

Scorpio ¼ Life Refurbishment

18-023

Request for Proposals
and Proposal Notices

Part C - Sample Agreement

May 3 2019

SAN FRANCISCO BAY AREA

**WATER EMERGENCY
TRANSPORTATION AUTHORITY**

1.	TERM; TIME FOR PERFORMANCE.....	4
2.	CONTRACT DOCUMENTS AND PRECEDENCE.....	5
3.	DEFINITIONS.....	5
4.	CONTRACTOR'S REPRESENTATIONS AND WARRANTIES	6
5.	SCOPE OF WORK.....	8
6.	COMPENSATION. MANNER OF PAYMENT	8
7.	Final ACCEPTANCE	10
8.	LIQUIDATED DAMAGES	10
9.	RISK OF LOSS	11
10.	INDEMNIFICATION.....	11
11.	INSURANCE	12
12.	PERFORMANCE GUARANTY	12
13.	QUALITY ASSURANCE	13
14.	WARRANTY.....	13
15.	SUBCONTRACTORS	15
16.	PERSONNEL	16
17.	COOPERATION WITH OTHER CONTRACTORS	16
18.	PROMPT PAYMENT TO SUBCONTRACTORS	16
19.	CHANGES	17
20.	DISPUTE RESOLUTION.....	19
21.	SUSPENSION.....	20
22.	TERMINATION OF CONTRACT.....	20
23.	RECORD-KEEPING; AND ACCESS TO RECORDS; AUDIT	23
24.	CONFLICT OF INTEREST	24
25.	PUBLICITY.....	25
26.	CONFIDENTIALITY.....	25

27.	PUBLIC RECORDS ACT.....	25
28.	ANTITRUST CLAIMS	26
29.	ENVIRONMENTAL AND SAFETY AND HEALTH STANDARDS COMPLIANCE	26
30.	HAZARDOUS AND NON-HAZARDOUS CHEMICALS AND WASTES	26
31.	OWNERSHIP OF WORK AND INTELLECTUAL PROPERTY RIGHTS	27
32.	EQUAL EMPLOYMENT OPPORTUNITY AND NON-DISCRIMINATION	28
33.	CONTINUING OBLIGATIONS.....	31
34.	NOTICE.....	31
35.	COMPLIANCE WITH LAWS.....	31
36.	NON-WAIVER.....	31
37.	APPLICABLE LAW, JURISDICTION, AND VENUE.....	32
38.	RIGHTS AND REMEDIES.....	32
39.	ASSIGNMENT.....	32
40.	SUCCESSION.....	32
41.	ATTORNEYS' FEES	32
42.	NO THIRD PARTY BENEFICIARIES	32
43.	WETA WARRANTIES	32
44.	CONTRACTOR STATUS	32
45.	HEADINGS, COMPLETE CONTRACT, AND SEVERABILITY	33

RFP #18-023
Sample Agreement

between

SAN FRANCISCO BAY AREA WATER EMERGENCY TRANSPORTATION AUTHORITY

and

[SHIPYARD]

This AGREEMENT is made and entered into as of _____ (Effective Date), by and between the San Francisco Bay Area Water Emergency Transportation Authority, (WETA) and **[SHIPYARD]** located at **[ADDRESS]** (Contractor). For purposes of this AGREEMENT, each of the WETA and Contractor may be referred to individually as a “Party” or together, as “Parties.”

RECITALS

WHEREAS, WETA was created to operate existing regional ferry service as well as investigate and implement expansion of ferry service within the San Francisco Bay Area and to provide a water-based transit response in the event of an emergency; and

WHEREAS, WETA desires to pursue the refurbishment of the ferry vessel M/V Scorpio and has issued an RFP dated **May 3, 2019**, a copy of which is attached and incorporated as Exhibit A—the RFP includes the Technical Specifications; and

WHEREAS, the Contractor desires to provide such vessel refurbishment services and has represented that it is experienced and qualified to perform such services. It has submitted a written proposal, dated _____, a copy of which is attached and incorporated as Exhibit B.

WHEREAS, on _____, WETA’s Board of Directors authorized award of the Agreement to the Consultant.

NOW THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. TERM; TIME FOR PERFORMANCE

The term of this Contract begins upon the Effective Date and continues through Delivery and Final Acceptance by WETA of all Work on the Vessel and completion of the warranty period, including satisfactory resolution of all warranty claims, unless otherwise terminated or extended as provided in this Contract. The Contractor will not commence performing work under this Contract until it is authorized in writing by WETA to do so by a Notice to Proceed (“NTP”). The Contractor must achieve Final Acceptance no later than **December 31, 2019**. The Contractor must take into consideration and make due allowance for foreseeable delays and interruptions to the Work such as weather, equipment breakdowns, shipping, and regulatory inspections and approvals. Granting or acceptance of extensions of time to complete the work or furnish the labor, supplies, materials, equipment, or any one of the aforementioned will not operate as a release to the Contractor or the surety on the Contractor's faithful performance bond from said guarantee.

2. CONTRACT DOCUMENTS AND PRECEDENCE

This Contract consists of the documents listed below (the “Contract Documents”), all of which are incorporated into the Contract by this reference. The Contractor may not take advantage of any apparent error or omission in the Contract Documents. Omissions from the Contract specifications, or incorrect description of details of work that are manifestly necessary to carry out the intent of the Contract specifications will not relieve the Contractor from performing such omitted work or incorrectly described details of the Work, and they must be performed as if fully and correctly set forth and described. The Contract Documents constituting the Contract between WETA and the Contractor are intended to be complementary so that what is required by any one of them will be as binding as if called for by all of them. In the event of any conflicting provisions or requirements within the several parts of the Contract Documents, they will take precedence in the following order, the first stated document being of the highest precedence:

- Amendments to this Contract (if any)
- This Contract
- Request for Proposals (RFP), as modified by any Addenda issued by the WETA (Exhibit A)
- Contractor’s Proposal, including all forms, attachments, certifications and exhibits, as accepted by WETA (Exhibit B)
- Insurance Requirements (Exhibit C)
- Performance Bond (Exhibit D)

3. DEFINITIONS

Contract or Contract Documents – This Agreement, including all incorporated attachments and exhibits. The terms Contract and Agreement both refer to the Contract.

Contractor – The entity to which WETA has awarded this Contract and which is a party to this Contract.

Contractor Software – Any Software for which any applicable Intellectual Property Rights necessary to grant the licenses contained in this Contract are owned by Contractor or its Subcontractors.

Delivery – Satisfaction by the Contractor of the requirements set forth in Technical Specifications.

Effective Date – The date the last party signs this Contract.

Final Acceptance – Satisfaction by the Contractor of the requirements set forth in Technical Specifications.

Final Acceptance Trials – Satisfaction by the Contractor of the requirements set forth in Technical Specifications.

Intellectual Property Rights – Any and all inventions (whether patentable or un-patentable and whether or not reduced to practice), patent rights, copyrights, trademark or service-mark rights, trade secrets, know-how, or other intellectual-property or proprietary rights, regardless of whether any such rights have been recorded, perfected, or have been recognized in registrations or issued patents.

Key Personnel – The individuals identified in Section 16.

Preliminary Acceptance – Satisfaction by the Contractor of the requirements set forth in Technical Specifications

Project Manager – WETA's representative with oversight of the Work and of the Contractor, including the power to enforce compliance with the Contract, including giving orders to do work determined necessary for Contractor to fulfill the requirements of the Contract. The Project Manager will have the authority to resolve disputes informally, and to issue change orders or amendments to the Contract, provided that such change orders or amendments do not exceed the authority delegated to the Project Manager by the WETA's Board of Directors. The exercise of or failure to exercise such power will not relieve Contractor of any of its obligations under the Contract.

RFP – The Request for Proposals issued on May 3, 2019, attached to this Agreement as Exhibit A.

Software – Any and all computer application programs which are incorporated in the Vessel, or in or as part of any system, subsystem, assembly, subassembly or components of the Vessel (or any interfaces or interface system control between or among any of these), or which are used by Contractor for diagnostics on or other testing of the Vessel.

Subcontractor – Any firm or person under contract to Contractor, authorized by WETA to assist in the Work.

Technical Specifications – The Technical Specifications included in the RFP, as may be modified by addendum or during negotiations prior to award of the Contract.

Third Party Software – Any Software that is not Contractor Software.

Total Contract Price – The amount listed in Section 6, representing the total amount to be paid the Contractor for the Work under the Contract.

Work – All the obligations of Contractor under the Contract -- including delivery and re-delivery, testing, submission of deliverables, performance of warranty obligations, furnishing of all equipment, items, materials, parts, systems, data, design, services, and other matters and things necessary or the required labor and management to be done by Contractor pursuant to this Contract, including all miscellaneous and incidental work.

Vessel – The M/V SCORPIO, on which the Work will be performed, that is the subject of this Contract.

