconsultants as insured under its policies or shall furnish separate certificates and endorsements for each subconsultant.

21.6 Submission of Policies. Upon request, CONSULTANT shall submit copies of all required insurance policy endorsements. CONSULTANT will supply copies of relevant policies if there is any coverage dispute.

21.7 If the CONSULTANT maintains higher limits than the minimums shown above, SANBAG and SANBAG's Entities require and shall be entitled to coverage for the higher limits maintained by the CONSULTANT. Any available insurance proceeds in excess of the specified minimum limits of insurance and coverage shall be available to SANBAG and its Entities.

- 21.8 Claims Made Insurance Forms. If any of the above insurances are written on a claims-made form: The retroactive date must be set forth on the certificate and the policy or applicable endorsement, and must be before the date of the contract or the beginning of contract work. Insurance must be maintained and evidence of insurance must be provided for at least three (3) years after completion of the contract of work. If coverage is canceled or non-renewed, and not replaced with another claims-made policy form with a retroactive date prior to the contract effective date, the CONSULTANT must purchase, provide and document extended period coverage for a minimum of three (3) years after completion of contract work.
- 21.9 Special Risks or Circumstances. SANBAG reserves the right to modify, upon agreement with CONSULTANT, any or all of the above insurance requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.
- 21.10 Cancellation. If any insurance company elects to cancel or non-renew coverage for any reason, CONSULTANT will provide SANBAG thirty (30) days prior written notice of such cancellation or nonrenewal. If the policy is cancelled for nonpayment of premium, CONSULTANT will provide SANBAG with a copy of any notice of termination or notice of any other change to any insurance coverage required herein which CONSULTANT receives within one business day after CONSULTANT receives it by faxing it to SANBAG at 909-885-4407, to the attention of SANBAG's Procurement Manager, and by depositing a copy of the notice in the U.S. Mail in accordance with the notice provisions in this Contract.

ARTICLE 22. INDEMNITY

- 22.1 CONSULTANT agrees to indemnify, defend (with legal counsel reasonably approved by SANBAG) and hold harmless SANBAG, San Bernardino Associated Governments and all of its associated entities and capacities, including the San Bernardino County Transportation Authority, San Bernardino County Transportation Commission, San Bernardino Congestion Management Agency, San Bernardino County Service Authority for Freeway Emergencies and their officers, members, employees (collectively "Indemnitees") and consultants providing services to SANBAG in connection with this Agreement, from any and all third party claims, actions, losses, damages and/or liability arising out of the CONSULTANT's negligent, grossly negligent, reckless or willful acts or omissions under this Contract resulting in personal injury, death, or property damage, including any costs or expenses incurred by SANBAG on account of any such claim except where such indemnification is prohibited by law. This indemnification provision shall apply regardless of the existence or degree of fault of Indemnitees. CONSULTANT's indemnification obligation applies to SANBAG's "active" as well as "passive" negligence but does not apply to SANBAG's "sole negligence" or "willful misconduct" within the meaning of Civil Code section 2782.
- 22.2 To the fullest extent permitted by applicable law, CONSULTANT shall indemnify and hold harmless the Indemnitees from and against all claims by third parties and resulting liabilities, losses, damages, costs and expenses (including reasonable external attorneys' fees) arising out of the infringement of any U.S. patent, copyright, trademark or trade secret by any Reports; provided, however, that CONSULTANT shall have no such indemnification obligation to the extent that the alleged infringement arises out of or results from (i) data, materials or other content provided by, from, through or at the request of,

SANBAG, (ii) SANBAG's use of the Reports other than as contemplated herein or in the relevant Scope of Work, (iii) any modification or alteration to, or of, the Reports by anyone other than CONSULTANT or not at CONSULTANT's direction, or (iv) CONSULTANT's compliance with SANBAG's designs, specifications, requests or instructions in the creation of the Reports.

22.3 CONSULTANT agrees to indemnify, defend and hold the Indemnitees harmless from any and all third party claims, actions, losses, damages and/or liability arising out of the CONSULTANT's gross negligence, reckless or willful acts or omissions in the performance of Work under this Contract including any costs or expenses incurred by SANBAG on account of any such claim except where such indemnification is prohibited by law. This indemnification provision shall apply regardless of the existence or degree of fault of Indemnitees. CONSULTANT's indemnification obligation applies to SANBAG's "active" as well as "passive" negligence but does not apply to SANBAG's "sole negligence" or "willful misconduct" within the meaning of Civil Code section 2782.

