



HRTAC RESOLUTION 2023-03

RESOLUTION AUTHORIZING AN AMENDMENT TO THE AMENDED AND RESTATED PROJECT AGREEMENT FOR FUNDING AND ADMINISTRATION FOR THE HRBT EXPANSION PROJECT AND FURTHER AUTHORIZING RELATED SUPPORTING ACTIONS

WHEREAS, the Hampton Roads Transportation Accountability Commission (the “Commission” or “HRTAC”) recognizes that the principal definitive agreements relating to the I-64 Hampton Roads Bridge-Tunnel Expansion Project (the “Project”), namely (a) the Comprehensive Agreement dated April 3, 2019 (the “Comprehensive Agreement”), by and between the Virginia Department of Transportation (“VDOT”) and Hampton Roads Connector Partners (the “Design-Builder”), and (b) the Amended and Restated Project Agreement for Funding and Administration dated December 16, 2021, by and between VDOT and HRTAC, as amended (the “PAFA”), established a construction schedule and certain milestones to deliver the Project by the end of 2025;

WHEREAS, the Design-Builder has submitted to VDOT schedule updates and requests for contract time and price adjustments, asserting that the planned Substantial Completion Deadline (as defined in the Comprehensive Agreement) of the Project has been impacted by delays and the unexpected escalation of costs of various commodities;

WHEREAS, VDOT and the Design-Builder have engaged in negotiations regarding such impacts to the planned Substantial Completion Deadline and Final Completion Deadline (as defined in the Comprehensive Agreement) of the Project and anticipate reaching agreement regarding certain modifications to the Comprehensive Agreement; and

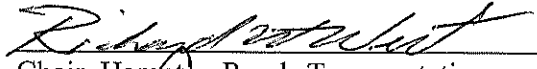
WHEREAS, in order to support VDOT’s efforts to reach agreement with the Design-Builder and to implement such agreement through an amendment to the Comprehensive Agreement (the “CA Amendment”), VDOT and HRTAC staff have worked collaboratively to develop an amendment to the PAFA in substantially the form attached as Exhibit A hereto.

NOW, THEREFORE, IN LIGHT OF THE FOREGOING AND IN ORDER TO MITIGATE FURTHER DELAY AND TO SUPPORT VDOT’S EFFORTS, BE IT RESOLVED BY THE HAMPTON ROADS TRANSPORTATION ACCOUNTABILITY COMMISSION AS FOLLOWS:

1. The amendment to the PAFA in substantially the form attached as Exhibit A hereto is hereby approved (the “PAFA Amendment”).

2. The Chair or the Vice-Chair of the Commission, either of whom may act (the "HRTAC Representative"), is authorized, for and on behalf of the Commission, to execute and deliver the PAFA Amendment with such additions, modifications, insertions or deletions (including, without limitation, the insertion of the form of the CA Amendment and the other exhibits, schedules and annexes to the PAFA Amendment) as the HRTAC Representative, with the advice of the Executive Director of the Commission and the Commission's general counsel, may approve, and the execution and delivery thereof by the HRTAC Representative shall be deemed conclusive evidence of the approval of any such addition, modification, insertion or deletion, provided that the Commission's "Maximum Commission Financial Commitment" under the PAFA, as defined and specified therein, may not be increased (the "Parameter").
3. The HRTAC Representative is authorized, for and on behalf of the Commission, to execute and deliver any and all other agreements, certificates or documents as the HRTAC Representative, with the advice of the Executive Director of the Commission and the Commission's general counsel, may deem necessary or appropriate in connection with the execution, delivery and implementation of the PAFA Amendment, and the execution and delivery thereof by the HRTAC Representative shall be deemed conclusive evidence that the applicable agreement, certificate or document was necessary or appropriate, subject to the Parameter.
4. The Commission hereby further delegates to the Executive Director of the Commission the power and authority, for and on behalf of the Commission, to cause the Commission to perform its obligations under the PAFA Amendment, including, without limitation, the Commission's support of the implementation of the Funding Advances system (as referenced in the PAFA Amendment).

