

Riverside County Transportation Commission

January 25, 2012

Mr. Vincent Mammano
Division Administrator
Federal Highway Administration
650 Capitol Mall, Suite 4-100
Sacramento, CA 95814

Subject: Special Experimental Project No. 14 (SEP-14)
Request for the SR-91 Corridor Improvement Design-Build Project
Riverside County Transportation Commission, Riverside County, CA
State Project Number: 08-00000136
Federal Aid Project Number: to be assigned/EA 08-0F540

Dear Mr. Mammano:

The Riverside County Transportation Commission (RCTC) has commenced with the procurement process for the SR-91 Corridor Improvement Project ("Project"). The Project is being developed using the design-build delivery method pursuant to California Public Contract Code section 6800 et. seq. RCTC is seeking federal aid for the Project, through the TIFIA and TIGER programs, and is structuring the procurement to comply with applicable federal requirements.

RCTC plans to award the design-build contract based on a best value determination using the sum of weighted values for the proposal present value [the price as adjusted to reflect the dollar value of each proposer's schedule, as calculated pursuant to a formula set forth in the Request for Proposals (RFP)] and technical score, with the design-build contract being awarded to the proposer whose proposal has the highest adjusted score. This approach gives the proposers the flexibility to advance beyond the bare minimum approach and the technical requirements required by the RFP and offers the best value to RCTC.

RCTC intends to allow the proposers to submit Alternate Technical Concepts (ATCs), consistent with 23 CFR 636.209, for review and approval (or disapproval) by RCTC during the pre-proposal period. The ATCs will be approved only if they meet certain minimum requirements and are otherwise acceptable to RCTC. 23 CFR 636.209 permits ATCs for design-build procurements, but states, "Alternate technical concept proposals may supplement, but not substitute for base proposals that respond to the Request For Proposal (RFP) requirements." We understand that the concern underlying this requirement is to ensure fair and open competition, and to make sure that all proposers are competing for the same project.

Accordingly, RCTC hereby requests that the requirement to submit separate proposals for the "base" and "alternate" technical concepts be waived for the Project, allowing each proposer the opportunity to submit ATCs for pre-approval and then to submit a proposal with or without ATCs. The process, which requires preapproval by RCTC of deviations

from design and other technical requirements of the design-build contract and other contract documents, has been carefully crafted by RCTC to avoid any potential unfairness. The ATC process gives RCTC the ability to factor the proposer's technical solutions into the selection process, allowing a true "best value" selection; and gives RCTC access to solutions from all proposers. It also gives the successful proposer a head start on implementation of its ATCs, and avoids unnecessary costs for proposers to advance a base design that ultimately will not be used.

Imposing a requirement for the proposers to submit separate proposals would impose an unnecessary burden on both the proposers and RCTC, and would likely deter proposers from submitting ATCs. RCTC has addressed the underlying concern regarding fairness by including minimum criteria for ATCs in the RFP. The deviations that will be allowed will not change the character of the Project, change tolling operations or increase the amount of time required to complete the Project. In addition, both the draft Instructions to Proposers (ITP) and design-build contract place the cost and delay risk associated with any additional permits, governmental approvals and third party approvals necessitated by the ATC on the Design-Builder. If the Design-Builder is unable to obtain approvals or satisfy other conditions identified by RCTC that are necessary to implement the ATC, the Design-Builder is required to develop the Project in accordance with the design-build contract and other contract documents without regard to the ATC and without any additional cost or an extension of time. Given these protections, RCTC believes that a waiver of the requirement is appropriate.

Following is information supporting the waiver request:

- a. Review process and requirements. Attachment 1 is an excerpt of the ATC provisions from the ITP included in the RFP for the Project.
 - ITP Section 3.1 sets forth RCTC's rationale behind the use of ATCs - further opportunity to incorporate innovation and creativity into the proposals, in turn allowing RCTC to consider proposer ATCs in making the selection decision, to avoid delays and potential conflicts in the design and/or construction associated with deferring of reviews of ATCs to the post-award period, and, ultimately, to obtain the best value for the public. This section also cites the ATC approval criteria of "equal to or better" and describes concepts that would not be eligible for consideration as ATCs.
 - ITP Section 3.2 sets forth the detailed submittal requirements/contents of an ATC, including a requirement that proposers submit ATC ideas to RCTC for consideration prior to making a formal ATC submittal.
 - ITP Sections 3.2.2, 3.2.4, and 3.3.3 lay out the specific submittal and review process for ATCs, including actions that may be taken by RCTC in response to ATCs.

