





# CITY AND BOROUGH OF SITKA

A COAST GUARD CITY

## MEMORANDUM

**To:** Mayor Eisenbeisz and Assembly Members

**Thru:** John Leach, Municipal Administrator 

**From:** Ron Vinson, Public Works Director 

**Date:** October 27, 2023

**Subject:** Approve Additional Match Funding for Seawalk Phase II

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### **Background**

Phase II of the Sitka Seawalk includes extending the existing Seawalk from the Sitka Public Library toward (and under) O'Connell Bridge and terminating at the West end of Lincoln Street at the intersection with Harbor Way. Funding for this project has been made available through a Western Federal Lands (WFL) grant award covering 90.97% of the project. The grant award requires the City and Borough of Sitka (CBS) and the Alaska Department of Transportation (ADOT) to provide a match contribution to fund the remaining 9.03% of the total project cost.

CBS appropriated match funding to date includes funding from both the General Fund and Commercial Passenger Vessel Excise Tax (CPV) Fund in the total amount of \$285,000. However, in response to inflationary costs, the Memorandum of Agreement (MOA) associated with the grant funding, has been recently amended to include an increased projected total cost of \$4,926,918.07. This projected increase in overall project cost has, in turn, increased the required match amount from \$285,000 to \$354,226.53. In addition to the increased match amount, and to provide contingency against further inflationary volatility, a 25% contingency is suggested.

To satisfy the obligatory match for this project, and fund the 25% contingency, an additional \$157,783.16 will need to be appropriated from the CPV Fund.

### **Fiscal Note**

- **Current Authorized Budget**
  - Prior year authorized budget is \$153,060 (from CPV funding), \$5,000 from General Fund for a total of \$158,060
  - During the FY24 budget \$126,940 was added.
  - Total current project budget of **\$285,000**

- **Current Requested Matching Funds**
  - The amendment has CBS funding \$354,226.53
  - Add 25% contingency, for a total of **\$442,783.16**
- **Total Additional Amount Requested**
  - $\$442,783.16 - \$285,000 = \mathbf{\$157,783.16}$ , transferred from CPV Fund

### **Recommendation**

It is recommended that the requested additional funding, in the amount of \$157,738.16, be appropriated from the CPV Fund to ensure that the CBS is able to meet it's 9.03% grant match obligation.

Encl: Federal Lands Access Program Project Memorandum of Agreement Amendment  
0001

# **Federal Lands Access Program**

## **Project Memorandum of Agreement**

### **Amendment 0001**

**Project / Facility Name:** AK SITKA 2017(1), Sitka Sea Walk Phase II

**Project Route:** Sitka Sea Walk

**State:** Alaska

**County(ies):** City and Borough of Sitka

**Owner of Federal Lands to which the Project Provides Access:** Sitka National Historical Park

**Entity with Title or Maintenance Responsibility for Facility:** City and Borough of Sitka and the Alaska Department of Transportation and Public Facilities

**Type of Work:** Preliminary Engineering, NEPA, utilities and construction and construction administration

This Agreement does not obligate (commit to) the expenditure of State or Federal funds nor does it commit the parties to complete the project. Rather, this agreement sets forth the respective responsibilities as the project proceeds through the project development process and construction.

This agreement replaces Federal Lands Access Program Match Agreement, dated 6/24/2018, between Federal Highway Administration, the Western Federal Lands Highway Division (WFL), the Alaska Department of Transportation and Public Facilities (DOT&PF) and the City and Borough of Sitka (CBS).

**Parties to this Agreement:** DOT&PF, CBS, and WFL.

The Program Decision Committee approved this project on 6/26/2014. The DOT&PF selected this project for Construction funding in 2016 through the Transportation Alternatives Program (TAP).

**AGREED:**

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Department of Transportation and Public Facilities

Date

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City and Borough of Sitka

Date

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Western Federal Lands Highway Division, FHWA-WFL

Date

#### **A. PURPOSE OF THIS AGREEMENT:**

This agreement documents the intent of the parties and sets forth the anticipated responsibilities of each party in the development, construction, and future maintenance of the subject project. The purpose of the Agreement is to identify and assign responsibilities for environmental analysis, surveying, design, right-of-way mapping, appraisal and acquisition, utility relocation, contract advertisement, construction and construction administration as appropriate for this project, and to ensure maintenance of the facility for public use if improvements are made. The parties understand that any final decision as to design or construction alternatives will not be made until after the environmental analysis required under the National Environmental Policy Act (NEPA) is completed (this does not prevent the parties from assigning proposed design criteria to be studied in the NEPA process.) Any decision to proceed with the design and construction of the project will depend on the availability of appropriations at the time of obligation and other factors such as issues raised during the NEPA process, a natural disaster that changes the need for the project, a change in Congressional direction, or other relevant factors.

If Federal Lands Access Program (FLAP) and Transportation Alternative Program (TAP) funds are used for the development or construction of this project, the CBS agrees to provide a matching share equal to 9.03% of the total cost of the project funded with FLAP and/or TAP, as detailed in Section J below. Separate agreements will be executed to obligate funds between agencies. No reimbursement will be made for expenses incurred prior to execution of the obligating document.

#### **B. AUTHORITY:**

This Agreement is entered into between the signatory parties pursuant to the provisions of 23 U.S.C. 204, Alaska Statute 44/42.020 and the CBS's Resolution 2014-5.

#### **C. JURISDICTION AND MAINTENANCE COMMITMENT:**

The DOT&PF has jurisdictional authority to operate in the adjacent existing facility and the project is within the right-of-way. The CBS will maintain the facility upon completion of the project through a separate maintenance agreement with DOT&PF. The separate maintenance agreement shall require CBS to indemnify and hold harmless DOT&PF for any and all damages, costs and fees, including attorney fees and expert fees, incurred by DOT&PF for enforcing the maintenance agreement.

#### **D. FEDERAL LAND MANAGEMENT AGENCY COORDINATION:**

The CBS has coordinated project development with the National Park Service. The National Park Service support of the project is documented in the Project Proposal by endorsing the proposal.

Each party to this agreement who has a primary role in NEPA, design or construction should coordinate their activities with the National Park Service.

## **E. PROJECT BACKGROUND / SCOPE:**

### **General:**

The Sitka Sea Walk Phase I was completed in 2013 from Harrigan Centennial Hall and Crescent Lightering Facility to the Sitka National Historical Park boundary. Phase II was approved for funding through both the FLAP and TAP Programs in 2016. Phase II will complete the planning, and design, ~~and construction~~ for the Sea Walk from the Sitka Public Library to the O'Connell lightering facility with a connector to Lincoln Street, downtown shopping and Totem Square. Construction will consist only of Segment 2 from O'Connell Bridge Approach to O'Connell Lightering Facility due to inflation causing reduction in scope. The other segments of work will be constructed at a later date through the City and Borough of Sitka. Phase II of the Sea Walk, once constructed, will link the Phase I project with downtown Sitka, thus increasing the use levels and functionality of the entire pathway.

The proposed project would begin at approximate coordinates 57.0491, -135.3393 at Lincoln Street and would end at approximate coordinates 57.0498, -135.3338 at the Sitka Public Library.

The project has been broken into three segments. These segments are:

- Segment 1 – Sitka Public Library to O'Connell Bridge Approach – **planning and design only**
- Segment 2 – O'Connell Bridge Approach to O'Connell Lightering Facility – **planning, design and construction**
- Segment 3 – O'Connell Lightering Facility to Totem Square and Lincoln Street – **planning and design only**

A scoping effort estimated the cost to construct the Project, inclusive of all three sections, exceeded the funding available. These findings are summarized in the AK SITKA 2017(1): Sitka Sea Walk Phase II Scoping Reports dated January 23, 2020, and September 24, 2020. The scope of the sea walk was re-examined to prioritize the sections of the Project. Section 2 was determined to be the highest priority.

