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**Transportation Service Agreements: A Preparation and
Reference Guide for Transit Attorneys**

This report was prepared under TCRP Project J-5, "Legal Aspects of Transit and Intermodal Transportation Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Barbara A. Adams and Clifford L. Weaver. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

THE PROBLEM AND ITS SOLUTION

The nation's transit agencies need to have access to a program that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to their businesses. The TCRP Project J5 is designed to provide insight into the operating practices and legal elements of specific problems in transportation agencies.

The intermodal approach to surface transportation requires a partnership between transit and other transportation modes. To make the partnership work well, attorneys for each mode need to be familiar with the legal framework and processes of the other modes. Research studies in areas of common concern will be needed to determine what adaptations are necessary to carry on successful intermodal programs.

Transit attorneys have noted that they particularly need information in several areas of transportation law, including

- Environmental standards and requirements;
- Construction and procurement contract procedures and administration;

- Civil rights and labor standards; and
- Tort liability, risk management, and system safety.

In other areas of the law, transit programs may involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit-equipment and operations guidelines, FTA financing initiatives, private sector programs, and labor or environmental standards relating to transit operations. Emphasis is placed on research of current importance and applicability to transit and intermodal operations and programs.

APPLICATIONS

Contracting for transit-related services is widespread, particularly among municipal and county governments that sponsor small bus operations. Many of these transit operators do not have staff attorneys who are familiar with contract requirements, or they may use city/county or private attorneys on a part-time basis.

This report provides an up-to-date reference and guide on the essentials of contracting for service agreements and should be useful to attorneys and contract administrators.

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Transportation Service Agreements: A Preparation and Reference Guide for Transit Attorneys

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INTRODUCTION AND OVERVIEW

In 1985, at least 35 percent of public sector transit agencies entered into contracts for the provision of all or part of their public transit services.¹ With that significant figure in mind, along with the recent focus in the popular press on "privatization" of public services, the Transportation Research Board (TRB) contracted with the authors of this report to survey and examine the legal issues involved in agreements for services and to assemble a reference guide to assist the transit attorney in the preparation and negotiation of service agreements.

The Survey

In 1995, the authors prepared a survey of transit agencies that covered a variety of issues in service agreements. That survey was sent by TRB to more than 350 transit agencies around the United States. Sixty-two responses were obtained from a variety of agencies. Of those, 58 respondents indicated that they do purchase at least some services from outside their agency, with 56 reporting that they make those purchases by written agreement. Only four indicated that they do not purchase any services from others.

The smallest population served by a respondent was 25,000, and the largest population served was 9 million, with the bulk of respondents serving populations ranging between 60,000 and 1.2 million. A number of the very large transit systems nationwide also responded, with populations served ranging from 2 million to 9 million.

Forty-eight of the respondents indicated that they were either a unit of government or a public or quasi-governmental corporation or entity, with the remainder being either state agencies or instrumentalities or compacts among entities. Only four respondents were private corporations.

The overwhelming majority of the responding agencies provide fixed-route bus service (55) and special services for the disabled (54). Other major types of services provided by the respondents include commuter express service (26), shuttle service (23), fixed-route train service (15), and taxi/specific destination services (15).

More than half of the respondents indicated that they purchase all of their special services for the disabled from an outside provider, with 15 additional respondents indicating that they purchase some portion of their services for the disabled.

At least one-third of the respondents purchase all or a portion of their fixed-route bus services from providers outside their transit agency, and about one-quarter of the respondents purchase all or a portion of their commuter express or shuttle service from an outside source. In addition, at least seven entities purchase all or a part of their fixed-route train service from others.

In addition, all or a portion of many other types of services are obtained by significant numbers of responding transit agencies (at least 25 for each service listed below), including maintenance of facilities, rolling stock, and equipment; legal, accounting, auditing, financial, investment, and insurance services; and traffic, planning, design, and construction services.

Smaller numbers of respondents (less than five for each service listed below) indicated that they purchase other services from time to time, such as security, advertising sales, drug and alcohol testing, computer services, and transit management services.

The organizations from which services are purchased are overwhelmingly from the private sector in all categories of services. A distant second as a provider of certain services, such as special services for the disabled, real estate or facilities, and legal services, is the category of government units that are neither state agencies nor public or quasi-governmental corporations.

The respondents provided a broad range of sample agreements with their survey responses. While many agreements were for the fixed-route bus or train service, commuter express service, shuttle service, and special services for the disabled, many other types of service agreements were also provided, such as construction contracts, design professionals contracts, and tire service contracts.

The survey asked transit agencies to report on any litigation, arbitration, or other proceedings addressing the interpretation of their service agreements, but no responses were received.

The Report

Based on a review of the survey responses and the various service agreements provided, the format, structure, and content of this report were developed.

It appears that the range of substantive issues addressed in service agreements is fairly consistent across the country, with both large and small transit agencies including many of the same topics in their agreements. However, the level of detail on various topics in the agreements varied substantially from place to place. The differences can likely be explained in part by what are the key transit concerns in a particular service area, and in part by the type and length of agreement to which the providers of service may be accustomed.

The length of the service agreements received varied substantially. In general, the longer agreements tended to be from transit agencies serving larger populations (such as New York City and Chicago), while the shorter agreements were from agencies serving smaller population areas (such as Greeley, Colorado, or Cedar Rapids, Iowa). However, these generalizations are not without exception, and examples of good contract language can be found in both the longer agreement and the shorter agreement.

The survey responses and the service agreements provided, along with a review of the legal issues raised therein, clearly demonstrate that the purchase of services by public transit agencies charged with providing one or more types of transportation services is a complex task, requiring the transit lawyer to address a broad range of legal issues in a service agreement. Through that agreement, the lawyer must ensure not only that the agency will obtain the desired services, but also that the contractor's duties are fully addressed, the contractor's right to payment is properly stated, and sufficient provisions are in place to guarantee that the services are obtained or, if not, that the agency has sufficient remedies available. In addition, such an agreement should address issues involving insurance, indemnity, reporting, auditing, inspections, personnel, equipment, and facilities, to name but a few. To further complicate matters, transit agencies face a variety of statutory and regulatory legal requirements that may apply to a particular service purchase.

To create a useful reference guide for the transit agency attorney, this report discusses the broad range of transit agency concerns by topic. The topics are arranged in the order in which the transit agency attorney might place them in a

contract for services, enabling the transit attorney to consider whether and how to address a topic in a particular service agreement. In addition to discussing the need to address, and the legal issues related to, each topic, the report provides one or more examples of provisions that could be used to address that topic. Of course, each transit attorney will need to modify these examples as required to fit his or her client's particular circumstances.

Because the transit agencies did not respond to the survey inquiries about litigation, arbitration, or other proceedings challenging or affecting the interpretation of their service agreements, it is difficult to identify and share experiences about common "hot spots" in public transit contract disputes. The review of the surveys and legal issues has, therefore, resulted in the preparation of a broad range of sound contract provisions that should provide a comprehensive guide to transit attorneys.

The model agreement provisions included in this report have been developed in light of general principles common to contracting in the public sector. It is, however, beyond this report's scope to research the applicable requirements of public contract law throughout the country. Thus, in using this report, the transit attorney should keep in mind the need to investigate the particulars of public contract law under the applicable state law.

With this report as a guide for identifying and considering the relevant legal issues, the transit attorney can control the range of issues and length of a particular purchase of service agreement by including those issues and provisions that he or she feels will best address specific client concerns and situations and will be most responsive to what the local market will bear (for example, while an agreement of 50 pages or more might be the norm in New York City or Chicago, an agreement of that length might discourage qualified service providers in smaller markets from contracting to provide service).

To aid in referring to various provisions of the model agreement contained in this report, a table of contents of the model agreement's provisions has been included in Appendix A of this report.

I. BASIC PROVISIONS

A. Setting Up the Agreement

To identify the parties entering into the agreement and to establish a contract, by confirming that consideration has been exchanged, the following provisions can be used at the beginning of the agreement:

AGREEMENT FOR THE PURCHASE OF SERVICES

THIS AGREEMENT is made and entered into this ____ day of ____, 19 __, by and between the [INSERT NAME OF TRANSIT AGENCY PURCHASING SERVICE], a [INSERT TRANSIT AGENCY'S TYPE OF ORGANIZATION], operating under the name and referred to in this Agreement as "Transit Agency," acting by and through [OR: pursuant to the authority of] its [INSERT NAME OF TRANSIT AGENCY GOVERNING BODY], referred to in this Agreement as "Transit Agency Board," and [INSERT NAME OF CONTRACTOR PROVIDING SERVICE], a [INSERT CONTRACTOR'S TYPE OF ORGANIZATION], hereinafter referred to in this Agreement as "Contractor."

NOW, THEREFORE, in consideration of the promises and agreements set forth in this Agreement, Transit Agency and Contractor HEREBY AGREE as follows:

These provisions identify the parties under their legal names, state the type of organization that they are (for example, a corporation, a partnership, a municipal corporation, or a unit of local government), and establish the defined terms that will be used to refer to them throughout the agreement. The governing board of the

Transit Agency is also identified. These definitions can also be included in the article containing other defined terms, for ease of reference.²

B. Background or Recitals

Regardless of what they are called, every agreement should contain a series of provisions that sets out how the parties have reached the point of entering into the agreement. Sometimes called "recitals," "background," "purpose and intent," or simply "whereas clauses," these provisions set out the legal authority for the parties to enter into the agreement and any other relevant background. They should be included as the first article in the agreement. Some examples are:

ARTICLE 1—BACKGROUND

Section 1.1. Transit Agency.

Transit Agency was created as a single authority to be responsible for providing, aiding, and assisting public transportation in the [DESCRIBE TERRITORIAL JURISDICTION], including financial review and facilitation of public transportation and its providers and providing public transportation by [INSERT RAIL, BUS, OR OTHER MODE OF TRANSIT]. [INSERT STATUTORY CITATIONS]

Section 1.2. Authority to Purchase Services.

Transit Agency may enter into purchase of service agreements with governmental and private-sector entities to obtain public [INSERT RAIL, BUS, OR OTHER MODE OF TRANSIT] service and to provide for payment of operating and other expenses upon such terms and conditions as Transit Agency shall provide in any such agreements. [INSERT STATUTORY CITATIONS]

Section 1.3. Determination to Purchase Services.

Transit Agency desires to procure from Contractor the Transportation Services and Other Services as described in this Agreement and Contractor desires to provide such Services.

If the Transit Agency sought proposals through a request for proposals or invitation for bids,³ the provisions in Section 1.4, or some variation, might be appropriate, either in place of, or in addition to, Section 1.3:

Section 1.4. Proposals Requested.

The Transit Agency issued a Request for Proposals for the provision of Transportation Services and Other Services on , _____ 19,____ and the Contractor submitted a proposal on ,19 _____.

Section 1.5. Acceptance of Proposal.

The Transit Agency Board has determined that it wishes to accept the Contractor's proposal, subject to the terms and conditions of this Agreement.

On the other hand, if the Transit Agency and the Contractor have simply negotiated an agreement, the provisions in Section 1.6 may be an appropriate supplement to Section 1.3:

Section 1.6. Agreement Negotiated.

The Transit Agency and the Contractor have negotiated the terms and conditions of this Agreement, and the Transit Agency Board has found and determined that it is in the best interests of the public and the Transit Agency to execute this Agreement for the provision of Transportation Services and Other Services.

C. Executing the Agreement

At the end of the agreement, provision should be made for execution of the agreement by both parties. An example of a contract closing with signature blocks follows:

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives.

CONTRACTOR	TRANSIT AGENCY
By: _____	By: _____
Title: _____	Title: _____
Date: _____	Date: _____
Attest:	Attest
By: _____	By: _____
Title: _____	Title: _____
Date: _____	Date: _____

If notarized signatures are required or desired in a particular locale, notary blocks can also be added, either on the signature page or the following page.

II. DEFINITIONS

Defined terms should be used throughout the agreement. Not only do they help ensure clarity through consistent references to the same concepts and things, they also shorten the agreement and make it more readable by using one or two words to refer to something that otherwise requires a whole paragraph to describe. All definitions should be included in the same article (which is Article 2 in this model) for ease of reference, and they should be listed in alphabetical order. As noted in Part I.A. of this report, the basic language establishing defined terms and terms defining the parties should be included here.

ARTICLE 2--DEFINITIONS

The following terms, whenever set forth in initial capitals in this Agreement, shall have the meanings set forth in this Article, except as otherwise expressly provided in this Agreement:

Contractor: [INSERT NAME OF CONTRACTOR PROVIDING SERVICE], a [INSERT CONTRACTOR'S TYPE OF ORGANIZATION].

Transit Agency: [INSERT NAME OF TRANSIT AGENCY PURCHASING SERVICE], a [INSERT TRANSIT AGENCY'S TYPE OF ORGANIZATION].

Transit Agency Board: The duly [INSERT: elected or appointed] Board of Directors [OR: Commissioners, Trustees, etc.] of the Transit Agency.

The following additional terms to be included in the definitions article are discussed in subsequent sections of this report:

Definition	Discussed In
Agreement Term	Section XII
Approved Budget	Section XII
Approved Budget Maximum	Section XII
Approved Capital Expenditure	Section XII
Budget Call	Section XII
Capital Asset	Section XII
Capital Expenditure	Section XII
Contrast Price	Section XII
Contractor Vehicle	Section IV
Equipment	Section IV
Fee Per Vehicle Hour	Section XII
Fixed Monthly fee	Section XII
Fixed Vehicle Monthly fee	Section XII
Line Item	Section XII
Line Item Budget	Section XII
Line Item Budget Maximum	Section XII

Monthly Report	Section XII
Non-Revenue Vehicle	Section IV
Operating Expense	Section XII
Operating Manual	Section III
Operations Bulletin	Section III
Other Contractor Equipment	Section IV
Other Services	Section III
Other Transit Agency Equipment	Section IV
Real Property and Facilities	Section V
Reimbursable Expenditure	Section XII
Required Coverages	Section X
Revenue Vehicle	Section IV
Transit Agency Equipment	Section IV
Transit Agency Vehicle	Section IV
Transportation and Other Services Revenue	Section XII
Transportation Services	Section III
Vehicle	Section IV
Vehicle Hour	Section XII

III. SERVICES TO BE PURCHASED

The survey of transit agencies revealed that these agencies regularly purchase two major categories of transit services:

- Fixed: fixed-route service, either by bus or rail; and
- Special: dispatched, door-to-door service by small bus, van, or car, most typically as paratransit for the disabled.

This section focuses on drafting provisions that describe and define these two categories of transit service along with related services.

The survey also revealed variations on these basic categories of service, such as airport shuttle service. Purchasers of such services may wish to combine some features of both fixed and special service in their agreements.

Finally, the survey revealed that transit' agencies purchase a wide range of nontransportation services, such as design (architectural and engineering) services; legal, accounting, and auditing services; security services; and drug and alcohol testing services. Because these are not directly "transportation services" in nature, this report does not suggest "scope of services" language for them. Nonetheless, transit attorneys will likely find those portions of this report that deal with more general contract issues to be useful in preparing agreements for the purchase of such nontransportation services.

A. Definitions

To address the scope of services, several definitions should be added to Article 2 of the agreement. Each is discussed in turn:

Transportation Services. The services specified in Section 3.1 of this Agreement, as the same may be modified from time to time pursuant to the provisions of Section 3.2 of this Agreement.

This definition of Transportation Services can be used for agreements for either fixed or special service. It can also be modified for agreements that provide both types of service by including references to the sections describing each type of service.

Other Services. The services specified in Section 3.3 of this Agreement.

This definition of Other Services will include all related services that are to be provided by the Contractor, described in Section 3.3, as discussed in Part III.D of this report.

Operating Manual. The manual (which currently bears the title [INSERT TITLE OF MANUAL]) of Transit Agency policies, practices, and procedures prepared and regularly amended, revised, and supplemented by the Transit Agency, as it may be amended, revised, or supplemented by the Transit Agency from time to time during the Agreement Term. All references to the Operating Manual shall be deemed to be references to the most current version of the Operating Manual and to include a reference to any and all applicable Operations Bulletins. All references to any specific section, exhibit, or provision of the Operating Manual are for convenience only and shall be deemed to be references to any and all relevant provisions of the Operating Manual.

The definition of Operating Manual is included to allow reference to and incorporation of all service and performance standards and guidelines that the Contractor must comply with in providing the Transportation Services. Ideally, the Transit Agency will have such a manual in effect. If not, this definition could be modified to include a collection of standards and guidelines that is assembled and included as an exhibit to the agreement.⁴ If neither of these options is feasible, the Transit Agency may wish to include, as part of the Transportation Services, a requirement that the Contractor develop and submit an Operating Manual for approval. This approach might be desirable when the staff of the Transit Agency is small and the Contractor is recognized as having substantial expertise in the transportation field.

Operations Bulletin. Any written directive issued by Transit Agency, whether before or during the Agreement Term, to advise Contractor of additional, supplemental, new, or revised Transit Agency policies, practices, and procedures regarding the provision of Transportation Services and Other Services and other matters relating to the performance of this Agreement.

The definition of Operations Bulletin is included to provide for (a) the inevitable changes to and revisions in the service and performance standards included in the Operating Manual and (b) supplements for items that might not be covered in the Operating Manual.

The definitions of other terms used in Article 3 are provided and discussed in connection with other articles of the model agreement. Examples are: Agreement Term (Article 13); Transportation and Other Services Revenue, Reimbursable Expenditure, and Approved Budget (Article 12); and Equipment and Vehicle (Article 4).

B. Fixed-Route and Special Service

A complete description of the elements of the basic fixed-route or special service is key to a successful agreement. Model Section 3.1 is designed to include a broad range of issues. It is also designed to provide the Transit Agency with the maximum flexibility in determining the standards, guidelines, and operational elements of the Transportation Services.

Model Section 3.1 also assumes that the Transit Agency has published and established routes and schedules for the fixed-route Transportation Services being procured; however, when a Transit Agency is negotiating these items with the Contractor, the text of model Section 3.1 can be revised to refer to specific routes and schedules that are "attached as Exhibit D"⁵ rather than to schedules on file with the Transit Agency. When special or paratransit Transportation Services are being procured, model Section 3.1 assumes that service will be by appointment during established time periods and in established areas.

The items addressed in the list of Contractor obligations in model Section 3.1 may also be subject to negotiation and modification by the parties, particularly in areas such as the level of fares.

ARTICLE 3--SCOPE AND DESCRIPTION OF SERVICES

Section 3.1. Transportation Services.

[USE THIS PARAGRAPH FOR FIXED ROUTE SERVICE]

Throughout the Agreement Term, Contractor, acting as an independent contractor for the benefit of Transit Agency and not as an agent for Transit Agency, agrees to provide safe, efficient, and economical [INSERT EITHER BUS OR RAIL] service along each of the routes listed in Exhibit __, according to the route map and schedule published or approved by Transit Agency and in effect for each such route on the first day of the Agreement Term, copies of which schedules and related materials are on file with Transit Agency, and along such additional or modified routes as are established pursuant to the procedures in Subsection 3.2 below, according to the route map and schedule published or approved by Transit Agency and placed on file by Transit Agency for each such additional or modified route. As an integral part of providing such service, Contractor shall at all times:

[USE THIS PARAGRAPH FOR SPECIAL OR PARATRANSIT SERVICE]

Throughout the Agreement Term, Contractor, acting as an independent contractor for the benefit of Transit Agency and not as an agent for Transit Agency, agrees to provide safe, efficient, and economical paratransit service for elderly and disabled passengers in the geographic area described in Exhibit __ by appointment during the schedule of times at which such service is to be provided as published or approved by Transit Agency and in effect for each such area on the first day of the Agreement Term, copies of which schedules and related materials are on file with Transit Agency, and in such additional or modified areas as are established pursuant to the procedures in Subsection 3.2 below, according to the area and schedule published or approved by Transit Agency and placed on file by Transit Agency for each such additional or modified area. As an integral part of providing such service, Contractor shall at all times:

[USE SUBSECTIONS A THROUGH K FOR BOTH FIXED-ROUTE AND SPECIAL SERVICE]

- A. Comply with all Transit Agency service standards as set forth in the Operating Manual;
- B. Comply with all of the other provisions of this Agreement;
- C. Take all steps necessary to ensure the safety and reasonable comfort and convenience of the public utilizing such service;
- D. Charge only such fares as may be directed by Transit Agency;
- E. Comply with all policies, practices, procedures, terms, and conditions as may be directed by Transit Agency with regard to collection, security for, and disposition of fares, and other Transportation and Other Services Revenue;
- F. Comply with all policies, practices, procedures, terms, and conditions as may be directed by Transit Agency with regard to matters such as passes, tickets, coupons, tokens, transfers, transfer systems, interconnections between different modes of transportation, and interconnections between different transportation agencies;
- G. Comply with all of the policies, practices, procedures, terms, and conditions required by use of federal, state, and other funds, including, without limitation, conditions pertaining to rates charged to students, elderly and handicapped persons; the prohibition of charter bus operations and school bus operations; employment; and reporting;
- H. Comply with all policies, practices, procedures, terms, and conditions as may be directed by Transit Agency with regard to the availability and distribution of schedules and other printed material related to such service and related transportation services, including distribution of such schedules and materials on vehicles providing Transportation Services under this Agreement;
- I. Conduct such services, and its business and operations as they relate to such services, in a safe, sound, economical, and efficient manner;
- J. Comply with all Transit Agency efforts to improve efficiency; and

K. Comply with all applicable provisions of federal, state, and local law [FOR SPECIAL OR PARATRANSIT SERVICE, ADD: including, without limitation, 49 C.F.R. Parts 27, 37, and 38; 49 C.F.R. Part 609; 28 C.F.R. Parts 35 and 36; and 41 C.F.R. Part 101-19].

