

# South Bay Cities Council of Governments

November 21, 2013

TO: SBCCOG Board of Directors

FROM: Measure R Oversight Committee

RE: Technical Bench Contract Hold Harmless Policy

During contract negotiations with South Bay Technical Bench Consultants, several firms offered alternate language in the Hold Harmless section of the contract. After reviewing the numerous suggestions, Mike Jenkins, the SBCCOG legal counsel, recommended specific language to respond to the concerns. That language has been incorporated into the draft contracts and re-circulated to the concerned firms.

The original contract reads as follows:

## **XI**

### **HOLD HARMLESS**

Consultant shall indemnify, defend with counsel approved by the SBCCOG, and hold harmless the SBCCOG, its officers, officials, employees and volunteers from and against all liability, loss, damage, expense, cost (including without limitation reasonable attorney's fees, expert fees and all other costs and fees of litigation) of every nature arising out of or in connection with the Consultant's performance of work hereunder or its failure to comply with any of its obligations contained in this AGREEMENT, regardless of the SBCCOG's passive negligence, but excepting such loss or damage which is caused by the sole active negligence or willful misconduct of the SBCCOG. Should the SBCCOG in its sole discretion find the Consultant's legal counsel unacceptable, then the Consultant shall reimburse the SBCCOG its costs of defense, including without limitation reasonable attorney's fees, expert fees and all other costs and fees of litigation. The Consultant shall promptly pay any final judgment rendered against the SBCCOG (and its officers, officials, employees and volunteers) covered by this indemnity obligation. It is expressly understood and agreed that the foregoing provisions are intended to be as broad and inclusive as is permitted by the law of the State of California and will survive termination of this Agreement.

The new language reads as follows:

## **XI**

### **HOLD HARMLESS**

Consultant shall indemnify and hold harmless SBCCOG from and against all liability arising out of or in connection with Consultant's negligent or wrongful acts, errors or omissions in the performance of work hereunder or its failure to comply with any of its obligations contained in this Agreement. In the event that SBCCOG is named as a party defendant in a lawsuit alleging injury as a result of Consultant's negligent or wrongful performance under this Agreement, Consultant shall defend SBCCOG with counsel approved by SBCCOG, which approval will not be unreasonably withheld, and bear responsibility for attorneys fees, expert fees and all other costs and expenses of litigation. Should conflict of interest principles preclude a single lawyer from representing both SBCCOG and Consultant, or should SBCCOG in its reasonable discretion find Consultant's legal counsel unacceptable, then Consultant shall reimburse the SBCCOG its costs of defense, including without limitation reasonable attorneys fees, expert fees and all other costs and expenses of litigation. Consultant shall promptly pay any final, non-appealable judgment rendered against the SBCCOG. It is expressly understood and agreed that the foregoing provisions are intended to be as broad and inclusive as is permitted by the law of the State of California but the indemnity obligation will exclude such loss or damage which is determined to be caused by the sole negligence or willful misconduct of the SBCCOG. The obligations established by this paragraph will survive termination of this Agreement.

For purposes of this paragraph:

- SBCCOG means the SBCCOG Board of Directors and its subordinate bodies, elected and appointed SBCCOG officials and officers, SBCCOG employees and authorized agents and volunteers of the SBCCOG.
- Liability means any claims or causes of action raised or asserted by, damage to, loss or expense incurred by or judgments rendered in favor of persons or entities not a party to this Agreement.
- The types of damages included within this indemnity obligation include, but are not limited to, personal injury, bodily injury, death, loss of use, and damage to or loss of real and personal property.
- The indemnity obligation of this paragraph includes all forms of negligent acts, errors and omissions, wrongful behavior and willful misconduct (including but not limited to breaches of professional standards of care, if applicable, and breach of contract) by Consultant and any of its officers, agents employees and sub-consultants.

Mr. Jenkins noted that some of the firms might continue to object to the new clause and suggested that the SBCCOG might entertain an alternative mutual indemnity clause. At that juncture, the SBCCOG will need to make a policy decision on how important it is to retain their services or whether to shift to a mutual indemnity clause, in which each party bears responsibility for its own negligent acts. If the SBCCOG is comfortable with using a mutual indemnity approach, the SBCCOG Board could authorize staff to use the following alternate clause provided by Mr. Jenkins:

## **XI**

### **HOLD HARMLESS**

CONSULTANT shall indemnify, defend with counsel approved by SBCCOG, and hold harmless SBCCOG, its officers, officials, employees and volunteers from and against all liability, loss, damage, expense, cost (including without limitation reasonable attorneys fees, expert fees and all other costs and fees of litigation) of every nature arising out of or in connection with CONSULTANT's performance of work hereunder or its failure to comply with any of its obligations contained in this AGREEMENT to the degree determined in a final and non-appealable judgment to be proportionate to its liability. Should SBCCOG in its reasonable discretion find CONSULTANT'S legal counsel unacceptable, then CONSULTANT shall reimburse the SBCCOG its costs of defense, including without limitation reasonable attorneys fees, expert fees and all other costs and fees of litigation. The CONSULTANT shall promptly pay any final judgment rendered against the SBCCOG (and its officers, officials, employees and volunteers) with respect to claims determined by a Trier of fact to have been CONSULTANT's allocated share of liability. It is expressly understood and agreed that the foregoing provisions are intended to be as broad and inclusive as is permitted by the law of the State of California and will survive termination of this Agreement.

### **RECOMMENDATION**

The Measure R Oversight Committee recommends that the SBCCOG Board approve the option being offered to consultants that have objected to the wording in our original contract for indemnifying the SBCCOG as already distributed. For those consultants that continue to object to this revised language, staff can offer the alternative mutual indemnity option for the XI Hold Harmless clause authored by Mike Jenkins to prospective SBHP Technical Bench consultant firm that have not executed their bench contract and continue to object to the current language. If the consultant firm is not satisfied with either of these alternatives, they will not be invited onto the bench.