In the case that the preliminary construction estimate exceeds the project budget, the CBS has provided the following list of priorities to assist in determining which components are of significance and which can be compromised. The following is listed in order of decreasing importance.

- Design of all 3 sections
- Construction of Section 2
- Maintain full 8-foot width
- Maintain “look and feel” of Sea Walk Phase I
- Safety lighting as sea walk wraps around O'Connell Bridge in Section 2
- Opportunity for scenic lookouts and interpretive signage

#### **F. PROJECT BUDGET:**

The available budget for the project is **\$4,926,918**, as summarized in the table below. The project is funded with FLAP funds, TAP funds, earmark funds and match funds provided by the CBS and DOT&PF. Due to the limited available budget, the project will be designed in its entirety, however, only Segment 2 of the project will be constructed.

<b>Item</b>	<b>Total</b>	<b>Comments</b>
Project Scoping and Stewardship and Oversight (PE)	<b>\$105,000.00</b>	This will be performed by WFL
Coordination Efforts	<b>\$150,458.39</b>	This is performed by CBS
Preliminary Engineering including scoping and NEPA (PE)	<b>\$910,000.00</b>	Verify at preliminary phase and update as needed.
Construction (CN) and Construction Engineering (CE)	<b>\$3,410,376.74</b>	Verify at preliminary phase and update as needed.
Contingency (Cong)	<b>\$351,082.94</b>	Reserved for design or construction phase.
<b>TOTAL</b>	<b><b>\$4,926,918.07</b></b>	

#### **G. ROLES AND RESPONSIBILITIES:**

##### The Alaska Department of Transportation and Public Facilities

- Will be responsible for project activities identified in Section P.
- Will appoint a primary contact.
- Will provide appropriate match as outlined in Section J.
- Will complete NEPA per the Statewide Agreement.
- Will be responsible for the acquisition of any rights-of-way and/or easements necessary to complete the project in accordance with the Uniform Relocation Assistance and Real Properties Acquisition Policies Act of 1970 and the Uniform Relocation Act Amendments of 1987.
- Will be responsible for the relocation of any utilities necessary to complete the project in accordance with 23 CFR PART 645.103; any applicable reimbursement to the utility company will be governed by State and federal Laws and regulations, or Occupancy Permits.
- Will discuss any design changes that deviate from the scope of work listed in Section E.
- Will provide all Project Development Authorization (PDA) request to CBS for project tracking.
- Submit each proposed design increase or construction change order of \$50,000 or more to the CBS and WFL for review and comment prior to commencement of the work covered by the change order and note if approval may result in the WFL exceeding their funds available or the overall match budgeted for the project. The project manager may approve Interim Work Authorizations (IWA) for amounts less than \$50,000 and will provide the CBS with a copy of any such IWA.
- Upon completion of construction, will provide copies of final inspection demonstrating the project has been constructed in substantial conformity with the approved plans and

specifications. The DOT&PF will provide written confirmation of its final acceptance of the constructed project.

- Will be responsible for terms and conditions as noted in 2 CFR 200 Common Rule Requirements & other legal requirements contained in Attachment 1.

#### The City and Borough of Sitka

- Will be responsible for project activities as identified in Section P.
- Will provide appropriate match as outlined in Section J.
- Will appoint a primary contact for the DOT&PF's Project Manager and WFL's Project Manager.
- Authorize the DOT&PF and its contractors on the Project to conduct any necessary work within the CBS road rights-of-way and provide the DOT&PF with construction easements and such other interests as required to meet federal right-of-way certification requirements.
- Except as otherwise expressly stated in this MOA, review all other information and action items from DOT&PF and provide any necessary responses within 14 calendar days of receipt. Failure to respond is considered acceptance of any proposed action items.
- Timely recommend approval or rejection of any change order that may exceed \$50,000 or more; in no instance shall the CBS's recommendation be more than 10 calendar days after DOT&PF's delivery of the proposed change order and all supporting documents to the CBS's authorized representative. If the CBS intends to recommend rejection of any proposed change order that DOT&PF finds necessary for the completion of the Project, within 7 calendar days of the DOT&PF's delivery of the proposed change order the CBS shall provide an alternative change order proposal—which may include reduction of the Project scope of work—that would allow timely completion of Project. At the time of the CBS's recommended approval or recommended alternative proposal, the CBS must transfer local match funding to WFL to cover any change order costs.
- Within 10 calendar days of receipt of DOT&PF's notice of substantial completion of each phase of the Project advise DOT&PF of their acceptance of completion of each phase. If the CBS contests the substantial completion of a phase of the Project, it shall provide DOT&PF in writing of its objections within the same 10 calendar day period. If the CBS fails to contest the substantial completion of a Project phase and fails to accept the substantial completion of a phase within 10 calendar days, the phase is deemed accepted. The CBS will maintain the facility upon completion of the improvements.
- Enter into a separate Maintenance Agreement with DOT&PF committing to provide all maintenance and operations activities for the life of the facility at the CBS sole cost and expense. The CBS acceptance of the continuing maintenance of the project and its signature on the Maintenance Agreement are conditions precedent to obligation of FLAP and TAP funding and DOT&PF's responsibilities hereunder.

#### FHWA-WFL

- Will be responsible for stewardship and oversight activities as noted in Section P, including managing the overall budget of the project.
- Will make budget available quarterly to CBS upon request.
- Will be responsible for WFL decisions that may not be delegated. These decisions are identified in Section P.

#### H. ROLES AND RESPONSIBILITIES – MILESTONE SCHEDULE:

Responsible Lead	Product/Service	Schedule Start/Finish
DOT&PF	60% Design	October 2022 / January 2023
DOT&PF	NEPA documentation	November 2022 / July 2023
DOT&PF	NEPA Decision	July 2023
DOT&PF	95% PS&E	September 2023
DOT&PF	Advertise/Award	October 2023 / November 2023
DOT&PF	Construction	February 2024 / April 2024

#### I. PROPOSED DESIGN STANDARDS:

Preferred design alternatives will be determined through the NEPA process.

Criteria		Comments
Standard	AASHTO Guide For The Planning, Design And Operation Of Pedestrian Facilities	
Functional Classification	Sidewalk	
Surface Type	Concrete or Asphalt	

Design exceptions to standards will be documented through the DOT&PF's process. Design exceptions to standards, will be documented and sent to the CBS and WFL for concurrence.

#### J. FUNDING:

The project is funded by the FLAP administered by WFL, the TAP administered by the DOT&PF and Earmark funds also administered by the DOT&PF with matching funds provided by the CBS and DOT&PF. All funding will be sent to WFL for budget management and then transferred to the DOT&PF for project delivery.

Phase	FLAP, TAP and Earmark Funds			Total
	To FHWA	To DOT&PF	To CBS	Total
PE	\$105,000.00	\$910,000.00	\$100,000.00	\$1,115,000.00
CN/CE	\$0.00	\$3,410,376.74	\$50,458.39	\$3,460,835.13
Cong	\$0.00	\$351,082.94	\$0.00	\$351,082.94
Total	\$105,000.00	\$4,671,459.68	\$150,458.39	\$4,926,918.07



Type of Funding	Amount	Required Match	Total
FLAP	\$773,245.00	\$76,755.00	\$850,000.00
TAP – 2017	\$1,360,000.00	\$134,998.35	\$1,494,998.35
TAP – 2023	\$2,026,608.00	\$201,168.18	\$2,227,776.18
Earmark	\$354,143.54	No Match required	\$354,143.54
Total	\$4,513,996.54	\$412,921.53	\$4,926,918.07

Agency	Amount of Match Provided
CBS	\$153,058.35
CBS (for TAP – 2023)	\$201,168.18
DOT&PF	\$58,695.00
Total	\$412,921.53

#### **K. MATCHING SHARE REQUIREMENTS:**

The purpose of this section is to document the intent of the City and Borough of Sitka to meet its match requirement for the subject project as authorized under section 23 USC 201(b)(7)(B). All FLAP and TAP expenditures associated with this project will need to be matched by a Non-Federal source, by other Federal funds other than those made available under Titles 23 and 49 of the United States Code, or by funds made available under 23 U.S.C. 202 and 203. The matching requirement under the FAST Act will be met by the CBS and DOT&PF.