This model Section 3.1 also assumes that the Transit Agency has an Operating Manual or other document that establishes all of the requirements for paratransit service. Given the extensive amount of federal regulations governing special or paratransit service, the Transit Agency would be well advised to prepare a set of requirements for such service. The issues to be addressed in these requirements include:

- Type of passengers served;
- Geographic area;
- Hours of service;
- Cost of service;
- Assistance provided to passengers in boarding and exiting;
- Passenger appointment procedures; and
- Waiting time for passengers.

C. Changes in Transportation Services

During the term of the Agreement, one or both of the parties may believe that a change in the Transportation Services is desirable. This model Section 3.2 provides for changes proposed by both the Contractor and the Transit Agency.

Section 3.2. Changes in Transportation Services.

A. Contractor Initiated Changes. Contractor shall not, without the prior written approval of Transit Agency, initiate or permit any change to the Transportation Services specified in Section 3.1 above. Contractor may propose changes in the Transportation Services by presenting a proposal therefor in writing to Transit Agency at least 45 days in advance of the date on which the change is proposed to take effect. Transit Agency shall either approve or disapprove the request in writing within 30 days after it receives the request. Notwithstanding the foregoing, Contractor may implement minor operational changes that will neither (1) increase any Reimbursable Expenditure, nor (2) affect any fare or system for passes, transfers, interconnections, or similar programs [INCLUDE THE FOLLOWING CLAUSE ONLY FOR FIXED-ROUTE SERVICE] nor (3) substantially change any route or schedule if Contractor first gives Transit Agency at least 30 days notice of its intent to make such minor change and if Transit Agency has not disapproved such proposed minor change in writing within 15 days following receipt of such notice. Contractor may, in addition, make minor operational changes of an emergency nature without Transit Agency approval; provided, however, that no such change shall be made that would increase any Reimbursable Expenditure and provided, further, that Contractor shall give Transit Agency notice of each such minor change as soon as possible, and in no event later than 12 hours after it is made.

B. Transit Agency Initiated Route and Schedule Changes. Transit Agency may require changes in routes and schedules specified in Section 3.1 above, but only on the following conditions:

- (1) Unless some other notice is permitted or required or unless Contractor shall agree to some lesser notice, Transit Agency shall provide Contractor at least 45 days written notice of the required change; and
- (2) Transit Agency shall have first complied with any special procedures or standards made applicable to the required change by any applicable law or regulation or by any other agreement between Transit Agency and Contractor; and
- (3) Transit Agency shall have first approved an amendment to the Approved Budget set forth in Article 12 of this Agreement, or shall otherwise have provided sufficient additional funding, to fairly reflect any increase in the Reimbursable Expenditures caused by the required change.

In the event Contractor disputes Transit Agency's compliance with either Paragraph 3.2B(2) or 3.2B(3) above, Contractor may request a review of the matter by the Transit Agency Board. If the Transit Agency Board determines that there is no failure by Transit Agency to comply with either Paragraph 3.2B(2) or 3.2B(3) above, Contractor shall then implement the required change not later than the expiration of the notice period required pursuant to Paragraph 3.2B(2) above, subject, however, to Contractor's remedies as set forth in Article 16 of this Agreement.

C. Other Transit Agency Initiated Changes. Except for changes in routes and schedules, Transit Agency may require any change in the Transportation Services specified in Section 3.1 above upon reasonable written notice to Contractor.

D. Transit Agency Discretion. Nothing in this Section 3.2 shall be construed to require Transit Agency to approve any change to the Transportation Services specified in Section 3.1, and Transit Agency may withhold its approval of any such change, at its sole discretion.

All changes provide for a notice procedure in advance of implementation of any changes in the Transportation Services, whether initiated by Transit Agency or Contractor. If a Transit Agency is subject to any special state or local statutory or contractual requirements regarding changes in service or routes, such as public hearings prior to changes in routes and schedules, those requirements should be incorporated into the process by which changes are permitted.

In agreements that are based on unit prices (such as a fixed price for each vehicle service hour) rather than a total price, the transit attorney might wish to include a maximum percentage by which the total number of units may change before the unit price is adjusted or renegotiated.

D. Other Services

In addition to the actual transporting of passengers, Contractor will typically be required to provide related services that support the provision of the Transportation Services. Model Section 3.3 enumerates these other services by category and refers to those parts of the Agreement that discuss them in greater detail.

Section 3.3. Other Services.

Throughout the Agreement Term, Contractor shall provide all ancillary and supporting services necessary or appropriate to providing the Transportation Services and to complying with the requirements of this Agreement, including, without limitation, the following services:

A. Contractor shall maintain all garages, yards, facilities, equipment, materials, and supplies used in providing, or supporting, the Transportation Services in first-class condition and shall specifically comply with the equipment maintenance responsibilities set forth in Article 4 of this Agreement;

B. Contractor shall provide all professional, supervisory, administrative, skilled, and unskilled personnel necessary or appropriate to provide the Transportation Services and to carry out its other obligations under this Agreement and, in so doing, shall comply with all the terms of this Agreement and, specifically, Articles 6 and 7 of this Agreement;

C. Contractor shall comply with the reporting and recordkeeping requirements set forth in Article 8 of this Agreement;

D. Contractor shall comply with its obligations with respect to accounting and budgeting as set forth in Article 12 of this Agreement.

The items included in Other Services can be modified depending on the scope of the services actually required in each agreement.

E. Equipment and Facilities

In most instances, the Transit Agency will find it beneficial to define the precise items of equipment, such as buses and trains, and particular facilities, such as garages and terminals, to be used in the provision of Transportation Services and Other Services. Surprisingly, however, a number of service agreements collected by the survey did not include any mechanism for identifying these items. While the details of these categories are discussed in model Articles 4 and 5, respectively, the following provisions are included here to confirm the obligation to use the identified items and to provide a useful cross-reference to Articles 4 and 5.

Section 3.4. Equipment.

Unless otherwise expressly provided in Article 4 of this Agreement, Contractor shall, in providing the Transportation Services and Other Services, employ the Equipment, and only the Equipment, specified in said Article 4.

Section 3.5. Real Property and Facilities.

Unless otherwise expressly provided in Article 5 of this Agreement, Contractor shall, in providing the Transportation Services and Other Services, utilize the garages, yards, and related facilities, and only the garages, yards, and related facilities, specified in said Article 5.

F. Permitted Service Variations

From time to time, there will be circumstances under which the Contractor will be unable to provide all or a part of the Transportation Services because of events that are beyond its control (*force majeure*). Model Section 3.6 defines these circumstances and requires Contractor to present a plan to notify potential passengers of the circumstances, provide interim services, and return to full service:

Section 3.6. Permitted Variations in Transportation Services and Other Services Due to Force Majeure.

Contractor shall not be in default of its obligation to provide Transportation Services and Other Services as herein required to the extent that it is unable to provide such Services as a result of abnormally severe weather or road conditions, strikes or other labor stoppages, unavailability of sufficient Revenue Vehicles through no fault of the Contractor and other events and conditions that are beyond the reasonable ability of Contractor to control or remedy and that render provision of such Service impossible or not reasonably feasible. In any such case, Contractor shall provide such modified or reduced Services as are practicable under the circumstances and shall use all reasonable efforts to restore full Services in accordance with this Agreement at the earliest possible time. Immediately upon the occurrence of, or the threat of the imminent occurrence of, any such event or condition, and prior to implementing any reduced or modified service, Contractor shall notify Transit Agency by telephone, with written confirmation as soon as possible thereafter, of:

- A. The nature of the event or condition;
- B. The actual or expected time of the occurrence of the event or condition and its expected duration;
- C. The impact of the event or condition on Transportation Services and Other Services;
- D. The modified or reduced service that Contractor proposes to provide during the continuation of the event or condition;
- E. The Contractor's plan to notify potential users of the Transportation Service of any disruption that may result; and
- F. The steps Contractor proposes to take to restore full service.

The Transit Agency also may wish to expand Section 3.1 or Section 3.6 to require the Contractor to submit, for Transit Agency review, a plan to deal with certain *force*

majeure issues, such as a "severe weather plan" or a "hurricane plan," early in the term of the agreement. Many of the sample agreements received from transit providers in areas subject to hurricanes or other weather extremes do include such a requirement. It is important to recognize, however, that while such a plan may establish certain basic parameters for providing and restoring service during such an event, it cannot address every eventuality. Therefore, the transit attorney will likely find it useful to retain the procedure for notice to the Transit Agency of the specific plan for each *force majeure* event that occurs.

IV. VEHICLES AND EQUIPMENT FOR TRANSPORTATION SERVICES AND OTHER SERVICES

The provision of Transportation Services is, in most instances, a vehicle- and equipment-intensive venture, requiring vehicles to transport passengers, vehicles for use in related supervisory and administrative tasks, vehicles and equipment for maintenance of the passenger vehicles, and equipment to be located in or on the passenger vehicles, such as fare boxes or radios. Because the successful provision of Transportation Services can be substantially affected by the type of vehicles and other equipment used and how those items are maintained, it is worthwhile for the transit attorney to set out in some detail the vehicle and equipment requirements.

A. Definitions

To address the various types of vehicles and equipment in the agreement, several terms should be defined. Some model definitions are provided below:

Vehicle. Any means of transportation or conveyance such as, but not limited to, a bus, a train, a truck, a van, an automobile, or a trailer, and any self-propelled maintenance equipment such as, but not limited to, a tow truck, a sweeper, or a tractor.

The definition of Vehicle is designed to be as broad as possible so as to cover all modes of vehicular transportation, as well as all support vehicles. If only bus service or rail service is provided under an agreement, the transit attorney may wish to modify this definition to include only buses or trains, as appropriate.

Revenue Vehicle. Any Vehicle designed or used as a means for the transportation or conveyance of the general public as passengers.

Nonrevenue Vehicle. Any Vehicle other than a Revenue Vehicle.

The definitions of Revenue Vehicle and Nonrevenue Vehicle distinguish Vehicles that are used to raise revenue through the transport of passengers from support Vehicles that do not raise revenue.

Transit Agency Vehicle. All Vehicles of every kind provided by Transit Agency to Contractor at any time, whether before or after the execution of this Agreement and whether in connection with this Agreement or in connection with any prior agreement or relation between Transit Agency and Contractor or in connection with the provision of services pursuant to this Agreement or any prior agreement or relation, including, without limitation, all Revenue Vehicles listed in Paragraph A of Exhibit B hereto as being "provided by" Transit Agency, all Nonrevenue Vehicles listed in Paragraph B of Exhibit B hereto, and all other Vehicles provided by Transit Agency to Contractor, whether or not listed on Exhibit B hereto.

Contractor Vehicle. Any vehicle listed in Exhibit B attached hereto as being "provided by" Contractor.

The definitions of Transit Agency Vehicle and Contractor Vehicle are used to identify which party has provided the Vehicles covered by the Agreement. As is

noted later in this section of this report, the parties are likely to be assigned different powers, duties, and obligations in connection with the Vehicles, depending on which party provided each one.

The Exhibit B referred to in these definitions need not be complex. Its primary purpose is to provide sufficient information to describe and identify the vehicles governed by the agreement. One example of such an exhibit, in chart format, is as follows:

EXHIBIT B-VEHICLES

Make, Model and Year	Vehicle Identification Number (VIN)	Mileage at Start of Agreement Term	Provided by
B. Nonrevenue Vehicles			
Make, Model and Year	Vehicle Identification Number (VIN)	Mileage at Start of Agreement Term	Provided by

If there are other items of identifying information that the parties wish to include, Exhibit B can be modified accordingly.

Finally, definitions of equipment other than Vehicles should be included, such as:

Transit Agency Equipment. All assets of every kind, including Transit Agency vehicles, (1) provided by Transit Agency to Contractor, at any time, whether before or after the execution of this Agreement, or (2) purchased by Contractor (a) with capital grant funds provided by or through Transit Agency, at any time, whether before or after the execution of this Agreement, or (b) with Transportation and Other Services Revenue or payments made by Transit Agency to Contractor pursuant to this Agreement.

Other Transit Agency Equipment. Any Transit Agency Equipment other than a Transit Agency Vehicle.

Other Contractor Equipment. All assets of every kind used in the performance of this agreement other than Transit Agency Equipment and Contractor Vehicles.

Equipment. Transit Agency Equipment, Contractor Vehicles, and other Contractor Equipment.

The definitions of Transit Agency Equipment, Other Transit Agency Equipment, Other Contractor Equipment, and Equipment are all designed to further aid the parties in stating their roles in connection with these categories of assets.

B. Equipment Provided By Transit Agency

In many instances, often as a result of the availability of grant funds for purchase or the economies of purchasing in larger quantities, the Transit Agency supplies many of the vehicles and much of the equipment needed to provide Transportation Services and Other Services. In those cases, the Transit Agency will want to reserve sufficient flexibility in the assignment, use, and return of these assets and will also want to establish adequate protections for these assets while they are being used by the Contractor. A series of model provisions addressing these issues as they relate to the Transit Agency's Equipment are discussed below.

1. General Provisions

The following three model subsections in model Section 4.1 address the basic agreement of the Transit Agency to supply the Vehicles and Equipment that the Contractor needs to provide all, or a significant portion, of the Transportation Services.

ARTICLE 4--EQUIPMENT

Section 4.1. Provision of Equipment By Transit Agency.

A. Transit Agency Rights With Respect to Transit Agency Vehicles and Other Transit Agency Equipment. This Agreement applies to all Transit Agency Equipment provided by Transit Agency to Contractor at any time. Transit Agency reserves the absolute right, in its sole discretion, (1) to determine the number and type of Transit Agency Vehicles and other Transit Agency Equipment to provide to Contractor; (2) to substitute or replace any Transit Agency Vehicles or Other Transit Agency Equipment provided to Contractor; and (3) to direct the return to Transit Agency or its designee of any or all Transit Agency Vehicles or Other Transit Agency Equipment at any time, provided, however, that in the absence of fault by Contractor or other good cause, Transit Agency shall not take action under this Paragraph 4.1A(3) that would have the effect of preventing or materially and adversely affecting the ability of Contractor to provide the Transportation Services and Other Services.

B. Transit Agency Equipment Provided. Transit Agency will provide or has already provided Contractor with the Transit Agency Revenue and Nonrevenue Vehicles listed in Exhibit B. Contractor acknowledges that the Transit Agency Revenue Vehicles listed in Exhibit B, together with the Contractor Vehicles listed in Exhibit B, if any, are adequate and sufficient to provide and support the Transportation Services. Contractor further acknowledges that it has, in addition, received various items of Other Transit Agency Equipment from Transit Agency, and Contractor agrees to comply with all Transit Agency procedures for handling such other Transit Agency Equipment in accordance with the Operating Manual.

C. Inventory and Documentation. Contractor agrees to cooperate fully with Transit Agency in developing and maintaining an accurate inventory of all Transit Agency Equipment from time to time in the possession of Contractor. Contractor shall complete and process all documentation necessary to evidence and record the receipt, possession, return, or transfer of any Transit Agency Equipment coming into, being in, or leaving its possession, as required by the Operating Manual. Copies of all such documentation with respect to Transit Agency Vehicles shall be attached to and become part of Exhibit B.

Particularly in the case of an ongoing relationship between the parties for the provision of services, it is important that the parties keep a complete and updated inventory of the Vehicles provided to the Contractor by the Transit Agency. Therefore, stipulating that the inventory listing in Exhibit B be updated from time to time as the inventory changes provides a clear method of itemizing the Vehicles provided.

In addition, model Subsections 4.1G and 4.1H (discussed later in this report) expand on the terms and conditions governing returns and substitutions of Transit Agency Equipment and the handling of surplus Transit Agency Equipment.

2. Payment of Consideration, Lease

In many instances, the Transit Agency may elect to supply the Contractor with sufficient Vehicles to provide the services required as a direct obligation under the Agreement. In such a case, no separate consideration is paid to the Transit Agency, such as in the following model provision:

D. No Consideration. Contractor shall not be required to pay any separate consideration for the use of the Transit Agency Equipment during the Agreement Term.

However, some service agreements provide that the Contractor's use of the Transit Agency Equipment is permitted pursuant to a lease for which a nominal fee is paid. An alternate model Paragraph D providing for this option would be as follows:

D. Lease. Transit Agency hereby leases to Contractor the Transit Agency Vehicles for one dollar (\$1.00) per Vehicle per year during the Agreement Term.

A lease arrangement of this type may be necessary due to financing requirements or legal limitations on the ability of the Transit Agency to allow others to use its personal property without a lease. The transit attorney should examine state and local laws and requirements for such constraints. In addition, the transit attorney should consider whether designating the transaction as a lease will cause other terms to be imposed on the agreement by operation of state or local law.

3. Delivery and Acceptance of Equipment

The agreement should provide for the delivery of Transit Agency Equipment to the Contractor. This model provision allows the Transit Agency to establish when this will occur:

E. Contractor Acceptance of Transit Agency Equipment. Contractor shall accept delivery of Transit Agency Equipment at such times and places within the territory of the Transit Agency as Transit Agency shall designate upon notice to Contractor that such Equipment is available for delivery. In case of any unreasonable delay, neglect, refusal, or failure to accept any Transit Agency Equipment at the time and place designated, all costs and expenses incurred by Transit Agency arising from such delay, neglect, refusal, or failure shall be reimbursed by Contractor immediately upon written demand by Transit Agency. Such costs and expenses shall not be a Reimbursable Expense for purposes of this Agreement.

4. Training in Use of Equipment

When the Transit Agency is purchasing new Vehicles or Other Transit Agency Equipment, it may be desirable to provide for training in its use, particularly when the manufacturer provides such training. In such instances, the Contractor should be required to make its personnel available for such training. The following model provision addresses these issues:

F. Training of Contractor Personnel. Transit Agency's contract for the purchase of the [DESCRIBE TYPE OF VEHICLE OR EQUIPMENT HERE] requires the manufacturer of such items to provide training in the use of such items to personnel of Transit Agency and Contractor. Contractor shall, upon notice from Transit Agency, require its personnel to attend such training. The training shall be held at [INSERT LOCATION].

5. Return and Substitution of Equipment

The Transit Agency should also reserve the right to require the Contractor to return Transit Agency Equipment and to accept substitute Equipment. The following provision provides an example:

G. Transit Agency Equipment Returns and Substitutions. Any Transit Agency Equipment that Transit Agency designates to be returned or transferred shall, upon reasonable notice, be delivered by Contractor at the time and to the place designated by Transit Agency. Contractor also shall accept delivery of any substitute Transit Agency Equipment at the time and place designated by Transit Agency. All terms and conditions of this Agreement shall apply to such substitute Transit Agency Equipment.

This right of the Transit Agency is limited by the terms of model Paragraph 4.1A(3), which provides that the Transit Agency cannot prevent or materially adversely affect the Contractor's provision of Transportation Services and Other Services.

6. Surplus Equipment

Where the Transit Agency has provided Equipment to the Contractor that is not needed in connection with the Transportation Services, the Transit Agency may wish to redirect that surplus Equipment to another use or to a more appropriate storage location. This model provision addresses these issues:

H. Surplus Transit Agency Equipment. Any Transit Agency Vehicle not scheduled for use in providing or supporting the Transportation Services and not required as a spare, as determined by Transit Agency, for a period of 10 days or more shall be considered surplus Transit Agency Equipment. Any other Transit Agency Equipment not required, as determined by Transit Agency, for providing Transportation Services or Other Services pursuant to this Agreement shall be considered surplus Transit Agency Equipment. Transit Agency may require Contractor either to return such surplus Transit Agency Equipment to Transit Agency, to transfer it to Transit Agency's designee, or to store it at such locations as Transit Agency may direct.

7. Repossession of Transit Agency Equipment

In instances where the Contractor does not return the Transit Agency Equipment when directed to do so or does not use or maintain it as required, the Transit Agency will want the clear right to regain possession and control of that Equipment. This model provision outlines those rights:

I. Transit Agency Right to Repossess Transit Agency Equipment. Upon the failure of Contractor to return or deliver any Transit Agency Equipment as directed by Transit Agency, or if Contractor fails to use, repair, or maintain any Transit Agency Equipment as required by this Agreement, Contractor shall permit Transit Agency, without demand, legal process, or a breach of the peace, to enter any premises under the control of Contractor where the Transit Agency Equipment is or may be located and to take possession of and remove the Transit Agency Equipment. Contractor shall not prosecute or assist in the prosecution of any claim, suit, action, or other proceeding arising out of any such repossession by Transit Agency. Contractor shall reimburse Transit Agency for any and all costs incurred by Transit Agency in connection with actions taken by Transit Agency pursuant to this subsection. Such costs shall not be Reimbursable Expenditures under this Agreement.