4. CONTRACTOR'S REPRESENTATIONS AND WARRANTIES

In the performance of the Work, the Contractor represents and warrants that:

Workmanship. It has and will exercise the degree of care, skill, efficiency, and judgment of contractors in the passenger vessel shipbuilding industry; that it carries all applicable licenses, certificates, and registrations in current and good standing that may be required to perform the Work; and that it will retain all such licenses, certificates, and registrations in active status throughout the duration of this engagement. Contractor will supervise and be solely responsible for the proper performance of the Work in accordance with the Contract, including the means, methods, techniques, and procedures, and for coordination of all parts of the Work.

Intellectual Property Rights. The Work, and any components of the Work, does not and will not infringe or violate the patent, copyright, trade-secret, or other intellectual-property or proprietary rights of any third party. Contractor further represents and warrants that it has or will have all appropriate licenses, agreements, or ownership rights pertaining to all U.S. patent, copyright, trade-secret, or other intellectual-property or proprietary rights needed for the performance of its obligations under this Agreement—including without limitation that it will have all necessary rights to use patentable (in the U.S.) or copyrightable materials, equipment, devices, or processes not furnished by WETA used in or incorporated in the Work. Contractor assumes all risks arising from the use of any such U.S. patented or copyrighted materials, equipment, devices, or processes.

Existence and Powers. Contractor is a [insert type of entity] duly organized, validly existing and in good standing under the laws of the State of [Insert State], and has the authority to do business in the State of California. It has the full legal right, power, and authority to own its properties and to carry on its business as now owned and operated and as required by this Agreement.

Corporate Authorization and Binding Obligation. Contractor has the authority and legal capacity to enter into and perform its obligations under this Agreement. This Agreement has been duly authorized, executed and delivered by all necessary corporate action of Contractor and constitutes a legal, valid and binding obligation of Contractor, enforceable against Contractor in accordance with its terms, except to the extent that its enforceability may be limited by bankruptcy, insolvency or other similar laws affecting creditor's rights from time-to-time in effect and equitable principles of general application. The persons signing this Agreement on behalf of Contractor have authority to do so.

No Conflict. Neither the execution and delivery by Contractor of this Agreement nor the performance by Contractor of its obligations in connection with the transactions contemplated hereby or the fulfillment by Contractor of any terms or conditions hereof to the best of its knowledge: (a) conflicts with, violates or results in a breach of any constitution, law or governmental regulation, bylaws or certificates of incorporation applicable to Contractor; or (b) conflicts with, violates or results in a breach of any order, judgment or decree, or any contract, agreement or instrument, to which Contractor is a party or by which Contractor or any of its properties or assets are bound, or constitutes a default under any of the foregoing.

No Litigation. Except as disclosed in writing to WETA before the Effective Date of this Agreement, there is no legal proceeding, at law or in equity, before or by any governmental body, pending or, to the best of Contractor's knowledge, overtly threatened or publicly announced against Contractor, or any of its affiliates or its parent or subsidiary corporations, or otherwise affecting Contractor, in which an unfavorable decision, ruling, or finding, in any single case or in the aggregate, could reasonably be expected to have a material and adverse effect on the execution and delivery of this Agreement by Contractor or on the validity or enforceability of this Agreement against Contractor, or any other agreement or instrument entered into by

Contractor in connection with the transactions contemplated in this Agreement, or on the ability of Contractor to perform its obligations under this Agreement or any such other agreement or instrument, or on the financial condition of Contractor.

Claims and Demands. Except as disclosed in writing to WETA before the Effective Date of this Agreement, there are no material and adverse claims and demands based in contract or tort law pending or, to the best of its knowledge, threatened against Contractor, or any of its affiliates or its parent or subsidiary corporations, with respect to any project similar to the one that is the subject of this Agreement.

Title. Contractor warrants that it owns or will own, and has or will have, good and marketable title to all goods, materials, equipment, tools, supplies, or systems furnished or to be furnished, by it and its Subcontractors, free and clear of all encumbrances. Contractor warrants that any title conveyed under the terms of this Agreement will be good and that all goods, materials, equipment, supplies, or systems, will be delivered free from all security interests or other liens or encumbrances. Contractor also agrees to defend the title against all persons claiming the whole or part of any goods, materials, equipment, supplies, or systems.

Personnel. The Contractor represents that it has or will obtain all personnel and equipment required to perform the Work. The Contractor represents and warrants that it and its Subcontractors will procure and keep current throughout the duration of this Contract any and all license, permits, registrations or certificates which are or may be required by properly constituted authorities for the performance of Work under this Contract.

5. SCOPE OF WORK

Contractor will perform the Work and all related tasks in accordance with the Technical Specifications, Exhibit A. The Contractor is responsible for performing all work necessary to complete, in a manner satisfactory to WETA, the Work described in this Contract, and in any properly approved Change Orders or amendments.

6. COMPENSATION. MANNER OF PAYMENT

WETA will pay Contractor the total fixed sum of \$_____ for the Work (Total Contract Price) The Total Contract Price includes all costs, charges, taxes and fees necessary and incidental to the Contractor's performance of the Work, including but not limited to insurance and bonding, including all parts and components thereto. WETA will make payments according to the Milestone Payment Schedule set forth below. All milestones are based on the requirements contained in the Technical Specifications. Upon completion of each milestone, to WETA's satisfaction and as determined in WETA's sole discretion, the Contractor may submit an invoice for the payment associated with the completed milestone. WETA will make payment to the Contractor within thirty (30) days following the receipt of approved invoices.

WETA has the option, in its sole discretion, to purchase any of the items identified in the RFP as "option items" at the prices specified on the Price Proposal. WETA may exercise this option at any time within 90 days of the Effective Date of this Agreement.

Contractor may not submit more than one invoice per calendar month. Invoices must state the milestone number that is the subject of the invoice and must also include the contract number, the full name, phone number, and email of the person to contact with invoice questions.

PDF invoices should be emailed to the WETA project manager, with cc to payables@watertransit.org. No hard copy invoices are required if WETA acknowledges receipt of the email invoice.

Upon making a milestone payment, WETA is granted title to all work in progress, materials, equipment, machinery, fittings, items of outfit and furnished goods (hereinafter "property") for which the milestone payment was made. Title to the property must be free of all encumbrances.

WETA's making of milestone payments does not constitute acceptance of any work by WETA, which will only occur as otherwise set forth in the Contract Documents. Nor does making milestone payments alter the Contractor's responsibility for any damage to the Vessel, which remains with the Contractor at all times until the earlier of Conditional or Final Acceptance. Furthermore, the Contractor bears the risk of any loss or damage to property, even though WETA may hold title to property. Nothing in this paragraph undermines any rights that WETA has under any insurance coverage pursuant to the Contract. **See sample milestone schedule below.** The Contractor shall propose a milestone schedule to be submitted to the OWNER prior to NTP for approval and inclusion in the final agreement. Items thirteen (13) through sixteen (16) in the milestone schedule shall remain as described with payment schedule negotiated.

Milestone Number	Milestone Description	Achievement Requirement	Payment Schedule
1	Notice to Proceed/Mobilization	Submission of Performance Bond and Insurance Certificate	10%
2	Major Machinery Order	Submission of purchase order for Propulsion Shafting, Reduction Gears, Waterjets, Generators and HVAC	3%
3	Major Machinery Delivery	Submission of evidence of receipt by Contractor of Milestone Number 2 Items	5%
4	Aluminum Order	Submission of purchase order for aluminum	2%
5	Aluminum Delivery	Submission of evidence of receipt by Contractor of Milestone Number 4 Items	5%
6	Engineering	WETA approval of final engineering	5%
7	Demolition	WETA approval that demolition required by the Contract is complete	5%
8	Hull Structural Welding Complete	USCG and WETA signoff of hull structural welding	6%
9	Superstructure Structural Modifications Complete	WETA signoff that superstructure structural modifications are complete	6%
10	Mechanical Systems Complete	WETA signoff that mechanical systems are tested and complete	6%

Milestone Number	Milestone Description	Achievement Requirement	Payment Schedule
11	Electrical Systems Complete	WETA signoff that electrical systems are tested and complete	6%
12	Vessel Outfitting Complete	WETA signoff that all items of vessel outfit are complete	6%
13	Dock and Sea Trials Complete	Completion of Dock and Sea Trials to the satisfaction of USCG and WETA	5%
14	Preliminary Acceptance	CONTR states readiness for Acceptance Survey	10%
15	Final Acceptance	Final acceptance in San Francisco Bay Area	15%
16	Completion of Warranty period	Completion of the Warranty period and satisfactory completion of all outstanding warranty claims.	5%

As a condition of Final Acceptance of the Vessel, and prior to submission of an invoice for Milestone Payment **#15**, the Contractor must furnish to WETA satisfactory evidence that all liens, claims and demands of Subcontractors, laborers and materialmen arising out of the Work, are fully satisfied, and that all of the Work is fully released from all liens, claims and demands of whatever kind and nature, whether just or otherwise.

The Contractor's acceptance of Milestone Payment **#15**, whether such payment be made pursuant to any judgment of any court, or otherwise, will constitute and operate as a release to WETA of any and all claims of the Contractor and liability to the Contractor for anything theretofore done or furnished for or relating to or arising out of this Contract and the Work, and for any prior act, neglect or default on the part of WETA or any of its directors, officers, agents or employees. Contractor will sign release in the form required by WETA as a condition of payment of Milestone Payment **#15**.