22.4 CONSULTANT agrees to indemnify, defend and hold the Indemnitees harmless from any and all third party claims, actions, losses, damages and/or liability arising out of the CONSULTANT's negligence in the performance of Work under this Contract including any costs or expenses incurred by SANBAG on account of any such claim except where such indemnification is prohibited by law. This indemnification provision shall apply regardless of the existence or degree of fault of Indemnitees. CONSULTANT's indemnification obligation applies to SANBAG's "active" as well as "passive" negligence but does not apply to SANBAG's "sole negligence" or "willful misconduct" within the meaning of Civil Code section 2782.

ARTICLE 23. ERRORS AND OMISSIONS

CONSULTANT shall be responsible for the professional quality, technical accuracy, and coordination of all Work required under this Contract. CONSULTANT shall be liable for SANBAG costs resulting from errors or deficiencies, in Work furnished under this Contract, including, but not limited to any fines, penalties, damages, and costs required because of an error or deficiency in the Work provided by CONSULTANT under this Contract.

ARTICLE 24. OWNERSHIP OF DOCUMENTS

24.1 All deliverables, including but not limited to, drawings, reports, worksheets, and other data developed by CONSULTANT specifically for SANBAG under this Contract ("Reports") shall become the sole property of SANBAG.

24.2 If SANBAG discloses to anyone in writing, by virtue of public records laws or otherwise, a written Reports prepared by CONSULTANT that is on CONSULTANT letterhead or that references CONSULTANT, SANBAG shall not alter, edit or modify the Reports from the form provided by CONSULTANT, including without limitation, any disclaimers included therein by CONSULTANT, without CONSULTANT's consent.

- 24.3 SANBAG may incorporate information, advice, recommendations or other content from the Reports into any memorandum, report, summary or compilation, whether oral or written, produced by SANBAG, as reasonably necessary in connection with the purpose of the Work, and communicate same to third parties without CONSULTANT's consent. In the case of any bond offering memorandum/official statement that references CONSULTANT, CONSULTANT's consent shall be required with respect to the incorporation of information from its Reports, which consent shall not be unreasonably withheld.
- 24.4 Nothing in this Contract shall be deemed to preclude SANBAG from referring to CONSULTANT generally as SANBAG's financial advisor with respect to the I-10 and I-15 corridor projects.
- 24.5 CONSULTANT may use data, software, designs, utilities, tools, models, systems, other methodologies and know-how and intellectual property ("Consultant Materials") that it owns or licenses in performing the Work. Notwithstanding the delivery of any Reports, CONSULTANT retains all intellectual property rights in the Consultant Materials (including any improvements or knowledge developed while performing the Work), and in any working papers compiled in connection with the Work (but not SANBAG proprietary information reflected in them) and such Consultant Materials shall not be deemed Reports and CONSULTANT shall not be restricted in any way with respect thereto. Upon payment for particular Work and subject to the other terms of this Contract, SANBAG may use the Reports relating to such Work, as well as any Consultant Materials owned by CONSULTANT that are included therein, solely to the extent necessary to use the Reports.

ARTICLE 25. SUBCONTRACTS

- 25.1 CONSULTANT shall not subcontract performance of all or any portion of Work under this Contract, except those subconsultants listed in CONSULTANT's proposal and any member firms of the Ernst & Young global organization ("EY Firms"), without first notifying SANBAG in writing of the intended subcontracting and obtaining SANBAG's written approval of the subcontracting and the subconsultant. The definition of subconsultant and the requirements for subconsultants hereunder shall include all subcontracts at any tier.
- 25.2 CONSULTANT agrees that any and all subconsultants of CONSULTANT performing Work under this Contract will comply with the terms and conditions of this Contract applicable to the portion of Work performed by them. CONSULTANT shall incorporate all applicable provisions of this Contract into their subcontracts regardless of the tier. If requested by SANBAG, CONSULTANT shall furnish SANBAG a copy of the proposed subcontract for SANBAG's approval of the terms and conditions thereof and shall not execute such subcontract until SANBAG has approved such terms and conditions. SANBAG approval shall not be unreasonably withheld.
- 25.3 Approval by SANBAG of any Work to be subcontracted and the subconsultant to perform said Work will not relieve CONSULTANT of any responsibility or liability in regard to the acceptable and complete performance of said Work. Any substitution of subconsultants must be approved in writing by SANBAG. CONSULTANT shall have sole responsibility for managing all of their subconsultants, including resolution of any disputes between CONSULTANT and its subconsultants.