8. Inspection of Transit Agency Equipment

To ensure that the Equipment is being properly maintained, the Transit Agency should include in the Agreement a provision outlining its right to inspect the Equipment. A model provision follows:

J. Transit Agency Equipment Inspection. Transit Agency shall have the right to inspect any and all Transit Agency Equipment or cause any or all Transit Agency Equipment to be inspected at any time, with or without prior notice to Contractor, provided, however, that unless Transit Agency determines in its sole discretion that emergency conditions or factors affecting safety or security require otherwise, Transit Agency shall give at least 24 hours notice of any such inspection. Transit Agency shall also have the right to demand from time to time a written statement from Contractor setting forth the condition of the Transit Agency Equipment or any part of it. Contractor shall furnish such a statement to Transit Agency within 10 days after receipt of Transit Agency's demand therefor. Should Transit Agency or its designee determine, in its sole discretion, that any Transit Agency

Equipment has not been maintained in accordance with this Agreement or the Operating Manual, Transit Agency or its designee shall report all deficiencies to Contractor in writing. Except for safety-related deficiencies, which shall be corrected as soon as reasonably possible and prior to placing the Vehicle in service, Contractor shall have 30 days to correct the reported deficiencies.

This provision could also be used, with slight modification, to provide for the right of the Transit Agency to inspect Contractor Equipment as well.

9. Return of Equipment and Records

When the Agreement Term is ended, Contractor should be required to return the Transit Agency Equipment, in accordance with the requirements established in model Article 13 on termination.

K. Return of Transit Agency Equipment and Related Records Upon Termination. Immediately following the Agreement Term, Contractor shall surrender and deliver to Transit Agency all Transit Agency Equipment and related records as required by Section 13.5 of this Agreement.

10. Title to Transit Agency Equipment

Even though the Contractor has possession and use of the Transit Agency Equipment, the Agreement should clearly state that title to this Equipment remains in the Transit Agency and may not be encumbered by the Contractor.

L. Title to Transit Agency Equipment. Contractor acknowledges and agrees that Transit Agency owns all the Transit Agency Equipment. Nothing contained in this Agreement shall affect Transit Agency's absolute ownership of and title to the Transit Agency Equipment, such ownership and title being hereby expressly reserved to and retained by Transit Agency. Contractor shall not:

- (1) Obtain, acquire, or otherwise be construed to own any property or other interest in the Transit Agency Equipment except the right to use it for the purposes and on the conditions stated in this Agreement during the Agreement Term;
- (2) Sell, assign, or otherwise grant any party any right to own, use, or possess the Transit Agency Equipment or any part of it;
- (3) Permit the Transit Agency Equipment, or any part of it, to pass from the possession and control of Contractor, unless directed to do so in writing by Transit Agency; or
- (4) In any manner, allow or permit the Transit Agency Equipment, or any part of it, to be pledged, seized, or held for any tax, debt, lien, or other obligation. Should the Transit Agency Equipment, or any part of it, become subject to or encumbered by any tax, debt, lien, or other obligation during the Agreement Term, or before the actual delivery of the Transit Agency Equipment to Transit Agency after the Agreement Term, Contractor shall, subject to its right to in good faith protest any such tax, debt, lien, or other obligation, promptly pay or discharge such tax, debt, lien, or other obligation, and relieve such Transit Agency Equipment from the encumbrance thereof.

11. Licensing and Registration

Because the Transit Agency owns the Transit Agency Vehicles that are being used by the Contractor, the Transit Agency may prefer to take responsibility for all licensing and registration of the Transit Agency Vehicles. The following provision reserves this duty to the Transit Agency:

M. Licensing and Registration. All Transit Agency Vehicles shall be licensed and registered by Transit Agency in the name of Transit Agency and at the expense of Transit Agency.

If the Transit Agency instead prefers to have the Contractor license and register the Transit Agency Vehicles, the following alternative Paragraph M can be used:

M. Licensing and Registration. All Transit Agency Vehicles shall be licensed and registered by Contractor in the name of Transit Agency and at the expense of the Contractor. Transit Agency will cooperate with Contractor in the execution of such documents as may be necessary to license and register the Transit Agency Vehicles.

12. Warranty

Three different aspects of warranty should be addressed by the agreement. First, when the Transit Agency Equipment is not manufactured by either party, neither can warrant as to its condition and ability to be used for Transportation Services or Other Services.

Second, because the Contractor will have both possession and use of the Transit Agency Equipment, the Contractor will be in the best position to ensure compliance with any warranty on these items. Thus, Transit Agency will most likely wish to require the Contractor to handle all administrative matters under the warranty.

Third, the parties will almost always wish to avoid waiving any of their rights against other parties outside of this agreement.

A model provision to address all three of these issues follows:

N. Warranty.

(1) NEITHER TRANSIT AGENCY NOR CONTRACTOR IS THE MANUFACTURER OF THE TRANSIT AGENCY EQUIPMENT OR THE MANUFACTURER'S AGENT, AND NEITHER TRANSIT AGENCY NOR CONTRACTOR MAKES ANY EXPRESS OR IMPLIED WARRANTY OF ANY NATURE REGARDING THE TRANSIT AGENCY EQUIPMENT, INCLUDING, BUT NOT LIMITED TO: ITS MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE; ITS DESIGN OR CONDITION; ITS WORKMANSHIP; ITS FREEDOM FROM LATENT DEFECTS; ITS COMPLIANCE WITH THE REQUIREMENTS OF ANY LAW, RULE, SPECIFICATION, OR CONTRACT; OR ITS NON-INFRINGEMENT OF ANY PATENT, TRADEMARK, OR LICENSE.

(2) Provided that Transit Agency or the manufacturer has supplied required warranty documents to Contractor, Contractor shall take all actions required to preserve any and all manufacturers' warranties regarding the Transit Agency Equipment.

(3) This Agreement shall not operate to release or waive any rights of Transit Agency or Contractor against any person not a party hereto, including the manufacturer of the Transit Agency Equipment.

C. Contractor Maintenance of Transit Agency Equipment

1. Maintenance

Proper maintenance of all Transit Agency Equipment should be required. In most cases, the Contractor will be in the best position to provide maintenance because the Contractor has custody of the Transit Agency Equipment. Although the survey showed that some agencies recite all of the details of required maintenance in the text of their service agreements, including items such as methods and schedules of cleaning of vehicles, removal of graffiti, and oil changes, the better practice would be for the Transit Agency to compile all of its technical requirements for maintenance into a single place, such as the Operating Manual. As an alternative, a compilation of all technical maintenance requirements can be included as an exhibit to the agreement.

A model provision requiring compliance with an operating manual follows.⁶ It can be modified to refer to an exhibit if desired.

Section 4.2. Maintenance of Transit Agency Equipment by Contractor

A. Maintenance Requirements. At all times during the Agreement Term, Contractor shall:

(1) Maintain all Transit Agency Equipment in good mechanical condition in conformity with all applicable safety practices, laws, and regulations;

(2) Maintain all Transit Agency Equipment in accordance with the terms and provisions of this Agreement, all maintenance policies, practices, procedures, conditions, and requirements contained in the Operating Manual, and all manufacturers' maintenance schedules and warranty requirements;

(3) Perform all preventive maintenance required pursuant to the Operating Manual;

(4) Keep both the exterior and interior of all Transit Agency vehicles neat, clean, and in first-class condition at all times; and

(5) Shall be responsible to ensure that all Transit Agency Revenue Vehicles are maintained at all times so as to meet the requirements of the [INSERT NAME OF APPLICABLE STATE REGULATORY BODY, SUCH AS STATE DEPARTMENT OF TRANSPORTATION] and that all Transit Agency vehicles have valid [INSERT NAME OF APPLICABLE STATE REGULATORY BODY] stickers affixed to them at all times.

The items on this list of maintenance items can be modified by the transit attorney to include such other items as may be applicable to the particular equipment or as may be required by state or local law.

2. Records

In addition to maintaining the Equipment, the Contractor should be required to keep sufficient records of that maintenance. Again, the specific types of maintenance information that the Transit Agency desires should be identified and, ideally, included in the Operating Manual.

B. Maintenance Records. Contractor shall prepare and maintain accurate records relating to all maintenance work performed by or for Contractor on all Transit Agency Equipment. All such records shall comply with the provisions of Article 8 of this Agreement and with all applicable Transit Agency policies, practices, procedures, conditions, and requirements as set forth in the Operating Manual. Contractor shall maintain a separate maintenance file for each Transit Agency vehicle containing all maintenance records pertaining thereto. Contractor shall also complete, maintain, and transmit to Transit Agency all maintenance forms required in the Operating Manual and any other records requested by Transit Agency, including, without limitation, vehicle maintenance records, fuel consumption records, and all records required under Transit Agency's Preventive Maintenance Program.⁷

D. Operation of Transit Agency Equipment by Contractor

1. General Standards

The Contractor should be required by the Agreement to use the Transit Agency Equipment only for Transportation Services and Other Services and to comply with general legal and operating standards in operating the Equipment.

Section 4.3. Operation of Transit Agency Equipment By Contractor

A. General Operating Standard. Contractor shall use and operate all Transit Agency Equipment only in accordance with the terms and provisions of this Agreement, the operating procedures set forth in the Operating Manual, and all applicable federal, state, and local laws and regulations and solely for the purpose of providing the Transportation Services and Other Services on behalf of Transit Agency.

If the Transit Agency is willing to allow the Transit Agency Equipment to be used for other purposes, a provision should be added to state the terms under which such use would be allowed.⁸ The following sentence could be added to Subsection 4.3A:

The Contractor shall not use the Transit Agency Equipment for any other purpose without the express prior written approval of Transit Agency, which may be subject to such terms and conditions as Transit Agency may require.

The use of Transit Agency Equipment for other purposes does raise a number of legal issues, including, without limitation, insurance and liability for incidents that may occur during that other use; whether the Contractor should reimburse the Transit Agency for the value of that other use; and maintenance or repair that may be necessitated by the other use. If the parties anticipate that use of the Transit Agency Equipment for purposes other than Transportation Services and Other Services will occur frequently, then they may wish to address these issues in detail within the Agreement itself, allocating responsibility for the various items in the appropriate provisions throughout the Agreement.

2. Identification of and Signs on Transit Agency Vehicles

The agreement should provide that any identification markings, decals, logos, or color schemes installed by Transit Agency shall remain on the Transit Agency Vehicles and that others shall not be added. In addition, where signs indicating the route served by the Vehicle are required by the Transit Agency, responsibility for those signs should be stated. Also, the policy on advertising on these vehicles should be stated.⁹

B. Transit Agency Vehicle Identification and Signs.

(1) Transit Agency Identification. Contractor shall not change or obstruct in any way and shall maintain all identification markings, decals, logos, and color schemes on all Transit Agency Vehicles as supplied and affixed by Transit Agency. Unless otherwise approved in writing by Transit Agency, Contractor shall not affix to or display on any Transit Agency Vehicle any identification marking, decal, logo, or color scheme other than those supplied and affixed by Transit Agency.

(2) Route Signs. All Transit Agency Revenue Vehicles shall be clearly marked with the route and destination being served by that Vehicle.

(3) Advertising Signs. No advertising signs shall be placed or displayed on, or affixed to, any Transit Agency Vehicle without the express prior written consent of Transit Agency.

3. Storage of Transit Agency Equipment

Storage of Transit Agency Equipment while in the custody of the Contractor should also be addressed. Depending on the type of equipment, climate, and other conditions in the area, indoor or outdoor storage may be more desirable. This model provision requires indoor storage unless outdoor storage is specifically approved:

C. Storage of Transit Agency Equipment. Contractor shall store all Transit Agency Equipment as directed by Transit Agency at the locations identified in Article 5 of this Agreement or in such other suitable locations as may be approved in writing by Transit Agency. Transit Agency Vehicles shall not be stored outdoors without the express prior written approval of Transit Agency and then only in accordance with such conditions as Transit Agency may require.

4. Pickup and Discharge of Passengers

Where fixed-route bus service is being provided, the Transit Agency should designate whether Contractor shall pick up and discharge passengers only at designated bus stops or at any safe place on the route. Two alternative model provisions follow:

D. Pickup and Discharge of Passengers. Unless Transit Agency shall otherwise direct in writing, passengers shall be picked up and discharged at any safe point along the Transit Agency designated route.

OR

D. Pickup and Discharge of Passengers. Unless Transit Agency shall otherwise direct in writing, passengers shall be picked up and discharged only at approved [INSERT APPROPRIATE ITEM: bus stops/rail stations] that are marked with a Transit Agency [INSERT APPROPRIATE ITEM: bus stop/rail stop sign].

If paratransit service for the elderly or disabled is provided, Transit Agency may wish to expand these requirements to include reference to the Operating Manual or other document setting forth standards regarding assistance in exiting or other requirements.

5. Fare Boxes and Ticket-Reading Equipment

Where fares are collected on the Revenue Vehicles, fare boxes or other electronic equipment for reading of coded tickets or passes must be provided. The Agreement should designate the type of equipment to be used and assign the obligations to provide, install, and maintain this equipment. The following model provision requires the use of equipment provided by the Transit Agency and requires the Contractor to install and maintain it.

E. Fare Boxes. Except as expressly approved in writing by Transit Agency, Contractor shall utilize only fare boxes and other electronic ticket-reading equipment provided by Transit Agency. Contractor shall install and maintain such fare boxes and ticket-reading equipment in good condition in all Revenue Vehicles.

Of course, this provision can be modified to allocate these obligations in a different manner. For example, the service agreements provided illustrate that some transit agencies may prefer that the Contractor obtain a maintenance contract for this equipment. An alternative provision is as follows:

E. Fare Boxes. Except as expressly provided in writing by Transit Agency, Contractor shall utilize only fare boxes and other electronic ticket-reading equipment provided by Transit Agency. Contractor shall install such fare boxes and other equipment in all Revenue Vehicles and shall enter into a contract for the maintenance of such items with a qualified third party approved by Transit Agency; provided, however, that such contract shall be submitted to Transit Agency for approval in advance by Transit Agency.

Issues relating to the collection and remittance of fares and tickets by Contractor are discussed in Parts XII.A.3 and XII.B.3 of this report.

6. Radios

The Transit Agency often requires Revenue Vehicles to remain in radio contact with the Contractor's staff or Transit Agency staff in case assistance is needed during the provision of Transportation Services. The issues involved are much the same as those involving fare boxes and ticket-reading equipment, which are addressed in model Section 4.3E in Part IV.D.5 of this report. These model provisions can be modified as needed to address issues regarding radios and other onboard equipment.

E. Provision of and Standards for Contractor Vehicles

1. When Contractor Vehicles Are Provided

In instances where the Contractor is providing Contractor Vehicles, the Contractor's obligations regarding those Contractor Vehicles should be addressed, and the terms of model Section 4.4A or a variation thereof will apply.

Section 4.4. Contractor Vehicles.

A. Applicability of Section. Vehicles, if any, to be supplied by Contractor for use in connection with providing the Transportation Services are listed in Exhibit B. If Exhibit B does not identify any Vehicles as being provided by Contractor, this Section 4.4 shall be of no force or effect; otherwise, it shall apply to any vehicles listed in Exhibit B as being "provided by" Contractor.

2. Duty to Provide

Where the Contractor is required to provide Vehicles, the obligation to provide them throughout the Agreement Term, unless otherwise approved by the Transit Agency, should be stated in the Agreement.

B. Duty to Provide Contractor Vehicles. Unless otherwise authorized by Transit Agency in writing, Contractor shall provide all Contractor Vehicles listed in Exhibit B for use in providing Transportation Services and Other Services at all times during the Agreement Term. Contractor shall not, without the prior written approval of Transit Agency, dispose of any Contractor vehicle or otherwise withdraw any Contractor Vehicle from service under this Agreement or substitute any other vehicle for any Contractor vehicle in providing Transportation Services and Other Services.

3. Duty to Maintain and Operate Contractor Vehicles

Contractor should be required to maintain and operate its Vehicles in the same manner that it is required to maintain and operate those of Transit Agency, unless the parties include other conditions and standards in the Agreement. Model Section 4.4C states this requirement and can be modified to state other conditions and standards.

C. Duty to Maintain and Operate Contractor Vehicles. Contractor shall comply with all the provisions of Sections 4.2 and 4.3 of this Agreement with respect to the maintenance and operation of all Contractor Vehicles the same as if the Contractor Vehicles were Transit Agency Vehicles.

F. Other Contractor Equipment

If the Contractor also has other equipment that is available for and useful in the provision of Transportation Services and Other Services, then Transit Agency is likely to want Contractor to be required to use those items. These items could include repair tools and equipment, office equipment, and other items. To the extent that the parties wish to specify these items, they can modify the following basic model provision:

Section 4.5. Other Contractor Equipment.

Contractor agrees to devote to its provision of Transportation Services and Other Services such equipment in its possession as may be useful in the provision of such Services and as may be reasonably available for such purposes.

V. REAL PROPERTY AND FACILITIES

In addition to vehicles and equipment, the provision of Transportation Services also requires the use of real property and facilities located thereon, such as bus or rail terminals, storage garages, and repair facilities. The transit attorney should consider the type of land and facilities that are needed and identify the responsibilities of the parties with respect to these items.

A. Definitions

The "real property and facilities" should be described in detail in the Agreement. A model definition follows:

Real Property and Facilities. All real estate, fixtures, property and facilities identified in Section 5.1 of this Agreement.

B. Use of Real Property and Facilities

Regardless of whether the Contractor is using its own land and facilities or land and facilities of the Transit Agency, all land and facilities to be used should be identified in a provision of the Agreement, such as:

ARTICLE 5--REAL PROPERTY AND FACILITIES

Section 5.1. Use of Real Property and Facilities.

Contractor agrees to, and shall, use the Real Property and Facilities, or the portions thereof, listed in Exhibit E for, and solely for, the purpose of providing Transportation Services and Other Services.

The listing of all such property and facilities is included as Exhibit E, an outline of which follows:

EXHIBIT E--REAL PROPERTY AND FACILITIES TO BE USED IN THE PERFORMANCE OF THIS AGREEMENT

[LIST DESCRIPTION, SUCH AS COMMON ADDRESS, FACILITY NAME, AND NATURE OF FACILITIES]

In instances where the land and facilities are not owned solely by the Contractor, it may be useful to create two paragraphs in Exhibit E, listing the items owned by the Contractor in a paragraph labeled A and those owned by the Transit Agency in a paragraph labeled B.

C. Maintenance of Real Property and Facilities

Responsibility for the maintenance of the land and facilities being used by the Contractor should be assigned in the Agreement. In many cases, the Contractor will be responsible for this maintenance, as in this basic model provision:

Section 5.2. Maintenance of Real Property and Facilities

Contractor agrees to maintain the Real Property and Facilities in first-class condition for their intended purposes throughout the Agreement Term.

As in the case of equipment, however, Transit Agency may wish to spell out in more detail certain specific maintenance obligations of Contractor. In such an instance, the provisions of model Section 4.2, regarding maintenance of Transit Agency Equipment, may provide a useful basis for drafting additional language governing land and facilities.

D. Lease of Transit Agency Real Property and Facilities

The parties will most likely wish to enter into a separate lease or other agreement governing the Contractor's right to possess and use any land or facilities owned by the Transit Agency. Its term and provisions should, of course, be consistent with the purchase of service agreement. The lease and service agreement should each include a cross-default provision.

E. Shared Use and Costs of Real Property and Facilities

In some instances, the Contractor may own land and facilities (such as tracks, storage barns, or garages) that are used by the Contractor to provide services to persons and entities other than the Transit Agency. In such cases, the Contractor and Transit Agency may wish to agree that the Transit Agency will compensate the Contractor for all or a share of the cost of certain construction or reconstruction of such jointly used facilities. This component of compensation may be reflected through the use of the approved budget method of payment to Contractor, by adding these costs as an additional budget item (see Part XII.B of this report), or by adding another element to the fixed-fee method, such as "facility rent" (see Part XII.A of this report).

VI. EMPLOYEES

The provision of Transportation Services and Other Services requires a substantial number of personnel to operate the Equipment to provide such Services, as well as personnel to perform various management and support functions. Transit Agencies should establish the Contractor's obligation to comply with applicable laws, provide proper management and operating personnel, and, where applicable, perform proper collective bargaining and labor activities.

A. Compliance with Laws

Laws at the federal, state, and local level may affect the Contractor's handling of its employees who perform Transportation Services and Other Services. All such laws, ranging from prevailing and minimum wage rules to health and safety requirements, must be followed by the Contractor.

In particular, the transit attorney should be aware of and examine Section 13(c) of the Federal Transit Act,¹⁰ which requires that various protections be provided to transit employees who may be affected by federal financial assistance under the Federal Transit Act.¹¹ Model Section 6.3 should also be examined in the context of Section 13(c) issues.

