



**SUPPORT DOCUMENTS**  
**AGENDA ITEM #F3**  
**AUTHORIZE AWARD (BENCH)**  
**CONTRACTS MNT13-16 (A-E)**  
**CUMMINS ENGINE PARTS**



CONTRACT AGREEMENT

between

CONTRACTOR )
CUMMINS CAL PACIFIC, LLC, )
1939 DEERE AVENUE )
IRVINE, CA 92606 )
(hereinafter "Contractor") )
Telephone: 949-253-6046 )
Fax: 949-862-7220 )
E-mail: p.c.fang@cummins.com )

CONTRACT DOCUMENTS

CONTRACT NO.
MNT13-16A

CUMMINS ENGINE PARTS

And )

Contract Amount: \$400,000

Omnitrans )
1700 West Fifth Street )
San Bernardino, CA 92411 )
(hereinafter "Omnitrans") )

Omnitrans Project Manager:
Name: Jack Dooley
Title: Director of Maintenance
Telephone: (909) 379-7183
Fax: (909) 885-2441
Email: jack.dooley@omnitrans.org

Contract Administrator:
Name: Eugenia Pinheiro
Title: Contracts Manager
Telephone: (909) 379-7314
Fax: (909) 379-7107
Email: eugenia.pinheiro@omnitrans.org



## TABLE OF CONTENTS

1.	SCOPE OF WORK.....	3
2.	TECHNICAL REQUIREMENTS .....	3
3.	PERIOD OF PERFORMANCE .....	5
4.	COMPENSATION.....	6
5.	AUDIT AND INSPECTION OF RECORDS.....	7
6.	NOTIFICATION .....	7
7.	OMNITRANS' AND CONTRACTOR'S REPRESENTATIVES.....	7
8.	TERMINATION FOR CONVENIENCE .....	8
9.	TERMINATION FOR BREACH OF AGREEMENT .....	9
10.	ASSIGNMENT .....	10
11.	SUBCONTRACTING.....	10
12.	INDEPENDENT CONTRACTOR.....	10
13.	INSURANCE .....	10
14.	INDEMNITY.....	11
15.	REVISIONS IN SCOPE OF WORK.....	11
16.	RIGHTS IN TECHNICAL DATA .....	11
17.	OWNERSHIP OF REPORTS AND DOCUMENTS.....	12
18.	OWNERSHIP RIGHTS.....	12
19.	WORK FOR HIRE .....	13
20.	SUBMITTAL OF CLAIMS BY CONTRACTOR.....	13

21.	EQUAL OPPORTUNITY.....	13
23.	NOTIFICATION OF EMPLOYMENT OF OMNITRANS BOARD MEMBERS/ALTERNATES AND EMPLOYEES .....	14
24.	DISQUALIFYING POLITICAL CONTRIBUTIONS .....	14
25.	COMPLIANCE WITH LAW.....	15
26.	COMPLIANCE WITH LOBBYING POLICIES.....	15
27.	PUBLIC RECORDS ACT.....	15
28.	WAIVER/INVALIDITY .....	16
29.	FORCE MAJEURE.....	16
30.	CONFIDENTIALITY .....	16
31.	CONTRACTOR’S INTERACTION WITH THE MEDIA AND THE PUBLIC .....	16
32.	GOVERNING LAW.....	17
33.	MODIFICATIONS TO AGREEMENT .....	17
34.	PRECEDENCE .....	17
35.	ENTIRE AGREEMENT.....	17

This Agreement is made and entered into as of this \_\_\_\_\_ day of \_\_\_\_\_, 2013 by and between Omnitrans (hereinafter referred to as "Omnitrans") and Cummins Cal Pacific, LLC (hereinafter referred to as "Contractor").

## **RECITALS**

WHEREAS, Omnitrans is a joint powers authority organized under Sections 6500 et seq. of the California Government Code and Section 130255 of the California Public Utilities Code with power to contract for services described in Scope of Work, "Scope of Work" (hereinafter referred to as "Work");

WHEREAS, Contractor has indicated it is qualified to supply and deliver to Omnitrans on an as-needed basis Cummins bus parts in accordance with the specifications, terms and conditions defined herein during the term of this Agreement. and (1) has reviewed all the available data furnished by Omnitrans pertinent to the Work to be rendered; (2) has inspected and reviewed the Work to be rendered; (3) will exercise the ordinary care; and (4) is willing to accept responsibility of performing the Work set forth in this Agreement for the compensation and in accordance with the terms, requirements and conditions herein specified;

NOW, THEREFORE, for the consideration hereinafter stated, the parties agree as follows:

### **1. SCOPE OF WORK**

- A. Contractor will perform the Work and related tasks as described in IFB-MNT13-16A Cummins Engine Parts, incorporated by reference into and made a part of this Agreement.
- B. This is a non-exclusive Agreement, whereby Omnitrans may, at its sole discretion, augment or supplant the Work. Contractor will cooperate fully with Omnitrans' staff or other contractor or entity that may be providing similar or the same Work for Omnitrans.

### **2. TECHNICAL REQUIREMENTS**

- 1. Cummins bus parts shall be new and shall, meet or exceed the Original Equipment Manufacturers (OEM) minimum specifications and conform to all applicable industry and safety standards.
- 2. Omnitrans reserves the sole right to determine whether a part or band of part is equivalent to OEM specifications. Omnitrans' decision on product equivalency is final and not appealable.
- 3. The CONTRACTOR shall notify Omnitrans if any of the aforementioned standards are changed, superseded or when new industry standards are set.

4. Contractor shall maintain adequate inventory of parts to continuously supply Omnitrans for the term of this Agreement Omnitrans will maintain a sufficient number of spare parts to insure continuous operations of the fleet.
  - a) Contractor shall ship requested parts within 3 working days after receipt of order for normal delivery and same day for expedited (overnight, 2<sup>nd</sup> day, etc.) delivery.
  - b) Contractor shall package the product(s) in such a manner as to prevent damage during shipment, receiving and storage.
  - c) Omnitrans shall only pay for direct and actual freight charge and no premium charges for expedited shipping. Omnitrans reserves the right to request proof of freight charges or validate referenced changes independently.
  - d) Deliveries shall be made to Omnitrans prepaid F.O.B destination.
  - f) Delivery Location:

Omnitrans  
1700 West 5<sup>th</sup> Street  
San Bernardino, CA 92411

5. Warranty claims, and other warranty issues shall be administered, coordinated and resolved with the Omnitrans' Warranty Coordinator and a Contractor assigned representative,
6. Cummins Warranty Claim Procedures appended hereto and by this reference incorporated herein:
  - a) Contractor shall notify Omnitrans in writing the disposition of a warranty claim within 15 days of receipt.
  - b) Contractor shall resolve all open warranty claims within 60 days after receipt. If the warranty claim is not resolved within the state time frame the Contractor will be information of Omnitrans' intent to automatically credit Omnitrans' accounts payable for the Contractor with the amount of the open claim.
  - c) Contractor is required to notify the Omnitrans' Warranty Coordinator on the disposition of products within five (5) days after notification from Omnitrans' Warranty Coordinator and obtain an authorizing purchase order before proceeding with the repair.

- d) For warranty repair claims or service requests which are determined by the Contractor not to be under warranty, Contractor must forward a written failure analysis report and an itemized quote to Omnitrans' Warranty Coordinator and obtain an authorizing purchase order before proceeding with the repair.
  - e) Contractor shall be able to electronically communicate on warranty coverage, registrations, claims, service requests and bulletins/alerts.
  - f) Contractor is required to reference the Omnitrans warranty purchase order and warranty claim number with shipping warranty replacement products.
  - g) Contractor is required to properly identify warranty returns or replacement products with a bill of lading.
7. Contractor shall provide a Material Safety Data Sheet (MSDS) for all products containing any toxic items that may be harmful to the end user or the environment.

### **3. PERIOD OF PERFORMANCE**

The period of performance shall be beginning upon execution of final agreement for a base period of three (3) years, or pursuant to the provisions of this Agreement, or unless earlier terminated pursuant to Section 8 or Section 9 of this Agreement.

The term of this Agreement shall be from the date of execution of this Agreement and continue in effect through March 6, 2016, unless terminated as specified in Section 8 and 9 of this Agreement. Omnitrans reserves the right at its sole discretion to exercise a total of two (2) one-year option terms with no obligation to purchase any specified amount of products/services. All applicable indemnification provisions in this Agreement shall remain in effect following the termination of this Agreement.

#### 4. COMPENSATION

For Contractor's full and complete performance of its obligations under this Requirements Agreement, Omnitrans shall pay Contractor on a FIXED UNIT PRICE basis as needed per attachment, no guarantee of usage. Purchase orders will be awarded based on lowest price with availability.

Omnitrans' maximum cumulative payment obligation under this Agreement shall not exceed Four Hundred Thousand Dollars (\$400,000.00), including all amounts payable to Contractor for all costs and profit.

- A. Contractor shall invoice Omnitrans on a monthly basis no later than the 15<sup>th</sup> of each month. Contractor shall furnish information as may be requested by Omnitrans to substantiate the validity of an invoice.

Contractor shall submit invoices in duplicate to:

Omnitrans  
1700 West Fifth Street  
San Bernardino, CA 92411  
Attn: Accounts Payable

Each invoice shall include, at minimum, the following information:

- Contract number
  - Detail description of parts
  - Time period covered by the invoice
  - Amount of payment requested
  - Information as requested by Omnitrans
- B. Omnitrans shall remit payment within thirty (30) calendar days of approval of the invoices by Omnitrans' Project Manager.

At its sole discretion, Omnitrans may decline to make full payment for parts until such time as Contractor has documented, to Omnitrans' satisfaction.

In the event Omnitrans should overpay Contractor, such overpayment shall not be construed as a waiver of Omnitrans' right to obtain reimbursement for the overpayment. Upon discovering any overpayment, either on its own or upon notice of Omnitrans, Contractor shall immediately reimburse Omnitrans the entire overpayment or, at its sole discretion, Omnitrans may deduct such overpayment amount from monies due to Contractor under this Agreement or any other Agreement between Omnitrans and Contractor.



**5. AUDIT AND INSPECTION OF RECORDS**

Contractor agrees that Omnitrans or any duly authorized representative shall have access to and the right to examine, audit, excerpt, copy or transcribe any pertinent transaction, activity, time cards, employment records or other records relating to this Agreement. Such material, including all pertinent cost, accounting, financial records, and proprietary data must be kept and maintained by Contractor for a period of three (3) years after completion of this Agreement unless Omnitrans’ written permission is given to Contractor to dispose of material prior to this time.

**6. NOTIFICATION**

All notices hereunder concerning this Agreement and the Work to be performed shall be physically transmitted by courier, overnight, registered or certified mail, return receipt requested, postage prepaid and addressed as follows:

To Omnitrans:

To Contractor:

Omnitrans  
1700 West Fifth Street  
San Bernardino, CA 92411

Cummins Cal Pacific, LLC  
1939 Deere Avenue  
Irvine, CA 92606

Attn: Eugenia F. Pinheiro  
Contracts Manager  
[Eugenia.Pinheiro@omnitrans.org](mailto:Eugenia.Pinheiro@omnitrans.org)

Attn: P.C. Fang  
Materials Director  
[p.c.fang@cummins.com](mailto:p.c.fang@cummins.com)

**7. OMNITRANS’ AND CONTRACTOR’S REPRESENTATIVES**

**A. OMNITRANS’ Project Manager**

Contracting Officer: Omnitrans’ CEO/General Manager or his authorized designee who has authority to execute contracts on behalf of Omnitrans.

Project Manager: Jack Dooley.

- a. Omnitrans has the final approval in all matters relating to or affecting the Work. Except as expressly specified in this Agreement, the Contracting Officer may exercise any powers, rights and/or privileges that have been lawfully delegated by Omnitrans. Nothing in this Agreement should be construed to bind Omnitrans for acts of its officers, employees, and/or agents that exceed the delegation of authority specified herein.
- b. The Contracting Officer has delegated to the Project Manager certain powers and duties in connection with this Agreement. The

Project Manager is the authorized representative of the Contracting Officer for matters related to this Agreement. The Project Manager or his/her designee is empowered to:

1. Have general oversight this Agreement, including the power to enforce compliance with this Agreement.
  2. Reserve the right to remove any portion of the Work from Contractor which have not been performed to Omnitrans' satisfaction.
  3. Subject to the review and acceptance by Omnitrans, negotiate with Contractor all adjustments pertaining to this Agreement for revision.
- c. In addition to the foregoing, the Project Manager shall have those rights and powers expressly set forth in other sections of this Agreement.

**B. Contractor's Key Personnel**

The following are Contractor's key personnel and their associated roles in the Work to be provided:

<u>Name</u>	<u>Role</u>
P.C. FANG	MATERIALS DIRECTOR

Any propose/substitution or replacement by Contractor of Contractor's key personnel shall ensure that such person possesses the same or better expertise and experience than the key personnel being substituted or replaced. Omnitrans reserves the right to interview such person to ascertain and verify if such proposed substitution or replacement does in deed possess such expertise and experience.

Omnitrans awarded this Agreement to Contractor based on Omnitrans' confidence and reliance on the expertise of Contractor's key personnel described above. Contractor shall not reassign key personnel or assign other personnel to key personnel roles until Contractor obtains prior written approval from Omnitrans.

**8. TERMINATION FOR CONVENIENCE**

Omnitrans may terminate this Agreement in whole or in part for Omnitrans' convenience. Omnitrans' CEO/General Manager shall terminate this Agreement by a written Notice of Termination to Contractor specifying the nature, extent, and effective date of the termination. Upon receipt of the notice of termination,

Contractor shall immediately discontinue all Work affected and deliver all data, drawings, specifications, reports, estimates, summaries, and other information and materials accumulated in performing this Agreement, whether completed or in process, to Omnitrans' CEO/General Manager. Omnitrans shall make an equitable adjustment in the Agreement for Work already performed, but shall not allow anticipated profit on unperformed services. Force Majeure shall apply.

## **9. TERMINATION FOR BREACH OF AGREEMENT**

- A. If Contractor fails to perform any of the provisions of this Agreement or so fails to make progress as to endanger timely performance of this Agreement, Omnitrans may give Contractor written notice of such default. If Contractor does not cure such default or provide a plan to cure such default which is acceptable to Omnitrans within the time permitted by Omnitrans, then Omnitrans may terminate this Agreement due to Contractor's breach of this Agreement.
- B. If a federal or state proceeding for relief of debtors is undertaken by or against Contractor, or if Contractor makes an assignment for the benefit of creditors, then Omnitrans may immediately terminate this Agreement.
- C. If Contractor violates Section 26, Compliance with Lobbying Policies, of this Agreement, then Omnitrans may immediately terminate this Agreement.
- D. In the event Omnitrans terminates this Agreement as provided in this Section, Omnitrans may procure, upon such terms and in such manner as Omnitrans may deem appropriate, Work similar in scope and level of effort to those so terminated, and Contractor shall be liable to Omnitrans for all of its costs and damages, including, but not limited, any excess costs for such Work.
- E. All finished or unfinished documents and materials produced or procured under this Agreement shall become Omnitrans' property upon date of such termination.
- F. If, after notice of termination of this Agreement under the provisions of this Section, it is determined for any reason that Contractor was not in default under the provisions of this Section, or that the default was excusable under the terms of this Agreement, the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to Section 8, Termination for Convenience.
- G. The rights and remedies of Omnitrans provided in this Article shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Agreement.

## 10. ASSIGNMENT

This Agreement, any interest herein or claim hereunder, may not be assigned by Contractor either voluntarily or by operation of law, nor may all or any part of this Agreement be subcontracted by Contractor, without the prior written consent of Omnitrans. Consent by Omnitrans shall not be deemed to relieve Contractor of its obligations to comply fully with all terms and conditions of this Agreement.

## 11. SUBCONTRACTING

Omnitrans hereby consents to Contractor's subcontracting of portions of the Work to the parties identified below for the functions described in Contractor's proposal. Contractor shall include in each subcontract agreement the stipulation that Contractor, not Omnitrans, is solely responsible for payment to the subcontractor for all amounts owing and that the subcontractor shall have no claim, and shall take no action against Omnitrans, Member Agencies or officers, directors, employees or sureties thereof for nonpayment by Contractor.

<b>Subcontractor's Name and Address</b>	<b>Work to Be Performed</b>
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N/A	
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## 12. INDEPENDENT CONTRACTOR

Contractor's relationship to Omnitrans in the performance of this Agreement is that of an independent Contractor. Contractor's personnel performing Work under this Agreement shall at all times be under Contractor's exclusive direction and control and shall be employees of Contractor and not employees of Omnitrans. Contractor shall pay all wages, salaries and other amounts due its employees in connection with this Agreement and shall be responsible for all reports and obligations respecting them, such as social security, income tax withholding, unemployment compensation, workers' compensation and similar matters.

## 13. INSURANCE

Throughout the duration of this Agreement, Contractor shall maintain the following insurance, which shall be full-coverage insurance not subject to self-insurance provisions. Contractor shall not of its own initiative cause such insurance to be canceled or materially changed during the term of this Agreement.

- A. **Commercial General Liability including Products/Completed Operations:** \$1,000,000 per occurrence for bodily and property damage liability and \$2,000,000 aggregate; *Endorsement naming Omnitrans as Additional Insured.*

- B. **Automobile Liability:** \$1,000,000 combined single limit bodily and property damage liability per accident; *Endorsement naming Omnitrans as Additional Insured.*
- C. **Workers' Compensation:** statutory limits or, a State-Approved program in an amount and form that meets all applicable requirements of the Labor Code of the State of California; *waiver of subrogation that includes Omnitrans.*

Omnitrans, its officers, officials, employees, agents, and volunteers.

#### 14. **INDEMNITY**

Contractor shall indemnify, defend and hold harmless Omnitrans, and its member agencies, and their officers, directors, employees and agents from and against any and all liability, expense (including, but not limited to, defense costs and attorneys' fees), claims, causes of action, and lawsuits for damages of any nature whatsoever, including, but not limited to, bodily injury, death, personal injury or property damage (including property of Contractor) arising from or connected with any alleged act and/or omission of Contractor, its officers, directors, employees, agents, Subcontractors or suppliers. This indemnity shall survive termination or expiration of this Agreement and/or final payment thereunder.

#### 15. **REVISIONS IN SCOPE OF WORK**

By written notice or order, Omnitrans may, from time to time, order work suspension or make changes to this Agreement. Changes in the Work shall be mutually agreed to and incorporated into an amendment to this Agreement. Upon execution of an amendment, Contractor shall perform the Work, as amended.

#### 16. **RIGHTS IN TECHNICAL DATA**

- A. No material or technical data prepared by Contractor under this Agreement is to be released by Contractor to any other person or entity except as necessary for the performance of the Work. All press releases or information concerning the Work that might appear in any publication or dissemination, including but not limited to, newspapers, magazines, and electronic media, shall first be authorized in writing by Omnitrans.
- B. The originals of all letters, documents, reports and other products and data produced under this Agreement shall become the property of Omnitrans without restriction or limitation on their use and shall be made available upon request to Omnitrans at any time. Original copies of such shall be delivered to Omnitrans upon completion of the Work or termination of the Work. Contractor shall be permitted to retain copies of such items for the furtherance of its technical proficiency; however,

publication of this material is subject to the prior written approval of Omnitrans. The provisions of this paragraph shall survive termination or expiration of this Agreement and/or final payment thereunder.