Should the Contractor refuse to accept any payment as tendered by WETA, it will constitute Contractor's waiver of any right to interest on such payment.

7. FINAL ACCEPTANCE

7.1 Delivery and Acceptance will follow the process outlined in the Technical Specifications.

8. LIQUIDATED DAMAGES

It is agreed by the Parties that time is of the essence, and in the event of delay in completion of the Work or the delivery of the supplies, materials, or equipment beyond the date set forth in the contract documents, or beyond authorized extensions thereof, damage will be sustained by WETA and that it is or will be impracticable to determine the actual amount of the damage by reason of such delay, and it is, therefore, agreed that WETA may assess an amount as set forth below as liquidated damages. If the delay is caused by strikes, government

controls, or other causes reasonably beyond the control of the Contractor, WETA will grant an extension of time without liquidated damages liability upon a proper showing and finding by WETA that the extension is justified. For avoidance of doubt, foreseeable delays such as weather events that are not extraordinary and catastrophic, equipment breakdowns, shipping delays, and regulatory agency inspections and approvals will not be excusable delays entitling the Contractor to an extension of time.

In the event that Contractor does not achieve Final Acceptance on or before the calendar date set forth in Section 1, WETA may assess liquidated damages in the amount of **\$6,000** for each and every calendar day or part of a day over 12 hours that the Contractor does not achieve Final Acceptance on or before the date specified in Section 1.

9. RISK OF LOSS

The Contractor will bear all risk of loss or damage to the Vessel, and all materials delivered pursuant to the Contract, until Operational Acceptance. The Contractor will not be responsible for any loss or damage arising from the sole negligence or willful misconduct of WETA.

Contractor will bear the risk of loss or damage to any WETA property arising from actions or inactions of Contractor. In addition, Contractor will bear all risk of loss or damage with respect to all materials acquired for the purpose of performing the Work. The foregoing applies to any property of Contractor, Subcontractors, workers, and others performing the work, as well as third parties. Contractor will protect from damage existing property, belonging to WETA or any third parties affected by Contractor's activities and will provide appropriate protection for all such property during progression of the work. Should any of WETA's or third party property be damaged, such property will be repaired or replaced at Contractor's expense to the satisfaction of WETA, and if applicable, to the satisfaction of the affected third party. No extension of time will be allowed for repair or replacement of such damaged items. Should Contractor not repair or replace such damaged items, WETA will have the right to take corrective measures itself and deduct the cost from any sums owed to the Contractor.

10. INDEMNIFICATION

To the fullest extent permitted by law, the Contractor assumes liability for and will save and protect, hold harmless, indemnify, and defend WETA, its directors, officers, agents, employees, representatives, contractors, subcontractors, insurers, attorneys, successors and assigns (all the foregoing, hereinafter collectively, "Indemnitees") from and against all claims, suits, demands, damages, losses, expenses, and liabilities of any kind whatsoever (all the foregoing, hereinafter collectively "Claims") including, without limitation, attorneys' fees, arising out of, resulting from, relating to, or claimed to have arisen out of, resulted from or related to the performance of the Work by the Contractor (including its subcontractors and suppliers), or any allegation that WETA's use of the Vessel as contemplated under this Contract infringes or violates any Intellectual Property Rights. It is expressly intended by the parties that Contractor's indemnity and defense obligations will apply, and Indemnitees will be fully indemnified without offset, deduction or contribution, regardless of any negligence or other fault of Indemnitees, or any of them, and whether or not such Indemnitee negligence or other fault caused or contributed to the arising of the Claims provided, however that the indemnity and defense obligation will not apply to the extent a Claim arises from the sole negligence or willful misconduct of any of the Indemnitees.

Notwithstanding the foregoing paragraph, and to the fullest extent permitted by law, Contractor must indemnify WETA for all claims that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of Contractor when Contractor is acting in the capacity of a design professional as that term is used in the California Civil Code.

“Claims” as used in this section includes, without limitation, those for personal injuries, wrongful death, mental or emotional distress, loss of consortium, damage to or loss of use of real, personal or intangible property of any kind, loss of income, loss of earning capacity, and business, financial, commercial or pecuniary losses of any kind whatsoever, and reasonable attorneys' fees, and costs and expenses of any kind whatsoever.

Contractor's indemnity and defense obligations cover the acts or omissions of any of Contractor's subcontractors, suppliers and consultants, and the employees of any of the foregoing.

The Contractor's indemnity and defense obligation under this section includes, without limitation, any claims, suits, demands, damages, losses, expenses, and liabilities arising from allegations of violations of Contractor's or its Subcontractor's personnel practices or from any allegation of an injury to an employee of the Contractor or subcontractor performing work or labor necessary to carry out the provisions of this Contract.

The indemnification obligations in this section will not be construed to negate, abridge or otherwise reduce any other obligation of indemnity the Contractor may have with respect to WETA which may otherwise exist. If any judgment is rendered against WETA or any of the other individuals enumerated above in any Claim subject to this indemnity, the Contractor will, at its expense, satisfy and discharge the same. This indemnification will survive termination or expiration of this Agreement and the Contractor must procure and maintain insurance coverage with a Contractual Liability endorsement that will insure its indemnity obligations.

If WETA is enjoined either temporarily or permanently from the use of any subject matter or materials as to which Contractor is to defend and indemnify WETA against a claim of infringement or other violation of Intellectual Property Rights, Contractor, at its sole cost and expense, must: (a) secure for WETA the right to continue using the subject matter or materials at issue by suspension of the injunction or procuring a license which imposes no cost on WETA; (b) replace the subject matter or materials at issue with non-infringing alternatives; or (c) modify the subject matter or materials at issue so that they become non-infringing or remove the enjoined subject matter or materials at issue and refund the sums paid for them without prejudice to any other rights of WETA. The option of (a), (b), and (c) in the preceding sentence must be selected in consultation with WETA and with WETA's consent, which will not be unreasonably withheld or delayed. The selected option may not entail an unreasonable or excessive amount of time or cause undue disruption to WETA's operations.

11. INSURANCE

Contractor will at all times comply with the insurance requirements set forth in Exhibit D.

12. PERFORMANCE GUARANTY

Within 10 days of execution of this Contract, and prior to issuance of a Notice to Proceed, the Contractor must furnish at its own expense a Performance Bond to guarantee the faithful and timely performance of the Work in accordance with the terms and conditions of the

Contract and in a manner acceptable to WETA, in an amount equal to twenty five percent (25%) of the Total Contract Price. The Performance Bond must be supplied using WETA's form and must be issued by an admitted Surety satisfactory to WETA and authorized to issue such bond in the state of California.

The Performance Bond must be effective from the date of award of the Contract to the completion of the warranty period and satisfactory resolution of any outstanding warranty claims. Notwithstanding the previous sentence, upon Final Acceptance of the Vessel, WETA will accept a reduced Performance Bond in the amount of 10% of the Total Contract Price that will remain in effect throughout the warranty period and until the resolution of all outstanding warranty claims.

Failure to provide a performance guaranty in accordance with this section is a material breach of the Contract. In lieu of finding Contractor in breach of its obligations under this section, WETA may, in its sole discretion, allow Contractor to continue the Work until it cures any deficiency in the requirements of this section. No further payments may be deemed due or will be made under the Contract until the Contractor is in compliance with this section, at which point WETA will pay all monies owed.

13. QUALITY ASSURANCE

The Contractor must establish and maintain an effective in-facility quality assurance program consistent with the Technical Specifications. The quality assurance program must exercise quality control over all phases of production from initiation of design through construction and preparation for delivery and will maintain an ongoing history of complaints with corrective action. The program must also control the quality of subcomponent articles. The quality assurance program must have the authority and responsibility for reliability, quality control, inspection planning, establishment of the quality control system, and acceptance/rejection of materials and manufactured articles in the construction of the vessel.

14. WARRANTY

14.1 **General Requirements.** The Contractor guarantees and warrants that the Vessel, and all Work (including without limitation any Software) furnished under this Contract will conform to the Contract Documents, including without limitation the Technical Specifications, and be free of any defects. The Contractor warrants the Vessel and all Work, including all equipment, spare parts and materials, and all labor performed, will be in full accordance with the Technical Specification, and will be free of all defects in the design, materials, and workmanship for a period of 365 calendar days commencing upon Final Acceptance. The warranty will apply regardless whether the equipment, materials or labor were furnished or performed by the Contractor or by any of its subcontractors or suppliers of any tier.

