



CENTRAL TEXAS REGIONAL
MOBILITY AUTHORITY

July 26, 2017
AGENDA ITEM #4

Authorize negotiation and execution of a Project Development Agreement (PDA) for Construction, Operation, and Maintenance with the Texas Department of Transportation (TxDOT) for the Manor Expressway (290E) Phase III project

Strategic Plan Relevance: Regional Mobility
Department: Engineering
Contact: Justin Word, P.E., Director of Engineering
Associated Costs: N/A
Funding Source: Manor Expressway (290E) Phase III Project
Action Requested: Consider and act on draft resolution

Summary:

Because of TxDOT's oversight and involvement in the Manor Expressway (290E) Phase III project, a Project Development Agreement (PDA) for Construction, Operation, and Maintenance is required to be executed between the Mobility Authority and TxDOT, clearly defining the roles and responsibilities of each during and after construction.

The draft resolution authorizes the Executive Director to negotiate and execute the PDA for Construction, Operation, and Maintenance with TxDOT to facilitate the development of the project.

Backup Provided: Draft Resolution
Draft PDA for Construction, Operation and Maintenance

**GENERAL MEETING OF THE BOARD OF DIRECTORS
OF THE
CENTRAL TEXAS REGIONAL MOBILITY AUTHORITY**

RESOLUTION NO. 17-0XX

**AUTHORIZE NEGOTIATION AND EXECUTION OF A
PROJECT DEVELOPMENT AGREEMENT WITH THE TEXAS DEPARTMENT OF
TRANSPORTATION FOR CONSTRUCTION, OPERATION, AND MAINTENANCE
OF THE MANOR EXPRESSWAY (290E) PHASE III PROJECT**

WHEREAS, the Mobility Authority supports the goal of improving mobility in the Central Texas region through development of three (3) additional 290 East / SH130 direct connectors in order to improve safety and operations; and

WHEREAS, by Resolution No. 16-080 dated September 28, 2016 the Mobility Authority exercised its option under Section 373.052, Transportation Code, to develop, finance, construct, and operate the Manor Expressway (290E) Phase III Project (the Project); and

WHEREAS, by Resolution No. 16-083, dated October 26, 2016, the Mobility Authority authorized the Executive Director to negotiate and execute a design phase project development agreement the Texas Department of Transportation (TxDOT) for the Project; and

WHEREAS, TxDOT subsequently expressed a desire to develop, finance, construct and operate the eastbound 290 East to southbound SH 130 direct connector and associated improvements as part of the Central Texas Turnpike System (the TxDOT Improvements); and

WHEREAS, by Resolution No. 17-028 dated, May 31, 2017, the Board rescinded its previous exercise of the option to develop, finance, construct, and operate the TxDOT Improvements portion of the Project; and

WHEREAS, a project development agreement with TxDOT for the construction, operation and maintenance is a required for the further development of the Project; and

WHEREAS, the Executive Director recommends that the Board authorize the Executive Director to negotiate and execute a project development agreement with TxDOT for the construction, operation, and maintenance of the Project.

NOW THEREFORE, BE IT RESOLVED that the Board authorize the Executive Director to negotiate and execute a project development agreement with TxDOT for the construction, operation, and maintenance of the Manor Expressway (290E) Phase III Project.

Adopted by the Board of Directors of the Central Texas Regional Mobility Authority on the 26th day of July 2017.

Submitted and reviewed by:

Approved:

Geoffrey Petrov, General Counsel

Ray A. Wilkerson
Chairman, Board of Directors

Draft No. 3
July 17, 2017

**PROJECT DEVELOPMENT AGREEMENT FOR
CONSTRUCTION, OPERATION, AND MAINTENANCE**

MANOR EXPRESSWAY (290E) PHASE III

Table of Contents

1.	Support for the Project.....	3
2.	Use of Right-of-Way.....	3
3.	Multi-Project Preliminary Development Agreement.....	4
4.	Construction, Operation, Maintenance, and Regulation.....	4
5.	Utility Relocations	5
	Design Obligations of the Authority; Control of Work.....	6
7.	Responsibility for Construction and Operations.....	6
8.	Environmental Permits and Compliance	7
9.	HUB Policy; DBE Guidelines	8
10.	Compliance With Applicable Laws.....	8
11.	Toll System Interoperability	8
12.	Maintenance of Records	8
13.	Reports and Plans.....	8
14.	Project Operations and Maintenance following Opening to Traffic.....	9
15.	Project Financing	9
16.	Termination of this Agreement.....	9
17.	Defaults and Remedies	9
18.	Dispute Resolution.....	10
19.	Successors and Assigns.....	11
20.	Officials Not to Benefit.....	11
21.	Debarment Requirements.....	11
22.	Circulation of the Agreement.....	11
23.	Severability	11
24.	Written Amendments	11
25.	Notices	11
26.	Gratuities.....	12
27.	Conflict of Interest	12
28.	Limitations	12
29.	release and indemnity	13
30.	Sole Benefit.....	14
31.	Relationship of the Parties	14
32.	Authorization	14
33.	Interpretation.....	14
34.	Conflicts.....	14

Exhibits

Exhibit “A”	Manor Expressway (290) Phase III Project and TxDOT Improvements Limits
Exhibit “B”	Operations and Maintenance Responsibilities after Opening to Traffic
Exhibit “C”	Debarment Certificate
Exhibit “D”	Lower Tier Participation Debarment Certification

**MANOR EXPRESSWAY (290E) PHASE III
PROJECT DEVELOPMENT AGREEMENT FOR CONSTRUCTION, OPERATION,
AND MAINTENANCE**

STATE OF TEXAS §

COUNTY OF TRAVIS §

THIS AGREEMENT, by and between the **TEXAS DEPARTMENT OF TRANSPORTATION**, an agency of the State of Texas, as authorized by the Texas Transportation Commission, hereinafter identified as “TxDOT,” and the **CENTRAL TEXAS REGIONAL MOBILITY AUTHORITY**, a political subdivision of the State of Texas, hereinafter identified as the “Authority” (each a “Party” and jointly referred to as the “Parties”), is executed to be effective this ___ day of _____, 2017 (the “Effective Date”).