The CBS and DOT&PF have committed to the project. The forms of match shall be those consistent with the 'Federal-Aid Guidance Non-Federal Matching Requirements' and as approved by WFL. In the State of Alaska, 9.03% of the total project cost.

This project is authorized to use a Tapered Match. Under this approach, the non-Federal match is imposed over the entire project rather than individual progress payments. Timing of all fund transfers are specified in the Funding Plan. Tapered Match is authorized because it will result in an earlier completion date.

Estimated costs and fiscal year (FY) for the funding are based on the best budgeting and scheduling information known at the time. The final match will be determined based on actual expenditures at the conclusion of project work. Matching cash funds in WFL receipt may need to be supplemented, or returned, once actual expenditures are determined. As noted under Modifications, if costs increase over the amount within this agreement, WFL will consult with the agency providing Match before granting approval.

All parties must maintain all project records, including source documentation for all expenditures and in-kind contributions, for a period of three (3) years from the date of final acceptance. If any litigation claim, negotiation, or audit has been started before expiration of the three-year period, the records shall be retained until completion of the action and resolution of all issues that arise from it.

The following agencies have agreed to contribute the amounts shown which will reduce the federal share by the same amount. The Funding Plan is as follows:

Agency	Phase	Form	Due	Value	Comments
CBS	Scoping/PE	CASH	12/09/2020	\$9,030.00	Provided
CBS	PE/CE	In-Kind	12/31/2024	\$150,458.39	Provide through Coordination
CBS	CE/CN	CASH	09/01/2023	\$194,738.14	
DOT&PF	CN	CASH	01/01/2022	\$58,695.00	

**L. PROJECT TEAM MEMBERS – POINT OF CONTACT:**

The following table provides the points of contact for this project. They are to be the first persons to deal with any issues or questions that arise over the implementation of each party's role and responsibility for this agreement.

Name & Title	Organization	Telephone No. & Email
Mike Harmon, PE Municipal Engineer	CBS	907-747-1804 Mike.harmon@cityofsitka.org
Samantha Shields, Program Manager	WFL	360-619-7847 Samantha.Shields@dot.gov
Loren Gehring, Project Manager	AKDOT&PF	907-465-8189 Loren.gehring@alaska.gov

**M. CHANGES / AMENDMENTS / ADDENDUMS:**

The agreement may be modified, or addended by mutual agreement of all parties. The change, amendment, or addendum must be in writing and executed by all parties.

The types of changes envisioned include, but are not limited to, changes that significantly impact scope, schedule, or budget; changes to the local match, either in type or responsibility; changes that alter the level of effort or responsibilities of a party. The parties commit to consider suggested changes in good faith. Failure to reach agreement on changes may be cause for termination of this agreement.

A change in composition of the project team members does not require the agreement to be amended.

It is the responsibility of the project team members to recognize when changes are needed and to make timely notifications to their management in order to avoid project delivery delays.

#### **N. ISSUE RESOLUTION PROCEDURES MATRIX:**

Issues should be resolved at the lowest level possible. The issue should be clearly defined in writing and understood by all parties. Escalating to the next level can be requested by any party. When an issue is resolved, the decision will be communicated to all levels below.

<b>WFL</b>	<b>CBS</b>	<b>AKDOT&amp;PF</b>	<b>Time</b>
Samantha Shields Program Manager Samantha.Shields@dot.gov 360-619-7847	Michael Harmon Municipal Engineer michael.harmon@cityofsitka.org 907-747-1804	Loren Gehring Project Manager loren.gehring@alaska.gov 907-465-8189	15 Days
Kristin Austin Programming and Planning Branch Chief kristin.austin@dot.gov 360-619-7619	John Leach Municipal Administrator administrator@cityofsitka.org 907-747-1812	Kirk Miller Preconstruction Engineer kirk.miller@alaska.gov 907-465-1215	15 Days

#### **O. TERMINATION:**

This agreement may be terminated by mutual written consent of all parties. This agreement may also be terminated if either the NEPA process or funding availability requires a change and the parties are not able to agree to the change. Any termination of this agreement shall not prejudice any rights or obligations accrued to the parties prior to termination. If Federal access funds have been expended prior to termination, the party responsible for the match agrees to provide a match in the applicable percentage of the total amount expended on the project prior to the termination.

**P. PROJECT and STEWARDSHIP & OVERSIGHT ACTIVITIES:**

Phase	Activity	DOT&PF	CBS	WFL
Planning & Programming	Funds Management	Provide Match	Provide Match	Lead
Planning & Programming	Confirmed Scope, Schedule, and Estimate through Project Agreement	Concur	Concur	Provide - Provide preliminary scoping report
Environment	Lead Federal agency identified	Lead	Concur	Provide Tribal Consultation if needed
Environment	Draft Environmental resource documents/ studies	Provide	File copy	File copy
Environment	Evidence of permits	Provide	File copy	File copy
Environment	FHWA NEPA decision	Provide and Comply	File copy	File copy
Design	Review 60% PS&E	Provide	File copy Concur	File copy
Design	Review 95% PS&E	Provide	File copy Concur	File copy
Design	Design exceptions	Provide	Concur	File copy
Design	Review ROW certifications and acquisition diaries	Provide	File Copy	File copy
Design	Utility / Railroad Agreements	Provide	File copy	File copy
Acquisitions	Approval of proprietary products	Provide	Concur	File copy

Phase	Activity	DOT&PF	CBS	WFL
Acquisitions	Contract package for required clauses (Civil Rights, Davis-Bacon, Buy America/American,...)	Provide	File copy	File copy
Acquisitions	Copy of award package	Provide	File copy	File copy
Acquisitions	Review or approve contract modifications	Review	Concur	File copy
Construction	Attend Pre-Construction meeting	Attend	Attend as determined by CBS	Attend as determined by WFL
Construction	Mid-Construction Project Inspections	Attend	Attend as determined by CBS	Attend as determined by WFL
Construction	Final Project Inspections	Attend	Attend as determined by CBS	Attend as determined by WFL
Construction	Copy of As-builts	Provide	File copy	File copy
Construction	Copy of final voucher	Provide	File copy	File copy
Construction	Contract Dispute (Claim)	Notify	Review	Review/Approve

## **ATTACHMENT 1**

### **2 CFR 200 Common Rule Requirements and other legal requirements**

## A. GENERAL TERMS AND CONDITIONS

Background. To promote accelerated and efficient delivery of projects that benefit Federal Land Management Agencies, the Secretary has exercised his discretion under 23 U.S.C. § 201(a) and § 204(a)(3) to apply Title 23 U.S.C. Chapter 1 requirements (Federal Aid requirements) to Federal Lands Access Projects delivered by State Departments of Transportation (DOTs) and local public agencies that are evaluated and certified by State DOTs to deliver Federal Aid projects. In instances where a local public agency is not certified to deliver Federal-aid projects and Federal Lands Access projects are delivered by the local public agency cooperatively with Federal Lands Highway Division office oversight, the government-wide Common Rule (2 CFR 200) will be applied. This cooperative relationship will enable the FLH to identify any federal law issues in cooperation with the local public agency which may arise in the project development and delivery process.