## **17. OWNERSHIP OF REPORTS AND DOCUMENTS**

The originals of all letters, documents, reports and other products and data produced under this Agreement shall be delivered to, and become the sole and exclusive property of Omnitrans. Copies may be made for Contractor's records, but shall not be furnished to others without prior written authorization from Omnitrans. Such deliverables shall be deemed works made for hire, and all rights in copyright therein shall be retained by Omnitrans.

## **18. OWNERSHIP RIGHTS**

- A. In the event Omnitrans rightfully obtains copies of Proprietary Data under the terms of the separate License Agreement and Escrow Agreement that govern rights in Documentation, Software and Intellectual Property created and/or developed by Contractor, its Third Party Software Contractors and its Suppliers as part of the Project, any derivative works and associated documentation created by or on behalf of Omnitrans by Permitted Programmers (as defined in the License Agreement) shall be the sole and exclusive property of Omnitrans (collectively, "Omnitrans Intellectual Property"), and Omnitrans may use, disclose and exercise dominion and full rights of ownership, in any manner in Omnitrans Intellectual Property in connection with the use, operation and maintenance of a transportation system administered by Omnitrans. No use of Omnitrans Intellectual Property shall be made for any purpose other than in conjunction with a transportation system administered by Contractor, and Omnitrans shall not sell, lease, rent, give away or otherwise disclose any Omnitrans Intellectual Property to any outside third party other than Permitted Programmers. To the extent there may be any question of rights of ownership or use in any Omnitrans Intellectual Property, Contractor shall require all of its subcontractors and suppliers (including without limitation its Third Party Software Contractors) to assign to Omnitrans, all worldwide right, title and interest in and to all Omnitrans Intellectual Property in a manner consistent with the foregoing terms of this paragraph. Contractor shall execute any documents as Omnitrans may from time to time reasonably request to effectuate the terms of this paragraph.
- B. All documentation and Software which predates this Contract and which otherwise owned by Contractor or its Third Party Software Contractors, and all Documentation and Software which is created by Contractor or its Third Party Software Contractors shall be Licensed Software or Licensed Documentation, as appropriate. All Licensed Software and Licensed

Documentation shall be governed by the License Agreement by and between the parties of event date herewith.

**19. WORK FOR HIRE**

Any work created or produced as a part of this Agreement that may be defined under Section 101, Title 17, USC will be considered “work for hire” as it pertains to ownership rights. Contractor, by his/her endorsement hereon agrees that all rights to any work(s) created or produced are waived, and that ownership rests with Omnitrans. Contractor further agrees to ensure transfer of all rights to such work(s), as defined under federal copyright law, that may be created or produced under this Agreement by its suppliers, contractors or subcontractors.

**20. SUBMITTAL OF CLAIMS BY CONTRACTOR**

Contractor shall file any and all claims with Omnitrans’ Project Manager in writing within thirty (30) days of the event or occurrence giving rise to the claim. The claim shall be in sufficient detail to enable Omnitrans to ascertain the claim’s basis and amount, and shall describe the date, place and other pertinent circumstances of the event or occurrence giving rise to the claim and the indebtedness, obligation, injury, loss or damages allegedly incurred by Contractor.

Even though a claim may be filed and/or in review by Omnitrans, Contractor shall continue to perform in accordance with this Agreement.

**21. EQUAL OPPORTUNITY**

Contractor shall not discriminate against, or grant preferential treatment to, any individual or group, or any employee or applicant for employment because of race, age, religion, color, ethnicity, sex, national origin, ancestry, physical disability, mental disability, political affiliation, sexual orientation, marital status or other status protected by law. Contractor shall take action to ensure that applicants and employees are treated without regard to the above.

**22. STANDARD OF PERFORMANCE**

- A. Contractor shall perform and exercise, and require its subcontractors to perform and exercise due professional care and competence in the performance of the Work in accordance with the requirements of this Agreement. Contractor shall be responsible for the professional quality, technical accuracy, completeness and coordination of the Work, it being understood that Omnitrans will be relying upon such professional quality, accuracy, completeness and coordination in utilizing the Work. The foregoing obligations and standards shall constitute the "Standard of Performance" for purposes of this Agreement. The provisions of this paragraph shall survive termination or expiration of this Agreement and/or final payment thereunder.
- B. All workers shall have sufficient skill and experience to perform the Work assigned to them. Omnitrans shall have the right, at its sole discretion, to require the immediate removal of Contractor's personnel at any level assigned to the performance of the Work at no additional fee or cost to Omnitrans, if Omnitrans considers such removal in its best interests and requests such removal in writing and such request is not done for illegal reasons. Further, an employee who is removed from performing Work under this Agreement under this Article shall not be re-assigned to perform Work in any other capacity under this Agreement without Omnitrans' prior written approval.

**23. NOTIFICATION OF EMPLOYMENT OF OMNITRANS BOARD MEMBERS/ALTERNATES AND EMPLOYEES**

To ensure compliance with Omnitrans' Ethics Policy, Contractor shall provide written notice to Omnitrans disclosing the identity of any individual who Contractor desires to employ or retain under a contract, and who (1) presently serves as a Board Member/Alternate or an employee of Omnitrans, or (2) served as a Board Member/Alternate or an employee of Omnitrans within the previous 12 months of the date of the proposed employment or retention by Contractor. Contractor's written notice shall indicate whether the individual will be an officer, principal or shareholder of the entity and/or will participate in the performance of this Agreement.

**24. DISQUALIFYING POLITICAL CONTRIBUTIONS**

In the event of a proposed amendment to this Agreement, Contractor shall provide prior to the execution of such amendment, a written statement disclosing any contribution(s) of \$250 or more made by Contractor or its subcontractor(s) to Omnitrans Board Members/Alternates or employees within the preceding twelve (12) months of the date of the proposed amendment. Applicable contributions include those made by any agent/person/entity on behalf of Contractor or subcontractor(s).



## **25. COMPLIANCE WITH LAW**

Contractor shall familiarize itself with and perform the Work required under this Agreement in conformity with requirements and standards of Omnitrans, municipal and public agencies, public and private utilities, special districts, and railroad agencies whose facilities and work may be affected by Work under this Agreement. Contractor shall also comply with all Federal, state and local laws and ordinances.

## **26. COMPLIANCE WITH LOBBYING POLICIES**

- A. Contractor agrees that if it is a Lobbyist Employer or if it has retained a Lobbying Firm or Lobbyist, as such terms are defined by Omnitrans in its Ethics Policy, it shall comply or ensure that its Lobbying Firm and Lobbyist complies with Omnitrans' Ethics Policy.
- B. If Contractor (Lobbyist Employer) or its Lobbying Firm or Lobbyist fails to comply, in whole or in part, with Omnitrans' Ethics Policy, such failure shall be considered a material breach of this Agreement and Omnitrans shall have the right to immediately terminate or suspend this Agreement.

## **27. PUBLIC RECORDS ACT**

- A. All records, documents, drawings, plans, specifications and other material relating to conduct of Omnitrans' business, including materials submitted by Contractor in its proposal and during the course of performing the Work under this Agreement, shall become the exclusive property of Omnitrans and may be deemed public records. Said materials may be subject to the provisions of the California Public Records Act. Omnitrans' use and disclosure of its records are governed by this Act.
- B. Omnitrans will not advise as to the nature or content of documents entitled to protection from disclosure under the California Public Records Act, including interpretations of the Act or the definitions of trade secret, confidential or proprietary. Omnitrans will accept materials clearly and prominently labeled "TRADE SECRET" or "CONFIDENTIAL" or "PROPRIETARY" as determined by Contractor. Omnitrans will endeavor to notify Contractor of any request of the disclosure of such materials. Under no circumstances, however, will Omnitrans be liable or responsible for the disclosure of any labeled materials whether the disclosure is required by law or a court order or occurs through inadvertence, mistake or negligence on the part of Omnitrans or its officers, employees and/or contractors.
- C. In the event of litigation concerning the disclosure of any material submitted by Contractor, Omnitrans' sole involvement will be as a stake holder, retaining the material until otherwise ordered by a court. Contractor, at its sole expense and risk, shall be responsible for

prosecuting or defending any action concerning the materials, and shall defend, indemnify and hold Omnitrans harmless from all costs and expenses, including attorneys' fees, in connection with such action.

**28. WAIVER/INVALIDITY**

No waiver of a breach of any provision of this Agreement by either party shall constitute a waiver of any other breach of the provision, or of any other breach of the provision of the Agreement. Failure of either party to enforce any provision of this Agreement at any time shall not be construed as a waiver of that provision.

The invalidity in whole or in part of any provision of this Agreement shall not void or affect the validity of any other provision.

**29. FORCE MAJEURE**

Performance of each and all Contractor's and Omnitrans' covenants herein shall be subject to such delays as may occur without Contractor's or Omnitrans' fault from acts of God, strikes, riots, or from other similar causes beyond Contractor's or Omnitrans' control.

**30. CONFIDENTIALITY**

Contractor agrees that for and during the entire term of this Agreement, any information, data, figures, records, findings and the like received or generated by Contractor in the performance of this Agreement, shall be considered and kept as the private and privileged records of Omnitrans and will not be divulged to any person, firm, corporation, or other entity except on the direct prior written authorization of Omnitrans. Further, upon expiration or termination of this Agreement for any reason, Contractor agrees that it will continue to treat as private and privileged any information, data, figures, records, findings and the like, and will not release any such information to any person, firm, corporation or other entity, either by statement, deposition, or as a witness, except upon direct prior written authority of Omnitrans.

**31. CONTRACTOR'S INTERACTION WITH THE MEDIA AND THE PUBLIC**

- A. Omnitrans shall review and approve in writing all Omnitrans related copy proposed to be used by Contractor for advertising or public relations purposes prior to publication. Contractor shall not allow Omnitrans related copy to be published in its advertisements and public relations programs prior to receiving such approval. Contractor shall ensure that all published information is factual and that it does not in any way imply that Omnitrans endorses Contractor's firm, service, and/or product.
- B. Contractor shall refer all inquiries from the news media to Omnitrans, and shall comply with the procedures of Omnitrans' Public Affairs staff regarding statements to the media relating to this Agreement or the Work.

- C. If Contractor receives a complaint from a citizen or the community, Contractor shall inform Omnitrans as soon as possible and inform Omnitrans of any action taken to alleviate the situation.
- D. The provisions of this Article shall survive the termination or expiration of this Agreement.

### **32. GOVERNING LAW**

The validity of this Agreement and of any of its terms or provisions, as well as the rights and duties of the parties hereunder, shall be governed by the laws of the State of California, and the proper venue of any action brought hereunder is and shall be the County of San Bernardino, California.

### **33. MODIFICATIONS TO AGREEMENT**

Unless specified otherwise in the Agreement, this Agreement may only be modified by written mutual consent evidenced by signatures of representatives authorized to enter into and modify the Agreement. In order to be effective, amendments may require prior approval by Omnitrans' Board of Directors, and in all instances require prior signature of an authorized representative of Omnitrans.

### **34. PRECEDENCE**

Conflicting provisions hereof, if any, shall prevail in the following descending order of precedence: (1) the provisions of this Agreement, (2), Attachment B, Prices by part (3) provisions of IFB No. MNT13-16 and (4) Contractor's proposal dated February 4, 2013.

### **35. ENTIRE AGREEMENT**

This Agreement, and any attachments or documents incorporated herein by inclusion or by reference, constitutes the complete and entire agreement between Omnitrans and Contractor and supersedes any prior representations, understandings, communications, commitments, agreements or proposals, oral or written.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed on the date shown below, and effective on the date first hereinabove written.

OMNITRANS

CUMMINS CAL PACIFIC, LLC

\_\_\_\_\_  
MILO VICTORIA  
CEO/General Manager

\_\_\_\_\_  
P.C. FANG  
Materials Director

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

Federal Tax I.D. No. \_\_\_\_\_



**CONTRACT AGREEMENT**

between

CONTRACTOR )  
 )  
NEW FLYER INDUSTRIES CANADA ULC )  
25 DEBAETS STREET )  
WINNIPEG, MANITOBA )  
R2J 4G5 CANADA )  
 )  
(hereinafter "Contractor") )  
Telephone: 800-665-2637 )  
Fax: 800-745-5368 )  
Email: kerri\_moloney@newflyer.com )

**CONTRACT DOCUMENTS**

**CONTRACT NO.  
MNT13-16B**

**CUMMINS ENGINE PARTS**

And )

Contract Amount: \$300,000

Omnitrans )  
1700 West Fifth Street )  
San Bernardino, CA 92411 )  
(hereinafter "Omnitrans") )

Omnitrans Project Manager:  
Name: Jack Dooley  
Title: Director of Maintenance  
Telephone: (909) 379-7183  
Fax: (909) 885-2441  
Email: [jack.dooley@omnitrans.org](mailto:jack.dooley@omnitrans.org)

Contract Administrator:  
Name: Eugenia Pinheiro  
Title: Contracts Manager  
Telephone: (909) 379-7314  
Fax: (909) 379-7107  
Email: [eugenia.pinheiro@omnitrans.org](mailto:eugenia.pinheiro@omnitrans.org)



## TABLE OF CONTENTS

1.	SCOPE OF WORK.....	3
2.	TECHNICAL REQUIREMENTS .....	3
3.	PERIOD OF PERFORMANCE .....	5
4.	COMPENSATION.....	6
5.	AUDIT AND INSPECTION OF RECORDS.....	7
6.	NOTIFICATION .....	7
7.	OMNITRANS' AND CONTRACTOR'S REPRESENTATIVES.....	7
8.	TERMINATION FOR CONVENIENCE .....	8
9.	TERMINATION FOR BREACH OF AGREEMENT .....	9
10.	ASSIGNMENT .....	10
11.	SUBCONTRACTING.....	10
12.	INDEPENDENT CONTRACTOR.....	10
13.	INSURANCE .....	10
14.	INDEMNITY.....	11
15.	REVISIONS IN SCOPE OF WORK.....	11
16.	RIGHTS IN TECHNICAL DATA .....	11
17.	OWNERSHIP OF REPORTS AND DOCUMENTS.....	12
18.	OWNERSHIP RIGHTS.....	12
19.	WORK FOR HIRE .....	13
20.	SUBMITTAL OF CLAIMS BY CONTRACTOR.....	13

21.	EQUAL OPPORTUNITY.....	13
23.	NOTIFICATION OF EMPLOYMENT OF OMNITRANS BOARD MEMBERS/ALTERNATES AND EMPLOYEES .....	14
24.	DISQUALIFYING POLITICAL CONTRIBUTIONS .....	14
25.	COMPLIANCE WITH LAW.....	15
26.	COMPLIANCE WITH LOBBYING POLICIES.....	15
27.	PUBLIC RECORDS ACT.....	15
28.	WAIVER/INVALIDITY .....	16
29.	FORCE MAJEURE.....	16
30.	CONFIDENTIALITY .....	16
31.	CONTRACTOR’S INTERACTION WITH THE MEDIA AND THE PUBLIC .....	16
32.	GOVERNING LAW.....	17
33.	MODIFICATIONS TO AGREEMENT .....	17
34.	PRECEDENCE .....	17
35.	ENTIRE AGREEMENT.....	17

This Agreement is made and entered into as of this \_\_\_\_\_ day of \_\_\_\_\_, 2013 by and between Omnitrans (hereinafter referred to as "Omnitrans") and NEW FLYER INDUSTRIES CANADA, ULC (hereinafter referred to as "Contractor").

## **RECITALS**

WHEREAS, Omnitrans is a joint powers authority organized under Sections 6500 et seq. of the California Government Code and Section 130255 of the California Public Utilities Code with power to contract for services described in Scope of Work, Scope of Work" (hereinafter referred to as "Work");

WHEREAS, Contractor has indicated it is qualified to supply and deliver to Omnitrans on as as-need basis Cummins bus parts in accordance with the specifications, term and conditions defined herein during the term of this Agreement. and (1) has reviewed all the available data furnished by Omnitrans pertinent to the Work to be rendered; (2) has inspected and reviewed the Work to be rendered; (3) will exercise the ordinary care; and (4) is willing to accept responsibility of performing the Work set forth in this Agreement for the compensation and in accordance with the terms, requirements and conditions herein specified;

NOW, THEREFORE, for the consideration hereinafter stated, the parties agree as follows:

### **1. SCOPE OF WORK**

- A. Contractor will perform the Work and related tasks as described in IFB-MNT13-16B Cummins Engine Parts, incorporated by reference into and made a part of this Agreement.
- B. This is a non-exclusive Agreement, whereby Omnitrans may, at its sole discretion, augment or supplant the Work. Contractor will cooperate fully with Omnitrans' staff or other contractor or entity that may be providing similar or the same Work for Omnitrans.

### **2. TECHNICAL REQUIREMENTS**

- 1. Cummins bus parts shall be new and shall, meet or exceed the Original Equipment Manufacturers (OEM) minimum specifications and conform to all applicable industry and safety standards.
- 2. Omnitrans reserves the sole right to determine whether a part or band of part is equivalent to OEM specifications. Omnitrans' decision on product equivalency is final and not appealable.
- 3. The Contractor shall notify Omnitrans if any of the aforementioned standards are changed, superseded or when new industry standards are set.



4. Contractor shall maintain adequate inventory of parts to continuously supply Omnitrans for the term of this Agreement Omnitrans will maintain a sufficient number of spare parts to insure continuous operations of the fleet.

- a) Contractor shall ship requested parts within 3 working days after receipt of order for normal delivery and same day for expedited (overnight, 2<sup>nd</sup> day, etc.) delivery.
- b) Contractor shall package the product(s) in such a manner as to prevent damage during shipment, receiving and storage.
- c) Omnitrans shall only pay for direct and actual freight charge and no premium charges for expedited shipping. Omnitrans reserves the right to request proof of freight charges or validate referenced changes independently.
- d) Deliveries shall be made to Omnitrans prepaid F.O.B destination.
- f) Delivery Location:

Omnitrans  
1700 West 5<sup>th</sup> Street  
San Bernardino, CA 92411

5. Warranty claims, and other warranty issues shall be administered, coordinated and resolved with the Omnitrans' Warranty Coordinator and a Contractor assigned representative,

6. Contractor's Warranty Claim Procedures appended hereto and by this reference incorporated herein:

- a) Contractor shall notify Omnitrans in writing the disposition of a warranty claim within 15 days of receipt.
- b) Contractor shall resolve all open warranty claims within 60 days after receipt. If the warranty claim is not resolved within the state time frame the Contractor will be information of Omnitrans' intent to automatically credit Omnitrans' accounts payable for the Contractor with the amount of the open claim.
- c) Contractor is required to notify the Omnitrans' Warranty Coordinator on the disposition of products within five (5) days after notification from Omnitrans' Warranty Coordinator and obtain an authorizing purchase order before proceeding with the repair.

- d) For warranty repair claims or service requests which are determined by the Contractor not to be under warranty, Contractor must forward a written failure analysis report and an itemized quote to Omnitrans' Warranty Coordinator and obtain an authorizing purchase order before proceeding with the repair.
  - e) Contractor shall be able to electronically communicate on warranty coverage, registrations, claims, service requests and bulletins/alerts.
  - f) Contractor is required to reference the Omnitrans warranty purchase order and warranty claim number with shipping warranty replacement products.
  - g) Contractor is required to properly identify warranty returns or replacement products with a bill of lading.
7. Contractor shall provide a Material Safety Data Sheet (MSDS) for all products containing any toxic items that may be harmful to the end user or the environment.