- ITP Section 3.3 outlines the determinations that may be made by RCTC on submitted ATCs. It also provides a notice to all proposers that approval of an ATC constitutes pre-approval of a change from specific requirements of the contract documents that would otherwise apply.
 - ITP Section 3.3 also includes an acknowledgement by each proposer submitting a proposal that the opportunity to submit ATCs was offered to all proposers.
 - ITP Section 3.5 addresses the confidential nature of ATCs. Confidentiality is a critical issue with proposers, who need to be reassured that their innovative thinking and concepts will not be shared with other proposers. ITP Section 2.5.2 (set forth in Attachment 2) concerning one-on-one meetings, further reinforces the confidentiality of the ATC process.
 - ITP Section 3.4 authorizes proposers to incorporate pre-approved ATCs into their proposals.
- b. How the ATC will be considered in the best value determination. Each proposer submits only one proposal in response to the RFP. The RFP does not distinguish between a proposal that does not include any ATCs and proposals that include ATCs. Both types of proposals are evaluated against the same technical evaluation factors, and a highest adjusted score determination is made in the same manner. A pre-approved ATC may or may not result in higher quality (technical rating) in a particular evaluation factor and may or may not result in a lower price. However, in allowing ATCs, RCTC anticipates that both the outcomes of higher quality and lower price will occur.
- c. What happens if ATC is not feasible. The contract documents included in the RFP include provisions making it clear that the Design-Builder is responsible for both (i) designing the project in conformance with all requirements of the contract documents (including ATCs included in its proposal) and (ii) for obtaining all third party approvals (including environmental approvals) required for ATCs. ITP Sections 3.1 and 3.2.4, as well as Section 1.11 of the design-build contract (Attachment 3) provide that if the Design-Builder fails to obtain a required environmental or other third party approval for an ATC, the Design-Builder will be required to comply with the original requirements of the RFP.
- d. Timeline for ATC approvals. Please refer to Attachment 1.
- e. Betterments. As noted above, RCTC wishes to encourage ATCs that will improve project quality as well as ATCs that reduce project costs or schedule without reducing quality. The evaluation process described above allows flexibility for the evaluators to consider quality enhancements.

Thank you for your consideration and assistance. If you have any further questions or comments, please do not hesitate to contact me or Michael Blomquist of my staff at 951.787.7141.

Sincerely,



Anne Mayer
Executive Director
Riverside County Transportation Commission

Attachments

cc: Tay Dam, FHWA Project Oversight Manager
Syed Raza, Caltrans SR-91 Corridor Director
Michael Blomquist, RCTC Toll Program Director

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ATTACHMENT 1: ITP PROVISIONS CONCERNING ATCS

3. ALTERNATIVE TECHNICAL CONCEPT SUBMITTALS

3.1 Alternative Technical Concepts General

Sections 3.1 through 3.5 set forth a process for pre-proposal review of ATCs conflicting with the requirements for design and construction of the Project, or otherwise requiring a modification of the Technical Provisions. ATCs also include those concepts that do not require a modification of the Technical Provisions, but that, if implemented, would require further environmental evaluation of the Project or a portion of the Project. This process is intended to allow Proposers to incorporate innovation and creativity into their Proposals, in turn allowing RCTC to consider Proposer ATCs in making the selection decision, to avoid delays and potential conflicts in the design and/or construction associated with deferring of reviews of ATCs to the post-award period, and, ultimately, to obtain the best value for the public.