The following model provision obligates the Contractor to assume all responsibility for compliance with all labor laws relating to its employees:

ARTICLE 6--EMPLOYEES

Section 6.1. Compliance with Federal, State, and Local Laws.

Contractor agrees that, with respect to persons employed by it to provide Transportation Services and Other Services, it will comply with all applicable federal, state, and local labor laws including, but not limited to, any and all laws relating to the minimum wages to be paid to its employees, limitations upon the employment of minors, minimum fair wage standards for minors, the payment of wages due employees, and all applicable regulations established to protect the health and safety of employees, passengers, and the public at large. Contractor also agrees to provide the employee protection required under Section 13(c) of the Federal Transit Act, as amended, 49 U.S.C. Section 5333(b), and [INSERT REFERENCE

TO NAME AND CITATION OF ANY PARALLEL STATE LAW] for persons employed by it to provide Transportation Services and Other Services.

This provision can be modified as necessary to address the particular approach desired by a Transit Agency.

B. Employing Personnel

The Agreement should specify responsibility for all personnel issues. In general, the Transit Agency will likely want the Contractor to provide the necessary personnel in compliance with certain Transit Agency standards. A general provision could read as follows:

Section 6.2. Employment of Personnel.

A. General. Except as otherwise provided in this Agreement, Contractor shall be responsible for all recruitment, screening, testing, selection, training, scheduling, supervision, discipline, termination, and all other functions related to personnel required to perform Contractor's obligations under this Agreement.

1. Management

Management personnel should be required to meet the Transit Agency's specified standards and perform all necessary functions. An example of a provision establishing this requirement follows:

B. Management. Contractor shall provide competent and professional management in accordance with Transit Agency policies, practices, procedures, and standards. If such managerial services are not being provided, Transit Agency may send Contractor a written notice requesting Contractor to take corrective action within 21 days. If Contractor fails to comply with such a request or if the action taken is unsatisfactory, Transit Agency shall no longer be obligated to pay salaries, fringe benefits, or travel and related expenses incurred in connection with such managerial services. In the event such failure to provide managerial services cannot be cured within said 21-day period notwithstanding diligent and continuous effort by Contractor, and Contractor shall have promptly commenced to cure the failure and shall have thereafter prosecuted the curing of same with diligence and continuity, then the period for curing such failure shall be extended for such time as may be necessary for curing such failure with diligence and continuity.

Some Transit Agencies prefer to be more specific within the Agreement, identifying certain "key" management personnel by name and job function, and specifying that 24-hour phone numbers for those personnel must be provided. However, if the Transit Agency has generally available standards and procedures for reference by Contractor, such as in the Operating Manual, this level of detail may not be needed in an agreement.

2. Other Employees.

As with management personnel, other employees must also meet the Transit Agency's standards and be able to perform all necessary functions. A sample provision follows:

C. Employees. Contractor shall employ only such persons as are competent and qualified to provide Transportation Services and Other Services in accordance with the requirements of this Agreement and Transit Agency policies, practices, procedures and standards. All employees shall meet all applicable qualifications established by federal, state, and local laws and regulations. Drivers shall display proper courtesy toward passengers and maintain a neat and clean appearance. Contractor shall comply with all federal requirements

relating to drug and alcohol testing including, but not limited to, those imposed under 49 C.F.R. Parts 40, 653, and 654. Contractor shall participate in driver training programs, if any, established by Transit Agency during the Agreement Term and shall comply with driver and safety standards set forth in the Operating Manual.

As in the use of management personnel, some transit agencies prefer to specify the rules applicable to operating personnel in great detail in the Agreement. For example, some agreements specify requirements such as that bus drivers must wear their hair at, or shorter than, a specified length, have no facial hair, and wear certain uniforms. This level of detail in the agreement may be unnecessary when the Contractor has been provided with detailed standards from the Transit Agency, such as in the Operating Manual.

C. Employment Contracts and Labor Agreements

Where Contractor's employees are, or may become, part of a collective bargaining unit, the Transit Agency should consider the extent to which it desires to be informed of the Contractor's activities in labor negotiations. The following provision allows the Transit Agency some involvement in the collective bargaining process. It can, however, be modified according to the situation and needs of the parties.

Section 6.3. Employment Contracts and Labor Agreements.

Contractor may deal with, and enter into written agreements with, its employees. Contractor shall notify Transit Agency of any labor negotiations being conducted with its employees, shall keep Transit Agency fully informed of the status and progress of such negotiations, shall permit Transit Agency to observe such negotiations if Transit Agency so requests, shall confer and consult with Transit Agency about the negotiating positions taken by Contractor in such negotiations if Transit Agency so requests, and shall not enter into, or agree to modify or amend, any labor agreement without Transit Agency's prior written approval. Transit Agency shall not directly negotiate with collective bargaining agents recognized by Contractor without Contractor's consent; provided, however, that this provision shall not be construed to prohibit communications or negotiations relating to Transit Agency's obligations and rights under [INSERT CITATION TO APPLICABLE STATE LAW]. Every such labor agreement shall provide that the agreement may be reopened if Contractor's budget is not approved by Transit Agency, either under this agreement or any subsequent, similar agreement between Transit Agency and Contractor; provided, however, that in any case where Transit Agency expressly approves a wage rate or fringe benefit guaranteed by any such labor agreement, Transit Agency shall also, if necessary, approve an amendment to the approved budget to accommodate such wage rate or fringe benefit.

VII. NONDISCRIMINATION, EQUAL EMPLOYMENT, AND BUSINESS OPPORTUNITY

Most transit agencies will be subject to a broad range of federal, as well as some state and local, laws, rules, and regulations in the areas of preventing discrimination against, and encouraging equal employment and business opportunity for, various protected classes of persons. Many of the prohibitions against discrimination and provisions promoting equal opportunity are already broadly applicable, whether or not a Transit Agency accepts federal financial assistance. With the acceptance of that assistance, however, transit agencies and their contractors will be subject to more requirements in their contracting and operations.¹²

As a matter of contract drafting, it is probably neither practical nor, indeed, possible to include every provision of every potentially applicable rule or regulation in an agreement for purchase of service, because the sheer volume of these items is immense. Instead, these model provisions are designed to serve as a general guide

for transit attorneys. The actual implementation of the requirements of various programs should be reviewed by each Transit Agency and its attorney to determine whether some additional provisions regarding these topics would be desirable additions.

A. General Compliance with Laws

The agreement should contain a direct statement that compliance with nondiscrimination, equal employment, and business opportunity laws is required, and it should list the key statutes that apply. An example follows:

ARTICLE 7--NONDISCRIMINATION, EQUAL EMPLOYMENT, AND BUSINESS OPPORTUNITY

Section 7.1. Compliance With Federal, State, and Local Laws.

Contractor shall comply with all applicable federal, state, and local anti-discrimination and equal employment and business opportunity laws and regulations, including, but not limited to, the Age Discrimination in Employment Act, as amended, 29 U.S.C. §§621 et seq.; the Federal Transit Act, 49 U.S.C. §5332(b); Titles VI and VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000d, 2000e et seq.; the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §§1981 and 1983; the Americans with Disabilities Act of 1990, 42 U.S.C. §§12101 et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794; and [INSERT POPULAR NAME AND CITATION FOR ANY SIMILAR AND APPLICABLE STATE OR LOCAL LAWS].

B. Compliance, and Failure to Comply, with Specified Requirements

Regulations of the U.S. Department of Transportation (USDOT) require that every contract that is paid for with financial assistance from USDOT must contain two paragraphs that state (1) the federal policy in favor of participation by minority business enterprises (MBEs) in such work and (2) the Transit Agency's and the Contractor's obligations to provide the maximum opportunity for MBEs to participate in such work.¹³ In addition, all such contracts must state that the Contractor's failure to meet these requirements is a breach of contract subject to termination or other remedies.¹⁴

Two model agreement provisions, and an exhibit containing the USDOT-specified language, meet these requirements.

Section 7.2. Equal Employment Opportunity.

Contractor shall comply with all of the affirmative action, equal employment opportunity, and minority business enterprise requirements in Exhibit F.

Section 7.3. Failure to Comply.

In the event Contractor's noncompliance with any provision of Exhibit F or with any federal, state, or local antidiscrimination or equal employment or business opportunity law, including but not limited to those identified in Section 7.1 hereof, results in Contractor being declared nonresponsible and therefore ineligible for future contracts or subcontracts with the State of [INSERT NAME OF STATE] or any of its political subdivisions or municipal corporations, this Agreement may be canceled or voided by Transit Agency in whole or in part, and such other sanctions, penalties, or remedies as may be provided by contract, law, or regulation may be imposed or invoked.

EXHIBIT F--AFFIRMATIVE ACTION, EQUAL EMPLOYMENT OPPORTUNITY, AND MINORITY BUSINESS ENTERPRISES

A. Minority Business Enterprises. In connection with the performance of this Agreement, Contractor shall provide for the maximum utilization of minority business enterprises and shall use its best efforts to ensure that minority business enterprises shall have

maximum practicable opportunity to compete for all subcontract work under this Agreement. Contractor agrees to comply with the following United States Department of Transportation requirements and to include such clauses in each subcontract:

(1) "Policy. It is the policy of the Department of Transportation that minority business enterprises as defined in 49 C.F.R. Part 23 shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with federal funds under this Agreement. Consequently, the MBE requirements of 49 C.F.R Part 23 apply to this Agreement."

(2) "MBE Obligation. (i) The recipient or its contractor agrees to ensure that minority business enterprises as defined in 49 C.F.R Part 23 have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with federal funds provided under this Agreement. In this regard all recipients or contractors shall take all necessary and reasonable steps in accordance with 49 C.F.R. Part 23 to ensure that minority business enterprises have the maximum opportunity to compete for and perform contracts. Recipients and their contractors shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of DOT-assisted contracts."

B. [INSERT APPLICABLE STATE OR LOCAL REQUIREMENTS]

Specific additional requirements of various state and local laws and regulations can also be added to Exhibit F by each transit attorney. Thus, in those states where additional protected classes are allowed similar protections by state or local law, such as religion, marital status, and other items, the transit attorney can include such other obligations as may be mandated by those agencies with jurisdiction.

VIII. REPORTS, RECORDS, AND INSPECTIONS

The preparation of reports, the maintenance of records, and the conduct of inspections and audits are important in most purchases of Transportation Services and Other Services, especially in instances where federal financial assistance is used by the Transit Agency to pay the Contractor.

A. Required Reports

The Transit Agency is likely to desire a wide range of reports and records to be provided by the Contractor. Some will be needed due to various operational concerns, while others are needed to comply with federal requirements for financial assistance. It is not practical to itemize every potential report that might be desired or required in a model provision. The following provision does, however, contain broad language requiring all necessary reports and generally addresses the types of reports that might be desired.

ARTICLE 8--REPORTS, RECORDS, AND INSPECTIONS

Section 8.1. Reports, Forms, and Statements Required.

Contractor shall furnish Transit Agency with all reports required by the Operating Manual, including, but not limited to, those reports specifically listed and described in the Operating Manual, in accordance with the due dates specified therein. In addition, Contractor shall furnish Transit Agency, on a timely basis, with the following documents:

A. A monthly listing of any reports and documents in any way related to the Transportation Services and Other Services filed by Contractor with any government or government agency. Upon request, Contractor shall provide Transit Agency with a copy of any such reports and documents.

B. All written forms and documentation required for the administration of Transit Agency's programs concerning students, the elderly, and the handicapped. Said forms and documentation shall be furnished by Contractor to the United States Department of Transportation

[and INSERT NAMES OF ANY STATE OR LOCAL AGENCIES WITH JURISDICTION] upon Transit Agency's request.

C. All applications, including all amendments or modifications to previously filed applications, for federal or state grants, loans, or other funding relating to Transportation Services and Other Services prior to making any such application. Contractor shall notify Transit Agency and obtain Transit Agency's written approval of any such application.

D. A mileage log for each Transit Agency Vehicle and each Contractor Vehicle, if any. Mileage shall be read and recorded from the Vehicle hubodometer and shall be reported to Transit Agency on a monthly basis.

E. All correspondence, papers, notices, accident reports, or documents of any nature received by Contractor in connection with any claim or demand involving or related to Transportation Services, Other Services, or Equipment.

F. All records required pursuant to Section 13.4 of this Agreement.

G. Such other reports, forms, and statements as may be required by this Agreement or by federal, state, or local laws or regulations or by order of any duly constituted authority.

As noted in connection with other model provisions, the Transit Agency may find it desirable to include a comprehensive listing of required reports in an Operating Manual, as is referred to in model Section 8.1, or in an exhibit to be attached to the agreement. The list included in model Section 8.1 can be customized as desired by the Transit Agency.

B. Creation, Maintenance, Destruction, and Disposal of Records

The Transit Agency will likely want to ensure that the Contractor is creating and properly keeping all records relating to Transportation Services and Other Services. Such records are important for a variety of reasons, and particularly where federal financial assistance is funding the Contractor's work. In addition, the Federal Transit Administration's (FTA) Master Agreement requires that all records be retained and accessible for 3 years after the FTA-funded work is complete.¹⁵

The following model Section 8.2 addresses these concerns:

Section 8.2. Records.

A. Creation and Maintenance. Contractor shall create and maintain at the location specified in Section 5.1 of this Agreement, or at such other location as Transit Agency may approve in writing, full, accurate, and complete records of all Transportation Services and Other Services performed; all time spent; all materials, equipment, and supplies purchased; and all costs incurred in the performance of the Transportation Services and Other Services pursuant to this Agreement, including all records required by this Agreement, the Operating Manual, or any applicable law or regulation.

B. Disposal or Destruction. Unless Transit Agency shall consent in writing to the destruction of any such records, and except for records required to be delivered to Transit Agency at the end of the Agreement Term, Contractor shall make said records available for review, inspection, and audit in accordance with Section 8.3 below during the entire Agreement Term and for 3 years thereafter, or such longer period as may be required by law or any applicable grant; provided that prior to the disposal or destruction of any such record by Contractor following said period, Contractor shall give notice to Transit Agency of any record or records to be disposed of or destroyed and the intended date of disposal or destruction, which shall be at least 90 days after the effective date of such notice. Transit Agency shall have 90 days after receipt of any such notice to give notice to Contractor not to dispose of or destroy said record or records and to require Contractor to deliver such record or records to Transit Agency or its designee, at Transit Agency's expense, on a confidential basis if appropriate.

C. Inspections and Audits

The Transit Agency should reserve to itself the right to inspect and audit the services being provided, as well as all Contractor records and other information related to the Services. The following model provision establishes that right and sets some reasonable guidelines for its exercise.

Section 8.3. Inspections and Audits.

A. Right of Transit Agency. Transit Agency shall have the right, with or without prior notice to Contractor, to review, inspect, and audit all Transportation Services and Other Services performed pursuant to this Agreement, and all information and records related thereto, at all reasonable times during and following the performance of Transportation Services and Other Services.

B. Performance of Inspections and Audits. Transit Agency shall perform such review, inspection, or audit in a manner that will not unduly delay or interfere with Contractor's performance under this Agreement. Contractor shall cooperate with Transit Agency, and provide reasonable facilities to Transit Agency to assist Transit Agency, in any such review, inspection, or audit. Transit Agency may perform any such review, inspection, or audit through an officer, employee, or any designated agent or independent contractor.

C. Defined Term. The phrase "all information and records related thereto" as used in this section shall mean all information and records under the control or supervision of, or reasonably available to, Contractor relating to this Agreement or the Transportation Services and Other Services that are reasonably necessary for Transit Agency to verify or audit Contractor's performance under this Agreement, or the accuracy or appropriateness of any Reimbursable Expenditure or portion thereof, or Contractor's compliance with this Agreement or any portion thereof, including but not limited to all data, samples, records, reports, documents, memoranda, maps, estimates, specifications, notes, studies, tapes, photographs, film, computer programs, or drawings, whether in preliminary, draft, final, or other form.

D. Confidentiality

Given the large number of records required in many service agreements, the sensitive nature of the information contained in some of those records, and the ability to create, retain, and duplicate those records on computers, issues of confidentiality should be addressed. Many of the agreements provided in response to the survey, however, did not carefully address these issues; indeed, a surprising number did not include any discussion of this topic.

The transit attorney should consider both the Transit Agency's and the Contractor's need to keep certain information confidential, as well as the privacy concerns of various individuals who may be involved with the services, such as employees who are subject to drug or alcohol testing and disabled passengers who use the services. When information about these individuals is recorded in a way that identifies them with it, such records are subject to the Federal Privacy Act of 1974.¹⁶ In addition, where the Transit Agency is a governmental unit subject to a state freedom of information act, the transit attorney must ensure compliance with all of these countervailing obligations.

A set of provisions addressing these issues follows.

Section 8.4. Confidential Information.

A. General. All information supplied by Transit Agency to Contractor for or in connection with this Agreement or the Transportation Services or Other Services shall be held confidential by Contractor and shall not, without the prior express written consent of Transit Agency, be used for any purpose other than performance of Transportation Services or Other Services. Neither Contractor nor any subcontractor or supplier of Contractor shall own or be entitled to claim a copyright in the Agreement or other documents prepared by Transit Agency and by Contractor pursuant to this Agreement.

B. Contractor Confidentiality Claims. Contractor shall identify any information supplied by it to Transit Agency in providing, performing, and completing the Transportation Services or Other Services that are considered by Contractor to be confidential or proprietary. Transit Agency shall not disclose any such designated confidential or proprietary information, unless such disclosure will not cause competitive harm, or such information was actually known to Transit Agency prior to its submission by Contractor, or such information was properly obtained or developed independently by Transit Agency, or Contractor consents to such disclosure. Notwithstanding the foregoing, Contractor acknowledges that Transit Agency is subject to the [INSERT NAME AND CITATION OF STATE FREEDOM OF INFORMATION ACT], and that no disclosure made in good faith by Transit Agency pursuant to such Act shall be deemed to violate this section.

C. Individual Confidentiality Claims. Contractor shall comply with the requirements of the Privacy Act of 1974, 5 U.S.C. § 552a, and shall require any subcontractor that administers or has access to any system of records governed by said Act to comply with said Act.

IX. PURCHASING

Each Transit Agency must determine whether, as a part of the service agreement, the Contractor must as a matter of law, or should as a matter of good purchasing practices, conform to certain procedures in the acquisition of the equipment, supplies, and materials that are necessary for performance of Transportation Services and Other Services.

A. Compliance with Purchasing Requirements

State and local law should be examined by the transit attorney to determine if such purchases must follow specific legal requirements, such as open and competitive bidding or the obtaining of competitive proposals. Such requirements may be used to the extent that they do not conflict with any applicable federal requirements¹⁷ or the FTA Master Agreement.¹⁸ The federal requirements state that purchases must be conducted with "full open competition." FTA establishes a series of alternative methods for encouraging that competition, including sealed bids and sealed proposals, and other methods for less complex procurements.¹⁹ The applicable requirements should be referenced in the agreement. A sample provision follows.

ARTICLE 9-PURCHASING

Section 9.1. Compliance with Purchasing Laws.

Contractor shall comply with the requirements of [INSERT NAME OF AND CITATION TO ALL APPLICABLE LAWS AND REGULATIONS], and any modifications or amendments thereto, and all other applicable laws in the purchasing or acquisition of any equipment, materials, or supplies to be used in connection with its performance of this Agreement.

If the Contractor is not required by law to abide by the procedures set out in the various purchasing laws and regulations, the Transit Agency may still prefer that the Contractor abide by those procedures. In such an instance, the same provision may be used.

However, if the Transit Agency wishes to allow the Contractor some exceptions to these requirements, it may provide that the Contractor can vary from those requirements with the Transit Agency's consent. In such an instance, the following phrase can be added before the period at the end of model Section 9.1: "... unless otherwise approved in advance in writing by Transit Agency."

B. Central or Joint Purchasing Programs

Some transit agencies manage a central purchasing program for the acquisition of all equipment, materials, and supplies for Transportation Services and Other Services that they purchase or provide. Others are participants in a joint purchasing program with other entities with similar purchasing needs. In these cases, the Transit Agency is likely to wish to require the Contractor to participate in these central or joint purchasing opportunities to reduce the cost of the Transportation Services and Other Services.²⁰ A sample provision for participating in a central purchasing program of Contractor could read as follows:

Section 9.2. Participation in Central Purchasing Required.

Contractor agrees to participate in Transit Agency's [INSERT NAME OF PROGRAM] as set forth in [INSERT PLACE WHERE PROGRAM IS DESCRIBED OR EXPLAINED, SUCH AS THE OPERATING MANUAL]. The Approved Budget shall be amended as necessary to reflect any cost savings realized by Contractor by reason of Transit Agency's purchase of any equipment, materials, supplies, or services on behalf of, or for the benefit of, Contractor. Contractor shall not independently purchase equipment, materials, or supplies available through [INSERT NAME OF PROGRAM] without the prior written approval of Transit Agency.