### **3. PERIOD OF PERFORMANCE**

The period of performance shall be beginning upon execution of final agreement for a base period of three (3) years, or pursuant to the provisions of this Agreement, or unless earlier terminated pursuant to Section 8 or Section 9 of this Agreement.

The term of this Agreement shall be from the date of execution of this Agreement and continue in effect through March 6, 2016, unless terminated as specified in Section 8 and 9 of this Agreement. Omnitrans reserves the right at its sole discretion to exercise a total of two (2) one-year option terms with no obligation to purchase any specified amount of products/services. All applicable indemnification provisions in this Agreement shall remain in effect following the termination of this Agreement.

#### 4. COMPENSATION

For Contractor's full and complete performance of its obligations under this Requirements Agreement, Omnitrans shall pay Contractor on a FIXED UNIT PRICE basis as needed per attachment, no guarantee of usage. Purchase orders will be awarded based on lowest price with availability.

Omnitrans' maximum cumulative payment obligation under this Agreement shall not exceed Three Hundred Thousand Dollars (\$300,000.00), including all amounts payable to Contractor for all costs and profit.

- A. Contractor shall invoice Omnitrans on a monthly basis no later than the 15<sup>th</sup> of each month. Contractor shall furnish information as may be requested by Omnitrans to substantiate the validity of an invoice.

Contractor shall submit invoices in duplicate to:

Omnitrans  
1700 West Fifth Street  
San Bernardino, CA 92411  
Attn: Accounts Payable

Each invoice shall include, at minimum, the following information:

- Contract number
  - Detail description of parts
  - Time period covered by the invoice
  - Amount of payment requested
  - Information as requested by Omnitrans
- B. Omnitrans shall remit payment within thirty (30) calendar days of approval of the invoices by Omnitrans' Project Manager.

At its sole discretion, Omnitrans may decline to make full payment for parts until such time as Contractor has documented, to Omnitrans' satisfaction.

In the event Omnitrans should overpay Contractor, such overpayment shall not be construed as a waiver of Omnitrans' right to obtain reimbursement for the overpayment. Upon discovering any overpayment, either on its own or upon notice of Omnitrans, Contractor shall immediately reimburse Omnitrans the entire overpayment or, at its sole discretion, Omnitrans may deduct such overpayment amount from monies due to Contractor under this Agreement or any other Agreement between Omnitrans and Contractor.

## 5. AUDIT AND INSPECTION OF RECORDS

Contractor agrees that Omnitrans or any duly authorized representative shall have access to and the right to examine, audit, excerpt, copy or transcribe any pertinent transaction, activity, time cards, employment records or other records relating to this Agreement. Such material, including all pertinent cost, accounting, financial records, and proprietary data must be kept and maintained by Contractor for a period of three (3) years after completion of this Agreement unless Omnitrans' written permission is given to Contractor to dispose of material prior to this time.

## 6. NOTIFICATION

All notices hereunder concerning this Agreement and the Work to be performed shall be physically transmitted by courier, overnight, registered or certified mail, return receipt requested, postage prepaid and addressed as follows:

To OMNITRANS:

Omnitrans  
1700 West Fifth Street  
San Bernardino, CA 92411

Attn: Eugenia F. Pinheiro  
Contracts Manager  
[Eugenia.Pinheiro@omnitrans.org](mailto:Eugenia.Pinheiro@omnitrans.org)

To CONTRACTOR:

New Flyer Industries Canada, ULC  
25 Debaets Street  
Winnipeg, Manitoba  
R2J 4G5 Canada

Attn: Kerri Maloney  
Director, Parts, Sales and Business  
Development  
[Kerri\\_moloney@newflyer.com](mailto:Kerri_moloney@newflyer.com)

## 7. OMNITRANS' AND CONTRACTOR'S REPRESENTATIVES

### A. Omnitrans' Project Manager

Contracting Officer: Omnitrans' CEO/General Manager or his authorized designee who has authority to execute contracts on behalf of Omnitrans.

Project Manager: Jack Dooley.

- a. Omnitrans has the final approval in all matters relating to or affecting the Work. Except as expressly specified in this Agreement, the Contracting Officer may exercise any powers, rights and/or privileges that have been lawfully delegated by Omnitrans. Nothing in this Agreement should be construed to bind Omnitrans for acts of its officers, employees, and/or agents that exceed the delegation of authority specified herein.

- b. The Contracting Officer has delegated to the Project Manager certain powers and duties in connection with this Agreement. The Project Manager is the authorized representative of the Contracting Officer for matters related to this Agreement. The Project Manager or his/her designee is empowered to:
  - 1. Have general oversight this Agreement, including the power to enforce compliance with this Agreement.
  - 2. Reserve the right to remove any portion of the Work from Contractor which have not been performed to Omnitrans' satisfaction.
  - 3. Subject to the review and acceptance by Omnitrans, negotiate with Contractor all adjustments pertaining to this Agreement for revision.
- c. In addition to the foregoing, the Project Manager shall have those rights and powers expressly set forth in other sections of this Agreement.

**B. Contractor's Key Personnel**

The following are Contractor's key personnel and their associated roles in the Work to be provided:

<u>Name</u>	<u>Role</u>
KERRI MOLONEY	DIRECTOR, PARTS, SALES AND BUSINESS DEVELOPMENT

Any propose/substitution or replacement by Contractor of Contractor's key personnel shall ensure that such person possesses the same or better expertise and experience than the key personnel being substituted or replaced. Omnitrans reserves the right to interview such person to ascertain and verify if such proposed substitution or replacement does in deed possess such expertise and experience.

Omnitrans awarded this Agreement to Contractor based on Omnitrans' confidence and reliance on the expertise of Contractor's key personnel described above. Contractor shall not reassign key personnel or assign other personnel to key personnel roles until Contractor obtains prior written approval from Omnitrans.

**8. TERMINATION FOR CONVENIENCE**

Omnitrans may terminate this Agreement in whole or in part for Omnitrans' convenience. Omnitrans' CEO/General Manager shall terminate this Agreement

by a written Notice of Termination to Contractor specifying the nature, extent, and effective date of the termination. Upon receipt of the notice of termination, Contractor shall immediately discontinue all Work affected and deliver all data, drawings, specifications, reports, estimates, summaries, and other information and materials accumulated in performing this Agreement, whether completed or in process, to Omnitrans' CEO/General Manager. Omnitrans shall make an equitable adjustment in the Agreement for Work already performed, but shall not allow anticipated profit on unperformed services. Force Majeure shall apply.

## **9. TERMINATION FOR BREACH OF AGREEMENT**

- A. If Contractor fails to perform any of the provisions of this Agreement or so fails to make progress as to endanger timely performance of this Agreement, Omnitrans may give Contractor written notice of such default. If Contractor does not cure such default or provide a plan to cure such default which is acceptable to Omnitrans within the time permitted by Omnitrans, then Omnitrans may terminate this Agreement due to Contractor's breach of this Agreement.
- B. If a federal or state proceeding for relief of debtors is undertaken by or against Contractor, or if Contractor makes an assignment for the benefit of creditors, then Omnitrans may immediately terminate this Agreement.
- C. If Contractor violates Section 26, Compliance with Lobbying Policies, of this Agreement, then Omnitrans may immediately terminate this Agreement.
- D. In the event Omnitrans terminates this Agreement as provided in this Section, Omnitrans may procure, upon such terms and in such manner as Omnitrans may deem appropriate, Work similar in scope and level of effort to those so terminated, and Contractor shall be liable to Omnitrans for all of its costs and damages, including, but not limited, any excess costs for such Work.
- E. All finished or unfinished documents and materials produced or procured under this Agreement shall become Omnitrans' property upon date of such termination.
- F. If, after notice of termination of this Agreement under the provisions of this Section, it is determined for any reason that Contractor was not in default under the provisions of this Section, or that the default was excusable under the terms of this Agreement, the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to Section 8, Termination for Convenience.
- G. The rights and remedies of Omnitrans provided in this Article shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Agreement.

## 10. ASSIGNMENT

This Agreement, any interest herein or claim hereunder, may not be assigned by Contractor either voluntarily or by operation of law, nor may all or any part of this Agreement be subcontracted by Contractor, without the prior written consent of Omnitrans. Consent by Omnitrans shall not be deemed to relieve Contractor of its obligations to comply fully with all terms and conditions of this Agreement.

## 11. SUBCONTRACTING

Omnitrans hereby consents to Contractor's subcontracting of portions of the Work to the parties identified below for the functions described in Contractor's proposal. Contractor shall include in each subcontract agreement the stipulation that Contractor, not Omnitrans, is solely responsible for payment to the subcontractor for all amounts owing and that the subcontractor shall have no claim, and shall take no action against Omnitrans, Member Agencies or officers, directors, employees or sureties thereof for nonpayment by Contractor.

Subcontractor's Name and Address	Work to Be Performed
----------------------------------	----------------------

N/A	
-----	--

## 12. INDEPENDENT CONTRACTOR

Contractor's relationship to Omnitrans in the performance of this Agreement is that of an independent Contractor. Contractor's personnel performing Work under this Agreement shall at all times be under Contractor's exclusive direction and control and shall be employees of Contractor and not employees of Omnitrans. Contractor shall pay all wages, salaries and other amounts due its employees in connection with this Agreement and shall be responsible for all reports and obligations respecting them, such as social security, income tax withholding, unemployment compensation, workers' compensation and similar matters.

## 13. INSURANCE

Throughout the duration of this Agreement, Contractor shall maintain the following insurance, which shall be full-coverage insurance not subject to self-insurance provisions. Contractor shall not of its own initiative cause such insurance to be canceled or materially changed during the term of this Agreement.

- A. **Commercial General Liability including Products/Completed Operations:** \$1,000,000 per occurrence for bodily and property damage liability and \$2,000,000 aggregate; *Endorsement naming Omnitrans as Additional Insured.*

- B. **Automobile Liability:** \$1,000,000 combined single limit bodily and property damage liability per accident; *Endorsement naming Omnitrans as Additional Insured.*
- C. **Workers' Compensation:** statutory limits or, a State-Approved program in an amount and form that meets all applicable requirements of the Labor Code of the State of California; *waiver of subrogation that includes Omnitrans.*

Omnitrans, its officers, officials, employees, agents, and volunteers.

#### **14. INDEMNITY**

Contractor shall indemnify, defend and hold harmless Omnitrans, and its member agencies, and their officers, directors, employees and agents from and against any and all liability, expense (including, but not limited to, defense costs and attorneys' fees), claims, causes of action, and lawsuits for damages of any nature whatsoever, including, but not limited to, bodily injury, death, personal injury or property damage (including property of Contractor) arising from or connected with any alleged act and/or omission of Contractor, its officers, directors, employees, agents, Subcontractors or suppliers. This indemnity shall survive termination or expiration of this Agreement and/or final payment thereunder.

#### **15. REVISIONS IN SCOPE OF WORK**

By written notice or order, Omnitrans may, from time to time, order work suspension or make changes to this Agreement. Changes in the Work shall be mutually agreed to and incorporated into an amendment to this Agreement. Upon execution of an amendment, Contractor shall perform the Work, as amended.

#### **16. RIGHTS IN TECHNICAL DATA**

- A. No material or technical data prepared by Contractor under this Agreement is to be released by Contractor to any other person or entity except as necessary for the performance of the Work. All press releases or information concerning the Work that might appear in any publication or dissemination, including but not limited to, newspapers, magazines, and electronic media, shall first be authorized in writing by Omnitrans.
- B. The originals of all letters, documents, reports and other products and data produced under this Agreement shall become the property of Omnitrans without restriction or limitation on their use and shall be made available upon request to Omnitrans at any time. Original copies of such shall be delivered to Omnitrans upon completion of the Work or termination of the Work. Contractor shall be permitted to retain copies of such items for the furtherance of its technical proficiency; however,



publication of this material is subject to the prior written approval of Omnitrans. The provisions of this paragraph shall survive termination or expiration of this Agreement and/or final payment thereunder.

## **17. OWNERSHIP OF REPORTS AND DOCUMENTS**

The originals of all letters, documents, reports and other products and data produced under this Agreement shall be delivered to, and become the sole and exclusive property of Omnitrans. Copies may be made for Contractor's records, but shall not be furnished to others without prior written authorization from Omnitrans. Such deliverables shall be deemed works made for hire, and all rights in copyright therein shall be retained by Omnitrans.

## **18. OWNERSHIP RIGHTS**

- A. In the event Omnitrans rightfully obtains copies of Proprietary Data under the terms of the separate License Agreement and Escrow Agreement that govern rights in Documentation, Software and Intellectual Property created and/or developed by Contractor, its Third Party Software Contractors and its Suppliers as part of the Project, any derivative works and associated documentation created by or on behalf of Omnitrans by Permitted Programmers (as defined in the License Agreement) shall be the sole and exclusive property of Omnitrans (collectively, "Omnitrans Intellectual Property"), and Omnitrans may use, disclose and exercise dominion and full rights of ownership, in any manner in Omnitrans Intellectual Property in connection with the use, operation and maintenance of a transportation system administered by Omnitrans. No use of Omnitrans Intellectual Property shall be made for any purpose other than in conjunction with a transportation system administered by Contractor, and Omnitrans shall not sell, lease, rent, give away or otherwise disclose any Omnitrans Intellectual Property to any outside third party other than Permitted Programmers. To the extent there may be any question of rights of ownership or use in any Omnitrans Intellectual Property, Contractor shall require all of its subcontractors and suppliers (including without limitation its Third Party Software Contractors) to assign to Omnitrans, all worldwide right, title and interest in and to all Omnitrans Intellectual Property in a manner consistent with the foregoing terms of this paragraph. Contractor shall execute any documents as Omnitrans may from time to time reasonably request to effectuate the terms of this paragraph.
- B. All documentation and Software which predates this Contract and which otherwise owned by Contractor or its Third Party Software Contractors, and all Documentation and Software which is created by Contractor or its Third Party Software Contractors shall be Licensed Software or Licensed Documentation, as appropriate. All Licensed Software and Licensed

Documentation shall be governed by the License Agreement by and between the parties of event date herewith.

**19. WORK FOR HIRE**

Any work created or produced as a part of this Agreement that may be defined under Section 101, Title 17, USC will be considered “work for hire” as it pertains to ownership rights. Contractor, by his/her endorsement hereon agrees that all rights to any work(s) created or produced are waived, and that ownership rests with Omnitrans. Contractor further agrees to ensure transfer of all rights to such work(s), as defined under federal copyright law, that may be created or produced under this Agreement by its suppliers, contractors or subcontractors.

**20. SUBMITTAL OF CLAIMS BY CONTRACTOR**

Contractor shall file any and all claims with Omnitrans’ Project Manager in writing within thirty (30) days of the event or occurrence giving rise to the claim. The claim shall be in sufficient detail to enable Omnitrans to ascertain the claim’s basis and amount, and shall describe the date, place and other pertinent circumstances of the event or occurrence giving rise to the claim and the indebtedness, obligation, injury, loss or damages allegedly incurred by Contractor.

Even though a claim may be filed and/or in review by Omnitrans, Contractor shall continue to perform in accordance with this Agreement.

**21. EQUAL OPPORTUNITY**

Contractor shall not discriminate against, or grant preferential treatment to, any individual or group, or any employee or applicant for employment because of race, age, religion, color, ethnicity, sex, national origin, ancestry, physical disability, mental disability, political affiliation, sexual orientation, marital status or other status protected by law. Contractor shall take action to ensure that applicants and employees are treated without regard to the above.

**22. STANDARD OF PERFORMANCE**

- A. Contractor shall perform and exercise, and require its subcontractors to perform and exercise due professional care and competence in the performance of the Work in accordance with the requirements of this Agreement. Contractor shall be responsible for the professional quality, technical accuracy, completeness and coordination of the Work, it being understood that Omnitrans will be relying upon such professional quality, accuracy, completeness and coordination in utilizing the Work. The foregoing obligations and standards shall constitute the "Standard of Performance" for purposes of this Agreement. The provisions of this paragraph shall survive termination or expiration of this Agreement and/or final payment thereunder.
- B. All workers shall have sufficient skill and experience to perform the Work assigned to them. Omnitrans shall have the right, at its sole discretion, to require the immediate removal of Contractor's personnel at any level assigned to the performance of the Work at no additional fee or cost to Omnitrans, if Omnitrans considers such removal in its best interests and requests such removal in writing and such request is not done for illegal reasons. Further, an employee who is removed from performing Work under this Agreement under this Article shall not be re-assigned to perform Work in any other capacity under this Agreement without Omnitrans' prior written approval.

**23. NOTIFICATION OF EMPLOYMENT OF OMNITRANS BOARD MEMBERS/ALTERNATES AND EMPLOYEES**

To ensure compliance with Omnitrans' Ethics Policy, Contractor shall provide written notice to Omnitrans disclosing the identity of any individual who Contractor desires to employ or retain under a contract, and who (1) presently serves as a Board Member/Alternate or an employee of Omnitrans, or (2) served as a Board Member/Alternate or an employee of Omnitrans within the previous 12 months of the date of the proposed employment or retention by Contractor. Contractor's written notice shall indicate whether the individual will be an officer, principal or shareholder of the entity and/or will participate in the performance of this Agreement.

**24. DISQUALIFYING POLITICAL CONTRIBUTIONS**

In the event of a proposed amendment to this Agreement, Contractor shall provide prior to the execution of such amendment, a written statement disclosing any contribution(s) of \$250 or more made by Contractor or its subcontractor(s) to Omnitrans Board Members/Alternates or employees within the preceding twelve (12) months of the date of the proposed amendment. Applicable contributions include those made by any agent/person/entity on behalf of Contractor or subcontractor(s).

## **25. COMPLIANCE WITH LAW**

Contractor shall familiarize itself with and perform the Work required under this Agreement in conformity with requirements and standards of Omnitrans, municipal and public agencies, public and private utilities, special districts, and railroad agencies whose facilities and work may be affected by Work under this Agreement. Contractor shall also comply with all Federal, state and local laws and ordinances.

## **26. COMPLIANCE WITH LOBBYING POLICIES**

- A. Contractor agrees that if it is a Lobbyist Employer or if it has retained a Lobbying Firm or Lobbyist, as such terms are defined by Omnitrans in its Ethics Policy, it shall comply or ensure that its Lobbying Firm and Lobbyist complies with Omnitrans' Ethics Policy.
- B. If Contractor (Lobbyist Employer) or its Lobbying Firm or Lobbyist fails to comply, in whole or in part, with Omnitrans' Ethics Policy, such failure shall be considered a material breach of this Agreement and Omnitrans shall have the right to immediately terminate or suspend this Agreement.

## **27. PUBLIC RECORDS ACT**

- A. All records, documents, drawings, plans, specifications and other material relating to conduct of Omnitrans' business, including materials submitted by Contractor in its proposal and during the course of performing the Work under this Agreement, shall become the exclusive property of Omnitrans and may be deemed public records. Said materials may be subject to the provisions of the California Public Records Act. Omnitrans' use and disclosure of its records are governed by this Act.
- B. Omnitrans will not advise as to the nature or content of documents entitled to protection from disclosure under the California Public Records Act, including interpretations of the Act or the definitions of trade secret, confidential or proprietary. Omnitrans will accept materials clearly and prominently labeled "TRADE SECRET" or "CONFIDENTIAL" or "PROPRIETARY" as determined by Contractor. Omnitrans will endeavor to notify Contractor of any request of the disclosure of such materials. Under no circumstances, however, will Omnitrans be liable or responsible for the disclosure of any labeled materials whether the disclosure is required by law or a court order or occurs through inadvertence, mistake or negligence on the part of Omnitrans or its officers, employees and/or contractors.
- C. In the event of litigation concerning the disclosure of any material submitted by Contractor, Omnitrans' sole involvement will be as a stake holder, retaining the material until otherwise ordered by a court. Contractor, at its sole expense and risk, shall be responsible for

prosecuting or defending any action concerning the materials, and shall defend, indemnify and hold Omnitrans harmless from all costs and expenses, including attorneys' fees, in connection with such action.

