

FIRST AMENDMENT TO WAVE PROJECT AGREEMENT

This First Amendment to Wave Project Agreement (“Amendment”) is entered into this _____ day of _____, 2017, by the State of Florida, Department of Transportation, an agency of the State of Florida (the “Department”) and Broward County, Florida, a charter county and political subdivision of the State of Florida (the “County”).

RECITALS

A. The Department and the County are parties to the Wave Project Agreement dated June 14, 2016 (the “Original Agreement”) regarding the funding, design, construction, operation and maintenance of the 2.8 mile modern streetcar known as The Wave Streetcar.

B. Pursuant to section 6.01 of the Original Agreement, the Parties are entering into this Amendment to modify the terms of the Original Agreement.

AGREEMENT

The parties agree the terms of the Original Agreement are amended as follows:

1. Recital J is amended as follows:

J. The Department is willing, under the terms and conditions of this Agreement, to: (i) take over responsibility for administering the remaining state- and local ~~and federal~~ funds for the Wave Streetcar in the possession and control of SFRTA; (ii) continue efforts initiated by SFRTA to obtain the requested FTA Section 5309 Small Starts funding; (iii) enter into agreements with ~~the USDOT to assume the outstanding balance of the TIGER grant and obtain the FTA Section 5309 Small Starts funds requested by SFRTA~~ to be a sub-recipient of the outstanding balance of the TIGER grant; (iv) enter into an agreement with the USDOT to obtain the FTA Section 5309 Small Starts funds requested by SFRTA; and ~~(iv)~~ procure and administer contracts required for design and construction of the Wave Streetcar.

2. Section 1.01 is amended by: insertion of a new subsection (1) and renumbering of the existing subsection (1) as subsection (2); insertion of a new subsection (3) and renumbering of the existing subsections (2) through (5) as subsections (4) through (7); amendment and renumbering of existing subsection (6); renumbering of existing subsections (7) through (15) as subsections (9) through (17); insertion of a new subsection (18); amendment of and renumbering of existing subsection (16); renumbering of existing subsections (17) through (29) as subsections (20) through (32); deletion of existing subsection (30) as indicated in the following; and renumbering of existing subsection (31) as subsection (33). The text of the amended and new subsections is as follows:

(1) “Adoption Date” means the date upon which the Department receives legislative approval to include the Project in its adopted work program pursuant to s. 339.135, Florida Statutes, and thereby obtains the necessary authority

to receive and expend the capital funding for the Project as contemplated by this Agreement and the Project Assumption Agreement. The anticipated date of such approval and adoption into the work program is no later than July 1, 2017. The term “Adoption Date” as used in this Agreement is intended to have the same meaning as provided in the Project Assumption Agreement.

(3) “Approval Date” means the latter of the date upon which USDOT and the FTA have approved the FDOT receipt of a subaward of the remaining TIGER Grant funds from SFRTA (if required) and the date upon which the Wave Partnership Agreement, the Wave County Direct Agreement, and the Wave City Direct Agreement have been terminated or amended as required for FDOT to receive a subaward of the remaining TIGER Grant funds and the balances of the Existing Local Funding Commitments and the Existing MPO Funding Commitment. The term “Approval Date” as used in this Agreement is intended to have the same meaning as provided in the Project Assumption Agreement.

(6) “Current Cost Estimate” means the total updated capital cost estimate for the Project prepared by the Department dated March 2, 2016, which is One Hundred Ninety-Five Million Two Hundred Eighty-One Thousand Dollars (\$195,281,000), the details of which are provided in Exhibit “B” hereto. The Current Cost Estimate includes the costs incurred by SFRTA for work performed during the time SFRTA has acted as the Project sponsor pursuant to the Wave Partnership Agreement, as well as the Two Million Dollar (\$2,000,000) actual cost of acquisition of the VMF Property. The Current Cost Estimate does not include funding for relocation of privately owned utilities that may need to be relocated on or from Department Real Property, County Real Property, or City Real Property for accomplishment of the Project.

(18) “Project Assumption Agreement” means that agreement between the Department and SFRTA dated August 26, 2016, as it may be amended from time to time consistent with the terms of this Agreement, pursuant to which the Department has agreed to: (i) take over responsibility for administering the federal funds for the Project in the possession and control of SFRTA; (ii) continue efforts initiated by SFRTA to obtain the requested FTA Section 5309 Small Starts funding; (iii) act as a sub-recipient of the outstanding balance of the TIGER grant and obtain the FTA Section 5309 Small Starts funds requested by SFRTA; and (iv) procure and administer contracts required for design and construction of the Project.

