

**PROJECT FUNDING AGREEMENT  
(PEORIA STREET GRADE SEPARATION CROSSING)**

**THIS PROJECT FUNDING AGREEMENT** (“Agreement”) is entered into by and among the **CITY AND COUNTY OF DENVER** (“Denver”), a home rule city and municipal corporation of the State of Colorado, the **REGIONAL TRANSPORTATION DISTRICT**, a political subdivision of the State of Colorado (“RTD”) and the **CITY OF AURORA**, a municipal corporation of the State of Colorado (Aurora). (Denver, RTD and Aurora together, the “Parties” or any of the Parties, a “Party”).

**RECITALS**

1. The Parties are legally empowered under Article XIV, Section 18(2)(a) of the Colorado Constitution, C.R.S. Section 29-1-201, et seq., and their respective charters and organizational documents and the laws of the State of Colorado to enter into this Agreement.

2. The Parties wish to cooperate in order to ensure the completion of environmental documentation, design, right-of-way acquisition and construction of improvements for the proposed grade separated crossing of existing Union Pacific Railroad (“UPRR”) facilities and soon to be constructed RTD East Corridor Commuter Rail Lines at Peoria Street, as more specifically described below. The Project is located partially in Denver and partially in Aurora.

3. The Parties wish to have this Agreement govern the proposed grade separated crossing Project and not other East Corridor agreements between the various Parties, except as specifically set forth herein.

4. The Parties wish to contribute to the funding of the Project in the amounts agreed to below and desire to establish the terms and conditions under which the Parties will provide such funding.

5. The Parties wish to provide for a mechanism for Denver to contract for and cause the completion of the environmental documentation, design, right-of-way acquisition and construction of the Project and for Aurora and RTD to participate in the Project as set forth herein.

6. The Parties desire to set forth a process for final acceptance of the completed Project.

**AGREEMENT**

**NOW, THEREFORE**, in consideration of the premises and the mutual covenants and obligations herein set forth, the Parties hereto mutually agree as follows:

**SECTION 1 – PROJECT**

**1.01 Project.**

The Peoria Street Grade Separation Crossing Project is a proposed grade separated crossing of existing Union Pacific Railroad ("UPRR") facilities and soon to be constructed RTD East Corridor Commuter Rail Line at Peoria Street. The general project area includes approximately one block east and west of Peoria Street from approximately the intersection of Peoria Street and 39<sup>th</sup> Avenue to Peoria Street and Baranmor Parkway and includes, but is not limited to, the work activities set forth below ("Project"). Other Project elements to be funded from Project Funds will be agreed to by the parties three months prior to the advertisement of a contract by Denver that exceeds the amount of Project Funds in the Project Account plus the Denver Contribution.:

- (a) Prepare an environmental study and appropriate documentation in accordance with the National Environmental Policy Act ("NEPA Documents"). The classification of the study and documentation necessary to complete the NEPA Documents will be determined by the Colorado Department of Transportation ("CDOT") and the Federal Highway Administration ("FHWA"). The NEPA Documents activities will include: (i) examination of the existing and future needs of the Project area to determine whether a grade separated crossing is needed to enhance the safety and transportation operations of Peoria Street and to meet other Project purposes and needs; (ii) prepare a sufficient level of design to better define the Project, and identify impacts and mitigation measures for the NEPA process and NEPA Documents; (iii) prepare a cost estimate of the Project based on the design as needed for the NEPA Documents; and (iv) complete surveys, legal descriptions and mapping of the rights of way and easements necessary for the Project.
- (b) Upon completion of the necessary NEPA Documents, including receiving the necessary approval from CDOT and FHWA, undertake and complete the appropriate level of design activities for the Project.
- (c) Acquisition of right-of-way necessary for the Project.
- (d) Construction of the Project.
- (e) Undertake and complete all other activities necessary to accomplish the Project, including Project management activities and submittal of PUC applications and all other activities necessary for PUC approval of the Project.

### **1.02 Project Specifics.**

The Project shall not be construed as a "Betterment" under Part 14 of the City of Aurora East Corridor Local Agency Contribution Intergovernmental Agreement dated May 23, 2011, between RTD and Aurora ("Aurora/RTD IGA"). The Project shall also not constitute a design change under Section 7.3 of the Aurora/RTD IGA.