When the program is a joint purchasing program, some modifications to this model provision may be desirable or required.

In addition, when a Contractor is required to participate in such a program, it may be useful to include an express prohibition on other purchasing arrangements that are not approved by the Transit Agency.

Section 9.3. Other Arrangements Prohibited.

Contractor shall not enter into or renew any purchase agreements in excess of \$[INSERT DESIRED AMOUNT] for equipment, materials, or supplies to be used in connection with its performance of this Agreement without the prior written approval of Transit Agency.

X. INSURANCE, RISK MANAGEMENT, AND BONDS

All service agreements should allocate responsibility for various risks of loss that may occur in the course of provision of Transportation Services and Other Services. This allocation is typically handled through a combination of commercial insurance policies or self-insurance plans and risk management requirements to minimize the exposure to loss, which are addressed in model Article 10, and indemnification, which is addressed in model Article 11.

The decision about whether to insure various risks through commercial insurance policies or self-insurance plans is one that should be made by the Transit Agency in consultation with the transit agency attorney and insurance brokers or consultants with experience in insuring providers of Transportation Services and Other Services. The survey revealed that, in many parts of the country, transit agencies are relying on commercial policies of insurance to cover most, if not all, risks of loss. It appears that only the larger transit agencies and contractors have elected to finance a self-insurance plan to cover these losses.

In evaluating the risks of loss to which the Transit Agency and Contractor may be subject, the transit attorney should examine state law to determine whether either party may be eligible for certain state-approved immunities, such as immunity from tort claims by third parties. Indeed, some states provide immunity to the Contractor who is providing the same service that the public Transit Agency is authorized to provide.²¹

A. Commercial Insurance

If commercial insurance is the appropriate form of coverage, the Transit Agency should determine both the types and limits of coverage that are desirable for the scope of Transportation Services and Other Services to be provided in a particular service agreement.

The determination of which party should obtain and maintain the necessary coverages will likely depend on a variety of factors, including:

- Whether the Transit Agency or the Contractor will be better able to take advantage of any economies of scale that will reduce the cost of purchasing the insurance. For example, a large Transit Agency may be able to purchase a large policy or package of policies to cover the services of several different Contractors, or a large Contractor that serves several Transit Agencies may be able to purchase a policy or policies for all of those it serves.²²
- Whether the Transit Agency or the Contractor is better able to administer the claims under the policies, in terms of available staff, expertise, and other resources.

1. Definitions

This definition of required insurance should be included in model Article 2:

Required Coverages. All insurance necessary to protect and save harmless Transit Agency, the Vehicles, the Equipment, and the Real Property and Facilities, including, without limitation, the insurance coverages specified in Section 10.5 of this Agreement.

2. Required Commercial Coverages

The following provisions are intended to serve as a guide to Transit Agencies in determining the types and limits of insurance coverage that should be required in the Agreement, and not as an exhaustive recommendation of all types and limits that may be necessary in each purchase of service situation. These provisions should be reviewed with a competent and experienced insurance consultant or broker familiar with the local market and should be modified as required to address the Transit Agency's needs in each contract situation.

ARTICLE 10-INSURANCE AND RISK MANAGEMENT

Section 10.1. Insurance Required.

Contractor shall, prior to and at all times while providing and performing the Transportation Services and Other Services, procure, maintain, and keep in force, at Contractor's expense, the Required Coverages.

Section 10.2. Evidence of Insurance.

Contemporaneous with Contractor's execution of this Agreement, Contractor shall provide certificates and policies of insurance evidencing the Required Coverages. For good cause shown, Transit Agency may extend the time for submission of the required policies of insurance upon such terms, and with such assurances of complete and prompt performance, as Transit Agency may impose in the exercise of its sole discretion.

Section 10.3. Additional Insureds.

All Required Coverages shall name the following persons as additional insured parties:

The [INSERT NAME OF TRANSIT AGENCY] and its boards, commissions, committees, authorities, employees, agencies, and officers, voluntary associations, other units operating under the jurisdiction and within the appointment of its budget [,and [ADD JOINT VENTURE OR MEMBER AGENCIES, IF ANY] and their employees, agencies, and officers for their individual interests in the joint venture].

The coverage afforded the additional insureds shall be primary insurance for the additional insureds with respect to claims arising out of operations performed by or on behalf of

Contractor. If the additional insureds have other insurance that is applicable to the loss, such other insurance shall be on an excess or contingent basis. The amount of the insurance companies' liability under the insurance policies Contractor maintains shall not be reduced by the existence of such other insurance.

Section 10.4. Insurance Companies and Policies.

All Required Coverages shall be provided by insurance companies rated A- or better in Best's Insurance Guide and otherwise acceptable to, and approved by, the Transit Agency. Required Coverages may be in any combination of primary, excess, and umbrella policies. Any excess or umbrella policy must provide excess coverage over underlying insurance on a following-form basis such that when any loss covered by the primary policy exceeds the limits under the primary policy, the excess or umbrella policy becomes effective to cover such loss. No policy may have a deductible or self-insured retention of more than 1 percent of the policy limit. The Contractor shall furnish to the Transit Agency two copies of a certificate of insurance and one copy of an insurance policy for each Required Coverage. Each such certificate and policy shall be in a form satisfactory to Transit Agency and shall provide that no change, modification, or cancellation of the insurance represented by it shall become effective until the expiration of 30 days after written notice thereof shall have been given by the insurance company to Transit Agency.

Section 10.5. Minimum Coverages.

Contractor shall, prior to, and at all times while, providing and performing Transportation Services and Other Services, procure, maintain, and keep in force, at Contractor's expense, at least the following minimum insurance coverages:

A. Workers' Compensation and Employer's Liability with limits not less than:

1. Workers' Compensation: Statutory
2. Employer's Liability:
 - \$ _____ injury-per occurrence
 - \$ _____ disease-per employee
 - \$ _____ disease-policy limit

Such insurance shall evidence that coverage applies to the State of [INSERT NAME OF STATE WITH JURISDICTION].

B. Comprehensive Motor Vehicle Liability with a combined single limit of liability for bodily injury and property damage of not less than \$_____ for vehicles owned, nonowned, or rented. All employees must be included as insureds.

C. Comprehensive General Liability with coverage written on an "occurrence" basis and with limits no less than:

1. General Aggregate: \$ _____
2. Bodily Injury:
 - \$ _____ per person
 - \$ _____ per occurrence
3. Property Damage:
 - \$ _____ per occurrence
 - \$ _____ aggregate
4. Other Coverages: \$ _____, or as otherwise approved or required by Transit Agency

Coverages shall include:

- Premises operations
- Independent contractors
- Personal injury (with employment exclusion deleted)
- Broad form property damage endorsement
- Blanket contractual liability (must expressly cover the indemnity provisions contained in

Section 11.1 of the Agreement)

- Bodily injury and property damage
- All employees shall be included as insureds.

D. Commercial Property Liability with coverage for all risks, including, without limitation, fire, extended coverage, vandalism and malicious mischief, sprinkler, leakage, flood, earth movement and collapse, and with limits no less than [INSERT DESIRED PERCENTAGE] percent of the full replacement value of the real property and facilities.

Section 10.6. Additional Coverages.

The insurance coverages and limits required by Section 10.5 above shall be deemed to be minimum coverages and limits and shall not be construed in any way as a limitation on Contractor's duty to carry adequate insurance as required by Section 10.1 above or on Contractor's liability for losses and damages under this Agreement. Contractor shall at all times carry such additional coverages and limits as may be necessary to fully comply with this Agreement.

Section 10.7. Subcontractor Insurance.

Unless otherwise approved by Transit Agency, Contractor shall not allow any subcontractor to commence or continue any part of the Transportation Services or Other Services until and unless such subcontractor provides and has in force insurance coverages equal to those required of Contractor by this Article.

B. Transit Agency Self-Insurance

When the Transit Agency has a self-insurance program, it may wish to require the Contractor to participate in it and to cover all losses through it. The following model provisions are an example of language addressing the key issues in connection with a Transit Agency self-insurance program:

ARTICLE 10-INSURANCE AND RISK MANAGEMENT

Section 10.1. Participation Required.

Contractor shall enter all Transit Agency Vehicles and all Contractor Vehicles, if any, used in the provision of Transportation Services and Other Services pursuant to this Agreement in Transit Agency's [INSERT NAME OF SELF-INSURANCE PROGRAM]. Transit Agency agrees to investigate, defend, and, in cases of liability, pay on behalf of the Contractor all claims for bodily injury or property damage asserted against Contractor arising out of the provision of Transportation Services and Other Services pursuant to this Agreement.

Section 10.2. Duplication of Coverage Prohibited.

Contractor agrees to terminate any insurance policies that duplicate the coverage of Transit Agency's [INSERT NAME OF SELF-INSURANCE PROGRAM] and not to purchase or maintain any insurance policies that duplicate the coverage of Transit Agency's [INSERT NAME OF SELF-INSURANCE PROGRAM] during the term of this Agreement.

Section 10.3. Reporting Accidents and Potential Claims.

Contractor shall immediately notify Transit Agency of any incidents that have resulted, or may result, in property damage or bodily injury. Such notice shall be provided in accordance with the provisions of the [INSERT: OPERATING MANUAL OR OTHER PLACE WHERE INSTRUCTIONS FOR NOTICE ARE ITEMIZED].

Section 10.4. Claims Administration and Defense.

Contractor shall, and shall require its employees to, cooperate with and assist Transit Agency and any claims service agencies, investigators, and attorneys employed by or on behalf of Transit Agency in the administration, investigation, and defense of any and all claims for bodily injury or property damage asserted against Transit Agency or Contractor arising out of the provision of Transportation Services or Other Services pursuant to this Agreement. The Contractor's failure to comply with the requirements of this section shall relieve Transit Agency of any and all obligations that Transit Agency may have under this Article 10.

Section 10.5. Loss Prevention.

Contractor shall, upon written notice from Transit Agency specifying and documenting claims or other evidence of incompetence, inattention, carelessness, or other fault on the part of Contractor or any of Contractor's employees, promptly take all lawful and reasonable steps to prevent claims or losses as a result of such incompetence, inattention, carelessness, or other fault. This section shall not, however, be construed to require Transit

Agency to give any such notice or to require Contractor to take any action in violation of its obligations under any labor agreement or other employment contract.

C. Contractor Self-Insurance

In the event that the Contractor has sufficient resources to provide self-insurance, rather than commercial policies of insurance, that self-insurance plan should be reviewed by the Transit Agency and its insurance consultant or broker in light of the various issues raised in the model provisions in Part 10.A of this report. The coverages and limits provided through a Contractor's self-insurance plan should not be less than those recommended by an insurance consultant or broker. However, it may be possible to achieve a cost savings by allowing the Contractor to provide a combination of self-insurance up to specified limits and commercial insurance at the higher limits.

D. Notice of Litigation Against Contractor

Regardless of the type of insurance plan that is agreed upon by the parties, the Transit Agency should be informed of any litigation that might have an impact on the Contractor's ability to perform under the Agreement. Therefore, it would be advisable to require that the Contractor notify the Transit Agency of such matters. A model provision for this purpose follows:

Section [10.6, if self-insured, or 10.8, if commercial insurance is obtained]. Litigation Against Contractor.

If, during the term of this Agreement, any lawsuits or proceedings are filed or initiated against Contractor or any subcontractor or supplier of Contractor, before any court, commission, board, bureau, agency, unit of government or subunit thereof, arbitrator, or other instrumentality, that may materially affect or inhibit the ability of Contractor to perform its obligations under, or otherwise to comply with, this Agreement, Contractor shall promptly deliver a copy of the complaint or charge related thereto to Transit Agency and shall thereafter keep Transit Agency fully informed concerning all aspects of such lawsuit or proceeding.

E. Bonds

Bonds to secure performance by the Contractor and payment by the Contractor to its subcontractors and suppliers are required by federal regulations only in construction or facility improvement contracts.²³ However, the financing agreement between the Transit Agency and FTA may require that bonds be obtained in other contexts, such as in service agreements.²⁴ The transit attorney should review that agreement in such instances to determine whether there is such an obligation. State or local law, or prudent business practices to protect the Transit Agency, may also require or demand that such bonds be obtained.

XI. INDEMNIFICATION

In addition to insurance, the allocation of risk in a service agreement should also be addressed by indemnification provisions. In addition to covering any court judgment or other loss, the indemnity provisions also often cover the cost of defense against claims of loss. As noted in Part X of this report, the availability of immunities for either party should be considered in this allocation of risk.

A. In General

The Transit Agency is likely to require a broad indemnity from the Contractor for all negligent acts of the Contractor in connection with the Agreement, as well as the cost of defense against any claims. Depending upon the circumstances in a particular agreement, however, the Transit Agency may wish to indemnify or defend the Contractor in connection with certain acts or requirements. A model provision containing broad indemnity and defense provisions, which can be modified to provide mutuality between the parties, follows:

ARTICLE 11-INDEMNIFICATION

Section 11.1. General.

Except as expressly provided in Article 10 of this Agreement, Contractor agrees to assume liability for and to indemnify and hold harmless Transit Agency, its board members, officers, employees, agents, and attorneys from and against any and all liabilities, losses, damages, costs, payments, and expenses of every kind and nature (including attorneys' fees and disbursements) ("Liabilities") as a result of claims, demands, actions, suits, proceedings, judgments, or settlements ("Claims") arising out of, or alleged to have arisen out of, or in any way relating to, or alleged to be relating to, the negligence of Contractor, or the execution, performance, nonperformance, or enforcement of this Agreement, including the enforcement of this indemnification provision, upon notice from Transit Agency of any such liability or claim that Transit Agency believes to be covered by this section. Contractor shall defend and accept Transit Agency's tender of defense of all suits brought upon all such liabilities or claims and shall pay all costs and expenses incidental thereto, including attorneys' fees incurred by Transit Agency, but Transit Agency shall have the right, at its option, to participate in the defense of any suit, without relieving Contractor of any of its obligations hereunder. The obligations contained in this section shall survive termination of this Agreement and shall not be limited by the amount of any insurance required to be obtained or maintained under this Agreement.

B. Contractor Damages

In addition to traditional indemnity and defense issues, the Transit Agency may wish to state that it is not responsible for losses and damages to the Contractor. To address this issue, a model Section 11.2 follows.

Section 11.2. Contractor's Damages.

Except as expressly provided in Article 10 of this Agreement, Transit Agency shall not be responsible to Contractor or to any of its officers, employees, agents, or attorneys for any loss of business or other damage caused by an interruption of Transportation Services, or for the time lost in repairing or replacing any Transit Agency Equipment, or for any loss, injury, or damage arising out of or relating to Transit Agency's failure to deliver Transit Agency Equipment, or for any other losses or damages sustained by the Contractor hereunder. Except as expressly provided in Article 10 of this Agreement, Transit Agency assumes no liability or responsibility for any acts or omissions of Contractor, or of Contractor's officers, employees, agents or attorneys, or for any property of Contractor or any other person that is damaged, lost, or stolen in the performance, or as a result of the performance, of this Agreement.

XII. PAYMENT

Critical to any agreement for services is determining the amount that the Contractor will be paid and the manner in which payments will be made. The survey revealed that the provisions used in contracts for Transportation Services and Other Services around the country vary widely in their approach to issues relating to payment of the Contractor.

Some Transit Agencies take a fairly simple fixed-fee approach, agreeing to pay the Contractor a fixed amount per vehicle-hour of service. Unless a ceiling on total payments is included, such an approach can result in a total payment to the Contractor that is somewhat open-ended. Other Transit Agencies take a more complex, annual budget approach, establishing an overall annual budget for the services that the Contractor is to provide. When the budget is relatively accurate, such an approach provides the Transit Agency with more certainty in its overall financial planning.

Model language for each approach is provided in model Article 12.

A. Fixed-Fee Method

1. Definitions

Certain defined terms should be used in the fixed-fee method to enable the parties to establish the payment rates. They are:

Fee Per Vehicle Hour. The hourly fee established in Section 12.1B.

Fixed Monthly Fee. The monthly fee established in Section 12.1B.

Fixed Vehicle Monthly Fee. The monthly fee for any Revenue Vehicle used for at least _ hours in that month established in Section 12.1B.

Vehicle Hour. All time scheduled for Transportation Services on the schedule approved by Transit Agency, from the start of the first run to the end of the last run, plus any deadheading to and from the Vehicle storage facility. The amount of time that the Vehicle is not providing Transportation Services due to work breaks of the operator shall not be counted toward any Vehicle Hour.

2. Payment Terms

The fixed-fee method provides for payment to the Contractor based on the amount of services provided by the Contractor in each calendar month. The following three model sections establish the amounts of the fees, invoice standards, and limitations on payments under the fixed-fee method:

ARTICLE 12-PAYMENT, BUDGET AND ACCOUNTING

Section 12.1. Payment for Services.

In consideration of the Transportation Services and Other Services to be provided by Contractor pursuant to this Agreement, Transit Agency agrees, subject to the provisions of this Article 12, to pay Contractor the following Fee Per Vehicle-Hour for each Vehicle-Hour satisfactorily performed by Contractor, plus the following Fixed Monthly Fee, plus the following Fixed Vehicle Monthly Fee for each Revenue Vehicle used at least ___ hours in that month:

Fee Per Vehicle Hour:	\$ _____
Fixed Monthly Fee:	\$ _____
Fixed Vehicle Monthly Fee:	\$ _____

Section 12.2. Monthly Payments.

A. Invoice. Following the end of each month, Contractor shall submit an invoice to Transit Agency for Transportation Services and Other Services provided in that month. The invoice shall provide a detailed accounting of the number of Vehicle-Hours provided and Revenue Vehicles used, and shall be for an amount equaling (1) the product of the number of Vehicle-Hours provided times the Fee Per Vehicle Hour, plus (2) the Fixed Monthly Fee, plus (3) the Fixed Vehicle Monthly Fee.

B. Transit Agency Credits. If, by audit conducted pursuant to Section 8.3 above or otherwise, it is determined that Contractor has received any payment not authorized by this Agreement, the amount of such payment shall be deducted from the next payment due or,

if no such payment is due, said amount shall be repaid to Transit Agency within 30 days following written demand therefor by Transit Agency.

Section 12.3. Limitations on Payments.

Notwithstanding any other provision of this Article, no payment shall be due, owing or made in violation of any of the following limitations:

A. Except for the first two monthly installments, no monthly installment due in any month shall be paid unless the monthly reports required pursuant to the Operating Manual due for all months prior to and including the month that is 2 months prior to the month in question have been filed with Transit Agency in accordance with said section.

B. No final payment shall be made unless monthly reports for all months during the Agreement Term have been filed with Transit Agency in accordance with the Operating Manual.

3. Revenue Collection

The agreement should provide for a method of handling fare or ticket collection and the resulting revenue. The following model provision provides several alternatives to address this issue.

Section 12.4. Transportation and Other Services Revenue.

A. Collection. All Transportation and Other Services Revenue shall be the property of Transit Agency. Contractor shall comply with Transit Agency policies, practices, and procedures relating to the collection, security, accounting and remittance of all Transportation and Other Service Revenues as set forth in the Operating Manual.

B. Remittance to Transit Agency. In the absence of any other specific policy, practice, or procedure, all Transportation and Other Services Revenue collected during any month shall be remitted to Transit Agency not later than the fifteenth day of the following month and shall be accounted for in the monthly report for the month during which it was collected.

OR

B. Retention by Contractor. All Transportation and Other Services Revenue collected during any month shall be retained by Contractor and (1) accounted for in the monthly report for the month during which it was collected and (2) shown on the monthly invoice required by Subsection 12.4A above as a deduction from any amount due to Contractor from Transit Agency.

Subsection 12.4A provides for the method and manner of collection of Transportation and Other Services Revenue. Two alternative models for Subsection 12.4B are included: one provides for the return of Transportation and Other Services Revenue to the Transit Agency by the Contractor, and the other provides that the Contractor may retain these Revenues and apply them on the monthly invoice to reduce the payment to be made by the Transit Agency to the Contractor.

Some transit agencies may prefer, for administrative reasons, to avoid making cash transfers of this revenue from the Contractor to the Transit Agency, where most or all of those funds will simply be paid back to the Contractor. In contrast, other transit agencies may prefer to retain, and to have the use of, the funds until payment to the Contractor is due. In addition, when a Contractor is not prompt in the submission of the monthly reports that Section 12.3 requires the Contractor to submit before receiving payment, the Transit Agency may wish to retain these Revenues and make payment only when the monthly reports are provided.

Finally, where the rate and amount of collection of these Revenues varies significantly from month to month, the Transit Agency may wish to include additional provisions to address those months where the Contractor is allowed to hold revenues collected that significantly exceed the payment due to the Contractor.

4. Revenue Accounting and Reporting

The Contractor should be required to maintain its books and records and provide reports pursuant to defined standards. Where federal assistance is provided, compliance with the Federal Transit Act is required.

Section 12.5. Accounting and Reporting Standards.