**28. WAIVER/INVALIDITY**

No waiver of a breach of any provision of this Agreement by either party shall constitute a waiver of any other breach of the provision, or of any other breach of the provision of the Agreement. Failure of either party to enforce any provision of this Agreement at any time shall not be construed as a waiver of that provision.

The invalidity in whole or in part of any provision of this Agreement shall not void or affect the validity of any other provision.

**29. FORCE MAJEURE**

Performance of each and all Contractor's and Omnitrans' covenants herein shall be subject to such delays as may occur without Contractor's or Omnitrans' fault from acts of God, strikes, riots, or from other similar causes beyond Contractor's or Omnitrans' control.

**30. CONFIDENTIALITY**

Contractor agrees that for and during the entire term of this Agreement, any information, data, figures, records, findings and the like received or generated by Contractor in the performance of this Agreement, shall be considered and kept as the private and privileged records of Omnitrans and will not be divulged to any person, firm, corporation, or other entity except on the direct prior written authorization of Omnitrans. Further, upon expiration or termination of this Agreement for any reason, Contractor agrees that it will continue to treat as private and privileged any information, data, figures, records, findings and the like, and will not release any such information to any person, firm, corporation or other entity, either by statement, deposition, or as a witness, except upon direct prior written authority of Omnitrans.

**31. CONTRACTOR'S INTERACTION WITH THE MEDIA AND THE PUBLIC**

- A. Omnitrans shall review and approve in writing all Omnitrans related copy proposed to be used by Contractor for advertising or public relations purposes prior to publication. Contractor shall not allow Omnitrans related copy to be published in its advertisements and public relations programs prior to receiving such approval. Contractor shall ensure that all published information is factual and that it does not in any way imply that Omnitrans endorses Contractor's firm, service, and/or product.
- B. Contractor shall refer all inquiries from the news media to Omnitrans, and shall comply with the procedures of Omnitrans' Public Affairs staff regarding statements to the media relating to this Agreement or the Work.

- C. If Contractor receives a complaint from a citizen or the community, Contractor shall inform Omnitrans as soon as possible and inform Omnitrans of any action taken to alleviate the situation.
- D. The provisions of this Article shall survive the termination or expiration of this Agreement.

### **32. GOVERNING LAW**

The validity of this Agreement and of any of its terms or provisions, as well as the rights and duties of the parties hereunder, shall be governed by the laws of the State of California, and the proper venue of any action brought hereunder is and shall be the County of San Bernardino, California.

### **33. MODIFICATIONS TO AGREEMENT**

Unless specified otherwise in the Agreement, this Agreement may only be modified by written mutual consent evidenced by signatures of representatives authorized to enter into and modify the Agreement. In order to be effective, amendments may require prior approval by Omnitrans' Board of Directors, and in all instances require prior signature of an authorized representative of Omnitrans.

### **34. PRECEDENCE**

Conflicting provisions hereof, if any, shall prevail in the following descending order of precedence: (1) the provisions of this Agreement, (2), Attachment B, Prices by part (3) provisions of IFB No. MNT13-16 and (4) Contractor's proposal dated February 5, 2013.

### **35. ENTIRE AGREEMENT**

This Agreement, and any attachments or documents incorporated herein by inclusion or by reference, constitutes the complete and entire agreement between Omnitrans and Contractor and supersedes any prior representations, understandings, communications, commitments, agreements or proposals, oral or written.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed on the date shown below, and effective on the date first hereinabove written.

OMNITRANS

NEW FLYER INDUSTRIES CANADA, ULC

\_\_\_\_\_  
MILO VICTORIA  
CEO/General Manager

\_\_\_\_\_  
KERRI MOLONEY  
Director

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

Federal Tax I.D. No. \_\_\_\_\_



CONTRACT AGREEMENT

between

CONTRACTOR )
DIRECT MACHINERY OUTLET, INC )
7785 ROUTE 175, SUITE 106 )
JESSUP, MD 20794 )
(hereinafter "CONTRACTOR") )
Telephone: 410-799-9530 )
Fax: 410-799-9531 )
E-mail: Koepckea.sales@gmail.com )

CONTRACT DOCUMENTS

CONTRACT NO.
MNT13-16C

CUMMINS ENGINE PARTS

And )

Contract Amount: \$225,000

Omnitrans )
1700 West Fifth Street )
San Bernardino, CA 92411 )
(hereinafter "Omnitrans") )

Omnitrans Project Manager:
Name: Jack Dooley
Title: Director of Maintenance
Telephone: (909) 379-7183
Fax: (909) 885-2441
Email: jack.dooley@omnitrans.org

Contract Administrator:
Name: Eugenia Pinheiro
Title: Contracts Manager
Telephone: (909) 379-7314
Fax: (909) 379-7107
Email: eugenia.pinheiro@omnitrans.org





## TABLE OF CONTENTS

1.	SCOPE OF WORK.....	3
2.	TECHNICAL REQUIREMENTS .....	3
3.	PERIOD OF PERFORMANCE .....	5
4.	COMPENSATION.....	6
5.	AUDIT AND INSPECTION OF RECORDS.....	7
6.	NOTIFICATION .....	7
7.	OMNITRANS' AND CONTRACTOR'S REPRESENTATIVES.....	7
8.	TERMINATION FOR CONVENIENCE .....	8
9.	TERMINATION FOR BREACH OF AGREEMENT .....	9
10.	ASSIGNMENT .....	10
11.	SUBCONTRACTING.....	10
12.	INDEPENDENT CONTRACTOR.....	10
13.	INSURANCE .....	10
14.	INDEMNITY.....	11
15.	REVISIONS IN SCOPE OF WORK.....	11
16.	RIGHTS IN TECHNICAL DATA .....	11
17.	OWNERSHIP OF REPORTS AND DOCUMENTS.....	12
18.	OWNERSHIP RIGHTS.....	12
19.	WORK FOR HIRE .....	13
20.	SUBMITTAL OF CLAIMS BY CONTRACTOR.....	13

21.	EQUAL OPPORTUNITY.....	13
23.	NOTIFICATION OF EMPLOYMENT OF OMNITRANS BOARD MEMBERS/ALTERNATES AND EMPLOYEES .....	14
24.	DISQUALIFYING POLITICAL CONTRIBUTIONS .....	14
25.	COMPLIANCE WITH LAW.....	14
26.	COMPLIANCE WITH LOBBYING POLICIES.....	15
27.	PUBLIC RECORDS ACT.....	15
28.	WAIVER/INVALIDITY .....	15
29.	FORCE MAJEURE.....	16
30.	CONFIDENTIALITY .....	16
31.	CONTRACTOR’S INTERACTION WITH THE MEDIA AND THE PUBLIC .....	16
32.	GOVERNING LAW.....	17
33.	MODIFICATIONS TO AGREEMENT .....	17
34.	PRECEDENCE .....	17
35.	ENTIRE AGREEMENT.....	17

This Agreement is made and entered into as of this \_\_\_\_\_ day of \_\_\_\_\_, 2013 by and between Omnitrans (hereinafter referred to as "Omnitrans") and DIRECT MACHINERY OUTLET, INC. (hereinafter referred to as "Contractor").

## **RECITALS**

WHEREAS, Omnitrans is a joint powers authority organized under Sections 6500 et seq. of the California Government Code and Section 130255 of the California Public Utilities Code with power to contract for services described in Scope of Work, Scope of Work" (hereinafter referred to as "Work");

WHEREAS, Contractor has indicated it is qualified to supply and deliver to Omnitrans on an as-needed basis Cummins bus parts in accordance with the specifications, terms and conditions defined herein during the term of this Agreement. and (1) has reviewed all the available data furnished by Omnitrans pertinent to the Work to be rendered; (2) has inspected and reviewed the Work to be rendered; (3) will exercise the ordinary care; and (4) is willing to accept responsibility of performing the Work set forth in this Agreement for the compensation and in accordance with the terms, requirements and conditions herein specified;

NOW, THEREFORE, for the consideration hereinafter stated, the parties agree as follows:

### **1. SCOPE OF WORK**

- A. Contractor will perform the Work and related tasks as described in IFB-MNT13-16C Cummins Engine Parts, incorporated by reference into and made a part of this Agreement.
- B. This is a non-exclusive Agreement, whereby Omnitrans may, at its sole discretion, augment or supplant the Work. Contractor will cooperate fully with Omnitrans' staff or other contractor or entity that may be providing similar or the same Work for Omnitrans.

### **2. TECHNICAL REQUIREMENTS**

- 1. Cummins bus parts shall be new and shall, meet or exceed the Original Equipment Manufacturers (OEM) minimum specifications and conform to all applicable industry and safety standards.
- 2. Omnitrans reserves the sole right to determine whether a part or band of part is equivalent to OEM specifications. Omnitrans' decision on product equivalency is final and not appealable.
- 3. The Contractor shall notify Omnitrans if any of the aforementioned standards are changed, superseded or when new industry standards are set.

4. Contractor shall maintain adequate inventory of parts to continuously supply Omnitrans for the term of this Agreement Omnitrans will maintain a sufficient number of spare parts to insure continuous operations of the fleet.

- a) Contractor shall ship requested parts within 3 working days after receipt of order for normal delivery and same day for expedited (overnight, 2<sup>nd</sup> day, etc.) delivery.
- b) Contractor shall package the product(s) in such a manner as to prevent damage during shipment, receiving and storage.
- c) Omnitrans shall only pay for direct and actual freight charge and no premium charges for expedited shipping. Omnitrans reserves the right to request proof of freight charges or validate referenced changes independently.
- d) Deliveries shall be made to Omnitrans prepaid F.O.B destination.
- f) Delivery Location:

Omnitrans  
1700 West 5<sup>th</sup> Street  
San Bernardino, CA 92411

5. Warranty claims, and other warranty issues shall be administered, coordinated and resolved with the Omnitrans' Warranty Coordinator and a Contractor assigned representative,

6. Contractor's Warranty Claim Procedures appended hereto and by this reference incorporated herein:

- a) Contractor shall notify Omnitrans in writing the disposition of a warranty claim within 15 days of receipt.
- b) Contractor shall resolve all open warranty claims within 60 days after receipt. If the warranty claim is not resolved within the state time frame the Contractor will be information of Omnitrans' intent to automatically credit Omnitrans' accounts payable for the Contractor with the amount of the open claim.
- c) Contractor is required to notify the Omnitrans' Warranty Coordinator on the disposition of products within five (5) days after notification from Omnitrans' Warranty Coordinator and obtain an authorizing purchase order before proceeding with the repair.

- d) For warranty repair claims or service requests which are determined by the Contractor not to be under warranty, Contractor must forward a written failure analysis report and an itemized quote to Omnitrans' Warranty Coordinator and obtain an authorizing purchase order before proceeding with the repair.
  - e) Contractor shall be able to electronically communicate on warranty coverage, registrations, claims, service requests and bulletins/alerts.
  - f) Contractor is required to reference the Omnitrans warranty purchase order and warranty claim number with shipping warranty replacement products.
  - g) Contractor is required to properly identify warranty returns or replacement products with a bill of lading.
7. Contractor shall provide a Material Safety Data Sheet (MSDS) for all products containing any toxic items that may be harmful to the end user or the environment.

### **3. PERIOD OF PERFORMANCE**

The period of performance shall be beginning upon execution of final agreement for a base period of three (3) years, or pursuant to the provisions of this Agreement, or unless earlier terminated pursuant to Section 8 or Section 9 of this Agreement.

The term of this Agreement shall be from the date of execution of this Agreement and continue in effect through March 6, 2016, unless terminated as specified in Section 8 and 9 of this Agreement. Omnitrans reserves the right at its sole discretion to exercise a total of two (2) one-year option terms with no obligation to purchase any specified amount of products/services. All applicable indemnification provisions in this Agreement shall remain in effect following the termination of this Agreement.

#### 4. COMPENSATION

For Contractor's full and complete performance of its obligations under this Requirements Agreement, Omnitrans shall pay Contractor on a FIXED UNIT PRICE basis as needed per attachment, no guarantee of usage. Purchase orders will be awarded based on lowest price with availability.

Omnitrans' maximum cumulative payment obligation under this Agreement shall not exceed Two Hundred Twenty Five Thousand Dollars (\$225,000.00), including all amounts payable to Contractor for all costs and profit.

- A. Contractor shall invoice Omnitrans on a monthly basis no later than the 15<sup>th</sup> of each month. Contractor shall furnish information as may be requested by Omnitrans to substantiate the validity of an invoice.

Contractor shall submit invoices in duplicate to:

Omnitrans  
1700 West Fifth Street  
San Bernardino, CA 92411  
Attn: Accounts Payable

Each invoice shall include, at minimum, the following information:

- Contract number
  - Detail description of parts
  - Time period covered by the invoice
  - Amount of payment requested
  - Information as requested by Omnitrans
- B. Omnitrans shall remit payment within thirty (30) calendar days of approval of the invoices by Omnitrans' Project Manager.

At its sole discretion, Omnitrans may decline to make full payment for parts until such time as Contractor has documented, to Omnitrans' satisfaction.

In the event Omnitrans should overpay Contractor, such overpayment shall not be construed as a waiver of Omnitrans' right to obtain reimbursement for the overpayment. Upon discovering any overpayment, either on its own or upon notice of Omnitrans, Contractor shall immediately reimburse Omnitrans the entire overpayment or, at its sole discretion, Omnitrans may deduct such overpayment amount from monies due to Contractor under this Agreement or any other Agreement between Omnitrans and Contractor.

**5. AUDIT AND INSPECTION OF RECORDS**

Contractor agrees that Omnitrans or any duly authorized representative shall have access to and the right to examine, audit, excerpt, copy or transcribe any pertinent transaction, activity, time cards, employment records or other records relating to this Agreement. Such material, including all pertinent cost, accounting, financial records, and proprietary data must be kept and maintained by Contractor for a period of three (3) years after completion of this Agreement unless Omnitrans' written permission is given to Contractor to dispose of material prior to this time.

**6. NOTIFICATION**

All notices hereunder concerning this Agreement and the Work to be performed shall be physically transmitted by courier, overnight, registered or certified mail, return receipt requested, postage prepaid and addressed as follows:

To OMNITRANS:

To CONTRACTOR:

Omnitrans  
1700 West Fifth Street  
San Bernardino, CA 92411

Direct Machinery Outlet, Inc.  
7785 Route 175, Suite 106  
Jessup, MD 20794

Attn: Eugenia F. Pinheiro  
Contracts Manager  
[Eugenia.Pinheiro@omnitrans.org](mailto:Eugenia.Pinheiro@omnitrans.org)

Attn: Angie Koepcke  
Contract Analyst  
[Koepckea.sales@gmail.com](mailto:Koepckea.sales@gmail.com)

**7. OMNITRANS' AND CONTRACTOR'S REPRESENTATIVES**

**A. OMNITRANS' Project Manager**

Contracting Officer: Omnitrans' CEO/General Manager or his authorized designee who has authority to execute contracts on behalf of Omnitrans.

Project Manager: Jack Dooley.

- a. Omnitrans has the final approval in all matters relating to or affecting the Work. Except as expressly specified in this Agreement, the Contracting Officer may exercise any powers, rights and/or privileges that have been lawfully delegated by Omnitrans. Nothing in this Agreement should be construed to bind Omnitrans for acts of its officers, employees, and/or agents that exceed the delegation of authority specified herein.
- b. The Contracting Officer has delegated to the Project Manager certain powers and duties in connection with this Agreement. The Project Manager is the authorized representative of the Contracting

Officer for matters related to this Agreement. The Project Manager or his/her designee is empowered to:

1. Have general oversight this Agreement, including the power to enforce compliance with this Agreement.
  2. Reserve the right to remove any portion of the Work from Contractor which have not been performed to Omnitrans' satisfaction.
  3. Subject to the review and acceptance by Omnitrans, negotiate with Contractor all adjustments pertaining to this Agreement for revision.
- c. In addition to the foregoing, the Project Manager shall have those rights and powers expressly set forth in other sections of this Agreement.

**B. Contractor's Key Personnel**

The following are Contractor's key personnel and their associated roles in the Work to be provided:

<u>Name</u>	<u>Role</u>
ANGIE KOEPCKE	CONTRACT ANALYST

Any propose/substitution or replacement by Contractor of Contractor's key personnel shall ensure that such person possesses the same or better expertise and experience than the key personnel being substituted or replaced. Omnitrans reserves the right to interview such person to ascertain and verify if such proposed substitution or replacement does in deed possess such expertise and experience.

Omnitrans awarded this Agreement to Contractor based on Omnitrans' confidence and reliance on the expertise of Contractor's key personnel described above. Contractor shall not reassign key personnel or assign other personnel to key personnel roles until Contractor obtains prior written approval from Omnitrans.

**8. TERMINATION FOR CONVENIENCE**

Omnitrans may terminate this Agreement in whole or in part for Omnitrans' convenience. Omnitrans' CEO/General Manager shall terminate this Agreement by a written Notice of Termination to Contractor specifying the nature, extent, and effective date of the termination. Upon receipt of the notice of termination, Contractor shall immediately discontinue all Work affected and deliver all data,



drawings, specifications, reports, estimates, summaries, and other information and materials accumulated in performing this Agreement, whether completed or in process, to Omnitrans' CEO/General Manager. Omnitrans shall make an equitable adjustment in the Agreement for Work already performed, but shall not allow anticipated profit on unperformed services. Force Majeure shall apply.

## **9. TERMINATION FOR BREACH OF AGREEMENT**

- A. If Contractor fails to perform any of the provisions of this Agreement or so fails to make progress as to endanger timely performance of this Agreement, Omnitrans may give Contractor written notice of such default. If Contractor does not cure such default or provide a plan to cure such default which is acceptable to Omnitrans within the time permitted by Omnitrans, then Omnitrans may terminate this Agreement due to Contractor's breach of this Agreement.
- B. If a federal or state proceeding for relief of debtors is undertaken by or against Contractor, or if Contractor makes an assignment for the benefit of creditors, then Omnitrans may immediately terminate this Agreement.
- C. If Contractor violates Section 26, Compliance with Lobbying Policies, of this Agreement, then Omnitrans may immediately terminate this Agreement.
- D. In the event Omnitrans terminates this Agreement as provided in this Section, Omnitrans may procure, upon such terms and in such manner as Omnitrans may deem appropriate, Work similar in scope and level of effort to those so terminated, and Contractor shall be liable to Omnitrans for all of its costs and damages, including, but not limited, any excess costs for such Work.
- E. All finished or unfinished documents and materials produced or procured under this Agreement shall become Omnitrans' property upon date of such termination.
- F. If, after notice of termination of this Agreement under the provisions of this Section, it is determined for any reason that Contractor was not in default under the provisions of this Section, or that the default was excusable under the terms of this Agreement, the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to Section 8, Termination for Convenience.
- G. The rights and remedies of Omnitrans provided in this Article shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Agreement.