1. The Agreement provides funds on a reimbursable basis to the Servicing Agency for the project described in the Access Program Project Memorandum of Agreement.
2. The Government's liability to make payments to the Servicing Agency under the Agreement is limited to those funds obligated by the Government under the Agreement as indicated herein and by any subsequent amendments agreed to in writing by all parties.
3. The Servicing Agency agrees to abide by and comply with all terms and conditions of the Agreement and to abide by, and comply with, all requirements of applicable law, including those specified in this Attachment, which are considered as an integral part of the Agreement.
4. In the case of any inconsistency or conflict between the specific provisions of the Agreement and this Attachment, such inconsistency or conflict shall be resolved by giving preference to the Agreement.
5. The Servicing Agency shall be responsible for ensuring that the Project is designed and/or constructed in accordance with the Agreement, and all applicable Federal laws, regulations and policies of the Federal Highway Administration ("FHWA" also referred to herein as the "Government").
6. Reimbursement of costs incurred pursuant to the Agreement will be made pursuant to and in accordance with 2 CFR Part 200 and the provisions of such regulations and procedures as the Government may prescribe. Determination of allowable costs incurred by the Servicing Agency under the Agreement shall be made in accordance with applicable government-wide cost principles under 2 CFR 200. Closeout of the Agreement shall be based upon a determination that all applicable administrative actions and all required work of the Agreement have been completed in accordance with 2 CFR Part 200. Upon the Government's review of all financial, performance, and other reports required as a condition of the Agreement, the Government may make any upward or downward adjustments to the allowable costs in accordance with 2 CFR 200.
7. The Servicing Agency agrees to carry out and complete the Project without undue delays and in accordance with the terms of the Agreement, including the Project Schedule set out in the Agreement, or in the Access Program Project Memorandum of Agreement if no Schedule is included in this Agreement, and comply with such regulations and procedures as the Government may prescribe.
8. The Servicing Agency agrees to retain all documents relevant to the Project for a period of three years from completion of the Project and receipt of final reimbursement from the Government. The Servicing Agency agrees to furnish the Government, upon request, all documents and records pertaining to the Project.

9. The Government is subject to the Freedom of Information Act (FOIA). The Servicing Agency should therefore be aware that all materials submitted by the Servicing Agency related to the Agreement will become agency records and thus are subject to FOIA and to public release through individual FOIA requests.

10. The Government shall not be responsible or liable for any damage to property or any injury to persons that may arise from, or be incident to, performance or compliance with this the Servicing Agency's work under the Agreement. The Government will be responsible for damages or injuries caused by the negligence of its own employees, to the extent permitted under the Federal Tort Claims Act, 28 U.S.C. 2671-2680.

11. To the extent that the State has not already enacted legislation regarding texting while driving, the Government encourages the Servicing Agency to adopt and enforce workplace safety policies to decrease crashes caused by distracted drivers including policies that bar text messaging while driving company-owned or rented vehicles, or government-owned, leased, or rented vehicles or privately-owned vehicles when on official government business or when performing any work for or on behalf of the Government. See Executive Order 13513 "Federal Leadership on Reducing Text Messaging While Driving", Oct. 1, 2009 (available at <http://edocket.access.gpo.gov/2009/E9-24203.htm> ) and DOT Order 3902.10 "Text Messaging While Driving", Dec. 30, 2009, as implemented by Financial Assistance Policy Letter (No. FAP-2010-01, Feb. 2, 2010, available at [http://www.dot.gov/sites/dot.dev/files/docs/FAPL\\_2010-01.pdf](http://www.dot.gov/sites/dot.dev/files/docs/FAPL_2010-01.pdf)) This includes, but is not limited to, the Servicing Agency:

- a. considering new rules and programs or re-evaluating existing programs to prohibit text messaging while driving;
- b. conducting education, awareness, and other outreach for employees about the safety risks associated with texting while driving; and
- c. encouraging voluntary compliance with the agency's text messaging policy while off duty.

The Servicing Agency is encouraged to insert the substance of this clause in all contracts and subcontracts.

## **B. APPLICABLE FEDERAL LAWS AND REGULATIONS**

By entering into the Agreement, the Servicing Agency assures, certifies, and agrees to comply with all applicable Federal laws, regulations, policies, guidelines, and requirements as they relate to the use of Federal funds for this Project including, but not limited to, the following:

### **General Federal Legislation**

- Fair Labor Standards Act - 29 U.S.C. § 201, et seq.
- Hatch Act - 5 U.S.C. §§ 1501, et seq.
- Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 Title - 42 U.S.C. §§4601, et seq.
- National Historic Preservation Act of 1966 – 16 U.S.C. § 470, et seq.
- Archaeological Resources Protection Act – 16 U.S.C. 470aa, et seq.
- Native American Graves Protection and Repatriation Act - 25 U.S.C. § 3001, et seq.
- National Environmental Policy Act of 1969 - 42 U.S.C. §§ 4321, et seq.
- Wild and Scenic Rivers Act, P.L. 90-542, as amended – 16 U.S.C. §§ 1271, et seq.
- Federal Water Pollution Control Act, as amended - 33 U.S.C. §§ 1251-1376
- Clean Air Act – 42 U.S.C. § 7401, et seq.



- Single Audit Act of 1984 - 31 U.S.C. §§ 7501, et seq.
- Americans with Disabilities Act of 1990 - 42 U.S.C. § 12101, et seq.
- Section 504 of the Rehabilitation Act of 1973, as amended - 29 U.S.C. § 794
- Title VI of the Civil Rights Act of 1964 - 42 U.S.C. §§ 2000d *et seq.*
- Limitation on Use of Appropriated Funds to Influence Certain Federal Contracting and Financial Transactions – 31 U.S.C. § 1352
- Magnuson-Stevens Fishery Conservation and Management Act – 16 U.S.C. § 1855
- Farmlands Protection Policy Act of 1981 – 7 U.S.C. 4201
- Noise Control Act of 1972 – 42 U.S.C. § 4901, et seq.
- Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 303 and 23 U.S.C. § 138
- Resource Conservation and Recovery Act of 1976 (RCRA), as amended -- 42 U.S.C. §§ 6901, et seq.
- Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended --42 U.S.C. §§ 9601-9657
- Safe Drinking Water Act -- 42 U.S.C. §§ 300f-300j-6
- Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 – 42 U.S.C. § 6901, et seq.
- Migratory Bird Treaty Act 16 U.S.C. § 760c-760g
- The Federal Funding Transparency and Accountability Act of 2006, as amended (Pub. L. 109–282, as amended by section 6202 of Public Law 110–252)
- Cargo Preference Act of 1954 – 46 U.S.C. § 55305
- Buy America Act – 23 U.S.C. § 313 (see [http://www.fhwa.dot.gov/construction/contracts/buyam\\_qa.cfm](http://www.fhwa.dot.gov/construction/contracts/buyam_qa.cfm))
- Nondiscrimination – 23 U.S.C. § 140