ARTICLE 26. RECORD INSPECTION AND AUDITING

SANBAG, or any of its designees, representatives or agents shall at all times have access during normal business hours to CONSULTANT's operations and products wherever they are in preparation or progress, and CONSULTANT shall provide sufficient, safe, and proper facilities for such access and inspection thereof. Inspection or lack of inspection by SANBAG shall not be deemed to be a waiver of any of their rights to require CONSULTANT to comply with the Contract or to subsequently reject unsatisfactory Work or products.

ARTICLE 27. INDEPENDENT CONTRACTOR

CONSULTANT is and shall be at all times an independent contractor. Accordingly, all Work provided by CONSULTANT shall be done and performed by CONSULTANT under the sole supervision, direction and control of CONSULTANT. SANBAG shall rely on CONSULTANT for results only, and shall have no right at any time to direct or supervise CONSULTANT or CONSULTANT's employees in the performance of Work or as to the manner, means and methods by which Work is performed. All personnel furnished by CONSULTANT pursuant to this Contract, and all representatives of CONSULTANT, shall be and remain the employees or agents of CONSULTANT or of CONSULTANT's subconsultant(s) at all times, and shall not at any time or for any purpose whatsoever be considered employees or agents of SANBAG.

ARTICLE 28. ATTORNEY'S FEES

If any legal action is instituted to enforce or declare any Party's rights under the Contract, each Party, including the prevailing Party, must bear its own costs and attorneys' fees. This Article shall not apply to those costs and attorneys' fees directly arising from any third party legal action against a Party hereto and payable under the "Indemnity" provision of the Contract.

ARTICLE 29. GOVERNING LAW AND VENUE

This Contract shall be subject to the law and jurisdiction of the State of California. The Parties acknowledge and agree that this Contract was entered into and intended to be performed in whole or substantial part in San Bernardino County, California. The Parties agree that the venue for any action or claim brought by any Party to this Contract will be the Superior Court of California, San Bernardino County. Each Party hereby waives any law or rule of court, which would allow them to request or demand a change of venue. If any action or claim concerning this Contract is brought by any third party, the Parties hereto agree to use their best efforts to obtain a change of venue to the Superior Court of California, San Bernardino County.

ARTICLE 30. FEDERAL, STATE AND LOCAL LAWS

CONSULTANT warrants that in the performance of this Contract, it shall comply with all applicable federal, State and local laws, ordinances, rules and regulations.

ARTICLE 31. PRECEDENCE

31.1 The Contract consists of this Contract document, Exhibit A "Scope of Work", and Exhibit B "Price Form", SANBAG's Request for Proposal and CONSULTANT's proposal, all of which are incorporated into this Contract by this reference.

31.2 The following order of precedence shall apply: first, the Contract Articles; second Exhibits A and B; third, SANBAG's Request for Proposal; and last, CONSULTANT's

proposal. In the event of a conflict between the Contract Articles and the Scope of Work, the Contract Articles will prevail.

- 31.3 In the event of an express conflict between the documents listed in this Article, or between any other documents, which are a part of the Contract, CONSULTANT shall notify SANBAG in writing within three (3) business days of its discovery of the conflict and shall comply with SANBAG's resolution of the conflict.

ARTICLE 32. COMMUNICATIONS AND NOTICES

Notices sent by mail shall be by United States Mail, postage paid, certified mail (return receipt requested). Any and all notices permitted or required to be given hereunder shall be deemed duly given and received: (a) upon actual delivery, if delivery is personally made or if made by fax during regular business hours; (b) the first business day following delivery by fax when not made during regular business hours; or (c) on the fourth business day after deposit of such notice into the United States Mail. Each such notice shall be sent to the respective Party at the address indicated below or to any other address as the respective Parties may designate from time to time by a notice given in accordance with this Article. CONSULTANT shall notify SANBAG of any contact information changes within ten (10) business days of the change.