Contractor shall maintain its books and records and shall prepare, maintain, and file reports relating to this Agreement and Transportation Services and Other Services in accordance with generally accepted government accounting principles; Section 15 of the Federal Transit Act; the Operating Manual; and any documentation submitted by Contractor, and approved by Transit Agency, in support of the fees paid to Contractor. In case of any conflict in the aforesaid standards, Contractor shall seek specific direction from Transit Agency and, pending receipt of such direction, shall comply with that standard that most fairly, accurately, and completely records and reports the results of operations.

B. Annual Budget Method

1. Definitions

When the annual budget method is used, a number of defined terms should be included in model Article 2 to allow the parties to establish the budget procedures and the budget.

Approved Budget. The budget of approved expenses attached to this Agreement as Exhibit A, as the same may be revised from time to time pursuant to Section 12.8 of this Agreement.

Approved Budget Maximum. The amount shown on the Approved Budget for the line designated "Total Expense," as such amount may be increased or decreased during the Agreement Term pursuant to the provisions of this Agreement.

Approved Capital Expenditure. A capital expenditure approved by Transit Agency pursuant to the provisions of Section 12.9 of this Agreement.

Budget Call. A written direction issued by Transit Agency directing the submission of a proposed budget for the calendar year following the Agreement Term.

Capital Asset. Land, a fixture attached to land, or an item of personal property that meets all of the following criteria: (1) the cost of acquisition or the cost of improvement of such property exceeds \$___, (2) the expected useful life of the property when acquired is more than 1 year or the extension of the useful life of the property as a result of the improvement is more than 1 year; (3) the property retains its original shape and appearance with use; and (4) the property is nonexpendable (meaning that if the property is damaged or some of its constituent parts are lost or worn out, it is usually more economical to repair the property than to replace it with an entirely new unit).

Capital Expenditure. An expenditure made to acquire or Improve one or more Capital Assets.

Contract Price. The total amount payable pursuant to Section 12.1 of this Agreement.

Line Item. A specific, separately identified category of expense listed on the Approved Budget.

Line Item Budget. The amount of the Approved Budget allocated to a specific Line Item.

Line Item Budget Maximum. The amount shown on the Approved Budget for each Line Item, as such amount may be increased or decreased during the Agreement Term pursuant to the provisions of this Agreement.

Monthly Report. The monthly report of revenue and expenses described in the Operating Manual.

Operating Expense. Any and all reasonable expenses, costs, and disbursements of every kind and nature, other than Capital Expenditures, paid or properly accrued in accordance with uniformly and consistently applied generally accepted government accounting principles by Contractor during the Agreement Term in connection with providing Transportation Services and Other Services pursuant to this Agreement.

Reimbursable Expenditure. Either (1) an Approved Capital Expenditure or (2) an Operating Expense other than the following Operating Expenses:

(a) Any amount required to be paid by Contractor to Transit Agency pursuant to this Agreement or pursuant to any other agreement between Transit Agency and Contractor;

(b) Any expense not incidental to, or necessary for, the provision of Transportation Services and Other Services;

(c) Any excessive or unreasonable expense;

(d) Any expense for local government taxes, fees, licenses, or other charges unless specifically included in the Approved Budget or its supporting documents or unless approved in writing by Transit Agency;

(e) Any expense resulting from any increase in wage rates in excess of Transit Agency established ceilings shown in Exhibit C;

(f) Any expense for wages or benefits resulting from any change in employment practices, Transportation Services, or Other Services not made in conformance with the Approved Budget or at the direction or with the approval of Transit Agency or pursuant to a requirement of federal or state law determined by Transit Agency to be applicable;

(g) Any expense not in compliance with the expense guidelines set forth in the Operating Manual;

(h) Any expense for inadequate managerial services (as provided in Subsection 6.2B of this Agreement);

(i) Any expense resulting from the amortization or payment of any debt incurred prior to the Agreement Term or incurred without the approval of Transit Agency;

(j) Any interest expense unless approved in writing by Transit Agency;

(k) Any sinking fund expense;

(l) Any expense resulting from the amortization of any intangible cost to the extent that it does not meet the evaluative criteria for allowable amortization established by Transit Agency from time to time;

(m) Any depreciation expense; and

(n) Any noncash expense incurred or accrued without Transit Agency's prior written approval.

Transportation and Other Services Revenue. All amounts properly classified as revenue or income generated by, derived from, attributable to, or related to the Transportation Services and Other Services during the Agreement Term, regardless of the date of collection, including all items of revenue identified and defined in Exhibit of the Operating Manual except only (1) nontransportation revenues as defined in said exhibits and (2) payments made by Transit Agency to the Contractor pursuant to this Agreement.

2. Payment Terms

The annual budget method provides for a maximum Contract Price paid to Contractor for a 1-year period based on an Approved Budget. If, however, a multiple-year agreement is desired, the number of monthly installments shown in the model text should be revised accordingly. Model provisions establishing the payment process and limitations on payment under the annual budget method follow:

ARTICLE 12-PAYMENT, BUDGET AND ACCOUNTING

Section 12.1. Payment for Services.

In consideration of the Transportation Services and Other Services to be provided by Contractor pursuant to this Agreement, Transit Agency agrees, subject to the provisions of this Article 12, to pay Contractor a total Contract Price not to exceed the Approved Budget Maximum or the portion thereof due for payment pursuant to Sections 12.2 and 12.3 below, whichever is less.

Section 12.2. Monthly Installments and Final Payment.

A. Timing and Amount of Payments. Subject to the provisions of this Article 12, the contract price shall be paid in (1) 12 monthly installments beginning on or about [INSERT DATE] and continuing on or about the fifteenth day of each month of the Agreement Term,

and (2) one final payment or credit, as the case may be, due on or about [INSERT DATE]. Each of the first two monthly installments shall be in an amount equal to one-twelfth of the Approved Budget Maximum. Each of the remaining monthly installments shall be in an amount equal to the amount of the "total expenses" shown on the Monthly Report, as hereinafter required, for the month that is 2 months prior to the month during which the payment is due. The final payment or credit shall be computed by subtracting the total amount of the 12 monthly installment payments from the total amount of the "total expenses" shown on the 12 Monthly Reports covering the 12 months of the Agreement Term. If a credit is due to Transit Agency, Contractor shall pay the amount of such credit to Transit Agency within 30 days following demand therefor by Transit Agency.

B. Transit Agency Credits. Notwithstanding the provisions of Subsection 12.2A above, if by audit conducted pursuant to Section 8.3 above or otherwise it is determined that Contractor has received any payment not authorized by this Agreement, the amount of such payment shall be deducted from the next payment due or, if no such payment is due, said amount shall be repaid to Transit Agency within 30 days following written demand therefor by Transit Agency.

Section 12.3. Limitations on Payments.

Notwithstanding any other provision of this Article, no payment of the Contract Price, or any installment thereof, shall be due, owing, or made in violation of any of the following limitations:

A. Except for the first two monthly installments, no monthly installment due in any month shall be paid unless the Monthly Reports required pursuant to the Operating Manual due for all months prior to and including the month that is 2 months prior to the month in question have been filed with Transit Agency in accordance with said section.

B. No final payment shall be made unless Monthly Reports for all months during the Agreement Term have been filed with Transit Agency in accordance with the Operating Manual.

C. No payment shall be made except with respect to a Reimbursable Expenditure.

D. No payment shall be made in excess of the Approved Budget Maximum.

E. No payment shall be made with respect to any Reimbursable Expenditure properly allocable to a Line Item if such Expenditure is in excess of the Line Item Budget Maximum for that Line Item, provided, however, that Transit Agency shall not unreasonably refuse to approve a Contractor request to receive payments with respect to Reimbursable Expenditures properly allocable to a Line Item that are in excess of the Line Item Budget Maximum for that Line Item if (1) the request is in writing and properly documented and supported; (2) such Reimbursable Expenditures were or will be reasonably and properly incurred in accordance with Transit Agency policies, guidelines, and practices; (3) Contractor agrees to reduce the Line Item Budget Maximum for one or more other Line Items by the amount of such requested excess payment or payments; and (4) Transit Agency reasonably determines that Contractor will not exceed such reduced Line Item Budget Maximum or Maximums.

F. No payment shall be made with respect to any Reimbursable Expenditure that is not properly allocated to the appropriate Line Item Budget.

G. No payment shall be made with respect to any Reimbursable Expenditure that was not approved by Transit Agency for inclusion in the Approved Budget and the Line Item Budget from which payment is requested.

H. No payment shall be made with respect to any Reimbursable Expenditure incurred or accrued in violation of this Agreement or any provision of the Operating Manual.

Section 12.4. Excess Expenses.

Any expenditure made by, and any cost, expense, or liability incurred by, Contractor that is not a Reimbursable Expense or that is in excess of the Approved Budget Maximum or the applicable Line Item Budget Maximum or that is otherwise barred from payment pursuant to Section 12.3 above shall be the responsibility of, and shall be promptly paid or discharged by, Contractor. Contractor shall indemnify, defend, and hold harmless Transit Agency from any claims, demands, or liabilities arising out of or relating to Contractor's failure to promptly pay or discharge any such cost, expense, or liability.

3. Revenue Collection

As in the fixed-fee method, the collection of sales, tickets, and revenues must be addressed.

Section 12.5. Transportation and Other Services Revenue.

A. Collection. All Transportation and Other Services Revenue shall be the property of Transit Agency. Contractor shall comply with Transit Agency policies, practices, and procedures relating to the collection, security, accounting, and remittance of all Transportation and Other Service Revenues as set forth in the Operating Manual.

B. Remittance to Transit Agency. In the absence of any other specific policy, practice, or procedure, all Transportation and Other Services Revenue collected during any month shall be remitted to Transit Agency not later than the fifteenth day of the following month and shall be accounted for in the Monthly Report for the month during which it was collected.

OR

B. Retention By Contractor. All Transportation and Other Services Revenue collected during any month shall be retained by Contractor and (1) accounted for in the Monthly Report for the month during which it was collected and (2) shown on the monthly invoice required by Subsection 12.4A above as a deduction from any amount due to Contractor from Transit Agency.

As discussed in Part XII.A.3 of this report, some Transit Agencies may prefer to have the Transportation and Other Services Revenue remitted to them, while others prefer to have the Contractor retain those funds and apply them as offsets against monthly payments that may be due.

4. Revenue Accounting and Reporting

As in the fixed-fee method, revenue accounting and reporting standards must be defined.

Section 12.6. Accounting and Reporting Standards.

Contractor shall maintain its books and records and shall prepare, maintain, and file reports relating to this Agreement and the Transportation Services and Other Services in accordance with generally accepted government accounting principles; Section 15 of the Federal Transit Act; the Operating Manual; and the Approved Budget and any documentation submitted by Contractor, and approved by Transit Agency, in support of the Approved Budget. In case of any conflict in the aforesaid standards, Contractor shall seek specific direction from Transit Agency and, pending receipt of such direction, shall comply with the standard that most fairly, accurately, and completely records and reports the results of operations.

5. Deviations from and Amendments to Budget

Procedures should be established to address situations where either the Contractor or Transit Agency desires to deviate from, or modify, the Approved Budget. Two model sections follow.

Section 12.7. Deviations from Approved Budget.

Should Transit Agency determine that Contractor has paid any expense or incurred any liability in excess of the Approved Budget Maximum, in excess of any applicable Line Item Budget Maximum, or in violation of any provision of this Agreement, or that Contractor is paying expenses or incurring liabilities at such a rate or in such amounts as to indicate that Contractor will or may exceed the Approved Budget Maximum or any Line Item Budget Maximum prior to the end of the Agreement Term, and should Transit Agency notify Contractor of such determination in writing, Contractor shall, within 10 days following such written notice, submit to Transit Agency:

A. A written analysis and explanation of the circumstances giving rise to the matter addressed in the notice; and

B. A detailed plan of corrective action to bring all expenses within the Approved Budget Maximum and applicable Line Item Budget Maximums or, in the alternative, Contractor's statement of intent to fund any excess expense pursuant to its obligation under Section 12.4 of this Agreement, together with a statement of the source and availability of funds to be used for such purpose; and

C. Where relevant, a detailed plan of corrective action to remedy any past or existing violation of this Agreement and to prevent the reoccurrence of any similar violation in the future.

Within 15 days following receipt of the aforesaid information and plan or plans, Transit Agency shall advise Contractor of its approval or nonapproval of such plan or plans. In the event of Transit Agency approval, Contractor shall promptly and effectively implement the approved plan or plans. In the event of Transit Agency nonapproval, Transit Agency shall either direct Contractor to submit a new or revised plan of corrective action for Transit Agency's approval within a stated time or direct Contractor to implement a plan of corrective action developed by Transit Agency, and Contractor shall comply with such directive.

The failure or refusal of Contractor to submit any information required pursuant to this section or to develop and submit an acceptable plan or plans of corrective action when required pursuant to this section or to promptly and effectively implement any Transit Agency-approved or Transit Agency-developed plan of corrective action shall, in addition to the remedies provided in Articles 13 and 16 of this Agreement, entitle Transit Agency to withhold all or any portion of any monthly installment or final payment that would otherwise be due to Contractor pursuant to Section 12.2 of this agreement until such plan is developed, submitted, approved, and implemented.

Section 12.8. Budget Amendments.

A. General Standard. Except as provided in Paragraph 3.2B and Section 6.1 of this Agreement, Transit Agency shall have no obligation to revise the Approved Budget or to increase the Approved Budget Maximum or any Line Item Budget Maximum.

B. Budget Amendments Requested by Contractor. Contractor may make a written request for an amendment to the Approved Budget when circumstances beyond the control of Contractor or circumstances not known or reasonably ascertainable prior to the beginning of the Agreement Term render it essential, in the opinion of Contractor, that the Approved Budget be amended. Transit Agency shall consider such requests in good faith; however, even in such circumstances, Transit Agency shall be under no obligation whatsoever to approve any such request. Contractor acknowledges that limitations on Transit Agency's own funding and other obligations of Transit Agency will make it difficult or impossible for Transit Agency to approve any amendment to the Approved Budget that results in an increase of the Approved Budget Maximum and that any Approved Budget amendment is therefore likely to be limited to transfers between Line Items. Notwithstanding the foregoing, but subject to the availability of Transit Agency funds, Transit Agency shall not unreasonably refuse to approve any Contractor request for an amendment to the Approved Budget when such amendment is limited to the reimbursement of materially additional costs incurred by Contractor as a direct result of significant changes in operating practices directed by Transit Agency after approval of the Approved Budget.

C. Budget Amendments Initiated by Transit Agency. Except when any other agreement between Transit Agency and Contractor provides otherwise, Transit Agency may unilaterally require an amendment to the Approved Budget in any of the following circumstances:

(1) When the funds available to Transit Agency for payments under this Agreement are insufficient to fully fund the Approved Budget Maximum;

(2) When circumstances beyond the reasonable control of Transit Agency, or not known or reasonably ascertainable at the beginning of the Agreement Term, require a reduction in the Approved Budget Maximum; or

(3) When a change in routes or schedules authorized pursuant to Section 3.2B, or any other change in the Transportation Services and Other Services to be provided pursuant to this Agreement, results in a saving of Reimbursable Expenditures, but only in the amount of such savings.

6. Capital Expenditures

The agreement should provide a method for decisions to be made about purchases of capital items needed for the Transportation Services or Other Services. A model procedure follows:

Section 12.9. Capital Expenditures.

A. Capital Improvement Program. Contractor shall make all Capital Expenditures through Transit Agency's capital improvement program as set forth in the Operating Manual.

B. Prior Approval of Capital Expenditures Required. Notwithstanding the availability of funds in the Approved Budget, Contractor shall not make, or become obligated to make, any Capital Expenditure for any item costing in excess of [INSERT AMOUNT] or previously programmed for acquisition pursuant to Transit Agency's capital improvement program, without first obtaining the approval of Transit Agency pursuant to this subsection. Any such Capital Expenditure made or obligated without such prior approval shall be the sole responsibility of Contractor and no payment under this Agreement shall be sought or made with respect to such Capital Expenditure.

C. Approval Procedures. Except in cases of emergency, approval for Capital Expenditures shall be requested by Contractor in writing. Such requests shall be made as far as possible in advance of the date when Contractor desires to make or to become obligated for such Capital Expenditures in order to accommodate funding in accordance with Transit Agency's capital improvement program. Such request shall describe the purpose of the Capital Expenditure and the necessity therefor with particularity. After receiving all information that it deems necessary to evaluate any such request and the available funding options, Transit Agency shall approve or disapprove the request in writing. In any case of emergency where delay of a Capital Expenditure that could not have reasonably be foreseen would result in an unacceptable interference with or disruption of Transportation Services or Other Services or would create a threat of personal injury or property damage, Contractor may request Transit Agency approval by telephone, followed by a confirming written request. Transit Agency shall respond to such requests as soon as reasonably feasible by telephone, followed by a confirming written response.

D. Ownership of Capital Assets. Any capital asset paid for with the proceeds of any payment made by Transit Agency shall be the property of Transit Agency and shall be added to Exhibit B or to the inventory of Transit Agency Equipment required pursuant to Subsection 4.1B and shall be returned to Transit Agency at the end of the Agreement Term.

7. Subsequent Budget

In circumstances where Transit Agency would be allowed to renew or extend its relationship with Contractor, a process for establishing a potential budget for the subsequent year can be included. A model Section 12.10 follows.

Section 12.10. Subsequent Budget.

In order to permit Transit Agency to evaluate the merits of entering into a new agreement for the Transportation Services and Other Services with Contractor following the end of the Agreement Term, Contractor shall, during the Agreement Term and pursuant to this section, cooperate with Transit Agency to develop a proposed budget for the budget year following the Agreement Term. On or before [INSERT DATE] of the Agreement Term, or such other date as Transit Agency may specify in a budget call, Contractor shall submit its formal budget estimate to Transit Agency in the format specified in the Operating Manual or such other format as Transit Agency may specify in a budget call. The budget estimate submitted by Contractor shall be consistent with assumptions established by Transit Agency, shall be reasonable and prudent, and shall be prepared in accordance with sound financial practices. Contractor shall provide all supporting budget documentation as requested by Transit Agency. Transit Agency shall fully review the budget estimate and supporting documentation. Transit Agency and Contractor shall confer and cooperate with each other to arrive at a mutually acceptable budget estimate. In the event that Transit Agency and

Contractor agree upon a mutually acceptable budget estimate and further agree to enter into a new agreement for Transportation Services and Other Services, the mutually acceptable budget estimate shall be incorporated into such agreement as the approved budget. Nothing in this section shall, however, obligate either Transit Agency or Contractor to agree to any budget estimate or to enter into any new agreement.

XIII. TERM, TERMINATION, AND REMEDIES

The three related topics of length of the agreement term, early termination of that term for various reasons, and remedies for breach or default by a party in its obligations are all treated in model Article 13.

A. Term

1. Definition. "Agreement Term" should be defined in Article 2 of the Agreement, as follows:

Agreement Term. The term specified in Section 13.1 of this Agreement, as such term may be reduced or extended pursuant to the provisions of this Agreement.

2. Established. The specific start and end dates of the Agreement Term should be stated. Model Section 13.1 provides an example:

ARTICLE 13-TERM

Section 13.1. Term.

The term of this Agreement shall be one year commencing on the 1st day of ____, 199__, and terminating after the last scheduled run on the 31st day of ____, 199__.

Although geared toward scheduled fixed-route bus or rail service, this section can be modified for other services as needed.

The Transit Agency should consider the implications of the length of the Agreement Term as part of its request for proposals, negotiations, or other process. Inspection of the service agreements provided in response to the survey reveals that there is no one "typical" length for the Agreement Term around the country. The longest agreements received were for terms of 4 to 5 years and were primarily for commuter rail service. The shortest agreements were for 1-year terms, and tended to be for special service or fixed-route bus service.

The advantages of the longer term are that the Transit Agency can avoid the time and expense of going through the procurement process on an annual basis and can develop some continuity in its relationship with the Contractor. These advantages are difficult to achieve in a 1-year agreement.

However, a 1-year term is more likely to allow the Transit Agency to end a relationship with a difficult or uncooperative Contractor at the end of that shorter time without undertaking a sometimes complicated and contentious early termination process. In addition, a Transit Agency with a significant concern about the availability of future sources of funding may be more comfortable with a 1-year term. Of course, language addressing the Transit Agency's right to terminate for lack of funding can be included to address this issue, such as that included in model Section 13.2, discussed in Part XIII.B below.

Most Transit Agencies seem to have recognized the advantages and disadvantages of both very long and very short Agreement Terms by implementing a combination of both. Some examples from the agreements provided in the survey responses include:

- A 3-year term that is made up of three renewable 1-year periods,

- A 1-year initial term with two 1-year renewal options, and
- A 3-year initial term with two 1-year renewal options.

Multiple-year agreements are easily accommodated in the model text for the fixed-fee method of payment, discussed in Part XII.A of this report. Some modifications to the model language for the annual budget method of payment may also be necessary for a multiple-year agreement, as noted in Part XII.B of this report.

