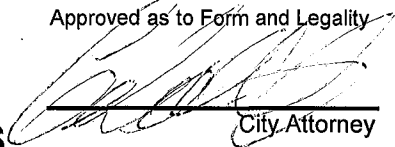


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OFFICE OF THE CITY CLERK  
OAKLAND

2017 NOV 29 PM 1:10

# OAKLAND CITY COUNCIL

Approved as to Form and Legality

  
City Attorney

RESOLUTION No. 86976 C.M.S.

Introduced by Councilmember \_\_\_\_\_

**A RESOLUTION AUTHORIZING THE CITY ADMINISTRATOR TO ENTER INTO A COOPERATIVE AGREEMENT WITH THE SAN FRANCISCO BAY AREA RAPID TRANSIT (BART) DISTRICT FOR BART SYSTEM MODERNIZATION PROGRAM FOR 34.5KV CABLE REPLACEMENT A-LINE ANA-ACO SUBSTATIONS CABLE REPLACEMENT, AND M03 INTERLOCKING PROJECTS**

**WHEREAS**, BART will start a system wide modernization Projects (34.5KV CABLE REPLACEMENT, A-LINE ANA-ACO SUBSTATIONS CABLE REPLACEMENT, AND M03 INTERLOCKING) within the City of Oakland; and

**WHEREAS**, BART and the City acknowledge that it will be necessary to develop procedures to ensure careful and continued cooperation between the parties including: review and finalizing design and construction, protection and/or relocation of City-owned facilities affected by the Projects, avoiding unnecessary delays, construction inspection, procedures for conveyance of property interest rights by City to BART, and securing permits; and

**WHEREAS**, BART has agreed to reimburse the City for all costs incurred for the review and approval of contract drawings, construction inspections, and obstruction of metered parking spaces, and other costs associated with the Projects per latest Master Fee Schedule; and

**WHEREAS**, BART will be required, at their sole expense to repair, to replace, reconstruct or relocate any City infrastructure impacted including but not limited to, roadways, sidewalk, curb and gutter, storm and sewer lines, and landscaping; and

**WHEREAS**, the parties recognize and agree that this agreement may not reasonably anticipate all aspects of the Projects and changes thereto which may occur due to unforeseen circumstances and accordingly, the parties acknowledge their respective obligations to act reasonably and in good faith and to modify the terms of the agreement when necessary to accomplish their mutual goals; be it

**RESOLVED:** Council of the City of Oakland authorizes and empowers the City Administrator or her designee to enter into a Cooperative Agreement with BART and negotiate reimbursements or permits related to the BART system modernization Projects; and be it

**FURTHER RESOLVED:** That this agreement applies solely to work performed under the BART system modernization program

IN COUNCIL, OAKLAND, CALIFORNIA, NOV 28, 2017

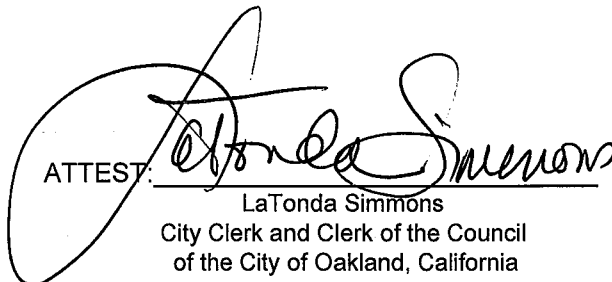
**PASSED BY THE FOLLOWING VOTE:**

AYES - BROOKS, CAMPBELL WASHINGTON, GALLO, GIBSON MCELHANEY, GUILLEN, KALB, KAPLAN and PRESIDENT REID - 8

NOES - 0

ABSENT - 0

ABSTENTION - 0

ATTEST:   
LaTonda Simmons  
City Clerk and Clerk of the Council  
of the City of Oakland, California

**Exhibit:** Cooperative Agreement (Draft)

COOPERATIVE AGREEMENT

BETWEEN

THE SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

AND

THE CITY OF OAKLAND

RELATING TO BART PROJECT

34.5 KV CABLE REPLACEMENT A-LINE ANA-ACO SUBSTATIONS  
CABLE REPLACEMENT PROJECT AND M03 INTERLOCKING PROJECT

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DRAFT

This Agreement (the "Agreement") is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2017 (the "Effective Date") between the San Francisco Bay Area Rapid Transit District ("BART" or the "District") a California rapid transit district, and the City of Oakland (the "City"), a charter city of the State of California (collectively referred to as the "Parties") for the BART 34.5 KV Cable Replacement Project and the M03 Interlocking Project. Herein after referred to as (the "Projects").

## RECITALS

A. BART is embarking on a vast modernization program to upgrade substations and surrounding public areas; replace obsolete cables, upgrade the 40-year old train control system and rehabilitate deteriorating infrastructure throughout the BART system. These efforts will include projects consisting of replacing all the antiquated 34.5kV cables throughout the BART system and overhauling the existing structures and a plethora of projects that will advance system functionality, improve capacity, flow and safety.

In performing project-related activities, BART reasonably anticipates that it might impact the City's sidewalks, streets, and other facilities which may cause damage to aforementioned public infrastructure, requiring BART to restore it to its original condition.

B. BART and the City acknowledge that it will be necessary to develop procedures to ensure careful and continued cooperation between the Parties, including the following: (1) procedures for finalizing any necessary design and construction options relating to City Infrastructure; (2) procedures for protecting in place and/or relocating certain City-owned facilities; (3) procedures to avoid all unnecessary delays to either the contracting or construction process; (4) procedures for inspecting the construction, relocation, and replacement, as necessary, of City Infrastructure; (5) procedures for conveyance of property

interest rights by City to BART, and (6) procedures for securing necessary permits and reimbursement to the City.

- C. BART and the City acknowledge that the work performed under this Agreement shall be in conformance with all applicable Federal and/or State grant conditions and all applicable laws.
- D. The Parties recognize and agree that this Agreement may not reasonably anticipate all aspects of the Projects and changes thereto which may occur due to unforeseen circumstances. Accordingly, the Parties acknowledge their respective obligations to act reasonably and in good faith and to modify the terms hereof when necessary to accomplish their mutual goals.
- E. BART and the City agree that this Agreement applies solely to work performed under the BART 34.5 KV Cable Replacement and the M03 Interlocking Projects.

