

TRANSBAY PROJECT COST OVERSIGHT AGREEMENT

This Transbay Project Cost Oversight Agreement (this “Agreement”) dated as of _____, 2016, is between the Transbay Joint Powers Authority, a joint powers authority (“TJPA”), the City and County of San Francisco, a municipal corporation and charter city and county (“City”), acting through its Controller’s Office (“Controller”), and the Metropolitan Transportation Commission, a state agency (“MTC”) (each individually a “Party” and, collectively, the “Parties”). The Parties are entering into this Agreement in connection with the provision by the City and MTC of the Interim Financing to the TJPA, as described in the Recitals below.

RECITALS

This Agreement is made with reference to the following facts and circumstances:

- A. The TJPA is a joint powers agency comprised of the City, the Alameda-Contra Costa Transit District, the Peninsula Corridor Joint Powers Board, and the State of California Department of Transportation (ex officio). The TJPA is responsible for the financing, design, development, construction, and operation of the Transbay Transit Center Program (the “Transbay Project”). In particular, the Transbay Project includes (1) the design and construction of a temporary terminal and then the permanent Transbay Transit Center, including open space on the roof of the Transit Center, a bus ramp, a bus storage facility, and the Train Box component of the rail extension (“Phase 1”); (2) the extension of Caltrain rail tracks from their current San Francisco terminus at Fourth and Townsend Streets to a new underground terminus beneath the Transbay Transit Center to accommodate Caltrain and California High Speed Rail (“Phase 2”); and (3) in coordination with the Office of Community Investment and Infrastructure, the successor to the former Redevelopment Agency, certain transit infrastructure activities related to implementation of the Redevelopment Plan for the Transbay Redevelopment Project Area.
- B. As provided in Section 6 of the Joint Powers Agreement establishing the TJPA and Article XII of the TJPA’s Bylaws, the TJPA designated the City as the “Administrator” for the TJPA, authorizing the City to provide necessary administrative services for the TJPA under an administrative services agreement. In doing so, the members of the TJPA acknowledged that appointing the City as the administrator may present conflicts of interest, and they expressly waived any liability on the part of the City arising out of any such conflict of interest.
- C. In 2001, the TJPA entered an Administrative Services Agreement with the City, confirming the terms under which the TJPA may request that the City in its capacity as Administrator for the TJPA assist the TJPA, in cooperation with consultants and contractors to the TJPA, to advance the Transbay Project. Under that Agreement, the City has from time to time provided such assistance to TJPA staff, consultants, and

contractors, including through two previous intergovernmental agreements that the TJPA approved in 2007 and 2008 with the SF Public Works.

- D. On January 13, 2015, under the Mello-Roos Community Facilities Act of 1982, as amended (the “Mello-Roos Act”), Government Code section 53311 et seq., the City and County of San Francisco Community Facilities District No. 2014-1 (the “CFD”) was formed. SF Public Works has ultimate responsibility for managing certain of the facilities that will be constructed under the CFD. Under the Mello-Roos Act, the City and the TJPA executed a Joint Community Facilities Agreement (the “JCFA”) to provide for financing design and construction of certain facilities of the Transbay Project by the City through the CFD. On June 30, 2015, the City and the TJPA entered a binding memorandum of understanding to define the City’s “project management oversight” role regarding the facilities to be constructed under the CFD as described in the JCFA (the “2015 SF Public Works MOU”).
- E. On November 12, 2015, the TJPA Board of Directors (sometimes “TJPA Board” or “Board”) adopted Resolution No. 15-043, adding a new Section 9.6(g) of the Bylaws of the TJPA, to provide as follows: “Construction of the Transbay Terminal Project. Notwithstanding the provisions of subsection (c), the Board may designate a person or entity to oversee all aspects of construction of the Transbay Project (including design and project controls related to construction), who shall take direction from and report directly to the Board and who shall also inform the Executive Director of such actions. Without limiting the foregoing, the Board may authorize the Authority to enter into an agreement with the City's Department of Public Works to perform this function.”
- F. Consistent with TJPA Bylaws Section 9.6(g), on March 10, 2016, the TJPA Board of Directors adopted Resolution No. 16-006 giving SF Public Works exclusive authority, subject to TJPA Board supervision, to oversee all aspects of construction of the Transbay Project, including, without limitation, design and project controls related to construction of the Transbay Project, which shall include the facilities identified in the JCFA. The Resolution provides that this authority includes the supervision and direction of the contractors and the TJPA engineer employees directly overseeing construction as it relates to all aspects of construction of the Transbay Project. The Resolution further provides that SF Public Works shall take direction from and report directly to the TJPA Board on all aspects of construction of the Transbay Project, and shall have a mutual responsibility with the TJPA’s Executive Director to work closely and collaboratively together and to keep each informed of any significant actions taken.
- G. In furtherance of the TJPA Board Resolution described immediately above as well as Section 6 of the TJPA’s Joint Powers Agreement, Article XII of the TJPA’s Bylaws, the Administrative Services Agreement, and the JCFA, the TJPA and the City have entered or are entering into an additional Intergovernmental Agreement under which SF Public Works agrees to perform construction management and oversight services for the Transbay Project (the “2016 SF Public Works Construction Oversight Agreement”).
- H. In 2015, MTC conducted a cost and risk review of Phase 1 of the Transbay Project. As a result of that review, MTC recommended a Phase 1 budget increase to \$2.259 billion.

