

NORTHERN VIRGINIA TRANSPORTATION AUTHORITY**MEMORANDUM**

FOR: Chairman Martin E. Nohe and Members
Northern Virginia Transportation Authority

FROM: Monica Backmon, Executive Director

DATE: November 8, 2018

SUBJECT: Regional Funding Project 2018-046-1 City of Fairfax (Jermantown Road Improvements Project)

- 1. Recommendation.** Approval of attached Standard Project Agreement (SPA) 2018-046-1.
- 2. Suggested motion.** I move approval of the proposed Standard Project Agreement 2018-046-1 City of Fairfax (Jermantown Road Improvements Project), in accordance with NVTAs approved Project Description Sheet as appended to the Standard Project Agreement; and authorize the Executive Director sign on behalf of the Authority.
- 3. Background.**
 - a.** This project was adopted as part of the FY2018-2023 Six Year Program and received appropriation approval on October 11, 2018.
 - b.** The attached SPA presented by the City of Fairfax is consistent with the project previously approved by the Authority.
 - c.** The attached SPA has been reviewed by the Council of Counsels, who noted that there were no legal issues.

Attachment: SPA for NVTAs Project Number 2018-046-1

Coordination: Council of Counsels

Standard Project Agreement for Funding and Administration
between
Northern Virginia Transportation Authority
and
The City of Fairfax
(Recipient Entity)

Project Name: Jermantown Road Corridor Improvements

NVTA Project Number: 2018-046-1

This Standard Project Agreement for Funding and Administration ("this Agreement") is made and executed in duplicate on this 12 day of October, 2018, as between the Northern Virginia Transportation Authority ("NVTA") and The City of Fairfax ("Recipient Entity").

WITNESSETH

WHEREAS, NVTA is a political subdivision of the Commonwealth of Virginia created by the Northern Virginia Transportation Authority Act ("the NVTA Act"), Chapter 25 of Title 33.2 of the Code of Virginia, as amended;

WHEREAS, Section 33.2-2500(4) of the Code of Virginia authorizes NVTA to enter into project agreements with certain statutorily designated entities for the provision of transportation facilities and services to the area embraced by NVTA;

WHEREAS, Section 33.2-2509 of the Code of Virginia authorizes NVTA to use funds from a fund established pursuant to that Code section (the "NVTA Fund") in order to assist in the financing, in whole or in part, of certain regional transportation projects in accordance with Code Section 33.2-2510;

WHEREAS, the NVTA Fund provides for the deposit therein of certain dedicated revenues and other funds appropriated by the Virginia General Assembly;

WHEREAS, Section 33.2-2510 of the Code of Virginia authorizes the use of funds from the NVTA Fund and the use of proceeds from NVTA debt issuances ("NVTA Bond Proceeds") to be used by NVTA solely for transportation purposes benefitting those counties and cities embraced by NVTA;

WHEREAS, the Project set forth and described on Appendix A to this Agreement ("the Project") satisfies the requirements of Virginia Code Section 33.2-2510;

A. Recipient Entity's Obligations

The City of Fairfax shall:

- I. Complete or perform all said work as described in Appendix A, advancing such work diligently and ensuring that all work is completed in accordance with all applicable federal, state, and local laws and regulations, and all terms and conditions of this Agreement.
2. Ensure that all work performed or to be performed under this Agreement is in accordance with the Project Description Sheets attached to Appendix A and complies with Va. Code Ann. Sections 33.2-2510(A), (C)1.
3. Perform or have performed, and remit all payment requisitions and other requests for funding for design and engineering, including all environmental work, right-of-way acquisition, construction, contract administration, testing services, inspection services, or capital asset acquisitions for the Project, as is required by this Agreement and that may be necessary for completion of the Project.
4. Not use the NVT A funds specified on Appendix B to pay any Project cost if the NVT A Act does not permit such Project cost to be paid with NVT A funds.
5. Recognize that, if the Project contains "multiple phases" (as such "multiple phases" are defined for the Project on Appendix A), for which NVT A will provide funding for such multiple phases (as set forth on Appendix B), NVT A may not provide funding to
The City of Fairfax to advance the Project to the next phase until the current phase is completed. In any circumstance where The City of Fairfax seeks to advance a Project to the next phase using NVT A funds, The City of Fairfax shall submit a written request to NVT A's Executive Director explaining the need for NVT A's funding of an advanced phase. NVT A's Executive Director will thereafter review the circumstances underlying the request in conjunction with Appendix B and NVT A's current and projected cash flow position and make a recommendation to NVT A whether to authorize the requested advance phase funding. Nothing herein, however, shall prohibit The City of Fairfax from providing its own funds to