## **AGREEMENT**

NOW, THEREFORE, BART and the City, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, agree as follows:

### **SECTION 1: DEFINITIONS**

The following definitions relate to terms found in the entire Agreement, including, without limitation, all Attachments and Exhibits hereto:

- A. **"Acceptance"** - The written acceptance by the City of BART work on City Infrastructure.
- B. **"BART"** - See "District."
- C. **"BART 34.5 KV Cable Replacement Project"** - See "Projects."
- D. **"BART M03 Interlocking Project"** – See "Projects."
- E. **"Best Management Practices"** -As defined in Section 5: D. of this Agreement.



- F. **"Betterment"** - The replacement of any City Infrastructure with (1) infrastructure of greater capacity, durability, or efficiency than that replaced, unless (2) such replacement is required by the Projects.
- G. **"CEQA"** - The California Environmental Quality Act, California Public Resources Code Section 2100 et Seq.
- H. **"City"** - The City of Oakland, its officers, employees, agents, consultants and contractors.
- I. **"City Authorized Utilities"** - Utilities owned by third parties but supported by, encased in, or otherwise attached to City Infrastructure from which the City obtains revenue.
- J. **"City Infrastructure"** - City streets (including medians, curbs, gutters and sidewalks), traffic control devices, storm drains, sanitary sewers, fire hydrants, electroliers, video detectors, traffic loops, palm trees, landscaping, irrigation systems, telecommunications equipment, cable television system, signage, banner structures, roadway lighting and other public facilities and appurtenances owned or authorized by the City within the Public Right of Way.
- K. **"City Standards and Specifications"** - (1) Standard Specifications for Public Works Construction, current edition, as adopted by the City at the time of advertisement of the Projects (the "Green Book"); and (2) City of Oakland, Standard Details for Public Works Construction, current edition, as adopted by the City at the time of advertisement of the Projects.
- L. **"Contract Documents"** - The applicable Contract Drawings; contract book, containing the executed contract; contract bonds; addenda; change orders; General Conditions; Supplementary Conditions; those portions of the Standard Specifications referenced in the contract specifications; City Standards and Specifications, as applicable; and additional documents incorporated by express reference into the Contract Documents.

- M. **"Contract Drawings"** - The official plans, profiles, typical cross sections, general cross sections, elevations, schedules and details listed or referenced in the Contract Documents or amendments thereto developed by BART or BART's contractor, and supplemental drawings approved by BART, which show the locations, character, dimensions, and details of the Projects work to be performed by BART.
- N. **"District" or "BART"** - The San Francisco Bay Area Rapid Transit District, its officers, directors, employees, agents, consultants and contractors.
- O. **"DTSC"** - As defined in Section 5:1. of this Agreement.
- P. **"Effective Date"** - As set forth in the caption to this Agreement.
- Q. **"Environmental Assessment Segment 1"** - The Environmental Assessment prepared by BART for the area of the Projects between ANA Substation at E 12<sup>th</sup> Street & 19<sup>th</sup> Avenue to ACO Substation at San Leandro Street & 69<sup>th</sup> Avenue.
- R. **"Environmental Laws"** - All laws, regulations, orders and decrees of any Federal, State or local government authority or court concerning environmental compliance including, but not limited to: (1) air pollution and emission of air contaminants, including without limitation the regulations of the California Air Resources Board and the Bay Area Air Quality Management District; (2) management of waste water and groundwater, including without limitation the requirements of the State Water Resources Control Board, the San Francisco Bay Regional Water Quality Control Board and local sanitary districts; and (3) management and disposal of solid and hazardous wastes generated or discovered in connection with the work on the Projects, including without limitation Title 22 of the California Code of Regulations, Title 40 of the Code of Federal Regulations and the requirements of the California Integrated Waste Management Board.
- S. **"FHWA"** - The United States Department of Transportation, Federal Highway Administration.

T. **"Hazardous Materials"** - Those materials defined by applicable State or Federal law as "hazardous material", "hazardous substances", "reproductive toxins" or "toxic materials or substances", including without limitation those defined in any of the following: having a hazardous waste concentration exceeding screening levels established by the Regional Water Quality Control Board, San Francisco Bay Region, the Department of Toxic Substances Control, or the United States Environmental Protection Agency Region 9; or exceeding regional background concentrations of greater than the residential screening level; containing a hazardous waste at a level that would require additional personnel protective equipment, medical monitoring, or training in excess of two hours to comply with CalOSHA requirements; or meeting the definition of a hazardous waste contained in (1) Section 25117 of the California Health and Safety Code and Title 22 of the California Code of Regulations; (2) the regulations adopted pursuant to such statutes at any time before the date of this Agreement and during the course of Projects construction, and (3) any statute enacted after the date of this Agreement during Projects construction and any regulation adopted after the date of this Agreement during Projects construction pursuant to any such statute, relating to the use, release or disposal of toxic or hazardous substances, or to the remediation of air, surface waters, groundwater, soil or other media contaminated with such substances.

U. **"Mediator"** - As defined in Section 12:B.1. of this Agreement.

V. **"MTC/PCI Index"** - As defined in Section 4:D.2. of this Agreement.

W. **"NEPA"** -National Environmental Policy Act.

X. **"OMC"** - As defined in Section 3:A. of this Agreement.

Y. **"Notice of Mediation"** - As defined in Section 12:B.1. of this Agreement.

Z. **"NPDES"** - As defined in Section 5:D. of this Agreement.

AA. **"Parties"** - As set forth in the caption to this Agreement.

BB. **"Pre-Existing Contamination"** - As defined in Section 5:1. of this Agreement.

- CC. **"Projects"** - The BART Projects, as described in Recital A. of this Agreement.
- DD. **"Public Right of Way"** - That portion of the real property owned by or dedicated to the City for public use.
- EE. **"Rearrangement"** - The relocation, replacement, modification, shoring or removal of facilities.
- FF. **"Response Action"** - As defined in Section 5: I. of this Agreement. GG. **"State"** - The State of California.
- GG. **"SWPPP"** - As defined in Section 5: D. of this Agreement.

**SECTION 2: PURPOSE OF THIS AGREEMENT**

The purpose of this Agreement is to define the Parties' respective rights and obligations and ensure cooperation between BART and the City in connection with construction of the Projects.

**SECTION 3: CITY REVIEW OF PROJECT PLANS AND SPECIFICATIONS**

BART will administer the design, construction, and operation of the Projects.

