

**FUNDING AGREEMENT
BETWEEN
CITY OF SAN JOSÉ
AND
SANTA CLARA VALLEY TRANSPORTATION AUTHORITY
FOR
AIRPORT CONNECTOR PROJECT FUNDING**

This Funding Agreement ("**Agreement**") is entered into by and between the **City of San José ("CSJ")** and the Santa Clara Valley Transportation Authority ("**VTA**") each of **VTA** and **CSJ**, a "**Party**" and collectively referred to herein as the "**Parties**" as of the latest execution date of any of the **Parties ("Effective Date")**.

I. RECITALS

- A. **WHEREAS**, in November 2000, the voters in Santa Clara County approved Measure A, a 30-year half cent sales tax devoted to specified public transit capital improvement projects and operations. Providing connections from the Norman Y. Mineta San José International Airport (SJC) to BART, Caltrain and VTA light rail is one of the fourteen (14) projects adopted by Measure A;
- B. **WHEREAS**, in June 2016, The VTA Board of Directors reaffirmed their support of this program and approved an additional \$3,000,000.00 in Measure A funding for the Airport connector (the "Project"), which brought the total funding for the program up to \$5,026,000.00; \$2,092,000.00 has been spent on previous efforts, which leaves a current balance of \$2,934,000.00 million of Measure A funding in the Project;
- C. **WHEREAS**, in February 2019, the CSJ Council directed CSJ staff to develop a Request for Information (RFI), with input from VTA, the City of Cupertino, and the City of Santa Clara.
- D. **WHEREAS**, CSJ is developing a Request for Proposals ("RFP") for a connector between SJC and Diridon Station
- E. **WHEREAS**, CSJ will enter into one or more agreements with contractors;
- F. **WHEREAS**, VTA is a special district responsible for public transit services, congestion management, specific highway improvement projects, and countywide transportation planning for Santa Clara County, California; and
- G. **WHEREAS**, CSJ is a Municipal Corporation and a Charter City in the State of California and CSJ is responsible for land use regulations and the operation and maintenance of public utilities, such as water, sewer, storm, and streets, within its corporate boundaries.

NOW THEREFORE, for good and valuable consideration, the **PARTIES** agree as follows:

II. AGREEMENT

1. PROJECT DESCRIPTION

CSJ will develop an RFP to Design, Build, Finance, Operate, and Maintain (DBFOM) an alignment to connect the SCJ and Diridon Station (the "Project").

2. SCOPE OF WORK

The scope of work for this agreement consists of developing, administering, and negotiating an RFP for the DBFOM as well as project development activities such as planning, preliminary engineering, public outreach, and project management CSJ will hire contractors, at its discretion, to develop the RFP and carry out project development.

3. TERM OF AGREEMENT

This Agreement shall become effective upon the Effective Date and will remain in effect through the earlier of: (i) CSJ's full expenditure of VTA's Contribution to contractor costs, (ii) December 31, 2024, or (iii) completion of the RFP, unless sooner terminated by either Party in accordance with the terms of this Agreement.

4. FINANCIAL CONTRIBUTION TO THE COST OF THE PROJECT

- a. VTA's Financial Contribution.** VTA will provide an amount not to exceed \$2,500,000.00 ("Maximum Contribution Amount") for Eligible Costs, (as defined below in Section 5) toward the advancement and development of the RFP on a cost reimbursement basis.
- b. CSJ'S Financial Contribution.** CSJ is solely responsible for all funds expended on the Project outside of this Agreement.
- c. Additional Funds.** If additional funds are secured through joint grant applications or joint efforts by VTA and the CSJ, the applicable joint funds will be utilized to fund the Project beyond the individual Party shares. Joint funds cannot be used to supplement a Party's pro-rata share. To the extent possible and allowable, joint funds will be utilized before individual Party contributions.

5. ELIGIBLE COSTS

The only eligible costs that may be reimbursed under this Agreement are contractor costs related to project development and the costs related to the development of the RFP ("Eligible Costs"). Any and all costs (direct, indirect, or staff time) incurred by a Party, with the exception of the contractor costs, are the responsibility of each respective Party.