## General Federal Regulations

- Suspension and Debarment – 2 CFR Parts Part 180
- Non-procurement Suspension and Debarment – 2 CFR Part 1200
- External Programs – 23 CFR Part 230
- Manual on Uniform Traffic Control Devices – 23 CFR Part 655
- Environmental Impact and Related Procedures – 23 CFR Part 771
- Procedures for Abatement of Highway Traffic and Construction Noise – 23 CFR Part 772
- Procedures Implementing Section 4(f) of the Department of Transportation Act – 23 CFR Part 774
- DOT's oversight of DOJ's ADA regulations for non-transit programs, including the ADA Accessibility Guidelines, required by the DOJ regulations at – 28 CFR Part 35
- Procedures for predetermination of wage rates – 29 CFR Part 1
- Contractors and subcontractors on public building or public work financed in whole or part by loans or grants from the United States – 29 CFR Part 3
- Labor standards provisions applicable to contracts governing federally financed and assisted construction (also labor standards provisions applicable to non-construction contracts subject to the Contract Work Hours and Safety Standards Act) – 29 CFR Part 5
- Permitting Requirements under the National Pollutant Discharge Elimination System – 40 CFR Part 122.
- Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor (Federal and federally assisted contracting requirements) – 41 CFR Parts 60, et seq.
- Uniform administrative requirements, cost principles, and audit requirements for Federal Awards – 2 CFR Part 200
- New Restrictions on Lobbying – 49 CFR Part 20
- Nondiscrimination in Federally Assisted Programs of the Department of Transportation –Effectuation of Title VI of the Civil Rights Act of 1964 – 49 CFR Part 21
- Uniform relocation assistance and real property acquisition for Federal and Federally assisted programs – 49 CFR Part 24
- Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance – 49 CFR Part 25
- Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs – 49 CFR Part 26
- Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance – 49 CFR Part 27
- Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Department of Transportation – 49 CFR Part 28
- Denial of public works contracts to suppliers of goods and services of countries that deny procurement market access to U.S. contractors – 49 CFR Part 30
- Government-wide Requirements for Drug-Free Workplace (Financial Assistance) – 49 CFR Part 32
- DOT's implementing ADA regulations for transit, including the ADA Accessibility Guidelines in Part 37, Appendix A – 49 CFR Parts 37 and 38
- Procedures for Transportation Workplace Drug and Alcohol Testing Programs – 49 CFR Part 40
- 23 C.F.R. Part 710 applies unless otherwise agreed to by FHWA

The Servicing Agency, when contracting for work to be performed under this Agreement, will include in the prime contract the applicable provisions required under 2 CFR 200.326.

The Servicing Agency, when contracting for construction services, shall ensure that all laborers and mechanics employed by contractors or subcontractors on the construction work shall be paid wages at rates not less than those prevailing on the same type of work on similar construction in the immediate locality as determined by the Secretary of Labor in accordance with sections 3141, 3146, and 3147 of title 40.

## **C. ASSURANCES AND CERTIFICATIONS**

### **TITLE VI ASSURANCE**

**(Implementing Title VI of the Civil Rights Act of 1964, as amended)**

#### **ASSURANCE CONCERNING NONDISCRIMINATION IN FEDERALLY-ASSISTED PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE**

(Implementing the Rehabilitation Act of 1973, as amended, and the Americans With Disabilities Act, as amended)

49 CFR Parts 21, 25, 27, 37 and 38

#### **The United States Department of Transportation (USDOT)**

#### **Standard Title VI/Non-Discrimination Assurances**

#### **DOT Order No. 1050.2A**

By entering into the Agreement, the Servicing Agency (also herein referred to as the “Recipient”), **HEREBY AGREES THAT**, as a condition to receiving any Federal funds from the U.S. Department of Transportation (DOT), through the Federal Highway Administration (FHWA), is subject to and will comply with the following:

#### **Statutory/Regulatory Authorities**

- Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*, 78 stat. 252), (prohibits discrimination on the basis of race, color, national origin);
- 49 CFR Part 21 (entitled *Non-discrimination In Federally-Assisted Programs Of The Department Of Transportation—Effectuation Of Title VI Of The Civil Rights Act Of 1964*);
- 28 CFR section 50.3 (U.S. Department of Justice Guidelines for Enforcement of Title VI of the Civil Rights Act of 1964);

The preceding statutory and regulatory cites hereinafter are referred to as the “Acts” and

“Regulations,” respectively.

### **General Assurances**

In accordance with the Acts, the Regulations, and other pertinent directives, circulars, policy, memoranda, and/or guidance, the Servicing Agency hereby gives assurance that it will promptly take any measures necessary to ensure that:

*“No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity,” for which the Recipient receives Federal financial assistance from DOT, including the FHWA.*

The Civil Rights Restoration Act of 1987 clarified the original intent of Congress, with respect to Title VI and other Non-discrimination requirements (The Age Discrimination Act of 1975, and Section 504 of the Rehabilitation Act of 1973), by restoring the broad, institutional-wide scope and coverage of these non-discrimination statutes and requirements to include all programs and activities of the Servicing Agency, so long as any portion of the program is Federally assisted.

### **Specific Assurances**

More specifically, and without limiting the above general Assurance, the Servicing Agency agrees with and gives the following Assurances with respect to its receipt of funds for this project:

1. The Servicing Agency agrees that each “activity,” “facility,” or “program,” as defined in §§ 21.23 (b) and 21.23 (e) of 49 CFR § 21 will be (with regard to an “activity”) facilitated, or will be (with regard to a “facility”) operated, or will be (with regard to a “program”) conducted in compliance with all requirements imposed by, or pursuant to the Acts and the Regulations.
2. The Servicing Agency will insert the following notification in all solicitations for bids and requests for proposals for work or materials, regardless of funding source:
  - a. *“The Servicing Agency, in accordance with the provisions of Title VI of the Civil Rights Act of 1964 (78 Stat. 252, 42 U.S.C. §§ 2000d to 2000d-4) and the Regulations, hereby notifies all bidders that it will affirmatively ensure that any contract entered into pursuant to this advertisement, disadvantaged business enterprises will be afforded full and fair opportunity to submit bids in response to this invitation and will not be discriminated against on the grounds of race, color, or national origin in consideration for an award.”*
3. The Servicing Agency will insert the clauses of Appendix A of this Assurance in every contract or agreement subject to the Acts and the Regulations.

4. The Servicing Agency will insert the clauses of Appendix B of this Assurance, as a covenant running with the land, in any deed from the United States effecting or recording a transfer of real property, structures, use, or improvements thereon or interest therein to a Recipient.
5. That where the Servicing Agency receives Federal financial assistance to construct a facility, or part of a facility, the Assurance will extend to the entire facility and facilities operated in connection therewith.
6. That where the Servicing Agency receives Federal financial assistance in the form, or for the acquisition of real property or an interest in real property, the Assurance will extend to rights to space on, over, or under such property.
7. That the Servicing Agency will include the clauses set forth in Appendix C and Appendix D of this Assurance, as a covenant running with the land, in any future deeds, leases, licenses, permits, or similar instruments entered into by the Servicing Agency with other parties:
  - a. for the subsequent transfer of real property acquired or improved under the applicable activity, project, or program; and
  - b. for the construction or use of, or access to, space on, over, or under real property acquired or improved under the applicable activity, project, or program.
8. That this Assurance obligates the Servicing Agency or any transferee for the longer of the following periods:
  - a. the period during which the property is used for a purpose for which the Federal funds were extended, or for another purpose involving the provision of similar services or benefits; or
  - b. the period during which the Servicing Agency retains ownership or possession of the property.
9. The Servicing Agency will provide for such methods of administration for the program as are found by the Secretary of Transportation or the official to whom he/she delegates specific authority to give reasonable guarantee that it, other recipients, sub-recipients, grantees, contractors, subcontractors, consultants, transferees, successors in interest, and other parties funded in whole or part from the funds provided under this Agreement will comply with all requirements imposed or pursuant to the Acts, the Regulations, and this Assurance.
10. The Servicing Agency agrees that the United States has a right to seek judicial enforcement with regard to any matter arising under the Acts, the Regulations, and this Assurance.

