



## CITY COUNCIL ACTION REPORT

December 9, 2015

TO: Honorable Mayor and Troy City Council Members

FROM: Brian Kischnick, City Manager  
Lori Grigg Bluhm, City Attorney

SUBJECT: Pass Thru Agreement Between SMART and Troy Regarding Transit Center FTA Grant

### History

In 2010, SMART was designated as the grantee of the \$1,300,000 Federal Transit Authority (FTA) appropriation secured by Congressman Peters. SMART is an eligible FTA grantee, but the City is not, so in a collaborative partnership, SMART agreed to accept the appropriation on behalf of the Multi-Modal Transit Center project. MDOT also agreed to provide \$300,000 in a funding match. This is in addition to construction dollars received through an FRA (Federal Rail Administration) grant.

When the adverse Court of Appeals decision made it necessary to file a condemnation lawsuit to re-acquire the Transit Center parcel, the City worked with SMART to request FTA repurpose the appropriation to allow it to be used for land acquisition purposes. Since that time, the condemnation case has been finalized and the City paid the judgment amounts to Grand Sakwa earlier this fall. In order for the City to receive reimbursement for the money paid for the land re-acquisition, SMART requires a pass-thru agreement which must be approved by the FTA. On Wednesday, December 9, 2015, SMART forwarded us a proposed Pass-Thru Agreement. City Administration worked quickly with SMART to clarify some of the provisions in the Agreement, and recommends the approval of the attached Pass-Thru Agreement, which incorporates these clarifications.

Essentially, the Pass-Thru Agreement requires the City to comply with all federal regulations and rules before receiving federal funds. Additionally, the Agreement clearly recognizes that SMART has not assumed any responsibility or liability for the Transit Center project, but as an eligible recipient for FTA funding, SMART is acting as a conduit for the federal money on behalf of the Transit Center project. The Agreement also sets forth the right of SMART to use the Transit Center parcel for its purposes.

### Recommendation

City Administration recommends that City Council approve the attached Pass-Thru Agreement between the City of Troy and SMART, and authorizes the Mayor and City Clerk to execute the document on behalf of the City.

**SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION AND  
CITY OF TROY PASS-THROUGH AGREEMENT FOR TROY MULTI-MODAL  
TRANSIT CENTER**

THIS AGREEMENT is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2015 by and between the Suburban Mobility Authority for Regional Transportation, (hereinafter SMART) an instrumentality of the State of Michigan established pursuant to 1967 PA 204, MCL 124.401 et seq. (Act 204); whose address is 535 Griswold Street, Suite 600, Detroit, MI 48226 and the City of Troy (hereinafter CITY or Sub-recipient) a municipal corporation whose address is 500 W. Big Beaver, Troy, MI 48084. CITY and SMART are collectively referred to as PARTIES.

**RECITALS**

WHEREAS, SMART, pursuant to Act 204, has been vested with the authority to acquire, plan, construct, operate, and maintain transportation systems and facilities within its jurisdiction; and

WHEREAS, State, Local and Federal authorities have designated SMART as the Federal Transit Administration's (hereinafter FTA) direct grant recipient within SMART's jurisdiction; and

WHEREAS, the PARTIES along with the Michigan Department of Transportation (hereinafter MDOT) identified a need to upgrade and replace the existing Amtrak station, and construct a new Multi Modal Transit Center (hereinafter TRANSIT CENTER) in order to increase the station's passenger utilization and to bring local surface transit modes together into a common passenger transfer facility; and

WHEREAS, on October 11, 2011, CITY entered into a contract with MDOT for the construction of the Transit Center using federal funding pursuant to the Federal Railroad Administration's High-Speed Intercity Passenger Rail program in the amount of \$8,485,212 through the American Recovery and Reinvestment Act of 2009 (ARRA). The Transit Center is now completed; (A copy of the Deed is attached hereto as Exhibit A); and

WHEREAS, as a result of an adverse ruling at the Michigan Court of Appeals, CITY was required to initiate condemnation proceedings to re-acquire ownership of the land on which TRANSIT CENTER was situated, as well as, an access easement over Doyle Drive; and