## 10. ASSIGNMENT

This Agreement, any interest herein or claim hereunder, may not be assigned by Contractor either voluntarily or by operation of law, nor may all or any part of this Agreement be subcontracted by Contractor, without the prior written consent of Omnitrans. Consent by Omnitrans shall not be deemed to relieve Contractor of its obligations to comply fully with all terms and conditions of this Agreement.

## 11. SUBCONTRACTING

Omnitrans hereby consents to Contractor's subcontracting of portions of the Work to the parties identified below for the functions described in Contractor's proposal. Contractor shall include in each subcontract agreement the stipulation that Contractor, not Omnitrans, is solely responsible for payment to the subcontractor for all amounts owing and that the subcontractor shall have no claim, and shall take no action against Omnitrans, Member Agencies or officers, directors, employees or sureties thereof for nonpayment by Contractor.

<b>Subcontractor's Name and Address</b>	<b>Work to Be Performed</b>
---	-----------------------------

N/A	
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## 12. INDEPENDENT CONTRACTOR

Contractors relationship to Omnitrans in the performance of this Agreement is that of an independent Contractor. Contractors personnel performing Work under this Agreement shall at all times be under Contractors exclusive direction and control and shall be employees of CONTRACTOR and not employees of Omnitrans. CONTRACTOR shall pay all wages, salaries and other amounts due its employees in connection with this Agreement and shall be responsible for all reports and obligations respecting them, such as social security, income tax withholding, unemployment compensation, workers' compensation and similar matters.

## 13. INSURANCE

Throughout the duration of this Agreement, CONTRACTOR shall maintain the following insurance, which shall be full-coverage insurance not subject to self-insurance provisions. CONTRACTOR shall not of its own initiative cause such insurance to be canceled or materially changed during the term of this Agreement.

- A. **Commercial General Liability including Products/Completed Operations:** \$1,000,000 per occurrence for bodily and property damage liability and \$2,000,000 aggregate; *Endorsement naming Omnitrans as Additional Insured.*

- B. **Automobile Liability:** \$1,000,000 combined single limit bodily and property damage liability per accident; *Endorsement naming Omnitrans as Additional Insured.*
  - C. **Workers' Compensation:** statutory limits or, a State-Approved program in an amount and form that meets all applicable requirements of the Labor Code of the State of California; *waiver of subrogation that includes Omnitrans.*
- Omnitrans, its officers, officials, employees, agents, and volunteers.

#### 14. INDEMNITY

CONTRACTOR shall indemnify, defend and hold harmless Omnitrans, and its member agencies, and their officers, directors, employees and agents from and against any and all liability, expense (including, but not limited to, defense costs and attorneys' fees), claims, causes of action, and lawsuits for damages of any nature whatsoever, including, but not limited to, bodily injury, death, personal injury or property damage (including property of CONTRACTOR) arising from or connected with any alleged act and/or omission of CONTRACTOR, its officers, directors, employees, agents, Subcontractors or suppliers. This indemnity shall survive termination or expiration of this Agreement and/or final payment thereunder.

#### 15. REVISIONS IN SCOPE OF WORK

By written notice or order, Omnitrans may, from time to time, order work suspension or make changes to this Agreement. Changes in the Work shall be mutually agreed to and incorporated into an amendment to this Agreement. Upon execution of an amendment, CONTRACTOR shall perform the Work, as amended.

#### 16. RIGHTS IN TECHNICAL DATA

- A. No material or technical data prepared by CONTRACTOR under this Agreement is to be released by CONTRACTOR to any other person or entity except as necessary for the performance of the Work. All press releases or information concerning the Work that might appear in any publication or dissemination, including but not limited to, newspapers, magazines, and electronic media, shall first be authorized in writing by Omnitrans.
- B. The originals of all letters, documents, reports and other products and data produced under this Agreement shall become the property of Omnitrans without restriction or limitation on their use and shall be made available upon request to Omnitrans at any time. Original copies of such shall be delivered to Omnitrans upon completion of the Work or termination of the Work. CONTRACTOR shall be permitted to retain

copies of such items for the furtherance of its technical proficiency; however, publication of this material is subject to the prior written approval of Omnitrans. The provisions of this paragraph shall survive termination or expiration of this Agreement and/or final payment thereunder.

## **17. OWNERSHIP OF REPORTS AND DOCUMENTS**

The originals of all letters, documents, reports and other products and data produced under this Agreement shall be delivered to, and become the sole and exclusive property of Omnitrans. Copies may be made for Contractors records, but shall not be furnished to others without prior written authorization from Omnitrans. Such deliverables shall be deemed works made for hire, and all rights in copyright therein shall be retained by Omnitrans.

## **18. OWNERSHIP RIGHTS**

- A. In the event Omnitrans rightfully obtains copies of Proprietary Data under the terms of the separate License Agreement and Escrow Agreement that govern rights in Documentation, Software and Intellectual Property created and/or developed by Contractor, its Third Party Software Contractors and its Suppliers as part of the Project, any derivative works and associated documentation created by or on behalf of Omnitrans by Permitted Programmers (as defined in the License Agreement) shall be the sole and exclusive property of Omnitrans (collectively, "Omnitrans Intellectual Property"), and Omnitrans may use, disclose and exercise dominion and full rights of ownership, in any manner in Omnitrans Intellectual Property in connection with the use, operation and maintenance of a transportation system administered by Omnitrans. No use of Omnitrans Intellectual Property shall be made for any purpose other than in conjunction with a transportation system administered by CONTRACTOR, and Omnitrans shall not sell, lease, rent, give away or otherwise disclose any Omnitrans Intellectual Property to any outside third party other than Permitted Programmers. To the extent there may be any question of rights of ownership or use in any Omnitrans Intellectual Property, Contractor shall require all of its subcontractors and suppliers (including without limitation its Third Party Software Contractors) to assign to Omnitrans, all worldwide right, title and interest in and to all Omnitrans Intellectual Property in a manner consistent with the foregoing terms of this paragraph. Contractor shall execute any documents as Omnitrans may from time to time reasonably request to effectuate the terms of this paragraph.
- B. All documentation and Software which predates this Contract and which otherwise owned by Contractor or its Third Party Software Contractors, and all Documentation and Software which is created by Contractor or its Third Party Software Contractors shall be Licensed Software or Licensed Documentation, as appropriate. All Licensed Software and Licensed

Documentation shall be governed by the License Agreement by and between the parties of event date herewith.

**19. WORK FOR HIRE**

Any work created or produced as a part of this Agreement that may be defined under Section 101, Title 17, USC will be considered “work for hire” as it pertains to ownership rights. CONTRACTOR, by his/her endorsement hereon agrees that all rights to any work(s) created or produced are waived, and that ownership rests with Omnitrans. CONTRACTOR further agrees to ensure transfer of all rights to such work(s), as defined under federal copyright law, that may be created or produced under this Agreement by its suppliers, contractors or subcontractors.

**20. SUBMITTAL OF CLAIMS BY CONTRACTOR**

CONTRACTOR shall file any and all claims with Omnitrans’ Project Manager in writing within thirty (30) days of the event or occurrence giving rise to the claim. The claim shall be in sufficient detail to enable Omnitrans to ascertain the claim’s basis and amount, and shall describe the date, place and other pertinent circumstances of the event or occurrence giving rise to the claim and the indebtedness, obligation, injury, loss or damages allegedly incurred by CONTRACTOR.

Even though a claim may be filed and/or in review by Omnitrans, CONTRACTOR shall continue to perform in accordance with this Agreement.

**21. EQUAL OPPORTUNITY**

CONTRACTOR shall not discriminate against, or grant preferential treatment to, any individual or group, or any employee or applicant for employment because of race, age, religion, color, ethnicity, sex, national origin, ancestry, physical disability, mental disability, political affiliation, sexual orientation, marital status or other status protected by law. CONTRACTOR shall take action to ensure that applicants and employees are treated without regard to the above.

**22. STANDARD OF PERFORMANCE**

A. CONTRACTOR shall perform and exercise, and require its subcontractors to perform and exercise due professional care and competence in the performance of the Work in accordance with the requirements of this Agreement. CONTRACTOR shall be responsible for the professional quality, technical accuracy, completeness and coordination of the Work, it being understood that Omnitrans will be relying upon such professional quality, accuracy, completeness and coordination in utilizing the Work. The foregoing obligations and standards shall constitute the “Standard of Performance” for purposes of this Agreement. The provisions of this

paragraph shall survive termination or expiration of this Agreement and/or final payment thereunder.

- B. All workers shall have sufficient skill and experience to perform the Work assigned to them. Omnitrans shall have the right, at its sole discretion, to require the immediate removal of Contractors personnel at any level assigned to the performance of the Work at no additional fee or cost to Omnitrans, if Omnitrans considers such removal in its best interests and requests such removal in writing and such request is not done for illegal reasons. Further, an employee who is removed from performing Work under this Agreement under this Article shall not be re-assigned to perform Work in any other capacity under this Agreement without Omnitrans' prior written approval.

**23. NOTIFICATION OF EMPLOYMENT OF OMNITRANS BOARD MEMBERS/ALTERNATES AND EMPLOYEES**

To ensure compliance with Omnitrans' Ethics Policy, CONTRACTOR shall provide written notice to Omnitrans disclosing the identity of any individual who CONTRACTOR desires to employ or retain under a contract, and who (1) presently serves as a Board Member/Alternate or an employee of Omnitrans, or (2) served as a Board Member/Alternate or an employee of Omnitrans within the previous 12 months of the date of the proposed employment or retention by Contractor. Contractor's written notice shall indicate whether the individual will be an officer, principal or shareholder of the entity and/or will participate in the performance of this Agreement.

**24. DISQUALIFYING POLITICAL CONTRIBUTIONS**

In the event of a proposed amendment to this Agreement, Contractor shall provide prior to the execution of such amendment, a written statement disclosing any contribution(s) of \$250 or more made by Contractor or its subcontractor(s) to Omnitrans Board Members/Alternates or employees within the preceding twelve (12) months of the date of the proposed amendment. Applicable contributions include those made by any agent/person/entity on behalf of Contractor or subcontractor(s).

**25. COMPLIANCE WITH LAW**

Contractor shall familiarize itself with and perform the Work required under this Agreement in conformity with requirements and standards of Omnitrans, municipal and public agencies, public and private utilities, special districts, and railroad agencies whose facilities and work may be affected by Work under this Agreement. Contractor shall also comply with all Federal, state and local laws and ordinances.

## **26. COMPLIANCE WITH LOBBYING POLICIES**

- A. Contractor agrees that if it is a Lobbyist Employer or if it has retained a Lobbying Firm or Lobbyist, as such terms are defined by Omnitrans in its Ethics Policy, it shall comply or ensure that its Lobbying Firm and Lobbyist complies with Omnitrans' Ethics Policy.
- B. If Contractor (Lobbyist Employer) or its Lobbying Firm or Lobbyist fails to comply, in whole or in part, with Omnitrans' Ethics Policy, such failure shall be considered a material breach of this Agreement and Omnitrans shall have the right to immediately terminate or suspend this Agreement.

## **27. PUBLIC RECORDS ACT**

- A. All records, documents, drawings, plans, specifications and other material relating to conduct of Omnitrans' business, including materials submitted by Contractor in its proposal and during the course of performing the Work under this Agreement, shall become the exclusive property of Omnitrans and may be deemed public records. Said materials may be subject to the provisions of the California Public Records Act. Omnitrans' use and disclosure of its records are governed by this Act.
- B. Omnitrans will not advise as to the nature or content of documents entitled to protection from disclosure under the California Public Records Act, including interpretations of the Act or the definitions of trade secret, confidential or proprietary. Omnitrans will accept materials clearly and prominently labeled "TRADE SECRET" or "CONFIDENTIAL" or "PROPRIETARY" as determined by Contractor. Omnitrans will endeavor to notify Contractor of any request of the disclosure of such materials. Under no circumstances, however, will Omnitrans be liable or responsible for the disclosure of any labeled materials whether the disclosure is required by law or a court order or occurs through inadvertence, mistake or negligence on the part of Omnitrans or its officers, employees and/or contractors.
- C. In the event of litigation concerning the disclosure of any material submitted by Contractor, Omnitrans' sole involvement will be as a stake holder, retaining the material until otherwise ordered by a court. Contractor, at its sole expense and risk, shall be responsible for prosecuting or defending any action concerning the materials, and shall defend, indemnify and hold Omnitrans harmless from all costs and expenses, including attorneys' fees, in connection with such action.

## **28. WAIVER/INVALIDITY**

No waiver of a breach of any provision of this Agreement by either party shall constitute a waiver of any other breach of the provision, or of any other breach of

the provision of the Agreement. Failure of either party to enforce any provision of this Agreement at any time shall not be construed as a waiver of that provision.

The invalidity in whole or in part of any provision of this Agreement shall not void or affect the validity of any other provision.

## **29. FORCE MAJEURE**

Performance of each and all Contractor's and Omnitrans' covenants herein shall be subject to such delays as may occur without Contractor's or Omnitrans' fault from acts of God, strikes, riots, or from other similar causes beyond Contractor's or Omnitrans' control.

## **30. CONFIDENTIALITY**

Contractor agrees that for and during the entire term of this Agreement, any information, data, figures, records, findings and the like received or generated by Contractor in the performance of this Agreement, shall be considered and kept as the private and privileged records of Omnitrans and will not be divulged to any person, firm, corporation, or other entity except on the direct prior written authorization of Omnitrans. Further, upon expiration or termination of this Agreement for any reason, Contractor agrees that it will continue to treat as private and privileged any information, data, figures, records, findings and the like, and will not release any such information to any person, firm, corporation or other entity, either by statement, deposition, or as a witness, except upon direct prior written authority of Omnitrans.

## **31. CONTRACTOR'S INTERACTION WITH THE MEDIA AND THE PUBLIC**

- A. Omnitrans shall review and approve in writing all Omnitrans related copy proposed to be used by CONTRACTOR for advertising or public relations purposes prior to publication. CONTRACTOR shall not allow Omnitrans related copy to be published in its advertisements and public relations programs prior to receiving such approval. Contractor shall ensure that all published information is factual and that it does not in any way imply that Omnitrans endorses Contractor's firm, service, and/or product.
- B. Contractor shall refer all inquiries from the news media to Omnitrans, and shall comply with the procedures of Omnitrans' Public Affairs staff regarding statements to the media relating to this Agreement or the Work.
- C. If Contractor receives a complaint from a citizen or the community, Contractor shall inform Omnitrans as soon as possible and inform Omnitrans of any action taken to alleviate the situation.
- D. The provisions of this Article shall survive the termination or expiration of this Agreement.



**32. GOVERNING LAW**

The validity of this Agreement and of any of its terms or provisions, as well as the rights and duties of the parties hereunder, shall be governed by the laws of the State of California, and the proper venue of any action brought hereunder is and shall be the County of San Bernardino, California.

**33. MODIFICATIONS TO AGREEMENT**

Unless specified otherwise in the Agreement, this Agreement may only be modified by written mutual consent evidenced by signatures of representatives authorized to enter into and modify the Agreement. In order to be effective, amendments may require prior approval by Omnitrans' Board of Directors, and in all instances require prior signature of an authorized representative of Omnitrans.

**34. PRECEDENCE**

Conflicting provisions hereof, if any, shall prevail in the following descending order of precedence: (1) the provisions of this Agreement, (2), Attachment B, Prices by part (3) provisions of IFB No. MNT13-16 and (4) Contractor's proposal dated January 30, 2013.

**35. ENTIRE AGREEMENT**

This Agreement, and any attachments or documents incorporated herein by inclusion or by reference, constitutes the complete and entire agreement between Omnitrans and Contractor and supersedes any prior representations, understandings, communications, commitments, agreements or proposals, oral or written.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed on the date shown below, and effective on the date first hereinabove written.

OMNITRANS

DIRECT MACHINERY OUTLET, INC.

\_\_\_\_\_  
MILO VICTORIA  
CEO/General Manager

\_\_\_\_\_  
ANGIE KOEPCKE  
CONTRACT ANALYST

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

Federal Tax I.D. No. \_\_\_\_\_



**CONTRACT AGREEMENT**

between

CONTRACTOR )

BUSWEST, LLC )  
10150 CHERRY AVENUE )  
FONTANA, CA 92335 )

(hereinafter "Contractor") )  
Telephone: 909-770-5189 )  
Fax: 562-447-1465 )  
E-mail: [ccarmen@buswest.com](mailto:ccarmen@buswest.com) )

And )

Omnitrans )  
1700 West Fifth Street )  
San Bernardino, CA 92411 )  
(hereinafter "Omnitrans") )

**CONTRACT DOCUMENTS**

**CONTRACT NO.**  
**MNT13-16D**

**CUMMINS ENGINE PARTS**

Contract Amount: \$10,000

Omnitrans Project Manager:  
Name: Jack Dooley  
Title: Director of Maintenance  
Telephone: (909) 379-7183  
Fax: (909) 885-2441  
Email: [jack.dooley@omnitrans.org](mailto:jack.dooley@omnitrans.org)

Contract Administrator:  
Name: Eugenia Pinheiro  
Title: Contracts Manager  
Telephone: (909) 379-7314  
Fax: (909) 379-7107  
Email: [eugenia.pinheiro@omnitrans.org](mailto:eugenia.pinheiro@omnitrans.org)



## TABLE OF CONTENTS

1.	SCOPE OF WORK.....	3
2.	TECHNICAL REQUIREMENTS .....	3
3.	PERIOD OF PERFORMANCE.....	5
4.	COMPENSATION.....	6
5.	AUDIT AND INSPECTION OF RECORDS.....	7
6.	NOTIFICATION .....	7
7.	OMNITRANS' AND CONTRACTOR'S REPRESENTATIVES.....	7
8.	TERMINATION FOR CONVENIENCE .....	8
9.	TERMINATION FOR BREACH OF AGREEMENT .....	9
10.	ASSIGNMENT.....	10
11.	SUBCONTRACTING.....	10
12.	INDEPENDENT CONTRACTOR.....	10
13.	INSURANCE .....	10
14.	INDEMNITY.....	11
15.	REVISIONS IN SCOPE OF WORK.....	11
16.	RIGHTS IN TECHNICAL DATA .....	11
17.	OWNERSHIP OF REPORTS AND DOCUMENTS.....	12
18.	OWNERSHIP RIGHTS.....	12
19.	WORK FOR HIRE .....	13
20.	SUBMITTAL OF CLAIMS BY CONTRACTOR.....	13

21.	EQUAL OPPORTUNITY.....	13
23.	NOTIFICATION OF EMPLOYMENT OF OMNITRANS BOARD MEMBERS/ALTERNATES AND EMPLOYEES .....	14
24.	DISQUALIFYING POLITICAL CONTRIBUTIONS .....	14
25.	COMPLIANCE WITH LAW.....	15
26.	COMPLIANCE WITH LOBBYING POLICIES.....	15
27.	PUBLIC RECORDS ACT.....	15
28.	WAIVER/INVALIDITY .....	16
29.	FORCE MAJEURE.....	16
30.	CONFIDENTIALITY .....	16
31.	CONTRACTOR’S INTERACTION WITH THE MEDIA AND THE PUBLIC .....	16
32.	GOVERNING LAW.....	17
33.	MODIFICATIONS TO AGREEMENT .....	17
34.	PRECEDENCE .....	17
35.	ENTIRE AGREEMENT.....	17

This Agreement is made and entered into as of this \_\_\_\_\_ day of \_\_\_\_\_, 2013 by and between Omnitrans (hereinafter referred to as "Omnitrans") and BUSWEST, LLC (hereinafter referred to as "Contractor").