The undersigned hereby certify that this is a true and correct copy of a resolution duly adopted at a meeting of the Hampton Roads Transportation Accountability Commission held on September 21, 2023.


Chair, Hampton Roads Transportation
Accountability Commission

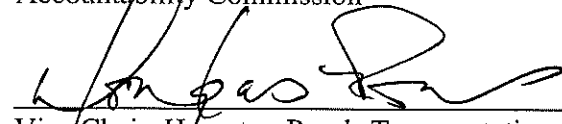

Vice Chair, Hampton Roads Transportation
Accountability Commission

EXHIBIT A

**FIRST AMENDMENT TO AMENDED AND RESTATED
PROJECT AGREEMENT FOR FUNDING AND ADMINISTRATION**

This FIRST AMENDMENT TO AMENDED AND RESTATED PROJECT AGREEMENT FOR FUNDING AND ADMINISTRATION FOR THE I-64 HAMPTON ROADS BRIDGE-TUNNEL EXPANSION PROJECT (this “**Amendment**”) is made, entered into, and effective as of [_____] [____], 2023, by and between the HAMPTON ROADS TRANSPORTATION ACCOUNTABILITY COMMISSION (the “**Commission**”), a body politic and a political subdivision of the Commonwealth of Virginia, and the VIRGINIA DEPARTMENT OF TRANSPORTATION (the “**Department**”), an agency of the Commonwealth of Virginia (each a “**Party**” and, together, the “**Parties**”).

RECITALS

WHEREAS, the Commission and the Department have entered into that certain Amended and Restated Project Agreement for Funding and Administration for the I-64 Hampton Roads Bridge-Tunnel Expansion Project (the “**Agreement**”), dated as of December 16, 2021, and effective as of the dates set forth in Section 1.02 (*Interpretation; Effective Dates*) thereof, as amended, for the Project, as identified and described in the Agreement;

WHEREAS, in order to achieve the design and construction of the Project, the Department has entered into that certain Comprehensive Agreement (the form of which is attached to the Agreement as Exhibit 8 (*Form of Comprehensive Agreement*)), dated April 3, 2019, with Hampton Roads Connector Partners (the “**Design-Builder**”);

WHEREAS, in order to resolve certain outstanding issues as between the Department and the Design-Builder with respect to the ongoing design and construction of the Project, and to otherwise facilitate timely completion of the design and construction of the Project, the Department intends to enter into that certain First Amendment to Comprehensive Agreement (the “**CA Amendment**”), the form of which is attached to this Amendment as Exhibit 8A (*Form of CA Amendment*), with the Design-Builder;

WHEREAS, the Commission and the Department each acknowledge and agree that the implementation of the CA Amendment is essential in order to achieve the design and construction of the Project;

WHEREAS, the Commission and the Department each further acknowledge and agree that certain modifications to the terms of the Agreement are necessary or otherwise desirable in order for the Department to implement and carry out the terms of the CA Amendment; and

WHEREAS, the Commission and the Department desire to amend the Agreement on the terms set forth herein to provide for the modifications necessary or otherwise desirable in order for the Department to implement and carry out the terms of the CA Amendment.

AGREEMENT

NOW, THEREFORE, in consideration of the covenants contained herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree as follows:

1. **Definitions; Interpretation.** Each capitalized term used and not otherwise defined herein shall have the respective meaning assigned to such term in the Agreement. For the avoidance of doubt, in the event of a conflict between the terms of this Amendment and the Agreement, the terms of this Amendment shall control.