~~(19)~~ “Project Capital Cost(s)” means: (i) any and all amounts paid by the Department to third parties for design or construction of the Project in connection with the performance of its Project responsibilities under this Agreement after the Agreement Date; (ii) Real Property Acquisition costs; (iii) the \$2,000,000 cost of acquisition of the VMF Property; (iv) all amounts expended by SFRTA on capital costs for the Project out of the TIGER Grant, the portion of the Department Capital Contribution transferred to SFRTA pursuant to the Joint Participation Agreement

between the Department and SFRTA for the Project (Contract AR068), the Existing MPO Funding Commitment, or the Existing Local Funding Commitments: and (v) any additional amounts that are required to be paid in order to ensure that all real property acquired for the Project prior to the Agreement Date is acquired in full compliance with applicable federal requirements. Notwithstanding any provision of this Agreement or any other agreement relating to the Project, Project Capital Costs shall not include: (i) any amounts paid or liability incurred to the owner of a privately owned utility (a utility that is not owned by the County, the City, or the Department), if any, by the Department, the County, or the City for the relocation of any privately owned utility on or from Department Real Property, County Real Property, or City Real Property for accomplishment of the Project; or (ii) any financial liability for delays incurred by the Department under the Design-Build Contract as a result of the failure of a privately owned utility to timely relocate its facilities.

~~(30) “TIGER Grant Assumption Agreement” means an anticipated agreement between the Department and USDOT, by which the Department will assume certain obligations of SFRTA with regard to the TIGER Grant.~~

3. Section 3.01(2) is amended as follows:

(2) The Department shall assume responsibility for design and construction of the Project in accordance with all applicable Federal and State laws, Federal regulations, and State rules, the ~~TIGER Grant Assumption Agreement~~, Project Assumption Agreement, and the Project Construction Grant Agreement. The Department shall provide the County with copies of the ~~TIGER Grant Assumption Agreement~~, and the Project Construction Grant Agreement before execution by the Department.

4. Section 3.01(14) is amended as follows:

(14) The Department shall terminate the existing JPA with SFRTA ~~prior to entering into the Project Construction Grant Agreement~~ on or promptly after the latter of the Approval Date or the Adoption Date.

5. Section 3.01(21) is amended as follows:

(21) Before execution of the Project Construction Grant Agreement, ~~the Department shall enter into a Locally Funded Agreement with SFRTA under which SFRTA shall transfer to the Department the remaining balance of the Four Million Two Hundred Twenty Eight Thousand Eight Hundred Dollars (\$4,228,800) of the existing MPO Funding Commitment which was “exchanged” with local funds by SFRTA and the Department shall have entered into an amendment to the Project Assumption Agreement under which SFRTA commits to transfer to the Department the remaining balance of the Four Million Two Hundred Twenty-Eight Thousand~~

Eight Hundred Dollars (\$4,228,800) of the Existing MPO Funding Commitment which was “exchanged” with local funds by SFRTA. Such agreement may provide for SFRTA to retain One Million Five Hundred Thousand Dollars (\$1,500,000) of the remaining balance of the “exchanged” Existing MPO Funding Commitment until December 31, 2017, for the purpose of paying final invoices for Project costs incurred prior to the later of the Approval Date or the Adoption Date.

6. Section 3.01(25) is added as follows:

(25) The Design-Build Contract will require the Department’s contractor to manage all utility coordination required for construction of the Project. The Department’s contractor will coordinate relocation of private utilities located on County Real Property with County staff to ensure that the County is aware of any issues with the relocation of private utilities. The Department shall require all privately owned utilities located on Department Real Property to relocate or adjust their facilities as needed for construction of the Project and shall take all action required to accomplish the timely relocation of such utilities. The Department shall be solely responsible for payment of the costs of relocating utilities that exist on Department Real Property if the utility owner is not responsible for the payment of such costs. The Department shall be solely responsible for taking such actions as it deems necessary or advisable to fully and finally determine the liability of the owner of a private utility located on Department Real Property for the costs of relocation of its facilities for accomplishment of the Project. Nothing herein shall be construed as creating an independent right to reimbursement of relocation costs in favor of the owner of any private utility.

