

## NORTHERN VIRGINIA TRANSPORTATION AUTHORITY

### MEMORANDUM

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

**FROM:** Monica Backmon, Executive Director

**DATE:** January 25, 2018

**SUBJECT:** Memorandum of Agreement for the Transform 66 Outside the Beltway  
Concessionaire Payment

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1. **Purpose:** To request Northern Virginia Transportation Authority (NVTA) ratification of the Memorandum of Agreement (MOA) for the Transform 66 Outside the Beltway (I-66 OTB Project).
2. **Suggested Motion:** *I move Authority ratification of the Transform I-66 Outside the Beltway Project MOA, and authorize the Executive Director to sign.*
3. **Background:**
  - a. The Commonwealth of Virginia's Transform I-66 OTB project is a multimodal public private partnership between the Virginia Department of Transportation (VDOT), the Department of Rail and Public Transportation (DRPT) and private partner, Express Mobility Partners.
  - b. The Commonwealth reached financial close on the I-66 OTB concession agreement with Express Mobility Partners in November 2017.
  - c. The final agreement included \$579 million concessionaire payment with \$500 million being used for multimodal projects within the I-66 OTB corridor.
  - d. The NVTA was requested, by then Secretary Layne, to solicit eligible projects and make project recommendations to the Commonwealth Transportation Board (CTB).
  - e. The NVTA recommended 14 projects totaling \$497. An adjustment was made to the requested cost of the Balls Ford Interchange Project reducing the total cost of the 14 projects to \$473.3M.
  - f. On December 6, 2017, the CTB endorsed the 14 projects selected by NVTA and a 15<sup>th</sup> project for the Route 29 Projects consisting of improvements that extend from Shirley Gate Road to the vicinity of Pickwick Road in Fairfax County.
  - g. A Public Hearing was held on the projects on January 4, 2018.
  - h. VDOT staff, NVTA staff and NVTA's Council of Counsels drafted an MOA documenting the roles and responsibilities between the Commonwealth Transportation Board (CTB) and the NVTA.
  - i. The CTB approved the projects and authorized the Commissioner to execute the MOA on January 10, 2018.
4. **Discussion:**

- a. The draft Transform 66 Outside the Beltway Project MOA is attached. The MOA covers NVTA's activity in the Call for Projects and the formulation of project recommendations to the CTB.

**Coordination:**

NVTA Council of Counsels

**Attachments:**

Attachment 1 - Memorandum of Agreement, Transform 66: Outside the Beltway Project

Attachment 2 - List of Projects Recommended for Concession Fee Projects

# **Attachment 1**

## APPENDIX B

**MEMORANDUM OF AGREEMENT**

**TRANSFORM66: OUTSIDE THE BELTWAY PROJECT**

This Memorandum of Agreement (“MOA”) is entered into on \_\_\_\_\_, 2018, between the Commonwealth Transportation Board (“CTB”), and the Northern Virginia Transportation Authority (“NVTA”) (collectively, the “Parties”).

**RECITALS**

WHEREAS, the CTB, the Virginia Department of Transportation (“VDOT”), and the Virginia Department of Rail and Public Transportation (“DRPT”) have embarked upon a multimodal transportation program, Transform66, which seeks to fund and implement solutions to move more people in the Interstate 66 (“I-66”) corridor between Gainesville, Virginia and Route 29 in the Rosslyn area of Arlington County, Virginia; and

WHEREAS, the Transform66 program is composed of two distinct components: (1) the Transform66: Inside the Beltway Project, which involves multimodal transportation improvements in the I-66 corridor beginning at the intersection of I-66 and I-495 (the “Beltway”) and ending at U.S. Route 29 in the Rosslyn area of Arlington County, Virginia (the “Inside the Beltway Component”), and (2) the Transform66: Outside the Beltway Project, which involves multimodal transportation improvements in the I-66 corridor beginning at Haymarket, Virginia, and ending at the Beltway (the “Outside the Beltway Component”); and

WHEREAS, the goals of the Outside the Beltway Component are to (1) move more people; (2) enhance transportation connectivity; (3) improve transit service; (4) reduce roadway congestion; and (5) increase travel options (collectively, the “Improvement Goals”), all of which will benefit the users of the portion of I-66 beginning at the Beltway and ending at Route 29 in Gainesville, Virginia (the “Facility”); and