complete and accurate update to Appendix B, if NVTA approves funding of any additional Project costs for the Project under this Paragraph.

9. Release or return any unexpended funds to NVTA no later than 90 days after final payment has been made to the contractors.
10. Review and acknowledge the requirements of NVTA Resolution No. 14-08 adopted January 23, 2014; to wit that, if applicable to The City of Fairfax 's Project: a) Prior to any NVTA funds being released for a project that may be part of a larger project, projects, or system undertaken with an extra-territorial funding partner, all such extra-territorial funding partners must commit to pay their appropriate, respective proportionate share or shares of the larger project or system cost commensurate with the benefits to each on a basis agreed upon by the NVTA member localities; b) any such funds released by NVTA for such project will be in addition to the funds that the NVTA member locality is to receive from or be credited with by the extra-territorial funding partner for the project or system; and c) there shall be no funding made available by NVTA until such time as all extra-territorial funding partners for such project or system pay or officially commit to fund their appropriate, respective proportionate shares of such large project or system commensurate with the benefits to each on a basis agreed upon with NVTA.
11. Should The City of Fairfax be required to provide matching funds in order to proceed or complete the funding necessary for the Project, The City of Fairfax shall certify to NVTA that all such matching funds have been either authorized and/or appropriated by The City of Fairfax s governing body or have been obtained through another, independent funding source;
12. Maintain complete and accurate financial records relative to the Project for all time periods as may be required by the Virginia Public Records Act and by all other applicable state or federal records retention laws or regulations, unless superseded by the laws that govern The City of Fairfax and provide copies of any such financial records to NVTA, free of charge, upon request.

19. Acknowledge that if the Project is being funded in whole or in part by NVTB Bond Proceeds, comply with the tax covenants attached as Appendix D.
20. Acknowledge that if The City of Fairfax expects and/or intends that the Project is to be submitted for acceptance by the Commonwealth into its system that The City of Fairfax agrees to comply with the Virginia Department of Transportation's ("VDOT's") "Standards, Requirements and Guidance."
21. Recognize that The City of Fairfax is solely responsible for obtaining all permits and permissions necessary to construct and/or operate the Project, including but not limited to, obtaining all required VDOT and local land use permits, applications for zoning approvals, and regulatory approvals.
22. Recognize that if The City of Fairfax is funding the Project, in whole or in part, with federal and/or state funds, in addition to NVTB funds and/or NVTB Bond Proceeds that The City of Fairfax will need to comply with all federal and Commonwealth funding requirements, including but not limited to, the completion and execution of VDOT's Standard Project Administration Agreement and acknowledges that NVTB will not be a party or signatory to that Agreement; nor will NVTB have any obligation to comply with the requirements of that Agreement.
23. Provide a certification to NVTB no later than 90 days after final payment to the contractors that The City of Fairfax adhered to all applicable laws and regulations and all requirements of this Agreement.

B. NVTB's Obligations

NVTB shall:

- I. Provide to The City of Fairfax the funding authorized by NVTB for design work, engineering, including all environmental work, all right-of-way acquisition, inspection services, testing services, construction, and/or capital asset acquisition(s) on a reimbursement basis as set forth in this Agreement and as specified in the Project Budget and Cash Flow contained in