14.2 **Notice of Warranty Claim and Manner of Response.** Upon notice from WETA of any failure or defect in any such design, materials, or workmanship, the Contractor must diligently perform all work necessary to determine the cause thereof, and the time necessary to remedy the defect, and must propose in writing to WETA how and in what manner it will remedy the defect. The response time required of Contractor to respond to WETA's notice will depend on the nature of the deficiency and the impacts to operation of the Vessel, but will be between 24 hours to 7 days. If WETA determines that the proposal complies with the terms of the Technical Specification, it will authorize the Contractor to proceed to redesign, repair, or replace the defective or failed items within the agreed time period. WETA will not unreasonably withhold

approval of the Contractors proposal. In the event of a repeated claim regarding the same part or equipment, and notwithstanding Section 14.3, WETA may require that Contractor redesign or replace a part or equipment that repeatedly fails, and not simply replace a defective part with the same part that has already demonstrated a defect more than once.

14.2.1 Drydocking. In the event that a warranty claim implicates an underwater deficiency, the cause of which cannot be determined without drydocking the Vessel, the Contractor is responsible for the cost of drydocking as part of its obligation to determine the cause of a failure or defect. Provided, however, that WETA will pay for all drydocking costs associated with regular maintenance pursuant to its normal drydocking schedule.

14.3 Contractor Obligation to Investigate Warranty Claim. In determining the cause of the defect, the Contractor must perform such investigations and tests as WETA may require to determine the cause, and to verify that such redesign, repairs, and replacements comply with the requirements of the Technical Specification. All costs associated with such investigation, redesign, repair, replacement and testing, including, but not limited to, the removal, replacement, and reinstallation of equipment and materials necessary to gain access, will be borne by the Contractor. Should the Contractor fail to promptly make the necessary investigation, redesign, repair, replacement, and test, WETA may perform or cause to be performed the same at the Contractor's expense.

14.4 Warranty on Replaced Equipment The Contractor warrants any redesigned, repaired, or replaced part or equipment against defective materials and workmanship for the remainder of the warranty period or a period of 365 calendar days from and after the date of acceptance by WETA of the redesigned, repaired or replaced part or equipment thereof, whichever occurs later. The parties do not intend for an "evergreen" warranty, and agree that, so long as WETA has approved the manner of a warranty claim in accordance with Section 14, 2, the warranty for redesigned, repaired, or replaced parts or equipment will not extend for a term greater than five years from the date of Final Acceptance of the Vessel.

14.5 On Site Repair Permitted. Subject to the approval of WETA, Contractor personnel may use WETA facilities and special equipment to perform warranty work, provided that such work does not interfere with other WETA activities, and is performed in accordance with WETA policies and directions. WETA will designate which facilities and equipment may be used, and the schedule thereof. WETA reserves the right to require the Contractor for expensed incurred using WETA facilities and equipment. If WETA in its sole discretion determines that its facilities or special equipment cannot be made available, Contractor will be responsible for obtaining its own facilities and special equipment at Contractor's cost. Damages to WETA's property caused by the Contractor, or its subcontractors or suppliers, will be the sole responsibility of the Contractor, and will be corrected at the Contractor's expense.

14.6 Use of WETA Spare Parts. At the sole discretion of WETA, as determined on a case-by-case basis, WETA owned spare parts may be utilized by the Contractor for correction purposes. The Contractor must replace each borrowed part with a new part within thirty (30) calendar days. All costs associated with replacing the spare parts will be borne by the Contractor.

14.7 Back Charge. If WETA determines, in the reasonable exercise of its discretion, that immediate repairs or replacements are essential to keep a Vessel in service, WETA may make any such repairs and charge the costs to the Contractor. WETA will give prompt notice to Contractor or its determination to conduct any repairs and will provide documentation of the

deficiency, the action taken, and the costs that the Contractor must reimburse WETA. Contractor will reimburse WETA within 30 calendar days or provide notice that it disputes the back-charge.

14.8 Statutory Warranties and Progressive Damage. WETA does not waive any warranty, express or implied, under the California Commercial Code with respect to the Vessel, or any of its parts or equipment. Further, Contractor is responsible for damage to or failure of any part of the Vessel that may be caused, directly or indirectly, by a deficiency subject to this warranty.

15. SUBCONTRACTORS

The Contractor may not subcontract any services to be performed by it under this Contract, or any materials or equipment incorporated into the Vessel, for an amount of \$100,000 or higher without the prior written approval of WETA's Project Manager. Any subcontractors must be engaged under written contract with Contractor with provisions allowing the Contractor to comply with all requirements of this Contract. Without limitation to the generality of the foregoing, each such written subcontract will at a minimum contain the following express provisions:

- Contractor, not WETA, is solely responsible for payment to the Subcontractor for any amounts owing—and the Subcontractor will have no claim, and will take no action against WETA or its officers, directors, employees, or sureties for nonpayment by Contractor.
- Subcontractor agrees that the subcontract is subservient to this Agreement and that it will be bound to the applicable terms and conditions of this Agreement.
- Subcontractor and Contractor must agree that in the event of termination of this Agreement, any subcontract will be assigned to WETA, at WETA's discretion.

Consent by WETA's Project Manager to any subcontracting will not relieve the Contractor of its primary responsibility for performance under this Contract. If subcontracting is approved, the Contractor agrees that all applicable FTA flow down compliance requirements will be included in such subcontracts and the Contractor will obtain all applicable FTA-required certifications before entering into any subcontract.

The Contractor will be fully responsible to WETA for all acts and omissions of its own employees, and of Subcontractors, Suppliers and their employees. The Contractor will also be responsible for coordinating the Work performed by Subcontractors/Suppliers. When a portion of the subcontracted Work is not performed in accordance with the Agreement, or if a Subcontractor/Supplier commits or omits any act that would constitute a breach of the Agreement, the Subcontractor/Supplier will be replaced at the request of WETA and will not again be employed on the project. The Contractor will be responsible for all materials and workmanship in the construction of the Vessel and all accessories used, whether the same are manufactured by the Contractor, subcontracted, assigned, or purchased from a supplier. The Contractor will be solely responsible for reimbursing any subcontractors and WETA will have no obligation to them.

Within ten (10) days of the Effective Date, the Contractor will submit for WETA's approval a preliminary list of Subcontractors. In the event that WETA in the exercise of its reasonable discretion, does not approve a proposed Subcontractor, Contractor will propose a suitable replacement within ten days of notice of WETA's rejection of the initial proposed Subcontractor.

Nothing contained herein nor will any course of conduct be construed to create any contractual relationship between WETA and any Subcontractor. Upon request, Contractor will provide to WETA an executed copy of each subcontract agreement, including any amendments thereto.

16. PERSONNEL

Contractor will assign only competent personnel to perform work hereunder. In the event that at any time WETA, in its sole discretion, desires the removal of any person or persons assigned by Contractor to perform work hereunder, Contractor will remove such person or persons immediately upon receiving written notice from WETA. Key Personnel for this Contract, and the amount of time such Key Personnel will dedicate to the Contract are set forth below.

[TBD BASED UPON PROPOSAL SUBMITTAL]

Any and all persons identified in the above table are deemed by WETA to be Key Personnel whose services were a material inducement to WETA to enter into this Contract, and without whose services WETA may not have entered into this Contract. Contractor may not remove, replace, substitute, or otherwise change any Key Personnel without the prior written consent of WETA.

In the event that any of Contractor's personnel assigned to perform services under this Agreement become unavailable due to resignation, sickness or other factors outside of Contractor's control, Contractor will be responsible for timely provision of adequately qualified replacements. In no event will a position remain unfilled for more than three months. Except for excusable delays as set forth in Section 8, unavailability of personnel, even due to factors outside of Contractor's control, will not provide Contractor an excuse from meeting the time requirements under this Contract.

17. COOPERATION WITH OTHER CONTRACTORS

At any time, WETA reserves the right to engage other contractors to perform additional work that is not the subject of this Agreement. Contractor will cooperate with all such contractors and allow them access to the Vessel, provided that such additional work will not interfere with or hinder the Contractor's Work. WETA will require, as a condition of gaining access to the Vessel that additional contractors hired under this section have their own insurance to cover liability associated with their work. These contractors will also be required to indemnify the Contractor from liability associated with their work.

18. PROMPT PAYMENT TO SUBCONTRACTORS

The Contractor shall pay any Subcontractor approved by WETA for work that has been satisfactorily performed no later than seven (7) days from the date of the Contractor's receipt of milestone payments by WETA. WETA shall make prompt and regular incremental acceptances of portions of the contract work, as determined by WETA. WETA will not hold retainage from the Contractor. The withholding of funds until completion of milestones will fulfill the retainage requirements of 49 CFR §26.29(b)(3). The Contractor shall return all monies withheld in retention from all Subcontractors within thirty (30) calendar days after receiving payment for work satisfactorily completed and accepted including incremental acceptances of portions of the contract work by WETA. Any delay or postponement of payment may take place only for good cause and with WETA's prior written approval.

Any violation of these provisions shall subject the violating Contractor to the penalties, sanctions and other remedies specified in Section 7108.5 of the California Business and Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise available to the Contractor or Subcontractor in the event of a dispute involving late payment, or nonpayment by the Contractor, or deficient Subcontractor performance, or noncompliance by a Subcontractor. This clause applies to both DBE/SBE and non-DBE/SBE Subcontractors.