To CONSULTANT	To SANBAG
725 South Figueroa Street, Suite 500	1170 W. 3 rd Street, 2 nd Floor
Los Angeles, CA 90017	San Bernardino, CA 92410-1715
Attn: Tuyen Mai	Attn: Garry Cohoe, Director of Project Delivery
Phone: (213) 977-4236	cc: Procurement Manager
With copy to: 5 Times Square New York, NY 10036 Attn: Tom Rousakis	
Phone: (212) 773-2228	Phone: (909) 884-8276

ARTICLE 33. DISPUTES

- 33.1 In the event any dispute, other than an audit, arises between the Parties in connection with this Contract (including but not limited to disputes over payments, reimbursements, costs, expenses, Work to be performed, Scope of Work and/or time of performance), the dispute shall be decided by SANBAG's Contract Administrator within thirty (30) calendar days after notice thereof in writing which shall include a particular statement of the grounds of the dispute. If CONSULTANT does not agree with the decision, then CONSULTANT shall have ten (10) calendar days after receipt of the decision in which to file a written appeal thereto with SANBAG's Executive Director. If the Executive Director fails to resolve the dispute in a manner acceptable to CONSULTANT, then such dispute is appealable to a court of competent jurisdiction.
- 33.2 During resolution of the dispute, CONSULTANT shall proceed with performance of this Contract with due diligence.

ARTICLE 34. GRATUITIES

CONSULTANT, its employees, agents, or representatives shall not offer or give to any officer, official, agent or employee of SANBAG, any gift, entertainment, payment, loan, or other gratuity.

ARTICLE 35. REVIEW AND ACCEPTANCE

All Work performed by CONSULTANT shall be subject to periodic review and approval by SANBAG at any and all places where such performance may be carried on. Failure of SANBAG to make such review, or to discover defective work, shall not prejudice the rights of SANBAG at the time of final acceptance. All Work performed by CONSULTANT shall be subject to periodic and final review and acceptance by SANBAG upon completion of all Work, which review and acceptance shall not be unreasonably withheld or delayed.

ARTICLE 36. CONFIDENTIALITY

Any SANBAG materials to which CONSULTANT or its subconsultants or agents have access or materials prepared by CONSULTANT under the terms of this Contract shall be held in confidence by CONSULTANT, who shall exercise reasonable precautions to prevent the disclosure of confidential information to anyone except as authorized by SANBAG, or as otherwise permitted by this Contract. CONSULTANT shall not release any Reports, information or promotional material or allow for the use of any photos related to this Contract for any purpose without prior written approval of SANBAG.

ARTICLE 37. EVALUATION OF CONSULTANT

CONSULTANT's performance may be evaluated by SANBAG periodically throughout the Contract performance period, such as at the completion of certain milestones as identified in Scope of Work and/or at the completion of the Contract. A copy of the evaluation will be given to CONSULTANT for their information. The evaluation information shall be retained as part of the Contract file and may be used to evaluate CONSULTANT if they submit a proposal on a future RFP issued by SANBAG.

ARTICLE 38. SAFETY

CONSULTANT shall strictly comply with OSHA regulations and local, municipal, state, and federal safety and health laws, orders and regulations applicable to CONSULTANT's operations in the performance of Work under this Contract. CONSULTANT shall comply with all safety instructions issued by SANBAG or their representatives.

ARTICLE 39. DRUG FREE WORKPLACE

CONSULTANT agrees to comply with the Drug Free Workplace Act of 1990 per Government Code section 8350 et seq.

ARTICLE 40. ASSIGNMENT

CONSULTANT shall not assign this Contract in whole or in part, voluntarily, by operation of law, or otherwise without first obtaining the written consent of SANBAG. SANBAG's exercise of consent shall be within its sole discretion. Any purported assignment without SANBAG's prior written consent shall be void and of no effect, and shall constitute a material breach of this

Contract. Subject to the foregoing, the provisions of this Contract shall extend to the benefit of and be binding upon the successors and assigns of the Parties.