4. Route all The City of Fairfax 's supplemental requests for funding from NVTa under Paragraphs A.5 and A.8 of this Agreement to NVTa's Executive Director. NVTa's Executive Director will initially review those requests and all supporting documentation with NVTa's CFO. After such initial review, NVTa's Executive Director will make a recommendation to NVTa's Finance Committee for its independent consideration and review. NVTa's Finance Committee will thereafter make a recommendation on any such request to NVTa for final determination by NVTa.
5. Conduct periodic compliance reviews scheduled in advance for the Project so as to determine whether the work being performed remains within the scope of this Agreement, the NVTa Act, Chapter 766, and other applicable law. Such compliance reviews may entail review of The City of Fairfax 's financial records for the Project and on -site inspections.
6. Acknowledge that if, as a result of NVTa's review of any payment requisition or of any NVTa compliance review, NVTa staff determines that The City of Fairfax has misused or misapplied any NVTa funds in derogation of this Agreement or in contravention of the NVTa Act, Chapter 766 or applicable law, NVTa staff will promptly advise NVTa's Executive Director and will advise The City of Fairfax 's designated representative in writing. The City of Fairfax will thereafter have thirty (30) days to respond in writing to NVTa's initial findings. NVTa's staff will review The City of Fairfax 's response and make a recommendation to NVTa's Finance Committee. NVTa's Finance Committee will thereafter conduct its own review of all submissions and make a recommendation to NVTa. Pending final resolution of the matter, NVTa will withhold further funding on the Project. If NVTa makes a final determination that The City of Fairfax has misused or misapplied funds in contravention of this Agreement, the NVTa Act, Chapter 766, or other applicable law, NVTa will cease further funding for the Project and will seek reimbursement from The City of Fairfax of all funds previously remitted by NVTa (with interest earned at the rate earned by NVTa) which were misapplied or misused by The City of Fairfax. Nothing herein shall, however, be construed as denying, restricting or limiting the pursuit of either party's legal rights or available legal remedies.

request that NVTA excuse The City of Fairfax from refunding all funds NVTA provided to The City of Fairfax for the Project based upon The City of Fairfax's substantial completion of the Project or severable portions thereof; and NVTA may, in its sole discretion, excuse The City of Fairfax from refunding all or a portion of the funds NVTA provided to The City of Fairfax for the Project. No such request to be excused from refunding will be allowed where The City of Fairfax has either misused or misapplied NVTA funds in contravention of applicable law.

4. Upon termination and payment of all eligible expenses as set forth in Paragraph C.3 above, The City of Fairfax will release or return to NVTA all unexpended NVTA funds with interest earned at the rate earned by NVTA no later than sixty (60) days after the date of termination.

D. Dispute

In the event of a dispute under this Agreement, the parties agree to meet and confer in order to ascertain if the dispute can be resolved informally without the need of a third party or judicial intervention. NVTA's Executive Director and The City of Fairfax's Chief Executive Officer or Chief Administrative Officer shall be authorized to conduct negotiations on behalf of their respective entities. If a resolution of the dispute is reached via a meet and confer dispute resolution method, it shall be presented to NVTA and to The City of Fairfax's governing body for formal confirmation and approval. If no satisfactory resolution can be reached via the meet and confer method, either party is free to pursue whatever remedies it may have at law, including all judicial remedies.

E. NVTA's Financial Interest in Project Assets

The City of Fairfax agrees to use the real property and appurtenances and fixtures thereto, capital assets, equipment and all other transportation facilities that are part of the Project and funded by NVTA under this Agreement ("Project Assets") for the designated transportation purposes of the Project under this Agreement and in accordance with applicable law throughout the useful life of each Project Asset. NVTA shall retain a financial interest in the value of each of the of the Project Assets, whether any such Project Asset may have depreciated or appreciated, throughout its respective useful life proportionate to the amount of the cost of the Project Asset funded by NVTA under this

H. Assignment

This Agreement shall not be assigned by either party unless express written consent is given by the other party.

I. Modification or Amendment

This Agreement may be modified, in writing, upon mutual agreement of both parties.

J. No Personal Liability or Creation of Third Party Rights

This Agreement shall not be construed as creating any personal liability on the part of any officer, employee, or agent of the parties; nor shall it be construed as giving any rights or benefits to anyone other than the parties hereto.

K. No Agency

The City of Fairfax represents that it is not acting as a partner or agent of NVTa; and nothing in this Agreement shall be construed as making any party a partner or agent with any other party.

L. Sovereign Immunity

This Agreement shall not be construed as a waiver of either party's sovereign immunity rights.