In the event the Contractor does not make progress payments or release retentions to the Subcontractors in accordance with the time periods in this section, the Contractor will be subject to a charge of two percent (2%) per month on the untimely or improperly withheld payment. Upon WETA's request, the Contractor will make available to WETA evidence that the Contractor has paid Subcontractors all amounts due in accordance with this section. Any subcontract entered into as a result of this Agreement shall contain all the provisions of this Section.

19. CHANGES

19.1 General. All changes to the Contract must be accomplished through the procedures set forth in this section. Any plan or method of work, whether suggested by Contractor or WETA, but not specified or required in the Contract, if adopted or followed by Contractor in whole or part without compliance with this section 19, will be adopted at the risk and responsibility of Contractor, and WETA assumes no responsibility. In particular, any approval by WETA's Project Manager of any modification, sample, schedule document, substitution, drawing or other matter not accomplished by the procedures set forth in this section 19 will not impose any liability upon WETA or relieve Contractor of any responsibilities under the Contract, including without limitation, the accuracy of any drawing or any obligation under any warranty provision, or the responsibility to deliver the vessel in compliance with all regulatory requirements, the Technical Specification, and this Contract. There are no verbal modifications to the Contract. The Contractor is responsible to ensure proper interrelation, functioning and systems integration of all aspects of the work related to the Vessel's systems and their relationship with other equipment and systems of the Vessel. The Contractor is responsible to ensure the suitability of the systems, devices, apparatus, components and parts for the service intended.

19.2 Contractor Changes. Any Contractor-proposed change in this Contract, both to scope of the Work or for extension of time, must be submitted to WETA for its prior approval. Oral change orders are not permitted. All Contractor initiated requests for a change must be made within 10 days after Contractor knows, or should have known, of the issues giving rise to the request. At WETA's request, Contractor will provide information giving the basis for the

requested change, or will provide a proposal containing the information set forth in Section 19.3. No change in this Contract will be made unless WETA gives prior written approval. The Contractor will be liable for all costs resulting from, and/or for satisfactorily correcting, any specification change not properly ordered by written modification to the Contract and signed by WETA.

19.3 WETA Changes. WETA may obtain changes to the Contract by notifying the Contractor in writing. As soon as reasonably possible but no later than ten (10) calendar days after receipt of the written change order to modify the Contract, the Contractor will submit to WETA's Project Manager a detailed price and schedule proposal for the work to be performed as follows.

19.3.1 The proposal must detail all applicable direct costs, including labor and materials, with the unit price and corresponding quantity, Subcontractor(s) or supplier(s) quote or purchase order, and mark up, etc. which makes up the total proposed cost. The information must be in sufficient detail for WETA to determine if the proposed costs are fair and reasonable.

19.3.2 Contractor agrees that in no event will the combined profit and overhead of the supplier(s)/Subcontractor(s) and Contractor with respect to any change order work exceed 10 percent (10%). Calculation of profit for the change order will be on the costs of Contractor and any subcontracted work without profit and overhead of the Contractor or supplier(s)/subcontractor(s). The Contractor agrees that it will include a provision in each subcontract which conforms to the provisions of the preceding sentence.

19.3.2.1 The Contractor represents that all rates charged by suppliers or Subcontractors contained in the proposal will be equal to or better than rates charged to other transit properties.

19.3.2.2 Equipment costs used for the work will be reimbursable to Contractor. All receipts, vouchers and all other supporting documentation required to substantiate the material costs will be available for WETA's inspection and verification.

19.4 Change Order.

19.4.1 Contractor's price and schedule proposal will be accepted or modified by negotiations between the Contractor and WETA. At that time a detailed modification will be executed in writing by both parties. Modifications that increase the cost to be paid Contractor may need to be approved by WETA's Board of Directors. Disagreements that cannot be resolved within negotiations will be resolved in accordance with the procedures in Section 20 below. In the event of a disagreement over a change order, WETA reserves the right unilaterally to direct the Contractor to perform work through a change order that does not need to be executed by both parties. The Contractor will perform the work as directed and may exercise its rights to pursue a claim pursuant to Section 20.1. Regardless of any disputes, the Contractor will proceed with the Work ordered.

19.4.2 A change order must be issued and executed before any work is started on the items covered by the change order. Any extra work done without a written change order signed by WETA's authorized representative will be considered as unauthorized and at the sole expense of Contractor. In the event Contractor receives direction, instruction, interpretation, or determination from any source which may cause any change in the Work, Contractor will

promptly notify WETA. Such written notification will be given to WETA before Contractor acts on said direction, instruction, interpretation, or determination.

19.4.3 Unless specified, no change order will impose any liability upon WETA, nor will any change order relieve Contractor of any responsibilities under the Contract, including without limitation, the accuracy of drawing or any obligation under any warranty provision.

20. DISPUTE RESOLUTION

20.1 Contractor Claims.

The Contractor will be solely responsible for providing timely written notice to WETA of any claims for additional compensation and/or time in accordance with the provisions of this Contract. It is WETA's intent to investigate and attempt to resolve any Contractor claims before the Contractor has performed any disputed work. Therefore, Contractor's failure to provide timely notice will constitute a waiver of Contractor's claims for additional compensation and/or time.

Claims by the Contractor disputing the meaning and intent of this Contract or arising from performance of this Contract will be referred in writing to WETA's Project Manager for a written decision. Except for claims that result from a disagreement over a proposed change order pursuant to Section 19, all such claims must be filed within 10 days after Contractor knows, or should have known, of the issues giving rise to the claim, and must be accompanied by written documentation substantiating the reasons for which the Contractor believes additional compensation may be due, the nature of the costs involved, and the amount of the potential claim. Claims resulting from a disagreement over a proposed change order pursuant to Section 19 must be filed with 10 days of the documented failure to resolve any disagreement or within 10 days of WETA's rejection of Contractor's request for a change order. WETA's Project Manager will respond to the Contractor in writing with a decision within thirty (30) calendar days following receipt of the Contractor's claim. WETA may in its discretion extend the time for its response if necessary.

The Contractor will not be entitled to the payment of any additional compensation for any cause, including any act, or failure to act, by WETA, or the failure or refusal to issue a modification, or the happening of any event, thing, or occurrence, unless it has given WETA due written notice of the claim as set forth above.

20.2 Appeal of Project Manager Decision. If the Contractor disagrees with any determination or decision of WETA's Project Manager, the Contractor will, within 15 calendar days of the date of such determination or decision, appeal the determination or decision in writing to WETA's Executive Director. Such written appeal will include all documents and other information necessary to substantiate the dispute or claim. The Executive Director will review the dispute or claim and transmit a decision in writing to the Contractor within 30 calendar days from the receipt of the dispute or claim. Failure of the Contractor to appeal the decision or determination of WETA's Project Manager within the 15 calendar day period will constitute a waiver of the Contractor's right to assert thereafter any claim resulting from such determination or decision. Submission of a dispute or claim to the Executive Director of WETA will be a condition precedent to any litigation under this Contract. The Executive Director of WETA may, at her discretion, extend the time period for response to the Contractor specified in this section.

20.3 Alternative Dispute Resolution. Any claim or controversy concerning the interpretation, application, or implementation of this Agreement between WETA and Contractor which cannot be resolved through the efforts described above, may, by specific agreement of the parties, be submitted to alternative dispute resolution (that is, mediation or arbitration) with the parameters for such dispute resolution being agreed to by the Parties at the time. Each party will bear the costs and expenses incurred by it in connection with such alternative dispute resolution processes. The cost of any independent decision maker will be shared equally between the parties. If a dispute is not resolved through discussion or the Parties do not agree to alternative dispute resolution, either party may pursue available legal remedies in a California State or Federal court of competent jurisdiction. Contractor must file a government claim pursuant to Government Code section 910 *et seq.* in order to initiate a civil action.

20.4 Any matter that is subject to the express sole discretion of either party to this Agreement will not be subject to the dispute resolution process described in this section.

20.5 Pending final decision of a dispute under this Section 20 the Contractor will proceed diligently with the performance of the Contract and the question or claim will be temporarily resolved in accordance with the decision of WETA's Executive Director, until final resolution of the question or claim.

21. SUSPENSION

WETA may at any time and for any reason within its sole discretion issue a written order to the Contractor suspending, delaying or interrupting all or any part of the work for a specified period of time.

The Contractor will comply immediately with any such written order and take all reasonable steps to minimize costs allocable to the work covered by the suspension during the period of work stoppage. Contractor must continue the work that is not included in the suspension and will continue such ancillary activities as are not suspended. The Contractor will resume performance of the suspended work upon expiration of the notice of suspension, or upon direction from WETA.

The Contractor will be allowed an equitable adjustment in the contract price (excluding profit) and/or an extension of the contract time, to the extent that cost or delays are shown by the Contractor to be directly attributable to any suspension. However, no adjustment will be made under this section for any suspension, delay or interruption due to the fault or negligence of the Contractor, or for which an equitable adjustment is otherwise provided for, or excluded under any other term or condition of the Contract. As soon as reasonably possible but no later than forty-five (45) calendar days, or any other period of time agreed to by the parties, after receipt of the written suspension of work notice, the Contractor will submit to WETA a detailed price and schedule proposal for the suspension, delay or interruption.