A. City Review of Contract Drawings

Prior to construction of any phase or portion of the Projects within the City right-of-way, BART will provide the City for review and approval, which approval shall not unreasonably be conditioned, delayed or withheld, nine (9) sets of proposed Contract Drawings, as set forth below, for all work requiring modifications, or changes to, or relocation of City Infrastructure. The Contract Drawings will include drawings of elements of the Projects as they relate to City Infrastructure, together with drawings showing any necessary relocations or modifications of City Infrastructure (including but not limited to facilities, utilities, landscaping and appurtenances). City review and approval of the Contract Drawings shall be limited to elements of the Projects directly affecting City Infrastructure and/or appurtenances

owned by or which will be conveyed to the City pursuant to the terms and conditions of this Agreement. Review and approval of the Contract Drawings for Rearrangement of City Infrastructure will be based upon the Oakland Municipal Code ("OMC"), including but not limited to OMC Chapter 12.12 of the Standard Specifications for Public Works Construction, and the Standard Details for Public Works Construction current at the time the construction contracts for the Projects are advertised. The City shall respond in writing to BART with approval or disapproval of the Contract Drawings, and with comments, no later than 15 working days from the date of City's receipt of such Contract Drawings. On an exception basis, only, if the City requires additional time to approve or disapprove the Contract Drawings, the City shall notify BART in writing no later than 10 working days from the date that the Contract Drawings were received from BART. In no case, will the City review exceed 20 working days. In the event that the City does not provide said written approval or disapproval with written comments within the prescribed time, it will be deemed to have approved the Contract Drawings in the form delivered to the City.

BART will provide ongoing and timely notice of progress to the City on the design elements subject to City review, will make every effort to bring to the City's attention any construction details that may not meet current City standards, design guidelines, or standard details, and will provide opportunities to include City staff in discussions regarding public infrastructure as appropriate.

#### B. Permits

City agrees to issue BART an agency permit for the Projects. This agency permit consolidates the City permitting requirements for the Projects. BART understands that the agency permit for the Projects will not authorize BART to proceed with work that affects City infrastructure. Therefore, during the progressive phases of the Projects, BART shall

submit Contract Drawings to the City that reflect Rearrangement of City Infrastructure, which will reference the agency permit for the Projects. Upon City's completing the Contract Drawing review process outlined in Section 3.A., above, BART will be authorized to commence construction that affects City Infrastructure.

BART shall reimburse the City for all reasonable costs incurred by the City in its review of the Contract Drawings and inspection of field work as described in Section 3.D. below of this Agreement.

C. Construction Management and Inspection

BART shall be responsible for all construction management, inspection, and testing necessary to ensure that all construction affecting City Infrastructure is performed in accordance with City Standards and Specifications. City shall provide inspection of construction affecting City Infrastructure under the agency permits. To allow for City inspection, BART shall provide the City at least 48 hours' notice prior to commencing construction affecting City Infrastructure. BART shall provide access to the Projects at all times as necessary for the City to perform its inspection and/or testing of work affecting City Infrastructure. City will coordinate its inspection and/or testing with BART. If BART requests City inspection for work affecting City Infrastructure and City does not perform inspection within 48 hours, BART will be authorized to inspect and certify any construction affecting City Infrastructure without requiring any further inspection by City. When BART performs inspection of work on or affecting City Infrastructure, BART shall provide test results and construction documentation to the City to ensure compliance with City Standards and Specifications and to allow for timely acceptance thereof. The City has, and hereby retains, the right to exercise full control over the employment, compensation and discharge of its personnel assisting in the performance of said testing and inspection services. The City

agrees to be solely responsible for all matters relating to payment of its employees or agents and all others assisting City inspectors in the performance of said testing and inspection services. BART shall reimburse the City for all reasonable costs incurred by the City in said inspection and testing in accordance with Section 3.D below.

D. Reimbursement for City Review and Construction Inspection and Testing Costs

BART will reimburse the City for its reasonable costs incurred in review of the Contract Drawings, traffic control plans, right of way engineering, and performance of construction inspections and testing. Said costs shall be based on time and material, or the reasonable costs paid to a consultant selected by the City to perform such review or inspection work. The City will use its best efforts to have such work performed in an economical fashion, consistent with good public works construction practice. City will prepare and submit invoices to BART for payment. Prior to payment, the City and BART shall jointly review the invoices submitted by the City. Prior to the beginning of each phase of work, City shall provide to BART an estimate of cost for plan review, and inspection. The City's estimated costs for review of the Contract Drawings, traffic control plans, review and approval of requirements by the traffic engineer, right of way engineering and performance of inspections and testing at Master Fee Schedule for that year shall constitute an agreed estimated amount. City shall provide to BART a written notification when the City costs incurred exceed 75% of the estimated costs. Any change in scope or amounts to be included in the City costs, which would cause the estimated amount agreed upon to be exceeded, must be negotiated in advance.

BART will issue a Work Authorization substantially in the form appended hereto as Exhibit B to the City for the agreed amount for that phase of work. Upon execution of this

Agreement, BART will reimburse City for work performed prior thereto within 30 calendar days of receipt of City's invoice for this payment.

Periodic payments under this Agreement shall meet all applicable Federal and State funding guidelines, and shall be subject to audit pursuant to the provisions of Section 15, below.

#### **SECTION 4: CITY INFRASTRUCTURE**

The Parties acknowledge that the construction of the Projects may result in damage, destruction, or relocation of City Infrastructure. City Infrastructure that could potentially be impacted by the Projects includes but is not limited to roadway improvements, paving, curb, gutter, medians, sidewalks, lane striping, traffic control signs, traffic signals, traffic controllers, video detectors, loop detectors, interconnecting conduits, telecommunications equipment, roadway lighting and conduits, storm drain lines, banner signs and associated lighting, and landscaping.

##### **A. Repair and Reconstruction of City Infrastructure**

BART shall be responsible for repair, relocation, reconstruction or replacement as appropriate under the terms set forth in this Agreement of City Infrastructure determined by BART and the City to have been damaged or destroyed by BART during construction of the Projects, to a condition at least equal to that which existed prior to construction, subject to the limitations of Section 4:F., below. Said repair, relocation, reconstruction, or replacement shall be performed in accordance with City Standards and Specifications. BART will repair, reconstruct, or replace City Infrastructure to its pre-construction condition as soon as practicable and subject to City's Acceptance of such repair, relocation, reconstruction or replacement of City Infrastructure. In the event that any construction-related damage poses a threat to public health, safety, or welfare, BART will repair such damage within 24 hours after written notice by the City or within a mutually agreed time. Absence of the City's



notification does not release BART from the correction or repair responsibility. If BART fails diligently to repair City Infrastructure damaged by the Projects, the City may complete the work, and reasonable costs incurred by City will be reimbursed by BART.