While the TJPA has identified federal, state and local funding sources of approximately \$2.012 billion, there are still unidentified funding needs to close the gap. In light of such short-term funding needs and at the TJPA's request, the City, subject to approval of the City's Board of Supervisors, is willing to execute and deliver lease revenue commercial paper certificates of participation and direct placement revolving certificates of participation, in the maximum amount of \$260,000,000 (the "Interim Financing"), which includes the estimated cost of issuance and the financing. To facilitate the City's execution and delivery of the Interim Financing, and subject to approval by the Bay Area Toll Authority ("BATA"), BATA would hold as an investment up to \$100 million of such commercial paper certificates. It is expected that the indebtedness under the Interim Financing, which is an obligation of the City's General Fund, will be repaid in part from an allocation of a portion of the CFD special taxes generated in the Transbay Redevelopment Project Area, and an allocation of a portion of the property tax increment that will be derived from the Transbay Redevelopment Project will pay on-going debt service on the outstanding balance, as and when such funds are available. The TJPA would be expected to secure a long-term take-out of the Interim Financing when the TJPA's net tax increment revenue stream matures.

- I. Notwithstanding the construction management and oversight role of SF Public Works under the 2016 SF Public Works Construction Management Agreement and the role of the Cost Review Committee under this Agreement, the TJPA, through its Board of Directors, retains ultimate responsibility for the Transbay Project.

AGREEMENT

ACCORDINGLY, in consideration of the public benefits and other matters described in the foregoing recitals, the obligations contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are mutually acknowledged, the TJPA, MTC and the City agree as follows:

1. COST REVIEW COMMITTEE

In connection with the Interim Financing and for the entire term that the indebtedness under the Interim Financing is outstanding, the TJPA agrees to work with a Cost Review Committee (the "Committee") to help ensure financial oversight of the TJPA's activities and projects, as follows.

A. Membership of Committee; Access to Expert Advice. The Committee shall consist of the following three voting members, or their designated representatives: the City's Controller, the Executive Director of the MTC, and the Executive Director or Chief Financial Officer of the TJPA. The Committee may seek expert advice as the Committee determines is appropriate to exercise its financial oversight, including from one or more of the City's Public Finance Director and the Executive Director of the San Francisco County Transportation Authority, or their designated representatives, and a City employee designated by the City Administrator with a background in construction management.

B. Purpose and Authority. The purpose of the Committee is to provide recommendations to help ensure that the TJPA is implementing the Transbay Program in a cost-effective manner and that the Interim Financing is timely repaid and to oversee the proper expenditure by the TJPA of the proceeds of the Interim Financing. In furtherance of that purpose, the Committee shall have following authority during the time that the Interim Financing is outstanding:

(i) The Committee may make recommendations to the TJPA Board about any proposed budget or budget amendment, before the TJPA Board considers taking action on any such budget or amendment;

(ii) The Committee may make recommendations to the TJPA Board about any new contract or amendment of an existing contract, with a cost to the TJPA in each instance in excess of \$250,000, before the TJPA Board considers such contract or contract amendment for approval, and if TJPA Board approval is not required, before the TJPA staff enter into any such contract or contract amendment;

(iii) The Committee may make recommendations to the TJPA Board about any construction contract change order with a cost to the TJPA in each instance in excess of \$250,000, before the TJPA Board considers the change order for approval, and if TJPA Board approval is not required, before the TJPA staff approve any such change order;