ATCs eligible for consideration hereunder shall be limited to those deviations from the requirements of the as-issued Contract Documents, or those concepts requiring further environmental evaluation, that result in performance and quality of the end product that is equal to or better than the performance and quality of the end product absent the deviation or concept, as determined by RCTC, in its sole discretion. A concept is not eligible for consideration as an ATC if, in RCTC's sole judgment, it is premised upon or would require (a) a reduction in Project scope, performance or reliability; (b) the addition of a separate RCTC or Caltrans project to the Contract (such as expansion of the scope of the Project to include additional roadways), (c) changes or additions to tolling operations, or (d) an increase in the amount of time required for Substantial Completion or any other Completion Deadline. If an ATC that would require further environmental evaluation of the Project is approved by RCTC for inclusion in a Proposal, RCTC may require the Design-Builder to bear the schedule and cost risk associated with the additional environmental evaluation. If the Design-Builder is not able to obtain the approvals or satisfy the other conditions identified by RCTC that are necessary to implement an ATC, the Design-Builder will be obligated to develop the Project in accordance with the Contract Documents without regard to the ATC and without additional cost or extension of time (and RCTC may be entitled to a reduction in the Contract Price and/or schedule as set forth in the Contract Documents).

Any ATC that has been pre-approved may be included in the Proposal, subject to the conditions set forth herein or in any approval letter.

If a Proposer is unsure whether a concept is consistent with the requirements of the RFP or if that concept would be considered an ATC by RCTC, RCTC recommends that Proposer submit such concept for review as an ATC.

3.2 Pre-Proposal Submission of ATCs

Proposer may submit ATCs for review to RCTC at the address specified in Section 2.2.1, until the applicable last date and time for submittal of ATCs identified in Section 1.4. All ATCs shall be submitted in writing, with a cover sheet identifying Proposer and

stating "SR 91 Corridor Improvement Project – Confidential ATCs." Proposer shall clearly identify the submittal as a request for review of an ATC under this ITP. If Proposer does not clearly designate its submittal as an ATC, the submission will not be treated as an ATC by RCTC. ATC submittals shall include five copies of a narrative description of the ATC and include the information described below.

3.2.1 Pre-ATC Submittal Requirements

Prior to making an ATC Submittal, Proposers shall deliver a Pre-ATC Submittal to RCTC, addressing the intended ATC. Pre-ATC Submittals shall be delivered to the address specified in Section 2.2.1, and shall include:

- (a) a general description and conceptual drawings of the configuration of the ATC or other appropriate descriptive information;
- (b) the locations where, and an explanation of how, the ATC will be used on the Project;
- (c) a general description of how the ATC will impact toll operations;
- (d) a general description of any reduction in the time period necessary to design and construct the Project resulting from implementing the ATC; and
- (e) a preliminary estimate of the Contract Price adjustment, should the ATC be approved and implemented.

The Pre-ATC Submittals are intended to afford Proposers an opportunity to have RCTC review the Pre-ATC Submittal for purposes of discussing such potential ATCs during the second one on one meeting described in Section 1.4. Pre-ATC Submittals shall not constitute ATC Submittals pursuant to Section 3.2.2 and a Proposer that wishes to utilize an ATC must make a formal ATC Submittal pursuant to Section 3.2.2.

3.2.2 ATC Submittal Requirements

ATC Submittals shall include:

- (a) a sequential ATC number identifying Proposer and the ATC number (multi-part or multi-option ATCs shall be submitted as separate individual ATCs with unique sequential numbers);
- (b) a description and conceptual drawings of the configuration of the ATC or other appropriate descriptive information, including a traffic operational analysis, if appropriate;
- (c) the locations where, and an explanation of how, the ATC will be used on the Project;
- (d) any changes in roadway or toll operations requirements associated with the ATC, including ease of operations;

- (e) any changes in routine or capital maintenance requirements associated with the ATC, including ease of maintenance;
- (f) any changes in the anticipated service life of the item(s) comprising the ATC or affected by the ATC;
- (g) any reduction in the time period necessary to design and construct the Project resulting from implementing the ATC, including, as appropriate, a description of method and commitments;
- (h) references to requirements of the RFP which are inconsistent with the proposed ATC, an explanation of the nature of the deviations from said requirements, and a request for approval of such deviations;
- (i) an analysis justifying use of the ATC and why the deviation, if any, from the requirements of the RFP should be allowed;
- (j) a preliminary analysis and quantitative discussion of potential impacts on vehicular traffic (both during and after construction), environmental permitting, community impact, safety, and life-cycle Project and infrastructure costs, including impacts on the cost of repair, replacement, maintenance and operation;
- (k) a description of any impacts on the land or facilities of third parties, including private owners, Governmental Entities; Utility owners, and railroads
- (l) if and what additional right of way will be required to implement the ATC (and Proposers are advised that they shall (i) be solely responsible for the costs of acquisition of any such right-of-way, and the costs for obtaining any necessary Environmental Approvals; (ii) not be entitled to any Change Order for time or money as a result of Site conditions (i.e., Hazardous Materials, Differing Site Conditions, geotechnical issues, Utilities, etc.) on such additional right of way; and (iii) not be entitled to any Change Order for additional time or money as a result of any delay, inability or cost associated with the acquisition of such right-of-way);
- (m) a description of other projects where the ATC has been used, the degree of success or failure of such usage, and names and contact information including phone numbers and e-mail addresses for project owner representatives that can confirm such statements;
- (n) a description of added risks to RCTC or third parties associated with implementing the ATC;
- (o) an estimate of any additional RCTC, Design-Builder and third-party costs associated with implementation of the ATC;
- (p) an estimate of the Contract Price adjustment, should the ATC be approved and implemented;