B. City Infrastructure Pre-Construction Survey Procedures

Prior to construction, BART, in consultation with the City, will perform a pre-construction survey of the City Infrastructure anticipated to be affected by construction of the Projects. Where appropriate, surveys may include photographs, videotape, lighting surveys and CCTV inspection of underground storm drain and sewer lines to assess the condition of City Infrastructure prior to construction of the Projects. Where pile driving or excavation during construction of the Projects will be within ten feet of City storm drain or sewer lines, BART will perform CCTV inspection of such lines. The methods for CCTV inspection will be in accordance with the City Standards and Specification. BART and the City shall agree to the conditions established in the pre-construction survey prior to commencement of construction, which agreement shall not be unreasonably conditioned, delayed or withheld by either.

C. Acceptance of City Infrastructure

Upon completion by BART of repair, relocation, reconstruction or replacement of any City Infrastructure and before such time as the City becomes responsible for operation of such City Infrastructure, BART will notify the City that its work on said City Infrastructure has been completed. With BART's notice of completion, BART will provide any certifications necessary in accordance with Section 4:D., below, and where any pre-construction CCTV surveys were performed on storm drain and sewer lines, BART shall provide post-construction CCTV surveys of the same utilities using methods in accordance with City Standards and Specifications. After notification from BART, the City will inspect such

completed City Infrastructure or any useable portion thereof within 5 working days and in accordance with the City's usual and customary practices for accepting such Infrastructure. If, after inspection and any necessary post-construction survey by the City, it is determined that the work, including all work performed pursuant to a change order, has been performed in accordance with the City Standards and Specifications, the City shall accept such work. If, after inspection by the City, it is determined that the work has not been so performed, the City shall notify BART of any claimed deficiency within 5 working days of such determination, and BART will correct the work prior to City's Acceptance. Except for warranty work and landscaping maintenance responsibilities, the City will become responsible for these facilities upon Acceptance thereof. If the Parties cannot agree on the condition of the City Infrastructure or the responsibility for damage to City Infrastructure during the post-construction survey, such issues shall be resolved in accordance with the mediation process described in Section 12, below.

D. Construction Impacts to City Streets

The locations of certain elements of the Projects are expected to require the use of certain City streets for construction operations. The City is willing to allow use of the City's streets for hauling and staging operations during construction of the Projects, provided that, in the event City's streets are damaged during such operations, BART agrees (a) to repair construction related damage in order to maintain the serviceability of City streets in accordance with City Standards and Specifications as set forth in Section D.1., below. When parking meters are located within staging areas used for the Projects, BART will pay the City the equivalent cost of an obstruction permit for lost revenue as stated in the Master Fee Schedule for that year.

1. Repair of Construction Damage to City Streets. Correction of any damage to City streets shall commence as soon as practicable after written notice to BART by the City of any claim for damage. Absence of the City's notification does not release BART from the correction or repair responsibility. Repairs to City streets shall be performed in accordance with City Standards and Specifications.
2. Reimbursement for Excess Wear and Tear to City Streets. BART and the City agree that, in accordance with the MTC PCI Index, BART will pay the City the dollar amount reflecting the decline in the MTC PCI Index directly attributable to excess wear and tear to City streets as a result of construction of the Projects. The methodology for determining any such decline is set forth in Exhibit C. Payment will be made based on current construction costs in effect as of the date of completion of BART's post-construction survey within 30 days of the date of determination of the cost of decline.
3. Excavations within City Streets. Where excavations are required within City streets BART shall comply with the provisions of the Contract Documents and Oakland Municipal Code Section 12.12.

E. Miscellaneous City Infrastructure

1. Lighting Levels. Prior to construction, BART will perform a survey to identify the existing lighting levels where street lighting will be relocated or rearranged by the Projects. Upon completion of the Projects, BART will restore roadway lighting levels impacted by the Projects to levels that existed prior to advertisement of the Projects and provide lighting level calculations if required by the City.
2. Landscaping Maintenance. After acceptance of landscaping BART shall maintain landscaping replaced as a result of the Projects in accordance with City Standards and Specifications for a period of three years. If any City trees are relocated by BART, BART shall maintain the trees for three years in accordance with City Standards and

Specifications. Upon completion of the maintenance period, and the City's acceptance of the landscaping, which acceptance shall not unreasonably be conditioned, delayed or withheld, City will assume control of landscaping and any relocated trees.

F. Betterments

If the City and BART determine that any City Infrastructure should be improved beyond that which is required by the construction contract, such work shall constitute a Betterment. The City shall reimburse or credit BART for the value of any such work or Betterment. In such event, BART and the City shall agree on the nature and extent of any Betterment, including related plans and specifications, and on the amount of Credit due to BART prior to commencement of construction of any such Betterment. Credit for salvage value of any facilities which were either removed or retained by the City during repair, relocation, reconstruction or replacement shall be based on the resale value of such facilities, less selling expenses. The City shall reimburse BART for all Betterments within 30 working days from the date a BART invoice is submitted to the City. Notwithstanding the terms set forth in this Section F, BART and the City may agree in writing, with supporting documentation, on a case-by-case basis that, where construction of the Projects will preclude future, economical access to City utilities, inclusion of methods to avoid such future detriment shall not be construed to be a Betterment.

G. As-Built Drawings

Upon final completion of any and all work by BART on City Infrastructure, and Acceptance by the City of such work, BART shall submit to the City, within 45 working days of completion of work on City Infrastructure, one set of as-built drawings (including parts, operations, and maintenance manuals), and an electronic copy of AutoCAD file (current version of AutoCAD used by the City at time of acceptance) showing work performed on

City Infrastructure. Such as-built drawings shall be in such sufficient detail, as the City customarily requires of the City's own public works contractors.