M. Incorporation of Recitals

The recitals to this Agreement are hereby incorporated into this Agreement and are expressly made a part hereof. The parties to this Agreement acknowledge and agree that such recitals are true and correct.

N. Mutual Preparation and Fair Meaning

The parties acknowledge that this Agreement has been prepared on behalf of all parties thereto and shall be construed in accordance with its fair meaning and not strictly construed for or against either party.

Appendix A – Narrative Description of Project (Attach Project Description Form)

NVTA Project Title: Jermantown Road Corridor Improvements Project _____

NVTA SPA Number: 2018-046-1 _____ Internal NVTA Project Number (leave blank): _____

Recipient Entity: _____ City of Fairfax _____

Project Manager Name: Wendy Sanford _____

Phone: ____ (703) 385-7889 email: wendy.sanford@fairfaxva.gov _____

Table A-1 Project Scope/Schedule Changes

Fill any Differences from the Approved NVTA Project Description Form Attached or Previously Submitted Appendix A. Describe and provide rationale for changes in scope and/or schedule.

Table A-2 Project Milestone by Phase Changes

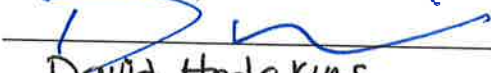
Fill any Differences from the Approved NVTA Project Description Form Attached or Previously Submitted Appendix B. Provide Date of Revision. Any update to Appendix A, Table A-2 requires an update to Appendix B reflecting the changes.

	Project description form		Rev. 1: MM/DD/YYYY		Rev. 2: MM/DD/YYYY	
	Start Date	End Date	Start Date	End Date	Start Date	End Date
Study						
Preliminary Engineering						
Right of Way						
Construction						
Capital Asset Acquisition						
Other						

	Rev. 3: MM/DD/YYYY		Rev. 4: MM/DD/YYYY		Rev. 5: MM/DD/YYYY	
	Start Date	End Date	Start Date	End Date	Start Date	End Date
Study						
Preliminary Engineering						
Right of Way						
Construction						
Capital Asset Acquisition						
Other						

RECIPIENT ENTITY

Submitted by (Person authorized in the resolution or Transportation Director):

Signature: 
Name: David Hodgkins
Title: Acting City Manager
Date: 10-16-18

NVTA

Accepted by:

APPENDIX D-Tax Covenants

TAX COVENANTS (For Bond Funded Projects Only)

The Recipient Entity will not permit more than five percent of the total amount of NVTB Bond Proceeds or the Financed Property to be used directly or indirectly (i) for a Private Business Use or (ii) to make or finance loans to Nongovernmental Persons. Any transaction that is generally characterized as a loan for federal income tax purposes is a "loan" for purposes of this paragraph. In addition, a loan may arise from the direct lending of NVTB Bond Proceeds or may arise from transactions in which indirect benefits that are the economic equivalent of a loan are conveyed, including any contractual arrangement which in substance transfers tax ownership and/or significant burdens and benefits of ownership.

The Recipient Entity agrees not to requisition or spend NVTB Bond Proceeds for any Project Cost not constituting a Capital Expenditure.

Except as may be described in Appendix B, the Recipient Entity neither has on the date of this Agreement nor expects to have after this date any funds that are restricted, segregated, legally required or otherwise intended to be used, directly or indirectly, for the purposes for which the Recipient Entity is receiving NVTB Bond Proceeds.

The Recipient Entity acknowledges that it may have to provide detailed information about the investment of the amount of any requisition unless (i) payments are remitted directly by NVTB to the contractors/vendors or (ii) the Recipient Entity remits payment to the contractors/vendors within five banking days after the date on which NVTB advances the amount of the requisition. NVTB may request the detailed information in order to compute the rebate liability to the U.S. Treasury on NVTB's bonds or other debt financing pursuant to Section 148 of the Internal Revenue Code of 1986, as amended (the "Code").

"Capital Expenditure" means any cost of a type that is properly chargeable to capital account (or would be so chargeable with (or but for) a proper election or the application of the definition of "placed in service" under Treas. Reg. § 1.150-2(c)) under general federal income tax principles, determined at the time the expenditure is paid.