(q) an estimate of the schedule adjustment, should the ATC be approved and implemented; and

(r) an analysis of how the ATC is equal to or better in quality, performance, and reliability than the requirements of the Contract Documents.

3.2.3 Proposer shall not make any public announcement or disclosure to third parties concerning any ATC until after pre-approval (including conditional pre-approval) from RCTC has been obtained. Following pre-approval (including conditional pre-approval), if a Proposer wishes to make any such announcement or disclosure, it must first notify RCTC in writing of its intent to take such action, including details as to date and participants, and obtain RCTC's prior written consent, in its sole discretion, to do so.

3.2.4 If implementation of an ATC will require approval by a third party (e.g., a Governmental Entity), Proposer will have full responsibility for, and bear the full risk of, obtaining any such approvals after award of the Contract and submission of data; provided, however, that RCTC shall retain its role as liaison with any Governmental Entities as more particularly described in the Contract Documents. If any required third-party approval is not subsequently granted with the result that Proposer must comply with the requirements of the original RFP, Proposer will not be entitled to a Change Order for additional compensation or time under the Contract (and RCTC may be entitled to a reduction in the Contract Price and/or schedule as set forth in the Contract Documents).

3.2.5 Proposers are advised that regarding any ATC they shall:

(a) be solely responsible for the acquisition of any additional right of way, including the cost thereof and obtaining any necessary Governmental Approvals;

(b) not be entitled to any additional time or money as a result of Site conditions (i.e., Hazardous Materials, Differing Site Conditions, geotechnical issues, Utilities, etc.) on such additional right of way; and

(c) not be entitled to any additional time or money as a result of any delay, inability or cost associated with the acquisition of such right of way.

3.2.6 If RCTC determines, based on a proposed ATC or otherwise, that the RFP contains an error, ambiguity, or mistake, RCTC reserves the right to modify the RFP to correct the error, ambiguity, or mistake, regardless of any impact on a proposed ATC (including that such ATC no longer qualifies or is eligible for consideration as an ATC).

3.3 RCTC Review of ATCs

RCTC may request additional information regarding proposed ATCs at any time and will, in each case, return responses to each Proposer regarding its ATC on or before the applicable last date set forth in Section 1.4, provided that RCTC has received all required and requested information regarding such ATC.

RCTC's responses will be limited to one of the following statements:

- (a) the ATC is acceptable for inclusion in the Proposal;
- (b) the ATC is not acceptable for inclusion in the Proposal;
- (c) the ATC is not acceptable in its present form, but may be acceptable upon the satisfaction, in RCTC's sole discretion, of certain identified conditions which must be met or clarifications or modifications that must be made;
- (d) the submittal does not qualify as an ATC but may be included in Proposer's Proposal because it appears to be within the requirements of the RFP (RCTC may not reject such submittal in the Proposal for the reason that it appears to be an ATC; provided, however, that should it turn out that such submittal is not within the requirements of the RFP, RCTC reserves the right to require compliance with the requirements of the RFP and Proposer will not be entitled to modify its Proposal or obtain a Change Order for additional compensation or time under the Contract Documents); or
- (e) the submittal does not qualify as an ATC and may not be included in the Proposer's Proposal.

RCTC will make a preliminary determination on whether to accept and approve an ATC for submission. However, Proposer will be responsible for ensuring that the final submittal complies with the requirements of the RFP.