## **RECITALS**

WHEREAS, Omnitrans is a joint powers authority organized under Sections 6500 et seq. of the California Government Code and Section 130255 of the California Public Utilities Code with power to contract for services described in Scope of Work, Scope of Work" (hereinafter referred to as "Work");

WHEREAS, Contractor has indicated it is qualified to supply and deliver to Omnitrans on as as-need basis Cummins bus parts in accordance with the specifications, term and conditions defined herein during the term of this Agreement. and (1) has reviewed all the available data furnished by Omnitrans pertinent to the Work to be rendered; (2) has inspected and reviewed the Work to be rendered; (3) will exercise the ordinary care; and (4) is willing to accept responsibility of performing the Work set forth in this Agreement for the compensation and in accordance with the terms, requirements and conditions herein specified;

NOW, THEREFORE, for the consideration hereinafter stated, the parties agree as follows:

### **1. SCOPE OF WORK**

- A. Contractor will perform the Work and related tasks as described in IFB-MNT13-16D Cummins Engine Parts, incorporated by reference into and made a part of this Agreement.
- B. This is a non-exclusive Agreement, whereby Omnitrans may, at its sole discretion, augment or supplant the Work. Contractor will cooperate fully with Omnitrans' staff or other contractor or entity that may be providing similar or the same Work for Omnitrans.

### **2. TECHNICAL REQUIREMENTS**

- 1. Cummins bus parts shall be new and shall, meet or exceed the Original Equipment Manufacturers (OEM) minimum specifications and conform to all applicable industry and safety standards.
- 2. Omnitrans reserves the sole right to determine whether a part or band of part is equivalent to OEM specifications. Omnitrans' decision on product equivalency is final and not appealable.
- 3. The Contractor shall notify Omnitrans if any of the aforementioned standards are changed, superseded or when new industry standards are set.

4. Contractor shall maintain adequate inventory of parts to continuously supply Omnitrans for the term of this Agreement Omnitrans will maintain a sufficient number of spare parts to insure continuous operations of the fleet.

- a) Contractor shall ship requested parts within 3 working days after receipt of order for normal delivery and same day for expedited (overnight, 2<sup>nd</sup> day, etc.) delivery.
- b) Contractor shall package the product(s) in such a manner as to prevent damage during shipment, receiving and storage.
- c) Omnitrans shall only pay for direct and actual freight charge and no premium charges for expedited shipping. Omnitrans reserves the right to request proof of freight charges or validate referenced changes independently.
- d) Deliveries shall be made to Omnitrans prepaid F.O.B destination.
- f) Delivery Location:

Omnitrans  
1700 West 5<sup>th</sup> Street  
San Bernardino, CA 92411

5. Warranty claims, and other warranty issues shall be administered, coordinated and resolved with the Omnitrans' Warranty Coordinator and a Contractor assigned representative,

6. Contractor's Warranty Claim Procedures appended hereto and by this reference incorporated herein:

- a) Contractor shall notify Omnitrans in writing the disposition of a warranty claim within 15 days of receipt.
- b) Contractor shall resolve all open warranty claims within 60 days after receipt. If the warranty claim is not resolved within the state time frame the Contractor will be information of Omnitrans' intent to automatically credit Omnitrans' accounts payable for the Contractor with the amount of the open claim.
- c) Contractor is required to notify the Omnitrans' Warranty Coordinator on the disposition of products within five (5) days after notification from Omnitrans' Warranty Coordinator and obtain an authorizing purchase order before proceeding with the repair.

- d) For warranty repair claims or service requests which are determined by the Contractor not to be under warranty, Contractor must forward a written failure analysis report and an itemized quote to Omnitrans' Warranty Coordinator and obtain an authorizing purchase order before proceeding with the repair.
  - e) Contractor shall be able to electronically communicate on warranty coverage, registrations, claims, service requests and bulletins/alerts.
  - f) Contractor is required to reference the Omnitrans warranty purchase order and warranty claim number with shipping warranty replacement products.
  - g) Contractor is required to properly identify warranty returns or replacement products with a bill of lading.
7. Contractor shall provide a Material Safety Data Sheet (MSDS) for all products containing any toxic items that may be harmful to the end user or the environment.

### **3. PERIOD OF PERFORMANCE**

The period of performance shall be beginning upon execution of final agreement for a base period of three (3) years, or pursuant to the provisions of this Agreement, or unless earlier terminated pursuant to Section 8 or Section 9 of this Agreement.

The term of this Agreement shall be from the date of execution of this Agreement and continue in effect through March 6, 2016, unless terminated as specified in Section 8 and 9 of this Agreement. Omnitrans reserves the right at its sole discretion to exercise a total of two (2) one-year option terms with no obligation to purchase any specified amount of products/services. All applicable indemnification provisions in this Agreement shall remain in effect following the termination of this Agreement.



#### 4. COMPENSATION

For Contractor's full and complete performance of its obligations under this Requirements Agreement, Omnitrans shall pay Contractor on a FIXED UNIT PRICE basis as needed per attachment, no guarantee of usage. Purchase orders will be awarded based on lowest price with availability.

Omnitrans' maximum cumulative payment obligation under this Agreement shall not exceed Ten Thousand Dollars (\$10,000.00), including all amounts payable to Contractor for all costs and profit.

- A. Contractor shall invoice Omnitrans on a monthly basis no later than the 15<sup>th</sup> of each month. Contractor shall furnish information as may be requested by Omnitrans to substantiate the validity of an invoice.

Contractor shall submit invoices in duplicate to:

Omnitrans  
1700 West Fifth Street  
San Bernardino, CA 92411  
Attn: Accounts Payable

Each invoice shall include, at minimum, the following information:

- Contract number
  - Detail description of parts
  - Time period covered by the invoice
  - Amount of payment requested
  - Information as requested by Omnitrans
- B. Omnitrans shall remit payment within thirty (30) calendar days of approval of the invoices by Omnitrans' Project Manager.

At its sole discretion, Omnitrans may decline to make full payment for parts until such time as Contractor has documented, to Omnitrans' satisfaction.

In the event Omnitrans should overpay Contractor, such overpayment shall not be construed as a waiver of Omnitrans' right to obtain reimbursement for the overpayment. Upon discovering any overpayment, either on its own or upon notice of Omnitrans, Contractor shall immediately reimburse Omnitrans the entire overpayment or, at its sole discretion, Omnitrans may deduct such overpayment amount from monies due to Contractor under this Agreement or any other Agreement between Omnitrans and Contractor.

**5. AUDIT AND INSPECTION OF RECORDS**

Contractor agrees that Omnitrans or any duly authorized representative shall have access to and the right to examine, audit, excerpt, copy or transcribe any pertinent transaction, activity, time cards, employment records or other records relating to this Agreement. Such material, including all pertinent cost, accounting, financial records, and proprietary data must be kept and maintained by Contractor for a period of three (3) years after completion of this Agreement unless Omnitrans’ written permission is given to Contractor to dispose of material prior to this time.

**6. NOTIFICATION**

All notices hereunder concerning this Agreement and the Work to be performed shall be physically transmitted by courier, overnight, registered or certified mail, return receipt requested, postage prepaid and addressed as follows:

To OMNITRANS:

To CONTRACTOR:

Omnitrans  
1700 West Fifth Street  
San Bernardino, CA 92411

Buswest, LLC  
10150 Cherry Avenue  
Fontana, CA 92335

Attn: Eugenia F. Pinheiro  
Contracts Manager  
[Eugenia.Pinheiro@omnitrans.org](mailto:Eugenia.Pinheiro@omnitrans.org)

Attn: Chris Carmen  
General Parts Manager  
[ccarmen@buswest.com](mailto:ccarmen@buswest.com)

**7. OMNITRANS’ AND CONTRACTOR’S REPRESENTATIVES**

**A. OMNITRANS’ Project Manager**

Contracting Officer: Omnitrans’ CEO/General Manager or his authorized designee who has authority to execute contracts on behalf of Omnitrans.

Project Manager: Jack Dooley.

- a. Omnitrans has the final approval in all matters relating to or affecting the Work. Except as expressly specified in this Agreement, the Contracting Officer may exercise any powers, rights and/or privileges that have been lawfully delegated by Omnitrans. Nothing in this Agreement should be construed to bind Omnitrans for acts of its officers, employees, and/or agents that exceed the delegation of authority specified herein.
- b. The Contracting Officer has delegated to the Project Manager certain powers and duties in connection with this Agreement. The

Project Manager is the authorized representative of the Contracting Officer for matters related to this Agreement. The Project Manager or his/her designee is empowered to:

1. Have general oversight this Agreement, including the power to enforce compliance with this Agreement.
  2. Reserve the right to remove any portion of the Work from Contractor which have not been performed to Omnitrans' satisfaction.
  3. Subject to the review and acceptance by Omnitrans, negotiate with Contractor all adjustments pertaining to this Agreement for revision.
- c. In addition to the foregoing, the Project Manager shall have those rights and powers expressly set forth in other sections of this Agreement.

**B. Contractor's Key Personnel**

The following are Contractor's key personnel and their associated roles in the Work to be provided:

<u>Name</u>	<u>Role</u>
Chris Carmen	General Parts Manager

Any propose/substitution or replacement by Contractor of Contractor's key personnel shall ensure that such person possesses the same or better expertise and experience than the key personnel being substituted or replaced. Omnitrans reserves the right to interview such person to ascertain and verify if such proposed substitution or replacement does in deed possess such expertise and experience.

Omnitrans awarded this Agreement to Contractor based on Omnitrans' confidence and reliance on the expertise of Contractor's key personnel described above. Contractor shall not reassign key personnel or assign other personnel to key personnel roles until Contractor obtains prior written approval from Omnitrans.

**8. TERMINATION FOR CONVENIENCE**

Omnitrans may terminate this Agreement in whole or in part for Omnitrans' convenience. Omnitrans' CEO/General Manager shall terminate this Agreement by a written Notice of Termination to Contractor specifying the nature, extent, and effective date of the termination. Upon receipt of the notice of termination,

Contractor shall immediately discontinue all Work affected and deliver all data, drawings, specifications, reports, estimates, summaries, and other information and materials accumulated in performing this Agreement, whether completed or in process, to Omnitrans' CEO/General Manager. Omnitrans shall make an equitable adjustment in the Agreement for Work already performed, but shall not allow anticipated profit on unperformed services. Force Majeure shall apply.

## **9. TERMINATION FOR BREACH OF AGREEMENT**

- A. If Contractor fails to perform any of the provisions of this Agreement or so fails to make progress as to endanger timely performance of this Agreement, Omnitrans may give Contractor written notice of such default. If Contractor does not cure such default or provide a plan to cure such default which is acceptable to Omnitrans within the time permitted by Omnitrans, then Omnitrans may terminate this Agreement due to Contractor's breach of this Agreement.
- B. If a federal or state proceeding for relief of debtors is undertaken by or against Contractor, or if Contractor makes an assignment for the benefit of creditors, then Omnitrans may immediately terminate this Agreement.
- C. If Contractor violates Section 26, Compliance with Lobbying Policies, of this Agreement, then Omnitrans may immediately terminate this Agreement.
- D. In the event Omnitrans terminates this Agreement as provided in this Section, Omnitrans may procure, upon such terms and in such manner as Omnitrans may deem appropriate, Work similar in scope and level of effort to those so terminated, and Contractor shall be liable to Omnitrans for all of its costs and damages, including, but not limited, any excess costs for such Work.
- E. All finished or unfinished documents and materials produced or procured under this Agreement shall become Omnitrans' property upon date of such termination.
- F. If, after notice of termination of this Agreement under the provisions of this Section, it is determined for any reason that Contractor was not in default under the provisions of this Section, or that the default was excusable under the terms of this Agreement, the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to Section 8, Termination for Convenience.
- G. The rights and remedies of Omnitrans provided in this Article shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Agreement.

## 10. ASSIGNMENT

This Agreement, any interest herein or claim hereunder, may not be assigned by Contractor either voluntarily or by operation of law, nor may all or any part of this Agreement be subcontracted by Contractor, without the prior written consent of Omnitrans. Consent by Omnitrans shall not be deemed to relieve Contractor of its obligations to comply fully with all terms and conditions of this Agreement.

## 11. SUBCONTRACTING

Omnitrans hereby consents to Contractor's subcontracting of portions of the Work to the parties identified below for the functions described in Contractor's proposal. Contractor shall include in each subcontract agreement the stipulation that Contractor, not Omnitrans, is solely responsible for payment to the subcontractor for all amounts owing and that the subcontractor shall have no claim, and shall take no action against Omnitrans, Member Agencies or officers, directors, employees or sureties thereof for nonpayment by Contractor.

Subcontractor's Name and Address	Work to Be Performed
----------------------------------	----------------------

N/A	
-----	--

## 12. INDEPENDENT CONTRACTOR

Contractor's relationship to Omnitrans in the performance of this Agreement is that of an independent Contractor. Contractor's personnel performing Work under this Agreement shall at all times be under Contractor's exclusive direction and control and shall be employees of Contractor and not employees of Omnitrans. Contractor shall pay all wages, salaries and other amounts due its employees in connection with this Agreement and shall be responsible for all reports and obligations respecting them, such as social security, income tax withholding, unemployment compensation, workers' compensation and similar matters.

## 13. INSURANCE

Throughout the duration of this Agreement, Contractor shall maintain the following insurance, which shall be full-coverage insurance not subject to self-insurance provisions. Contractor shall not of its own initiative cause such insurance to be canceled or materially changed during the term of this Agreement.

- A. **Commercial General Liability including Products/Completed Operations:** \$1,000,000 per occurrence for bodily and property damage liability and \$2,000,000 aggregate; *Endorsement naming Omnitrans as Additional Insured.*

- B. **Automobile Liability:** \$1,000,000 combined single limit bodily and property damage liability per accident; *Endorsement naming Omnitrans as Additional Insured.*
- C. **Workers' Compensation:** statutory limits or, a State-Approved program in an amount and form that meets all applicable requirements of the Labor Code of the State of California; *waiver of subrogation that includes Omnitrans.*

Omnitrans, its officers, officials, employees, agents, and volunteers.

#### 14. INDEMNITY

Contractor shall indemnify, defend and hold harmless Omnitrans, and its member agencies, and their officers, directors, employees and agents from and against any and all liability, expense (including, but not limited to, defense costs and attorneys' fees), claims, causes of action, and lawsuits for damages of any nature whatsoever, including, but not limited to, bodily injury, death, personal injury or property damage (including property of Contractor) arising from or connected with any alleged act and/or omission of Contractor, its officers, directors, employees, agents, Subcontractors or suppliers. This indemnity shall survive termination or expiration of this Agreement and/or final payment thereunder.

#### 15. REVISIONS IN SCOPE OF WORK

By written notice or order, Omnitrans may, from time to time, order work suspension or make changes to this Agreement. Changes in the Work shall be mutually agreed to and incorporated into an amendment to this Agreement. Upon execution of an amendment, Contractor shall perform the Work, as amended.

#### 16. RIGHTS IN TECHNICAL DATA

- A. No material or technical data prepared by Contractor under this Agreement is to be released by Contractor to any other person or entity except as necessary for the performance of the Work. All press releases or information concerning the Work that might appear in any publication or dissemination, including but not limited to, newspapers, magazines, and electronic media, shall first be authorized in writing by Omnitrans.
- B. The originals of all letters, documents, reports and other products and data produced under this Agreement shall become the property of Omnitrans without restriction or limitation on their use and shall be made available upon request to Omnitrans at any time. Original copies of such shall be delivered to Omnitrans upon completion of the Work or termination of the Work. Contractor shall be permitted to retain copies of such items for the furtherance of its technical proficiency; however,

publication of this material is subject to the prior written approval of Omnitrans. The provisions of this paragraph shall survive termination or expiration of this Agreement and/or final payment thereunder.

## **17. OWNERSHIP OF REPORTS AND DOCUMENTS**

The originals of all letters, documents, reports and other products and data produced under this Agreement shall be delivered to, and become the sole and exclusive property of Omnitrans. Copies may be made for Contractor's records, but shall not be furnished to others without prior written authorization from Omnitrans. Such deliverables shall be deemed works made for hire, and all rights in copyright therein shall be retained by Omnitrans.

## **18. OWNERSHIP RIGHTS**

- A. In the event Omnitrans rightfully obtains copies of Proprietary Data under the terms of the separate License Agreement and Escrow Agreement that govern rights in Documentation, Software and Intellectual Property created and/or developed by Contractor, its Third Party Software Contractors and its Suppliers as part of the Project, any derivative works and associated documentation created by or on behalf of Omnitrans by Permitted Programmers (as defined in the License Agreement) shall be the sole and exclusive property of Omnitrans (collectively, "Omnitrans Intellectual Property"), and Omnitrans may use, disclose and exercise dominion and full rights of ownership, in any manner in Omnitrans Intellectual Property in connection with the use, operation and maintenance of a transportation system administered by Omnitrans. No use of Omnitrans Intellectual Property shall be made for any purpose other than in conjunction with a transportation system administered by Contractor, and Omnitrans shall not sell, lease, rent, give away or otherwise disclose any Omnitrans Intellectual Property to any outside third party other than Permitted Programmers. To the extent there may be any question of rights of ownership or use in any Omnitrans Intellectual Property, Contractor shall require all of its subcontractors and suppliers (including without limitation its Third Party Software Contractors) to assign to Omnitrans, all worldwide right, title and interest in and to all Omnitrans Intellectual Property in a manner consistent with the foregoing terms of this paragraph. Contractor shall execute any documents as Omnitrans may from time to time reasonably request to effectuate the terms of this paragraph.
- B. All documentation and Software which predates this Contract and which otherwise owned by Contractor or its Third Party Software Contractors, and all Documentation and Software which is created by Contractor or its Third Party Software Contractors shall be Licensed Software or Licensed Documentation, as appropriate. All Licensed Software and Licensed

Documentation shall be governed by the License Agreement by and between the parties of event date herewith.

**19. WORK FOR HIRE**

Any work created or produced as a part of this Agreement that may be defined under Section 101, Title 17, USC will be considered “work for hire” as it pertains to ownership rights. Contractor, by his/her endorsement hereon agrees that all rights to any work(s) created or produced are waived, and that ownership rests with Omnitrans. Contractor further agrees to ensure transfer of all rights to such work(s), as defined under federal copyright law, that may be created or produced under this Agreement by its suppliers, contractors or subcontractors.

**20. SUBMITTAL OF CLAIMS BY CONTRACTOR**

Contractor shall file any and all claims with Omnitrans’ Project Manager in writing within thirty (30) days of the event or occurrence giving rise to the claim. The claim shall be in sufficient detail to enable Omnitrans to ascertain the claim’s basis and amount, and shall describe the date, place and other pertinent circumstances of the event or occurrence giving rise to the claim and the indebtedness, obligation, injury, loss or damages allegedly incurred by Contractor.

Even though a claim may be filed and/or in review by Omnitrans, Contractor shall continue to perform in accordance with this Agreement.

**21. EQUAL OPPORTUNITY**

Contractor shall not discriminate against, or grant preferential treatment to, any individual or group, or any employee or applicant for employment because of race, age, religion, color, ethnicity, sex, national origin, ancestry, physical disability, mental disability, political affiliation, sexual orientation, marital status or other status protected by law. Contractor shall take action to ensure that applicants and employees are treated without regard to the above.