(iv) The Committee may make recommendations to the TJPA Board or TJPA staff regarding adoption and implementation of internal controls for financial management;

(v) The Committee must approve any expenditure of the proceeds of the Interim Financing before the TJPA may make such expenditure or take any action committing to expend any such proceeds, provided that once the Committee grants an approval and the TJPA subsequent to that approval takes action to commit to expend those funds, such approval may not be reversed by the Committee; and

(vi) The Committee may obtain financial or performance audits or reviews as the Committee may from time to time deem necessary, with the cost of such audits to be borne the TJPA, and the TJPA shall cooperate fully in such audits and reviews. Such audits or reviews may be performed by the City, the MTC or any consultant or expert that the Committee may select.

In connection with the Committee's role under clauses (i)–(iii) above, the TJPA shall give the Committee at least 10 business days written notice of any proposed action before placing the item on the agenda for the action by the TJPA Board. The Committee may recommend approval, including with conditions, or disapproval, provided that if it recommends disapproval of any matter the Committee shall state generally its reasons why and describe any actions it recommends that the TJPA take. The Committee shall use its good faith efforts to provide any recommendations within a reasonable period, but in no event more than 10 business days after receiving notice of a proposed action by the TJPA. The Committee and TJPA staff shall use good faith efforts to resolve any recommendation of disapproval of any matter so that the Committee and staff can make a reconciled recommendation to the TJPA Board.

In connection with its approval authority under clause (v) above, the Committee may approve any matter subject to conditions or may request further information from or action by the TJPA before considering granting approval. If the Committee disapproves any matter it shall state generally its reasons why and describe any actions the TJPA may take to gain its approval. The Committee shall use its good faith efforts to respond to requests for approval within a reasonable period.

C. Meetings and Approvals. The Committee shall meet at least quarterly, and otherwise on an as needed basis as is necessary to facilitate timely review and approvals required by this agreement. Its meetings shall be subject to all applicable laws, including the open meeting and sunshine laws applicable to such bodies in the State of California and the City and County of San Francisco. The TJPA shall cooperate with the Committee in connection with the development of agenda for each meeting, and making TJPA staff available for such purposes. The Committee may meet with a quorum of two of its members, and may act with the approval of at least two of its three voting members. The Committee may from time to time increase any of the dollar thresholds for review established under clauses (ii) – (iii) above, by majority vote of its members and written notice to the TJPA .

D. Rules and Procedures. The Committee may adopt rules and procedures for how it operates, including rules for delegating its review or approval authority to one or more individual members of the Committee or increasing the approval thresholds permitted in clauses (i) – (iii), so that it may issue its recommendations and approvals on a timely basis consistent with the needs of the TJPA to implement the Transbay Project.

E. Documents and Information. The TJPA’s Executive Director and staff shall cooperate fully with the Committee and shall furnish such documents and information as the Committee or any of its individual members may request from time to time, in furtherance of its authority as described above; notwithstanding the foregoing, the TJPA shall not be required to provide copies of documents or information that are protected from disclosure by the attorney-client privilege or other privileges and protections.

F. Waiver of Liability. In light of the limited financial purposes of the review by the Committee, any approval granted by or recommendation made by the Committee shall not be deemed approval of the Transbay Project or any substantive component of it, nor shall it imply any assurance that the action proposed complies with applicable laws, regulations, grants or agreements. The TJPA waives any liability on the part of the Committee, the City or the MTC (including BATA) arising out of the Committee’s exercise, or any failure to exercise, of any of its authority or rights under this Agreement.

G. Termination. This Agreement shall terminate when the indebtedness under the Interim Financing is fully paid.

2 GENERAL

A. Amendments. This Agreement may be amended or modified only by written agreement signed by all three Parties.

B. **Severability.** If any part of this Agreement is held to be illegal or unenforceable by a court of competent jurisdiction, the remainder of the Agreement shall be given effect to the fullest extent reasonably possible.

C. **Relationship to Other Agreements.** This Agreement is intended to be separate from and consistent with the 2015 SF Public Works MOU and the 2016 SF Public Works Construction Oversight Agreement.

D. **Successors and Assigns.** This Agreement shall inure to the benefit of and bind the respective successors and assigns of the TJPA, MTC and the City. This Agreement is for the exclusive benefit of the Parties and not for the benefit of any other person or entity and shall not be deemed to have conferred any rights, express or implied, upon any other person or entity.