Approval of an ATC will constitute a change in the specific requirements of the Contract Documents associated with the approved ATC for that specific Proposer. Each Proposer, by submittal of its Proposal, acknowledges that the opportunity to submit ATCs was offered to all Proposers, and waives any right to object to RCTC's determinations regarding acceptability of ATCs.

RCTC's rejection of a pre-Proposal submission of an ATC will not entitle Proposer to an extension of the Proposal Due Date or the date that the ATCs are due; provided, however, that the foregoing shall not limit RCTC's absolute and sole right to modify the Proposal Due Date or any other date in connection with this procurement.

RCTC anticipates that its comments provided to a Proposer will be sufficient to enable Proposer to make any necessary changes to its ATCs. However, if a Proposer wishes additional clarifications regarding necessary changes, Proposer may provide a written request for clarifications under Section 2.3.1.

3.4 Incorporation of ATCs in the Contract Documents

Following award of the Contract, the ATCs that were pre-approved by RCTC and incorporated in the Proposal by the successful Proposer shall be included in the Contract Documents. If RCTC responded to any ATC by stating that it would be acceptable if certain conditions were met, those conditions will become part of the Contract Documents. The Contract Documents will be conformed prior to execution of the Contract to reflect the ATCs, including any RCTC conditions thereto. Notwithstanding anything to the contrary herein, if Design-Builder does not comply with one or more RCTC conditions of pre-approval for an ATC, or Design-Builder fails to obtain a required third party approval for an

ATC, Design-Builder will be required to comply with the original requirements of the Contract Documents without regard to the ATC and without additional cost or extension of time as set forth in the Contract Documents (and RCTC may be entitled to a reduction in the Contract Price and/or schedule as set forth in the Contract Documents).

Prior to execution of the Contract, ATCs from unsuccessful Proposers may, in RCTC's sole discretion, be presented to the selected Design-Builder for possible incorporation in the Contract Documents during negotiation of the final terms of the Contract pursuant to Section 5.11. In addition, following execution of the Contract, ATCs from unsuccessful Proposers may, in RCTC's sole discretion, be presented to the selected Design-Builder as an RCTC Change Order in accordance with the Contract.

3.5 Confidentiality

Subject to the provisions of this ITP and the Public Records Act, all ATCs and all communications regarding ATCs will remain confidential until award or cancellation of the procurement, provided that, upon identification of the apparent best value Proposer, ATCs will be subject to disclosure to the apparent best value Proposer. Upon award or cancellation, such confidentiality rights shall be of no further force and effect except as otherwise allowed under the Public Records Act and applicable Governmental Rules. By submitting a Proposal, Proposer agrees, if it is not selected, to disclosure of its work product to the successful Proposer.

ATTACHMENT 2: ADDITIONAL ITP PROVISIONS

2.5.2 One-on-One Meetings

RCTC intends to conduct one-on-one meetings with each Proposer on the dates set forth in Section 1.4, and on such other dates designated by RCTC in writing to the Proposers, to discuss issues and clarifications regarding the RFP and Proposer's ATCs. RCTC reserves the right to disclose to all Proposers any issues raised during the one-on-one meetings, except to the extent that RCTC determines, in its sole discretion, such disclosure would impair the confidentiality of an ATC or would reveal a Proposer's confidential business strategies. Participation at such meetings by the Proposers shall be mandatory; provided, however, if an ATC or a question concerning an ATC raises an issue with respect to which RCTC determines that it is appropriate to provide a general response, RCTC will modify the question to remove the information that RCTC determines is confidential.

The one-on-one meetings are subject to the following:

- The meetings are intended to provide Proposers with a better understanding of the RFP.
- RCTC will not discuss with any Proposer any Proposal or ATC other than its own.
- Proposers shall not seek to obtain commitments from RCTC in the meetings or otherwise seek to obtain an unfair competitive advantage over any other Proposer.
- No aspect of these meetings is intended to provide any Proposer with access to information that is not similarly available to other Proposers, and no part of the evaluation of Proposals will be based on the conduct or discussions that occur during these meetings.

Persons attending the one-on-one meetings will be required to sign an acknowledgment of the foregoing rules and to identify all participants from Proposer whether attending in person or by phone.

The protocols that will apply in connection with any such one-on-one meetings are set forth in Exhibit H to this ITP.