**22. STANDARD OF PERFORMANCE**



- A. Contractor shall perform and exercise, and require its subcontractors to perform and exercise due professional care and competence in the performance of the Work in accordance with the requirements of this Agreement. Contractor shall be responsible for the professional quality, technical accuracy, completeness and coordination of the Work, it being understood that Omnitrans will be relying upon such professional quality, accuracy, completeness and coordination in utilizing the Work. The foregoing obligations and standards shall constitute the "Standard of Performance" for purposes of this Agreement. The provisions of this paragraph shall survive termination or expiration of this Agreement and/or final payment thereunder.
- B. All workers shall have sufficient skill and experience to perform the Work assigned to them. Omnitrans shall have the right, at its sole discretion, to require the immediate removal of Contractor's personnel at any level assigned to the performance of the Work at no additional fee or cost to Omnitrans, if Omnitrans considers such removal in its best interests and requests such removal in writing and such request is not done for illegal reasons. Further, an employee who is removed from performing Work under this Agreement under this Article shall not be re-assigned to perform Work in any other capacity under this Agreement without Omnitrans' prior written approval.

**23. NOTIFICATION OF EMPLOYMENT OF OMNITRANS BOARD MEMBERS/ALTERNATES AND EMPLOYEES**

To ensure compliance with Omnitrans' Ethics Policy, Contractor shall provide written notice to Omnitrans disclosing the identity of any individual who Contractor desires to employ or retain under a contract, and who (1) presently serves as a Board Member/Alternate or an employee of Omnitrans, or (2) served as a Board Member/Alternate or an employee of Omnitrans within the previous 12 months of the date of the proposed employment or retention by Contractor. Contractor's written notice shall indicate whether the individual will be an officer, principal or shareholder of the entity and/or will participate in the performance of this Agreement.

**24. DISQUALIFYING POLITICAL CONTRIBUTIONS**

In the event of a proposed amendment to this Agreement, Contractor shall provide prior to the execution of such amendment, a written statement disclosing any contribution(s) of \$250 or more made by Contractor or its subcontractor(s) to Omnitrans Board Members/Alternates or employees within the preceding twelve (12) months of the date of the proposed amendment. Applicable contributions include those made by any agent/person/entity on behalf of Contractor or subcontractor(s).

## **25. COMPLIANCE WITH LAW**

Contractor shall familiarize itself with and perform the Work required under this Agreement in conformity with requirements and standards of Omnitrans, municipal and public agencies, public and private utilities, special districts, and railroad agencies whose facilities and work may be affected by Work under this Agreement. Contractor shall also comply with all Federal, state and local laws and ordinances.

## **26. COMPLIANCE WITH LOBBYING POLICIES**

- A. Contractor agrees that if it is a Lobbyist Employer or if it has retained a Lobbying Firm or Lobbyist, as such terms are defined by Omnitrans in its Ethics Policy, it shall comply or ensure that its Lobbying Firm and Lobbyist complies with Omnitrans' Ethics Policy.
- B. If Contractor (Lobbyist Employer) or its Lobbying Firm or Lobbyist fails to comply, in whole or in part, with Omnitrans' Ethics Policy, such failure shall be considered a material breach of this Agreement and Omnitrans shall have the right to immediately terminate or suspend this Agreement.

## **27. PUBLIC RECORDS ACT**

- A. All records, documents, drawings, plans, specifications and other material relating to conduct of Omnitrans' business, including materials submitted by Contractor in its proposal and during the course of performing the Work under this Agreement, shall become the exclusive property of Omnitrans and may be deemed public records. Said materials may be subject to the provisions of the California Public Records Act. Omnitrans' use and disclosure of its records are governed by this Act.
- B. Omnitrans will not advise as to the nature or content of documents entitled to protection from disclosure under the California Public Records Act, including interpretations of the Act or the definitions of trade secret, confidential or proprietary. Omnitrans will accept materials clearly and prominently labeled "TRADE SECRET" or "CONFIDENTIAL" or "PROPRIETARY" as determined by Contractor. Omnitrans will endeavor to notify Contractor of any request of the disclosure of such materials. Under no circumstances, however, will Omnitrans be liable or responsible for the disclosure of any labeled materials whether the disclosure is required by law or a court order or occurs through inadvertence, mistake or negligence on the part of Omnitrans or its officers, employees and/or contractors.
- C. In the event of litigation concerning the disclosure of any material submitted by Contractor, Omnitrans' sole involvement will be as a stake holder, retaining the material until otherwise ordered by a court. Contractor, at its sole expense and risk, shall be responsible for

prosecuting or defending any action concerning the materials, and shall defend, indemnify and hold Omnitrans harmless from all costs and expenses, including attorneys' fees, in connection with such action.

## **28. WAIVER/INVALIDITY**

No waiver of a breach of any provision of this Agreement by either party shall constitute a waiver of any other breach of the provision, or of any other breach of the provision of the Agreement. Failure of either party to enforce any provision of this Agreement at any time shall not be construed as a waiver of that provision.

The invalidity in whole or in part of any provision of this Agreement shall not void or affect the validity of any other provision.

## **29. FORCE MAJEURE**

Performance of each and all Contractor's and Omnitrans' covenants herein shall be subject to such delays as may occur without Contractor's or Omnitrans' fault from acts of God, strikes, riots, or from other similar causes beyond Contractor's or Omnitrans' control.

## **30. CONFIDENTIALITY**

Contractor agrees that for and during the entire term of this Agreement, any information, data, figures, records, findings and the like received or generated by Contractor in the performance of this Agreement, shall be considered and kept as the private and privileged records of Omnitrans and will not be divulged to any person, firm, corporation, or other entity except on the direct prior written authorization of Omnitrans. Further, upon expiration or termination of this Agreement for any reason, Contractor agrees that it will continue to treat as private and privileged any information, data, figures, records, findings and the like, and will not release any such information to any person, firm, corporation or other entity, either by statement, deposition, or as a witness, except upon direct prior written authority of Omnitrans.

## **31. CONTRACTOR'S INTERACTION WITH THE MEDIA AND THE PUBLIC**

- A. Omnitrans shall review and approve in writing all Omnitrans related copy proposed to be used by Contractor for advertising or public relations purposes prior to publication. Contractor shall not allow Omnitrans related copy to be published in its advertisements and public relations programs prior to receiving such approval. Contractor shall ensure that all published information is factual and that it does not in any way imply that Omnitrans endorses Contractor's firm, service, and/or product.
- B. Contractor shall refer all inquiries from the news media to Omnitrans, and shall comply with the procedures of Omnitrans' Public Affairs staff regarding statements to the media relating to this Agreement or the Work.

- C. If Contractor receives a complaint from a citizen or the community, Contractor shall inform Omnitrans as soon as possible and inform Omnitrans of any action taken to alleviate the situation.
- D. The provisions of this Article shall survive the termination or expiration of this Agreement.

### **32. GOVERNING LAW**

The validity of this Agreement and of any of its terms or provisions, as well as the rights and duties of the parties hereunder, shall be governed by the laws of the State of California, and the proper venue of any action brought hereunder is and shall be the County of San Bernardino, California.

### **33. MODIFICATIONS TO AGREEMENT**

Unless specified otherwise in the Agreement, this Agreement may only be modified by written mutual consent evidenced by signatures of representatives authorized to enter into and modify the Agreement. In order to be effective, amendments may require prior approval by Omnitrans' Board of Directors, and in all instances require prior signature of an authorized representative of Omnitrans.

### **34. PRECEDENCE**

Conflicting provisions hereof, if any, shall prevail in the following descending order of precedence: (1) the provisions of this Agreement, (2), Attachment B, Prices by part (3) provisions of IFB No. MNT13-16 and (4) Contractor's proposal dated January 21, 2013.

### **35. ENTIRE AGREEMENT**

This Agreement, and any attachments or documents incorporated herein by inclusion or by reference, constitutes the complete and entire agreement between Omnitrans and Contractor and supersedes any prior representations, understandings, communications, commitments, agreements or proposals, oral or written.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed on the date shown below, and effective on the date first hereinabove written.

OMNITRANS

BUSWEST, LLC

\_\_\_\_\_  
MILO VICTORIA  
CEO/General Manager

\_\_\_\_\_  
CHRIS CARMEN  
General Parts Manager

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

Federal Tax I.D. No. \_\_\_\_\_



CONTRACT AGREEMENT

between

CONTRACTOR )
PERFORMANCE TURBOCHARGERS, LLC )
8482 CHERRY AVENUE )
FONTANA, CA 92335 )
(hereinafter "Contractor") )
Telephone: 909-429-7200 )
Fax: 909-429-7204 )
E-mail: garyhetrick@dieselusa.com )

CONTRACT DOCUMENTS

CONTRACT NO.
MNT13-16E

CUMMINS ENG
INE PARTS

And )

Contract Amount: \$10,000

Omnitrans )
1700 West Fifth Street )
San Bernardino, CA 92411 )
(hereinafter "Omnitrans") )

Omnitrans Project Manager:
Name: Jack Dooley
Title: Director of Maintenance
Telephone: (909) 379-7183
Fax: (909) 885-2441
Email: jack.dooley@omnitrans.org

Contract Administrator:
Name: Eugenia Pinheiro
Title: Contracts Manager
Telephone: (909) 379-7314
Fax: (909) 379-7107
Email: eugenia.pinheiro@omnitrans.org



## TABLE OF CONTENTS

1.	SCOPE OF WORK.....	3
2.	TECHNICAL REQUIREMENTS .....	3
3.	PERIOD OF PERFORMANCE.....	5
4.	COMPENSATION.....	6
5.	AUDIT AND INSPECTION OF RECORDS.....	7
6.	NOTIFICATION .....	7
7.	OMNITRANS' AND CONTRACTOR'S REPRESENTATIVES.....	7
8.	TERMINATION FOR CONVENIENCE .....	8
9.	TERMINATION FOR BREACH OF AGREEMENT .....	9
10.	ASSIGNMENT.....	10
11.	SUBCONTRACTING.....	10
12.	INDEPENDENT CONTRACTOR.....	10
13.	INSURANCE .....	10
14.	INDEMNITY.....	11
15.	REVISIONS IN SCOPE OF WORK.....	11
16.	RIGHTS IN TECHNICAL DATA .....	11
17.	OWNERSHIP OF REPORTS AND DOCUMENTS.....	12
18.	OWNERSHIP RIGHTS.....	12
19.	WORK FOR HIRE .....	13
20.	SUBMITTAL OF CLAIMS BY CONTRACTOR.....	13

21.	EQUAL OPPORTUNITY.....	13
23.	NOTIFICATION OF EMPLOYMENT OF OMNITRANS BOARD MEMBERS/ALTERNATES AND EMPLOYEES .....	14
24.	DISQUALIFYING POLITICAL CONTRIBUTIONS .....	14
25.	COMPLIANCE WITH LAW.....	15
26.	COMPLIANCE WITH LOBBYING POLICIES.....	15
27.	PUBLIC RECORDS ACT.....	15
28.	WAIVER/INVALIDITY .....	16
29.	FORCE MAJEURE.....	16
30.	CONFIDENTIALITY .....	16
31.	CONTRACTOR’S INTERACTION WITH THE MEDIA AND THE PUBLIC .....	16
32.	GOVERNING LAW.....	17
33.	MODIFICATIONS TO AGREEMENT .....	17
34.	PRECEDENCE .....	17
35.	ENTIRE AGREEMENT.....	17



This Agreement is made and entered into as of this \_\_\_\_\_ day of \_\_\_\_\_, 2013 by and between Omnitrans (hereinafter referred to as "Omnitrans") and PERFORMANCE TURBOCHARGERS, LLC (hereinafter referred to as "Contractor").

## **RECITALS**

WHEREAS, Omnitrans is a joint powers authority organized under Sections 6500 et seq. of the California Government Code and Section 130255 of the California Public Utilities Code with power to contract for services described in Scope of Work, Scope of Work" (hereinafter referred to as "Work");

WHEREAS, Contractor has indicated it is qualified to supply and deliver to Omnitrans on as as-need basis Cummins bus parts in accordance with the specifications, term and conditions defined herein during the term of this Agreement. and (1) has reviewed all the available data furnished by Omnitrans pertinent to the Work to be rendered; (2) has inspected and reviewed the Work to be rendered; (3) will exercise the ordinary care; and (4) is willing to accept responsibility of performing the Work set forth in this Agreement for the compensation and in accordance with the terms, requirements and conditions herein specified;

NOW, THEREFORE, for the consideration hereinafter stated, the parties agree as follows:

### **1. SCOPE OF WORK**

- A. Contractor will perform the Work and related tasks as described in IFB-MNT13-16E Cummins Engine Parts, incorporated by reference into and made a part of this Agreement.
- B. This is a non-exclusive Agreement, whereby Omnitrans may, at its sole discretion, augment or supplant the Work. Contractor will cooperate fully with Omnitrans' staff or other contractor or entity that may be providing similar or the same Work for Omnitrans.

### **2. TECHNICAL REQUIREMENTS**

- 1. Cummins bus parts shall be new and shall, meet or exceed the Original Equipment Manufacturers (OEM) minimum specifications and conform to all applicable industry and safety standards.
- 2. Omnitrans reserves the sole right to determine whether a part or band of part is equivalent to OEM specifications. Omnitrans' decision on product equivalency is final and not appealable.
- 3. The Contractor shall notify Omnitrans if any of the aforementioned standards are changed, superseded or when new industry standards are set.

4. Contractor shall maintain adequate inventory of parts to continuously supply Omnitrans for the term of this Agreement Omnitrans will maintain a sufficient number of spare parts to insure continuous operations of the fleet.

- a) Contractor shall ship requested parts within 3 working days after receipt of order for normal delivery and same day for expedited (overnight, 2<sup>nd</sup> day, etc.) delivery.
- b) Contractor shall package the product(s) in such a manner as to prevent damage during shipment, receiving and storage.
- c) Omnitrans shall only pay for direct and actual freight charge and no premium charges for expedited shipping. Omnitrans reserves the right to request proof of freight charges or validate referenced changes independently.
- d) Deliveries shall be made to Omnitrans prepaid F.O.B destination.
- f) Delivery Location:

Omnitrans  
1700 West 5<sup>th</sup> Street  
San Bernardino, CA 92411

5. Warranty claims, and other warranty issues shall be administered, coordinated and resolved with the Omnitrans' Warranty Coordinator and a Contractor assigned representative,

6. Contractor's Warranty Claim Procedures appended hereto and by this reference incorporated herein:

- a) Contractor shall notify Omnitrans in writing the disposition of a warranty claim within 15 days of receipt.
- b) Contractor shall resolve all open warranty claims within 60 days after receipt. If the warranty claim is not resolved within the state time frame the Contractor will be information of Omnitrans' intent to automatically credit Omnitrans' accounts payable for the Contractor with the amount of the open claim.
- c) Contractor is required to notify the Omnitrans' Warranty Coordinator on the disposition of products within five (5) days after notification from Omnitrans' Warranty Coordinator and obtain an authorizing purchase order before proceeding with the repair.

- d) For warranty repair claims or service requests which are determined by the Contractor not to be under warranty, Contractor must forward a written failure analysis report and an itemized quote to Omnitrans' Warranty Coordinator and obtain an authorizing purchase order before proceeding with the repair.
  - e) Contractor shall be able to electronically communicate on warranty coverage, registrations, claims, service requests and bulletins/alerts.
  - f) Contractor is required to reference the Omnitrans warranty purchase order and warranty claim number with shipping warranty replacement products.
  - g) Contractor is required to properly identify warranty returns or replacement products with a bill of lading.
7. Contractor shall provide a Material Safety Data Sheet (MSDS) for all products containing any toxic items that may be harmful to the end user or the environment.

### **3. PERIOD OF PERFORMANCE**

The period of performance shall be beginning upon execution of final agreement for a base period of three (3) years, or pursuant to the provisions of this Agreement, or unless earlier terminated pursuant to Section 8 or Section 9 of this Agreement.

The term of this Agreement shall be from the date of execution of this Agreement and continue in effect through March 6, 2016, unless terminated as specified in Section 8 and 9 of this Agreement. Omnitrans reserves the right at its sole discretion to exercise a total of two (2) one-year option terms with no obligation to purchase any specified amount of products/services. All applicable indemnification provisions in this Agreement shall remain in effect following the termination of this Agreement.

#### 4. COMPENSATION

For Contractor's full and complete performance of its obligations under this Requirements Agreement, Omnitrans shall pay Contractor on a FIXED UNIT PRICE basis as needed per attachment, no guarantee of usage. Purchase orders will be awarded based on lowest price with availability.

Omnitrans' maximum cumulative payment obligation under this Agreement shall not exceed Ten Thousand Dollars (\$10,000.00), including all amounts payable to Contractor for all costs and profit.

- A. Contractor shall invoice Omnitrans on a monthly basis no later than the 15<sup>th</sup> of each month. Contractor shall furnish information as may be requested by Omnitrans to substantiate the validity of an invoice.

Contractor shall submit invoices in duplicate to:

Omnitrans  
1700 West Fifth Street  
San Bernardino, CA 92411  
Attn: Accounts Payable

Each invoice shall include, at minimum, the following information:

- Contract number
  - Detail description of parts
  - Time period covered by the invoice
  - Amount of payment requested
  - Information as requested by Omnitrans
- B. Omnitrans shall remit payment within thirty (30) calendar days of approval of the invoices by Omnitrans' Project Manager.

At its sole discretion, Omnitrans may decline to make full payment for parts until such time as Contractor has documented, to Omnitrans' satisfaction.

In the event Omnitrans should overpay Contractor, such overpayment shall not be construed as a waiver of Omnitrans' right to obtain reimbursement for the overpayment. Upon discovering any overpayment, either on its own or upon notice of Omnitrans, Contractor shall immediately reimburse Omnitrans the entire overpayment or, at its sole discretion, Omnitrans may deduct such overpayment amount from monies due to Contractor under this Agreement or any other Agreement between Omnitrans and Contractor.

## 5. AUDIT AND INSPECTION OF RECORDS

Contractor agrees that Omnitrans or any duly authorized representative shall have access to and the right to examine, audit, excerpt, copy or transcribe any pertinent transaction, activity, time cards, employment records or other records relating to this Agreement. Such material, including all pertinent cost, accounting, financial records, and proprietary data must be kept and maintained by Contractor for a period of three (3) years after completion of this Agreement unless Omnitrans' written permission is given to Contractor to dispose of material prior to this time.

## 6. NOTIFICATION

All notices hereunder concerning this Agreement and the Work to be performed shall be physically transmitted by courier, overnight, registered or certified mail, return receipt requested, postage prepaid and addressed as follows:

To OMNITRANS:

Omnitrans  
1700 West Fifth Street  
San Bernardino, CA 92411

Attn: Eugenia F. Pinheiro  
Contracts Manager  
[Eugenia.Pinheiro@omnitrans.org](mailto:Eugenia.Pinheiro@omnitrans.org)

To CONTRACTOR:

Performance Turbochargers, LLC  
8482 Cherry Avenue  
Fontana, CA 92335

Attn: Gary Hetrick  
General Manager  
[garyhetrick@dieselusa.com](mailto:garyhetrick@dieselusa.com)

## 7. OMNITRANS' AND CONTRACTOR'S REPRESENTATIVES

### A. Omnitrans' Project Manager

Contracting Officer: Omnitrans' CEO/General Manager or his authorized designee who has authority to execute contracts on behalf of Omnitrans.

Project Manager: Jack Dooley.

