

**COMPENSATION & PAYMENT PROVISIONS (FIRM FIXED PRICE)**

**Note:**

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

**CP-01 BASIS OF COMPENSATION \***

Contractor will be paid the Contract Price in accordance with the following Articles, the Payment Schedule in the Article entitled COMPENSATION in the Form of Contract and all other applicable terms and conditions of the Contract.

**CP-02 PROGRESS PAYMENTS**

A. Applicability

This Article applies only if the Payment Schedule in the Contract provides for Progress Payments.

B. Definition

A Progress Payment is a payment of a portion to the Contract Price for partial completion of the Work based upon the Payment Schedule.

C. Application for Progress Payment

Contractor's Applications for Progress Payments ("Applications") shall contain:

1. The original and two copies of the invoice, dated and identifying the Contract Number;
2. A description of the Work completed;
3. Any other documentation Metro requires to process the Progress Payment;
4. The Contractor's signature and certification that the Work has been performed in accordance with the Contract, using the form attached hereto as Attachment 1; and
5. Signature of Metro's Authorized Representative acknowledging that the Work described in the Application has been done in accordance with the Contract.
6. Certification for Request for Payment attached as Exhibit 1

D. Terms of Payment

1. Contractor shall submit the Application to Metro, based on the Payment Schedule, not later than the 25<sup>th</sup> day of each month.

2. Metro will make Progress Payments within thirty (30) days after it's receipt of an undisputed and properly submitted Application. Upon receipt of an Application, Metro shall:
  - a. Review the Application to determine if it is complete and meets Contractual requirements.
  - b. Return any Application that is not complete or does not meet Contractual requirements, setting forth in writing the reasons for the determination.
  - c. No Progress Payments shall be made for Work not performed in accordance with the Contract.

## **CP-03      RETENTIONS, ESCROW ACCOUNTS AND DEDUCTIONS**

### **A. Applicability**

Except for the Section herein entitled Additional Deductions, this Article applies only if (1) the Payment Schedule in the Contract provides for Progress Payments, as described in the Article herein entitled Progress Payments, and (2) a portion of each Progress Payment will be retained by Metro.

### **B. Retention**

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

### **C. Substitution of Securities**

To ensure performance under the Contract, the Contractor may, at its sole expense, substitute securities equivalent to the retention withheld by Metro. Such securities shall be deposited with an escrow agent approved by Metro, who shall then pay such retention to the Contractor. Upon satisfactory completion of the Contract, the securities shall be returned to the Contractor. The Contractor shall be the beneficial owner of any security substituted for monies withheld and shall receive any accrued interest thereon. Securities eligible for investment shall include those listed in Government Code §16430, bank or savings and loan certificates of deposit, interest bearing demand deposit accounts, standby letters of credit, or any other security mutually

agreed to by the Contractor and Metro. No such substitution shall be accepted until the Escrow Agreement, securities, and any other documents related to the substitution are reviewed and accepted in writing by Metro.

D. Payment to Escrow Agent

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

E. Release of Retention

Release of retention shall be in accordance with the Article herein entitled FINAL PAYMENT.

F. Additional Deductions

Metro may deduct from each Progress Payment any or all of the following:

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

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

**CP-04 PAYMENT TO SUBCONTRACTORS \***

A. Applicability

This Article applies only if the Contractor has employed Subcontractors.

B. Requirements

1. Progress Payments - Contractor shall pay each Subcontractor under this Contract for satisfactory performance of its Subcontract no later than ten (10) days after its receipt of each Progress Payment from Metro.
2. Final Payment to Subcontractors - The Contractor shall pay to each Subcontractor all amounts it has retained from payments under the Subcontract within ten (10) days after the Subcontractor's Work is satisfactorily completed.
3. Delay in Payment – Contractor shall not delay payment beyond the ten (10) day time limit except for good cause, and only upon the prior written approval of Metro.

C. Failure to Comply

If Metro determines that the Contractor has failed to comply with this Article, Metro may give written notice to the Contractor and the Contractor's Surety describing the default, that the default shall be cured, and if the default is not cured as provided the Article entitled TERMINATION FOR DEFAULT in the GENERAL CONDITIONS of this Contract, the Contract may be terminated for default as provided therein, or Metro may exercise any other remedy it has under the Contract or Law.