WHEREAS, VDOT entered into a Comprehensive Agreement with I-66 Express Mobility Partners, LLC relating to the Outside the Beltway Component, which provided for a concession payment to the Commonwealth to facilitate implementation of projects that are reasonably related to or benefit the users of the Outside the Beltway Component, including but not limited to multimodal transportation improvements to the roadways and associated transportation and transit facilities in the vicinity of the Facility (“OTB Projects”); and

WHEREAS, in accordance with § 33.2-1528 of the *Code of Virginia* (1950), the Commonwealth has established a separate subaccount (“Concession Payments Account”) of the Transportation Trust Fund in which to hold the concession payment, from which the CTB may make allocations for the purposes set forth in the statute; and

WHEREAS, in accordance with § 33.2-2500(4) and § 33.2-2512(10) of the *Code of Virginia* (1950), NVTA may enter into agreements with any federal, state, local or private entity to provide, or cause to be provided, transportation facilities and services to the area embraced by NVTA; and

WHEREAS, subject to the requirements set forth in this MOA the CTB has indicated by resolution dated December 6, 2017 its preliminary endorsement of the use of funds from the Concession Payments Account for certain projects selected by NVTA designed specifically to attain the Improvement Goals (NVTA-selected Projects) and certain Route 29 Improvement Projects, set forth in Exhibit 1 and amounting to \$500,000,000 collectively; and

WHEREAS, by resolution dated January 10, 2018, the CTB has indicated its intent to allocate up to \$500,000,000 from the Concession Payments Account to be used to fund the NVTA-selected Projects) and the Route 29 Improvement Projects (NVTA/CTB Project Portion), subject to certain conditions, including but not limited to lawful appropriations; and

WHEREAS, such project selection by NVTA shall not constitute approval by NVTA of the Commonwealth’s actions to impose tolling along the Facility; and

WHEREAS, the NVTA may continue to select and submit additional Projects for approval and allocation by the CTB in accordance with this MOA (“Additional NVTA-selected Projects”) until the NVTA/CTB Project Portion from the Concession Payments Account has been exhausted.

NOW THEREFORE, in consideration of the foregoing recitals, the mutual covenants and agreements contained herein, and the mutual benefit to the Parties of attaining the Improvement Goals, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

## **I. Nature of the Parties’ Interest under This MOA**

This MOA provides NVTA with the authority to submit for CTB approval the NVTA-selected Projects and any additional NVTA-selected Projects to be financed in whole or in part from the NVTA/CTB Project Portion from the Concession Payments Account, subject to the conditions and requirements of this MOA. This MOA and the rights and obligations hereunder, are specifically subject to, and governed by applicable state and federal laws concerning the

allowable use of concession payments, including but not limited to § 33.2-1528, § 33.2-2500(4) and § 33.2-2512(10) of the *Code of Virginia* (1950), as amended (“Virginia Code”), 23 U.S.C. §§ 129 and 166 and the terms of any agreement by and between the Federal Highway Administration (“FHWA”) and VDOT that may be required in order to toll the Facility.

This MOA does not grant NVTA any authority over I-66, the tolling of I-66, or any other roadways in the I-66 corridor. It also does not obligate VDOT or the CTB to provide any specified amount of revenues beyond the NVTA/CTB Project Portion of the Concession Payment allocated by the CTB in compliance with Virginia Code § 33.2-1528 as provided in this MOA.

## **II. Basic Agreement; Roles and Responsibilities**

A. The CTB shall have the following roles and responsibilities:

**1. Establishment of Concession Payments Account.** Subject to any applicable and necessary approvals of FHWA, and in accordance with law, the CTB has established and shall maintain the Concession Payments Account as a separate subaccount of the Transportation Trust Fund in which to hold the concession payment. In addition, the Concession Payments Account shall hold all interest, dividends, unexpended or excess funds allocated to NVTA-selected projects and appreciation that accrue to the Concession Payments Account and that are not otherwise specifically directed by law or reserved by the CTB for other purposes allowed by law. The CTB shall cause VDOT to provide annual reports to the NVTA on the balance of the NVTA/CTB Project Portion of and the overall Concession Payments Account.