6. CSJ's OBLIGATIONS

- a. Contractor.** CSJ may retain contractors in the development and delivery of the RFP. CSJ may issue task orders to the contractors for the contractor to proceed with services. However, CSJ may, in its sole discretion, wait for sufficient funding before issuing a task order to ensure that there will be sufficient funds to reimburse CSJ for cost of the contractor services rendered under the task order.
- b. Invoicing.** CSJ shall submit invoices to VTA on a quarterly, if not more frequent, basis for reimbursement of the contractor costs to develop and deliver the RFP. CSJ shall include auditable back-up documentation with each invoice. VTA shall, within thirty (30) calendar days after receipt of an invoice from CSJ, reimburse CSJ for all eligible expenditures up to the Maximum Contribution Amount.

7. VTA's OBLIGATIONS

VTA will remit the amount due to the CSJ under this Agreement within thirty (30) calendar days of receipt of a complete and proper, fully documented invoice complying with the requirements set forth herein.

8. INDEMNIFICATION

Neither VTA nor any officer or employee thereof shall be responsible for any damage or liability arising out of or relating to CSJ's negligence, recklessness, or willful misconduct under or in connection with any work, authority or jurisdiction associated with the Project or the RFP. CSJ will fully indemnify and hold VTA harmless from any liability imposed for injury (as defined by Government Code §810.8) arising out of or relating to CSJ's negligence, recklessness, or willful

misconduct under or in connection with any work, authority or jurisdiction delegated to CSJ under this Agreement.

9. INSURANCE

Sponsor may satisfy all insurance requirements pursuant with this agreement by means of self-insurance. Sponsor's program of self-insurance shall be equivalent of the insurance set forth in Exhibit A. In the event that Sponsor elects to purchase insurance policies rather than self-insure, Sponsor must comply with the insurance requirements set forth in Attachment A.

10. PUBLIC WORKS

If CSJ awards a contract to a third party for the performance of a public work (as defined in California Labor Code Section 1720 through 1720.6) (a "Public Works Contract") in connection with this Agreement, CSJ must comply, and must require such third party to comply, with the requirements of California Labor Code Section 1720 et seq. If the Public Works Contract is funded in whole or in part with federal funds, CSJ must also comply, and must require such third party to also comply, with the requirements of the Davis Bacon Act (40 U.S.C. Sections 3141-3144 and 3146-3148)

11. COMPLIANCE WITH APPLICABLE LAW

In the execution of the RFP and performance responsibilities set forth herein, VTA and the CSJ must comply with all applicable requirements of local, state, and federal laws.

12. TERMINATION

Each of the PARTIES may at any time terminate this Agreement by giving fourteen (14) days written notice of such termination to the other Party. Notice must identify the effective date of such termination and must be provided in accordance with the terms and conditions of this Agreement.

In the event of termination as set forth herein, CSJ must submit its final invoice to VTA within thirty (30) calendar days of the effective date of termination, such invoice will be solely for Eligible Costs incurred by CSJ prior to termination (see Section 5).

13. AUDIT AND RECORDS

- a. All Parties must maintain, and shall require their contractors to maintain, in accordance with generally accepted accounting principles and practices, complete books, accounts, records and data pertaining to services performed under this Agreement, including the costs of contract administration. Such documentation must be supported by properly executed payrolls, invoices, contracts, and vouchers evidencing in detail the nature and propriety of any charges and must be sufficient to allow a proper audit of services. All checks, payrolls, invoices, contracts and other accounting documents pertaining in whole or in part to the services must be clearly identified and readily accessible.
- b. For the duration of the Agreement, and for a period of five (5) years after final payment, the Parties and their representatives shall have access during normal business hours to the other Party's books, accounts, records, data, and other relevant documents that are pertinent to this

Agreement for audits, examinations, excerpts, and transactions and copies thereof must be furnished upon request.

14. AGENCIES REPRESENTITIVES

The General Manager of VTA or the General Manager's designee is hereby made the representative of VTA for all purposes under this Agreement. The City Manager for CSJ or the City Manager's designee is hereby made the representative of CSJ for all purposes under this Agreement.

15. NOTICES

Any notice required to be given by either Party, or which either Party may wish to give, must be in writing and served either by personal delivery or sent by certified or registered mail, postage prepaid, addressed as follows:

To VTA: Santa Clara Valley Transportation Authority
Attention: Deborah Dagang, Director of Planning & Programming
3331 North First Street, Bldg. B-2
San José, CA. 95134-1906

To CSJ: City of San Jose, Department of Transportation
Attention: Director of Transportation
200 East Santa Clara Street, 8th Floor
San José, CA 95113

Notice shall be deemed effective on the date personally delivered or, if mailed, three (3) days after deposit in the United States mail.