## **SECTION 2 – PROJECT FUNDING**

### **2.01 Funds.**

- (a) The total amount of money currently being made available for the Project is \$50,000,000 ("Funds" or "Project Funds"). The Project budget, including appropriate contingencies, shall be based on the Funds available for design and construction of the Project.
- (b) Parties shall contribute the following amounts for the Project and on the conditions set forth herein:
- (i) Aurora Contribution – Aurora shall contribute \$2,500,000.00 to the Project ("Aurora Contribution"). Aurora shall pay to Denver the Aurora Contribution no later than January 15, 2012. Denver shall place the Aurora Contribution in the Project Account (defined below) for use on the Project.
  - (ii) Denver Contribution –Denver shall contribute \$2,500,000.00 to the Project ("Denver Contribution"). The Denver Contribution shall be used to fund the NEPA Consultant contract as defined below and other costs of the Project.
  - (iii) RTD Contribution –RTD shall contribute \$20,000,000.00 to the Project ("RTD Contribution"). As set forth in the Aurora/RTD IGA, Aurora and Denver are supporting RTD in obtaining a federal grant of \$13,350,000 (inclusive of any federal match requirement) in DRCOG FasTracks Second Commitment East Corridor Funds in the FY 2012-2013 time frame for RTD's East Corridor Project, which does not include a Peoria Street Grade Separation. RTD agrees to make a total of \$20,000,000 in local funds, reduced in an amount equal to any amount by which the DRCOG FasTracks Second Commitment East Corridor allocation (inclusive of federally required local match) is less than \$13,350,000. . RTD shall pay to Denver the RTD Contribution by July 1, 2012. Denver shall place the RTD Contribution into the Project Account (defined below) for use on the Project.
  - (iv) DRCOG Grant

Denver was awarded a Transportation Improvement Program ("TIP") grant from the Denver Regional Council of Governments ("DRCOG") in the amount of \$25,000,000.00 for the Project ("DRCOG Grant"). Denver intends to enter into an Agreement with CDOT so that the Project begins receiving the DRCOG Grant monies by no later than September 2012 as programmed in the DRCOG 2012-2017 TIP. The DRCOG Grant funds shall be accounted for as set forth in the Intergovernmental Agreement between the Colorado Department of Transportation ("CDOT") and Denver ("Denver/CDOT IGA"). The DRCOG Grant monies are anticipated to be received in the following amounts on the

following dates:

- |                 |                 |
|-----------------|-----------------|
| a. \$2,400,000  | Federal FY 2012 |
| b. \$2,017,000  | Federal FY 2013 |
| c. \$2,142,000  | Federal FY 2014 |
| d. \$18,441,000 | Federal FY 2015 |

Any modifications in the anticipated amounts or timing of the DRCOG Grant shall be documented by an addendum to this Agreement initialed by the PMT and kept in the Project Account file.

## **2.02 Project Account.**

Denver shall set up a Project Account that will hold all Project Funds other than the Denver Contribution, separate from other accounts of Denver, which Project Account shall contain subaccounts for each of the RTD Contribution, Aurora Contribution and DRCOG Grant. Funds in the Project Account and the Denver Contribution shall be used exclusively for the Project, until completion of the Project. Denver shall keep an accounting of the Project Account and the Denver Contribution and shall provide an annual report of all Project Account and the Denver Contribution activities no later than sixty (60) days following the end of Denver's Fiscal Year.

## **2.03 Administration Charges and Cost Reimbursement.**

Denver, Aurora, and RTD shall not be reimbursed out of the Project Funds for direct and indirect staff costs for staffing the Project Management Team ("PMT"), as defined below, supervision, inspection and acceptance of facilities, and oversight of any aspects of the Project except:

- (a) Denver will be eligible for reimbursement of reasonable direct and indirect labor costs for employee time for Project administration, Project management and supervision of consultants and contractors performing services for Project planning, NEPA Documents, preliminary design, design and construction of the Project as set forth in a Staffing Plan to be prepared by Denver and approved by the PMT up to a maximum of \$750,000.
- (b) Denver will be eligible for reimbursement for the costs associated with plans review and permit inspections based on actual hours worked at the specified hourly rates of the employees performing the work up to a maximum cost of \$150,000.
- (c) Aurora will be eligible for reimbursement for the costs associated with plans review

and permit inspections based on actual hours worked at the specified hourly rates of the employees performing the work up to a maximum cost of \$150,000.