7. Section 3.02(4) is amended as follows:

(4) The County will ~~obtain, at no cost to the County,~~ accept fee title to the VMF Property from the Department within sixty (60) days after conditions on the VMF Property meet the legal requirements for the County Pollution Prevention Division to issue a No Further Action (NFA) or No Further Action with Conditions (NFAC) approval letter, which is expected to occur no later than October 2017.

8. Section 3.02(10) is amended as follows:

(10) The County acknowledges that the Department would not agree to ~~assume the TIGER Grant,~~ apply for the Project Construction Grant, or execute this Agreement without assurance that the County is an eligible recipient of FTA administered Section 5309 Small Starts grant funds and has accepted and will assume upon Project Completion all responsibility under the Project Construction Grant Agreement for the ongoing obligation to maintain satisfactory continuing control of the Project Property throughout the useful life, or allowable disposition, of the Project Property. By execution of this Agreement, the County unconditionally and irrevocably covenants and agrees that upon Project

Completion it shall: (i) accept ownership of the Project Property; (ii) assume all responsibility under the Project Construction Grant Agreement for the ongoing obligation to maintain satisfactory continuing control of the Project Property throughout the useful life, or allowable disposition, of the Project Property; (iii) operate and maintain the Project and the Project Property in accordance with the Project Construction Grant Agreement, all applicable FTA project management guidelines and requirements, and the performance measures included in the TIGER Grant; (iv) provide FTA with all legal assurance required by FTA that the Project Property will remain available to be used for its originally authorized purpose throughout its useful life or until disposition is authorized under the Project Construction Grant Agreement and applicable FTA guidelines; and (v) cooperate fully with the Department to provide FTA or USDOT with any required documentation of such transfer and assumption of responsibilities. The intent of the Department and the County is that all risk of a required repayment of federal funds for any reason other than the Department's failure, at no fault of the County, to complete design and construction of the Project, will completely transfer to the County upon Project Completion. In accordance with separate State requirements for the expenditure of State funding off the State highway system, the County agrees to maintain the Project facility and equipment in good working order for the useful life of said facility or equipment, and maintain property records, conduct physical inventories, and develop control systems.

9. Section 3.02(14) is added as follows:

(14) The County shall cooperate with the Department's Design-Build contractor, to the extent necessary, to accomplish the relocation of utilities located on County Real Property for the Project. The County shall require all privately owned utilities located on County Real Property to relocate or adjust their facilities as needed for construction of the Project and shall take all action required to accomplish the timely relocation of such utilities without cost to the Department. The County shall be solely responsible for any financial liability for delays incurred by the Department under the Design-Build Contract as a result of the failure of a privately owned utility located on County Real Property to timely relocate its facilities, and shall reimburse the Department for such costs within forty (40) calendar days from the date of the invoice from the DEPARTMENT. Funds due from the County not paid within forty (40) calendar days from the date of the invoice are subject to an interest charge at a rate established pursuant to section 55.03, Florida Statutes. The County shall be solely responsible for payment of the costs of relocating utilities that exist on County Real Property if the utility owner is not responsible for the payment of such costs. The County shall be solely responsible for taking such actions as it deems necessary or advisable to fully and finally determine the liability of the owner of a private utility located on County Real Property for the costs of relocation of its facilities for accomplishment of the Project. Nothing herein shall be construed as creating an independent right to reimbursement of relocation costs in favor of the owner of any private utility.