"Federal Government" means the government of the United States and its agencies or instrumentalities.

"Financed Property" means the property financed by the NVTB Bond Proceeds.


"General Public Use" means use of Financed Property by a Nongovernmental Person as a member of the general public. Use of Financed Property by a Nongovernmental Person in a Trade or Business is treated as General Public Use only if the Financed Property is intended to be available and in fact is reasonably available for use on the same basis by natural persons not

(iii) whether the cost of the Financed Property is treated as depreciable by the Nongovernmental Person.

"Service Contract" means a contract under which a Nongovernmental Person will provide services involving all, a portion or any function of any Financed Property. For example, a Service Contract includes a contract for the provision of management services for all or any portion of Financed Property. Contracts for services that are solely incidental to the primary governmental function or functions of Financed Property (for example, contracts for janitorial, office equipment repair, billing, or similar services) are not included in this definition. Additional contracts not included in this definition are (i) a contract to provide for services by a Nongovernmental Person in compliance with Revenue Procedure 97-13, 1997-1 C.B. 632, as modified by Revenue Procedure 2001-39, I.R.B. 2001-28, (ii) a contract to provide for services by a Nongovernmental Person if the only compensation is the reimbursement of the Nongovernmental Person for actual and direct expenses paid by the Nongovernmental Person to unrelated parties and (iii) a contract to provide for the operations by a Nongovernmental Person of a facility or system of facilities that consists predominately of public utility property (within the meaning of Section 168(i)(10) of the Code), if the only compensation is the reimbursement of actual and direct expenses of the Nongovernmental Person and reasonable administrative overhead expenses of the Nongovernmental Person.

"Trade or Business" has the meaning set forth in Section 141(b)(6)(B) of the Code, and includes, with respect to any Nongovernmental Person other than a natural person, any activity carried on by such Nongovernmental Person. "Trade or Business" for a natural person means any activity carried on by such natural person that constitutes a "trade or business" within the meaning of Section 162 of the Code.

RECIPIENT ENTITY

By: 
Name: David Hodgkins
Title: Acting City Manager
Date: 10-16-18

RESOLUTION NO. R-18-40

**RESOLUTION AUTHORIZING THE CITY MANAGER TO SIGN THE STANDARD
PROJECT AGREEMENTS WITH THE NORTHERN VIRGINIA
TRANSPORTATION AUTHORITY (NVTa) FOR NVTa 70% FUNDING**

WHEREAS, In 2013, the General Assembly passed HB 2313, which created a designated funding source for transportation projects through the NVTa. Thirty percent of the funds are distributed back to the jurisdiction; the remaining 70 percent of funds are allocated to regional projects by the NVTa; and

WHEREAS, On June 14, 2018, the NVTa adopted the FY 2018-2023 Six Year Program; and

WHEREAS, Four projects in the City of Fairfax were awarded funding; and

WHEREAS, The City plans to utilize project funds for two of the awarded projects in FY 19; and

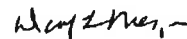
WHEREAS, The City must submit an executed Standard Project Agreement (SPA) to the NVTa for each project in order to obtain these funds. The SPA stipulates the terms and conditions of the project award; and

WHEREAS, The two projects that will receive FY 19 appropriations from the NVTa are listed below:

- 1) Jermantown Road Corridor Improvements: SPA ID 2018-046-1, \$21,000,000
- 2) Roadway Network Northfax West: SPA ID 2018-051-1, \$2,500,000

NOW THEREFORE, BE IT RESOLVED by the City Council of the City of Fairfax, Virginia that the City Manager is hereby authorized to sign the Standard Project Agreements with the Northern Virginia Transportation Authority for the two projects awarded funding in the Authority's FY 18-23 Six Year Program that will receive FY 19 appropriations.

Adopted: September 25, 2018



Mayor

Attest:


City Clerk

The vote on the motion to approve was recorded as follows:

VOTE:

Councilmember DeMarco	Aye
Councilmember Lim	Aye
Councilmember Miller	Aye
Councilmember Passey	Aye
Councilmember Stehle	Aye
Councilmember Yi	Aye