B. Termination for Impossibility

Where the Transit Agency is a public sector or other entity that depends on outside funding, whether from state, federal, or other sources, there may be instances where funding is no longer available, making the Transit Agency unable to meet its payment obligations to the Contractor. In such cases, or in cases where equipment is unavailable, the Transit Agency should be permitted to terminate the Agreement because performance by the Transit Agency will be impossible. Model Section 13.2 addresses this issue:

Section 13.2. Termination for Impossibility of Performance.

A. Basis for Impossibility. This Agreement may be terminated, in whole or in part, upon 7 days written notice given by Transit Agency to Contractor in the event that [INSERT ALL KNOWN FUNDING SOURCES] or any other funding source fails in any fiscal year to appropriate or otherwise make available sufficient funds, as determined in the sole discretion of Transit Agency, to cover payments to be made to Contractor pursuant to Article 12 hereof, or if Equipment necessary to perform the Transportation Services and Other Services hereunder is unavailable for any reason, as determined by the sole discretion of Transit Agency.

B. Termination During or After Performance. The termination of this Agreement shall not be in any manner prevented or affected by the fact that Contractor may have already partially or fully performed its obligations under this Agreement in respect to any unpaid part or parts of this Agreement by the time it is determined by Transit Agency that it will be unable to pay the remaining unpaid part or parts of this Agreement.

C. Termination for Contractor Default

If Contractor defaults in its obligations under the Agreement, Transit Agency may wish to terminate the Agreement. Virtually all of the agreements provided in response to the survey provide for termination in the case of at least some types of defaults by the Contractor. Some agreements provide for a notice to the Contractor and allow a period of time thereafter to cure the default; if a cure does not occur, the Transit Agency may then terminate the agreement as a result of that Contractor default. Others, however, do identify certain items that are so critical that immediate termination is justified. Typically, these critical items involve failure by the Contractor to comply with certain specified requirements, such as an established fare structure, handling of fares, or providing the agreed-upon service. Where the default is very blatant or serious, a Transit Agency may desire to seek termination after 24 hours' notice to the Contractor. Particular factors other than fares and schedules may fit into this category of serious defaults in a specific case, such as certain safety issues where there is a public perception of a lack of safety in the service provided. In other instances, the Transit Agency may be willing to allow the Contractor a period to cure the default following notice. In any event, contract language for the type of termination that is appropriate should be developed in light of all the circumstances affecting the Transit Agency and the services involved. Both options can be included in the model section, as follows:

Section 13.3. Termination for Contractor Default.

A. Immediate Termination. This agreement shall be terminated, and the Agreement Term shall end, 24 hours after written notice of such termination given by Transit Agency to Contractor in the event that Contractor shall, for any reason, other than as specified in Section 3.6 of this Agreement:

(1) Cancel, eliminate, or reduce any route or diminish service or scheduling along any route (except for changes approved by Transit Agency, minor operational changes made pursuant to Section 3.2 of this Agreement, and changes due to normal seasonal route rescheduling identical to such rescheduling in the calendar year prior to the Agreement Term);

(2) Fail to comply with any of the requirements of Subsections 3.1D through 3.1G of this Agreement; or

(3) [FOR USE WITH ANNUAL BUDGET METHOD] Fail to file or implement a plan of corrective action when required to do so pursuant to Section 12.7 of this Agreement.

B. Termination Following Failure To Cure. This Agreement shall be terminated, and the Agreement Term shall end, if Contractor violates any other material obligation under this Agreement or fails to timely perform any other material obligation under this Agreement and such violation or failure shall continue for a period of 21 days after Contractor receives written notice from Transit Agency describing in reasonable detail the nature of the violation or failure, provided, however, that in the event such violation or failure cannot be cured within said 21-day period notwithstanding diligent and continuous effort by Contractor, and Contractor shall have promptly commenced to cure the violation or failure and shall have thereafter prosecuted the curing of same with diligence and continuity, then the period for curing such violation or failure shall be extended for such time as may be necessary to cure such violation with diligence and continuity.

D. Post-Termination Actions

In the event of a termination of the Agreement, regardless of the reason, the necessary actions should be taken to resolve outstanding matters between the parties. Model Sections 13.4 and 13.5 outline the most typical issues to be resolved.

Section 13.4. Obligations Following Termination.

Transit Agency's obligations upon termination of this Agreement in any manner and for any purpose authorized by this Article 13 shall be limited to payment for services rendered by Contractor up to the date of said termination, provided, however, that Transit Agency may agree to make certain additional payments to Contractor pursuant to Subsection 13.5C below. Immediately upon termination of this Agreement in any manner and for any purpose, Contractor shall comply with the provisions of Section 13.5 below. In addition, Contractor shall be liable to Transit Agency for all damages incurred as a result of any violation or failure that leads to termination of this Agreement. Said damages shall include, but shall not be limited to, all court costs and attorneys' fees and disbursements incurred in connection with enforcing or defending Transit Agency's rights hereunder, and all costs and expenses incurred by Transit Agency in providing or obtaining substitute Transportation and Other Services following the termination of the Agreement to replace the Services that Contractor would be obligated to provide pursuant to this Agreement for the duration of the Agreement Term if the Agreement had not been terminated early.

Section 13.5. Return of Transit Agency Equipment and Records Upon Termination.

A. Return of Equipment and Records by Contractor. Immediately following the Agreement Term, Contractor shall surrender and deliver to Transit Agency at such time or times and at such location or locations as Transit Agency may designate:

(1) All Transit Agency Vehicles and other Transit Agency Equipment in good operating order, repair, and condition, reasonable wear and tear and normal depreciation excepted;

(2) All records pertaining to all Transit Agency Vehicles and other Transit Agency Equipment, including, without limitation, all preventive maintenance reports and vehicle repair reports; and

(3) All records that pertain to the Transportation Services and Other Services, including, without limitation, personnel and payroll records of the employees engaged in the provision

of Transportation Services and Other Services, all labor contracts and agreements relating to such employees, and any other records that are deemed by Transit Agency to be necessary to the continuation of services similar to the Transportation Services and Other Services. This Subsection 13.5C shall not be construed to preclude Contractor from keeping personnel, payroll, or other records that it is required to maintain by state or federal law or generally accepted accounting practices. However, Transit Agency and its designated agents shall have the right, except as restricted by law, to examine any records so maintained and to receive photocopies thereof.

B. Inspection and Removal by Transit Agency. Transit Agency shall have the right to inspect the premises of Contractor and to remove, in the manner provided in Subsection 4.1G of this Agreement, any Transit Agency Equipment or any such records that remain in the possession of Contractor.

C. Condition of Returned Equipment. Transit Agency, in its sole discretion, shall determine the condition of surrendered and returned Transit Agency Equipment and the extent of any wear and tear, depreciation, or damage. Contractor shall make, or cause to be made, any and all repairs deemed necessary by Transit Agency to place the surrendered and returned Transit Agency equipment in the condition required by Sections 4.1 and 4.2 of this Agreement. Such repairs shall be completed within 21 days following Transit Agency's written demand that they be undertaken, which written demand shall include a statement of whether Transit Agency has designated the cost of such repairs as a Reimbursable Expenditure under this Agreement. If any such repairs are the result of Contractor's failure to comply with the provisions of this Agreement, the cost thereof shall not be a Reimbursable Expenditure under this Agreement.

Model Section 13.4 limits the Transit Agency's obligation to make payments for the Contractor's services to those provided through the date of termination, except for those later repair expenses that Transit Agency may agree constitute Reimbursable Expenditures pursuant to model Subsection 13.5C. In the event of a termination due to Contractor violation or failure, this provision establishes that the Transit Agency's court costs, attorneys' fees, and costs of substitute services are all damages that are recoverable from the Contractor by the Transit Agency.

Model Section 13.5 provides for the return of equipment and records by the Contractor to the Transit Agency. The list of items in Subsection 13.5A can, of course, be modified to include any particular or unique items of concern to the Transit Agency.

The cost of certain repairs made by the Contractor at the request of the Transit Agency following termination may be considered to be Reimbursable Expenditures under model Subsection 13.5C. Text to allow this alternative has been included, and each Transit Agency can decide if it wishes to include this ability to return to the Contractor for repairs after the end of the Agreement. There will likely be individual circumstances that would make using such a Contractor to perform repairs more or less desirable in particular cases.

E. Liquidated Damages and Bonuses

Some transit agencies choose to impose liquidated damages on the Contractor when the Contractor fails to meet a specified performance standard, and some allow the Contractor to earn a bonus for exceeding a specified standard.

The survey revealed that a liquidated damages clause has been included to assess a specific monetary loss to the Contractor for failures in on-time service performance, failure to file an accident report on time, or failure to provide proper facility maintenance. The 1995 FTA Master Agreement provides that liquidated damages may be assessed only where a "specific rate per day" for lateness is established in the Agreement.²⁵ However, the Master Agreement does not clearly state whether liquidated damages can be specified at other than a "per day" rate, such as in the

case of multiple failures in on-time performance on the same day. In addition, any Transit Agency considering the inclusion of a liquidated damages provision should carefully examine applicable state law to determine whether the inclusion of a liquidated damages provision will preclude the later assessment of actual damages.

The survey also shows that bonuses are sometimes authorized to provide an incentive to the Contractor to meet certain standards, such as completing a month with no accidents.

A model section containing liquidated damages and bonus provisions follows:

Section 13.6. Liquidated Damages and Bonuses.

A. Liquidated Damages. If Contractor fails to [INSERT LATE ITEM OF SERVICE, SUCH AS "COMMENCE THE PROVISION OF TRANSPORTATION SERVICES"] on or before [INSERT DATE], Contractor shall, promptly upon demand by Transit Agency, pay to Transit Agency as liquidated damages for delay and not as a penalty, the sum of [INSERT AMOUNT] per day for each day until Contractor [INSERT LATE ITEM OF SERVICE], in addition to any other remedies of Transit Agency under this Agreement.

B. Bonuses. If Contractor [INSERT DESIRED GOAL, SUCH AS "PROVIDES THE TRANSPORTATION ANOTHER SERVICES FOR ONE CALENDAR MONTH WITH NO ACCIDENTS"], Transit Agency shall pay to Contractor, as additional compensation as part of the next payment due to Contractor, a bonus of [INSERT AMOUNT].

F. Remedies

The Agreement should also provide that, in addition to termination, the parties have such other rights as are provided by law, including filing a lawsuit. In some cases, the parties will wish to allow a period for notice of the alleged breach and an opportunity to cure the breach before a lawsuit is filed. Model Sections 13.7 and 13.8 provide these options.

Section 13.7. Remedies.

In addition to Transit Agency's right to terminate this Agreement pursuant to Article 13 and any other rights otherwise provided in this Agreement, in the event of a breach or an alleged breach of this Agreement by either party, either party may, by suit, action, mandamus, or any other proceeding, in law or in equity, including specific performance, enforce or compel the performance, or recover damages for nonperformance, of this Agreement, or both. Any cost or expense associated with pursuing any such remedy shall not be a Reimbursable Expenditure under this Agreement.

Section 13.8. Notice and Cure.

Neither party may exercise the right to bring any suit, action, mandamus, or any other proceeding pursuant to Section 13.7 of this Agreement without first providing written notice to the other party of the breach or alleged breach, and allowing a period of 15 days for the curing of said breach or alleged breach; provided, however, that in the event such violation or failure cannot be cured within said 15-day period notwithstanding diligent and continuous effort by the party receiving notice and said party shall have promptly commenced to cure the violation or failure and shall have thereafter prosecuted the curing of same with diligence and continuity, then the period for curing such violation or failure shall be extended for such period as may be necessary for curing such violation with diligence and continuity.

XIV. CONTRACTOR COVENANTS AND REPRESENTATIONS

When a Transit Agency enters into an agreement with a Contractor for Transportation Services and Other Services, it should obtain from the Contractor a variety of assurances regarding the Contractor, including Contractor's legal and financial status, its authority to enter into the agreement and perform the Services, and

its freedom from any legal, financial, or other constraints in performing the Services, among others.

The Transit Agency also will need to obtain the Contractor's assurances that the Contractor complies with various requirements in cases where the agreement is financed in whole or in part with federal, state, or local grant assistance.

Finally, where the Transit Agency is a unit of government or governmental agency subject to requirements of state or local laws and regulations, the Transit Agency will want to ensure that the Contractor will comply with all such applicable requirements.

A. General Covenants and Representations

The Transit Agency may wish to obtain one or more general covenants and representations from the Contractor to ensure that the Contractor agrees to, and will be able to, perform the obligations imposed on the Contractor in the Agreement. Such items can include the following:

ARTICLE 14-COVENANTS AND REPRESENTATIONS

Section 14.1. General.

Contractor hereby makes the covenants and representations with and to Transit Agency as described in this Article and hereby agrees to abide by each and every one of them.

Section 14.2. Existence and Power.

Contractor is a duly organized and validly existing [INSERT TYPE OF ENTITY], in good standing under the laws of the State of [INSERT NAME OF STATE], and has the legal power and authority to provide, engage in, and carry out the Transportation Services and Other Services. Contractor shall maintain its identity as a [INSERT TYPE OF ENTITY] and shall make no attempt to cause its existence as a [INSERT TYPE OF ENTITY] to be abolished during the Agreement Term.

Section 14.3. Authorization.

Contractor has been duly authorized to execute this Agreement by its [INSERT AUTHORIZING ENTITY], and the execution and delivery of this Agreement by all of the parties signatory hereto shall constitute a valid and binding obligation of Contractor, enforceable in accordance with its terms, and the making of and compliance by Contractor with the terms and conditions of this Agreement will not result in any breach or violation of, or default under, any judgment, decree, mortgage, contract, agreement, indenture, or other instrument applicable to Contractor.

Section 14.4. Approvals Received.

All such approvals, consents, permits, licenses, certificates, authorizations, or modifications as may be required to permit the performance by Contractor of its obligations under this Agreement have been obtained from the appropriate governmental authorities or other persons or entities.

Section 14.5. No Material Litigation.

No litigation, investigation, or proceeding of or before any court, commission, bureau, agency, unit of government or subunit thereof, arbitrator, or other instrumentality is pending or, to the knowledge of Contractor, threatened by or against Contractor, or against any of its properties or revenues (a) with respect to this Agreement, or (b) that is reasonably likely to have a material adverse effect on the operations, property, or financial condition of Contractor.

Section 14.6. No Default.

Contractor is not in default under or with respect to any obligation in any respect that could be materially adverse to the business, operations, property, or financial condition of Contractor or that is reasonably likely to materially adversely affect the ability of Contractor to perform its obligations under this Agreement.

Section 14.7. No Burdensome Restrictions.

No obligation of Contractor and no requirement of law materially adversely affects, or insofar as Contractor may reasonably foresee may so affect, the business, operations, property, or financial condition of Contractor or the ability of Contractor to perform its obligations under this Agreement.

Section 14.8. No Sale, Lease or Encumbrance.

Contractor will not sell, lease, loan, mortgage, or in any manner dispose of the Transit Agency Equipment or the Real Property, or any improvements or additions thereto, during the Agreement Term.

Section 14.9. Payment of Obligations.

Contractor shall pay and discharge all of its obligations and indebtednesses with respect to the Transportation Services and Other Services and with respect to the Contractor Vehicles and Other Contractor Equipment, if any, provided, however, that any such obligation or indebtedness need not be paid if the validity thereof shall currently be contested in good faith by appropriate proceedings and if Contractor shall have set aside on its books adequate reserves with respect thereto, except that all such obligations and indebtednesses shall be paid forthwith upon an adverse decision in such proceedings and the exhaustion of available appellate relief with respect thereto.

Section 14.10. Compliance with Agreements.

Contractor shall comply with the provisions of existing leases, contracts, and agreements to which it is a party and that are material to Contractor's provision of the Transportation Services and Other Services. Contractor shall not, without the prior written approval of Transit Agency, enter into, renew, fail to renew, modify, or terminate any such contracts, leases, or agreements if such entry, renewal, failure to renew, modification, or termination will impair the performance by Contractor of the Transportation Services or Other Services or result in any material increase in Reimbursable Expenses or material reduction in Transportation and Other Services Revenues.

Section 14.11. Compliance With Applicable Laws.

Contractor shall comply with all federal, state, and local statutes, laws, rules, regulations, and orders applicable to the Transportation Services and Other Services, including the Operating Manual.

B. Compliance with Grant Conditions

When a Transit Agency is obtaining the Transportation Services and Other Services with funds received from a Federal, State, or local grant, the Transit Agency will need to ensure that the Contractor complies with any conditions placed on those funds. A general agreement by the Contractor that it will comply with those conditions is advisable, since these conditions and requirements can change from time to time. An example follows:

Section 14.12. Compliance With Grant Conditions.

Contractor shall comply with all conditions of, and all laws and regulations and all Transit Agency policies, practices, and procedures applicable to, any federal, state or local grant received by Transit Agency or by Contractor at any time with respect to the Transportation Services, the Other Services, the Equipment, or the Real Property and Facilities.

In addition, the Transit Agency may wish to identify certain grant requirements that may be applicable, some of which are outlined below.

1. Federal Debarment, Suspension, and Voluntary Exclusion

When a Transit Agency intends to enter into an agreement with a third party, such as the Contractor, and pay the Contractor with federal grant assistance funds,

it must verify that the Contractor, and Contractor's subcontractors and suppliers, are not debarred, suspended, or voluntarily excluded from such agreements under federal law.²⁶

Where the agreement is for more than \$100,000, it is treated as a "primary covered transaction" or "major third-party contract,"²⁷ and the Contractor must provide a specific certification that it is not debarred, suspended, or voluntarily excluded²⁸ from receiving federal funds.

Where the agreement is for less than \$25,000, or with a subcontractor or supplier under a primary covered transaction or major third-party contract, the transaction is considered a "lower tier covered transaction,"²⁹ and that contractor, subcontractor, or supplier must provide a different certification.

These certifications can be addressed as covenants and representations in the following manner:

Section 14.13. No Debarment, Suspension, or Exclusion.

Contractor warrants and represents that the statements contained in its certification in Exhibit G are true and correct, and that it will obtain certifications from its subcontractors and suppliers in the form of Exhibit H.

Exhibit G is the longer certification required of the Contractor, in cases where the amount of the Agreement exceeds \$100,000,³⁰ as follows:

EXHIBIT G-CERTIFICATION OF PRIMARY PARTICIPANT REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS

The Primary Participant (applicant for a FTA grant or cooperative agreement, or potential contractor for a major third party contract), _____ certifies to the best of its knowledge and belief, that it and its principals:

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

(If the primary participant (applicant for an FTA grant or cooperative agreement, or potential third-party contractor) is unable to certify to any of the statements in this certification, the participant shall attach an explanation to this certification.)

THE PRIMARY PARTICIPANT (APPLICANT FOR AN FTA GRANT OR COOPERATIVE AGREEMENT, OR POTENTIAL CONTRACTOR FOR A MAJOR THIRD-PARTY CONTRACT), _____, CERTIFIES OR AFFIRMS THE TRUTHFULNESS AND ACCURACY OF THE CONTENTS OF THE STATEMENTS SUBMITTED ON OR WITH THIS CERTIFICATION AND UNDERSTANDS THAT THE PROVISIONS OF 31 U.S.C. SECTIONS 3801 ET SEQ. ARE APPLICABLE THERETO.

Signature and Title of Authorized Official

The undersigned chief legal counsel for the (entity) hereby certifies that the (entity) has authority under State and local law to comply with the subject assurances and that the certification above has been legally made.

Signature of Applicant's Attorney Date

Exhibit H is the certification that the Contractor must provide if the amount of the Agreement is less than \$25,000, or, where the Contractor is required to provide the certificate in Exhibit G, it is the certification that the Contractor must obtain from its subcontractors and suppliers.³¹

EXHIBIT H-CERTIFICATION OF LOWER-TIER PARTICIPANTS REGARDING DEBARMENT, SUSPENSION, AND OTHER INELIGIBILITY AND VOLUNTARY EXCLUSION

The Lower Tier Participant (potential subgrantee or subrecipient under a FTA project, potential third party contractor, or potential subcontractor under a major third party contract), _____, certifies, by submission of this proposal, that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any federal department or agency.

(If the Lower Tier Participant (potential subgrantee or subrecipient under a FTA project, potential third party contractor, or potential subcontractor under a major third party contract) is unable to certify to any of the statements in this certification, such participant shall attach an explanation to this proposal.)

THE LOWER TIER PARTICIPANT (POTENTIAL SUBGRANTEE OR SUB-RECIPIENT UNDER A FTA PROJECT, POTENTIAL THIRD PARTY CONTRACTOR, OR POTENTIAL SUBCONTRACTOR UNDER A MAJOR THIRD PARTY CONTRACT) _____, CERTIFIES OR AFFIRMS THE TRUTHFULNESS AND ACCURACY OF THE CONTENTS OF THE STATEMENTS SUBMITTED ON OR WITH THIS CERTIFICATION AND UNDERSTANDS THAT THE PROVISIONS OF 31 U.S.C. SECTION 3801 ET SEQ. ARE APPLICABLE THERETO.

Signature and Title of Authorized Official

The undersigned chief legal counsel for the (entity) hereby certifies that the (entity) has authority under State and local law to comply with the subject assurances and that the certification above has been legally made.