10. Section 4.02(1) is amended as follows:

(1) ~~The County will promptly obtain custody and control of the balance of the Existing Local Funding Commitments not expended by SFRTA for Project costs (with the exception of the DDA SIB Loan).~~ In connection with termination or amendment of the Wave Partnership Agreement and the Wave County Direct Agreement, the County will enter into an agreement with SFRTA that requires SFRTA to: transfer to the Department the balance of the Existing Local Funding Commitments and the Existing MPO Funding Commitment not expended by SFRTA for Project costs (with the exception of the DDA SIB Loan), provided that, consistent with the terms of the Project Assumption Agreement, SFRTA may retain up to One Million Five Hundred Thousand Dollars (\$1,500,000) of the Four Million Two Hundred Twenty-Eight Thousand Eight Hundred Dollars (\$4,228,800) of the Existing MPO Funding Commitment which were “exchanged” with local funds by SFRTA (and such portion of the Existing Local Funding Commitments as needed to provide \$1,500,000 if there is not a sufficient remaining balance of the “exchanged” Existing MPO Funding Commitment) until December 31, 2017, for the purpose of paying bills outstanding as of the latter of the Approval Date or the Adoption Date. No amendment, termination, or replacement of the Wave Partnership Agreement, the Wave City Direct Agreement, or the Wave County Direct Agreement shall reduce the Existing Local Funding Commitments or the County Capital Contribution required under this Agreement. Nothing in the Local Funding ILA, or the failure of any party to the Local Funding ILA to perform in accordance with the terms of the Local Funding ILA, shall be construed in any manner to limit the obligations of the County to the Department under this Agreement.

11. Section 4.02(2) is amended as follows:

(2) At the time the County provides its assent to the terms of the Project Construction Grant Agreement as provided in section 3.02(~~68~~), the County will provide the balance of the Initial County Capital Contribution to the Department in cash. The Initial County Capital Contribution will be available to the Department to pay Project Capital Costs. Any interest earned on the Initial County Capital Contribution shall be treated as an increase in the funds deposited by the County for the Project and shall be applied by the Department to pay the County’s share of Project Capital Costs. If pursuant to section 5.02 the County is responsible for any payment to the federal government, the Department shall utilize any available interest earned on the Initial County Capital Contribution in the same manner as it would utilize the remaining portion of the County Capital Contribution.

12. Section 5.01(2) is amended as follows:

(2) If, as provided in Section 3.02(86) of this Agreement, the County fails to provide its written assent to the Project Construction Grant Agreement, the Department may terminate this Agreement, which termination shall only be effective if the County has failed to provide its written assent to the Project Construction Grant Agreement within thirty (30) days after the Department's notice of termination.

13. Section 5.01(4) is amended as follows:

(4) If, on or before ~~May 1~~ August 1, 2017, the federal government does not ~~agree to transfer the TIGER Grant to the Department~~ approve the Department acting as a sub-recipient of the remaining balance of the TIGER Grant on terms and conditions acceptable to the Department, in its discretion, either party may terminate this Agreement.

14. Section 5.01(5) is amended as follows:

(5) If the Project Construction Grant Agreement is not executed on or before ~~May 1~~ August 1, 2017, on terms and conditions acceptable to the Department and the County, either party may terminate this Agreement.

15. Section 5.01(6) is amended as follows:

(6) If the parties to the DDA SIB Loan have not agreed to an amendment to remove SFRTA from the DDA SIB Loan and provide for disbursement of the DDA SIB Loan to the Department on or before ~~July~~ August 1, 2016, either party may terminate this Agreement.

16. Section 5.01(7) is amended as follows:

(7) If the Department and the County have not executed the County SIB Loan agreement on or before ~~July~~ August 1, 2016, either party may terminate this Agreement.

17. Section 5.01(8) is amended as follows:

(8) If the County fails to accept title to the VMF Property as required in Section 3.02(43), the Department may terminate this Agreement, which termination shall only be effective if the County has failed to accept title to the VMF Property within thirty (30) days of the Department's notice of termination.

18. Section 5.01(9) is amended as follows:

(9) If on or before ~~May~~ August 1, 2017, SFRTA does not assign and transfer to the Department the ability to expend the remaining balance of the Existing MPO Funding Commitment, ~~together with the balance of the funding~~

~~available under the TIGER Grant, both on terms acceptable to the Department in its sole discretion, including terms that require SFRTA to repay any TIGER Grant funds expended by SFRTA that are required to be repaid by the federal government if the Project is not completed for any reason, as contemplated in section 4.02(1) and agree to provide the balance of the funding available under the TIGER Grant to the Department as a sub-recipient, each on terms acceptable to the Department in its sole discretion, the Department may terminate this Agreement.~~

19. A new section 5.01(10) is inserted as follows:

(10) If prior to August 1, 2017, the County has failed to enter into an agreement with SFRTA that requires SFRTA to transfer to the Department the balance of the Existing Local Funding Commitments not expended by SFRTA for Project costs (with the exception of the DDA SIB Loan) as contemplated in section 4.02(1), or if any amendment, termination, or replacement of the Wave Partnership Agreement, the Wave City Direct Agreement, or the Wave County Direct Agreement reduces the Existing Local Funding Commitments, the Department may terminate this Agreement.