**CP-05 PAYMENT OF TAXES \***

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

**CP-06 FINAL PAYMENT \***

A. Final Acceptance

After Final Acceptance of the Work, as provided in the General Conditions of this Contract, Final Payment will be made as follows:

1. Prior to Final Acceptance of the Contract, as provided in the General Conditions of this Contract, the Contractor shall prepare and submit an Application for Final Payment to Metro including:
  - a. The proposed total amount due the Contractor, segregated by items on the Payment Schedule, Amendments, Change Orders, and other bases for payment;
  - b. Deductions for prior Progress Payments;
  - c. Amounts retained;
  - d. List of Claims the Contractor is filing concurrently with the Application for Final Payment, or a statement that no Claims will be filed with the Application for Final Payment; and
  - e. List of pending unsettled Claims, stating claimed amounts.
2. Prior Progress Payments shall be subject to correction in Metro's review of the Application for Final Payment. Claims filed with the Application for Final Payment, or at any time thereafter prior to Final Payment, must be otherwise timely under the Contract and applicable Law.
3. Metro will review the Contractor's Application for Final Payment will forward any required changes or corrections to the Contractor. Within ten (10) days after receipt of required changes from Metro, the Contractor will make the changes, and, if applicable, list Claims that will be filed as a result of the required changes, and shall submit the revised Application for Final Payment. Upon acceptance by Metro, the revised Application for Final Payment will become the approved Application for Final Payment.
4. If no Claims have been filed with the initial or any revised Application for Final Payment and no Claims remain unsettled within thirty (30) days after Final Acceptance of the Work by Metro, and agreements are reached on all issues regarding the Application for Final Payment, Metro, in exchange for an executed release, satisfactory in form and substance to Metro, will pay the entire sum found due on the approved Application for Final Payment, including the amount, if any, allowed on settled Claims.
5. The release from the Contractor shall be from any and all Claims arising under the Contract, except for Claims that with the concurrence of Metro are specifically reserved, and shall release and waive all unreserved Claims against Metro and its officers, directors, employees and Authorized Representatives. The release shall be accompanied by a certification by the Contractor that:
  - a. It has resolved all Subcontractor, Supplier and other Claims that are related to the settled Claims included in the Final Payment;

- b. It has no reason to believe that any party has a valid Claim against the Contractor or Metro which has not been communicated in writing by the Contractor to Metro as of the date of the Certificate;
  - c. All warranties are in full force and effect; and
  - d. The releases and warranties shall survive final payment.
6. If any Claims remain open, Metro may make final Payment subject to resolution of those Claims. Metro may withhold from the Final Payment an amount not to exceed one hundred fifty percent (150%) of the amount of the open Claims.

**B. Discovery of Deficiencies \***

Notwithstanding Metro's acceptance of the Application for Final Payment and irrespective of whether it is before or after Final Payment has been made, Metro shall not be precluded from subsequently showing that:

- 1. The true and correct amount payable for the Work is different from that previously accepted;
- 2. The previously accepted Work did not conform to the Contract requirements; or
- 3. A previous payment, or portion thereof, for Work was improperly made.

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

**CP-07      AUDIT REQUIREMENTS \***

**A. Applicability**

This Section applies to the Contractor, its Subcontractors and Suppliers. The Contractor, its Subcontractors and Suppliers shall be subject to audit at any reasonable time by the Authorized Auditors for;

- 1. Any Costs proposed for a Modification, or
- 2. Defective Cost or pricing on the Contract including any Modification.

**B. Defined Terms**

**Audit:** audit, examine, verify, review, excerpt, vouch or transcribe Contractor's, Subcontractors' or Suppliers' Records.

**Authorized Auditors:** Metro employees, any firms appointed by Metro or other authorized agencies acting as agents of a Governmental Entity. For federally funded Contracts, Authorized Auditors shall also include the FTA

Administrator, the Comptroller General of the United States, or any of their duly authorized representatives.

**Costs:** Amounts (both direct and indirect) claimed to be due and payable, or anticipated to be incurred in performing the proposed Modification.