#### H. Coordination with City-Planned Improvements

In order to coordinate construction of the Projects with construction of City-planned improvements, the City has provided BART with a copy of the "City of Oakland, Capital Improvement Program FY 2016-2020". If the City's annual Capital Improvement Program is modified, City shall notify BART and provide a copy of the document reflecting revisions to the "City of Oakland, Capital Improvement Program FY 2016-2020" or the City Capital Projects. BART must revisit this information with City staff to make sure the information is current.

BART and the City agree to coordinate construction activities of the construction projects referenced above to allow for the successful completion of these projects.

#### I. City Authorized Utilities

In the event that BART activities associated with the Projects should cause a City Authorized Utility to be taken out of service, which removal from service results in loss of revenue to the City, BART shall reimburse City for the actual value of revenue lost. City shall provide documentation to validate its claimed loss of revenue.

### **SECTION 5: GENERAL COMMITMENTS**

#### A. City Input

BART will consider the City's input regarding City Infrastructure during all design phases of the Projects. However, BART's decision on all design and engineering elements that do not materially affect City Infrastructure shall be final, provided these decisions comply with

applicable provisions of the Municipal Code, the Standard Specifications for Public Works Construction, and the Standard Details for Public Works Construction current at the time the construction contract for the Projects is advertised.

B. Graffiti and Trash

During the Projects' construction, BART shall remove all graffiti and trash from the Projects' construction area in a timely manner. In addition, BART shall remove all spray paint markings from streets and sidewalks used for construction from City Infrastructure prior to acceptance of the Projects by the City.

C. Noise Standards

BART and its contractors shall comply with BART's noise standards for construction contracts. All noise limitations set forth therein for "daytime" (7:00 a.m. to 7:00 p.m.) and "nighttime" (7:00 p.m. to 7:00 a.m.) construction activities shall be strictly adhered to.

D. Stormwater Hydrology and Water Quality; Best Management Practices

Specific mitigation measures for implementation by BART to reduce the impact of storm water discharge will be defined by the requirements of the National Pollution Discharge Elimination System ("NPDES") General Permit for Storm Water Discharges associated with Construction Activity, issued by the State Water Resources Control Board. Compliance is required to meet the requirements of the NPDES permit, including development of a Storm Water Pollution Prevention Plan ("SWPPP"). BART will provide the City with a copy of the SWPPP for review and comment. BART will coordinate the design of any post- construction Best Management Practices for management of storm water discharges with the City to meet the intent of the Alameda County NPDES Municipal Storm water permit during Projects operation.

E. Site Security

During construction of the Projects, BART will be responsible for maintaining security of all BART construction areas, including off-site construction staging and storage areas, within the City in consultation with the Oakland Police Department, as necessary.

F. Work Hours

Normal work hours for on-site construction work shall be between 7:00 a.m. and 7:00 p.m., Monday through Saturday, except for City-designated limited-operations streets, where hours specified by the City for work in those streets will apply. In the event that on-site construction work needs to be performed outside of the above-specified normal work hours, BART will contact the City 72 hours in advance for approval of such work, which approval shall be promptly given. BART shall observe the City's provisions within the City Standards and Specifications for restricted streets during the holiday season.

G. Liaison

BART shall provide a community relations liaison for the Projects who will serve as the information point of contact. The liaison will inform the public about the status of the Projects, using a variety of methods and techniques. Outreach to the community will include, but not be limited to, local agencies; regional city staff; the media; and neighboring residential, commercial, and industrial neighbors, as well as to the broader general public regionally. BART shall be responsible for notifying all affected businesses and residences, within 300 feet of the property involved prior to the commencement of construction activities.

H. Project Information Signage and Telephone

Projects informational signage will be posted at key areas along the construction site as appropriate and as determined by BART, with appropriate input by the City. BART will operate a Projects information telephone for questions, concerns, or complaints during normal business hours with access for emergencies 24 hours per day, 7 days per week.

I. Environmental Remediation

BART shall, at its sole expense, as and if applicable, promptly undertake and complete any and all investigation, treatment, removal, reuse, handling, transport and/or other remediation and monitoring (collectively "Response Action"), to the extent that Response Action to complete Projects work authorized by this Agreement is required by Environmental Laws, (1) of any Hazardous Materials released by BART within the Projects area, or (2) to the extent of any increase in the scope, boundaries or cost of Response Action for Hazardous Materials present within the Projects area prior to the date of this Agreement ("Pre-Existing Contamination") as a result of the acts or omissions of BART prior to or during the construction of the Projects. BART shall perform all such Response Action in compliance with all applicable Environmental Laws and to the satisfaction of the Department of Toxic Substances Control ("DTSC") or as required by applicable regulatory agencies. BART will provide City with a schedule, testing data, workplan for Hazardous Materials remediation or removal operations or other information related to remediation that are reasonably requested by the City in a timely manner.

J. Meet and Confer

Except as provided in Sections 5:I. and 5:N. of this Agreement, if discovery of any Hazardous Materials within or adjacent to the Projects area requires Response Action, BART



and the City shall meet and confer on an appropriate course of action, including determining their respective responsibilities for required actions and associated costs.

K. Notice to City

BART shall promptly give notice to City of any required Response Action and, to the extent required by law, to the applicable government agency, of its investigation. BART shall provide City with copies of any written reports of such investigation.

L. Cooperation Regarding Response Action

City and BART shall cooperate with one another and the applicable government agencies in connection with such Response Action to assist the party responsible for Response Action hereunder and/or the agency in identifying and pursuing third parties who may be liable for any Hazardous Materials contamination necessitating remediation by BART or City pursuant to this Agreement.

M. Hazardous Materials Information

City shall provide to BART all information, reports or knowledge City has, including all information, reports, or knowledge City's consultants have provided to City, with respect to any Hazardous Materials that may exist in, under or about the Projects area.

N. City Action

City shall, at its sole expense, as and if applicable, promptly undertake and complete any and all Response Action within the Projects area to the extent that Response Action is required by Environmental Laws, for any Hazardous Materials hereinafter released in the area of the Projects as a result of direct action of the City, its employees, consultants or contractors. City shall perform all such Response Action in compliance with all applicable Environmental

Laws and to the satisfaction of the DTSC or as required by applicable regulatory agencies. City will provide BART with a schedule, testing data, workplan for Hazardous Materials remediation or removal operations or other information related to remediation that are reasonably requested by BART in a timely manner.

O. Dust Abatement Program

BART shall develop and maintain a dust abatement program in accordance with the requirements of the Bay Area Air Quality Management District and the Contract Documents.