By signing the Agreement, the Servicing Agency also agrees to comply (and require any sub-recipients, contractors, successors, transferees, and/or assignees to comply) with all applicable provisions governing the FHWA's access to records, accounts, documents, information, facilities, and staff. The Servicing Agency also recognizes that it must comply with any program or compliance reviews, and/or complaint investigations conducted by the FHWA. The Servicing Agency must keep records, reports, and submit the material for review upon request to FHWA, or its designee in a timely, complete, and accurate way. Additionally, the Servicing Agency must comply with all other reporting, data collection, and evaluation requirements, as prescribed by law or detailed in program guidance.

The Servicing Agency gives this ASSURANCE in consideration of and for obtaining any Federal funds, and/or discounts, or other Federal-aid and Federal financial assistance extended after the date hereof to the recipients by the U.S. Department of Transportation.

This ASSURANCE is binding on the Servicing Agency, contractors, subcontractors and their subcontractors', transferees, successors in interest, and any other participants in the funds provided under this Agreement.

#### APPENDIX A

During the performance of this contract, the contractor, for itself, its assignees, and successors in interest (hereinafter referred to as the "contractor") agrees as follows:

1. **Compliance with Regulations:** The contractor (hereinafter includes consultants) will comply with the Acts and the Regulations relative to Non-discrimination in Federally-funded programs of the U.S. Department of Transportation, Federal Highway Administration (FHWA), as they may be amended from time to time, which are herein incorporated by reference and made a part of this contract.
2. **Non-discrimination:** The contractor, with regard to the work performed by it during the contract, will not discriminate on the grounds of race, color, or national origin in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The contractor will not participate directly or indirectly in the discrimination prohibited by the Acts and the Regulations, including employment practices when the contract covers any activity, project, or program set forth in Appendix B of 49 CFR Part 21.
3. **Solicitations for Subcontracts, Including Procurements of Materials and Equipment:** In all solicitations, either by competitive bidding, or negotiation made by the contractor for work to be performed under a subcontract, including procurements of materials, or leases of equipment, each potential subcontractor or supplier will be notified by the contractor of the contractor's obligations under this contract and the Acts and the Regulations relative to Non-discrimination on the grounds of race, color, or national origin.
4. **Information and Reports:** The contractor will provide all information and reports required by the Acts, the Regulations, and directives issued pursuant thereto and will permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the Servicing Agency or the FHWA to be pertinent to ascertain compliance with such Acts, Regulations, and instructions. Where any information required of a contractor is in the exclusive possession of another who fails or refuses to furnish the information, the contractor will so certify to the Servicing Agency or the FHWA, as appropriate, and will set forth what efforts it has made to obtain the information.

5. **Sanctions for Noncompliance:** In the event of a contractor's noncompliance with the Non-discrimination provisions of this contract, the Servicing Agency will impose such contract sanctions as it or the FHWA may determine to be appropriate, including, but not limited to:
  - a. withholding payments to the contractor under the contract until the contractor complies; and/or
  - b. cancelling, terminating, or suspending a contract, in whole or in part.
6. **Incorporation of Provisions:** The contractor will include the provisions of paragraphs one through six in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Acts, the Regulations and directives issued pursuant thereto. The contractor will take action with respect to any subcontract or procurement as the Servicing Agency or the FHWA may direct as a means of enforcing such provisions including sanctions for noncompliance. Provided, that if the contractor becomes involved in, or is threatened with litigation by a subcontractor, or supplier because of such direction, the contractor may request the Servicing Agency to enter into any litigation to protect the interests of the Servicing Agency. In addition, the contractor may request the United States to enter into the litigation to protect the interests of the United States.

## APPENDIX B

### CLAUSES FOR TRANSFER OF REAL PROPERTY ACQUIRED OR IMPROVED UNDER THE ACTIVITY, FACILITY, OR PROGRAM

The following clauses will be included in deeds, licenses, leases, permits, or similar instruments entered into by the Servicing Agency under the terms of the Agreement:

1. The (grantee, lessee, permittee, etc. as appropriate) for himself/herself, his/her heirs, personal representatives, successors in interest, and assigns, as a part of the consideration hereof, does hereby covenant and agree [in the case of deeds and leases add "as a covenant running with the land"] that:

In the event facilities are constructed, maintained, or otherwise operated on the property described in this (deed, license, lease, permit, etc.) for a purpose for which a U.S. Department of Transportation activity, facility, or program is extended or for another purpose involving the provision of similar services or benefits, the (grantee, licensee, lessee, permittee, etc.) will maintain and operate such facilities and services in compliance with all requirements imposed by the Acts and Regulations (as may be amended) such that no person on the grounds of race, color, or national origin, will be excluded from participation in, denied the benefits of, or be otherwise subjected to discrimination in the use of said facilities.

2. With respect to licenses, leases, permits, etc., in the event of breach of any of the above Non-discrimination covenants, the Servicing Agency will have the right to terminate the (lease, license, permit, etc.) and to enter, re-enter, and repossess said lands and facilities thereon, and hold the same as if the (lease, license, permit, etc.) had never been made or issued.\*

3. With respect to a deed, in the event of breach of any of the above Non-discrimination covenants, the Servicing Agency will have the right to enter or re-enter the lands and facilities thereon, and the above described lands and facilities will there upon revert to and vest in and become the absolute property of the Servicing Agency and its assigns.\*

(\*Reverter clause and related language to be used only when it is determined that such a clause is necessary to make clear the purpose of Title VI.)

#### APPENDIX C

#### CLAUSES FOR CONSTRUCTION/USE/ACCESS TO REAL PROPERTY ACQUIRED UNDER THE ACTIVITY, FACILITY OR PROGRAM

The following clauses will be included in deeds, licenses, permits, or similar instruments/agreements entered into by Servicing Agency pursuant to the provisions of this Agreement:

1. The (grantee, licensee, permittee, etc., as appropriate) for himself/herself, his/her heirs, personal representatives, successors in interest, and assigns, as a part of the consideration hereof, does hereby covenant and agree (in the case of deeds and leases add, "as a covenant running with the land") that (1) no person on the ground of race, color, or national origin, will be excluded from participation in, denied the benefits of, or be otherwise subjected to discrimination in the use of said facilities, (2) that in the construction of any improvements on, over, or under such land, and the furnishing of services thereon, no person on the ground of race, color, or national origin, will be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination, (3) that the (grantee, licensee, lessee, permittee, etc.) will use the premises in compliance with all other requirements imposed by or pursuant to the Acts and Regulations, as amended, set forth in this Assurance.
2. With respect to (licenses, leases, permits, etc.), in the event of breach of any of the above Non-discrimination covenants, the Servicing Agency will have the right to terminate the (license, permit, etc., as appropriate) and to enter or re-enter and repossess said land and the facilities thereon, and hold the same as if said (license, permit, etc., as appropriate) had never been made or issued.\*
3. With respect to deeds, in the event of breach of any of the above Non-discrimination covenants, the Servicing Agency will there upon revert to and vest in and become the absolute property of the Servicing Agency and its assigns.\*

(\*Reverter clause and related language to be used only when it is determined that such a clause is necessary to make clear the purpose of Title VI.)