WITNESSETH

WHEREAS, on September 3, 2002, Travis and Williamson Counties (the “Counties”) petitioned the Texas Transportation Commission (the “Commission”) for authorization to form the Central Texas Regional Mobility Authority pursuant to provisions of the Texas Transportation Code; and

WHEREAS, in Minute Order No. 109052 adopted by the Commission on October 31, 2002, the Commission authorized the creation of the Authority; and

WHEREAS, the Authority now operates pursuant to Chapter 370 of the Texas Transportation Code (the “RMA Act”) and 43 TEX. ADMIN. CODE § 26.11 *et seq.* (the “RMA Rules”), as well as its own policies and procedures; and

WHEREAS, the Authority is charged with funding and developing transportation projects throughout the region to provide innovative transportation solutions, promote economic development, and improve the quality of life for residents of the region; and

WHEREAS, the Authority and TxDOT are parties to that certain Interim Project Development Agreement, 290E Toll at SH 130 Interchange Direct Connector Project, effective as of March 27, 2017 between TxDOT and the Authority, which provides for the Authority’s design of the project and responsibility for environmental permits and compliance required for the project (the “Interim Project Development Agreement”);

WHEREAS, TxDOT and the Authority have been cooperatively developing Phase III of the Manor Expressway (290E) project, comprised of projects of TxDOT and the Authority that collectively would construct three additional direct connectors and associated improvements at the 290E/SH 130 interchange in northeast Austin in order to improve safety and operations (southbound SH 130 to westbound 290 East, northbound SH 130 to westbound 290 East, and eastbound 290 East to southbound SH 130), and would complement the existing TxDOT owned and operated eastbound 290 East to northbound SH 130 direct connector already constructed at this interchange. The projects are shown in the attached Exhibit “A”; and

WHEREAS, in its Resolution No. 16-080 adopted on September 28, 2016, the Authority took

appropriate action as required by Transportation Code § 373.052 and exercised the first option to develop, finance, construct, and operate the three direct connectors as a toll project; and

WHEREAS, TxDOT determined that revenues of the Central Texas Turnpike System (CTTS) are available to develop, finance, construct, and operate the eastbound 290 East to southbound SH 130 direct connector and associated improvements as an improvement to the state highway system, and recommended that the Commission approve the expansion of a portion of the SH 130 element of the CTTS to add the eastbound 290 East to southbound SH 130 direct connector and associated improvements to improve safety and mobility on SH 130, Segments 1-4; and

WHEREAS, in response to TxDOT's request that the Authority rescind its previous exercise of the first option to develop, finance, construct, and operate the eastbound 290 East to southbound SH 130 direct connector, in its Resolution No. 17-028, adopted on May 31, 2017, the Authority took appropriate action as authorized by Transportation Code § 373.055 to rescind its previous exercise of its option, effective upon the commitment by the Commission of funding to pay for the actual costs of the development and construction of the eastbound 290 East to southbound SH 130 direct connector; and

WHEREAS, the Authority intends to develop, finance, construct, and operate the remaining two direct connectors that will connect to 290 East and associated improvements (the "Project"), and intends to develop and construct all three direct connectors and associated improvements through a single contract (the "Contract"), and will procure the services of a contractor (the "Contractor") pursuant to the RMA Act; and

WHEREAS, in Minute Order No. 114958 dated June 29, 2017, the Commission (i) approved the connection of the Project to the state highway system pursuant to Transportation Code § 370.187 and 43 TAC §§26.32 and 11.58, (ii) authorized the Authority, pursuant to Transportation Code § 370.033(f), to develop and construct improvements to the state highway system in connection with the design and construction of the eastbound 290 East to southbound SH 130 direct connector and associated improvements, (iii) authorized TxDOT to expend available CTTS revenues to pay for the actual costs of the development and construction of the eastbound 290 East to southbound SH 130 direct connector and associated improvements as an expansion of a portion of the SH 130 element of the CTTS (the "TxDOT Improvements"), and (iv) authorized the Executive Director of TxDOT or designee to enter into necessary agreements with the Authority for the development, construction, operation, and maintenance of the Project, and for the improvement of the state highway system through the construction of the TxDOT Improvements; and

WHEREAS, on _____, 2017, TxDOT and the Authority executed an advance funding agreement to reimburse the Authority for payment of the actual costs of the development and construction of the TxDOT Improvements on the state highway system on TxDOT's behalf in the estimated amount of \$41.1 million (the "Advance Funding Agreement"); and

WHEREAS, final environmental clearance on the Project and the TxDOT Improvements was received on April 10, 2017; and

WHEREAS, this Agreement is necessary and desirable to clarify the relationships between TxDOT and the Authority in connection with the development, design, construction, operation

and maintenance of the Project and the TxDOT Improvements.