- (d) RTD will be eligible for reimbursement for the costs associated with plans review and construction coordination based on actual hours worked at the specified hourly rates of the employees performing the work up to a maximum cost of \$150,000.

Project costs incurred prior to the Effective Date of this Agreement shall be eligible for reimbursement out of Project Funds. All reimbursements shall be consistent with the requirements of the Denver/CDOT IGA.

#### **2.04 Maximum Funding and Appropriations.**

Each Party's obligation to make the above described Contributions shall not exceed the Contribution identified for each Party as set forth in Section 2.01(b)(i), (ii), or (iii). No Party is obligated to execute an agreement or any amendments to this Agreement or approve any change orders that would increase such Party's Contribution beyond that specifically described in Paragraph 2.01(b)(i), (ii), or (iii), unless specifically agreed to by such Party through an amendment to this Agreement.

### **SECTION 3 – PROJECT IMPLEMENTATION**

#### **3.01 NEPA Document Phase.**

Denver intends to enter into the Design Services Agreement with CH2MHill ("NEPA Consultant") for completing the necessary NEPA Documents for the Project. Denver shall manage the NEPA Consultant contract and be responsible for coordination of the NEPA Consultant with the PMT as necessary to complete the NEPA Documents in a timely manner.

#### **3.02 Design Phase.**

Denver intends to enter into a contract with a professional multi-disciplinary consulting firm ("Design Consultant") for completing the appropriate level of design of the Project for each phase of the Project. The level of design necessary for each phase of the Project shall be determined during the NEPA Documents Phase. Denver shall manage the Design Consultant contract and be responsible for coordination of the Design Consultant with the PMT as necessary to complete the Project in a timely manner. The Parties shall agree on any design requirements and standards as part of the NEPA Document Phase.

#### **3.03 Land Acquisition Phase.**

- (a) To the extent, and only to the extent, that RTD determines it is necessary to acquire right of way at Smith-Peoria to accommodate its East Corridor project including an at grade crossing, and such at grade crossing is later removed or is not completed due to

completion of the Peoria Street Grade Separation, RTD will make available at no cost to Denver, Aurora, or the Project, by way of dedication or easement at RTD's discretion following review of the Project plans, property it acquired at the southwest corner of Peoria Street and Smith Road that is needed for a Peoria Street Grade Separation.

- (b) Denver shall be responsible for acquiring the necessary land for the Project that is currently within Denver's municipal boundaries. Aurora shall be responsible for acquiring the necessary land for the Project that is currently within Aurora's municipal boundaries. Such land shall be acquired in a timely manner.
- (c) The land shall be acquired in accordance with federal, state and Project requirements. The Project shall pay for all land acquisition costs, except as otherwise set forth herein.

### **3.04 Construction Phase.**

Denver shall enter into a construction contract and such other contracts necessary for construction of the Project with qualified construction firms ("Contractor"), in accordance with the Denver Revised Municipal Code and other applicable Denver requirements. Denver shall manage the Contractor and the construction contract and be responsible for coordination of the Contractor with the PMT as necessary to complete the Project in a timely manner. The Parties shall agree on any design requirements and standards as part of the NEPA Document Phase and the Design Phase.

### **3.05 PUC Approvals.**

The Project will need approval from the Public Utilities Commission ("PUC") for construction and operation of the Project's grade separated structure. Denver shall be responsible for submitting, with Aurora as co-applicant, all applications and submittals necessary to seek approval for the Project from the PUC. Denver shall also manage all coordination with the UPRR. RTD shall support all PUC applications needed for the Project.

### **3.06 Project Management and Coordination.**

Denver shall act in the best interest of the Project. Denver shall be the main point of contact for the Project and will be responsible for coordinating the Project, the NEPA Consultant, the Design Consultant, the Contractor and all interested parties with a staff level project management team consisting of one staff member from each of the Parties ("PMT"). The PMT shall meet monthly, or more often as needed. The PMT shall make recommendations to Denver on all matters concerning the Project.

### **3.07 Project Acceptance Upon Completion.**

The Parties shall agree on final Project acceptance procedures and policies prior to the Construction Phase of the Project.

**3.08 Maintenance and Operation.**

Maintenance and operation of the grade separated structure and Peoria Street shall be as set forth in separate agreements. The Parties currently intend that RTD shall not have any maintenance or operational responsibilities for the grade separated structure.