WHEREAS, CITY is within SMART's jurisdiction and has obtained preliminary approval of Federal Grant number MI-04-0084 in the amount of \$1,300,000.00 administered by the FTA, which was matched by \$325,000 in State of Michigan funds, as administered by

MDOT, for a total of \$1,625,000 (hereinafter referred to as GRANT) and SMART has agreed to pass through this money to the CITY for the purposes and in the manner and amounts recited herein; and

WHEREAS, in consideration of SMART's facilitation of CITY's funding from the Grant, CITY has agreed to provide SMART access to and use of, the TRANSIT CENTER, drives, curb cuts, shelters and other amenities for purposes of providing transportation services to the public consistent with SMART's mission, including but not limited to fixed route service; and

WHEREAS, as a result of CITY's initiated condemnation action, legal title to the TRANSIT CENTER parcel vested with CITY as of July 10, 2014 after CITY's payment of the estimated just compensation for the property; and

WHEREAS, as a result of a mutual acceptance of a case evaluation award, the Court entered an Order finalizing the condemnation action on September 14, 2015, after CITY's payment of the agreed upon just compensation for the property; and

WHEREAS, this Agreement will provide a mechanism for CITY to receive the agreed upon grant funds designated for the CITY, and will memorialize CITY's use of those funds as required by FTA and MDOT; and

WHEREAS, at this time the FTA and MDOT have given preliminary approval for the use of the GRANT to acquire the property interests necessary for the public use of this TRANSIT CENTER, including acquisition of title to the real estate, acquisition of a non-exclusive easement over Doyle Drive for ingress and egress to the TRANSIT CENTER, attorney fees and costs incident to CITY's real estate acquisition, together with facility access ways and amenities thereto from the City of Birmingham to the TRANSIT CENTER facility in Troy (hereinafter referred to as TRANSIT CENTER PROJECT or PROJECT).

NOW THEREFORE, in consideration of the mutual promises herein, the adequacy and sufficiency of which is hereby acknowledged, the PARTIES agree as follows:

## **1. PURPOSE**

a. SMART will act as the Recipient of GRANT for use by CITY for the TRANSIT CENTER PROJECT. SMART will pass-through to Sub-recipient, this funding for use as described below by CITY. SMART does not guarantee the availability of any funding, and shall not be held liable for the unavailability of any such funding for any reason. Notwithstanding anything to the contrary contained in this Agreement, SMART shall not be liable to CITY, without limitation, for any monies other than those which SMART actually receives as recipient for the TRANSIT CENTER PROJECT, pursuant to this Agreement, nor shall it be liable to CITY for any breach of this Agreement.

b. SMART is not and shall not be held liable for any funding delays and if any funding expected to be made available for the TRANSIT CENTER is later reduced or eliminated, SMART will in its sole discretion, pass through the funding at the reduced level without any liability to CITY whatsoever. Should it be determined that any funding provided by SMART to CITY under this Agreement shall be refunded to any funding source, CITY shall be liable for the entire refund amount, and shall repay SMART on demand so that SMART can repay the funding source in a timely manner.

c. CITY will use GRANT for three (3) purposes only:

(i) to acquire unencumbered fee title and free of all liens to the real estate on which TRANSIT CENTER is situated, and which is located in the City of Troy, County of Oakland, and State of Michigan as more fully described in Exhibit A.

(ii) to acquire a perpetual non-exclusive easement for ingress and egress on, over, through and across the main boulevard driveway connecting Coolidge Road and Maple Road, now known as Doyle Drive, as the same may be modified or relocated from time to time, on the parcels situated in the City of Troy, County of Oakland, State of Michigan, as more fully described in Exhibit B, and hereinafter referred to as the "Easement"; and,

(iii) to defray the cost of the following land acquisition expenses which may be incurred by the CITY, including but not limited to reasonable and necessary fees for the Property Owner's condemnation counsel, the CITY's land acquisition counsel, court costs, and land acquisition expert fees, provided that such expenses meet the criteria set forth in Office of Management and Budget Circular A-87, FTA Circular 4220.1F, FTA Circular 5010.1D, and any other applicable state and Federal Acquisition Regulations or SMART Policy, each of which are incorporated herein by reference as if the same were repeated in full herein. It is further agreed that if any expense of the CITY fails to comport with the terms of the grant application and awarded GRANT, or with any applicable State or Federal law, regulation or requirement, then that expense shall not be reimbursed from GRANT.