A G R E E M E N T

NOW, THEREFORE, in consideration of these premises and of the mutual covenants and agreements of the Parties hereto to be by them respectively kept and performed as hereinafter set forth, TxDOT and the Authority agree as follows:

1. **Support for the Projects.** Without limiting the provisions of this Agreement, TxDOT will take all actions that are consistent with its undertakings pursuant to this Agreement and in furtherance of the purposes of this Agreement and which are consistent with applicable law.
2. **Acquisition, Transfer, and Use of Right-of-Way.** The Authority shall own, operate, and maintain the southbound SH 130 to westbound 290 East and northbound SH 130 to westbound 290 East tolled direct connectors and associated improvements. The Authority shall design, construct, and deliver to TxDOT the TxDOT Improvements, which, after delivery and acceptance, will be owned, operated and maintained by TxDOT. The Authority shall be responsible for acquiring any additional right-of-way necessary for the Project and the TxDOT Improvements, and will acquire any such right-of-way in the name of the State of Texas or in the name of the Authority with provision for subsequent transfer to the State of Texas for that portion of the right-of-way to be used for the TxDOT Improvements. Right-of-way acquired solely for the TxDOT Improvements shall be acquired in the name of the State of Texas.

During such time that the Authority or any contractor working on the Authority's behalf is developing, constructing, operating, or maintaining the Project, or is developing and constructing the TxDOT Improvements, it shall have a right to use and occupy as necessary and in accordance with applicable law all TxDOT owned property, including property acquired by TxDOT subsequent to this Agreement, within the SH 130 corridor and US 290 corridor as depicted on Exhibit "A" attached hereto (the "Property") as necessary for the development, construction, operation, or maintenance of the Project or the development and construction of the TxDOT Improvements, in accordance with applicable law.

The Authority shall have, and TxDOT hereby grants to the Authority, a license and right of entry on, over, and under such portions of the Property owned by, subsequently acquired by, and otherwise under TxDOT's control as necessary to enable the Authority to cause the Project to be constructed, maintained, and operated, and to cause the TxDOT Improvements to be developed and constructed. Such license and right of entry shall remain in effect unless and until responsibility for construction, maintenance, or operation of the Project reverts to TxDOT or is otherwise acquired and assumed by TxDOT with the consent of the Authority, and until the TxDOT Improvements are delivered and accepted by TxDOT, pursuant to [this Agreement] [the Advance Funding Agreement], or pursuant to applicable law. In the event a third party requests evidence of authorization for the Authority to use TxDOT owned right-of-way pursuant to this Agreement, TxDOT agrees to execute a license, right-of-entry, easement, or other document in a form reasonably acceptable to TxDOT and which evidences the rights granted herein.

TxDOT waives any requirement that the Authority reimburse TxDOT for the use of the TxDOT

right-of-way permitted in this agreement.

Notwithstanding anything else in this Agreement, and without otherwise limiting the rights of the Authority to access and utilize the Property for the purposes described in this Section, TxDOT shall maintain ownership of its existing right-of-way and control of access points. TxDOT will notify the Authority regarding all access requests prior to TxDOT's consideration of any request for access. The Authority will notify TxDOT of any request to authorize connection to the Project. If allowing access impacts the maintenance and operations of the Project, TxDOT shall coordinate with the Authority to mitigate the impacts prior to TxDOT's approval of any request for access. Notwithstanding the foregoing, if any of the existing right-of-way is part of the Property Interests, as defined in the Project Development, Operation, and Maintenance Agreement 290 East Toll Project (the "Manor Expressway PDA"), then that portion of the right of way shall be transferred to the Authority in accordance with the terms of the Manor Expressway PDA.

Except for the portion of the Property solely required for the construction of TxDOT Improvements on behalf of TxDOT, the Authority acknowledges that it enters the Property "AS IS" with all faults, including but not limited to any and all pollutants, asbestos, underground storage tanks and/or any other hazardous materials, and that TxDOT has not made any representations or warranties as to the condition of the Property. TxDOT will provide to the Authority information TxDOT may have concerning the environmental status of the Property. The Authority hereby waives any and all causes of action, claims, demands, and damages based on any warranty, express or implied, including but not limited to any implied warranty of suitability for a particular purpose, any and all warranties of habitability, and any other implied warranties not expressly set forth in the Agreement. The Authority acknowledges and agrees that it has fully exercised the right to inspect the Property for any defects as to its suitability for the purpose to which the Authority intends to put it. This Agreement is subject to all covenants, easements, reservations, restrictions and other matters applicable to the Property, and the Authority is using the Property subject to rights, if any, of any other persons or entities, including utilities authorized to be in the right-of-way of a state highway.

3. Interim Project Development Agreement. The Parties agree to comply with the Interim Project Development Agreement as it pertains to the Project and the TxDOT Improvements, as long as that agreement remains effective. To the extent of any conflict or inconsistency between this Agreement and the Interim Project Development Agreement, the Parties shall construe them, to the extent possible, to give full effect to both agreements. To the extent a conflict between the two exists which is irreconcilable, the terms of this Agreement shall control.

4. Construction, Operation, and Maintenance. The Authority shall be responsible for construction, operation, and maintenance of the Project, the TxDOT Improvements, and associated right-of-way from the time of commencement of construction activities through opening to traffic. Except as set forth otherwise herein, the Authority shall comply with 43 TAC, Ch. 26, Subch. D, and Ch. 27, Subch. E, with regard to the design and construction of the Project and the TxDOT Improvements.