P. Right-of-Way

At the request of BART, the City agrees to convey to BART at fair market value (1) any temporary or permanent easements, and (2) fee title for rights of way necessary to the Projects, without requiring BART to comply with the City's customary right of way acquisition processes. BART will prepare, or cause to be prepared, required title documents and documents of conveyance and other instruments as appropriate and will submit such instruments to the City's designated agent. The City shall approve and execute Projects right of way instruments without undue delay pursuant to Section 15: A. of this Agreement.

Q. Maintenance of the Projects

Upon completion of the Projects, BART agrees to assume total control and responsibility for the Projects, including, without limitation, repair and maintenance and the expense thereof, in perpetuity, including water and all utility costs for the Projects, including all associated landscaping on BART property.

R. Recycling

The District will require its contractor, to the extent reasonably possible, to recycle all construction debris from the Projects within the City of Oakland.

## **SECTION 6: CITY STREETS, TRAFFIC MAINTENANCE AND DETOURS**

### **A. Traffic Plans**

BART shall submit traffic plans, prepared by a registered Civil Engineer or Traffic Engineer, showing haul routes, detours, staging areas, temporary closures, and the method of traffic maintenance (including traffic control facilities/devices and personnel) to the City for approval prior to commencement of any construction requiring such actions, which approval shall not be unreasonably conditioned, delayed or withheld. Approval or disapproval of the plans will be delivered in writing to BART no later than 15 working days from the receipt of such plans. Failure by the City to provide a written approval or disapproval within such 15 working-day period shall be deemed to be approval by the City. BART and the City may agree in writing to mutually convenient time extensions.

BART will assume responsibility for maintaining in service, or causing to be maintained in service, all traffic detours (including traffic control facilities/devices used during detours) during BART construction in a manner reasonably satisfactory to the City, subject to all applicable City and California Department of Transportation requirements. All traffic control, lane closure, and detour plans shall specify the length of time that portions of City streets will likely be closed. Traffic control plans will include elements for nighttime traffic control and emergency vehicle access at all times. BART intends to develop and obtain City approval of traffic control plans that minimize traffic impacts and delays. However, if BART and the City determine that an approved traffic control plan has resulted in unacceptable impacts, BART will make adjustments to detour to reduce impacts. If unacceptable traffic

impacts cannot be resolved, upon the City's written request, BART will shut down such traffic control plan and re-submit a revised traffic control plan to mitigate the unacceptable impact.

B. Notice of Closure

BART will, prior to temporary closure to traffic of any street, sidewalk, or other public access, provide at least 10 working days' notice of such closure to the City's Public Works, Police and Fire Departments, and to AC Transit. Deviation from this 10 working-day requirement may be permitted in an emergency situation or as determined by BART and the City.

C. Posting of Notices

At least 72 hours prior to the temporary closure to traffic of any street, sidewalk, or other public access, BART shall post notice of such closure in areas that provide adequate notice to the public. Temporary road closure notices shall include flyers to residents and businesses within a 500-foot radius of such closures. BART shall also provide notice of closures to emergency services operating in the area of the closure. Such notice of any road closure may include, as appropriate, use of changeable message signs.

D. Coordination with Agencies

BART shall coordinate with public agencies as necessary for approval to post temporary closure information signs.

E. Debris Removal

On City streets used to construct the Projects, BART shall dispose of all construction-related debris in a timely manner. Such cleaning shall be performed in accordance with the provisions of the Contract Documents.

F. Ingress and Egress Plans

Where ingress and egress of contractor employee parking and construction storage areas impact City streets, BART shall develop plans regarding ingress and egress and submit them to the City for review and approval.

G. Barriers

BART shall submit its construction fencing and traffic barrier plans to the City for review and comment prior to construction of any phase or portion of the Projects requiring such construction fencing and traffic barriers affecting Public Right of Way.

**SECTION 7: CONTRACT DOCUMENTS INDEMNITY**

BART will require all of the Projects' construction contractors to defend, indemnify and hold the City, its officers, agents and employees harmless against any liability arising out of the acts or omissions of each such contractor and such contractor shall include the City as additional insureds in any insurance policies obtained by them at no cost to the City.

**SECTION 8: DESIGNATED AGENT OF THE PARTIES**

The City's contact person for all design and construction matters will be the Director of Public Works, or his or her designee. BART's contact person for all matters related to this Agreement will be the managers of the Projects, or their respective designees.

**SECTION 9: INDEMNIFICATION**

Neither the City nor any officer, agent or employee of the City is responsible for any damages or liability occurring by reason of anything done or omitted to be done by BART, its directors, officers, agents and employees, under or in connection with any work, authority or jurisdiction delegated to BART under this Agreement. Pursuant to California Government Code Section

895.4, BART will fully indemnify, hold harmless and defend in any claim or litigation, the City, its officers, agents and employees from any damage or liability occurring by reason of anything done or omitted to be done by BART, its directors, officers, agents and employees under or in connection with any work, authority or jurisdiction delegated to BART under this Agreement. The duty of BART to indemnify and hold harmless, as set forth above, shall include the duty to defend as set forth in Section 2778 of the California Civil Code, provided, however, that nothing herein shall be construed to require BART to indemnify the City, its officers, agents and employees against any responsibility or liability in contravention of Section 2782 of the California Civil Code. Neither BART nor any director, officer, agent or employee of BART is responsible for any damages or liability occurring by reason of anything done or omitted to be done by the City, its officers, agents and employees, under or in connection with any work, authority or jurisdiction delegated to the City under this Agreement. Pursuant to California Government Code Section 895.4, the City will fully indemnify, hold harmless and defend in any claim or litigation, BART, its directors, officers, agents and employees from any damage or liability occurring by reason of anything done or omitted to be done by the City, its officers, agents and employees under or in connection with any work, authority or jurisdiction delegated to the City under this Agreement. The duty of the City to indemnify and hold harmless, as set forth above, shall include the duty to defend as set forth in Section 2778 of the California Civil Code, provided, however, that nothing herein shall be construed to require the City to indemnify BART, its directors, officers, agents and employees against any responsibility or liability in contravention of Section 2782 of the California Civil Code.

#### **SECTION 10: INSURANCE**

A. BART shall include the City of Oakland, its Councilmembers, officers, directors, employees and agents as additional insureds in the Contractor's insurance program obtained for

construction of the Projects. Coverage for the City will include general liability, builder's risk (course of construction) and employer's liability insurance. BART shall forward the relevant certificates of insurance and endorsements on all such policies to the City. The Contractor's coverage will be maintained in full force and effect during construction of the Projects.