- a. Omnitrans has the final approval in all matters relating to or affecting the Work. Except as expressly specified in this Agreement, the Contracting Officer may exercise any powers, rights and/or privileges that have been lawfully delegated by Omnitrans. Nothing in this Agreement should be construed to bind Omnitrans for acts of its officers, employees, and/or agents that exceed the delegation of authority specified herein.
- b. The Contracting Officer has delegated to the Project Manager certain powers and duties in connection with this Agreement. The

Project Manager is the authorized representative of the Contracting Officer for matters related to this Agreement. The Project Manager or his/her designee is empowered to:

1. Have general oversight this Agreement, including the power to enforce compliance with this Agreement.
  2. Reserve the right to remove any portion of the Work from Contractor which have not been performed to Omnitrans' satisfaction.
  3. Subject to the review and acceptance by Omnitrans, negotiate with Contractor all adjustments pertaining to this Agreement for revision.
- c. In addition to the foregoing, the Project Manager shall have those rights and powers expressly set forth in other sections of this Agreement.

**B. Contractor's Key Personnel**

The following are Contractor's key personnel and their associated roles in the Work to be provided:

<u>Name</u>	<u>Role</u>
GARY HETRICK	GENERAL MANAGER

Any propose/substitution or replacement by Contractor of Contractor's key personnel shall ensure that such person possesses the same or better expertise and experience than the key personnel being substituted or replaced. Omnitrans reserves the right to interview such person to ascertain and verify if such proposed substitution or replacement does in deed possess such expertise and experience.

Omnitrans awarded this Agreement to Contractor based on Omnitrans' confidence and reliance on the expertise of Contractor's key personnel described above. Contractor shall not reassign key personnel or assign other personnel to key personnel roles until Contractor obtains prior written approval from Omnitrans.

**8. TERMINATION FOR CONVENIENCE**

Omnitrans may terminate this Agreement in whole or in part for Omnitrans' convenience. Omnitrans' CEO/General Manager shall terminate this Agreement by a written Notice of Termination to Contractor specifying the nature, extent, and effective date of the termination. Upon receipt of the notice of termination,

Contractor shall immediately discontinue all Work affected and deliver all data, drawings, specifications, reports, estimates, summaries, and other information and materials accumulated in performing this Agreement, whether completed or in process, to Omnitrans' CEO/General Manager. Omnitrans shall make an equitable adjustment in the Agreement for Work already performed, but shall not allow anticipated profit on unperformed services. Force Majeure shall apply.

## **9. TERMINATION FOR BREACH OF AGREEMENT**

- A. If Contractor fails to perform any of the provisions of this Agreement or so fails to make progress as to endanger timely performance of this Agreement, Omnitrans may give Contractor written notice of such default. If Contractor does not cure such default or provide a plan to cure such default which is acceptable to Omnitrans within the time permitted by Omnitrans, then Omnitrans may terminate this Agreement due to Contractor's breach of this Agreement.
- B. If a federal or state proceeding for relief of debtors is undertaken by or against Contractor, or if Contractor makes an assignment for the benefit of creditors, then Omnitrans may immediately terminate this Agreement.
- C. If Contractor violates Section 26, Compliance with Lobbying Policies, of this Agreement, then Omnitrans may immediately terminate this Agreement.
- D. In the event Omnitrans terminates this Agreement as provided in this Section, Omnitrans may procure, upon such terms and in such manner as Omnitrans may deem appropriate, Work similar in scope and level of effort to those so terminated, and Contractor shall be liable to Omnitrans for all of its costs and damages, including, but not limited, any excess costs for such Work.
- E. All finished or unfinished documents and materials produced or procured under this Agreement shall become Omnitrans' property upon date of such termination.
- F. If, after notice of termination of this Agreement under the provisions of this Section, it is determined for any reason that Contractor was not in default under the provisions of this Section, or that the default was excusable under the terms of this Agreement, the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to Section 8, Termination for Convenience.
- G. The rights and remedies of Omnitrans provided in this Article shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Agreement.

## 10. ASSIGNMENT

This Agreement, any interest herein or claim hereunder, may not be assigned by Contractor either voluntarily or by operation of law, nor may all or any part of this Agreement be subcontracted by Contractor, without the prior written consent of Omnitrans. Consent by Omnitrans shall not be deemed to relieve Contractor of its obligations to comply fully with all terms and conditions of this Agreement.

## 11. SUBCONTRACTING

Omnitrans hereby consents to Contractor's subcontracting of portions of the Work to the parties identified below for the functions described in Contractor's proposal. Contractor shall include in each subcontract agreement the stipulation that Contractor, not Omnitrans, is solely responsible for payment to the subcontractor for all amounts owing and that the subcontractor shall have no claim, and shall take no action against Omnitrans, Member Agencies or officers, directors, employees or sureties thereof for nonpayment by Contractor.

Subcontractor's Name and Address	Work to Be Performed
----------------------------------	----------------------

N/A	
-----	--

## 12. INDEPENDENT CONTRACTOR

Contractor's relationship to Omnitrans in the performance of this Agreement is that of an independent Contractor. Contractor's personnel performing Work under this Agreement shall at all times be under Contractor's exclusive direction and control and shall be employees of Contractor and not employees of Omnitrans. Contractor shall pay all wages, salaries and other amounts due its employees in connection with this Agreement and shall be responsible for all reports and obligations respecting them, such as social security, income tax withholding, unemployment compensation, workers' compensation and similar matters.

## 13. INSURANCE

Throughout the duration of this Agreement, Contractor shall maintain the following insurance, which shall be full-coverage insurance not subject to self-insurance provisions. Contractor shall not of its own initiative cause such insurance to be canceled or materially changed during the term of this Agreement.

- A. **Commercial General Liability including Products/Completed Operations:** \$1,000,000 per occurrence for bodily and property damage liability and \$2,000,000 aggregate; *Endorsement naming Omnitrans as Additional Insured.*



- B. **Automobile Liability:** \$1,000,000 combined single limit bodily and property damage liability per accident; *Endorsement naming Omnitrans as Additional Insured.*
- C. **Workers' Compensation:** statutory limits or, a State-Approved program in an amount and form that meets all applicable requirements of the Labor Code of the State of California; *waiver of subrogation that includes Omnitrans.*

Omnitrans, its officers, officials, employees, agents, and volunteers.

#### 14. INDEMNITY

Contractor shall indemnify, defend and hold harmless Omnitrans, and its member agencies, and their officers, directors, employees and agents from and against any and all liability, expense (including, but not limited to, defense costs and attorneys' fees), claims, causes of action, and lawsuits for damages of any nature whatsoever, including, but not limited to, bodily injury, death, personal injury or property damage (including property of Contractor) arising from or connected with any alleged act and/or omission of Contractor, its officers, directors, employees, agents, Subcontractors or suppliers. This indemnity shall survive termination or expiration of this Agreement and/or final payment thereunder.

#### 15. REVISIONS IN SCOPE OF WORK

By written notice or order, Omnitrans may, from time to time, order work suspension or make changes to this Agreement. Changes in the Work shall be mutually agreed to and incorporated into an amendment to this Agreement. Upon execution of an amendment, Contractor shall perform the Work, as amended.

#### 16. RIGHTS IN TECHNICAL DATA

- A. No material or technical data prepared by Contractor under this Agreement is to be released by Contractor to any other person or entity except as necessary for the performance of the Work. All press releases or information concerning the Work that might appear in any publication or dissemination, including but not limited to, newspapers, magazines, and electronic media, shall first be authorized in writing by Omnitrans.
- B. The originals of all letters, documents, reports and other products and data produced under this Agreement shall become the property of Omnitrans without restriction or limitation on their use and shall be made available upon request to Omnitrans at any time. Original copies of such shall be delivered to Omnitrans upon completion of the Work or termination of the Work. Contractor shall be permitted to retain copies of such items for the furtherance of its technical proficiency; however,

publication of this material is subject to the prior written approval of Omnitrans. The provisions of this paragraph shall survive termination or expiration of this Agreement and/or final payment thereunder.

## **17. OWNERSHIP OF REPORTS AND DOCUMENTS**

The originals of all letters, documents, reports and other products and data produced under this Agreement shall be delivered to, and become the sole and exclusive property of Omnitrans. Copies may be made for Contractor's records, but shall not be furnished to others without prior written authorization from Omnitrans. Such deliverables shall be deemed works made for hire, and all rights in copyright therein shall be retained by Omnitrans.

## **18. OWNERSHIP RIGHTS**

- A. In the event Omnitrans rightfully obtains copies of Proprietary Data under the terms of the separate License Agreement and Escrow Agreement that govern rights in Documentation, Software and Intellectual Property created and/or developed by Contractor, its Third Party Software Contractors and its Suppliers as part of the Project, any derivative works and associated documentation created by or on behalf of Omnitrans by Permitted Programmers (as defined in the License Agreement) shall be the sole and exclusive property of Omnitrans (collectively, "Omnitrans Intellectual Property"), and Omnitrans may use, disclose and exercise dominion and full rights of ownership, in any manner in Omnitrans Intellectual Property in connection with the use, operation and maintenance of a transportation system administered by Omnitrans. No use of Omnitrans Intellectual Property shall be made for any purpose other than in conjunction with a transportation system administered by Contractor, and Omnitrans shall not sell, lease, rent, give away or otherwise disclose any Omnitrans Intellectual Property to any outside third party other than Permitted Programmers. To the extent there may be any question of rights of ownership or use in any Omnitrans Intellectual Property, Contractor shall require all of its subcontractors and suppliers (including without limitation its Third Party Software Contractors) to assign to Omnitrans, all worldwide right, title and interest in and to all Omnitrans Intellectual Property in a manner consistent with the foregoing terms of this paragraph. Contractor shall execute any documents as Omnitrans may from time to time reasonably request to effectuate the terms of this paragraph.
- B. All documentation and Software which predates this Contract and which otherwise owned by Contractor or its Third Party Software Contractors, and all Documentation and Software which is created by Contractor or its Third Party Software Contractors shall be Licensed Software or Licensed Documentation, as appropriate. All Licensed Software and Licensed

Documentation shall be governed by the License Agreement by and between the parties of event date herewith.

**19. WORK FOR HIRE**

Any work created or produced as a part of this Agreement that may be defined under Section 101, Title 17, USC will be considered “work for hire” as it pertains to ownership rights. Contractor, by his/her endorsement hereon agrees that all rights to any work(s) created or produced are waived, and that ownership rests with Omnitrans. Contractor further agrees to ensure transfer of all rights to such work(s), as defined under federal copyright law, that may be created or produced under this Agreement by its suppliers, contractors or subcontractors.

**20. SUBMITTAL OF CLAIMS BY CONTRACTOR**

Contractor shall file any and all claims with Omnitrans’ Project Manager in writing within thirty (30) days of the event or occurrence giving rise to the claim. The claim shall be in sufficient detail to enable Omnitrans to ascertain the claim’s basis and amount, and shall describe the date, place and other pertinent circumstances of the event or occurrence giving rise to the claim and the indebtedness, obligation, injury, loss or damages allegedly incurred by Contractor.

Even though a claim may be filed and/or in review by Omnitrans, Contractor shall continue to perform in accordance with this Agreement.

**21. EQUAL OPPORTUNITY**

Contractor shall not discriminate against, or grant preferential treatment to, any individual or group, or any employee or applicant for employment because of race, age, religion, color, ethnicity, sex, national origin, ancestry, physical disability, mental disability, political affiliation, sexual orientation, marital status or other status protected by law. Contractor shall take action to ensure that applicants and employees are treated without regard to the above.

**22. STANDARD OF PERFORMANCE**

- A. Contractor shall perform and exercise, and require its subcontractors to perform and exercise due professional care and competence in the performance of the Work in accordance with the requirements of this Agreement. Contractor shall be responsible for the professional quality, technical accuracy, completeness and coordination of the Work, it being understood that Omnitrans will be relying upon such professional quality, accuracy, completeness and coordination in utilizing the Work. The foregoing obligations and standards shall constitute the "Standard of Performance" for purposes of this Agreement. The provisions of this paragraph shall survive termination or expiration of this Agreement and/or final payment thereunder.
- B. All workers shall have sufficient skill and experience to perform the Work assigned to them. Omnitrans shall have the right, at its sole discretion, to require the immediate removal of Contractor's personnel at any level assigned to the performance of the Work at no additional fee or cost to Omnitrans, if Omnitrans considers such removal in its best interests and requests such removal in writing and such request is not done for illegal reasons. Further, an employee who is removed from performing Work under this Agreement under this Article shall not be re-assigned to perform Work in any other capacity under this Agreement without Omnitrans' prior written approval.

**23. NOTIFICATION OF EMPLOYMENT OF OMNITRANS BOARD MEMBERS/ALTERNATES AND EMPLOYEES**

To ensure compliance with Omnitrans' Ethics Policy, Contractor shall provide written notice to Omnitrans disclosing the identity of any individual who Contractor desires to employ or retain under a contract, and who (1) presently serves as a Board Member/Alternate or an employee of Omnitrans, or (2) served as a Board Member/Alternate or an employee of Omnitrans within the previous 12 months of the date of the proposed employment or retention by Contractor. Contractor's written notice shall indicate whether the individual will be an officer, principal or shareholder of the entity and/or will participate in the performance of this Agreement.

**24. DISQUALIFYING POLITICAL CONTRIBUTIONS**

In the event of a proposed amendment to this Agreement, Contractor shall provide prior to the execution of such amendment, a written statement disclosing any contribution(s) of \$250 or more made by Contractor or its subcontractor(s) to Omnitrans Board Members/Alternates or employees within the preceding twelve (12) months of the date of the proposed amendment. Applicable contributions include those made by any agent/person/entity on behalf of Contractor or subcontractor(s).

## **25. COMPLIANCE WITH LAW**

Contractor shall familiarize itself with and perform the Work required under this Agreement in conformity with requirements and standards of Omnitrans, municipal and public agencies, public and private utilities, special districts, and railroad agencies whose facilities and work may be affected by Work under this Agreement. Contractor shall also comply with all Federal, state and local laws and ordinances.

## **26. COMPLIANCE WITH LOBBYING POLICIES**

- A. Contractor agrees that if it is a Lobbyist Employer or if it has retained a Lobbying Firm or Lobbyist, as such terms are defined by Omnitrans in its Ethics Policy, it shall comply or ensure that its Lobbying Firm and Lobbyist complies with Omnitrans' Ethics Policy.
- B. If Contractor (Lobbyist Employer) or its Lobbying Firm or Lobbyist fails to comply, in whole or in part, with Omnitrans' Ethics Policy, such failure shall be considered a material breach of this Agreement and Omnitrans shall have the right to immediately terminate or suspend this Agreement.

## **27. PUBLIC RECORDS ACT**

- A. All records, documents, drawings, plans, specifications and other material relating to conduct of Omnitrans' business, including materials submitted by Contractor in its proposal and during the course of performing the Work under this Agreement, shall become the exclusive property of Omnitrans and may be deemed public records. Said materials may be subject to the provisions of the California Public Records Act. Omnitrans' use and disclosure of its records are governed by this Act.
- B. Omnitrans will not advise as to the nature or content of documents entitled to protection from disclosure under the California Public Records Act, including interpretations of the Act or the definitions of trade secret, confidential or proprietary. Omnitrans will accept materials clearly and prominently labeled "TRADE SECRET" or "CONFIDENTIAL" or "PROPRIETARY" as determined by Contractor. Omnitrans will endeavor to notify Contractor of any request of the disclosure of such materials. Under no circumstances, however, will Omnitrans be liable or responsible for the disclosure of any labeled materials whether the disclosure is required by law or a court order or occurs through inadvertence, mistake or negligence on the part of Omnitrans or its officers, employees and/or contractors.
- C. In the event of litigation concerning the disclosure of any material submitted by Contractor, Omnitrans' sole involvement will be as a stake holder, retaining the material until otherwise ordered by a court. Contractor, at its sole expense and risk, shall be responsible for

prosecuting or defending any action concerning the materials, and shall defend, indemnify and hold Omnitrans harmless from all costs and expenses, including attorneys' fees, in connection with such action.

**28. WAIVER/INVALIDITY**

No waiver of a breach of any provision of this Agreement by either party shall constitute a waiver of any other breach of the provision, or of any other breach of the provision of the Agreement. Failure of either party to enforce any provision of this Agreement at any time shall not be construed as a waiver of that provision.

The invalidity in whole or in part of any provision of this Agreement shall not void or affect the validity of any other provision.

**29. FORCE MAJEURE**

Performance of each and all Contractor's and Omnitrans' covenants herein shall be subject to such delays as may occur without Contractor's or Omnitrans' fault from acts of God, strikes, riots, or from other similar causes beyond Contractor's or Omnitrans' control.

**30. CONFIDENTIALITY**

Contractor agrees that for and during the entire term of this Agreement, any information, data, figures, records, findings and the like received or generated by Contractor in the performance of this Agreement, shall be considered and kept as the private and privileged records of Omnitrans and will not be divulged to any person, firm, corporation, or other entity except on the direct prior written authorization of Omnitrans. Further, upon expiration or termination of this Agreement for any reason, Contractor agrees that it will continue to treat as private and privileged any information, data, figures, records, findings and the like, and will not release any such information to any person, firm, corporation or other entity, either by statement, deposition, or as a witness, except upon direct prior written authority of Omnitrans.

**31. CONTRACTOR'S INTERACTION WITH THE MEDIA AND THE PUBLIC**

- A. Omnitrans shall review and approve in writing all Omnitrans related copy proposed to be used by Contractor for advertising or public relations purposes prior to publication. Contractor shall not allow Omnitrans related copy to be published in its advertisements and public relations programs prior to receiving such approval. Contractor shall ensure that all published information is factual and that it does not in any way imply that Omnitrans endorses Contractor's firm, service, and/or product.
- B. Contractor shall refer all inquiries from the news media to Omnitrans, and shall comply with the procedures of Omnitrans' Public Affairs staff regarding statements to the media relating to this Agreement or the Work.

- C. If Contractor receives a complaint from a citizen or the community, Contractor shall inform Omnitrans as soon as possible and inform Omnitrans of any action taken to alleviate the situation.
- D. The provisions of this Article shall survive the termination or expiration of this Agreement.

### **32. GOVERNING LAW**

The validity of this Agreement and of any of its terms or provisions, as well as the rights and duties of the parties hereunder, shall be governed by the laws of the State of California, and the proper venue of any action brought hereunder is and shall be the County of San Bernardino, California.

### **33. MODIFICATIONS TO AGREEMENT**

Unless specified otherwise in the Agreement, this Agreement may only be modified by written mutual consent evidenced by signatures of representatives authorized to enter into and modify the Agreement. In order to be effective, amendments may require prior approval by Omnitrans' Board of Directors, and in all instances require prior signature of an authorized representative of Omnitrans.

### **34. PRECEDENCE**

Conflicting provisions hereof, if any, shall prevail in the following descending order of precedence: (1) the provisions of this Agreement, (2), Attachment B, Prices by part (3) provisions of IFB No. MNT13-16 and (4) Contractor's proposal dated February 5, 2013.

### **35. ENTIRE AGREEMENT**

This Agreement, and any attachments or documents incorporated herein by inclusion or by reference, constitutes the complete and entire agreement between Omnitrans and Contractor and supersedes any prior representations, understandings, communications, commitments, agreements or proposals, oral or written.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed on the date shown below, and effective on the date first hereinabove written.

OMNITRANS

PERFORMANCE TURBOCHARGERS, LLC

\_\_\_\_\_  
MILO VICTORIA  
CEO/General Manager

\_\_\_\_\_  
GARY HETRICK  
General Manager

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

Federal Tax I.D. No. \_\_\_\_\_