ARTICLE 41. AMENDMENTS

The Contract may only be changed by a written amendment duly executed by the Parties. Work authorized under an amendment shall not commence until the amendment has been duly executed.

ARTICLE 42. PREVAILING WAGES

42.1 The State of California's General Prevailing Wage Rates are not applicable to this Contract.

ARTICLE 43. CONTINGENT FEE

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

ARTICLE 44. FORCE MAJEURE

CONSULTANT shall not be in default under this Contract in the event that the Work performed by CONSULTANT is temporarily interrupted or discontinued for any of the following reasons: riots, wars, sabotage, acts of terrorism, civil disturbances, insurrection, explosion, pandemics, quarantines, acts of God, acts of government or governmental restraint, and natural disasters such as floods, earthquakes, landslides, and fires, or other catastrophic events which are beyond the reasonable control of CONSULTANT and which CONSULTANT could not reasonably be expected to have prevented or controlled. "Other catastrophic events" does not include the financial inability of CONSULTANT to perform or failure of CONSULTANT to obtain either any necessary permits or licenses from other governmental agencies or the right to use the facilities of any public utility where such failure is due solely to the acts or omissions of CONSULTANT.

ARTICLE 45. WARRANTY

CONSULTANT warrants that all Work performed shall be in accordance with the Contract and all applicable professional standards. In the event of a breach of this provision, CONSULTANT shall take the necessary actions to correct the breach at CONSULTANT's sole expense. If CONSULTANT does not take the necessary action to correct the breach, SANBAG, without waiving any other rights or remedies it may have, may take the necessary steps to correct the breach, and the CONSULTANT shall promptly reimburse SANBAG for all reasonable and documented expenses and costs incurred.

ARTICLE 46. ENTIRE DOCUMENT

- 46.1 This Contract and its attachments constitute the sole and only agreement governing the Work and supersede any prior understandings, written or oral, between the Parties respecting the Project. All previous proposals, offers, and other communications, written or oral, relative to this Contract, are superseded except to the extent that they have been expressly incorporated into this Contract.
- 46.2 No agent, official, employee or representative of SANBAG has any authority to bind SANBAG to any affirmation, representation or warranty outside of, or in conflict with, the stated terms of this Contract, and CONSULTANT hereby stipulates that it has not relied, and will not rely, on same.
- 46.3 Both Parties have been represented or had the full opportunity to be represented by legal counsel of their own choosing in the negotiation and preparation of this Contract. Therefore, the language in all parts of this Contract will be construed, in all cases, according to its fair meaning, and not for or against either Party.

ARTICLE 47. COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT

CONSULTANT shall comply with all applicable provisions of the Americans with Disabilities Act in performing Work under this Contract.

ARTICLE 48. EFFECTIVE DATE

The date that this Contract is executed by SANBAG shall be the Effective Date of the Contract.

ARTICLE 49. LIMITATION OF LIABILITY

SANBAG may not recover from CONSULTANT, in contract or tort, under statute or otherwise, aggregate damages, including without limitation any direct, indirect, consequential, incidental, punitive or special damages, in excess of \$8 million dollars.

This limitation will not apply to the CONSULTANT's indemnification obligations set forth in Articles 22.1, 22.2 or 22.3 of this Contract, CONSULTANT's fraud or willful misconduct, or to the extent prohibited by applicable law or professional regulations, but shall apply to CONSULTANT's indemnification obligation set forth in Article 22.4.

SANBAG may not make a claim or bring proceedings relating to the Work or otherwise under this Contract against any other EY Firm or its or CONSULTANT's partners, principals, employees, subcontractors or agents.

-----SIGNATURES ARE ON THE FOLLOWING PAGE-----

IN WITNESS WHEREOF, the Parties hereto have executed this Contract below.

**ERNST & YOUNG
INFRASTRUCTURE ADVISORS, LLC**

SANBAG

By: _____
Tom Rousakis
Senior Managing Director

By: _____
Ryan McEachron
President, Board of Directors

Date: _____

Date: _____

APPROVED AS TO FORM

By: _____
Eileen Monaghan Teichert
General Counsel

CONCURRENCE

By: _____
Jeffery Hill
Procurement Manager