- a. Nothing in this MOA shall obligate the CTB to allocate any funds in excess of funds agreed upon in this MOA generally and as to each project set forth in Exhibit 1 and any such obligation under this MOA is subject to Section XVIII.
- b. For any project allocated funds from the NVTA/CTB Project Portion of the Concession Payments Account, in the event it is determined by the entity administering the project (“Project Sponsor”), either before commencement or during delivery of the project, that the cost of a NVTA-selected Project will or may exceed the allocation shown for such Project in Exhibit 1, both parties agree to cooperate, in consultation with the Project Sponsor when

necessary, (i) in determining whether additional funding or sources of funding for the project can be made available, (ii) in reducing the scope of the project, if feasible, or (iii) to terminate the project, or if the project has commenced, to terminate the project before its costs exceed the allocated amount. Notwithstanding the foregoing, the Parties agree, that to the extent there are sufficient funds in the Concession Payments Account to fund the additional Project costs, said funds will not be available unless and until the CTB has taken action to allocate such additional funds.

**2. Approval of Projects of the Outside the Beltway Component.** Provided NVTA complies with the criteria established herein for selection of Projects, all other requirements of this MOA are satisfied, and there are sufficient funds in the NVTA/CTB Project Portion of the Concession Payments Account to fund said project(s), the CTB shall consider, approve, and allocate funds to, the NVTA-selected projects and any Additional NVTA-selected Projects.

**3. Ensure Appropriate Administration of NVTA-selected Projects.** NVTA-selected Projects approved by the CTB may be administered by entities such as VDOT, DRPT, localities or transit entities/agencies, and the CTB shall cause VDOT to ensure that standard procedures, protocols and project administration agreements are used/established for such projects.

B. NVTA shall have the following roles and responsibilities:

**1. Use of Concession Payment; Compliance with Laws Limiting Use.** NVTA shall work with VDOT to determine, and develop documentation evidencing, that all NVTA-selected Projects meet the criteria below and have been selected in accordance with NVTA's selection process described in Section II.B.2. Until all funds remaining in the NVTA/CTB Project Portion of the Concession Payments Account have been exhausted, NVTA may, when advised by VDOT that sums from the NVTA/CTB Project Portion of the Concession Payments Account remain unexpended and are available for additional projects, submit to the CTB Additional NVTA-selected Projects proposed to be funded in whole or in part by the NVTA/CTB Project Portion of the Concession Payments Account. Such Projects

shall be separately identified with supporting documentation. The CTB shall consider and may approve the Projects selected by NVTAs, pursuant to Section II.A.2, provided the Projects meet the criteria below and are selected in accordance with NVTAs selection process described in Section II.B.2 and provided further that there are sufficient sums in the NVTAs/CTB Project Portion of the Concession Payments Account. NVTAs must work with VDOT to determine and provide documentation evidencing that each proposed Project meets/satisfies each of the following criteria:

- (a) Must be reasonably related to or benefit the users of the Outside the Beltway Component;
- (b) Must have the capacity to attain one or more of the Improvement Goals;
- (c) Must be a project that is eligible/qualifies for federal-aid pursuant to Title 23 of the U.S. Code;
- (d) Must be one of the following types of multimodal transportation improvements or projects serving the Facility,
  - i. Capital Projects for new or enhanced local and commuter bus service, and transit priority improvements,
  - ii. Expansion or enhancement of transportation demand management strategies, including without limitation, vanpool, and carpooling programs and assistance,
  - iii. Capital improvements for expansion or enhancement of Washington Metropolitan Area Transit Authority rail and bus service, and for improved access to Metrorail stations and Metrobus stops,
  - iv. New or enhanced park and ride lot(s) and access or improved access thereto,
  - v. Capital Improvement projects for new or enhanced Virginia Railway Express facilities or services,
  - vi. Roadway improvements,
  - vii. Transportation Systems Management and Operations as defined in 23 U.S.C. § 101(a)(30), or
  - viii. Projects identified in Commonwealth studies and plans or projects in the region's constrained long range plan or regional transportation plans approved by the Northern Virginia Transportation Authority, as any such plan may be updated from time to time; and

- (e) Must demonstrate that the Projects will be in compliance with all applicable laws, rules and regulations and have received or will receive all required regulatory approvals.