d. The CITY will be entitled to use a maximum of \$1,475,000 of the GRANT in payment of the aforementioned expenses set forth in Paragraphs 1c (i)-(iii). The PARTIES agree that SMART will use the balance of the GRANT in the amount of \$150,000 to construct access ways and amenities from the City of Birmingham to the TRANSIT CENTER located in Troy. The PARTIES understand and agree that any amounts needed to purchase unencumbered fee title to the Property, perpetual use of the Easement and full payment of the land acquisition counsel, costs and, land acquisition expert costs, exceeding the GRANT of \$1,475,000, if any, shall be borne by the CITY only.

e. PARTIES agree that CITY's use of its share of the GRANT is contingent upon: the United States Department of Labor approving the repurposing of the GRANT requested by the PARTIES in their joint letter to the FTA dated September 23, 2013; FTA concurrence with the Federal Railroad Administrations (FRA) finding of 'No Significant Impact' dated September 5, 2011, for the construction of the TRANSIT CENTER; and, the FTA's determination that the land acquisition activity requested by SMART under MI-04-0084 is a categorical exclusion under 23 CFR 771.118(c)(6) and that pre-award authority was established November 26, 2013, for SMART and the CITY, as SMART's Sub-recipient, to incur costs associated with the acquisition of real property for the purposes of completing the TRANSIT CENTER.

## **2. PROPERTY ACQUISITION AND REIMBURSEMENT**

a. CITY agrees to pay any and all costs necessary to acquire unencumbered fee title to the TRANSIT CENTER property and a non-exclusive perpetual use of the Easement for use by the PARTIES. SMART agrees to pass through to CITY the GRANT funds for land acquisition expenses properly submitted and payable. All land acquisition expenses exceeding the amount of the GRANT will be borne by CITY.

b. The PARTIES agree that the CITY's Land Acquisition Expenses will be met by contributions from the Federal and State governments under this Agreement up to a maximum of \$1,475,000 total. SMART will disburse the CITY's portion of the GRANT to the CITY in the manner specified below on a reimbursement basis, only after the CITY has provided evidence final payment has been made and unencumbered fee title has vested with the CITY, and a perpetual non-exclusive use of the Easement has vested in the CITY. All Land Acquisition Expenses exceeding the \$1,475,000 GRANT will be borne by the CITY.

c. The reimbursements identified in 2b will be made by SMART based upon invoices presented to it by the CITY detailing actual costs by the CITY and/or its consultants as well as evidence of payment and/or other supporting documentation by the CITY. The CITY will assure that it and all of its subcontractors have complied with all applicable State and Federal laws and regulations including the provisions of FTA Circular 4220.1F, FTA Circular 5010.1D, 49 USC 5333, the Uniform Assistance and Real Property Relocation Act, being 49 CFR Part 24 inclusive. Reimbursement for costs incurred by the CITY is subject to review and approval by SMART and FTA.

d. CITY will submit along with each invoice, as identified in Section 2(c), a project billing summary showing actual PROJECT costs to date. The CITY agrees that the costs reported to SMART for this Agreement will represent only those items that are properly chargeable in accordance with this Contract and the Grant terms.

e. In the event that CITY is unable or fails to appropriate sufficient funds and/or fails to pay the necessary costs and expenses as contemplated in this Agreement, then CITY shall return all

Grant funds which it may have received pursuant to this Agreement, if any, to SMART upon demand by SMART.

f. CITY agrees that SMART has no obligation to fund CITY's Land Acquisition Expenses contemplated by this Agreement if for any reason GRANT funds are not made available to SMART by FTA or MDOT.