E. **Interpretation of Agreement.**

(i) **Attachments.** Whenever an “Exhibit” or “Attachment” is referenced, it means an attachment to this Agreement unless otherwise specifically identified. All such Attachments are incorporated in this Agreement by reference.

(ii) **Captions.** Whenever a section or paragraph is referenced, it refers to this Agreement unless otherwise specifically identified. The title of this Agreement, and the captions preceding the articles and sections of this Agreement have been inserted for convenience of reference only. Such title and captions shall not define or limit the scope or intent of any provision of this Agreement.

(iii) **Words of Inclusion.** The use of the term “including,” “such as” or words of similar import when following any general term, statement or matter shall not be construed to limit such term, statement or matter to the specific items or matters, whether or not language of non-limitation is used with reference thereto. Rather, such terms shall be deemed to refer to all other items or matters that could reasonably fall within the broadest possible scope of such statement, term or matter.

(iv) **References.** Wherever reference is made to any provision, term or matter “in this Agreement,” “herein” or “hereof” or words of similar import, the reference shall be deemed to refer to any and all provisions of this Agreement reasonably related thereto in the context of such reference, unless such reference refers solely to a specific numbered or lettered, section or paragraph of this Agreement or any specific subdivision thereof.

(v) **Recitals.** In the event of any conflict or inconsistency between the recitals and any of the remaining provisions of this Agreement, the remaining provisions of this Agreement shall prevail. The Recitals in this Agreement are included for convenience of reference only and are not intended to create or imply covenants under this Agreement.

F. **Cooperation.** In connection with this Agreement, the Committee and the TJPA shall deal with one another in good faith and reasonably cooperate with one another to achieve the objectives and purposes of this Agreement. In so doing, each of the Parties shall each refrain from doing anything that would render its performance under this Agreement impossible and each shall

do everything that this Agreement contemplates that the Party shall do to accomplish the objectives and purposes of this Agreement. Also, the Committee shall also cooperate and coordinate with SF Public Works as it performs its functions under the 2016 Transbay Transit Program Construction Oversight Agreement.

G. Entire Agreement. This Agreement (including any Attachments) contain all the representations and the entire agreement between the Parties with respect to the subject matter of this Agreement. Any prior correspondence, memoranda, agreements, warranties or representations relating to such subject matter are superseded in total by this Agreement. No prior drafts of this Agreement or changes from those drafts to the executed version of this Agreement may be introduced as evidence in any litigation or other dispute resolution proceeding by either Party and no court or other body shall consider those drafts in interpreting this Agreement.

H. Notices. All notices required by this Agreement shall be given to the TJPA, MTC and the City in writing, by first-class mail, postage prepaid, addressed as follows:

TJPA: Chair of the Board of Directors
Transbay Joint Powers Authority
201 Mission Street, Suite 2100
San Francisco, CA 94105

and to: Executive Director
Transbay Joint Powers Authority
201 Mission Street, Suite 2100
San Francisco, CA 94105

MTC: Steve Heminger
Executive Director
Metropolitan Transportation Commission
375 Beale Street
San Francisco CA 94105

City: Controller
City and County of San Francisco
City Hall, Room 316
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Every notice given to a Party under to the terms of this Agreement must state (or must be accompanied by a cover letter that states) substantially the following:

- (i) the Section of this Agreement to which the notice is given and the action or response required, if any;
- (ii) if applicable, the period of time within which the recipient of the notice must respond;

- (iii) if approval or review is being requested, shall be clearly marked “Request for Approval/Review under the Transbay Project Cost Review Oversight Agreement”; and
- (iv) if a notice of a disapproval or an objection that requires reasonableness, shall specify with particularity the reasons.

I. **Non-Waiver.** Any delay or failure by either Party to exercise any of its respective rights or remedies under this Agreement shall not be deemed a waiver of that or any other right contained in this Agreement.

J. **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of California.

K. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first written above.

TRANSBAY JOINT POWERS AUTHORITY

Greg Harper, Chair of the Board of Directors

APPROVED AS TO FORM:

By _____
TJPA Legal Counsel

METROPOLITAN TRANSPORTATION
COMMISSION

Steve Heminger, Executive Director

APPROVED AS TO FORM:

By _____
Adrienne Weil
MTC General Counsel

CONTROLLER'S OFFICE

Benjamin Rosenfield, Controller

APPROVED AS TO FORM:

DENNIS J. HERRERA
City Attorney

By _____
Deputy City Attorney