**3.09 Schedule.**

The contractor for the Peoria Project shall coordinate its schedule with the RTD East Corridor Commuter Rail Project schedule ("East Corridor Schedule") established at the time of the award of the construction contract for the Peoria Project ("Peoria Schedule"). The East Corridor Schedule shall have priority over the Peoria Schedule. Should the schedules come into conflict due to East Corridor needs or for unforeseen circumstances attributable to the East Corridor project, the East Corridor Schedule will have priority over the Peoria Schedule; provided however, any costs incurred by the Peoria Project, including acceleration or delay costs, due to such circumstances shall be paid for by RTD or its contractors. The target completion date for the Project is March 1, 2015.

**3.10 Future Discussions about Certain Matters.**

The Parties agree to work in good faith to resolve the following matters no later than three months prior to the advertisement of a contract that exceeds the amount of Project Funds in the Project Account plus the Denver Contribution: (a) RTD's deposit of DRCOG Grant funds prior to receipt of such Grant and the repayment thereof; (b) use of funds received from non-parties; (c) Project savings; (d) Project cost overruns; (e) Project elements eligible for reimbursement from Project Funds; (f) land acquisition duties and liabilities; (g) seeking acceleration of the receipt of DRCOG Grant funds; and (h) receiving additional funds. The resolution of such matters shall be documented as required by each Parties' laws and procedures. If these matters are not resolved, the Parties agree that all work on the Project shall cease.

**SECTION 4 - GENERAL CONDITIONS**

**4.01** The Parties do not intend and nothing contained in this Agreement shall be deemed to create a partnership, co-tenancy, joint venture or agency of any kind.

**4.02** This Agreement shall be interpreted and enforced according to the laws of the State of Colorado, the ordinances of Denver and Aurora, the applicable provisions of federal and state law, and the applicable rules and regulations promulgated under any of them. Venue for any action hereunder shall be determined by the location of the disputed issue.

**4.03**

(a) Disputes shall be initially resolved by the PMT. If the PMT cannot resolve the dispute, the PMT shall document the basis of the dispute, either individually or collectively, and forward such information to the Executive Oversight Committee consisting of RTD's Deputy

Assistant General Manager for Capital Programs, Denver's Manager of Public Works and Aurora's Director of Public Works or their respective designees ("EOC").

(b) While the above dispute resolution process is underway, construction on the Project may proceed in accordance with approved Project plans and specifications.

**4.04** This Agreement shall inure to the benefit of, and be binding upon the parties to this Agreement and their respective successors and permitted assigns. This Agreement is solely between and for the benefit of the Parties, and no design consultant, contractor, any subcontractor nor any other person is a third-party beneficiary to or under this Agreement.

**4.05** Approval by Denver and Aurora City Councils and the RTD Board. This Agreement is expressly subject to and shall not be or become effective or binding on the parties until approved by the Aurora City Council, the Denver City Council and the RTD General Manager acting under delegation and authority from the RTD Board of Directors.

**4.06** Appropriation of Funds. The Parties agree and expressly acknowledge that this Agreement is subject to and contingent on receipt of the Project Funds as set forth herein, including the DRCOG Grant. No penalties shall inure to any of the Parties for funding that is not received for whatever reason, including failure to appropriate. In addition, any and all financial obligations of the Parties are subject to the prior appropriations of funds expressly for this Agreement.

**4.07** Except as otherwise set forth herein, this Agreement contains the entire agreement of the Parties with respect to its subject matter; and it cannot be amended or modified except by a writing signed by all Parties. Any amendments or modifications to this Agreement must be in writing executed by the Parties in order to be valid and binding

**4.08** No waiver of any of the provisions of this Agreement shall be deemed to constitute a waiver of any other of the provisions of this Agreement, nor shall such waiver constitute a continuing waiver unless otherwise expressly provided herein, nor shall the waiver of any default hereunder be deemed a waiver of any subsequent default hereunder.