### **3. CITY OF BIRMINGHAM IMPROVEMENTS**

a. The FTA and MDOT have determined that \$150,000 of the GRANT shall be used by SMART to construct access ways and amenities from the City of Birmingham to the TRANSIT CENTER. SMART shall construct these improvements only after the CITY has obtained unencumbered fee title to the Property and the perpetual Easement for ingress and egress.

b. SMART has no obligation to provide funding for the Birmingham amenities and access ways except as available from the GRANT. The PARTIES acknowledge it is SMART's obligation to assure \$150,000 is reserved for and shall only be applied to the Birmingham improvements.

### **4. INSURANCE AND MAINTENANCE**

a. CITY currently insures the Transit Center Property against all losses and liability claims. CITY will continue such insurance coverage and will insure its entire ownership interest against all losses and liability claims (hereinafter the insurance) in the parameters set forth in Exhibit C. At all times, the CITY shall maintain said insurance while this Agreement is operative.

b. CITY currently maintains and cares for the TRANSIT CENTER including the structures on the Property and the developed and undeveloped lands. CITY shall continue all appropriate maintenance and care of the TRANSIT CENTER, Property and Easement exclusive of any contribution from SMART, in a manner that preserves and enables the use of said premises as a TRANSIT CENTER from the date this Agreement is fully executed and for the succeeding thirty (30) years.

### **5. TRANSIT CENTER USE**

a. CITY hereby warrants that in consideration of SMART facilitating the CITY's use of up to \$1,475,000 of the Grant funds for land acquisition expenses as described above, the Transit Center Facility shall continue to be used as a public transit center for the succeeding thirty (30) years. After thirty (30) years, if the Property and Easement are no longer needed for transit purposes, the CITY shall seek and obtain FTA concurrence in the disposal of the Property and Easement, as well as in the use of all sales proceeds generated from any FTA approved sale and otherwise shall comply with the requirements of 49 CFR Part 24, Cir. 5010.1D and all applicable Federal laws. Further, so long as the Property is used as a transit center, the PARTIES agree that SMART shall be entitled to use the premises at no charge to provide transportation services to

the public as is consistent with SMART's ongoing objectives and purposes. The PARTIES agree that SMART may operate fixed route services through the TRANSIT CENTER as community demand and SMART policy may justify. Additionally, SMART will be permitted appropriate signage at the TRANSIT CENTER, on the shelters and the right of first refusal for advertising within the facility building. CITY may not use SMART logos, indicia or other SMART material without the prior written approval of SMART.

b. In the event the CITY fails or breaches the provisions of this Agreement, or if the CITY impairs or prevents SMART's ability to use the Transit Center Facility, then the CITY must pay SMART on demand for all losses incurred by SMART and/or imposed by the FTA, including without limitation, the cost of paying all FTA demands for return of the Grant proceeds, cost of paying all demands by MDOT for return of the matching funds, loss of ridership revenues, loss of advertising revenues, loss of Grant opportunities arising from the breach, SMART's attorney fees and costs and any other damages allowed by law or equity.

If there is a dispute between the PARTIES as to whether SMART use of the TRANSIT CENTER has been impaired or prevented, either party may request the issue be arbitrated. If the PARTIES cannot agree to a single neutral arbitrator, then each party shall select their own arbitrator and those two arbitrators shall select a neutral third arbitrator. If a neutral third arbitrator cannot be agreed to the matter shall be submitted to the American Arbitration Association who shall assign a third impartial arbitrator. In all events, the arbitration shall proceed according to American Arbitration Association rules unless both parties agree to a modification.

## **6. AUDIT AND RECORD RETENTION**

a. CITY will establish and maintain accurate records of all expenses incurred for which payment is sought or made under this Agreement, in accordance with generally accepted government accounting principles.

b. CITY will maintain all of its records for at least six (6) years from the date of final payment made to the CITY by SMART under this Agreement. In the event of a dispute with regard to the allowable expenses or any other issue under this Agreement, CITY will thereafter continue to maintain the records at least until that dispute has been finally decided and the time for all available challenges or appeals of that decision has expired, or until the end of the six (6) year period, whichever is later.

c. SMART, MDOT, FTA, the U.S. Department of Transportation, and the Comptroller General of the United States, and their authorized representatives shall have access to and the right to inspect, copy, and/or audit the records, at any reasonable time after giving reasonable notice. In connection with such audit and inspection activities, the CITY shall afford SMART, MDOT, FTA, the U.S. Department of Transportation, and the Comptroller General of the United States, and their authorized representatives, access to all records and the opportunity to interview the

CITY's employees concerning any matter relating to this Agreement, and adequate and appropriate workspace.

d. The PARTIES shall at all times comply with applicable Federal, State and local laws and regulations without limitation, including those relative to audit requirements.