2. **CA Amendment.** For purposes of Section 4.01(b) (*General Obligations of the Department (Delivery)*) of the Agreement, the Commission consents to the Department entering into the CA Amendment with the Design-Builder on or before [_____] [____], 2023. The final, complete form of the CA Amendment shall be in substantially the form attached hereto as Exhibit 8A (Form of CA Amendment), which the Department and the Commission expressly acknowledge and agree will, among other things, reset the Substantial Completion Deadline and the Final Completion Deadline, each referenced in Sections 4.01(d) (*General Obligations of the Department (Delivery)*) and 4.08 (*Delay Liquidated Damages and Other Damages and Recoveries*) of the Agreement. Before executing and delivering the CA Amendment, the Department shall provide the Commission with the final, complete form of the CA Amendment (including all exhibits, appendices, and attachments thereto) and shall identify all modifications to the form attached hereto as Exhibit 8A (Form of CA Amendment). The Department shall not incorporate any material modification into the final, complete form of the CA Amendment, or thereafter make any material amendment to the CA Amendment, except for any Work Order entered into in accordance with Section 4.03 (*Work Orders Increasing the Contract Price; Claims*) of the Agreement. Following execution of the CA Amendment by the Department and the Design-Builder, all references in the Agreement to "Comprehensive Agreement" shall be deemed to mean the Comprehensive Agreement, as amended by the CA Amendment.

3. **Project Budget.** The Project Budget appended to the Agreement as Exhibit 3 (*Project Budget*) is hereby amended, replaced, and otherwise superseded by the Project Budget attached hereto as Amended Exhibit 3 (Amended Project Budget).

4. **Estimated Costs and Payout Schedule.** The Estimated Costs and Payout Schedule appended to the Agreement as Exhibit 5 (*Estimated Costs and Payout Schedule*) is hereby amended, replaced, and otherwise superseded by the Estimated Costs and Payout Schedule attached hereto as Amended Exhibit 5 (Amended Estimated Costs and Payout Schedule).

5. **Contract Price Increases from Commodities Adjustments.** Exhibit 9 (*Unit Price Work and Commodity Adjustment Items*) to the Agreement, referenced primarily in Section 4.05 (*Contract Price Increases from Unit Price Work or Commodities Adjustments*) of the Agreement, is hereby amended, replaced, and otherwise superseded by Amended Exhibit 9 (Amended Unit Price Work and Commodity Adjustment Items) attached hereto; *provided, however*, that the Department shall administer any and all related adjustments in accordance with the Comprehensive Agreement, as amended by the CA Amendment, including, without limitation, (a) Sections 6 (*Adjustments to Asphalt, Fuel, and Steel*), 7 (*Adjustments to Certain Other*

Commodities), 9 (*Miscellaneous Terms Relating to Commodity Adjustments*), and 10.a (*Compensation Constraint Relating to Commodity Adjustments*) of the CA Amendment and (b) the \$373,119,941 aggregate cap set forth in the CA Amendment as the “NTE Amount” in respect of amounts paid as a result of the application of the Materials Adjustment Provisions (as defined in the CA Amendment). For the avoidance of doubt, the Department shall not increase the NTE Amount or make amendments to the CA Amendment or any of the exhibits thereto that set forth the Materials Adjustments Provisions unless, in each case, the Department obtains the Commission’s prior written consent, which may be granted, withheld, or conditioned by the Commission in its sole discretion.

6. **Amendments to Section 3.04 (*Maximum Cumulative Compensation Amount under Comprehensive Agreement*)**. Section 3.04 (*Maximum Cumulative Compensation Amount*) of the Agreement is hereby amended by inserting the following new subsection:

(e) The Parties acknowledge that under the CA Amendment (specifically, Exhibit 28 (*Funding Advances*) thereof), the manner by which the Department will compensate the Design-Builder is being modified to establish a system by which the Department may make “Funding Advances” (such term, and the terms “Funding Advances Account” and “Disbursement Account,” shall have the meanings given in the CA Amendment) to the Design-Builder. In consenting to the CA Amendment, the Commission consents to the establishment of such system in accordance with the terms of the CA Amendment. The Parties acknowledge and agree that while such system is in effect, in lieu of the Commission funding the Department in conformity with Subsections (a) [through (c)] of Section 3.04 (*Maximum Cumulative Compensation Amount Under Comprehensive Agreement*) and Section 5.02(a) (*Payment Requisitions*) of the Agreement, the Commission shall provide the Department the funds required to make such Funding Advances in accordance with the following: _____; *provided, however*, that _____ . If the Department suspends or terminates the Funding Advance system under the CA Amendment, then the terms of Subsections (a) [through (c)] of Section 3.04 (*Maximum Cumulative Compensation Amount Under Comprehensive Agreement*) shall apply. The Department shall take reasonable steps to ensure that the Design-Builder only uses the proceeds of any Funding Advance to pay for costs and expenses arising from or relating to undisputed elements of the Work and approved Work Orders, with priority given to the payment of Design Consultants and Subcontractors (such payments to be made by the Design-Builder in a timely manner and not later than when required under the Comprehensive Agreement). Funding Advances shall not (i) increase the Contract Price, (ii) modify the Target Earnings Schedule (as defined in the CA Amendment), or (iii) modify the Maximum Cumulative Compensation Amount. Funding Advances shall otherwise be subject to recovery or claw back from the Design-Builder pursuant to terms set forth in the Comprehensive Agreement. Any Funding Advance moneys (including any interest) recovered or clawed back from the Design-Builder or the Funding Advances Account or the Disbursement Account pursuant to the terms of the Comprehensive Agreement shall be paid to the Commission promptly and thereafter constitute Commission-Controlled Moneys available as part of the Maximum Commission Financial Commitment.

7. **Amendment to Section 3.09 (Additional Costs; Claims)**. The last sentence of Section 3.09(a) (*Additional Costs; Claims*) of the Agreement is hereby deleted in its entirety and replaced as follows:

If the Department notifies the Commission that Additional Costs may be incurred, then, subject to clause (d) below, the Parties will collaborate and consider the following solutions (in order of priority):

- (i) reducing the Project scope, re-engineering, and/or considering value engineering options;
- (ii) identifying other funding sources; and
- (iii) terminating the Comprehensive Agreement.

8. **Amendments to Section 3.11 (Funding the South Island Trestle Bridge Replacement Work)**. The heading of Section 3.11 (*Funding the South Island Trestle Bridge Replacement Work*) is hereby amended to read as follows: “**Section 3.11 Funding the South Island Trestle Bridge Replacement Work and Reversal Work**” and Section 3.11 is hereby further amended by inserting the following new subsection:

(e) The Department shall be solely responsible for paying the costs of the Reversal Work. The Department has identified a funding source for the Reversal Work, other than Commission-Controlled Moneys (or the Aggregate Supplemental Contingency), or toll-backed financing. The Department shall procure the goods and services in respect of the Reversal Work in conformity with the terms of the Master Tolling Agreement, including, without limitation, Sections 3.01 and 3.02 thereof, and, without limiting the foregoing, in connection with contracting for such goods and services, the Department shall confer with the Commission regarding the liquidated damages (for the benefit of the Commission) that will be assessed against the applicable contractor(s) for late completion under the applicable contract(s).

9. **Amendments to Section 4.03 (Work Orders Increasing the Contract Price; Claims)**. Clauses (iii), (iv), and (v) of Section 4.03(d) (*Work Orders Increasing the Contract Price*) of the Agreement are hereby deleted in their entirety and replaced as follows:

(iii) for the period between the Department’s issuance of NTP and the date on which the Design-Builder completes tunnel excavation work, the Minimum Commission-Supported Contingency Amount shall be equal to [fifteen percent (15%)] of the sum of (x) the amount of the Base Contingency Reserve plus (y) the amount of the Aggregate Supplemental Contingency;

(iv) for the period between the Design-Builder’s completion of the tunnel excavation work and the Final Completion Date, the Minimum Commission-Supported Contingency Amount shall be equal to [seven percent (7%)] of the sum of (x) the amount of the Base Contingency Reserve plus (y) the amount of the Aggregate Supplemental Contingency; and

(v) for the period between the Final Completion Date and the date on which all claims relating to the Project are resolved, the Minimum Commission-Supported Contingency Reserve shall be equal to \$0.