B. Primary Insurance

The insurance afforded to the City shall be considered primary insurance and any insurance against a loss covered by policies held by the City shall be considered excess insurance only. General Liability policies shall contain a severability-of-interests clause.

A. Tender of Defense

The City shall be accorded the same protections with respect to liability and indemnity as is accorded BART under such insurance policies. The City reserves the right to tender to BART the defense of any claims asserted against the City in connection with or arising out of the Projects.

**SECTION 11: WARRANTIES**

BART will require warranties from all its contractors for all work performed and for all contractor-installed equipment and materials supplied in connection with the Projects. BART acceptance of all work performed and for all contractor-installed equipment and materials supplied in connection with City Infrastructure shall be predicated upon City's reasonable acceptance of such work, equipment and materials. All BART warranties to the City shall be for a period of 12 months from acceptance by the City, except where the manufacturer's usual warranty is for a longer period. In that event, the longer period, less 30 days, will apply. If necessary, BART will pursue all its available remedies under such warranty provisions for correction of any defects in material and/or workmanship discovered within the warranty period. Correction of such defects in the work performed for the City shall commence within 60 working

days of written notification to BART by the City, at no cost to the City, as long as the notification is within the warranty period.

## **SECTION 12: RESOLUTION OF DISPUTES**

### **A. Referral to Higher Authority**

If any dispute under this Agreement cannot be resolved by the Parties, prior to submission to mediation as set forth below, upon the written request of either of the Parties, the matter shall be dealt with as follows:

1. **First Level.** Each Party will designate project staff or individuals to be the initial person or persons to discuss any apparent dispute or disagreement between the Parties and initiate this procedure. Each such designated first-level person(s) may contact his or her counterpart at the same level at any time to raise any apparent disagreement related to the Projects. For the City, unless the City shall designate otherwise in writing, the first-level person shall be the City's Public Works Agency Project Manager. For BART, the first-level person, unless BART shall designate otherwise in writing, shall be either or both of BART's Project Managers.
  - a. **Urgent Matters.** For any matter designated by the initiating Party as "urgent", the other Party shall make its first response within 24 hours, or within such other period as the first-level persons may agree.
  - b. **Non-Urgent Matters.** Unless a matter is designated "urgent" by the initiating Party, the other Party shall respond within 5 working days, or within such other period as the first-level persons may agree.



- c. Predetermined Timeline. Items that have a predetermined timeline already specified within this Agreement do not constitute urgent matters within the meaning of this Section 12.
2. Second Level. Each Party will designate individuals to whom matters not resolved at the first level shall be referred. Each such designated second-level person may contact his or her counterpart at the same level at any time to raise any apparent disagreement related to the Projects. For the City, the second-level person shall be City's Director of Public Works. For BART, the second-level person, unless BART shall designate otherwise in writing, shall be BART's Executive Manager for the Projects.
- a. Urgent Matters. For any matter designated by the initiating Party as "urgent", the other Party shall make its first response within 24 hours, or within such other period as the second-level persons may agree.
- b. Non-Urgent Matters. Unless a matter is designated "urgent" by the initiating Party, the other Party shall respond within 3 working days, or within such other period as the second-level persons may agree.
- c. Predetermined Timeline. Items that have a predetermined timeline already specified within this Agreement do not constitute urgent matters within the meaning of this Section 12.
3. Third-Level. Each Party will designate individuals to whom matters not resolved at the second-level shall be referred. These designated third-level persons shall constitute the final internal level within BART and the City for resolution of issues between the parties. Each such designated third-level person may contact his or her counterpart at the same level at any time to raise any apparent disagreement related to the Projects. For the City, the third-level person shall be the City Administrator. For BART, the third-level person, unless BART shall designate otherwise in writing, shall be its General Manager. The

initiating third-level person will request a response from his or her counterpart and that response will be made within a time period agreed between the third-level persons.

B. Mediation. If the designated third-level persons are unable to reach resolution, upon written request of either of the Parties the matter shall be referred to mediation as set forth in this Section B, below.

1. Notice of Mediation. In the event of any dispute hereunder which the Parties are unable to resolve, either BART or the City may submit such dispute to mediation by serving a written notice of mediation ("Notice of Mediation") on the other. The Notice of Mediation shall be signed on behalf of BART by either of its Project Managers, and on behalf of City by its Director of Public Works or his designee. The mediation shall proceed in accordance with rules promulgated by the mediator ("Mediator") (chosen as described in Section 2., below), and shall be concluded within 30 days, unless extended by mutual agreement of the Parties. Lawyers may participate only if both parties agree. The entire process shall be confidential and treated as a compromise negotiation for purposes of Federal and State rules of evidence.
2. Selection of Mediator. Within 15 days of the Notice of Mediation referred to in subsection 1, above, the Parties shall meet and select a disinterested third person to act as Mediator. If the Parties fail to agree, either Party may request the American Arbitration Association in San Francisco, to appoint the Mediator. The Mediator shall be replaced within 15 days of receipt of a written request of either Party, using the procedure outlined above; provided, however, that either Party may only replace the Mediator once.
3. Cost of Mediator. BART shall provide to the Mediator, at no cost to City, administrative services, such as conference facilities and secretarial services. All other fees and expenses of the Mediator shall be borne equally by BART and City.

**SECTION 13: NOTICES**

All notices required hereunder may be given by personal delivery, U.S. mail, courier service (e.g. Federal Express) or telecopier transmission. Notices shall be effective upon receipt at the following addresses:

To BART by U.S. Mail: San Francisco Bay Area Rapid Transit District  
P.O. Box 12688  
Oakland, CA 94604-2688  
Attention: Kathleen K. Mayo  
Telefax: (510) 287-4908

To BART by personal or courier delivery: San Francisco Bay Area Rapid Transit District  
300 Lakeside Dr., 17th Fl.  
Oakland, CA 94612  
Attention: Kathleen K. Mayo  
Telefax: (510) 287-4908

Copy to: San Francisco Bay Area Rapid Transit District  
300 Lakeside Dr., 21st Fl. Oakland, CA 94612  
Attention:  
Telefax: (510) 287-4821

To City Public Works Agency City of Oakland  
250 Frank Ogawa Plaza, Suite 4314  
Oakland, CA 94612-2033  
Attn: Jason Mitchell Director,  
Public Works Agency  
Telefax: (510) 238-2233

Copy to: Public Works Agency City of Oakland  
250 Frank Ogawa Plaza, Suite 4314  
Oakland, CA 94612-2033  
Attn:  
Telefax: (510) 238-2233

**SECTION 14: PARTIES NOT PARTNERS**

Nothing in this Agreement is intended to nor does it establish the Parties as partners, co-venturers or principal and agent with one another.