## APPENDIX D

During the performance of this contract, the contractor, for itself, its assignees, and successors in interest (hereinafter referred to as the “contractor”) agrees to comply with the following non-discrimination statutes and authorities; including but not limited to:

### **Pertinent Non-Discrimination Authorities:**

- Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*, 78 stat. 252), (prohibits discrimination on the basis of race, color, national origin); and 49 CFR Part 21.
- The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, (42 U.S.C. § 4601), (prohibits unfair treatment of persons displaced or whose property has been acquired because of Federal or Federal-aid programs and projects);
- Federal-Aid Highway Act of 1973, (23 U.S.C. § 324 *et seq.*), (prohibits discrimination on the basis of sex);
- Section 504 of the Rehabilitation Act of 1973, (29 U.S.C. § 794 *et seq.*), as amended, (prohibits discrimination on the basis of disability); and 49 CFR Part 27;
- The Age Discrimination Act of 1975, as amended, (42 U.S.C. § 6101 *et seq.*), (prohibits discrimination on the basis of age);
- Airport and Airway Improvement Act of 1982, (49 USC § 471, Section 47123), as amended, (prohibits discrimination based on race, creed, color, national origin, or sex);
- The Civil Rights Restoration Act of 1987, (PL 100-209), (Broadened the scope, coverage and applicability of Title VI of the Civil Rights Act of 1964, The Age Discrimination Act of 1975 and Section 504 of the Rehabilitation Act of 1973, by expanding the definition of the terms “programs or activities” to include all of the programs or activities of the Federal-aid recipients, sub-recipients and contractors, whether such programs or activities are Federally funded or not);
- Titles II and III of the Americans with Disabilities Act, which prohibit discrimination on the basis of disability in the operation of public entities, public and private transportation systems, places of public accommodation, and certain testing entities (42 U.S.C. §§ 12131 – 12189) as implemented by Department of Transportation regulations at 49 CFR parts 37 and 38;
- The Federal Aviation Administration’s Non-discrimination statute (49 U.S.C. § 47123) (prohibits discrimination on the basis of race, color, national origin, and sex);
- Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, which ensures discrimination against minority populations by discouraging programs, policies, and activities with disproportionately high and adverse human health or environmental effects on minority and low-income populations;  
Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, and resulting agency guidance, national origin discrimination includes discrimination because of limited English proficiency (LEP). To ensure compliance with Title VI, you must take reasonable steps to ensure that LEP persons have meaningful access to your programs (70 Fed. Reg. at 74087 to 74100);

- Title IX of the Education Amendments of 1972, as amended, which prohibits you from discriminating because of sex in education programs or activities (20 U.S.C. 1681 et seq).

**A. ASSURANCE OF DISCLOSURE OF LOBBYING ACTIVITIES**

Certification for Contracts, Grants, Loans, and Agreements

The person signing this Agreement for the Servicing Agency certifies, to the best of his or her knowledge and belief, that:

No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any grant agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or grant agreement.

If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or grant agreement, the undersigned shall complete and submit Standard Form-LLL (Rev. 7-97), "Disclosure of Lobbying Activities," in accordance with its instructions.

The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts and contracts under grants, loans and grant agreements) and that all subcontractors shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. § 1352, title. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

**B. CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS**

The Servicing Agency certifies that it will, or will continue, to provide a drug-free workplace by:

1. Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the Servicing Agency's workplace, and specifying the actions that will be taken against employees for violation of such prohibition.
2. Establishing an ongoing drug-free awareness program to inform employees about:
  - a. The dangers of drug abuse in the workplace;
  - b. The Servicing Agency's policy of maintaining a drug-free workplace;
  - c. Any available drug counseling, rehabilitation, and employee assistance programs;
  - and,
  - d. The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

3. Making it a requirement that each employee to be engaged in the performance of work supported by the Agreement be given a copy of the statement required by paragraph 1.
4. Notifying the employee in the statement required by paragraph 1 that, as a condition of employment supported by the Agreement, the employee will:
  - a. Abide by the terms of the statement; and
  - b. Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction.
5. Notifying the agency in writing, within ten calendar days after receiving notice under paragraph 4.b. from an employee or otherwise receiving actual notice of conviction. Employers of convicted employees must provide notice, including position title, to FHWA. Notice shall include the order number of the Agreement.
6. Taking one of the following actions, within 30 days of receiving notice under paragraph 4(b), with respect to any employee who is so convicted:
  - a. Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended, or
  - b. Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State or local health, law enforcement, or other appropriate agency.
7. Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs 1, 2, 3, 4, 5, and 6.
8. The Servicing Agency *may*, but is not required to, provide the site for the performance of work done in connection with the Agreement. For the provision of services pursuant to the Agreement, workplaces include outstations, maintenance sites, headquarters office locations, training sites and any other worksites where work is performed that is supported by the Agreement. If the Servicing Agency does so, the Servicing Agency shall identify the Places of Performance by listing the street address, city, county, state, zip code. Also identify if there are workplaces on file that are not identified in this section of the Agreement.

**C. CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS --  
PRIMARY COVERED TRANSACTIONS  
2 CFR Parts 180, 1200, 48 CFR Part 9, and 49 CFR Part 32**

These assurances and certifications are applicable to all construction contracts, design-build contracts, subcontracts, lower-tier subcontracts, purchase orders, lease agreements, consultant contracts or any other covered transaction requiring FHWA approval or that is estimated to cost \$25,000 or more – as defined in 2 CFR Parts 180 and 1200, and 48 CFR Part. 9.

By entering into this Agreement the Servicing Agency is providing the assurances and certifications for First Tier Participants and Lower Tier Participants as set out below.

**1. Instructions for Certification – First Tier Participants:**

- a. The prospective first tier participant is providing the certification set out below.
- b. The inability of a person to provide the certification set out below will not necessarily result in denial of participation in this covered transaction. The prospective first tier participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective first tier participant to furnish a certification or an explanation shall disqualify such a person from participation in this transaction.
- c. The certification in this clause is a material representation of fact upon which reliance was placed when the contracting agency determined to enter into this transaction. If it is later determined that the prospective participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the contracting agency may terminate this transaction for cause of default.
- d. The prospective first tier participant shall provide immediate written notice to the contracting agency to whom this proposal is submitted if any time the prospective first tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
- e. The terms "covered transaction," "debarred," "suspended," "ineligible," "participant," "person," "principal," and "voluntarily excluded," as used in this clause, are defined in 2 C.F.R. Parts 180 and 1200. "First Tier Covered Transactions" refers to any covered transaction between a recipient or subrecipient of Federal funds and a participant (such as the prime or general contractor). "Lower Tier Covered Transactions" refers to any covered transaction under a First Tier Covered Transaction (such as subcontracts). "First Tier Participant" refers to the participant who has entered into a covered transaction with a recipient or subrecipient of Federal funds (such as the prime or general contractor). "Lower Tier Participant" refers to any participant who has entered into a covered transaction with a First Tier Participant or other Lower Tier Participants (such as subcontractors and suppliers).
- f. The prospective first tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.
- g. The prospective first tier participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions," provided by the department or contracting agency, entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions exceeding the \$25,000 threshold.

h. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant is responsible for ensuring that its principals are not suspended, debarred, or otherwise ineligible to participate in covered transactions. To verify the eligibility of its principals, as well as the eligibility of any lower tier prospective participants, each participant may, but is not required to, check the Excluded Parties List System website (<https://www.epls.gov/>), which is compiled by the General Services Administration.

i. Nothing contained in the foregoing shall be construed to require the establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of the prospective participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

j. Except for transactions authorized under paragraph (f) of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

**2. Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion – First Tier Participants:**

a. The prospective first tier participant certifies to the best of its knowledge and belief, that it and its principals:

1. Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in covered transactions by any Federal department or agency;
2. Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
3. Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph a.2. of this certification; and

4. Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

b. Where the prospective participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

### **3. Instructions for Certification - Lower Tier Participants:**

(Applicable to all subcontracts, purchase orders and other lower tier transactions requiring prior FHWA approval or estimated to cost \$25,000 or more - 2 C.F.R. Parts 180 and 1200)

a. The prospective lower tier participant is providing the certification set out below.

b. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department, or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

c. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous by reason of changed circumstances.