16. GENERAL TERMS AND CONDITIONS

- a. **Headings.** The subject headings of the articles and paragraphs in this Agreement are included for convenience only and will not affect the construction or interpretation of any of its provisions
- b. **Construction and Interpretation of Agreement.** This Agreement, and each of its provisions, terms and conditions, has been reached as a result of negotiations between the Parties. Accordingly, each Party expressly acknowledges and agrees that: (i) this Agreement will not be deemed to have been authored, prepared, or drafted by any particular Party and (ii) the rule of construction to the effect that ambiguities are to be resolved against the drafting party will not be employed in the interpretation of this Agreement or in the resolution of disputes.
- c. **Amendment.** No alteration or variation of the terms of this Agreement will be valid unless made in writing and signed by both of the Parties hereto, and no oral understanding or agreement not incorporated herein will be binding on any of the Parties hereto.
- d. **Entire Agreement.** This Agreement contains the entire understanding between VTA and CSJ relating to the subject matter hereof. This Agreement supersedes any and all other agreements which may have existed between the Parties, whether oral or written, relating to the subject matter hereof. This Agreement is binding upon each Party, their legal representatives, and successors for the duration of the Agreement.

- e. **Representation of Authority.** Each Party to this Agreement represents and warrants that each person whose signature appears hereon has been duly authorized and has the full authority to execute this Agreement on behalf of the entity that is a party to this Agreement.
- f. **No Waiver.** The failure of either Party to insist upon the strict performance of any of the terms, covenants and conditions of this Agreement will not be deemed a waiver of any right or remedy that either Party may have, and will not be deemed a waiver of either Party's right to require strict performance of all of the terms, covenants, and conditions hereunder.
- g. **Dispute Resolution.** If a question or allegation arises regarding (i) interpretation of this Agreement or its performance, or (ii) the alleged failure of a Party to perform, the Party raising the question or making the allegation shall give written notice thereof to the other Party. The Parties shall promptly meet in an effort to resolve the issues raised. If the Parties fail to resolve the issues raised, alternative forms of dispute resolution, including mediation, may be pursued by mutual agreement. It is the intent of the Parties to the greatest extent possible to avoid litigation as a method of dispute resolution.
- h. **Severability.** If any of the provisions of this Agreement (or portions or applications thereof) are held to be unenforceable or invalid by any court of competent jurisdiction, VTA and CSJ shall negotiate an equitable adjustment in the provisions this Agreement with a view toward effecting the purpose of this Agreement, and the validity and enforceability of the remaining provisions or portions or applications thereof will not be affected thereby.
- i. **Governing Law.** The laws of the State of California will govern this Agreement, as well as any claim that might arise between CSJ and VTA, without regard to conflict of law provisions.
- j. **Venue.** Any lawsuit or legal action arising from this Agreement must be commenced and prosecuted in the courts of Santa Clara County, California. CSJ agrees to submit to the personal jurisdiction of the courts located in Santa Clara County, California for the purpose of litigating all such claims.
- k. **Non-discrimination.** The Parties and any contractors performing services on behalf of the Parties ("Contractors") will not unlawfully discriminate or permit discrimination, harass, or allow harassment against any person or group of persons because of race, color, religious creed, national origin, ancestry, age (over 40), sex, gender, gender identity, gender expression, sexual orientation, marital status, pregnancy, childbirth or related conditions, medical condition (including cancer), mental disability, physical disability (including HIV and AIDS), genetic information, or military and veteran's status, or in any manner prohibited by federal, state, or local laws. In addition, the Parties and Contractors shall not unlawfully deny any of their employees family care leave or discriminate against such employees on the basis of having to use family care leave. The Parties and Contractors must ensure that the evaluation and treatment of their employees and applicants for employment is free of such discrimination and harassment.
- l. **Relationship of the Parties.** It is understood that this is an Agreement by and between independent parties and does not create the relationship of agent, servant, employee, partnership, joint venture or association, or any other relationship other than that of independent contractor.
- m. **Execution in Counterparts / Electronic Signature.** This Agreement may be executed in any number of counterparts and by each Party in separate counterparts, each of which when so executed and delivered shall be deemed to be an original and all of which taken together shall constitute one and the same instrument. Unless otherwise prohibited by law, VTA policy, or CSJ policy, the Parties agree that an electronic copy of a signed contract, or an electronically signed contract, has the same force and legal effect as a contract executed with an original ink signature. The term "electronic copy of a signed contract" refers to a writing as set forth in Evidence Code