## SECTION 15: FURTHER ASSURANCES

### A. Additional Instruments

Each party shall execute and deliver to the other all such additional instruments or documents as may be necessary to carry out the purposes of this Agreement or to assure and secure to the other party the full and complete enjoyment of its rights and privileges under this Agreement, subject to appropriate approvals of each party's governing body.

### B. Amendments

Should unforeseen circumstances occur, BART and the City shall negotiate in good faith to reach agreement on any amendments that may be necessary fully to effectuate the Parties' respective intentions in entering into this Agreement.

### C. Records

The City agrees to establish and maintain records pertaining to the fiscal activities of the Projects, which records shall show the actual time devoted and the costs incurred by the City with respect to any work performed under this Agreement. The accounting systems of the City shall conform to generally accepted accounting principles and all records shall provide a breakdown of total costs charged to the Projects, including properly executed payrolls, time records, invoices and vouchers. Upon written request, the City shall, at a mutually convenient time, permit BART to inspect, examine, re-examine, and copy the City's books, records, accounts, and any and all data relevant to this Agreement for the purpose of auditing and verifying statements, invoices or bills submitted by the City pursuant to this Agreement, and shall provide such assistance as may be reasonably required in the course of such inspection. The City shall, at BART's request, provide a letter of representation concerning its usual and ordinary charges for work similar to the work to be performed under this Agreement, as well

as the accounting systems utilized by the City for work to be performed under this Agreement.

D. Examination of Records

BART reserves the right to examine and re-examine such books, records, payrolls, accounts and data during the 3-year period after final payment under this Agreement and until all pending matters are closed, and the City shall in no event dispose of said books, records, payrolls, accounts and data in any manner whatsoever for 3 years after the final payment under this Agreement or until all pending matters are closed, whichever is later.

E. State Auditor

Pursuant to California Government Code Section 8546.7, the Parties shall be subject to the examination and audit of the State Auditor, at the request of BART or as part of any audit of BART by the State Auditor, for a period of 3 years after final payment under this Agreement. The examination and audit shall be confined to those matters connected with the performance of this Agreement including, but not limited to the cost of administering the Agreement.

**SECTION 16: NON-LIABILITY OF OFFICIALS, EMPLOYEES AND AGENTS**

No director, officer, employee or agent of the City or BART shall be personally liable to any party to this Agreement or any successor in interest in the event of any default or breach of this Agreement or for any amount which may become due on any obligation under the terms of this Agreement.

**SECTION 17: HEADINGS AND TITLES**

Any titles to the Sections of this Agreement are inserted for convenience of reference only, and shall be disregarded in construing or interpreting any part of their provisions.

**SECTION 18: APPLICABLE LAW**

This Agreement shall be interpreted under and pursuant to the laws of the State of California, without reference to conflicts of law principles. The Parties agree that the jurisdiction and venue of any dispute between the Parties to this Agreement shall be the Superior Court of Alameda County.

**SECTION 19: SEVERABILITY**

If any term, provision, covenant or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions shall continue in full force and effect unless the rights and obligations of the Parties have been materially altered or abridged by such invalidation, voiding or unenforceability.

**SECTION 20: BINDING UPON SUCCESSORS**

This Agreement shall be binding upon and inure to the benefit of the transferees, successors and assigns of each of the Parties to it, except that there shall be no transfer of any interest by any of the Parties to this Agreement except pursuant to the terms of the Agreement.

**SECTION 21: REMEDIES NOT EXCLUSIVE**

No right or remedy conferred upon or reserved to BART or the City under this Agreement is intended to be exclusive of any other right or remedy, except as expressly stated in this Agreement, and each and every right and remedy shall be cumulative and in addition to any other right or remedy given under this Agreement or now or hereafter existing at law or in equity or by statute, except such rights or remedies as are expressly limited to this Agreement.

**SECTION 22: FORCE MAJEURE**

In addition to specific provisions of this Agreement permitting delays in performance, performance by either party shall not be deemed to be in default where delays or defaults are due to war, insurrection, strikes, lockouts, riots, floods, earthquakes, fires, quarantine restrictions, casualties, acts of God, acts of the public enemy, epidemic, government restrictions on priorities, freight embargoes, shortage of labor or materials, unusually inclement weather, lack of transportation, court order, or any other similar causes beyond the control or without the fault of the party claiming an extension of time to perform. An extension of time for any cause will be deemed granted if notice by the party claiming such extension is sent to the other party within 30 days from the commencement of the cause and such extension is not rejected in writing by the other party within 30 days of receipt of the notice. Time of performance under this Agreement may also be extended by mutual written agreement, signed by both Parties.

#### **SECTION 23: INTEGRATION**

This Agreement represents the full, complete and entire agreement of the Parties with respect to the subject matter hereof, and supersedes any and all other communications, representations, proposals, understandings or agreements, whether written or oral, between the Parties with respect to such subject matter. This Agreement may not be modified or amended, in whole or in part, except by a writing signed by an authorized officer or representative of each of the Parties.

This Agreement is made and entered into as of the date set forth above.

#### **SECTION 24: INCORPORATION BY REFERENCE**

All Exhibits and Attachments hereto are hereby incorporated into this Agreement by this reference.

SAN FRANCISCO BAY AREA RAPID  
TRANSIT DISTRICT

CITY OF OAKLAND

By: \_\_\_\_\_  
Grace Crunican  
General Manager

By: \_\_\_\_\_  
Oakland City Administrator or Designee

**APPROVED AS TO FORM:**  
Office of the General Counsel

**APPROVED AS TO FORM:**  
Office of the City Attorney

By: \_\_\_\_\_  
Raymond Pascual, BART Attorney

By: \_\_\_\_\_  
Oakland City Attorney or Designee

Office of the City Clerk

By: \_\_\_\_\_  
LaTonda Simmons, City Clerk

**DRAFT**