d. The terms "covered transaction," "debarred," "suspended," "ineligible," "participant," "person," "principal," and "voluntarily excluded," as used in this clause, are defined in 2 CFR Parts 180 and 1200. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations. "First Tier Covered Transactions" refers to any covered transaction between a recipient and subrecipient of Federal funds and a participant (such as the prime or general contract). "Lower Tier Covered Transactions" refers to any covered transaction under a First Tier Covered Transaction (such as subcontracts). "First Tier Participant" refers to the participant who has entered into a covered transaction with a recipient or subrecipient of Federal funds (such as the prime or general contractor). "Lower Tier Participant" refers any participant who has entered into a covered transaction with a First Tier Participant or other Lower Tier Participants (such as subcontractors and suppliers).

e. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

f. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions exceeding the \$25,000 threshold.

g. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant is responsible for ensuring that its principals are not suspended, debarred, or otherwise ineligible to participate in covered transactions. To verify the eligibility of its principals, as well as the eligibility of any lower tier prospective participants, each participant may, but is not required to, check the Excluded Parties List System website (<https://www.epls.gov/>), which is compiled by the General Services Administration.

h. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

i. Except for transactions authorized under paragraph e of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

#### **4. Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion--Lower Tier Participants:**

a. The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in covered transactions by any Federal department or agency.

b. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

#### **D. ASSURANCE OF ADEQUATE FINANCIAL SYSTEMS AND CONTROL OF PROJECT COSTS**

1. The Servicing Agency will be reimbursed in accordance with the terms of this Agreement.

2. The Servicing Agency shall have entered into obligations for services and goods associated with the Project prior to seeking reimbursement from the Government. Reimbursement will only be made for expenses incurred after execution of a project agreement.

3. The Servicing Agency shall ensure that the funds provided by the Government are not misappropriated or misdirected to any other account, need, project, line-item, or unrelated activity.



4. Any Federal funds not expended in conjunction with the Project will remain the property of the Government.

5. Financial Management System: By signing this Agreement, the Servicing Agency verifies that it has, or will implement, a financial management system adequate for monitoring the accumulation of costs and that it complies with the financial management system requirements of 2CFR Part 200.302. The Servicing Agency's failure to comply with these requirements may result in Agreement termination.

6. Allowable Costs: Determination of allowable costs will be made in accordance with the applicable Federal cost principles, e.g., 2 CFR Part 200. Disallowed costs are those charges determined to not be allowed in accordance with the applicable Federal cost principles or other conditions contained in this Agreement.

## **E. TRANSPARENCY ACT REQUIREMENTS**

Pursuant to the Federal Funding Transparency and Accountability Act of 2006, as amended (Pub. L. 109–282, as amended by section 6202 of Public Law 110–252, hereafter referred to as “the Transparency Act” or “the Act”) and the OMB Interim Final Rule (75 FR 55663 (September 14, 2010) (available at <http://www.gpo.gov/fdsys/pkg/FR-2010-09-14/pdf/2010-22705.pdf>) (codified at 2 CFR Part 170), the Servicing Agency is required to report as required under the Act: The Servicing Agency shall also report information for its prime contractor.

### **1. Reporting Obligations**

a. Applicability. Unless the Servicing Agency (hereinafter in this section referred to as “you”) are exempt as provided in paragraph 4. of this section, you must report each action that obligates \$25,000 or more in Federal funds for a prime contract to an entity (see definitions in subsection 5. of this section).

b. Where and when to report.

1. You must report each obligating action described in subsection 1.a. of this section to <http://www.fsrs.gov>.

2. For contractor information, report no later than the end of the month following the month in which the contract was executed. (For example, if the obligation was made on November 7, 2010, the obligation must be reported by no later than December 31, 2010.)

c. What to report. You must report the information about each obligating action that the submission instructions posted at <http://www.fsrs.gov> specify.

### **2. Reporting Total Compensation of Executives.**

a. Applicability and what to report. You must report total compensation for each of your five most highly compensated executives for the preceding completed fiscal year, if—

1. the total Federal funding authorized to date under this award is \$25,000 or more;
2. in the preceding fiscal year, you received—
  - i.* 80 percent or more of your annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 CFR 170.320 (and subawards); and
  - ii.* \$25,000,000 or more in annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 CFR 170.320 (and subawards); and
  - iii.* The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986. (To determine if the public has access to the compensation information, see the U.S. Security and Exchange Commission total compensation filings at <http://www.sec.gov/answers/execomp.htm>.)
- b. Where and when to report. You must report executive total compensation described in subsection 2.a.. of this section:
  1. As part of your registration profile at <https://www.sam.gov>
  2. By the end of the month following the month in which this award is made, and annually thereafter.

### **3. Reporting of Total Compensation of Prime Contractor's Executives.**

- a. Applicability and what to report. Unless you are exempt as provided in subsection d. of this section, for each prime contractor receiving funds for which reimbursement will be sought, you shall report the names and total compensation of each of the prime contractor's five most highly compensated executives for the prime contractor's preceding completed fiscal year, if—
  1. in the prime contractor's preceding fiscal year, the contractor received—
    - i.* 80 percent or more of its annual gross revenues from Federal procurement contracts (and subcontracts) and Federal financial assistance subject to the Transparency Act, as defined at 2 CFR 170.320 (and subawards); and
    - ii.* \$25,000,000 or more in annual gross revenues from Federal procurement contracts (and subcontracts), and Federal financial assistance subject to the Transparency Act (and subawards); and
  2. The public does not have access to information about the compensation of the executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986. (To

determine if the public has access to the compensation information, see the U.S. Security and Exchange Commission total compensation filings at <http://www.sec.gov/answers/execomp.htm>.)

b. Where and when to report. You must report the prime contractor's executive total compensation described in subsection 3.a. of this section:

1. [To http://www.fsrs.gov](http://www.fsrs.gov).

2. By the end of the month following the month during which you executed the prime contract. For example, if a prime contract is executed on any date during the month of October of a given year (i.e., between October 1 and 31), you must report any required compensation information of the prime contractor by November 30 of that year.

#### **4. Exemptions.**

If, in the previous tax year, you or the prime contractor had gross income, from all sources, under \$300,000, you are exempt from the requirements to report prime contracts and the total compensation of the five most highly compensated executives of any prime contractor.

#### **5. Definitions. For purposes of this section:**

a. Entity means all of the following, as defined in 2 CFR Part 25:

1. A Governmental organization, which is a State, local government, or Indian tribe;
2. A foreign public entity;
3. A domestic or foreign nonprofit organization;
4. A domestic or foreign for-profit organization;
5. A Federal agency, but only as a contractor or subcontractor to a non-Federal entity.

b. Executive means officers, managing partners, or any other employees in management positions.

c. Total compensation means the cash and noncash dollar value earned by the executive during the Servicing Agency's or prime contractor's preceding fiscal year and includes the following (for more information see 17 CFR 229.402(c)(2)):

1. Salary and bonus.
2. Awards of stock, stock options, and stock appreciation rights. Use the dollar amount recognized for financial statement reporting purposes with respect to the fiscal year in accordance with the Statement of Financial Accounting Standards No. 123 (Revised 2004) (FAS 123R), Shared Based Payments.

3. Earnings for services under non-equity incentive plans. This does not include group life, health, hospitalization or medical reimbursement plans that do not discriminate in favor of executives, and are available generally to all salaried employees.
4. Change in pension value. This is the change in present value of defined benefit and actuarial pension plans.
5. Above-market earnings on deferred compensation which is not tax-qualified.
6. Other compensation, if the aggregate value of all such other compensation (e.g. severance, termination payments, value of life insurance paid on behalf of the employee, perquisites or property) for the executive exceeds \$10,000.

#### **E. SINGLE AUDIT INFORMATION FOR SERVICING AGENCIES**

To maximize the transparency and accountability of funds authorized under the Act as required by Congress and in accordance with 2 CFR 200 "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards", the Servicing Agency agrees to maintain records that identify adequately the source and application of FHWA funds.