Prior to or at such time that all or a portion of the Project or the TxDOT Improvements opens to traffic, the Parties shall work cooperatively to determine appropriate signage, provided that the

Authority shall have the right to install and maintain such signage as it reasonably deems necessary and in such locations to maximize the safe and efficient operation of the tolled lanes and the toll collection system, provided that said structures and their installation shall conform to all applicable safety codes and standards (including, if applicable, the Texas Manual on Uniform Traffic Control Devices, as amended or revised) and further provided that the signage and/or illumination does not conflict with the operation of TxDOT facilities. The signage may be revised, relocated, or supplemented from time-to-time as the Authority deems necessary to assure safe operations or to enhance efficiency of the operations of the tolled lanes or the aesthetics of the corridor, subject to conformance to all applicable safety codes and standards (including, if applicable, the Texas Manual on Uniform Traffic Control Devices, as amended or revised) and shall not conflict with the operation of any TxDOT facilities.

The Authority shall be responsible for the operation and regulation of the Project in compliance with applicable law and relevant provisions of this Agreement, the operations and maintenance agreement described in Section 15, and any trust agreement(s) or similar documentation evidencing or securing financing, if any. The Authority shall be responsible for the construction, installation, operation and maintenance of all the tolling equipment and tolling infrastructure required for operation of the tolled lanes, and for operation and maintenance of any non-tolled facilities and equipment incorporated within the Project. The Authority may subcontract to third parties all or part of the design, construction, maintenance, and/or operation of the Project; however, the Authority shall retain ultimate responsibility for the obligations, responsibilities, and liabilities assumed in this Agreement.

The Authority shall be responsible, as may be required by any applicable state or federal law, for promptly and diligently addressing, through clean-up or other appropriate and lawful steps, based on a property use appropriate risk-based clean-up standard, any hazardous materials that are encountered in or on the Property by the Authority or any contractors working on the Project and the TxDOT Improvements. If soil excavated within the right-of-way in the course of the Authority's construction of the Project or the TxDOT Improvements is identified as containing hazardous materials, the Authority or its contractors shall accept delivery of the identified soil and handle it properly in accordance with applicable law.

5. Utility Relocations. Any utility relocations required for the Project and the TxDOT Improvements shall be the responsibility of the Authority. The Authority shall ensure that all utility relocations are performed in accordance with applicable State and federal laws, regulations, rules, policies, and procedures. This includes, without limitation, 43 TEX. ADMIN. CODE § 21.21 relating to State Participation in Relocation, Adjustment, and/or Removal of Utilities, and 43 TEX. ADMIN. CODE § 21.31 *et seq.* relating to Utility Accommodation. TxDOT acknowledges that utility relocation activities may be undertaken on the Authority's behalf by its contractor, in which case the Authority shall be responsible for ensuring that such contractor carries out all such relocation activities in a manner consistent with applicable laws and administrative regulations. The Authority shall pay, or cause to be paid, utility owners for relocations required by construction of the Project pursuant to Section 370.170 of the RMA Act, and shall pay, or cause to be paid, utility owners for relocations required by construction of the TxDOT Improvements pursuant to Section 203.092, Transportation Code. The relocation of any utility shall be subject to the approval of TxDOT, which approval shall not be unreasonably withheld and provided without delay. TxDOT agrees to provide such permits and easements as

may be necessary for the Authority to accomplish the relocation of utilities as provided herein. TxDOT will cooperate with the Authority in securing the performance of all necessary utility relocations; however, other than as provided herein, nothing herein shall require TxDOT (i) to join or undertake any proceeding with regard to utility relocation, (ii) to enter into any agreements with any utility owners, or (iii) to incur more than a nominal expense in connection with utility relocations.

TxDOT will coordinate with the Authority regarding the placement or relocation of any utility within or on the Property so as to minimize and mitigate any disruption to the construction, operation, or maintenance of the Project.

6. Capital Metro Railroad Coordination and Agreement. As part of project development, the Authority will be responsible for coordination and execution of a railroad overpass agreement with Capital Metro Railroad (the "Railroad") for the northbound SH 130 to westbound 290 East direct connector ramp and TxDOT will be responsible for executing a railroad overpass agreement with the Railroad for the TxDOT Improvements over the Railroad right-of-way.

The Authority or its Contractor shall be responsible for the construction of both direct connectors and for complying with construction requirements, notifications, permitting and payment for services for each of the two Railroad crossings according to the terms of both agreements. The Advance Funding Agreement between the Authority and TxDOT will define the specifics of these obligations.

7. Design Obligations of the Authority; Control of Work. Design obligations of the Authority and TxDOT are defined in the Interim Project Development Agreement.