22. TERMINATION OF CONTRACT.

22.1 Termination for Default.

If Contractor fails to perform any of the provisions of this Contract, WETA may find Contractor to be in partial or complete default. If Contractor does not cure such default within thirty (30) days after receipt of written notification that such failure has occurred, or provide a plan to cure such default which is acceptable to WETA within the time specified by WETA, then

WETA may, in its discretion, terminate this Contract, in whole or in part, on the basis of Contractor's default of this Agreement. If the Contractor cures the default within the cure period, but subsequently defaults again, WETA may immediately terminate the Contract or a portion of it without giving the Contractor a right to cure.

The term "default" for purposes of this section includes, but is not limited to: the performance of the work in violation of the terms of the Contract; abandonment, assignment or subletting of the Contract without approval of WETA; filing a petition for bankruptcy by or against the Contractor or appointment of a receiver for Contractor's property; initiation of a federal or state proceeding for relief of debtors by or against Contractor; failure of the Contractor to perform its obligations under the Contract Documents (including but not limited to use of materials, supplies, plant, or equipment of quality or quantity below the requirements in the Contract Documents; failure to use an adequate number of properly skilled workers; failure to provide required Key Personnel; failure to provide proper workmanship); failure to perform its obligations under the Contract Documents within the time specified therein; failure to take effective steps to end a prolonged labor dispute; or the performance of the Contract in bad faith.

If the Contract is terminated in whole or in part for default, WETA may complete the Work, upon such terms and in such manner as WETA may deem appropriate. Without in any way affecting WETA's rights under the Performance Guaranty, the Contractor may be liable to WETA for any excess costs expenses incurred by WETA in completing the Work.

If, after notice of termination of this Contract under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, or that the default was excusable under the provisions of this clause, the rights and obligations of the parties will be the same as if the notice of termination had been issued pursuant to termination for convenience of WETA.

All finished or unfinished documents and any goods or materials procured for or produced pursuant to this Contract will become the property of WETA upon the effective date of such termination for default. In particular, and without limitation, the following becomes the property of WETA upon the effective date of termination: all fabricated or un-fabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of, the Work terminated, and the completed or partially completed plans, drawings, information and other property which, if the Contract had been completed, would have been furnished to WETA.

22.2 Termination for Convenience.

WETA may terminate this Contract for convenience, including for non-availability of funds, in whole or in part, upon 30 calendar days' notice sent by certified mail, return receipt requested, to the Contractor. If WETA terminates this Contract for convenience, the Contractor will:

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

- Terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the notice of termination.
- Settle all outstanding liabilities and all claims arising out of such termination or orders and subcontracts, with the approval or ratification of WETA, to the extent that may be required, which approval or ratification will be final for all the purposes of this section.
- Transfer title to WETA and deliver in the manner, at the times, and to the extent, if any, directed by WETA the fabricated or un-fabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of, the work terminated, and the completed or partially completed plans, drawings, information and other property which, if the Contract had been completed, would have been furnished to WETA.
- Use its best efforts to sell, in the manner, at the times, to the extent, and at the price(s) directed or authorized by WETA, any property of the types referred to above, provided however, that the Contractor will not be required to extend credit to any purchaser, and may acquire any such property under the conditions prescribed by and at a price(s) approved by WETA. The proceeds of any such transfer or disposition will be applied in reduction of any payments to be made by WETA to the Contractor under this Contract or will otherwise be credited to the price or cost of the work covered by this Contract or paid in such other manner as WETA may direct.
- Complete performance of such part of the Work as will not have been terminated by the notice of termination.
- Take such action as may be necessary, or as WETA may direct, for the protection or preservation of the property related to this Contract which is in the possession of the Contractor and in which WETA has or may acquire an interest.

In the event of termination for convenience, the Contractor will be paid all sums actually due and owing for all services performed and all expenses incurred up to the day written notice of termination is given, plus any costs reasonably and necessarily incurred by Contractor to effect such termination. Contractor will not be entitled to claim any lost profits or consequential damages as a result of any termination for convenience. Thereafter, Contractor will not be entitled to make any claim against WETA in connection with this Agreement. All finished or unfinished documents and any materials procured for or produced pursuant to this Agreement will become the property of WETA upon the effective date of such termination for convenience.

In the event of termination for convenience, Contractor, and its Subcontractors, will provide reasonable and good faith cooperation in any transition to other vendors or contractors as WETA may determine necessary. Failure to so cooperate is a breach of the agreement and grounds for a termination for convenience to be treated as a termination for breach.

22.3 Contractor Responsibility for Subcontracts. If this Contract is terminated, WETA will have no liability or responsibility for leases or contractual agreements entered into by the

Contractor for performance of the Contractor's responsibilities under this Contract, except as provided in this section. In the event of termination for any reason, and at WETA's direction, Contractor must assign any Subcontract to WETA, and must include in any Subcontract the assignability to WETA in the event of any termination.

23. RECORD-KEEPING; AND ACCESS TO RECORDS; AUDIT

23.1 Establishment and Maintenance of Information. The Contractor agrees to establish and maintain accurate, detailed, and complete separate books, accounts, financial records, documentation, and other evidence pertaining to: i) the performance of the work under this Contract, and ii) the receipt and expenditure of all funds received under this Contract. The Contractor will also maintain the financial information and data used in preparation or support of the cost submission for any negotiated Contract amendment or change order under this Contract. The Contractor will establish and maintain all such information in accordance with generally accepted accounting principles and practices and will retain intact all such information until the latest of:

- (a) complete performance of this Contract; or
- (b) six years following the end of the term of this Contract; or
- (c) if any litigation, claim, or audit is commenced during either such period, when all such litigation, claims or audits have been resolved.

If the Contractor engages any subcontractors to perform any of the work under this Contract, the Contractor agrees that the contract for such work will include provisions requiring the subcontractor to establish and maintain information in accordance with the provisions of this section and to allow access to and audit of such information in accordance with Section 23.2 below.

23.2 Access to Data and Other Information. WETA, as well as representatives of the California State Auditor and the Federal Transit Administration, will have access to all Contractor data under this Contract and Contractor will cooperate with WETA's reasonable requests for access to the data for the purpose of inspection and copying. The Contractor must maintain the data in convenient formats reasonably requested by WETA. The Contractor will provide appropriate facilities for such access, inspection, audit, and copying and will require that this section be included in any subcontract for the work under the contract. For WETA to determine whether the Contractor has complied with the requirements under this section, the Contractor will, at any time when requested, submit to WETA properly authenticated documents or other satisfactory proof as to the Contractor's compliance with such requirements. The term "data" for the purposes of this section includes all information and records collected, created, received, maintained, or disseminated by the Contractor in the performance of the work under this Contract, regardless of physical form, storage media, or conditions of use.

23.3 Audits. The accounts and records of the Contractor relating to this Contract will be audited in the same manner as all other accounts and records of the Contractor are audited. Authorized representatives of WETA, as well as representatives of the California State Auditor and the Federal Transit Administration, will have access to all such books, records, documents, accounting practices and procedures, and other information for the purpose of inspection, audit, and copying during normal business hours. The Contractor will provide proper facilities for such

access and inspection. Financial adjustments resulting from any audit will be paid in full within 30 calendar days of the Contractor's receipt of audit.

23.4 Within 30 calendar days after completion, the Contractor will deliver to WETA a copy of any audit of the Contractor done by the Contractor or at its request or at the direction of any governmental agency or department which relate to the performance of the work under this Contract.

24. CONFLICT OF INTEREST

In addition to those direct conflicts of interest discussed and prohibited in the RFP, Contractor will take all reasonable measures to preclude the existence or development of an organizational conflict of interest in connection with work performed under this Contract. An organizational conflict of interest occurs when, due to other activities, relationships, or contracts, a firm or person is unable, or potentially unable, to render impartial assistance or advice to WETA.

Contractor will not engage the services of any Subcontractor or consultant on any work related to this Agreement if the Subcontractor or consultant, or any employee of the Subcontractor or consultant, has an actual or apparent organizational conflict of interest related to work or services contemplated under this Agreement.

If at any time during the term of this Agreement Contractor becomes aware of an organizational conflict of interest in connection with the work performed thereunder, Contractor immediately will provide WETA with written notice of the facts and circumstances giving rise to this organizational conflict of interest. Contractor's written notice will also propose alternatives for addressing or eliminating the organizational conflict of interest. If at any time during the term of this Agreement, WETA becomes aware of an organizational conflict of interest in connection with the Contractor's performance of the Work, WETA will similarly notify the Contractor. In the event a conflict is presented, whether disclosed by the Contractor or discovered by WETA, WETA will consider the conflict presented and the alternatives proposed and meet with the Contractor to determine an appropriate course of action. WETA's determination as to the manner in which to address the conflict will be final.

During the term of this Agreement, Contractor must maintain lists of its employees, and the Subcontractors and consultants used and their employees. Contractor must provide this information to WETA upon request submittal of such lists does not relieve the Contractor of its obligation to assure that no organizational conflicts of interest exist.