EXHIBIT A

INSURANCE REQUIREMENTS

Without limiting CSJ's indemnification and defense of claims obligations to VTA, CSJ must procure and maintain for the duration of the Agreement insurance against claims for injuries to persons or damages to property which may arise under or in connection with any work, authority, or jurisdiction associated with the Agreement. The cost of such insurance must be borne by CSJ. CSJ must furnish complete copies of all insurance policies within three (3) business days of any request for such by VTA.

A. MINIMUM SCOPE OF INSURANCE

Coverage must be at least as broad as:

1. Insurance Services Office General Liability coverage ("occurrence" form CG 0001). General Liability insurance written on a "claims made" basis is not acceptable.
2. Business Auto Coverage, Insurance Services Office form number CA 0001, covering Automobile Liability, code 1 "any auto." Auto Liability written on a "claims-made" basis is not acceptable.
3. Workers' Compensation insurance as required by the Labor Code of the State of California and Employer's Liability insurance.
4. Professional Liability, including limited contractual liability coverage, covering liability arising out of any negligent act, error, mistake or omission in the performance of CSJ's services under this Agreement. This coverage must be continuously maintained for a minimum of two (2) years following completion of this Agreement. This coverage may be written on a "claims made" basis, if so, please see special provisions in Section B.

B. MINIMUM LIMITS OF INSURANCE

1. CSJ must maintain limits no less than:
 - a. General Liability (including umbrella/excess liability): \$2,000,000 limit per occurrence for bodily injury, personal injury, and property damage. If General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit must apply separately to this project/location or the general aggregate limit must be twice the required occurrence limit. This requirement may be satisfied by a combination of General Liability with Excess or Umbrella insurance, but in no event may the primary General Liability policy limit per occurrence be less than \$2,000,000, unless Umbrella/Excess policies feature inception and expiration dates concurrent with the

underlying General Liability policy, "Follow Form" coverage and a "Drop Down" provision.

- b. Automobile Liability (including umbrella/excess liability): \$1,000,000 limit per accident for bodily injury and property damage.
 - c. Workers' Compensation and Employer's Liability: Workers' compensation limits as required by the Labor Code of the State of California and Employer's Liability limits of \$1,000,000 per accident.
 - d. Professional Liability: \$1,000,000 each occurrence/aggregate minimum limit per claim.
2. Notwithstanding any language in this Agreement to the contrary, if CSJ carries insurance limits exceeding the minima stated in Section B(a)(1)-(3) immediately above, such greater limits will apply to this Agreement.

C. SELF-INSURED RETENTION

The certificate of insurance must disclose the actual amount of any deductible or self-insured retention, or lack thereof, for all coverages required herein. Any self-insured retention or deductible in excess of \$250,000 must be declared to and approved by VTA. If CSJ is a governmental authority such as a state, municipality or special district, self-insurance is permitted. To apply for approval for a level of retention or deductible in excess of \$250,000, CSJ must provide a current financial report including balance sheets and income statements for the past three years, so that VTA can assess CSJ's ability to pay claims falling within the self-insured retention or deductible. Upon review of the financial report, if deemed necessary by VTA in its sole discretion, VTA may elect one of the following options: to accept the existing self-insured retention or deductible; require the insurer to reduce or eliminate the self-insured retention or deductible as respects VTA, its directors, officers, officials, employees and volunteers; or to require CSJ to procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses. Applicable costs resulting therefrom will be borne solely by CSJ. CSJ may request execution of a nondisclosure agreement prior to submission of financial reports.

D. CLAIMS MADE PROVISIONS (NOT APPLICABLE TO GENERAL LIABILITY OR AUTO LIABILITY)

Claims-made coverage is never acceptable for General Liability or Auto Liability. Claims-made may be considered for Professional, Environmental/Pollution, or Cyber Liability. If coverage is written on a claims-made basis, the Certificate of Insurance must clearly state so. In addition to all other coverage requirements, such policy must comply with the following:

1. The policy retroactive date must be no later than the date of this Agreement.
2. If any policy is not renewed or the retroactive date of such policy is to be changed, CSJ must obtain or cause to be obtained the broadest extended reporting period coverage available in the commercial insurance market. This extended reporting provision must cover at least two (2) years.
3. There is no prior acts exclusion to which coverage is subject that predates the date of this Agreement.