8. Responsibility for Construction and Operations. The Authority is responsible for the construction of the Project and the TxDOT Improvements, and in addition is responsible for the regulation, signage, and overall operation of the Project and the TxDOT Improvements during construction. Without limiting any of its other obligations under this Agreement, and, with respect to the TxDOT Improvements, subject to TxDOT's general authority over roads on the state highway system, the Authority shall have sole authority and responsibility for: (a) the selection of construction contractor(s); (b) the commencement, sequencing and timing of construction activities and other work; (c) the installation of temporary traffic control devices and maintenance of traffic; (d) construction oversight and inspection, and materials testing and inspection; and (e) the acceptance or rejection of work, materials, or other deliverables performed under a contract let by the Authority. All change orders modifying the scope of work for the construction of the TxDOT Improvements must be approved by TxDOT prior to the Authority's issuance of the change order. NEITHER TXDOT NOR THE AUTHORITY WAIVES, RELINQUISHES, LIMITS OR CONDITIONS ITS GOVERNMENTAL IMMUNITY OR ANY OTHER RIGHT TO AVOID LIABILITY WHICH IT OTHERWISE MIGHT HAVE TO THIRD PARTIES. NOTHING IN THIS AGREEMENT SHALL BE CONSTRUED AS CREATING ANY LIABILITY IN FAVOR OF ANY THIRD PARTY OR PARTIES AGAINST EITHER TXDOT OR THE AUTHORITY, NOR SHALL IT EVER BE CONSTRUED AS RELIEVING ANY THIRD PARTY OR PARTIES FROM ANY LIABILITIES OF SUCH THIRD PARTY OR PARTIES TO TXDOT OR THE AUTHORITY.

The Authority shall be responsible for adhering to all applicable Federal Highway Administration (“FHWA”) and TxDOT rules, regulations, policies, procedures, and standards for the design and construction of the Project and the TxDOT Improvements, except as specifically stated in this Agreement. The Authority has obtained the approval of the Commission as required by Section 370.187 of the Texas Transportation Code and in accordance with the requirements of 43 Tex. Admin. Code §§11.58 and 26.32. It is the Authority's obligation to monitor its Contractor to ensure the Contractor prosecutes its scope of work in compliance with all applicable state and federal laws, rules, regulations, policies, procedures, and standards.

To the extent that any revisions to the Contract require TxDOT approval, the Authority shall submit, or shall cause its Contractor to submit, the proposed revision to TxDOT. TxDOT shall promptly complete its review and the TxDOT Executive Director or designee shall notify the Authority of approval or disapproval of the contract revision within twenty (20) business days. In the event TxDOT withholds approval of the information submitted, it shall notify the Authority of the reasons therefore within such twenty (20) day period. The Authority will have an opportunity to correct or submit additional information to cure any defects or deviations identified by TxDOT. TxDOT shall review and respond to any such re-submittal within five (5) business days.

9. Environmental Permits and Compliance. Environmental clearance was achieved for the Project and the TxDOT Improvements through the issuance of a Categorical Exclusion dated April 10, 2017. The Authority shall be solely responsible for compliance with applicable requirements of state and federal law regarding environmental permits, issues, and commitments (“EPIC”) during construction. This shall include, without limitation, full compliance with the approved Environmental Documents (which includes the approved Categorical Exclusion and all associated technical reports and support documents) and completion of any required consultations and any required mitigation and additional permitting. In addition, the Authority shall implement the best management practices (“BMPs”) and protocols as described in the Final Design Plans associated with the Project and the TxDOT Improvements. In order to fully vest the Authority with the ability and obligation to comply with all EPIC, TxDOT, to the extent permitted by law, hereby commits to transfer and assign to the Authority all rights and delegate all obligations granted under the approved Environmental Documents for the Project, as well as the right to pursue any claims or causes of action for errors or omissions committed in the environmental review process. In the event that changes are made to the scope of the Project by the Authority, which require a re-evaluation of (or supplement to) the approved Environmental Documents, the cost of such work shall be borne by the Authority.

1. Contracting Procedures. Pursuant to the RMA Act and Article 6 of the Authority’s Policy Code, the Authority is developing the Project through the Design/Bid/Build Method. TxDOT and FHWA representatives will have the opportunity to observe the procurement process for purposes of confirming compliance with applicable laws and regulations. TxDOT shall in no way be liable for any claims, protests, or causes of action arising out of the procurement process. The Authority shall ensure compliance by its selected Contractor with the applicable provisions of this Agreement. The Authority shall, following Final Acceptance of the Project and to the extent permitted by the Contract, transfer to TxDOT all rights of the Authority with respect to the enforcement of any warranties related to the TxDOT Improvements provided by the Contractor under the Contract, and shall cause the

Contractor to comply with all such warranty provisions upon the terms and for the time periods specified in the Contract.

10. **HUB Policy; DBE Guidelines.** The Authority shall require its selected contractor to comply with the Authority's Business Opportunity Policy as set forth in the Authority's Policy Code. If requested, the Authority shall provide to TxDOT quarterly reports regarding compliance with this Section.

11. **Compliance With Applicable Laws.** It is the Authority's obligation to monitor its contractor to ensure that the contractor prosecutes its scope of work in compliance with all applicable state and federal laws.

12. **Toll System Interoperability.** Prior to deploying any toll collection equipment or technology, the Authority (or its contractor) shall certify to TxDOT that the technology complies with any statewide interoperability standards adopted by TxDOT and with the requirements of any interoperability agreements between TxDOT and the Authority.

13. **Maintenance of Records.** All records and documents prepared by the Authority under this Agreement must be made available to authorized representatives of TxDOT during normal work hours. All records and documents prepared under this Agreement must be maintained by the Authority for three (3) years after final payment of construction costs incurred in connection with the Project and the TxDOT Improvements. Additionally, TxDOT, and its duly authorized representatives shall have access to all records in the actual or constructive possession of the Authority that are directly applicable to this Agreement for the purpose of making audits, examinations, excerpts, and transcriptions. Notwithstanding the foregoing, the Authority shall comply with all laws pertaining to the retention of records and the provision of access thereto.