The Contractor must maintain written policies prohibiting organizational conflicts of interest and must ensure that its employees are fully familiar with these policies. The Contractor must monitor and enforce these policies and must require any subcontractors and affiliates to maintain, monitor and enforce policies prohibiting organizational conflicts of interest.

Failure to comply with this section may subject the Contractor to damages incurred by WETA in addressing organizational conflicts that arise out of work performed by the Contractor, which damages the Contractor agrees to reimburse, or to termination of this Agreement for breach.

25. PUBLICITY

The Contractor, its employees, subcontractors, and agents will not refer to WETA, or use any logos, images, or photographs of WETA for any commercial purpose, including, but not limited to, advertising, promotion, or public relations, without WETA's prior written consent. Such written consent will not be required for the inclusion of WETA's name on a customer list.

26. CONFIDENTIALITY

Any WETA materials to which the Contractor has access or materials prepared by the Contractor during the course of this Contract ("Confidential Information") will be held in confidence by the Contractor, who will exercise all reasonable precautions to prevent the disclosure of Confidential Information to anyone except the officers, employees and agents of the Contractor as necessary to perform the Work.

The Contractor will not release any reports, information or promotional materials prepared in connection with this Contract, whether deemed confidential or not, to any third party without the approval of WETA's Project Manager.

Confidentiality obligations hereunder will not apply to any portion of WETA's Information which:

- (a) has become a matter of public knowledge other than through an act or omission of the Contractor;
- (b) has been made known to the Contractor by a third party in accordance with such third party's legal rights without any restriction on disclosure;
- (c) was in the possession of the Contractor prior to the disclosure of such Information by WETA and was not acquired directly or indirectly from the other party or any person or entity in a relationship of trust and confidence with the other party with respect to such Information; or
- (d) Contractor is required by law to disclose.

27. PUBLIC RECORDS ACT

All records, documents, drawings, plans, specifications and other material relating to conduct of WETA's business, including materials submitted by Contractor in its Proposal and during the course of performing the work under this Agreement, will become the exclusive property of WETA and may be deemed public records. Said materials may be subject to the provisions of the California Public Records Act. WETA's use and disclosure of its records are governed by this Act.

Contractor may designate material submitted to WETA as "Trade Secret" or "Proprietary" and request that WETA not disclose such information to the public. If WETA agrees not to disclose such information, Contractor assumes all responsibility for any challenges resulting from the non-disclosure, and will defend, indemnify and hold harmless WETA from and against all damages (including but not limited to attorneys' fees that may be awarded to the party requesting the Contractor's information), and pay any and all costs and expenses related to the withholding of Contractor's information. Contractor will not make a

claim, sue, or maintain any legal action against WETA or its directors, officers, employees, or agents concerning the withholding from disclosure of Contractor information.

28. ANTITRUST CLAIMS

Contractor and its Subcontractors must comply with California Government Code Section 4552, which states:

"In submitting a bid to a public purchasing body, the bidder offers and agrees that if the bid is accepted, it will assign to the purchasing body all rights, title, and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Sec. 15) or under the Cartwright Act (Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code), arising from purchases of goods, materials, or services by the bidder for sale to the purchasing body pursuant to the bid. Such assignment shall be made and become effective at the time the purchasing body tenders final payment to the bidder."

29. ENVIRONMENTAL AND SAFETY AND HEALTH STANDARDS COMPLIANCE

The Contractor must comply with all applicable environmental statutes, regulations, and guidelines in performing the Work. The Contractor must also comply with applicable occupational safety and health standards, regulations, and guidelines in performing the Work.

30. HAZARDOUS AND NON-HAZARDOUS CHEMICALS AND WASTES

Contractor will bear full and exclusive responsibility for any release of hazardous or non-hazardous chemicals or substances during the course of performance of this Contract except to the extent that any such releases are caused by the direct negligence of WETA. The Contractor will immediately report any such release to WETA. The Contractor will be solely responsible for all claims and expenses associated with the response to, removal and remediation of the release, including, without limit, payment of any fines or penalties levied against WETA by any agency as a result of such release and will hold harmless, indemnify and defend WETA from any claims arising from such release. For purposes of this section only, the term "claims" will include (i) all notices, orders, directives, administrative or judicial proceedings, fines, penalties, fees or charges imposed by any governmental agency with jurisdiction, and (ii) any claim, cause of action, or administrative or judicial proceeding brought against WETA, its member agencies, their directors, or employees, or for any loss, cost (including reasonable attorney's fees), damage or liability, sustained or suffered by any person or entity, including WETA. This indemnification will survive the termination of the Contract.

If the performance of the work outlined by these contract specifications creates any hazardous wastes, those wastes will be properly disposed of according to federal, state, and local laws, at the expense of Contractor. The Contractor will dispose of the wastes under its own EPA Generator Number. In no event will WETA be identified as the generator. The Contractor will notify WETA of any such hazardous wastes. WETA reserves the right to a copy of the results of any tests conducted on the wastes and, at its cost, to perform additional tests or examine those wastes, prior to their disposition.

31. OWNERSHIP OF WORK AND INTELLECTUAL PROPERTY RIGHTS

31.1 Ownership of Copies of Written Materials. Any and all copies (whether physical or electronic) of any materials prepared, or in the process of being prepared, for the Work to be performed by Contractor under this Agreement will be and are the property of WETA. WETA will be entitled to access to and copies of any such materials during the progress of the Work under this Agreement. Any copies of such materials as specified in the Technical Specifications and required for performance of training and maintenance under this Agreement must be delivered to WETA. If any copies of such materials which the Contractor is owing WETA under this Agreement particularly under the Technical Specification are lost, damaged, or destroyed before final delivery to WETA, Contractor will replace them at its own expense and the Contractor assumes all risks of loss, damage, or destruction of or to any such materials

31.2 Intellectual Property Rights to Written Materials. Contractor will retain ownership of all intellectual property rights in the written materials described in the previous paragraph delivered to WETA under this Agreement. Contractor grants to WETA a perpetual, unlimited, royalty-free, non-exclusive and irrevocable license for WETA (including without limitation its officers, directors, employees, contractors, and agents) to use, copy, distribute, perform, and modify (and create derivative works from) any and all such written materials for its business purposes, including without limitation operation, maintenance, and repair of the Vessel, as well as for the purposes of future procurements of Vessels

31.3 Software Documentation. Without limitation to the generality of sub-paragraphs 31.1 and 31.2 above, Contractor must provide WETA the documentation listed in this section 31.3 in compliance with any requirements as to form, format, or media set forth in the Technical Specifications and Contractor must provide WETA any new, modified, or updated versions of such documentation promptly as such documentation becomes available, through the end of the warranty period of the Vessel. The copies of documentation to be delivered to WETA by Contractor will become the property of WETA. Contractor must provide:

- documentation relating to Contractor Software reasonably necessary or desirable for WETA's operation and maintenance of the Vessel, including without limitation: user manuals, systems manuals, training manuals, and other such guides; logic diagrams; programmer's notes; flow-charts; algorithms; development tools and platforms, and data identifying source, functional characteristics, and performance requirements.
- documentation relating to any Third Party Software authorized by WETA under the terms of this Contract reasonably necessary or desirable for WETA's operation and maintenance of the Vessel, including without limitation any user manuals, systems manuals, training manuals, and other such guides.
- documentation relating to any and all input/output protocols and operating parameters for all microprocessor-based control systems in or used with the Vessel, including without limitation a complete list of all commands and operating parameters generated by electronic input devices (such as manual controls, sensors, and test equipment used with the system) and responses generated by the controller to such devices, directives and responses sent between controllers, and the output to the controlled system.

- documentation relating to the form, fit, and function of any and all systems, subsystems, assemblies, subassemblies, or components thereof in or relating to the Vessel, including without limitation: as-built drawings; parts lists; schematics and diagrams; data relating to items, components, or processes sufficient to enable physical and functional interchangeability; data identifying source, size, configuration, mating, and attachment characteristics; and performance requirements.
- Contractor grants WETA a perpetual, irrevocable, royalty-free, non-exclusive license to use, copy, distribute, modify, and create derivative works from any and all documentation and data set forth in this section.

31.4 Software License.

- Contractor hereby grants to WETA a perpetual, irrevocable, royalty-free, non-exclusive license under any and all applicable Intellectual Property Rights as reasonably necessary for WETA to operate, maintain, or repair the Vessel—including without limitation any systems, subsystems, assemblies, subassemblies, components, interface systems and controls and including without limitation any hardware or Software—but excluding Third Party Software.
- Contractor further grants WETA a perpetual, irrevocable, royalty-free, non-exclusive license to use, copy, distribute, modify, and create derivative works from any and all Contractor Software for purpose of operating, maintaining, or repairing the Vessel.
- For any Third Party Software authorized by WETA under the terms of this Contract, Contractor will be responsible for negotiating and procuring, at its cost, all needed licenses for WETA's use of such software. Such licenses will be in WETA's name and must be reviewed, approved, and ultimately signed and agreed to by WETA.
- All rights and licenses granted under or pursuant to this Contract are and are deemed to be, for purposes of Section 365(n) of the U.S. Bankruptcy Code, licenses of rights to “intellectual property,” as defined under Section 101 of the U.S. Bankruptcy Code (or any successor or amended statutory provision). The parties agree that WETA, as a licensee of such rights under this Contract, retains and may fully exercise all of its rights and elections under the U.S. Bankruptcy Code; however, nothing herein is deemed to constitute a present exercise of such rights and elections.