5. The policy must allow for reporting of circumstances or incidents that might give rise to future claims.

E. OTHER INSURANCE PROVISIONS

The policies must contain, or be endorsed to contain, the following provisions:

1. General Liability and Automobile Liability
 - a. VTA, its directors, officers, officials, employees, and volunteers must be named as additional insureds as respects: liability arising under or in connection with any work, authority, or jurisdiction associated with the Agreement. The coverage must contain no special limitations on the scope of protection afforded to VTA, its directors, officers, officials, employees, or volunteers. Additional Insured endorsements must provide coverage at least as broad as afforded by the combination of ISO CG 20 10 10 01 and CG 20 37 10 01.
 - b. Any failure to comply with reporting provisions of the policies may not affect coverage provided to VTA, its directors, officers, officials, employees, or volunteers.
 - c. Coverage must state that CSJ's insurance applies separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
 - d. The General Liability General Aggregate limit must apply per project, not per policy.
 - e. The General Liability policy must be endorsed to remove the exclusion for railroad liabilities, with coverage at least as broad as afforded by ISO CG 24 17.
2. All Coverages
 - a. CSJ must agree to waive all rights of subrogation against VTA, its directors, officers, officials, employees, and volunteers for losses arising under or in connection with any work, authority, or jurisdiction associated with the Agreement.
 - b. CSJ's insurance coverage must be primary insurance as respects VTA, its directors, officers, officials, employees, and volunteers. Self-insurance or insurance that may be maintained by VTA, its directors, officers, officials, employees, or volunteers may apply only as excess to CSJ's insurance. CSJ's insurance must not seek contribution from VTA's insurance program.
3. Other Insurance Provisions
 - a. The Certificate must disclose the actual amount of the Deductible or Self-Insured Retention.
 - b. If any coverage forms or endorsements required by this Agreement are updated by their publishers, whether they be the insurance carrier(s), the Insurance Services office, or the American Association of Insurance Services, during the duration of this Agreement, VTA reserves the rights to require CSJ to procure said coverage forms or endorsements using the updated versions upon the next renewal cycle.

F. ACCEPTABILITY OF INSURERS

Insurance must be placed with insurers with an A.M. Best's rating of no less than A VII (financial strength rating of no less than A and financial size category of no less than VII), unless specific prior written approval has been granted by VTA.

G. CERTIFICATES OF INSURANCE

CSJ must furnish VTA with a Certificate of Insurance. The certificates for each insurance policy must be signed by an authorized representative of that insurer. The certificates must be issued on a standard ACORD Form. CSJ must instruct their insurance broker/agent to submit all insurance certificates and required notices electronically in PDF format to real.estate@vta.org. All endorsements must be attached to the ACORD certificate in a single PDF document.

The certificates must (1) identify the insurers, the types of insurance, the insurance limits, the deductibles, and the policy term, (2) include copies of all the actual policy endorsements required herein, and (3) in the "Certificate Holder" box include:

Santa Clara Valley Transportation Authority ("VTA")
3331 North First Street
San Jose, CA 95134-1906

In the Description of Operations/Locations/Vehicles/Special Items Box, the VTA property leased must appear, the list of policies scheduled as underlying on the Umbrella/Excess policy must be listed, Certificate Holder must be named as additional insured, and Waiver of Subrogation must be indicated as endorsed to all policies as stated in the Agreement documents.

It is a condition precedent to granting of this Agreement that all insurance certificates and endorsements be received and approved by VTA before Agreement execution. No occupancy may be taken until insurance is in full compliance. VTA reserves the rights to require complete, certified copies of all required insurance policies, at any time.

If CSJ receives notice that any of the insurance policies required by this Exhibit may be cancelled or coverage reduced for any reason whatsoever, CSJ must immediately provide written notice to VTA that such insurance policy required by this Exhibit is canceled or coverage is reduced.

H. MAINTENANCE OF INSURANCE

If CSJ fails to maintain insurance as required herein, VTA, at its option, may suspend the Agreement until a new policy of insurance is in effect.