The State Auditor may conduct an audit or investigation of any entity receiving funds from the state directly under this Agreement or the Advance Funding Agreement, or indirectly through a contract or subcontract under this Agreement. Acceptance of funds from the state acts as acceptance of the authority of the State Auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds. An entity that is the subject of an audit or investigation must provide the State Auditor with access to any information the State Auditor considers relevant to the investigation or audit.

The Authority shall maintain its books and records in accordance with generally accepted accounting principles in the United States, subject to any exceptions required by existing bond indentures of the Authority, and shall provide TxDOT with a copy of any audit of those books and records. The Authority shall comply with the audit requirements and other requirements relating to project records in 43 TAC § 27.55(b), including having a full audit of its books and records performed annually in accordance with the standards of OMB Circular No. A-133. The Parties shall comply with the requirements of the Single Audit Act of 1984, P.L. 98-502, ensuring that the single audit report includes the coverage stipulated in OMB Circular A-133.

14. **Reports and Plans.** The Authority shall deliver to TxDOT quarterly progress reports for the Project and the TxDOT Improvements. Within six (6) months after completion of the Project and the TxDOT Improvements, the Authority will deliver to TxDOT the final record drawings, signed, sealed and dated by a professional engineer, licensed in the State of Texas, certifying that

the Project and the TxDOT Improvements were constructed in accordance with the approved plans and specifications, and approved contract revisions.

15. **Project Operations and Maintenance following Opening to Traffic.** The division of operations and maintenance obligations for TxDOT and the Authority will be determined in a future agreement between the Parties. These operations and maintenance obligations are generally defined as shown in Exhibit “B” (Operations and Maintenance Responsibilities after Opening to Traffic), attached hereto and made a part hereof for all purposes.

16. **Project Financing.** The Authority is responsible for financing the Project. The terms of any TxDOT payments to the Authority to reimburse the actual costs of the development and construction of the TxDOT Improvements shall be governed solely by the Advance Funding Agreement.

17. **Termination of this Agreement.** This Agreement may be terminated upon the occurrence of any of the following conditions:

- a) **Mutual Termination.** This Agreement may be terminated by written agreement and consent of the Parties hereto.
- b) **Primacy.** Either Party may terminate this Agreement by written notice to the other Party if the Authority’s exercise of its primacy rights and option with regard to the Project is terminated, rescinded, or lapses.
- c) **Dissolution of the Authority.** In the event that the Authority is dissolved, ceases to function, or its operations assumed by a third party, then TxDOT may elect to terminate this Agreement. If the Authority’s operations are assumed by another governmental entity performing essentially the same functions as the Authority, then that shall not constitute a basis for termination.
- d) **Material Breach.** This Agreement may be terminated by TxDOT, upon a material breach of the Agreement by the Authority, after following the procedures outlined in Section 17 below.
- e) **Completion.** By satisfactory completion of all responsibilities and obligations described herein. In that event, the provisions of Section 2 regarding use of right-of-way shall survive the termination of this agreement.

The parties agree that the provisions of Section 29 regarding release and indemnity shall survive the termination of this agreement.

18. **Defaults and Remedies**

- a) **Authority Defaults.** The Authority shall be in breach under this Agreement if the Authority fails to observe or perform any covenant, agreement, term or condition required to be observed or performed by the Authority under this Agreement (an “Authority Default”).
- b) **Authority Cure Periods.** For the purpose of TxDOT’s exercise of remedies, the

- Authority shall have thirty (30) days after TxDOT delivers to the Authority written notice of the Authority Default; provided that if the Authority Default is of such a nature that the cure cannot with diligence be completed within such time period and the Authority has commenced meaningful steps to cure promptly after receiving the default notice, the Authority shall have such additional period of time, up to a maximum cure period of one hundred twenty (120) days, as is reasonably necessary to diligently effect cure.
- c) **TxDOT Remedies for Authority Defaults.** TxDOT shall have available to it all remedies for default provided at law or in equity. In addition, in the event of a material breach of the Agreement by the Authority, TxDOT may elect to terminate this Agreement as provided for in Section 16 above. All remedies provided herein shall be cumulative of all other remedies.
 - d) **TxDOT Defaults.** TxDOT shall be in breach under this Agreement if TxDOT fails to observe or perform any covenant, agreement, term or condition required to be observed or performed by TxDOT under this Agreement (a “TxDOT Default”).
 - e) **TxDOT Cure Periods.** For the purpose of the Authority’s exercise of remedies upon a TxDOT Default, TxDOT shall have a cure period of thirty (30) days after the Authority delivers to TxDOT written notice of the TxDOT Default; provided that if the TxDOT Default is of such a nature that the cure cannot with diligence be completed within such time period and TxDOT has commenced meaningful steps to cure immediately after receiving the default notice, TxDOT shall have such additional period of time, up to a maximum cure period of one hundred twenty (120) days, as is reasonably necessary to diligently effect such cure.
 - f) **Authority Remedies for TxDOT Defaults.** In the event that TxDOT fails to perform its obligations under this Agreement, the sole and exclusive remedy of the Authority shall be an action in mandamus seeking to compel TxDOT to perform its obligations contained herein.