Under no circumstances shall the NVTA/CTB Project Portion of the Concession Payments Account be used to pay any debt, obligation or liability unrelated to the Outside the Beltway Component, or for any purposes other than those specified in this MOA.

NVTA understands and agrees that in the selection of Projects to be funded with the NVTA/CTB Project Portion of the Concession Payments Account, the provisions of Virginia Code § 33.2-1528 as well as all other state and federal laws and regulations that limit the use of concession payments, and concession payments from interstate highways specifically shall apply.

**2. Project Selection Process:** NVTA warrants that any NVTA-selected Project that has been or will be proposed for CTB approval has been or shall be selected by NVTA through a process established by NVTA that includes the following elements:

- (a) A public notice requesting submission of proposed Projects issued by NVTA (Such notice shall be substantially in the form of the Project Submittal Form attached hereto as **Exhibit 2**);
- (b) The evaluation, prioritization, and selection of proposed Projects by NVTA, and the submission of selected Projects by NVTA to the CTB.

The CTB shall consider and may approve Additional NVTA-selected Projects, provided they have been selected in accord with and satisfy the requirements set forth in Section II.A.2, and provided the Components meet the criteria in Section II.B.1.

**III. Term.** Unless this MOA is otherwise terminated in accordance with Section VI, the term of this MOA shall commence on the date last signed by the Parties (“the Effective Date”) and shall expire upon the exhaustion of all funds within the NVTA/CTB Project Portion of the Concession Payments Account.

**IV. Entire Agreement.** This MOA constitutes the entire and exclusive agreement between the Parties relating to the specific matters addressed herein. All prior written, and prior or contemporaneous verbal agreements, understandings, and representations are superseded, revoked, and rendered ineffective for any purpose.

**V. Amendment.** This MOA and/or any of the rights and obligations herein may be altered, amended, terminated or revoked only by an instrument in writing signed by all Parties or their permitted successor(s) or assignee(s).

**VI. Termination.** This MOA may be terminated (a) by a Party for material non-compliance with this MOA which has not either been remedied, or a remedy commenced and diligently pursued thereafter, within 120 days after written notice from the other Party, or (b) by written agreement of the Parties.

**VII. Resolution of Disputes.** Prior to any termination of this Agreement pursuant to Section VI (a) or in the case of any dispute relating to whether one or more NVTA-selected Projects does not satisfy the criteria set forth in Section II B.1. or has not been selected in accord with the process set forth in Section II B.2., the Parties shall meet and confer to make a good faith attempt to resolve any issues or disputes as follows. Within 30 days of a written notice seeking termination or alleging dispute, the Commissioner of Highways and the NVTA Executive Director shall meet to discuss resolution of the issues or dispute. If a resolution cannot be reached within 30 days, the Secretary of Transportation and the Chairman of NVTA shall meet within 30 days to discuss resolution of the issues or dispute. If a resolution cannot be agreed upon within 30 days, (i) the termination shall be effective as set forth in the written notice and in accordance with this MOA or (ii) in the case of a dispute relating to an NVTA-selected Project, the NVTA-selected Project shall not be funded using funds from the NVTA/CTB Project Portion of the Concession Payments Account.

**VIII. Notices.** Notices shall be made in writing and shall not be effective for any purpose unless and until actually received by the addressee or unless served personally, by independent reputable overnight commercial courier, by facsimile transmission followed by a timely service of the original, or by deposit in the United States mail, postage and fees fully prepaid, registered or certified mail, with return receipt requested, addressed as follows:

**If to NVTA:**

Executive Director  
Northern Virginia Transportation Authority  
3040 Williams Drive, Suite 200  
Fairfax, VA 22031  
Fax: 703-642-5077

**If to CTB:**

c/o Commissioner of Highways  
1401 E. Broad Street  
Richmond, VA 23219  
Fax: 804-786-6683

Any Party may, by notice as specified above, in writing designate an additional or a different entity or mailing address to which all such notices should be sent.

