



FROM THE OFFICE OF THE CITY MANAGER

December 14, 2015

To: Mayor and City Council Members

From: Brian Kischnick, City Manger

Subject: City Council Member Questions and Responses

I have discussed questions advanced by Mayor and Council with Staff, and responses are attached. Thank you for asking questions in advance of the meeting.

Subject: I-4 Pass Thru Agreement Between SMART and Troy Regarding Transit Center FTA Grant (Introduced by: Brian Kischnick, City Manager, and Lori Grigg Bluhm, City Attorney)

Questions from Council Member Dave Henderson:

- 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.**

What sort of breach could possibly come up here? What if SMART gets the funds from MDOT, then simply decides to not pass it through to Troy? Is that not a breach of the agreement?

Response:

We asked SMART to remove this provision. Although they were not willing to further amend it, SMART's only obligation is to pass thru the Federal and State money, and Paragraph 1 (a) states SMART must pass thru all money it receives for the Transit Center project.

- 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.

2 questions... What is the likelihood that MDOT & Federal funding would get reduced? If the amount gets reduced, MDOT and the Feds will notify us right? SMART will not have the ability to just say, well we didn't get enough money to cover what we thought was owed?

Response:

The federal appropriation is set at \$1.3 million. The State (MDOT) match is \$325,000. SMART does not have any involvement in the determination of how much money will be awarded. We have already spent the entire amount, and therefore should get reimbursed for all of it, especially if we can get this finalized as quickly as possible.

(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,

Did we obtain that right and easement in the settled suit with Sakwa? I don't recall that language in the contract.

Response:

We obtained the Transit Center parcel and the easement in the condemnation case.

(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.

Is the legal cost completely covered by the language in the grant?

Response:

We have Peter Webster's attorney fees, and these are part of the request for reimbursement.

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.

This varies from the white board (attached) in Brian's office describing the total costs and our reimbursements. In fact, I was under the impression that Birmingham funds were separate from the numbers we have been discussing that come to Troy. Can you please provide a revised total net sheet for the constituents that accurately portrays what the cities liability is on this project? I would like to discuss this at the meeting tomorrow night.

Response:

As more funding information becomes available, we will pass it along.

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.

Is this the same \$ 150,000 mentioned in d above? (I assume it is)

Response:

Yes

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.

I am under the impression we are charging for naming rights and other advertising that will soften the costs of the transit center. Does this preclude us from charging SMART according to the same fee structure we might collect from other entities?

Response:

No

- 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.

In the event the city opts out of SMART in the future, does that constitute an impairment as it regards the transit center?

Response:

If the voters decided not to approve a SMART millage in the future, then this is beyond the control of City Council or City Administration. SMART also agreed to add an arbitration provision, which is included and which provides additional protection for the City.

- 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.

What is a DBE?

Response:

Disadvantaged Business Enterprise

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.

Is this a FTA or MDOT requirement or just SMART?

Response:

FTA and MDOT and SMART all require this notification.

Last but not least, I didn't notice anything in the contract pertaining specifically to this, but does any of the legaleze prohibit us from allowing competitive (to SMART) transportation scenarios to operate from our transit center?

Response:

No

c: Mark Miller, Director of Economic and Community Development
Tom Darling, Financial Services Director
Lori Grigg Bluhm, City Attorney
Table

BK/bt\Agenda\2015\12.14.15 – Council Questions and Responses