10. **Amendments to Section 4.04 (Intentionally Omitted)**. Section 4.04 (*Intentionally Omitted*) of the Agreement is hereby deleted in its entirety and replaced as follows:

Section 4.04 Supplemental Funding for Contingency Reserve; De-Scoped Work

The Parties acknowledge and agree as follows:

(a) As of [●], the amount of the Commission-Supported Contingency Reserve remaining is \$265,495,663 (the “**Base Contingency Reserve**”).

(b) In order to provide additional support for the Base Contingency Reserve, (i) the Commission hereby commits to provide an additional \$53,812,139 to the Commission-Supported Contingency Reserve (the “**Supplemental Commission Contingency**”) and (ii) the Department hereby commits to provide an additional \$53,812,139 to match the Supplemental Commission Contingency (the “**Supplemental Department Contingency**”) and, together with the Supplemental Commission Contingency, the “**Aggregate Supplemental Contingency**,” which, for the avoidance of doubt, equals \$107,624,278). The Aggregate Supplemental Contingency shall be used after the Base Contingency Reserve is reduced to \$0, and each time any funding for Project costs (or any Funding Advance) is required out of the Aggregate Supplemental Contingency, it shall be funded by the Commission and the Department in equal halves (i.e., 50%/50%).

(c) The rules set forth in Section 3.09 (*Additional Costs; Claims*) related to collaboration regarding solutions shall apply after (i) *first*, the funds committed pursuant to subsections (a) and (b) of this Section 4.04 (Supplemental Funding for Contingency Reserve; De-Scoped Work) have been exhausted (in that order), and (ii) *second*, the Commission has funded its entire Maximum Commission Financial Commitment (including the \$8,530,419 referenced in Section 3.08(f) (*Availability of Contingency Reserves; Tracking*)) with funds that may be legally available to it. In such event, consistent with (and without limiting) Section 3.09(a) (*Additional Costs; Claims*), as part of their collaboration to identify other funding sources that may be available to the Parties, the Parties will investigate, and coordinate efforts regarding, programs (federal, state, and other) that may be legally available.

(d) By _____, dated _____, the Comprehensive Agreement was amended to reduce the scope of the work (as more specifically stated therein, the “**De-Scoped Work**”), and to reduce the Contract Price (as defined in the Comprehensive Agreement) by the value of such De-Scoped Work; specifically, \$53,812,139 (the “**De-Scoped Value**”). The Department will engage a third-party contractor to complete the De-Scoped Work and the Commission has committed to provide \$53,812,139 in connection therewith. Accordingly, the amount of the Base Contingency Reserve stated in Section

4.04(a) (Supplemental Funding for Commission-Supported Contingency Reserve) of this Amendment is derived net of the De-Scoped Value. In lieu of reducing the amount of the Maximum Commission Financial Commitment in connection with such change and then increasing it to reflect the Commission's supplemental commitment under Section 4.04(b) (Supplemental Funding For Commission-Supported Contingency Reserve) of this Amendment, the Maximum Commission Financial Commitment shall remain \$3,562,000,000. Attached hereto as Annex 1 (Revised Project Description) is a revised description of the Project and its geographic termini.

(c) For the avoidance of doubt, if the Base Contingency Reserve is exhausted, the Department's special reimbursement right under Section 3.07(a) (Administration Costs) of the Agreement with respect to Administration Costs in excess of the Admin Cost Subcap shall cease to apply.

11. Amendments to and re: Section 4.07 (No Excuses Incentive Payment). Subsection (a) of Section 4.07 (No Excuses Incentive Payment) is hereby deleted in its entirety and replaced as shown below. For the avoidance of doubt, the amount of the No Excuses Incentive Payment (as defined below), including the circumstances in which it is earned by the Design-Builder, shall be determined in strict conformity with the CA Amendment.

(a) The Department shall include in the Comprehensive Agreement a mechanism by which the Design-Builder may earn a no excuses incentive payment for the early achievement of Substantial Completion (the "No Excuses Incentive Payment") in an amount not to exceed ninety million dollars (\$90,000,000). The amount of the No Excuses Incentive Payment shall decline progressively to zero dollars (\$0) over a six-month period during which the Design-Builder may achieve Substantial Completion, with no incentive payable if Substantial Completion is achieved on or after February 26, 2027, as such date may be adjusted pursuant to the terms of the CA Amendment. For the avoidance of doubt, the Department shall not make any modification to such mechanism without the Commission's prior written consent, which may be granted, withheld, or conditioned by the Commission in its sole discretion.