**IX. Relationship of the Parties.** The relationship of NVTA to CTB shall be one of an independent contractor, not an agent, partner, lessee, joint venture, or employee.

**X. No Third Party Beneficiaries.** Nothing contained in this MOA is intended or shall be construed as creating or conferring any rights benefits or remedies upon or creating any obligations of the Parties toward any person or entity not a party to this MOA.

**XI. Governing Law.** This MOA shall be governed and construed in accordance with the laws of the Commonwealth of Virginia.

**XII. Assignment.** This MOA may be assigned only with the written approval of the other Parties. In the event of an agreed assignment, there will be an amendment to this MOA to reflect the change in Parties.

**XIII. Survival.** If any provisions in this MOA are rendered obsolete or ineffective, the Parties agree to negotiate in good faith appropriate amendments to, or replacement of such provisions, in order to restore and carry out the original purposes to the extent practicable. If any provision is rendered void or invalid, all remaining provisions shall survive.

**XIV. Notice of Legal Proceedings.** The Parties agree to promptly notify each other if they become aware of any claim or legal proceeding that could impact the program, projects, and activities undertaken pursuant to this MOA.

**XV. Construction of Agreement.** This MOA is intended by the Parties to be construed as a whole, and indivisible, and its meaning is to be ascertained from the entire instrument. All parts of the

MOA are to be given effect with equal dignity, including but not limited to the recitals at the beginning of this MOA, and all such parts, including the recitals, are to be given full force and effect in construing this MOA. No provision of any recital shall be construed as being controlled by, or having less force and effect, than any other part of this MOA because the provision is set forth in a recital.

**XVI. No Personal Liability.** 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.

**XVII. No Waiver of Sovereign Immunity.** Nothing in this MOA shall be deemed a waiver of sovereign immunity by any Party.

**XVIII. Availability of Funding.** The obligations of the CTB and VDOT herein are subject to appropriations and the legal availability of funds necessary to carry out said obligations.

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In witness whereof, the Parties hereby cause this MOA to be executed, each by its duly authorized officers, as of the date below.

COMMONWEALTH TRANSPORTATION BOARD

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Stephen C. Brich, PE  
Commissioner of Highways

Date: \_\_\_\_\_

NORTHERN VIRGINIA TRANSPORTATION AUTHORITY

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Monica Backmon  
Executive Director

Date: \_\_\_\_\_

**Appendix A**  
**Transform 66 Outside the Beltway**  
**Concession Fee Projects**

Jurisdiction	Project	Request - Millions
Arlington County	East Falls Church Metrorail Station Bus Bay Expansion	\$4.8
Fairfax County	Jermantown Road Bridge over I-66: Widen to four lanes	\$11.0
	Route 50 and Waples Mill Road intersection improvements	\$2.0
	Monument Drive bridge pedestrian facility improvement	\$3.8
	Commuter parking structure at Government Center/Fairfax Corner	\$38.5
	Lee Highway pedestrian improvements: Completion of missing segments of pedestrian walkway on the south side of Lee Highway from Nutley Street to Vaden Drive	\$1.3
	Poplar Tree Road bridge construction to four lanes	\$6.0
	I-66 median widening (Lee Highway (Route 29) to Route 28) for WMATA Orange Line accommodation	\$40.0
Prince William County	Route 234 at Balls Ford Road interchange including Balls Ford Road improvements*	\$145.0
	Balls Ford Road widening: Groveton Road to Route 234 Business (Sudley Road)	\$67.4
City of Fairfax	George Snyder Trail: From Chain Bridge Road (Route 123) to Fairfax Boulevard (Route 50) at Draper Drive	\$13.6
Town of Vienna	Nutley Street SW mixed-use trail: From Marshall Road SW to Tapawingo Road SW	\$0.3
PRTC	Western bus maintenance & storage facility	\$11.1
VRE	VRE Manassas Line capacity expansion and real-time multimodal traveler information project (rolling stock, Broad Run station/parking/expansion, South Manassas 3rd track, Manassas Station platform extension, Manassas Park parking/bridge, real-time traveler info)	\$128.5
Fairfax County	Route 29 Improvements: From Pickwick Road to Shirley Gate Road, various phases	\$26.7
	<b>Total</b>	<b>\$500.0</b>