32. EQUAL EMPLOYMENT OPPORTUNITY AND NON-DISCRIMINATION

In connection with the performance of this Agreement, the Contractor will not discriminate against any employee or applicant for employment because of race, color, religion (including religious dress and grooming practices), citizenship, political activity or affiliation, national origin, ancestry, physical or mental disability, marital status, age (if 40 or over), medical condition (as defined under California law), genetic information, military or veteran status, sexual orientation, gender identity, gender expression, sex or gender (which includes pregnancy, childbirth, breastfeeding, or related medical conditions), taking or requesting

statutorily protected leave, or any other characteristics protected under federal, state, or local laws.

The Contractor will take affirmative actions to ensure that applicants are employed, and that employees are treated during their employment, without regard to their race, religion (including religious dress and grooming practices), color, sex, physical or mental disability, national origin, ancestry, medical condition, genetic information, marital status, sexual orientation, gender (which includes pregnancy, childbirth, breastfeeding, or related medical conditions), gender identity, gender expression, age (if 40 or over), military and veteran status, taking or requesting statutorily protected leave or any other characteristic protected under state, federal, or local laws. Such actions will include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the consulting officer setting forth the provisions of this nondiscrimination clause. The Contractor further agrees to insert a similar provision in all subcontracts.

The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the consultant, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.

The Contractor will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed or disclosed the compensation of the employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information.

The Contractor will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer, advising the labor union or workers' representative of the Contractor's commitments under section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

The Contractor will comply with all provision of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

The Contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1964, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

In the event of the Contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the Contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

The Contractor will include the provisions of 41 C.F.R. section 60-1.4 in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance.

The Contractor agrees to carry out applicable requirements of 49 CFR Part 26 in the award and administration of U.S. DOT-assisted contracts. Further, the Contractor agrees to comply with all provisions prohibiting discrimination on the basis of race, color, or national origin of Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d *et seq.*, and with U.S. DOT regulations, "Nondiscrimination in Federally-Assisted Programs of the Department of Transportation – Effectuation of Title VI of the Civil Rights Act," 49 C.F.R. Part 21. The Contractor must obtain the same assurances from its joint venture partners, subcontractors, and subconsultants by including this assurance in all subcontracts entered into under this Agreement. Failure by the Contractor to carry out these requirements is a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy as WETA deems appropriate.

During the performance of this Contract, Contractor and any Subcontractor will not unlawfully discriminate, harass, or allow harassment against any employee or applicant for employment because of sex, race, color, ancestry, religious creed, national origin, physical disability (including HIV and AIDS), mental disability, medical condition (e.g., cancer), age (over 40), marital status, and denial of family care leave. Contractor must insure that the evaluation and treatment of their employees and applicants for employment are free from such discrimination and harassment. Contractor must comply with the provisions of the Fair Employment and Housing Act (Gov. Code §12990 (a-f) *et seq.*) and the applicable regulations promulgated thereunder (California Code of Regulations, Title 2, Section 7285 *et seq.*). The applicable regulations of the Fair Employment and Housing Commission implementing Government Code Section 12990 (a-f), set forth in Chapter 5 of Division 4 of Title 2 of the California Code of Regulations, are incorporated into this Contract by reference and made a part hereof as if set forth in full. Contractor must give written notice of its obligations under this clause to labor organizations with which it has a collective bargaining or other Agreement.

Contractor will include the nondiscrimination and compliance provisions of this clause in all subcontracts to perform work under the Contract.

In the event of the Contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part.

33. CONTINUING OBLIGATIONS

The Contractor acknowledges that the following provisions of this Contract impose continuing obligations on the Contractor which extend and are effective notwithstanding termination or the conclusion of the term of this Contract: Sections 4, 10, 11, 12, 13, 14, 17, 20, 22, 23, 25, 26, 27, 28, 30, 31, 36, 37, 41, 42, 43, 44 and 45.

34. NOTICE

All communications relating to the day-to-day activities of the project must be exchanged between WETA's Project Manager and the Contractor's _____.

All other notices and communications regarding interpretation of the terms of this Agreement and changes thereto must be given to the other party in writing and may be given by personal delivery to a representative of the parties or by mailing the same postage prepaid, addressed as follows:

If to WETA: San Francisco Bay Water Emergency Transportation Authority
Pier 9, Suite 111
San Francisco, CA, 94111
Attn: Tim Hanners, Administrator of Maintenance and Engineering

If to the Contractor: _____

Attention: _____

The address to which mailings may be made may be changed from time to time by notice mailed as described above. Any notice given by mail will be deemed given on the day after that on which it is deposited in the United States Mail as provided above.

35. COMPLIANCE WITH LAWS

Contractor and its employees, agents, and Subcontractors performing the Work must at all times comply with all applicable local, state, federal laws, ordinances, statutes, and regulations in effect at the time Work is performed, including without limitation the federal requirements contained in the Request for Proposals attached as Exhibit A. Contractor must indemnify and hold harmless WETA from and against any and all claims or expenses caused or occasioned directly or indirectly by its failure to so comply.

36. NON-WAIVER

WETA's failure to insist in any one or more instances upon the Contractor's performance of any term or condition of the Contract will not be construed as a waiver or relinquishment of WETA's right to such performance, or to future performance, of such term or condition by the Contractor, and the Contractor's obligation for performance of that term or condition will continue in full force and effect.

37. APPLICABLE LAW, JURISDICTION, AND VENUE

All matters relating to the performance of this Contract will be controlled by and determined in accordance with the laws of the State of California. Venue for all legal proceedings arising out of this Contract, or breach of this Contract, will be in the state or federal court with competent jurisdiction in San Francisco, California.

38. RIGHTS AND REMEDIES

The rights and remedies of the parties provided herein are not exclusive and are in addition to any other rights and remedies provided by law or under the Contract.

39. ASSIGNMENT

The Contractor will not assign any interest, obligation, or benefit under or in the Contract or transfer any interest in the Contract, whether by assignment, or novation, without prior written consent of WETA. If assignment is approved, the Contract will be binding upon and inure to the benefit of the successors of the Contractor. Any attempt by the Contractor to assign any interest in the Contract without WETA's prior written consent will be null, void, and of no effect whatsoever.

40. SUCCESSION

This Contract is binding on the parties, their successors, and assigns.

41. ATTORNEYS' FEES

If any legal proceeding should be instituted by either of the parties to enforce the terms of this Contract or to determine the rights of the parties under this Agreement, the prevailing party in said proceeding will recover, in addition to all court costs, reasonable attorneys' fees.

42. NO THIRD PARTY BENEFICIARIES

This Agreement is not for the benefit of any person or entity other than the Parties.

43. WETA WARRANTIES

WETA makes no warranties, representations or agreements, either express or implied, beyond such as are explicitly stated in this Agreement. In carrying out any of the provisions of the Contract or their duties to WETA, WETA's employees and agents will incur no personal liability under this Contract.

44. CONTRACTOR STATUS

Neither the Contractor nor any party contracting with the Contractor will be deemed to be an agent or employee of WETA. The Contractor is and will be an independent contractor, and the legal relationship of any person performing services for the Contractor will be one solely between that person and the Contractor.

45. HEADINGS, COMPLETE CONTRACT, AND SEVERABILITY

The section headings in this Contract are for reference purposes only and do not affect in any way the meaning or interpretation of this Contract. If any provision of this Contract is deemed invalid or unenforceable, that provision is reformed and/or construed consistently with applicable law as nearly as possible to reflect the original intentions of this Agreement, and in any event, the remaining provisions of this Contract remain in full force and effect.

This Contract, including exhibits and other documents incorporated in this Contract or made applicable by reference, constitutes the complete and exclusive statement of the terms and conditions of the Contract between the Contractor and WETA. This Contract supersedes all prior representations, understandings, and communications.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their authorized representatives on the dates shown below.

FOR WETA:

By:

Title

ATTEST:

By:

FOR THE CONTRACTOR*:

By:

Title:

By:

Title:

APPROVED AS TO FORM:

By:

Attorney for WETA

*If the Contractor is a corporation, this Agreement must be executed by two corporate officers, consisting of: (1) the president, vice president or chair of the board; and (2) the secretary, assistant secretary, chief financial officer or assistant treasurer. In the alternative, this Agreement may be executed by a single officer or a person other than an officer provided that evidence satisfactory to WETA is provided demonstrating that such individual is authorized to bind the corporation or LLC (e.g. a copy of a certified resolution from the corporation's or LLC's board or a copy of the corporation's bylaws or LLC's operating agreement.)