## **7. THIRD PARTY BENEFICIARIES AND INDEMNITY**

a. This contract is by and between SMART and CITY. It does not, nor is it intended to create any rights to third parties or anyone not a signatory to this Agreement.

b. Notwithstanding any other provision in this Agreement, CITY shall indemnify, defend and hold harmless SMART, its officers, agents, employees and members of its Board of Directors from any and all claims, losses and damages, including costs and attorney fees occurring or resulting from any act, omission, or negligence of or chargeable to CITY, their officers, agents, employees, subcontractors, successors and/or assigns arising out of and pursuant to this agreement. This provision is independent of any insurance requirements contained herein.

## **8. NONDISCRIMINATION**

a. By executing this Agreement, CITY agrees to comply with all of the State of Michigan provisions for "Prohibition of Discrimination in State Contracts", as set forth in the attached Appendix "A" (and designated as "Contractor" in Appendix "A") dated August 1985; for purposes of Appendix A, "CITY" and "Contractor" shall be interchangeable. The CITY further covenants that it will comply with the Civil Rights Act of 1964, as amended, and the Regulations of the Department of Transportation (49 CFR Part 21) issued pursuant to said Act, including Appendix "B", dated June 2011, attached hereto and made a part hereof. The CITY will require similar covenants on the part of any contractor or subcontractor employed in the performance of the PROJECT for which this Agreement is made.

b. CITY will carry out the applicable requirements of SMART's DBE program and in accordance with 1980 PA 278, MCL 423.321 et seq. the CITY in the performance of this Agreement, shall not enter into a contract with a subcontractor, manufacturer, or supplier listed in the register maintained by the State of Michigan and the Department of Labor, of employers who have been found in contempt of court by a Federal Court of Appeals, on not less than three (3) occasions involving different violations during the preceding seven (7) years, for failure to correct an unfair labor practice, as prohibited by Section 8 of Chapter 372 of the National Labor Relations Act, 29 USC 158. SMART may void this Agreement if the CITY or a subcontractor, manufacturer or supplier utilized by the CITY in the performance of this Agreement, appears in said register during the performance period of this Agreement.

## **9. CHANGES**

All changes in the scope or character of the PROJECT or in the cost, terms of reimbursement, or terms of this Contract will be by written amendment to this contract signed by duly authorized representatives of the PARTIES and subject to the approval of FTA.

## **10. TERMINATION**

In the event the CITY fails to complete any part of the PROJECT in a manner satisfactory to SMART, or if the CITY breaches any terms of this Agreement, then SMART may terminate this Contract for cause. If SMART terminates this contract for cause, SMART will not reimburse the CITY for any PROJECT costs. SMART will provide the CITY written notice of such termination and allow fourteen (14) days for the CITY to cure any defects identified. In the event SMART elects to terminate for cause, SMART will be entitled to pursue whatever remedy is available to it, including, but not limited to, withholding funds or off-setting against funds owed to the CITY under this contract, as well as under any other existing or future contract(s) between the CITY and SMART. This provision shall not limit SMART's ability to seek redress for all losses it may incur as a result of the CITY's breach of this Agreement.

## **11. SEVERABILITY**

If any part of this Agreement is determined to be invalid, illegal, or unenforceable, such determination will not affect the validity, legality, or enforceability of any other part of this Contract, and the remaining parts of this Contract will be enforced as if such invalid, illegal, or unenforceable part were not contained herein.