2.5.3 Questions and Responses During One-on-One Meetings

During one-on-one meetings, Proposers may ask questions and RCTC may provide responses. However, any responses provided by RCTC during one-on-one meetings may not be relied upon unless questions were submitted in writing and RCTC provided written responses in accordance with Section 2.3.1 (and then, only to the extent provided in Section 2.3.1 and in the Contract Documents). The questions and RCTC's responses will be provided in writing to all Proposers, except to the extent such questions

are deemed by RCTC to contain confidential or proprietary information relating to a particular Proposer's Proposal or ATCs. See also Section 2.3.1, Section 2.5.2, and Section 2.6 regarding confidentiality of questions and ATCs.

2.6.3 Confidential Materials

RCTC will accept materials clearly and prominently labeled "TRADE SECRET" or "CONFIDENTIAL" by the submitting party. In addition, each Proposal must include a cover sheet listing the pages and forms on which there is confidential information. Any such proprietary information, trade secrets or confidential commercial and financial information that a Proposer believes should be exempted from disclosure shall be specifically identified and marked as such. Blanket, all-inclusive identifications by designation of whole sections as containing proprietary information, trade secrets, or confidential commercial or financial information are discouraged and may be deemed invalid. Any specific proprietary information, trade secrets, or confidential commercial and financial information shall be clearly identified as such and shall be accompanied by a concise statement of reasons supporting the claim. RCTC will endeavor to advise the submitter of any request (pursuant to Government Code sections 6250 et seq. and any other applicable laws) for disclosure or release of any material properly labeled as proprietary, trade secret, or confidential so as to allow the submitter the opportunity to seek a court order to protect such materials from disclosure. Under no circumstances will RCTC or Caltrans be responsible or liable to a Proposer or any other party as a result of disclosing any such labeled materials, whether the disclosure is deemed required by law, by an order of court, or occurs through inadvertence, mistake, or negligence on the part of RCTC, Caltrans, or their respective officers, employees, contractors, consultants, or agents.

RCTC will not advise a submitting party as to the nature or content of documents entitled to protection from disclosure under Government Code sections 6250 et seq. or other California laws, as to the interpretation of such laws, or as to definition of trade secret. The submitting party shall be solely responsible for all determinations made by it under applicable laws, and for clearly and prominently marking each and every page or sheet of materials with "TRADE SECRET" or "CONFIDENTIAL" as it determines to be appropriate. Each submitting party is advised to contact its own legal counsel concerning the effect of applicable laws to the submitting party's own circumstances.

ATTACHMENT 3: CONTRACT PROVISIONS

1.11 Incorporation of ATCs

1.11.1 In the event that ATCs incorporated into the Contract Documents require additional environmental approvals, analysis, or assessment prior to implementation, Design-Builder shall (a) be solely responsible for the cost and schedule impact of any related review, analysis, assessment, approvals, permits and findings; (b) be solely responsible for the risk that any approvals, permits or findings are not granted, issued, approved or obtained or timely granted, issued, approved or obtained; and (c) not be entitled to any increase in the Contract Price or extension of the Completion Deadlines as a result of any delay or cost associated with the environmental review, analysis, approvals, permits or findings related to such ATC, including the inability to obtain such approvals, permits or findings.

1.11.2 If the Contract Documents incorporate any approved ATCs and: (a) Design-Builder does not comply or is unable to comply with one or more RCTC conditions of pre-approval for the ATC (including the obligation to obtain any required additional environmental approvals, analysis or assessment), (b) Design-Builder is unable to obtain a third party approval required for the ATC, or (c) the ATC otherwise proves to be infeasible, then Design-Builder shall comply with the Contract Document requirements that would have been applicable but for the ATC, without any increase in the Contract Price, extension of the Completion Deadlines or any other Change Order. In such case, RCTC shall be entitled to (i) a reduction in the Contract Price in an amount equal to the value of the ATC, as reasonably determined by RCTC, but which in no event shall be less than cost (plus mark-up and profit) of the ATC as reflected in the proposal price, and (ii) a reduction in the time allowed to achieve substantial completion in an amount equal to the estimated schedule savings as a result of the ATC not being implemented.

1.11.3 ATCs contained in proposals submitted by unsuccessful proposers may, in RCTC's sole discretion, be presented to Design-Builder as a change notice in accordance with Section 13.2.1 of this Contract.