**Records:** All of the Contractor's, Subcontractors' or Suppliers' Cost or pricing data supporting the Modification or Element thereof, including but not limited to books, data, Records, documents, reports, computations and projections, accounting procedures and practices and other evidence, in all forms (e.g. paper or machine readable media such as disk, tape, etc.) or types (e.g., databases, applications software, database management software, utilities, etc.), sufficient to properly reflect the performance of the Work and all Costs claimed to have been incurred or anticipated to be incurred in performing the Work on a proposed Modification. Any information provided by the Contractor, Subcontractor or Supplier on machine-readable media shall be provided in a format accessible and readable by the Authorized Auditors. The detail and depth of Records required as backup support for Audits shall be that which adequately establishes and maintains visibility of both allowable, and identified unallowable costs including directly associated costs.

**Reproduce:** copy, download, transcribe, print etc. by any means whatsoever free of charge.

C. Access

1. Records

Upon reasonable written advance notice to the Contractor, Subcontractors or Suppliers, with a copy sent to the Contractor's Authorized Representative, the Authorized Auditors shall have access during Contractor's normal business hours to all Records related to Costs or performance of the proposed Modification for the purpose of Auditing.

2. Worksites

For any federally funded major capital project, the Authorized Auditors shall include the FTA Administrator or his authorized representatives including any PMO Contractor. Access shall include the Worksite.

D. Records Retention

The Contractor, Subcontractors and Suppliers shall maintain all Records required under this Contract for a period of not less than three years after the date of Termination, in whole or in part or Final Payment, whichever is later. In the event of litigation or settlement of claims arising from the performance of this Contract, the Contractor, Subcontractor and Suppliers shall maintain all Records related to this Contract until Metro or any Governmental Agency or their duly authorized representatives have disposed of all such litigation, appeals, claims or exceptions related thereto.

E. Reproduction of Records

The Authorized Auditors shall have the right to Reproduce any Contractor, Subcontractor or Supplier Records related to Costs proposed for a Modification. The Contractor, Subcontractor or Supplier shall make said evidence (or to the extent accepted by the Authorized Auditors, photographs, micro-photographs or other authentic reproductions thereof) available to the Authorized Auditors at the Contractor's offices at all reasonable times and without charge.

F. Modifications

The Contractor, Subcontractors or Suppliers shall maintain and segregate Cost and pricing data and Records sufficient to properly reflect all direct and indirect Costs of whatever nature claimed to have been incurred or anticipated to be incurred in connection with a Modification to the Contract.

G. Defective Cost and Pricing Data

FAR 52-215-10 Price Reduction for Defective Cost or Pricing Data and 52.215-11 Price Reduction for Defective Cost or Pricing Data-Modifications shall apply to this Contract. The term Government referred to in the FAR clauses shall include Metro for purposes of this Contract.

H. Disposition of Audit Findings

The Contracting Officer may use all evidence in the Records including the Audit findings to:

1. Negotiate Modifications, or
2. Demand payment from the Contractor or adjust any Contractor's invoice to:
  - a. Reduce amounts found by the Contracting Officer to be unallowable costs; or
  - b. Adjust for prior overpayments or underpayments.

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

**EXHIBIT 1 - PAYMENT CERTIFICATION**

1. I hereby certify to the best of my knowledge and belief that:
  - A. This Payment Request represents a true and correct statement of the Work performed;
  - B. The Work completed to date under this Contract is in full accordance with the terms of the Contract; and
  - C. All Subcontractors and/or Suppliers who have performed Work on the project through the closing date of the prior Payment Request have been paid their proportionate share of all previous payments from Metro.
  
2. I understand that it is a violation of both the federal and California False Claims Acts to knowingly present or cause to be presented to Metro a false claim for payment or approval. A claim includes a demand or request for money. It is also a violation of the False Claims Acts to knowingly make use of a false Record or statement to get a false claim paid. The term "knowingly" includes either actual knowledge of the information, deliberate ignorance of the truth or falsity of the information, or reckless disregard for the truth or falsity of the information. Proof of specific intent to defraud is not necessary under the False Claims Acts. I understand that the penalties under the Federal False Claims Act and State of California False Claims Act are non-exclusive, and are in addition to any other criminal and/or civil remedies which Metro may have either under contract or law.

I certify under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct

Firm: \_\_\_\_\_

Signature: \_\_\_\_\_

Name of Certifying Official: \_\_\_\_\_

Title: \_\_\_\_\_

Date of Execution: \_\_\_\_\_

**END OF COMPENSATION & PAYMENT PROVISIONS**