20. Section 5.01(11) is amended as follows:

~~(11) If, prior to the Department entering into the Project Construction Grant Agreement, the County has not obtained the balance of the Existing Local Funding Commitments not expended as of the Agreement Date currently held by SFRTA, on or promptly after the latter of the Approval Date or the Adoption Date, SFRTA does not assign and transfer to the Department the ability to expend the then remaining balance of the Existing Local Funding Commitments (not including the DDA SIB Loan), either party may terminate this Agreement.~~

21. Section 5.02(1) is amended as follows:

(1) The County acknowledges that its failure to make a required County Capital Contribution or accept title to the VMF Property as provided in this Agreement may result in the Department being found to be in default of the ~~TIGER Grant Agreement, the TIGER Grant Assumption Agreement or, Project Construction Grant Agreement.~~ The County acknowledges that in such event, the federal government may demand that all federal funds provided for the Project be returned to the federal government. If this Agreement is terminated by the Department for failure of the County to make a required County Capital Contribution or failure of the County to accept title to the VMF Property, the County shall reimburse the Department, in full, for any amounts which the federal government demands that the Department repay under the terms of the ~~TIGER Grant, the TIGER Grant Assumption Agreement or Project Construction Grant Agreement (this requirement shall not extend to any portion of the TIGER Grant expended by SFRTA).~~ The Department shall utilize any amounts remaining in its possession and control from the County Capital Contribution to repay the federal

government before requesting additional funds from the County. If the remaining County Capital Contribution is not sufficient to repay the amounts owed to the federal government, the Department shall promptly notify the County of the amount of any repayment. The County shall pay the amount of the required repayment to the Department within forty (40) calendar days from the date of the invoice from the Department. Funds due from the County not paid within forty (40) calendar days from the date of the invoice are subject to an interest charge at a rate established pursuant to section 55.03, Florida Statutes.

22. Section 5.02(3) is amended as follows:

(3) Upon any termination of this Agreement pursuant to section 5.01(4), (5), or (6), the County and the Department shall share equally any amounts which the federal government demands that the Department repay under the terms of the ~~TIGER Grant, the TIGER Grant Assumption Agreement or the Project Construction Grant Agreement~~ (the requirement shall not extend to any portion of the ~~TIGER Grant~~ expended by SFRTA).

23. Section 6.04 is amended as follows:

6.04 THIRD PARTY AGREEMENTS AND BENEFICIARIES.

Nothing in this Agreement shall prevent the Parties from entering into third party agreements that require third parties to assist the Parties with their obligations under this Agreement; provided, however, such third party agreements shall not in any manner relieve the Parties of their obligations under this Agreement. The City is an intended third party beneficiary of this Agreement. Except to the extent set forth herein, neither the Department nor the County shall be obligated or liable hereunder to any person or entity not a party to this Agreement. Except for the City, ~~This~~ this Agreement confers no rights on any third party and shall not create any other third party beneficiary under this Agreement, nor shall this Agreement authorize anyone other than the City which is not a party to this Agreement to maintain a suit against the Department or the County pursuant to the terms of this Agreement.

24. Other than as expressly stated in this Amendment, the terms and conditions of the Original Agreement remain in full force and effect.

25. This Amendment may be executed in two or more counterparts, any of which shall be regarded as an original and all of which constitute but one and the same instrument.

IN WITNESS WHEREOF, the Parties hereto have made and executed this First Amendment to Wave Project Agreement on the respective dates under each signature: Broward County through its Board of County Commissioners, signing by and through its Mayor or Vice-Mayor, authorized to execute same by Board action on the _____ day of _____, 2017, and the State of Florida, Department of Transportation, signing by and through the individual duly authorized to execute same.

COUNTY

ATTEST:

Broward County, by and through
its Board of County Commissioners

Broward County Administrator, as
Ex-officio Clerk of the Broward County
Board of County Commissioners

By _____
Mayor

____ day of _____, 2017

Approved as to form by
Joni Armstrong Coffey
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By _____
Annika E. Ashton (Date)
Assistant County Attorney

Angela J. Wallace (Date)
Deputy County Attorney

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

By: _____

Date: _____

Legal Review:

Office of the Comptroller