**4.09** Any notices or other communications required or permitted by this Agreement or by law to be served on, given to or delivered to any Party hereto, by the other Parties shall be in writing and shall be deemed duly served, given or delivered when personally delivered to the Party to whom it is addressed or in lieu of such personal services, upon receipt in the United States' mail, first-class postage prepaid, addressed as follows:

Denver: City and County of Denver  
Manager of Public Works  
201 W. Colfax Avenue. Dept. 608  
Denver, Colorado 80202

Aurora: City of Aurora  
Director of Public Works



15151 E. Alameda Parkway  
Aurora, Colorado 80012

RTD: Regional Transportation District  
Deputy Assistant General Manager for Fastracks Capital Programs  
1560 Broadway  
Denver, Colorado 80202

**4.10** The Parties are political subdivisions of the State of Colorado and, as such, (1) any and all financial obligations described hereunder are subject to annual budget and appropriations requirements, and (2) no consultants, contractors or subcontractors shall have lien rights against the Parties, nor against any property lying within the boundaries of the Parties in the event of nonpayment of any amount due under this Agreement.

**4.11** The Parties, their elected officials, directors, officials, officers, agents and employees are relying upon and do not waive or abrogate, or intend to waive or abrogate by any provision of this Agreement the monetary limitations or any other rights immunities or protections afforded by the Colorado Governmental Immunity Act, Section 24-10-101 et seq., C.R.S., as the same may be amended from time to time.

**4.12** No elected official, director, officer, agent or employee of any Party shall be charged personally or held contractually liable under any term or provision of this Agreement, or because of any breach thereof or because of its or their execution, approval or attempted execution of this Agreement.

**4.13** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and together shall constitute one and the same instrument.

**4.14** The Parties consent to the use of electronic signatures by Denver. The Agreement, and any other documents requiring a signature hereunder, may be signed electronically by Denver in the manner specified by Denver. The Parties agree not to deny the legal effect or enforceability of the Agreement solely because it is in electronic form or because an electronic record was used in its formation. The Parties agree not to object to the admissibility of the Agreement in the form of an electronic record, or a paper copy of an electronic document, or a paper copy of a document bearing an electronic signature, on the ground that it is an electronic record or electronic signature or that it is not in its original form or is not an original.

**4.15** Except as expressly provided elsewhere herein, each Party shall be responsible for any and all suits, demands, claims, costs, or actions proximately resulting from its own individual acts or omissions or from the acts or omissions of any of its officers, agents or employees.

**4.16** The Section headings are inserted herein only as a matter of convenience and for reference and in no way are intended to be a part of this Agreement or to define, limit or describe

the scope or intent of this Agreement or the particular sections hereof to which they refer.

**4.17** The Parties agree that any duly authorized representative of any Party, including the Denver Auditor or his or her designee, shall, until three (3) years after termination of this Agreement, have access to and the right to examine any directly pertinent books, documents, papers, and records directly related to this Agreement upon at least ten (10) calendar days prior written notice.

**4.18** Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law; provided however if any provision of this Agreement is held to be prohibited by or invalid under applicable law, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provisions or the remaining provisions of this Agreement.

**4.19** Each Party represents that to the best of their information and belief no officer or employee of any other Party is either directly or indirectly a party to or in any manner interested in this Agreement except as such interest may arise as a result of the lawful discharge of the responsibilities of such elected official or employee.

**4.20** The effective date of this Agreement shall be the later of December 15, 2011 or the final approval of all the Parties ("Effective Date"). This Agreement shall terminate on March 25, 2043 unless otherwise extended by the Parties.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be duly executed and delivered as of the Effective Date.

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**Contract Control Number:** 201100907

**Vendor Name:** Regional Transportation District and City of Aurora

IN WITNESS WHEREOF, the parties have set their hands and affixed their seals at Denver, Colorado as of

SEAL

**CITY AND COUNTY OF DENVER**

ATTEST:

By \_\_\_\_\_

\_\_\_\_\_

APPROVED AS TO FORM:

REGISTERED AND COUNTERSIGNED:

DOUGLAS J. FRIEDNASH, Attorney  
for the City and County of Denver

By \_\_\_\_\_

By \_\_\_\_\_

By \_\_\_\_\_



This agreement is being executed by the City of Aurora and Regional Transportation District simultaneously, therefore this page is being inserted so that our signature process can continue.

:tlg

**City of Aurora**

By: \_\_\_\_\_

Attest:

By: \_\_\_\_\_

Approved as to form for the City  
of Aurora

By: \_\_\_\_\_

**Regional Transportation District**

By: \_\_\_\_\_

Approved as to form

By: \_\_\_\_\_