Signature of Applicant's Attorney Date

Care should be taken by the transit attorney to examine the federal regulations and forms of certification for this issue from time to time to ensure continued compliance by Transit Agency and Contractor.

2. Interest of Congress

Members of, and delegates to, Congress are prohibited from having any direct or indirect interest in an agreement entered into with, or on behalf of, the federal government.³² The following provision has been included in many agreements to address this issue.

Section 14.14. Interest of Members of and Delegates to, Congress.

No member of, or delegate to, the Congress of the United States shall be admitted to any share or part of this Agreement or to any benefit arising from this Agreement.

Many Transit Agencies that are also units of government or state or local government agencies have similar prohibitions in place for their own governing bodies and often for their employees as well. In these instances, the model provision for members of Congress can be adapted for use by such governments and agencies.

3. Restrictions on Lobbying the Federal Government

Federally appropriated funds that a Transit Agency receives through a federal grant, loan, contract, or cooperative agreement cannot be expended for the purpose of

paying "any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress" in connection with making, awarding, or extending any federal contract, loan, grant, or cooperative agreement.³³

Transit agencies that are recipients of such contracts, loans, grants, or cooperative agreements are required to file a specific written declaration that they have not lobbied the federal government,³⁴ and subgrantees and subcontractors of the recipient Transit Agency must also file a specific certification with the Transit Agency.³⁵ If nonappropriated funds have been spent for lobbying, a specific disclosure form must be filed at the end of the calendar quarter in which that occurs.³⁶

These required certifications and disclosures can be included as covenants and representations of the Contractor in the following manner:

Section 14.15. Restrictions on Lobbying.

Contractor warrants and represents that:

- A. It will comply, and will require its subcontractors and suppliers to comply, with the requirements of 31 U.S.C. § 1352 and 49 C.F.R. Part 20 regarding use of federal funds for lobbying;
- B. The statements contained in its certification in Exhibit I are true and correct;
- C. It will require all of its subcontractors and suppliers of any tier to provide the certification contained in Exhibit I and will transmit such certifications to Transit Agency; and
- D. If Contractor, or any of its subcontractors and suppliers of any tier, is required to make any disclosure of lobbying activities, it will do so, and require its subcontractors and suppliers to do so, in the form provided in Exhibit J.

The form of Exhibit I shall be as follows if the federal funds received are a loan rather than a grant:

EXHIBIT I-STATEMENT FOR LOAN GUARANTEES AND LOAN INSURANCE

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, US. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

Signature Date

SUBSCRIBED AND SWORN TO (or affirmed) before me on (date) _____ by (affiant) _____. He/She is personally known to me or has presented (type of identification) _____ as identification.

(Signature of Notary)

(Print or Stamp Name of Notary) (Expiration Date)

Notary Public (State): _____ Notary Seal

If other than a loan, the form of Exhibit I shall be as follows:

EXHIBIT I-CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief that:

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

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

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

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

Signature Date

SUBSCRIBED AND SWORN TO (or affirmed) before me on (date) _____ by (affiant) _____. He/She is personally known to me or has presented (type of identification) _____ as identification.

(Signature of Notary)

(Print or Stamp Name of Notary) (Expiration Date)

Notary Public (State): _____ Notary Seal

The form of Exhibit J is titled "Disclosure of Lobbying Activities," Standard Form LLL, which is available from FTA.

C. Compliance with State and Local Requirements

The transit attorney should be aware of any requirements applicable to the Agreement that may be imposed by state or local law. Such items are appropriate for inclusion in the covenants and representations article. These requirements can be wide-ranging in topic, from certification that the Contractor has not been convicted of bid-rigging or bid-rotating in public contracts,³⁷ to affidavits of the Contractor's compliance with the Cuba Democracy Act.³⁸ Additional provisions and exhibits can be added to the agreement as necessary to address these specific concerns.

XV. GENERAL PROVISIONS

Often referred to as the "boilerplate" or the "fine print," the general provisions include many of the generally applicable terms of an agreement, including establishing

rules of procedure for various events, designating applicable law, and explaining certain rules for interpretation. While many attorneys overlook these boilerplate provisions, it is worthwhile to consider the issues such provisions raise to be certain that they will assist the Transit Agency in reaching its desired result.

A. Defining the Agreement

Three provisions, when used together, will identify what is and, often just as important, what is not part of the Agreement. Models of these follow:

ARTICLE 15-GENERAL PROVISIONS

Section 15.1. Exhibits, Operating Manual, Conflicts.

Exhibits A through _____ attached to this Agreement and the Operating Manual are incorporated in and made a part of this Agreement by this reference. In case of any conflict among the provisions of this Agreement, including the exhibits and the Operating Manual, that provision which, in the opinion of Transit Agency, best promotes safe, efficient, and economical [INSERT: BUS OR RAIL, AS APPLICABLE] transportation service and best protects the Equipment shall control.

Section 15.2. Complete Agreement.

This Agreement, including the exhibits hereto and the Operating Manual, constitutes the entire agreement between the parties hereto with respect to Transportation Services and Other Services, and this Agreement supersedes any prior agreement between the parties, whether oral or written, with respect to Transportation and Other Services, except for those agreements, if any, listed on Exhibit K hereto.

Section 15.3. Amendments.

No modification, addition, deletion, revision, alteration, or other change to this Agreement shall be effective unless and until such change is reduced to writing and executed and delivered by the authorized representatives of each of the parties hereto.

Section 15.2 refers to other agreements between the parties as listed on Exhibit K. Exhibit K is intended to serve as an inventory of all other agreements that the parties may have in place and intend to maintain in force, such as leases or agreements regarding Real Property and Facilities, as discussed in model Section 5.1 and Exhibit E, and as detailed in Parts V.B and V.D of this report. An example of a possible format for Exhibit K follows:

<i>Title of Agreement</i>	EXHIBIT K-ADDITIONAL AGREEMENTS	<i>Date of Agreement</i>
	[Real estate, building and facilities leases and agreements to be added by Contractor and Transit Agency]	

B. Notice

Throughout the model Agreement, the parties are required to notify each other of various actions, events, and other items. The manner in which, and the persons and places to which, these notices should be given is described in model Section 15.4.

Section 15.4. Notices.

Any notice or other communication required or permitted to be given under this Agreement shall be in writing and shall be (A) personally delivered, or (B) delivered by a reputable overnight courier, or (C) delivered by certified mail, return receipt requested, and deposited in the U.S. mail, postage prepaid. Teletype notices shall be deemed valid only to the extent that they are (i) actually received by the individual to whom addressed and (ii) followed by delivery of actual notice in the manner described in either (A), (B) or (C) above

within 3 business days thereafter. Unless otherwise expressly provided in this Agreement, notices shall be deemed received at the earlier of (x) actual receipt; or (y) 1 business day after deposit with an overnight courier as evidenced by a receipt of deposit; or (z) 3 business days following deposit in the U.S. mail, as evidenced by a return receipt. Notices shall be directed to the parties at their respective addresses as follows: For notices and communications to Transit Agency:

[INSERT NAME AND ADDRESS OF TRANSIT AGENCY]
Attention: _____

For notices and communications to Contractor:

[INSERT NAME AND ADDRESS OF CONTRACTOR]
Attention: _____

By notice complying with the foregoing requirements of this Section, each party shall have the right to change the address or addressee or both for all future notices and communications to such party, but no notice of a change of address or addressee shall be effective until actually received.

C. Days and Time

It is valuable for the Transit Agency and Contractor to have the same understanding of how to count days and how to determine the time for purposes of the agreement. Attorneys are sometimes surprised to discover that in some types of businesses in some parts of the country, a "day" is not always a calendar day. For example, in the construction industry in some parts of the country, "day" may be understood to mean a day on which the weather allows construction work to be performed. A model provision for determining days and time follows.

Section 15.5. Calendar Days and Time.

Any reference herein to "day" or "days" shall mean calendar and not business days. If the date for giving or receiving of any notice required to be given hereunder or the performance of any obligation hereunder falls on a Saturday, Sunday, or federal or State of [INSERT NAME OF STATE] holiday, then said notice or obligation may be given or performed on the next business day after such Saturday, Sunday, or federal or State of [INSERT NAME OF STATE] holiday. Any reference herein to time of day shall refer to local time for [INSERT NAME OF CITY AND STATE].

D. Grammatical Use and Construction

To avoid confusion in matters of gender and number, it can be useful to include a provision that makes all gender pronouns interchangeable and allows singular and plural terms to be substituted where appropriate:

Section 15.6. Gender and Number.

In construing this Agreement, feminine or neuter pronouns shall be substituted for those masculine in form and vice versa, and plural terms shall be substituted for singular and singular for plural in any place in which the context requires.

E. Headings

Brief headings or titles are included in the Agreement for ease of reference. However, they are generally not intended to have a substantive effect, as stated in model Section 15.7, as follows:

Section 15.7. Headings.

The article and section headings of this Agreement are for convenience and reference only and in no way define, extend, limit, or describe the scope or intent of this Agreement or the intent of any provision hereof.

F. Applicable Laws

Several general rules defining the law that applies to the Agreement should be considered.

1. Governing State Law

The parties should determine which state law will apply to the Agreement. In instances where the Transit Agency and Contractor are entities created under the same state's law, and the Transportation Services and Other Services are performed in that state, it is not likely to be a difficult matter to determine that the substantive law of that state applies. However, where a Transit Agency is an entity consisting of several entities, and each one is organized and operating under a different state's laws, or where the services are provided in several states, the drafting of this provision is likely to be more complex. In such cases, the transit attorney should carefully examine the impact of this choice of law provision. A model provision follows:

Section 15.8. Governing Laws.

This Agreement and the rights of the parties hereunder shall be interpreted and enforced in accordance with the internal laws, but not the conflict of laws rules, of the State of [INSERT DESIRED STATE].

In order to avoid any peculiarities of the rules of conflict of laws that would cause another state's substantive law to apply, the language excluding the conflict of laws rule has been added.

2. Changes in Laws

In many cases, the laws that are applicable to the Agreement may change during the term of the Agreement. The Transit Agency is likely to desire compliance with those changes; where federal assistance is involved, the FTA will require compliance with changes in law.³⁹ A model provision follows:

Section 15.9. Changes in Law.

Unless otherwise explicitly provided in this Agreement, any reference to laws, ordinances, rules, or regulations shall include such laws, ordinances, rules, or regulations as they may be amended or modified from time to time.

Changes in law may cause increased or decreased costs to the Contractor in providing Transportation and Other Services. The model payment methods included in Article 12 of the model Agreement do not authorize changes in compensation due to changes in law. However, the transit attorney may provide for such an adjustment in the price paid the Contractor where the parties can anticipate such a change and the related cost in advance.

G. Interpretation

In situations where the attorney for the Transit Agency has prepared an agreement, and the Transit Agency and the Contractor then negotiate and revise its terms, the Transit Agency may wish to avoid possible application of the legal

presumption that the Agreement should be interpreted against the Transit Agency as the drafter of the Agreement. A model provision follows:

Section 15.10. Interpretation.

This Agreement shall be construed without regard to the identity of the party who drafted the various provisions of this Agreement. Moreover, each and every provision of this Agreement shall be construed as though all parties hereto participated equally in the drafting thereof. As a result of the foregoing, any rule of construction that a document is to be construed against the drafting party shall not be applicable to this Agreement.

H. Time of Essence

In most cases, the parties wish to provide that time is of the essence, as follows:

Section 15.11. Time of Essence.

Time is of the essence in the performance of all terms and provisions of this Agreement.

I. Severability

If a provision of the Agreement is found to be invalid or unenforceable, the transit attorney should determine whether the offending provision should be severed from the Agreement and whether or not the remaining Agreement should survive. A broad provision allowing such severability follows.

Section 15.12. Severability.

The provisions of this Agreement shall be interpreted when possible to sustain their legality and enforceability as a whole. If any provision of this Agreement is construed or held to be void, invalid, illegal, or unenforceable in any respect, the remaining part of that provision and the remaining provisions of this Agreement shall not be affected, impaired, or invalidated thereby, but shall remain in full force and effect. The unenforceability of any provision of this Agreement in a specific situation shall not affect the enforceability of that provision in any other situation.

However, it may be that some provisions are so critical to the overall transaction that the parties do not want the remaining Agreement to survive if such a critical provision is invalidated. In such cases, model Section 15.12 should be revised to become a nonseverability provision with respect to those specific critical items.

J. Third Party Beneficiaries

In most cases, the parties to an agreement do not want nonparties to that agreement to be able to claim that the nonparties have rights under the agreement. An example of a provision that denies such nonparty rights follows.

Section 15.13. No Third Party Beneficiaries.

Nothing in this Agreement shall create, or be construed to create, any third party beneficiary rights in any person or entity not a signatory to this Agreement.

K. Counterparts

The execution of the Agreement in counterparts is often desired by the parties. A model provision follows.

Section 15.14. Counterparts.

This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original.

L. Independent Contractor

The Transit Agency is likely to want to clarify that the Contractor is a separate entity from the Transit Agency for legal purposes. An example of a provision to establish that separate identity follows:

Section 15.15. Independent Contractor

In the performance of the Transportation Services and Other Services pursuant to this Agreement, Contractor is an independent contractor with the authority to control and direct the performance of the details of the Transportation Services and Other Services to be performed pursuant to this Agreement. All personnel necessary for Contractor's performance pursuant to this Agreement shall be employees of Contractor or of Contractor's subcontractors. None of the said personnel shall be deemed for any purpose to be employees, agents, or representatives of Transit Agency. No requirement of approval or other provision of this Agreement and no subsequent conduct of Transit Agency or Contractor shall be construed to create the relationship of principal and agent, partners, or joint venturers between Transit Agency and Contractor.

M. Assignment

In general, after a Transit Agency has selected a Contractor to provide the Transportation Services and Other Services, the Transit Agency will want to be assured that another entity cannot step in to provide those Services without the Transit Agency's consent. A model provision to limit the assignment of the Agreement by the Contractor follows:

Section 15.16. No Assignment.

Contractor shall not assign either its rights or its obligations under this Agreement without the prior written consent of Transit Agency, which consent may be granted or withheld at the sole discretion of Transit Agency. Any attempted or purported assignment of such rights or obligations without the prior written consent of Transit Agency shall be void and of no effect. Any successor to Contractor's rights under this Agreement shall be bound by, and shall comply with, all of the provisions, conditions, and requirements of this Agreement.

If the parties wish to allow the assignment of the Agreement under certain circumstances, this provision can be modified accordingly.

N. Nonwaiver

The Transit Agency should consider protecting itself against allegations that it waived or gave up various rights under the agreement through an action other than a knowing waiver. An example of such a provision follows:

Section 15.17. Nonwaiver.

Transit Agency shall not be deemed to have waived any right, provision, covenant, condition, or payment under this Agreement unless such waiver is in writing and signed by an authorized officer or director of Transit Agency. No delay or omission by Transit Agency in exercising any right under this Agreement, and no failure by Transit Agency to enforce any provision, covenant, or condition of this Agreement, and no payment or receipt of any money by Transit Agency under this Agreement, shall operate as a waiver of such right, provision, covenant, condition, or payment, or any other right, by Transit Agency. All the rights and remedies of Transit Agency under this Agreement shall be cumulative and not exclusive and may be exercised singly or concurrently by Transit Agency. The waiver or exercise of any remedy by Transit Agency shall not be construed as a waiver of any other remedy available under this Agreement or under general principles of law or equity.

O. Other and Future Agreements

The Transit Agency should consider whether it wishes to preserve its right to enter into agreements with others for all or part of the Transportation Services and Other Services. In addition, it should consider whether the current Agreement establishes any precedent for, or obligation to enter into, future agreements. Two model provisions on these topics follow:

Section 15.18. Other Agreements Not Prohibited.

Nothing in this Agreement shall be deemed to prohibit Transit Agency from entering into additional or alternative agreements or arrangements to provide replacement, additional, supplementary, or duplicative service in the area served by Contractor.

Section 15.19. No Future Obligations.

Nothing in this Agreement or the parties' performance thereof shall be construed to create any obligation to renew this Agreement after the Agreement Term or to enter into any other agreement of any kind or nature.

ENDNOTES

¹ TEAL and MORLOCK, U.S. DEPT OF TRANSPORTATION, ESTIMATING THE COST IMPACTS OF TRANSIT SERVICE CONTRACTING, 7-3 (1987).

² See discussion of Article 2, Definitions, in Part II of this report.

³ The Scope of Work for this Project did not include the preparation of a model request for proposals or bid package. The state law requirements for proposal or bidding processes vary widely from state to state and should be examined by the transit attorney as part of preparation of such documents. However, in instances where a request for proposal (RFP) or bidding process is required, it is always wise to include in the RFP or bid package the form of agreement that the Transit Agency will desire or require, in order to avoid surprises on both sides that may substantially impact the services to be provided, the price to be paid, or other contract terms.

⁴ Note that the Operating Manual is incorporated by reference into the agreement in model Section 15.2.

⁵ Note that all exhibits are incorporated by reference into the agreement in model Section 15.2.

⁶ Note that the Operating Manual is incorporated by reference into the agreement in model Section 15.2.

⁷ If no separate Preventive Maintenance Program is in place, this reference can be omitted.

⁸ Note that model Section 3.1G contains certain prohibitions on other uses of the Equipment for other services, such as prohibiting charter and school bus operations. Receipt of federal assistance involves strict rules on whether and when recipients of such assistance can provide charter and school bus service. 49 U.S.C. § 5323(d), (f), 49 C.F.R. Pts. 604 and 605 (1995). Applicable laws governing such uses should be examined and the provisions

of Sections 3.1G and 4.3A should be made consistent.

⁹ The subject of advertising on transit vehicles will be addressed in a forthcoming TRB report currently being prepared but not yet issued.

¹⁰ 49 U.S.C. § 5333(b).

¹¹ For a complete discussion of this provision, its development, and its implications, see *Transit Labor Protection--A Guide to Section 13(c) Federal Transit Act*, Transit Cooperative Research Program, LEGAL RESEARCH DIGEST, June 1995.

¹² For example, see 49 C.F.R. § 27.19(a), pertaining to "Compliance with Americans with Disabilities Act Requirements and UMTA Policy."

¹³ 49 C.F.R. § 23.43(a).

¹⁴ 49 C.F.R. § 23.43(c).

¹⁵ FTA Master Agreement, § 8(b) (1996).

¹⁶ 5 U.S.C. § 552a *et seq.*

¹⁷ FTA Circular C4220.1D, §7.A.

¹⁸ FTA Master Agreement, §15 (1996).

¹⁹ FTA Circular C4220.1D, §§ 8-9.

²⁰ See also Article 12 of the model agreement regarding the Approved Budget and payments to Contractor.

²¹ An example of such an extended immunity is found in the Texas Transportation Code, V.T.C.A.-Transportation Code §452.056(d) (1997).

²² Some caution is required, however, in this case, to assure that the coverage limits provided by the Contractor's policy or policies are sufficient to cover the risks of all agencies relying on the same policy or policies.

²³ 49 C.F.R. § 18.36(h) (1995).

²⁴ See, e.g., FTA Master Agreement, § 15 (m) (1996).

²⁵ FTA Master Agreement, § 17(p) (1995); FTA Circular C4220.1D, § 13. Interestingly, the 1996 edition of the FTA Master Agreement does not

contain the quoted language. However, liquidated damages are still mentioned in Section 39(b) of the 1996 edition. The reason for this change is not clear from the text of the 1995 and 1996 editions.

²⁶ 49 C.F.R. § 29.100.

²⁷ URBAN MASS TRANSIT ADMINISTRATION, U.S. DEPT OF TRANSPORTATION, CIRCULAR C2015.1, § 3 (1989); 49 C.F.R. §29.110(a)(1)(i) (1995).

²⁸ 49 C.F.R. § 29.510(a) and Appendix A (1995).

²⁹ URBAN MASS TRANSIT ADMINISTRATION, U.S. DEPT OF TRANSPORTATION, CIRCULAR C2015.1; 49 C.F.R. § 29.110(a)(1)(ii) (1995).

³⁰ 49 C.F.R. Pt. 29, Appendix A (1995).

³¹ 29 C.F.R. Pt. 29, Appendix B (1995).

³² 18 U.S.C. § 431.

³³ 31 U.S.C. § 1352(a); 49 C.F.R. § 20.100(a) (1995).

³⁴ 31 U.S.C. § 1352(b)(1)-(4); 49 C.F.R. § 20.100(b), Appendix A (1995).

³⁵ 31 U.S.C. § 1352(b)(5); 49 C.F.R. § 20.100(c) Appendix A (1995).

³⁶ 49 C.F.R. § 20.110(c), Appendix B (1995).

³⁷ See, e.g., 720 ILCS 5/33E-1 *et seq.* (1994).

³⁸ See Dade County, Florida Resolution No. R-656-93.

³⁹ FTA Master Agreement, § 2 (d) (1996).

APPENDIX A

OUTLINE OF MODEL AGREEMENT

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