19. **Dispute Resolution.** The Authority and TxDOT will set up a formalized process to resolve any issues that arise in connection with this Agreement. The process will include an issues resolution ladder to resolve questions at the appropriate organizational levels of each Party. Any issues that cannot be resolved by use of the issues resolution ladder will be referred to the Authority’s Executive Director or designee and TxDOT’s Executive Director or designee to resolve. If a dispute is processed under the issues resolution ladder and not resolved, the Parties agree to use the procedures in the following sentences. The Party making a claim may advance it in accordance with the statutes and administrative rules applicable on the Effective Date, including all statutory provisions that effect a waiver, in whole or part, of sovereign immunity to suit for the purpose of adjudicating a claim for a breach under this Agreement. The parties agree to use any alternative dispute resolution procedure that is a part of the applicable claim procedure. The Parties shall satisfy the requirement for alternative dispute resolution by participating in non-binding arbitration, unless otherwise agreed to by the Parties. During the resolution of an issue the Authority and TxDOT will not hinder work under the Agreement and such work will proceed.

20. **Successors and Assigns.** This Agreement shall bind, and shall be for the sole and exclusive benefit of, the Parties and their legal successors, including without limitation any successor agency to TxDOT or the Authority. Other than as provided in the preceding sentence, neither TxDOT nor the Authority shall assign, sublet, or transfer its interest in this Agreement without the prior written consent of the other Party to this Agreement, unless otherwise provided by law.

21. **Officials Not to Benefit.** No member or delegate to the Congress of the United States of America shall be admitted to any share or part of this Agreement or to any benefit arising therefrom. No member, officer, or employee of the State of Texas, TxDOT, the Authority, or of a local public body during his/her tenure shall have interest in this Agreement or the benefits/proceeds thereof.

22. **Debarment Requirements.** The Authority shall require its Contractor to complete the "Debarment Certification", attached hereto as Exhibit "C" and made a part hereof for all purposes. All subcontractors to the Authority's Contractor must complete the "Lower Tier Participation Debarment Certification", a sample copy being attached hereto as Exhibit "D" and made a part hereof for all purposes.

23. **Circulation of the Agreement.** Copies of this Agreement will be provided to, reviewed and relied upon by underwriters, investment bankers, brokerage firms, bond counsel, and similar parties in connection with the provision of any additional financing.

24. **Severability.** If any provision of this Agreement, or the application thereof to any person or circumstance, is rendered or declared illegal for any reason and shall be invalid or unenforceable, the remainder of the Agreement and the application of such provision to other persons or circumstances shall not be affected thereby but shall be enforced to the greatest extent permitted by applicable law.

25. **Written Amendments.** Any changes in the character, agreement, terms and/or responsibilities of the Parties hereto must be enacted through a written amendment. No amendment to this Agreement shall be of any effect unless in writing and executed by the Authority and TxDOT.

26. **Notices.** All notices to either Party by the other required under this Agreement shall be delivered personally or sent by certified or registered U.S. Mail, postage prepaid, addressed to such Party at the following respective addresses:

Texas Department of Transportation
Austin District Office
7901 N. IH 35
Austin, Texas 78753
Attention: District Engineer

Central Texas Regional Mobility Authority
3300 N. IH 35, Suite 300
Austin, Texas 78705
Attention: Executive Director

with copies to:

Texas Department of Transportation
General Counsel Division
125 E. 11th Street
Austin, Texas 78701
Attention: General Counsel

Central Texas Regional Mobility Authority
3300 N. IH 35, Suite 300
Austin, Texas 78705
Attention: Director of Engineering

All notices shall be deemed given on the date so delivered or so deposited in the mail, unless otherwise provided herein. Either Party hereto may change the above address by sending written notice of such change to the other in the manner provided for above.

27. **Gratuities.** Any person who is doing business with or who may do business with TxDOT under this Agreement may not make any offer of benefits, gifts, or favors to employees of TxDOT.

28. **Conflict of Interest.** The Authority shall not assign an employee to the Project if the employee or any immediate family member of the employee:

- a) owns an interest in or is an officer or employee of a business entity that has or may have a contract with TxDOT relating to the Project;
- b) has a direct or indirect financial interest in the outcome of the Project;
- c) has performed services regarding the subject matter of the Project for an entity that has a direct or indirect financial interest in the outcome of the Project or that has or may have a contract with TxDOT; or
- d) is a current part-time or full time employee of TxDOT.

29. **Limitations.** All covenants and obligations of TxDOT and the Authority under this Agreement shall be deemed to be valid covenants and obligations of said entities, and no officer, director, or employee of TxDOT or the Authority shall have any personal obligations or liability hereunder.

30. RELEASE AND INDEMNITY.

TO THE EXTENT PERMITTED BY LAW, THE AUTHORITY HEREBY INDEMNIFIES TXDOT, ITS OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, AND ADVISORS OF ANY OF THE FOREGOING PERSONS (EACH SUCH PERSON BEING CALLED AN "INDEMNITEE") AGAINST, AND HOLDS EACH INDEMNITEE HARMLESS FROM AND AGAINST, ANY AND ALL CLAIMS, DAMAGES, LOSSES, LIABILITIES, COSTS OR EXPENSES (INCLUDING REASONABLE FEES, CHARGES AND DISBURSEMENTS OF COUNSEL OF THE INDEMNITEE'S CHOICE) WHICH SUCH INDEMNITEE MAY INCUR OR WHICH MAY BE CLAIMED AGAINST SUCH INDEMNITEE BY ANY PERSON OR ENTITY:

- i. BY REASON OF THE AUTHORITY'S PROCUREMENT, DESIGN, CONSTRUCTION, OPERATION, OR MAINTENANCE OF THE PROJECT OR THE TXDOT IMPROVEMENTS; OR**
- ii. BY REASON OF ANY ACTUAL OR ALLEGED PRESENCE OR RELEASE OF HAZARDOUS SUBSTANCE ON OR FROM THE PROJECT, OR ANY LIABILITY IN RESPECT OF THE AUTHORITY'S CONSTRUCTION OR OPERATIONAL ACTIVITIES FOR THE PROJECT OR THE TXDOT IMPROVEMENTS, OR**
- iii. BY REASON OF ANY ACTUAL CLAIM, LITIGATION, INVESTIGATION OR PROCEEDING RELATING TO ANY OF THE FOREGOING, WHETHER BASED ON CONTRACT, TORT OR ANY OTHER THEORY AND REGARDLESS OF WHETHER ANY INDEMNITEE IS A PARTY THERETO;**

PROVIDED THAT THE INDEMNITIES IN THIS SECTION SHALL NOT, AS TO ANY INDEMNITEE, BE AVAILABLE TO THE EXTENT THAT SUCH LOSSES, CLAIMS, DAMAGES, LIABILITIES OR RELATED EXPENSES ARE DETERMINED BY A COURT OF COMPETENT JURISDICTION BY FINAL AND NONAPPEALABLE JUDGMENT TO HAVE RESULTED FROM THE NEGLIGENCE, BAD FAITH OR WILLFUL MISCONDUCT OF SUCH INDEMNITEE.

NOTHING IN THIS SECTION IS INTENDED TO LIMIT THE AUTHORITY'S OBLIGATIONS UNDER THE TERMS OF THIS AGREEMENT. WITHOUT PREJUDICE TO THE SURVIVAL OF ANY

OTHER OBLIGATION OF THE AUTHORITY HEREUNDER, THE INDEMNITIES AND OBLIGATIONS OF THE AUTHORITY CONTAINED IN THIS SECTION SHALL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT.

31. **Sole Benefit.** This Agreement is entered into for the sole benefit of TxDOT and the Authority and their respective successors and permitted assigns. Nothing in this Agreement or in any approval subsequently provided by either Party hereto shall be construed as giving any benefits, rights, remedies, or claims to any other person, firm, corporation or other entity, including, without limitation, the public in general.

32. **Relationship of the Parties.** Nothing in this Agreement shall be deemed or construed by the Parties, or by any third party, as creating the relationship of principal and agent, or joint venture or partnership, between TxDOT and the Authority.

33. **Authorization.** Each Party to this Agreement represents to the other that it is fully authorized to enter into this Agreement and to perform its obligations hereunder, and that no waiver, consent, approval, or authorization from any third party is required to be obtained or made in connection with the execution, delivery, or performance of this Agreement. If and to the extent that any approval or action by the Governor of the State of Texas is required to effectuate or authorize any provision of this Agreement, TxDOT agrees that it will use all reasonable efforts to obtain said approval or action. Each signatory on behalf of TxDOT and the Authority, as applicable, is fully authorized to bind that entity to the terms of this Agreement.

34. **Interpretation.** No provision of this Agreement shall be construed against or interpreted to the disadvantage of any Party by any court or other governmental or judicial authority by reason of such Party having or being deemed to have drafted, prepared, structured, or dictated such provision.

35. **Conflicts.** Insofar as possible the provisions of this Agreement shall be deemed complementary to the terms of the Advance Funding Agreement, but in the event of conflict the terms of the Advance Funding Agreement shall control.

IN WITNESS WHEREOF, TxDOT and the Authority have executed this Agreement by three (3) multiple counterparts on the dates shown herein below, effective on the date listed above.

**CENTRAL TEXAS
REGIONAL MOBILITY AUTHORITY**

**TEXAS DEPARTMENT OF
TRANSPORTATION**

By: _____
Mike Heiligenstein
Executive Director

By: _____
James M. Bass
Executive Director

Date: _____

Date: _____

EXHIBIT “A”

**Manor Expressway (290) Phase III Project
and TxDOT Improvements
Limits**

EXHIBIT “B”

**Operations and Maintenance Responsibilities
after Opening to Traffic**

EXHIBIT “C”

Debarment Certificate

- (1) The CONTRACTOR certifies to the best of its knowledge and belief, that its principals:
 - (a) Are not presently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from covered transactions by any federal department or agency;
 - (b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public* transaction or contract under a public* transaction; violation of federal or state antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
 - (c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity* with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and
 - (d) Have not within a three-year period preceding this application/proposal had one or more public* transactions terminated for cause or default.
- (2) Where the CONTRACTOR is unable to certify to any of the statements in this certification, such CONTRACTOR shall attach an explanation to this certification.

*federal, state or local

Signature of Certifying Official

Title

Date

EXHIBIT “D”

Lower Tier Participant Debarment Certification

(Negotiated Contracts)

_____, being duly sworn

(insert name of certifying official)

or under penalty of perjury under the laws of the United States, certifies that

neither _____ nor its

(insert name of lower tier participant)

principals are presently:

- debarred, suspended, proposed for debarment,
- declared ineligible,
- or voluntarily excluded from participation in this transaction by any Federal department or agency.

Where the above identified lower tier participant is unable to certify to any of the above statements in this certification, such prospective participant shall indicate below to whom the exception applies, the initiating agency, and dates of action.

Exceptions will not necessarily result in denial of award, but will be considered in determining contractor responsibility. Providing false information may result in criminal prosecution or administrative sanctions.

EXCEPTIONS:

Signature of certifying Official

Title

Date of Certification