12. Amendments to Section 4.09 (Optional Work: I-564 Direct Connections; Bridge Repair Option Work). Section 4.09 (Optional Work: I-546 Direct Connections; Bridge Repair Option Work) is hereby deleted in its entirety and replaced as follows:

[Intentionally Omitted.]

13. Amendments to Exhibit 1. The following definitions are hereby deleted in their entirety and replaced as follows:

"**Comprehensive Agreement**" means that certain Comprehensive Agreement Relating to the I-64 Hampton Roads Bridge-Tunnel Expansion Project dated as of April 3, 2019, by and between the Department and the Design-Builder, as amended by that certain First Amendment to Comprehensive Agreement dated as of September [], 2023, and as further amended consistent with its terms and the terms of this Agreement.

14. **New Defined Terms Added to Exhibit 1.** The following definitions are hereby added to Exhibit 1:

“**Aggregate Supplemental Contingency**” is defined in Section 4.04(b) (Supplemental Funding for Contingency Reserve).

“**Base Contingency Reserve**” is defined in Section 4.04(a) (Supplemental Funding for Contingency Reserve).

“**De-Scoped Work**” is defined in Section 4.04(d) (Supplemental Funding for Contingency Reserve).

“**De-Scoped Value**” is defined in Section 4.04(d) (Supplemental Funding for Contingency Reserve).

“**Reversal Work**” means all modifications, improvements and replacements (including, without limitation, all goods and services required to engineer, design, construct and otherwise install and implement such modifications, improvements and replacements) to the ventilation and lighting systems and equipment in the existing eastbound tunnel that are required to reverse the direction of travel in the existing eastbound tunnel (the Design-Builder’s scope of work under the Comprehensive Agreement, as further described in Section 3.b (*No Excuses Incentive Payment*) of the CA Amendment, has been modified to exclude such modifications, improvements and replacements).

“**Supplemental Commission Contingency**” is defined in Section 4.04(b) (Supplemental Funding for Contingency Reserve).

“**Supplemental Department Contingency**” is defined in Section 4.04(b) (Supplemental Funding for Contingency Reserve).

15. **No Modification.** This Amendment is limited to the matters set forth herein and shall not constitute a modification or waiver of any other provision of the Agreement. Except as modified hereby, all other terms of the Agreement shall remain full force and effect. For the avoidance of doubt (and without limiting the foregoing), the Parties expressly agree that Section 7.09 (*No Personal Liability or Creation of Third Party Rights*) of the Agreement shall apply to this Amendment.

16. **Counterparts.** This Amendment may be executed in two or more counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument.

[Signature Page Follows]

IN WITNESS WHEREOF, the Parties, intending to be legally bound, have executed this First Amendment to Amended and Restated Project Agreement for Funding and Administration for the I-64 Hampton Roads Bridge-Tunnel Expansion Project as of the date first written above.

HAMPTON ROADS TRANSPORTATION ACCOUNTABILITY COMMISSION,
a body politic and a political subdivision of the Commonwealth of Virginia

By: _____

Name: _____

Title: _____

VIRGINIA DEPARTMENT OF TRANSPORTATION,
an agency of the Commonwealth of Virginia

By: _____

Stephen C. Brich, P.E.

Commissioner of Highways

AMENDED EXHIBIT 3

Amended Project Budget

(see attached)

AMENDED EXHIBIT 5

Amended Estimated Costs and Payout Schedule

(see attached)

EXHIBIT 8A

CA Amendment

(see attached)

AMENDED EXHIBIT 9

Amended Unit Price and Commodity Adjustment Items

(see attached)

ANNEX 1

REVISED PROJECT DESCRIPTION

(see attached)