## **12. TERM**

- a. This Agreement will be in effect from the date of its execution through the Thirtieth (30<sup>th</sup>) year after the date on which this agreement was executed.
- b. The CITY must make final request for reimbursement pursuant to the provisions of Paragraph 2 above, as soon as practicable after all of the following occurs: 1) the CITY secures unencumbered fee title to the Property and the perpetual Easement of ingress and egress; 2) the CITY pays the full just compensation, attorney fees and expenses Ordered by the Trial Court to be paid to the property owner; 3) all appeals of the CITY's UCPA proceeding are exhausted. If the PARTIES hereto agree to any changes or extension(s) of this Contract, such extension(s) and changes must be approved by FTA in writing in order to become effective. Upon FTA approval and authorization, a written amendment may be issued by SMART. The terms and conditions of the change and/or extension will be set forth in the amendment. Any such change and/or extension will not operate as a waiver by SMART of any of its rights set forth herein.

### **13. PROHIBITION AGAINST ASSIGNMENT, SALE OR LEASE**

a. The CITY will retain and not sell, convey, lease, sublet, dispose of, assign its rights to or abandon the TRANSIT CENTER, the Property or Easement without the prior written approval of SMART. Notwithstanding any such approval, the assignment will not relieve CITY of its obligations under this agreement.

b. When the TRANSIT CENTER is no longer needed for a transit purpose, then the CITY shall notify SMART and request disposition instructions from the FTA pursuant to FTA Circular 5010.1D. If the CITY breaches the provisions of this paragraph, in addition to the indemnity provision set forth in Paragraph 7 above, the CITY shall also assume all liability for and shall indemnify and hold SMART harmless from and against all of its losses, including without limitation, repayment of all Grant funds, penalties, interest and costs requested or required by the FTA and MDOT, as well as payment of all of SMART's actual attorney fees and costs, incurred as a result of the CITY's breach, whether such fees be incurred prior, subsequent or incident to litigation.

### **14. APPLICATION OF FEDERAL LAW**

a. As Sub-recipient, CITY shall comply with all applicable federal laws, regulations, executive orders, circulars, rules, policies, procedures, and directives, whether or not expressly set forth in this agreement, including but not limited to the following, which are incorporated into and made a part hereof: FTA Circular 4220.1F and FTA Circular 5010.1D. The Master Agreement dated October 1, 2014 between FTA and SMART, and all future amendments thereto (hereinafter collectively referred to as MASTER AGREEMENT), are incorporated by reference and made a part of this Agreement. Sub-recipient agrees to be subject to the terms and conditions of the Master Agreement that are applicable to a Recipient, all amendments to the Master Agreement, as well as any financial assistance agreements between SMART and FTA. CITY shall be subject to 49 CFR Part 18 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), and all Certifications and Assurances for FTA grants and cooperative agreements, as updated annually.

b. CITY and SMART agree that federal requirements, including federal laws, regulations, policies, certifications and assurances, circulars and related administrative practices, may change or be subject to amendment, and that the changed requirements will apply to the PROJECT and this Agreement, as necessary. CITY will include this provision in all subcontracts it finances with Grant funds relating to the PROJECT.

### **15. AWARD**

This Agreement shall become binding on the PARTIES upon its execution by the duly authorized official(s) for the CITY and SMART; and the adoption of a Resolution approving said Agreement and authorizing the signatures thereto of the respective official(s) of the CITY and SMART, a certified copy of such Resolution(s) shall be attached to this Agreement.

## 16. MISCELLANEOUS PROVISIONS

- a. Nothing in this Agreement shall require the CITY to observe, comply, or do any other thing in contravention of a state, local or federal law.
- b. The CITY agrees to notify SMART of any event which may have significant potential impact on the land acquisition progress, direction, control or cost.

## 17. ENTIRE CONTRACT

This Contract constitutes the entire agreement between the PARTIES with respect to the PROJECT. All prior contracts, agreements, and understandings between the PARTIES with respect to the PROJECT are subsumed within this Agreement. Except as otherwise provided in this Agreement, no change in, modification to, or amendment to this Agreement will be of any force or effect unless it is in writing, dated, and signed by the duly authorized representatives of the PARTIES.

CITY OF TROY:

SUBURBAN MOBILITY AUTHORITY  
FOR REGIONAL TRANSPORTATION:

BY: \_\_\_\_\_  
Dane Slater, Mayor

BY: \_\_\_\_\_  
John C. Hertel, General Manager

BY: \_\_\_\_\_  
Aileen Bittner, City Clerk